

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEOPOLD E. GREGOIRE and DEPARTMENT OF THE NAVY,
PORTSMOUTH NAVAL SHIPYARD, VA

*Docket No. 97-1977; Submitted on the Record;
Issued July 19, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied modification of appellant's loss of wage-earning capacity determination.

In the present case, the Office has accepted that appellant, a pipefitter, sustained low back strain and a herniated disc L4-5, requiring lumbar laminectomy, as a result of the performance of his federal employment on or about June 6, 1992. On November 24, 1992 appellant accepted a limited-duty position. The limited-duty assignment offer advised appellant that the position was light, office-type work, assigned through the Reserve Manpower Shop. In a notice of proposed separation dated August 23, 1993, the employing establishment informed appellant that his separation from employment was proposed based upon his physical inability to perform the full duties of his position. Appellant was advised that, based upon his medical restrictions of July 1, 1993, his medical condition prevented him from performing the full range of duties required from his position of pipefitter, and the employing establishment was unable to restructure his position and continue his employment. It was further noted that on July 27, 1993 appellant was placed in the Shipyard's Mandatory Placement Program. The notice further stated that the employing establishment would continue to attempt to place appellant in a vacant position commensurate with his medical condition for which he qualified, however, should light duty become unavailable he would be placed in an appropriate leave status. On September 27, 1993 appellant was advised by the employing establishment that a decision had been made to separate him from government service, effective January 7, 1994. Appellant was further advised that under normal circumstances his immediate separation would be warranted; however, appellant's separation would be held in abeyance so that he could benefit from the Shipyard's Mandatory Placement Program. Therefore, appellant was informed that if he was placed in another position or if his disability retirement was approved, the separation would be canceled. On April 4, 1994 appellant's disability retirement became effective.

On October 14, 1993 the Office determined that appellant's actual earnings in his limited-duty position, which he began on November 24, 1992, fairly and reasonably represented

his wage-earning capacity. By decision dated April 14, 1997, the Office denied modification of appellant's loss of wage-earning capacity determination.

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

Section 8115(1) of the Federal Employees' Compensation Act,¹ 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.² 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.³ Therefore actual wages are the preferred measure of wage-earning capacity only if they fairly and reasonably represent such capacity.⁴ 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.⁵

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 makeshift position designed for a claimant's particular needs,⁶ whether the position was temporary or seasonal in nature,⁷ and whether the medical evidence indicates that the claimant's work tolerance limitations are exceeded by the requirements of the position.⁸ Appellant, in requesting that the Office modify the wage-earning capacity determination, has cited the fact that the light-duty position to which he returned was a temporary position, in support of his argument that the wage-earning capacity determination was made in error.

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of

¹ 5 U.S.C. § 8115.

² *Clarence D. Ross*, 42 ECAB 556 (1991).

³ *See Billy R. Beasley*, 45 ECAB 244 (1993).

⁴ *Michael E. Moravec*, 46 ECAB 492 (1995); *see also* 20 C.F.R. § 10.303(a).

⁵ *Id.*

⁶ *James D. Champlain*, 44 ECAB 438 (1993).

⁷ *Id.*

⁸ *Mary Jo Colvert*, 45 ECAB 575 (1994).

the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous. The burden of proof is on the party attempting to show a modification of the wage-earning capacity award.⁹

Appellant requested modification of the loss of wage-earning capacity determination on the grounds that the determination was erroneous. In denying appellant's request for modification of the loss of wage-earning capacity determination, the Office found that appellant had not submitted any additional medical evidence to indicate that the decision of October 14, 1993 was in error; that his medical condition due to the work injury had worsened; or that he had rehabilitated himself.

In denying appellant's request for modification of the loss of wage-earning capacity determination, the Office did not address appellant's allegations, which are supported by some evidence of record, that the October 14, 1993 determination was erroneous because appellant's earnings accrued from a temporary position, which did not fairly and reasonably represent his wage-earning capacity. The Board notes in this regard the August 23, 1993 and September 27, 1993 notices from the employing establishment, which advised appellant that his light-duty assignment may no longer be available. The notices do not indicate that a permanent position to which appellant was assigned was to be eliminated due to a reduction-in-force, or other similar reason such as employing establishment closure, but simply indicates that light-duty assignments may no longer remain available for appellant.

On remand, the Office shall further develop the case record as necessary to determine whether appellant's actual earning accrued from a temporary position, which did not fairly and reasonably represent his wage-earning capacity. After such further development as necessary, the Office shall issue a new decision regarding the issue of modification of appellant's wage-earning capacity determination.

⁹ *Gregory A. Compton*, 45 ECAB 154 (1993).

The decision of the Office of Workers' Compensation Programs dated April 14, 1997 is hereby set aside and this case is remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, D.C.
July 19, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member