

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH V. PFAFF and U.S. POSTAL SERVICE,
POST OFFICE, Fort Worth, Tex.

*Docket No. 97-362; Submitted on the Record;
Issued June 8, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

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

In the instant case, the Office accepted that appellant sustained lumbar strain due to a traumatic injury on January 4, 1982. The Office further accepted appellant's claim for residuals of his April 28, 1983 laminectomy and fusion surgery and March 14, 1984 lumbar laminectomy at L4-5. Appellant returned to full-time employment on February 15, 1990. On May 18, 1990 appellant began working four hours per day as a modified assignment carrier in accordance with his physician's restrictions.

By decision dated June 24, 1991, the Office determined that the part-time position of modified assignment carrier fairly and reasonably represented appellant's wage-earning capacity effective May 17, 1990 and reduced his compensation accordingly.¹ The Office calculated appellant's weekly pay rate at the time of his May 18, 1990 recurrence of disability as \$628.25 and found that his adjusted earning capacity per week in his reemployment position was \$383.23 which resulted in a loss of earning capacity per week of \$245.02. The Office further found that appellant was entitled to a compensation rate of \$183.77 (3/4 of his loss in earning capacity, the rate established for employees with dependents).

By decision dated May 9, 1996, the Office modified its wage-earning capacity decision after finding that its original determination of appellant's loss of wage-earning capacity was erroneous. The Office found that it had not included appellant's night differential in its recurrent pay rate and that his weekly pay rate of \$628.25 was incorrect. The Office found that appellant's pay rate at the time of his May 18, 1990 recurrence of disability was \$32,219.00 per year or \$619.59 per week, plus 10 percent night differential pay, or \$30.97, for a total weekly pay rate of

¹ The Office acknowledged that the effective date of May 17, 1990 was a typographical error and that the effective date was actually May 18, 1990.

\$650.56. The Office found that his current (May 18, 1990) pay rate for the job held on his date of injury was \$26,766.00 per year plus a night differential of \$45.15 plus \$25.68 for Sunday pay for a total weekly salary of \$585.56. The Office calculated appellant's earnings beginning May 18, 1990 as \$340.76 and found that his adjusted earning capacity per week in his reemployment position was \$377.32 for a loss of earning capacity per week of \$273.24. The Office next determined that appellant was entitled to a compensation rate of \$204.93 (3/4 of his loss in earning capacity, the rate established for employees with dependents), increased to \$234.00 for applicable cost of living adjustments. The Office rejected appellant's arguments that he was entitled to additional compensation as he was scheduled to receive a promotion soon after his injury, that he was entitled to step increases, and that he was entitled to lost overtime wages.

Appellant requested reconsideration and submitted evidence, verified by the employing establishment at the Office's request, that his pay rate effective May 18, 1990 was \$28,914.00 per year rather than \$26,766.00 per year.

By decision dated June 10, 1996, the Office found that the evidence submitted by appellant warranted modification of its prior decision. In another decision of the same date, the Office modified its wage-earning capacity determination to reflect appellant's corrected loss of wage-earning capacity based on his May 18, 1990 position as a modified carrier. The Office recalculated its findings of appellant's loss of wage-earning capacity based on his corrected salary information. The Office reaffirmed the remainder of the findings in its May 9, 1996 decision.

The Board finds that the Office properly modified its determination of appellant's wage-earning capacity.

Once loss of wage-earning capacity is determined, a modification of such 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.² The burden of proof is on the party attempting to show the award should be modified.³

In the present case, the Office, in its June 24, 1991 decision, based appellant's loss of wage-earning capacity on a determination that his actual earnings as a part-time modified assignment carrier at the employing establishment beginning May 18, 1990 represented his wage-earning capacity. This determination was consistent with section 8115(a) of the Act,⁴ which provides that 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." The Board has stated, "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

² *James D. Champlain*, 44 ECAB 438 (1993).

³ *Id.*

⁴ 5 U.S.C. § 8115(a).

the injured employee's wage-earning capacity, must be accepted as such measure."⁵ In this case, there is no evidence that the modified position constituted part-time, sporadic, seasonal or temporary work.⁶ Moreover, appellant worked in the position for more than 60 days prior to the Office's initial wage-earning capacity determination and that record does not reveal that the position was a makeshift position designed for appellant's particular needs.⁷ The Board, therefore, finds that the Office properly based its determination of appellant's wage-earning capacity on his actual earnings as a modified assignment carrier.

