

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

S.G., Appellant)

and)

**DEPARTMENT OF LABOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Dallas, TX, Employer**)

**Docket No. 06-129
Issued: January 17, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 24, 2005 appellant filed a timely appeal of an August 18, 2005 merit decision of the Office of Workers' Compensation Programs regarding an offset of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly calculated appellant's compensation for wage loss during periods where appellant had actual earnings.

FACTUAL HISTORY

The case was before the Board on a prior appeal. The Board reversed an October 21, 2003 Office decision terminating appellant's compensation on the grounds that she refused an

offer of suitable work.¹ The history of the case was set forth in the Board's prior decision and is incorporated herein by reference.

Appellant worked in private employment for 15 hours per week from September 3, 2004 to April 1, 2005, at \$7.00 per hour. She had been receiving benefits from the Office of Personnel Management (OPM), but elected benefits under the Federal Employees' Compensation Act. The Office determined that appellant was entitled to a retroactive payment of compensation from December 1, 2003 to April 1, 2005.

An Office letter dated April 28, 2005 reported that the date of injury was October 1, 1996 and appellant's pay rate was a GS-7, Step 8 at that time. The earnings for a GS-7, Step 8 as of January 2005 were reported as \$43,381.00 annually (\$834.25 per week). The Office also noted that the date that disability began was December 12, 2000, when appellant was a GS-12, Step 1. The current earnings for a GS-12, Step 1 were \$62,392.00 per year (\$1,199.85 per week).

The record contains worksheets indicating that, for the period December 1, 2003 to August 30, 2004, appellant was owed \$27,562.51 in compensation for wage loss. For the period August 31, 2004 to April 1, 2005, the compensation was \$20,201.39. The offset formula used compared actual earnings of \$85.12 per week with a current pay rate for the date-of-injury job of \$1,199.85. The Office indicated that, after deducting payments to OPM, appellant would be paid \$14,775.90 for the period December 1, 2003 to April 1, 2005.

Appellant returned to work at the employing establishment on July 12, 2005 at 15 hours per week. She indicated that her pay rate was a GS-12, Step 4 employee. As of July 12, 2005, appellant began receiving compensation with an offset for her actual earnings. The worksheet of record indicated that the actual earnings of \$448.50 per week were compared to a current date-of-injury pay rate of \$834.25 to determine the percentage of wage-earning capacity.

By decision dated August 18, 2005, the Office stated that the formula used to calculate compensation was correct. The Office stated that, under *Shadrick* formula, actual earnings were compared to the current pay rate for the date-of-injury position, not with earnings on a recurrence of disability in December 2000. According to the Office, appellant was a GS-7, Step 8 on the date of injury.

LEGAL PRECEDENT

The formula used by the Office to compute the compensation payable for partial disability is the *Shadrick* formula,² which has been codified at 20 C.F.R. § 10.403. The Office first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job; the wage-earning capacity in terms of dollars is computed by multiplying the pay rate for compensation purposes by the percentage of wage-earning capacity and the resulting dollar amount is subtracted from the pay rate for compensation purposes to obtain the loss of wage-earning capacity. Earnings that do not

¹ Docket No. 04-341 (issued November 12, 2004).

² *Albert C. Shadrick*, 5 ECAB 376 (1953).

represent the claimant's wage-earning capacity should be deducted from continuing compensation using the *Shadrick* formula.³

ANALYSIS

There are two periods of time in this case when the Office reduced appellant's compensation based on actual earnings: (1) from August 31, 2004 to April 1, 2005, when she worked in private employment; and (2) commencing July 12, 2005, when she returned to part-time work at the employing establishment. The *Shadrick* formula is used to compare the current actual earnings with the current pay rate for the date-of-injury position. A percentage is calculated and appellant's loss of wage-earning capacity is then determined.

The Office stated that appellant had argued that the current pay rate for the date-of-injury position used by the Office was incorrect, as a date of recurrence of disability should be used. On appeal, it appeared that appellant was arguing, at least with respect to July 12, 2005, that the Office should compare her actual earnings with the current full-time pay rate for her current job. Since she is currently a GS-12, Step 4 employee, she argued that this represented her current pay rate for her date-of-injury position. The Office cited *Francis J. Carter*,⁴ and this case does discuss the underlying principle of *Shadrick*. As the Board explained, factors such as subsequent promotions are not considered. The Office examines the pay of the step and grade "in which appellant was working at the time of the injury" and then determines the current pay of that same grade step. It is not the full-time pay rate of a current job or the pay rate at the time of a recurrence of disability that is relevant to the determination.

Accordingly, the Board finds the Office was correct in stating the general principle of the *Shadrick* formula. The determination of the current pay for the date-of-injury position; however, is dependant on a proper determination of the date of injury. The Board notes that the calculations used for August 31, 2004 to April 1, 2005 apparently used a pay rate based on a date of injury in December 2000. The reduction in compensation commencing July 12, 2005 appeared to be based on a pay rate as of October 1, 1996, of \$834.25 per week as a GS-7, Step 8. When appellant filed her occupational claim in May 1997, she reported that she became aware of the condition and its relationship to employment in October 1996. The date of injury in an occupational claim is not the date a claimant became aware of a condition and its relationship to employment. In an occupational claim, the date of injury is the date of last exposure to the identified employment factors.⁵

The Office failed to make adequate findings in this case as to the date of injury. Until the date of injury is properly determined, the current pay rate of the date-of-injury position cannot be accurately determined. The case will be remanded to the Office for proper findings on the pay

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.7(d) (June 1996).

⁴ 53 ECAB 497 (2002).

⁵ See *Barbara A. Dunnivant*, 48 ECAB 517 (1997); *Dorothy Ward*, 32 ECAB 1506 (1981).

rate issues in this case. After such further development as the Office deems necessary, it should issue an appropriate decision.⁶

CONCLUSION

The Office properly determined that the *Shadrick* formula requires a comparison between the actual earnings and current pay rate for the date-of-injury position. The case, however, requires further development to determine the date of injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 18, 2005 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: January 17, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

⁶ The Board notes that, after appellant filed her appeal, the Office issued a formal wage-earning capacity decision dated October 25, 2005. Since the pay rate issues discussed in this appeal are relevant to a wage-earning capacity determination, the October 25, 2005 decision, issued while the Board had jurisdiction over the case, is null and void. *See Douglas E. Billings*, 41 ECAB 880, 895 (1990).