

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM J. CIEMINSKI and DEPARTMENT OF THE ARMY,
FORT MCCOY, Sparta, Wis.

*Docket No. 97-95; Submitted on the Record;
Issued July 6, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant had a loss of wage-earning capacity from July 10, 1989 to May 8, 1991.

The Office of Workers' Compensation Programs accepted that appellant sustained a cervical contusion and a permanent aggravation of cervical degenerative disc disease and a congenital anomaly as a result of a traumatic injury on April 8, 1987. At the time of his April 8, 1987 injury, appellant worked as an intermittent "on call" employee in the position of motor vehicle operator.

Appellant returned to work as a motor vehicle operator on May 29, 1987 and worked until December 3, 1988, when his physician revoked his driver's license due to his employment injury. The Office paid appellant compensation for total disability from December 4, 1988 until July 9, 1989. The Office calculated appellant's pay rate for compensation purposes based on his average weekly earnings for the year prior to December 4, 1988.

On July 10, 1989 appellant returned to full-time employment in a temporary position as a custodial work inspector. Appellant worked in this position until May 9, 1991, received compensation for total disability from May 9, 1991 through June 5, 1994, and returned to work on June 6, 1994 in a temporary position as a part-time home systems coordinator. Appellant stopped work in March 1995 and on April 2, 1995 the Office began paying appellant compensation for total disability from that date to the present.

By letter dated July 29, 1994, appellant requested compensation for a loss of wage-earning capacity from July 19, 1989 through May 8, 1991.

By decision dated July 10, 1995, the Office found that appellant had no loss of wage-earning capacity effective July 10, 1989. The Office found that while appellant's earnings per hour in his July 10, 1989 position were less than he received in the position held at the time of

injury, his average weekly earnings were higher as he worked in a full time rather than intermittent position.

Appellant requested a hearing, which was held on May 8, 1996. In a decision dated June 10, 1996, the Office hearing representative affirmed the Office's May 8, 1996 decision.

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

In the present case, the Office determined that appellant had no loss of wage-earning capacity from July 10, 1989 through May 8, 1991 because he earned a higher weekly wage on July 10, 1989 than on December 3, 1988 the date of his recurrence of disability. The formula for determining loss of wage-earning capacity based on actual earnings was developed in *Albert C. Shadrick*¹ and codified by regulation at 20 C.F.R. § 10.303. Section (b) of this regulation provides that wage-earning capacity in terms of percentage is obtained by dividing the employee's earnings by the "current pay rate" which "means 'current' salary or pay rate for the job held at the time of injury."²

In order to determine appellant's wage-earning capacity pursuant to *Shadrick*, it is necessary to accurately determine appellant's pay rate on the date of injury. The Office calculated appellant's pay rate on the date of injury and on the date of his recurrence of disability based on his average weekly salary for prior year in determining the "pay rate for compensation purposes."³

Regarding computation of pay, the Federal Employees' Compensation Act provides:

"Average annual earnings are determined as follows:

(1) If the employee worked in the employment in which he was employed at the time of injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay –

(A) was fixed, the average annual earnings are the annual rate of pay; or

(B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for the particular employment, or the average thereof if the daily wage has fluctuated, by 300 if he was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5 ½-day week and 260 if employed on the basis of a 5-day week.

¹ 5 ECAB 376 (1953).

² 20 C.F.R. § 10.303(b).

³ 20 C.F.R. § 10.5(20) defines "pay rate for compensation purposes" as the employee's pay, as determined by 5 U.S.C. § 8114, at the time of injury, or the time disability begins, or the time disability recurs if the recurrence begins more than six months after the employee resumes full-time employment with the United States, whichever, is greater.

Appellant worked as an intermittent employee on April 8, 1987 the date of injury. Thus, to determine his pay rate at the time of injury, a necessary calculation in the *Shadrick* formula, the Office should have applied section 8114(b) for intermittent employees. Further, the calculation of appellant's pay rate at the time of his recurrence of disability depends on whether his rate of pay was fixed or fluctuated for the year preceding December 3, 1988.⁴ Accordingly, the case will be remanded to the Office for a determination of the pay rate at the time of appellant's injury and at the time of his recurrence of disability in accordance with 5 U.S.C. § 8114. Once appellant's pay rate is properly determined, the Office can then make a finding regarding whether appellant had a loss of wage-earning capacity from July 10, 1989 through May 8, 1991.

The decision of the Office of Workers' Compensation Programs dated June 10, 1996 is set aside and the case remanded for further actions consistent with this decision by the Board.

Dated, Washington, D.C.
July 6, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

⁴ It is not clear from the record whether appellant worked from May 29, 1987 to December 3, 1988 in a full-time or intermittent capacity.