

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARLOS PEREZ and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Austin, TX

*Docket No. 98-128; Submitted on the Record;
Issued July 23, 1999*

DECISION and ORDER

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

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

In the present case, the Office accepted that appellant, an internal revenue agent, sustained cervical and lumbar strain as a result of a motor vehicle collision on December 21, 1990 in the performance of duty.

Appellant returned to work for four hours a day on September 9, 1991 and the Office paid compensation benefits for four hours of wage loss per day, until it terminated benefits on April 15, 1993. By decision dated October 5, 1995, the Board reversed the termination of appellant's compensation benefits on the grounds that the weight of the medical evidence did not establish that appellant's accepted disabling conditions had ceased, or that the conditions were no longer related to the employment.¹

By decision dated November 27, 1995, the Office determined appellant's loss of wage-earning capacity. The Office found that appellant had been reemployed as a modified team coordinator for the employing establishment with wages of \$633.80 per week, effective September 9, 1991.² The Office found that this position fairly and reasonably represented appellant's wage-earning capacity. In an accompanying worksheet, the Office applied the *Shadrick* formula³ and noted that appellant's pay rate for the date-of-injury position, as of the date of injury, was \$1,037.71. The Office also noted that the current pay rate for the date-of-injury position was \$1,080.23. The Office stated that appellant's current actual earnings were \$633.80 weekly. The Office thereafter determined that appellant's wage-earning capacity was

¹ Docket No. 95-1594.

² The record indicates that appellant returned to work for four hours a day.

³ See *Abert C. Shadrick*, 5 ECAB 376 (1953).

59 percent, that his weekly compensation rate was \$355.25 and his four-week compensation rate was \$1,421.00. An Office hearing representative affirmed the Office's decision on July 2, 1997.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction of compensation benefits.⁴

Pursuant to section 8115(a) of the Federal Employees' Compensation Act,⁵ in determining compensation for partial disability, wage-earning capacity is determined by the actual wages received by an employee, if the earnings fairly and reasonably represent his wage-earning capacity. The Board has previously explained that generally, wages actually earned are the best measure of a wage-earning capacity, and, in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁶ In the present case, appellant had actual earnings in the team coordinator position since September 1991. While the Act contemplates that actual earnings will not be used to determine wage-earning capacity if they do not fairly and reasonably represent wage-earning capacity, in the present case, appellant had actual earnings for a period of over four years and appellant did not submit any evidence to establish that his earnings as a team coordinator did not fairly and reasonably represent his wage-earning capacity. The Office, therefore, properly determined appellant's wage-earning capacity, based upon his actual earnings, rather than on a constructed position.

On appeal, appellant alleges that the Office should have applied the *Shadrick* formula to determine his real loss of wage-earning capacity, rather than loss of earnings due to economic fluctuations, but did not properly do so in determining appellant's loss of wage-earning capacity. The Office's federal regulations at section 10.303⁷ codify the Board's case law promulgated in the case of *Albert C. Shadrick*⁸ to accommodate the statutory amendments to section 8101(4) of the Act. The regulations define three basic terms which are used in formulating an employee's entitlement to compensation based on his or her wage-earning capacity. These terms are: (1) "Pay Rate for Compensation Purposes"; (2) "Current Pay Rate"; and (3) "Earnings."

"Pay Rate for Compensation Purposes" is, as defined in 5 U.S.C. § 8101(4), the greater of the employee's pay as of the date of injury, the date disability begins or the date of recurrence of disability if more than six months after returning to work. "Current Pay Rate" is defined as the current, or updated, salary or pay rate for the job the employee held at the time of injury.⁹

⁴ *Gregory A. Compton*, 45 ECAB 154 (1993).

⁵ 5 U.S.C. § 8115(a).

⁶ *See Compton*, *supra* note 4.

⁷ 20 C.F.R. § 10.303.

⁸ *Supra* note 3.

⁹ 20 C.F.R. § 10.303(b).

“Earnings” is defined as the employee’s actual earnings, or the salary or pay rate of the job selected as representative of his or her wage-earning capacity.¹⁰

In conformance with the *Shadrick* decision, when a partially disabled employee, who is unable to return to the position held at the time of injury, returns to other work or finds employment, a wage-earning capacity percentage must be determined. The Office claims examiner, applying Office regulations, properly determined appellant’s wage-earning capacity in terms of percentage by dividing his current actual earnings of \$633.80 by the current pay rate for the job he held at the time of injury, \$1,080.23. This yielded a 59 percent wage-earning capacity. Next, to determine appellant’s wage-earning capacity in terms of dollars, the claims examiner multiplied his pay rate for compensation purposes, \$1,037.71, by the percent of wage-earning capacity (59 percent), to equal \$612.24. This resulting dollar amount was, thereafter, subtracted from appellant’s pay rate for compensation purposes, \$1,037.71, to obtain his proper loss of wage-earning capacity rate of \$425.47 per week. Compensation is payable under the Act at the basic rate of 66 2/3 percent or, if the employee has eligible dependents, monthly compensation is augmented at the rate of 8 1/3 percent, or 75 percent of monthly compensation.¹¹ As appellant has dependents, his loss in wage-earning capacity each week of \$425.47 was multiplied by 75 percent to equal a compensation rate of \$319.10. This amount was, in turn, increased by applicable cost-of-living adjustments to equal \$355.25, or \$1,421.00, payable every 4 weeks. The Office properly determined that appellant’s actual earnings fairly and reasonably represented his wage-earning capacity in this case. The Office also properly applied the *Shadrick* formula to determine appellant’s loss of wage-earning capacity.

The decision of the Office of Workers’ Compensation Programs dated July 2, 1997 is hereby affirmed.

Dated, Washington, D.C.
July 23, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

¹⁰ *Id.*

¹¹ See 5 U.S.C. §§ 8106 (a) and 8110(b).