

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HERBERT E. BURGESS and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION HOSPITAL, New York, N.Y.

*Docket No. 97-1753; Submitted on the Record;
Issued July 6, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's actual earnings fairly and reasonably represented his wage-earning capacity.

In the present case, the Office accepted that appellant sustained a lumbosacral strain, herniated lumbar disc and chronic cervical strain in the performance of duty on May 19, 1976. By decision dated July 24, 1996, the Office determined that appellant's actual earnings as a security guard represented his wage-earning capacity, and accordingly reduced his compensation to reflect his loss of wage-earning capacity.

The Board has reviewed the record and finds that the Office properly reduced appellant's compensation in this case.

When an individual sustains an employment-related injury that prevents return to the employment held at the time of injury, but that 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

Under section 8115(a) of the Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.² Generally, wages actually earned are the best measure of a wage-earning capacity

¹ 5 U.S.C. § 8115.

² 5 U.S.C. § 8115(a).

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.³

In the present case, the record establishes that appellant began work on May 17, 1996 in a full-time position as a security guard. Under the Office's procedures, after a claimant has been working in a position for 60 days, the Office will make a determination as to whether the actual earnings fairly and reasonably represent the claimant's wage-earning capacity.⁴ In this case, the Office determined that actual earnings did fairly and reasonably represent appellant's wage-earning capacity, and there is no contrary evidence. There is, for example, no indication that the position was seasonal, temporary or less than full time. As noted above, wages earned are generally the best measure of wage-earning capacity. The Board therefore finds that the position of security guard fairly and reasonably represented appellant's wage-earning capacity.

The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,⁵ has been codified at 20 C.F.R. § 10.303. The Office first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the "current" pay rate.⁶ In this case, the Office properly used earnings of \$6.00 per hour,⁷ or \$240.00 per week, and a current pay rate for the date-of-injury job of \$545.08 per week, for a 44 percent wage-earning capacity. The pay rate at the time of injury is multiplied by the wage-earning capacity percentage, and the resulting dollar amount is subtracted from the pay rate at time of injury to determine the loss of wage-earning capacity. This amount is multiplied by the appropriate compensation rate and applicable cost-of-living adjustments are added.

The Board finds that the Office properly determined that appellant's actual earnings represented his wage-earning capacity, and properly reduced his compensation according to the *Shadrick* principles.

³ *Dennis E. Maddy*, 47 ECAB 259 (1995).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

⁵ 5 ECAB 376 (1953).

⁶ 20 C.F.R. § 10.303(b). According to this section, current pay rate means the current pay rate for the job held at the time of injury.

⁷ A report from a vocational rehabilitation specialist initially indicated that appellant's earnings would be reduced to \$5.00 per hour on June 3, 1996, but the continuing rehabilitation reports and appellant's claims for continuing compensation (Form CA-8) establish that appellant continued to receive \$6.00 per hour, with no indication that the employer intended to reduce the hourly wage.

The decision of the Office of Workers' Compensation Programs dated July 24, 1996 is affirmed.⁸

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

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁸ The record contains two Office decisions dated June 20, 1997 on issues unrelated to the July 24, 1996 wage-earning capacity determination. These decisions were issued after appellant filed his appeal to the Board on April 28, 1997, and are not before the Board on this appeal.