

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS M. DEMGEN and DEPARTMENT OF THE NAVY,
MARE ISLAND NAVAL SHIPYARD, Vallejo, Calif.

*Docket No. 96-2254; Submitted on the Record;
Issued February 9, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined appellant's wage-earning capacity based on his actual earnings as an industrial trainee; and (2) whether the Office properly refused to modify its determination of appellant's wage-earning capacity.

On March 29, 1988 appellant, then a 39-year-old ship fitter, sustained a lumbar contusion and strain in the performance of duty when he slipped and fell. He sustained a recurrence of disability from February 22 to March 4, 1994 and the Office subsequently accepted that appellant also sustained a herniated disc due to his March 29, 1988 employment injury.

In a report dated December 18, 1989, Dr. Ronald V. Stradiotto, a Board-certified orthopedic surgeon, provided a history of appellant's condition and physical findings on examination and stated that he was permanently disabled from his regular job.

By letter dated October 1, 1991, the employing establishment advised the Office that appellant had accepted the position of "industrial trainee" effective August 23, 1991 with the retained salary for his former position. The employing establishment noted that the training plan for appellant would be designed to meet his medical restrictions, interest, skills and abilities, that at the end of the training period, appellant would be moved into an entry level position of the targeted job at which time a new position description reflecting the career ladder or targeted journey level of the position would be completed. The job description included with the letter stated that the industrial trainee position was part of a "FECA [Federal Employees' Compensation Act] Development Program" and consisted of assessment, career counseling, training/retraining, out placement counseling, and ultimate placement into a career at the end of the program with possible placement ranging from office automation careers to other appropriate specialized clerical, administrative or industrial positions to be determined after assessment was completed. The job description indicated that the training program would last from one month to two years and that the trainee would perform technical, industrial or general Office support in a

sedentary environment. The description stated that upon completion of assessment, a copy of the employee's individual development plan would be attached to a target position description when the employee was placed in a position.

In response to a December 20, 1993 inquiry from the Office, the employing establishment advised that appellant had been placed as an industrial trainee during a reduction-in-force on August 23, 1991 and had been working in that position since that time. The employing establishment provided a job description of the position of industrial trainee which included a listing of examples of the types of jobs which an industrial trainee would perform such as answering the telephone, requisitioning office supplies and filing.

By letter dated March 24, 1994, Mr. C. Edgerton, an officer in appellant's union, advised the Office that appellant's industrial trainee position was to provide two months to two years of training in order to retrain appellant for a new career. He noted that appellant had been working in the industrial trainee position for approximately two years and seven months and had not been retrained or permanently placed into a valid career position.

By letter dated May 9, 1995, the Office provided Dr. Bala C. Marar, a Board-certified orthopedic surgeon and Office referral physician, with a copy of the job description for the position of industrial trainee. By letter dated March 12, 1995, Dr. Marar stated his opinion that appellant could perform the position of industrial trainee.

By decision dated June 29, 1995, the Office determined that appellant's reemployment effective on August 23, 1991 as an industrial trainee with wages of \$676.40 per week fairly and reasonably represented his wage-earning capacity and that his compensation benefits would be terminated since his actual wages met or exceeded the wages of the position held when injured and no loss of wages had occurred.

By letter dated July 7, 1995, appellant requested an oral hearing before an Office hearing representative and submitted additional evidence.

In a letter dated March 12, 1994 to appellant's congressional representative, the Director for Federal Employee's Compensation, stated that through the FECA Development Program the Office worked with the employing establishment to develop a generic industrial trainee position to allow each employee time for evaluation, mentoring and training and to permit the employing establishment to target suitable permanent jobs.¹ He stated:

"Each participant in the [program] would have a maximum of two years to complete work in the program....

"[The Office] soon recognized that the [i]ndustrial [t]rainee position was too general to allow [Office] claims staff to determine whether the position reasonably represented the claimant's wage-earning capacity. It was later

¹ The Director noted that the Office ordinarily did not become involved with injured workers whose employers had accommodated them and who were receiving wages but that a threatened reduction-in-force at the employing establishment presented special circumstances which warranted the Office's participation.

determined that since the [i]ndustrial [t]rainee position was transitional and did not represent the targeted job, [the Office] would adjust compensation based on the claimant's actual earnings while the claimant participated in the program, but that the [i]ndustrial [t]rainee job would not be considered truly representative of the claimant's wage-earning capacity. Rather, [the Office] would assess the targeted job as reasonably representing the claimant's wage-earning capacity once the claimant was working in it."

