

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL L. ROSENBAUM and DEPARTMENT OF EDUCATION,
GALLAUDET COLLEGE, Washington, D.C.

*Docket No. 95-2462; Submitted on the Record;
Issued April 8, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly computed appellant's loss of wage-earning capacity based on his actual earnings.

The Board finds that this case is not in posture for decision.

In the present case, the Office has accepted that appellant, a teacher at Gallaudet University, sustained right sided neuroma and ulnar nerve compression and left sided ulnar neuropathy as a result of his signing duties. Appellant stopped work on November 22, 1988 and the Office utilized the date of disability pay rate, \$782.88, as the monthly pay rate for computation of compensation benefits. Appellant thereafter obtained employment as a teacher with the Stafford County Public School District. Appellant submitted to the record an employment contract with the Stafford County School Board dated May 28, 1992 which states that appellant would be paid a salary of \$39,935.00 for the school year 1992 to 1993, in 12 equal installments, at the rate of \$767.98 per week. By decision dated March 10, 1994, the Office determined that appellant's actual earnings as a teacher with the Stafford County School System with wages of \$811.77 per week, effective June 4, 1993, reasonably represented appellant's wage-earning capacity. The Office thereafter calculated appellant's wage-earning capacity noting that appellant's weekly pay rate when disability began was \$782.88; the current pay rate for the date of injury position as of June 4, 1993 was \$980.75 weekly; and claimant's actual earnings as of June 4, 1993 was \$811.77 weekly. The Office thereafter calculated that appellant had an 83 percent wage-earning capacity; a weekly compensation rate of \$99.82, increased by CPI to \$116.75, effective March 1, 1993; and a four-week compensation rate of \$467.00. The Office denied modification of the calculation of appellant's wage-earning capacity on April 6, 1995.

Where an employee sustains an injury-related impairment that prohibits the employee from returning to the employment held at the time of injury, or from earning equivalent wages, but does not render the employee totally disabled for all gainful employment, the employee is

considered partially disabled and is entitled to compensation for his loss of wage-earning capacity as provided for under section 8115 of the Federal Employees' Compensation Act.¹ Thus, if an employee is not totally disabled for all gainful employment, the threshold question which must be addressed before a loss of wage-earning capacity determination is required is whether appellant is prohibited by his injury from returning to his employment held at the time of injury or from earning equivalent wages.² In this case, appellant was prohibited by residuals of his accepted injury from returning to his teaching position which required deaf signing, yet appellant was able to return to a different teaching position earning lower wages. Appellant was therefore entitled to a loss of wage-earning capacity determination.

The Board initially discussed the necessity for payment of compensation where an employee has sustained a loss of wage-earning capacity, but has actual earnings, in the case of *Albert C. Shadrick*.³ *Shadrick* provides that appellant's wage-earning capacity shall be determined by actual earnings, if such actual earnings fairly and reasonably represent appellant's wage-earning capacity. The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Shadrick* decision, has been codified by regulation at 20 C.F.R. § 10.303. Section (a) of this regulation recognizes the basic premise that an injured employee who is unable to return to the position held at the time of injury (or to earn equivalent wages) but who is not totally disabled for all gainful employment is entitled to compensation computed on loss of wage-earning capacity.⁴ Section (b) of this regulation provides the formula to be utilized by the Office for computing compensation payable for partial disability.⁵ This methodology requires that first, the Office determine appellant's "wage-earning capacity in terms of percentage" by dividing his actual earnings by the current, or updated, pay rate for the position he held at the time of injury.

