

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LORENZO P. ALVARADO, JR. and U.S. POSTAL SERVICE,
POST OFFICE, Riverdale, Md.

*Docket No. 95-1720; Submitted on the Record;
Issued August 3, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's loss of wage earning capacity effective December 11, 1994.

Generally, wages actually earned are the best measure of a wage-earning capacity, and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.¹ In the present case, the Office based appellant's wage-earning capacity upon his actual earnings as a modified clerk at the employing establishment for six hours per day. Appellant had been working in this position for this number of hours since June 14, 1993, almost one and one-half years before the Office used the position as a measure of his wage-earning capacity. This extended period of performing the position of modified clerk for six hours per day is persuasive evidence that this position was a proper measure of appellant's wage-earning capacity.² The medical evidence from appellant's attending physician, Dr. Daniel Ignacio, a Board-certified physiatrist, indicates that appellant was able to work light duty six hours per day. There is no evidence indicating that the position of modified clerk for six hours per day at the employing establishment did not represent appellant's wage-earning capacity effective December 11, 1994.

The formula for determining loss of wage-earning capacity based on actual earnings, initially developed by the Board in the *Shadrick* decision,³ 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

¹ *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

² See *Hubert F. Myatt*, *supra* note 1; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.813.12a (2) (January 1992).

³ *Albert C. Shadrick*, 5 ECAB 376 (1953).

wages) but who is not totally disabled for all gainful employment is entitled to compensation computed on loss of wage-earning capacity. Section (b) of this regulation provides the formula to be utilized by the Office for computing compensation payable for partial disability. First, the Office must determine the employee's "wage-earning capacity in terms of percentage" by dividing his or her earnings by the current, or updated, pay rate for the position held at the time of injury. The Office properly determined this percentage as 75, given that appellant was working 30 hours per week instead of the 40 hours per week he worked prior to his employment injury.⁴

To determine the employee's "wage-earning capacity in terms of dollars," the Office then multiplies the "wage-earning capacity in terms of percentage" by the employee's "monthly pay," as defined in section 8101(4) of the Act as "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 6 months after the injured employee resumes regular full-time employment with the United States, whichever is greater."

The Office properly selected the date of appellant's recurrence of disability on September 23, 1992 as the highest pay rate under section 8101(4) of the Federal Employees' Compensation Act. The Office, however, erred in finding that this pay rate was \$654.80 per week. The employing establishment indicated that appellant's rate of pay on September 22, 1992 was \$34,404 per year, which is greater than the \$654.80 per week used by the Office. In addition, the employing establishment indicated that appellant was entitled to additional pay for night differential, which is included in monthly pay.⁵ The case must therefore be remanded to the Office for recomputation of appellant's entitlement to compensation for loss of wage-earning capacity effective December 11, 1994.

⁴ 5 U.S.C. § 8101(4).

⁵ 5 U.S.C. § 8114(e); *Dempsey Jackson, Jr.*, 40 ECAB 942 (1989).

The decision of the Office of Workers' Compensation Programs dated February 8, 1995 is affirmed insofar as it determined that appellant's actual earnings as a modified clerk represent his wage-earning capacity. The case is remanded to the Office for recomputation of appellant's entitlement to compensation for loss of wage-earning capacity effective December 11, 1994 consistent with this decision of the Board.

Dated, Washington, D.C.
August 3, 1998

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member