The Office, however, used an incorrect amount in determining appellant's pay rate for his job held at the time of his recurrence of disability on May 18, 1990. The employing establishment initially provided the Office with a salary rate of \$26,766.00 per year rather than the correct amount of \$28,914.00 per year. Thus, the Office's original determination of appellant's wage-earning capacity was erroneous, and the Office properly modified its determination of appellant's wage-earning capacity based on the corrected information.

The Board finds that the Office properly recomputed appellant's loss of wage-earning capacity based on his actual earnings effective May 18, 1990.

The Board has initially discussed the necessity for payment of compensation where an employee has sustained a loss of wage-earning capacity but has actual earnings, as in the case of *Albert C. Shadrick*.⁸ *Shadrick* provides that appellant's wage-earning capacity shall be determined by actual earnings, if such actual earnings fairly and reasonably represent appellant's wage-earning capacity.⁹

The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Shadrick* decision, has been codified by regulation at 20 C.F.R. § 10.303(a) and recognizes the basic premise that an injured employee who is unable to return to the position held at the time of injury (or to earn equivalent wages) but who is not totally disabled for all gainful employment is entitled to compensation computed on loss of wage-earning capacity.¹⁰

⁵ *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981).

⁶ *See William D. Emory*, 47 ECAB 365 (1996).

⁷ *Id.*

⁸ 5 U.S.C. § 376 (1953).

⁹ Where the Office learns of actual earnings that span a lengthy period of time (e.g., several months or more), the compensation entitlement should be determined by averaging the earnings for the entire period, determining the average pay rate, and applying the *Shadrick* formula (comparing the average pay rate for the entire period to the pay rate of the date of injury job in effect at the end of the period of actual earnings.) Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(d)(4) (June 1996).

¹⁰ 20 C.F.R. § 10.303(a).

Section (b) of this regulation provides the formula to be utilized by the Office for computing compensation payable for partial disability.¹¹ First, the Office must determine appellant's "wage-earning capacity in terms of percentage" by dividing his earnings by the current, or updated, pay rate for the position he held at the time of injury. In this case, the Office properly determined appellant's wage-earning capacity in terms of percentage by dividing his actual earnings at the time of his injury of \$340.76 per week, including night differential and Sunday premium pay, by the current, or updated, pay rate for the job held at the time of injury, or \$632.05, to arrive at a 54 percent wage-earning capacity.¹²

The Office proceeded with a consideration of appellant's "wage-earning capacity in terms of dollars" by applying section 8104(4) of the Act to determine his "pay rate for compensation purposes." This requires a comparison of the highest pay rate by comparing the rate as of the date of injury, the date disability begins, or the date of recurrence if more than six months after returning to work.¹³ In the present case, the Office determined that appellant's highest rate of pay under section 8101(4) was \$650.56, the rate of pay he received on May 18, 1990, the date of his recurrence of disability.

The Office computed appellant's "wage-earning capacity in terms of dollars" by multiplying the pay rate for compensation purposes, \$650.56, by the percentage of wage-earning capacity, 54 percent, to equal \$351.30. The Office then subtracted this figure from the pay rate for compensation purposes to obtain the employee's loss of wage-earning capacity. The difference of \$299.26 reflects appellant's loss of wage-earning capacity. The Office then properly determined that appellant, with dependents, was entitled to three-fourths of that amount, or \$224.45.¹⁴

On appeal, appellant contends that as he had obtained a promotion which was to begin five days after the injury, he should receive compensation based on his earning capacity after the promotion. However, the job held on that actual date of injury is the basis for determining wage-earning capacity.¹⁵ Further, the Board has held that the probability that an employee, if not for his work-related condition, might have had greater earnings is not proof of a loss of wage-earning capacity and does not afford a basis for payment of compensation under the Act.¹⁶ The Office also correctly rejected appellant's argument that he was entitled to more compensation because he could no longer work overtime, as the Act specifically excludes overtime pay as a factor in calculating the pay rate for compensation purposes.¹⁷

¹¹ 20 C.F.R. § 10.303(b).

¹² 20 C.F.R. § 10.303(b); *Bernard A. Newman*, 44 ECAB 759 (1993).

¹³ *Fernando O. Valles*, 44 ECAB 776 (1993).

¹⁴ *See* 5 U.S.C. § 8106.

¹⁵ *See* 20 C.F.R. § 10.303(b).

¹⁶ *Dempsey Jackson, Jr.*, 40 ECAB 942 (1989).

¹⁷ 5 U.S.C. § 8114(e)(1).

Accordingly, the Board finds that the Office properly modified its determination of appellant's loss of wage-earning capacity.

The decisions of the Office of Workers' Compensation Programs dated June 10 and May 9, 1996 are hereby affirmed.

Dated, Washington, D.C.
June 8, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member