

**United States Department of Labor
Employees' Compensation Appeals Board**

KIT C. JEH, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Francisco, CA, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 03-1085
Issued: July 12, 2004**

Appearances:
Robert Williamson, for appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On March 24, 2003 appellant filed a timely appeal from the December 10, 2002 merit decision of the Office of Workers' Compensation Programs, which reduced her compensation based on actual earnings. Appellant also filed a timely appeal from the March 6, 2003 merit decision of the Office, which found a resulting overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the issues of wage-earning capacity and overpayment.

ISSUES

The issues are: (1) whether the Office properly reduced appellant's compensation on the grounds that her actual earnings in a modified position fairly and reasonably represented her wage-earning capacity; and if so, (2) whether a resulting overpayment of \$5,082.82 occurred in appellant's case; (3) whether the Office properly denied waiver of the overpayment; and (4) whether the Office properly set the rate of recovery.

FACTUAL HISTORY

On September 29, 1993 appellant, then a 48-year-old flat sorter machine operator, filed a claim alleging that her chronic muscle strain and middle back pain were a result of her federal employment, which involved repetitive reaching, bending, lifting trays of mail and pulling or pushing heavy mail containers. The Office accepted her claim for lumbar back strain and chronic pain. Appellant stopped work on April 12, 1996 and received compensation for periods of disability.¹

Appellant returned to a permanent limited-duty assignment on October 9, 1996 working eight hours a day.² Beginning December 18, 1996, however, her attending physician, Dr. Robert J. Harrison, a Board-certified internist specializing in occupational medicine and an associate clinical professor of medicine, limited her to four hours a day. After unsuccessfully attempting to increase her hours to eight and then to six, appellant returned to work four hours a day on March 12, 1997.

On December 16, 1998 Dr. Robert S. Ferretti, a Board-certified orthopedic surgeon and Office referral physician, examined appellant and reported as follows:

“She is unable to return to the full duties of her original job as a [f]lat [s]orter [m]achine [o]perator (FSM) without work restrictions. Due to the chronicity of her condition, based on medical probability she will never be able to return to her original full[-]duty job. She is able to work six hours in a modified capacity with a 10 pound. limit for lifting, pushing and pulling with no repetitive stooping, no repetitive/prolonged overhead reaching and no casing of mail. She should be able to work six hours a day with the modifications and this can be extended to eight hours for the specific job related to repairing damaged mail which is less physically demanding on the spine.”

On December 17, 1998 Dr. Harrison released appellant to return to limited-duty working up to six hours a day. Beginning December 18, 1998 appellant returned to limited-duty working six hours a day. The Office paid compensation for wage loss on the periodic rolls.

In a decision dated August 20, 2001, the Office found that appellant’s current actual earnings in her permanent part-time modified position fairly and reasonably represented her wage-earning capacity. The Office advised that it was adjusting her compensation in accordance with the provision of 5 U.S.C. §§ 8106 and 8115 and that her compensation payments would be based on the difference between her pay rate, as determined for compensation purposes and her

¹ The Office paid compensation after April 11, 1996, based on a weekly salary of \$707.87, which reportedly did not include appellant’s Sunday pay. The Office determined that the correct weekly salary on the date disability began was \$730.25. To compensate her for the difference, the Office made a direct payment to appellant for \$527.59, which covered the period from April 12, 1996 to August 11, 2001.

² Appellant’s annual salary and work schedule remained unchanged from the time disability began earlier that year.

ability to earn wages in her new position. On January 17, 2002 the Office modified its August 20, 2001 decision.

On February 8, 2002 appellant requested an oral hearing before an Office hearing representative. She argued that her wages did not fairly and reasonably represent her wage-earning capacity “had I been working full time, which I would have been if not for the injury I incurred at work.”

On December 19, 2002 the Office made a preliminary determination that an overpayment occurred in appellant’s case in the amount of \$5,082.82. The Office made a preliminary finding that appellant was without fault in the matter.

