

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SAMUEL GRIMES, JR and DEPARTMENT OF THE NAVY,
CHARLESTON NAVAL SHIPYARD, Charleston, S.C.

*Docket No. 96-2078; Submitted on the Record;
Issued June 24, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's wage-earning capacity, retroactive to July 21, 1993 based upon his actual earnings commencing that date.

The Board has duly reviewed the case record and finds that the Office did not meet its burden of proof in this case.

In the present case, the Office has accepted that appellant, an insulator leader, sustained a pulmonary condition due to his exposure to asbestos in his federal employment as of October 3, 1992. Appellant did not initially stop work, however, the record reflects that appellant was placed in a light-duty position July 21, 1993 after an employing establishment physician restricted appellant to light-duty work due to his accepted pulmonary condition.

On October 15, 1993 appellant's supervisor completed a Civil Service Retirement System Form 2824 B wherein he noted that appellant was unable to perform shipboard duties because of physical restriction caused by job related illness. Appellant's supervisor further noted that appellant was placed in a job detail to accommodate appellant and was "assigned job/tasks outside of his job descriptions and other work in job that are within limits of class." Furthermore, appellant's supervisor noted that appellant had not been reassigned to a new permanent position, but had been reassigned to "light duty" or other temporary position. Regarding the expected length of time appellant was anticipated to occupy the position, the supervisor indicated that "paperwork and software connected with job detail will end with the completion of project DD-987 (approximately 12/93)."

On July 11, 1995 the Office received a letter from appellant wherein appellant requested a determination of his loss of wage-earning capacity. Appellant stated that he had retired on March 1, 1995 due to the closure of his employing establishment and that his medical condition would not allow him to work as an insulator or asbestos worker any longer. On November 30,

1995 the Office advised appellant that he was entitled to receive wage-loss benefits from June 14, 1995 continuing and would receive compensation benefits every four weeks in the amount of \$1,834.00.¹

By decision dated February 12, 1996, the Office determined that appellant had been reemployed as a limited-duty insulation worker with wages of \$14.88 per hour as of July 21, 1993, effective July 21, 1993. The Office further advised that appellant's actual earnings as a limited-duty insulation worker fairly and reasonably represented his wage-earning capacity and appellant's compensation benefits would be reduced to 0.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.² The Office therefore bore the burden of proof in this case to properly determine appellant's wage-earning capacity.

Section 8115(1) of the Federal Employees' Compensation Act,³ titled "Determination of wage-earning capacity" states in pertinent part: "In determining compensation for partial disability, ... the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity...."

In this regard, the Board has stated that 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.⁴ Loss of wage-earning capacity is, however, a measure of loss of capacity to earn wages and not merely a measure of actual wages lost.⁵ Therefore actual wages are the preferred measure of wage-earning capacity only if they fairly and reasonably represent such capacity.⁶ The Board has explained that this view constitutes a natural extension of the general principle of workers' compensation law that wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions, rather than in an artificial setting such as a make-shift position or other position at retained pay not necessarily reflective of true wage-earning capacity.⁷

Therefore, while the Office's procedures require that that the claims examiner determine whether the claimant's actual earnings fairly and reasonably represent his or her wage-earning

¹ Appellant had been granted a a schedule award for a 22% permanent impairment of each lung due to his accepted pulmonary condition. The period of the award ran from February 18, 1994 through June 13, 1995.

² See generally *Michael E. Moravec*, 46 ECAB 492 (1995).

³ 5 U.S.C. § 8115.

⁴ *Clarence D. Ross*, 42 ECAB 556 (1991).

⁵ See *Billy R. Beasley*, 45 ECAB 244 (1993).

⁶ *Michael E. Moravec*, 46 ECAB 492 (1995); see also 20 C.F.R. § 10.303(a).

⁷ *Id.*

capacity after the claimant has been working in a position for 60 days,⁸ and the Office may determine wage-earning capacity retroactively after the claimant has stopped work,⁹ actual earnings will be presumed to fairly and reasonably represent wage-earning capacity only in the absence of contrary evidence.¹⁰ In the present case, the Office did not properly evaluate the contrary evidence of record that appellant's earnings in his temporary light-duty make-shift position did not fairly and reasonably represent his wage-earning capacity.

In evaluating whether actual earnings fairly and reasonably represent wage-earning capacity, the Board has previously considered such factors as whether the earnings are from a make-shift position designed for a claimant's particular needs,¹¹ whether the position was temporary or seasonal in nature,¹² and whether the medical evidence indicates that the claimant's work tolerance limitations are exceeded by the requirements of the position.¹³

Appellant's supervisor has indicated that the light-duty detail appellant was performing as of July 21, 1993 was not a permanent position but rather was temporary in nature and at the time appellant was placed in the position was expected to end in December 1993. Appellant's supervisor has also stated that the position was tailored for appellant's specific needs. Appellant's supervisor has explained that appellant was assigned jobs and tasks outside of his job descriptions. Make-shift work is work which is specifically designed for a claimant's particular abilities and needs.¹⁴

As the Office did not consider the contrary evidence of record that appellant's position as of July 21, 1993 was temporary and make-shift in nature, the Office did not meet its burden of proof to establish that appellant's actual earnings in this position fairly and reasonably represented his wage-earning capacity.

⁸ Federal (FECA) Procedure Manual, Chapter 2-814.7, Part 2 - Claims (April 1995).

⁹ *Supra*, Chapter 2-814.7e.

¹⁰ *See Mary Jo Colvert*, 45 ECAB 575 (1994).

¹¹ *James D. Champlain*, 44 ECAB 438 (1993).

¹² *Id.*

¹³ *Mary Jo Colvert*, 45 ECAB 575 (1994).

¹⁴ *See Elizabeth E. Campbell*, 37 ECAB 224 (1985)

The decision of the Office of Workers' Compensation Programs dated February 12, 1996 is hereby reversed.

Dated, Washington, D.C.
June 24, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member