In the present case, the Board concludes that the Office applied the proper methodology as required by the *Shadrick* decision to determine appellant's wage-earning capacity; however, the Board can not ascertain how the Office computed the amount of appellant's actual earnings on June 4, 1993. The evidence of record includes a contract appellant entered into with the Stafford County School System on May 28, 1992 to teach during the 1992 to 1993 school year, and to receive a salary of \$39,375.00 in 12 monthly increments. It is not clear from this contract whether the first payment was due as of June 1992 and the last payment due in May 1993, or whether payment would begin with the school year, for a period of 12 months. The record also does not include any contract signed in 1993, which presumably would have been signed in May 1993 and which may have indicated a different salary payable for the 1993 to 1994 school year. The Board is therefore unable to ascertain appellant's actual earnings on June 4, 1993. The record does not substantiate weekly earnings of \$811.77, but rather that during the 1992 to 1993

¹ 5 U.S.C. § 8115.

² *Sue A. Sedgewick*, 45 ECAB 211 (1993).

³ 5 ECAB 376 (1953)

⁴ 20 C.F.R. § 10.303(a).

⁵ 20 C.F.R. § 10.303(b).

school year appellant was paid at a weekly rate of \$767.98. This case will therefore be remanded to the Office for verification of appellant's actual earnings as of June 4, 1993 and recalculation of appellant's wage-earning capacity if necessary.

On appeal, appellant contends that the Office also made legal errors in application of the principles elucidated in *Shadrick* for computation of wage-earning capacity. In this case, the Office properly determined appellant's wage-earning capacity in terms of percentage by dividing his actual earnings by the current, or updated, pay rate for the job held at the time of injury, to arrive at appellant's percentage of wage-earning capacity.⁶

The Office properly proceeded with a consideration of appellant's "wage-earning capacity in terms of dollars" by applying section 8101(4) of the Act to determine his "Pay Rate for Compensation Purposes."⁷ This requires a comparison of the highest pay rate earned by appellant in the job he held when injured, by comparing the pay rate as of the date of injury, the date disability begins or the date of recurrence if more than six months after returning to work.⁸ In the present case, appellant's highest rate of pay under section 8101(4) was the rate of pay he received as of the date of his disability on November 22, 1988.

The Office computed appellant's "wage-earning capacity in terms of dollars" by multiplying the pay rate for compensation purposes, by the percentage of wage-earning capacity. This figure was subtracted from the pay rate for compensation purposes to obtain the employee's loss of wage-earning capacity, per week. The Office then properly determined that appellant, with dependents, was entitled to three-quarters of that amount, per week. The Board finds that the Office properly applied the *Shadrick* formula as codified by 20 C.F.R. § 10.303, except that the Board is unable to determine how the Office calculated appellant's actual earnings as of June 4, 1993 to be \$811.77 per week, upon remand the Office shall develop the record as necessary to verify the amount of appellant's actual earnings on June 4, 1993, after such further development as necessary the Office shall issue a *de novo* decision.

Finally, appellant alleged that he should receive compensation for the grade and step increases he would have received in his former federal employment. The Board has previously held, however, that compensation is not payable for loss of future step increases and partial cost-of-living adjustments. This position is supported by Larson's *The Law of Workmen's Compensation*.⁹ Larson's notes that, for practical purposes, wage-earning capacity should not stand or fall according to such variables as the behavior of wage levels caused by economic gains or losses. The Board has held that the probability that an employee, if not for his injury-

⁶ 20 C.F.R. § 10.303(b) ; *Bernard A. Newman*, 44 ECAB 759 (1993).

⁷ The Office's regulations at 20 C.F.R. § 10.5(20) define pay for compensation purposes pursuant to sections 8114 and 8101(4) of the Act.

⁸ See also *Fernando O. Valles*, 44 ECAB 776 (1993).

⁹ A. Larson, *The Law of Workmen's Compensation* § 57.32(b) (1992).

related condition, might have had greater earnings is not proof of a loss of wage-earning capacity and does not afford a basis for payment of compensation under the Act.¹⁰

The decision of the Office of Workers' Compensation Programs dated April 6, 1995 is set aside and remanded for further proceedings consistent with this opinion.

Dated, Washington, D.C.
April 8, 1998

George E. Rivers
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁰ See *Dempsey Jackson, Jr.*, 40 ECAB 942 (1989).