In a decision dated September 23, 2002, an Office hearing representative found that the case was not in posture for a hearing because the evidence of record was insufficient to establish whether the Office correctly determined one of the pay rates used in the formula for computing appellant’s wage-earning capacity: “The amount computed for the claimant’s compensation for loss of wage-earning capacity (LWEC) and the amount of the overpayment, are therefore in question.” The hearing representative observed that the record contained appropriate documentation for the Office’s calculation of appellant’s pay rate for compensation purposes, which was \$730.25 per week effective the date disability began on April 11, 1996 and which included appropriate increments for night differential and Sunday premium pay; however, the record contained conflicting information on the base annual salary, as of August 2001, of appellant’s date-of-injury job:

“The Office originally requested that the agency report the pay rate as of December 18, 1998 for the job (grade and step) the claimant held when injured. In notes of a telephone conversation held with an agency injury compensation specialist (ICS) on August 7, 2001 an Office Senior Claims Examiner (SrCE) indicated that the reported base salary for that grade and step was \$38,076[.00] on December 18, 1998. However, the agency sent a response by fax on August 7, 2001 which gave the annual pay rate as \$38,377[.00]. The SrCE made a note on August 8, 2001 stating that she received a telephone call from the ICS who confirmed that the figure of \$38,377[.00] was correct. The ICS then sent a fax on that same date confirming the base annual rate of \$38,377[.00], in effect on December 18, 1998. The SrCE had another telephone conversation with the ICS on August 13, 2001. In a note of that conversation, the SrCE wrote that the base annual salary as of August 13, 2001 for the grade and step the claimant held at the time of injury was \$38,076[.00]. An obvious question about the accuracy of this figure is raised by the fact that the amount was less than that which had previously been reported as the pay rate in effect on a date almost three years previously. No explanation was given as to why the amount was less than that which had previously been reported for the pay of that grade and step as of December 1998 and the Office never received written confirmation from the employing agency that \$38,076[.00] was the base annual pay as of August of 2001 for the grade and step the claimant held on the date of her injury. Nevertheless, the Office used \$38,076[.00] as the base rate to compute the pay rate as of August 2001 for the job the claimant held on the date of injury.

“On remand, the Office should obtain from the employing agency a written statement regarding the base pay rate in effect as of August 13, 2001 for the position (grade and step) the claimant held at the time of her injury. If there are any questions about the reported amount, they should be resolved in writing and with proper documentation. If the correct base pay as of August 13, 2001 for the date of injury job is not \$38,076[.00] per year, then the Office will need to recompute the correct weekly pay rate, including the appropriate increments for night differential and Sunday premium pay and then recompute the claimant’s LWEC and the amount of any overpayment. If the agency provides written confirmation that the figure of \$38,076[.00] is correct for the base annual salary as of August 13, 2001 for the job the claimant held when injured, the Office shall reissue the LWEC and preliminary overpayment determinations.”³

The hearing representative set aside the Office’s January 17, 2002 decision on appellant’s LWEC and remanded the case for further development.

On October 21, 1002 the employing establishment confirmed appellant’s grade and step when disability began on April 11, 1996 and reported that the annual pay for this grade and step on August 7, 2001 was \$38,838.00 with a night differential of 8 percent. On November 26, 2002 the employing establishment further confirmed appellant’s grade and step in her modified position on August 7, 2001 and reported that the pay rate for this grade and step was \$40,952.00 annually with a night differential of 8 percent.

In a decision dated December 10, 2002, the Office noted that appellant’s employment injury had disabled her from her date-of-injury position. The Office also noted that she was reemployed six hours a day effective December 18, 1998 with weekly wages of \$665.03. The Office found that this position fairly and reasonably represented her wage-earning capacity. As she had demonstrated the ability to perform the duties of the job for two months or more, the Office found that the position was suitable to her partially disabled condition. The Office therefore notified appellant that her entitlement to compensation was being reduced effective December 18, 1998 according to the provision of 5 U.S.C. §§ 8106 and 8115.

On December 19, 2002 the Office made a preliminary determination that an overpayment of \$5,082.82 occurred in appellant’s case for the following reason:

“For the period December 18, 1998 -- November 30, 2002 you were overpaid because the office made erroneous calculations about your wage-earning capacity based upon your actual earnings of 6 hours of work since December 18, 1998. Enclosed is a copy of the material used to make the calculations for the overpayment. Your entitlement was calculated using computer worksheets at the wage-earning capacity rate shown in the decision recently issued. Your payment history was used to determine how much compensation had been paid to you during the overpayment period. The difference between the two figures is the overpayment.”

³ The hearing representative noted that the SrCE recorded, in her notes of the August 13, 2001 telephone conversation, a figure of \$40,472.00 for the annual full-time base pay of the job the claimant was currently working.