On February 28, 1996 a hearing was held before an Office hearing representative at which time appellant testified. Appellant argued that the position of industrial trainee was a temporary position and did not fairly and reasonably represent his wage-earning capacity. He noted that he had been performing the position of industrial trainee for four and one-half years and had received only the career skills assessment specified as the first step in the program but no individual development plan, job training, or placement in a targeted position. He also asserted that the position of industrial trainee was an odd-lot, makeshift position which could not be used to determine wage-earning capacity.

By decision dated April 18, 1996, the Office hearing representative affirmed the Office's June 29, 1995 decision.

The Board finds that the Office improperly determined appellant's wage-earning capacity based upon his actual earnings as an industrial trainee.

Once the Office has accepted a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.²

Section 8115(a) of the Federal Employees' Compensation Act provides that the wage-earning capacity of an employee may be determined by actual earnings if actual earnings fairly and reasonably represent his or her wage-earning capacity.³ Generally, wages actually earned are the best measure of wage-earning capacity and, in the absence of evidence that they do not fairly or reasonably represent the injured employee's wage-earning capacity, will be accepted as such measure.⁴

Following appellant's return to work in the industrial trainee position, the Office applied its procedures to determine that his actual wages represented his wage-earning capacity. The Board notes, however, that this policy can be invoked only in the absence of contrary evidence. In the present case, the record reflects that the position of industrial trainee was temporary in nature. It does not appear that the Office followed its procedures in its preliminary assessment of the suitability of the industrial trainee job offered to appellant. In this regard, the Office's procedure manual states: "A temporary job will be considered unsuitable unless the claimant

² *Mary Jo Colvert*, 45 ECAB 575 (1994).

³ *See* 5 U.S.C. § 8115(a).

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

was a temporary employee when injured⁵ and the temporary job reasonably represents the claimant's wage-earning capacity. Even if these conditions are met, a job which will terminate in less than 90 days will be considered unsuitable."⁶

At the time appellant returned to work in the industrial trainee position, the record reflects that it was temporary in nature. The job description reflected the temporary nature of the position, stating that the training program would last from one month to two years. The Director for Federal Employees' Compensation stated in his March 12, 1994 letter to appellant's congressional representative that "Each participant in the [program] would have a maximum of two years to complete work in the program..." He stated that the position was "transitional" and did not reasonably represent the employee's wage-earning capacity. The Director stated that the industrial trainee position would not be used to determine an employee's wage-earning capacity and that, rather, the Office would determine whether the targeted job reasonably represented the claimant's wage-earning capacity once the claimant was working in the targeted job. As noted above, appellant was never placed in a targeted job and was performing the industrial trainee position at the time of the Office's June 29, 1995 wage-earning decision and the April 18, 1996 hearing representative decision affirming the June 29, 1995 decision. The mere fact that appellant worked more than 60 days in the industrial trainee position does not provide, in and of itself, a sufficient basis for the Office's wage-earning capacity given the circumstances of this case. As appellant's industrial trainee position can be deemed temporary in nature, the Office cannot use his earnings from this position to determine his wage-earning capacity.

The Board further finds that the Office improperly refused to modify its determination of his wage-earning capacity.

Once a loss of wage-earning capacity is determined, a modification of such a determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous.⁷ The burden of proof is on the party attempting to show the award should be modified.⁸

In this case, the Board finds that appellant met his burden of proof by showing, as explained above, that the Office's original wage-earning capacity decision was in error since the position upon which the wage-earning capacity was based was a temporary position and appellant was not a temporary employee when injured.

⁵ The record reflects that appellant was not a temporary worker at the time of his injury.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(3) (December 1993). Section 2.814.7(c) provides: "After the claimant has been working for 60 days, the [claims examiner] will determine whether the claimant's actual earnings fairly and reasonably represent his or her [wage-earning capacity]..."

⁷ *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

⁸ *Jack E. Rohrabough*, 38 ECAB 186, 190 (1986).

The April 18, 1996 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, D.C.
February 9, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member