The Office also made a preliminary finding that appellant was without fault in creating the overpayment. The Office provided appellant with an overpayment recovery questionnaire, advised that it would deny waiver if she failed to furnish the information requested and allowed her 30 days to respond.

In a decision dated March 6, 2003, the Office finalized its preliminary determinations. Having received no response from appellant, the Office determined that the circumstances of appellant's case did not warrant waiver of the overpayment. The Office determined that recovery of the overpayment should be made from continuing compensation at the rate of \$431.52 a month.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act provides that the United States "shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty."⁴ Section 8106(a) provides in pertinent part as follows:

"If the disability is partial, the United States shall pay the employee during the disability monthly monetary compensation equal to 66²/₃ percent of the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability, which is known as his basic compensation for partial disability."⁵

In determining compensation for partial disability, the wage-earning capacity of an employee is determined by the employee's actual earnings if the employee's actual earnings fairly and reasonably represent his or her wage-earning capacity."⁶ Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity must be accepted as such measure.⁷

In the case of *Albert C. Shadrick*,⁸ the Board set forth the principle that, if current actual earnings are used as one of the factors in computing an employee's wage-earning capacity, then the current increased wage for the employee's original job should also be used to avoid any distortions caused by changes in business conditions since the injury. Following this principle,

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* § 8106(a).

⁶ *Id.* § 8115(a).

⁷ *Don J. Mazurek*, 46 ECAB 447 (1995).

⁸ 5 ECAB 376 (1953).

the Office established the “*Shadrick*” formula as the method of computing compensation when determining an injured worker’s wage-earning capacity.⁹

ANALYSIS -- ISSUE 1

In the present case, appellant returned to limited duty on December 18, 1998 working six hours a day. The contemporaneous medical evidence established that she could perform these duties for six hours a day and she continued to earn wages in this position for years, further supporting her capacity to earn such wages. As there is no evidence showing that these wages did not fairly and reasonably represent her wage-earning capacity, appellant’s actual earnings in this limited-duty position must be accepted as the best measure of her wage-earning capacity.¹⁰ The question for determination, therefore, is whether the Office properly calculated appellant’s LWEC based on her actual earnings.

After thoroughly reviewing every calculation in the Office’s December 10, 2002 decision on appellant’s LWEC, the Board finds that the Office properly applied the *Shadrick* formula and committed no meaningful mathematical errors.¹¹ This does not end the inquiry, however, because the Office’s determination rests on the validity of three variables in the *Shadrick* formula: (1) appellant’s base annual pay on April 11, 1996 the date disability began;¹² (2) the base annual pay for the same grade and step on August 7, 2001 the date the Office used to compare pay rates under *Shadrick*¹³; and (3) appellant’s base annual pay on August 7, 2001 in

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.2 (December 1993). For the formula itself, see *id.*, *Computation of Compensation*, Chapter 2.900.16.c (January 1991).

¹⁰ *Supra* notes 6 and 7.

¹¹ The Office rounded the weekly base pay rate for actual earnings up five cents from \$590.65 to \$590.70, but this had no effect on the percentage of appellant’s wage-earning capacity.

¹² See 5 U.S.C. § 8101(4) (“monthly pay” means the monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States whichever is greater, except when otherwise determined under section 8113 of the Act with respect to any period); *id.* § 8114(c) (when compensation is paid on a weekly basis, the weekly equivalent of monthly pay is deemed one-fifty-second of the average annual earnings); *id.* § 8114(d)(1)(A) (if the employee worked in the employment in which he or she was employed at the time of injury during substantially the whole year immediately preceding the injury and the employment was in a position for which the annual rate of pay was fixed, the average annual earnings are the annual rate of pay).

¹³ In determining wage-earning capacity, the comparison of wage rates (*i.e.*, the claimant’s actual earnings or the salary of the selected position and the “current” salary of the job held at time of injury/disability) need not be made as of the beginning of the period of disability. Any convenient date may be chosen for making the wage rate comparison, as long as the two wage rates are in effect on the date used for the comparison. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7.c(2) (December 1993). *But see id.*, *Computation of Compensation*, Chapter 2.900.16.c (January 1991) “(The pay rates of the date of injury job and the new job should be compared as of the time that the formal LWEC decision is being prepared, unless there are compelling reasons to use a different date.)”

her limited-duty position. If any of these figures are incorrect or unreliable, then the Office did not properly determined appellant's LWEC.¹⁴

In her September 23, 2002 decision, the hearing representative found that the record contained appropriate documentation for the first figure. At the time of her injury appellant's annual salary was \$31,454.00. When disability began after April 11, 1996, her annual salary was \$33,848.00. Her work schedule at this time was Tuesday through Saturday from 11:30 pm to 8:00 am, entitling her to 30 hours' night differential at 10 percent, for working 12:00 am to 6:00 am and 7.5 hours' Sunday pay at 25 percent, for working midnight 8:00 am Sundays on a shift that began Saturday at 11:30 pm (she had a half-hour lunch after four hours' work). The Office paid compensation after April 11, 1996, based on a weekly salary of \$707.87, which mistakenly assumed seven hours of night work and which did not include appellant's Sunday pay. With proper night differential and Sunday pay, her correct weekly salary at the time disability began was \$730.25. The first figure is therefore established.

A question remains, however, on the second figure, the base annual pay for the same grade and step on August 7, 2001. On August 3, 2001 the Office asked the employing establishment to confirm appellant's grade and step on April 11, 1996 the date disability began. On August 7, 2001 the employing establishment confirmed by telephone that appellant was a Grade 5, Step G, when disability began and that this same grade and step paid \$38,076.00 on December 18, 1998. On August 7, 2001 the employing establishment confirmed by fax that a Grade 5, Step G, position paid an annual salary of \$38,377.00 as of December 18, 1998. When the Office sought clarification, the employing establishment confirmed by telephone and fax that the correct pay for a Grade 5, Step G, was \$38,377.00 as of December 18, 1998. As the hearing representative explained in her September 23, 2002 decision, a question arose when the employing establishment confirmed by telephone on August 13, 2001 that a Grade 5, Step G, position currently paid \$38,076.00, a lower figure than that confirmed some three years earlier.

On remand from the hearing representative, the Office further developed the factual evidence and received written confirmation from the employing establishment that a Grade 5, Step G, position paid an annual salary of \$38,838.00 as of August 7, 2001. The Board is not satisfied that this resolves the question raised by the hearing representative because it now appears that the base annual pay of a Grade 5, Step G, employee increased only \$461.00, or 1.2 percent, from December 18, 1998 to August 7, 2001. According to the Office's Form CA-816, used to show its application of the *Shadrick* formula, Consumer Price Index increases during this same period approached eight percent. Further, development of this issue is once again warranted. Because the Office has made multiple attempts to obtain a reliable figure from the employing establishment, something more than another written confirmation is required. In addition to obtaining written clarification from the employing establishment, the Office must obtain from the employing establishment a copy of the source of its information -- perhaps an appropriate salary table -- so that the Office and any reviewing body can rely with some confidence on the information supplied.

¹⁴ See *Loni J. Cleveland*, 52 ECAB 171 (2000) (finding the Office did not meet its burden of proof in determining the claimant's wage-earning capacity); *William H. Woods*, 51 ECAB 619 (2000) (finding the Office did not meet its burden of proof to reduce the claimant's compensation).

Finally, as for the third variable, appellant's base annual pay on August 7, 2001 in her limited-duty position, the Board finds that further development is also warranted. On remand from the hearing representative, the Office further developed the factual evidence and received written confirmation from the employing establishment on November 26, 2002 that appellant was a Grade 5, Step O, in her limited-duty position on August 7, 2001 and that the pay rate for this grade and step was \$40,952.00 annually. This appears to conflict with what the employing establishment confirmed on August 13, 2001 when it advised the Office that appellant currently earned \$40,472.00 as a Grade 5, Step O, employee. As before, the Office must obtain written clarification and a copy of the source of the employing establishment's information to facilitate a resolution of this matter.

CONCLUSION

The Board finds that this case is not in posture for decision because further development of the factual evidence is warranted. The Board will set aside the Office's December 10, 2002 decision on appellant's LWEC. As this issue is currently unresolved, the Board will also set aside the Office's March 6, 2003 decision finding an overpayment of compensation resulting from erroneous calculations the Office previously made about appellant's wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the March 6, 2003 and December 10, 2002 decisions of the Office of Workers' Compensation Programs are set aside. The case is remanded for further action consistent with this opinion.

Issued: July 12, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member