

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of NATHANIEL HARVEY and U.S. POSTAL SERVICE,  
POST OFFICE, Dallas, Tex.

*Docket No. 97-380; Submitted on the Record;  
Issued March 22, 1999*

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DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's monetary compensation based on his actual earnings in a modified limited-duty position.

On September 6, 1983 appellant, a letter carrier, sustained an injury while in the performance of duty. The Office accepted his claim for cervical and lumbosacral spine derangement, authorized surgical interventions and paid compensation for temporary total disability.

In a report dated March 25, 1993, an Office referral physician and orthopedist, Dr. Mark Greenberg, indicated that it was unlikely that appellant would ever return to any type of gainful employment but that he was physically capable of performing some type of gainful employment within the restrictions of his current disability. On May 26, 1993 appellant's attending neurologist, Dr. Syed A.A. Shah, agreed with Dr. Greenberg's assessment for the most part, especially regarding appellant's capacity to work, but he added:

“However, the patient still has pain, dizziness; which incapacitates him. If the patient can only stand intermittently for two hours, walk intermittently for two hours, then sit for four hours, and stand for two hours; one will find it hard to find a job for him. Furthermore, the patient hurts considerably with continued exertion of this type even.

“I agree with an assessment and help by [r]ehab[ilitation] may be of help to him. As far as I am concerned, and have know[n] the patient, I do not think he will be able to do any gainful work. He is one of those ‘post-laminectomy’ syndromes who continued to be disabled, probably indefinitely.”

With Dr. Shah's guarded approval, appellant returned to work on a trial basis to a modified limited-duty position on August 5, 1995 with a salary of \$36,561.00 per year “saved

rate.” Dr. Shah’s prognosis remained guarded, but he recommended that appellant continue on limited duty.

In a decision dated October 10, 1995, the Office reduced appellant’s monetary compensation to zero, finding that appellant had been working successfully for at least 60 days and that the modified limited-duty position fairly and reasonably represented his wage-earning capacity.

Appellant testified at a hearing on May 15, 1996 that he experienced symptoms performing some of his duties and had to take medication frequently. He stated that his supervisor told him, “Just do what you can.” He also stated that his supervisor did not require him to perform some of the listed duties of the position because of his complaints of pain.

In a decision dated August 23, 1996, the Office affirmed the October 10, 1995 decision which found that appellant’s earnings in the modified limited-duty position reasonably represented his wage-earning capacity.

The Board finds that that the Office failed to discharge its burden of proof to justify the reduction of appellant’s monetary compensation.

Once the Office accepts a claim, it has the burden to justify termination or modification of compensation benefits.<sup>1</sup> The Office accepted that appellant sustained an injury while in the performance of duty on September 6, 1983. It authorized surgical interventions and paid compensation for temporary total disability until August 5, 1995, when appellant returned to work in a modified limited-duty position. It is therefore the Office’s burden to justify the reduction of appellant’s monetary compensation.

Section 8115(a) of the Federal Employees’ Compensation Act provides that the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonably represent the wage-earning capacity. 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.<sup>2</sup>

In the case of *Elden H. Tietze*,<sup>3</sup> the Board held that actual wages or earnings received after disability, while evidence of wage-earning capacity, are not conclusive. Ability to earn, rather than wages actually received, is generally regarded as the test. Wage-earning capacity means the employee’s ability to earn, taking into consideration the effects caused by the employee’s impaired physical condition due to injury, his usual occupation, his age, the extent of his education and all other relevant factors which disclose the extent of such ability. Wages or actual earnings after injury should not be confused with “wage-earning capacity,” the Board explained, and while the wages earned after injury often may reasonably reflect the ability of the individual to earn, they do not always reflect such ability, as, for example, if the employer should

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<sup>1</sup> *Harold S. McGough*, 36 ECAB 332 (1984).

<sup>2</sup> *Don J. Mazurek*, 46 ECAB 447 (1995).

<sup>3</sup> 2 ECAB 38 (1948).

because of generosity, special need or other similar reason pay the employee the same wage as he received at time of injury and thus pay more than the employee's capacity would warrant.<sup>4</sup>

In the present case, the record contains substantial evidence that appellant's actual earnings in the modified limited-duty position did not fairly and reasonably represent his wage-earning capacity. Medical opinion evidence from both the Office referral physician and appellant's attending physician supported that it was unlikely that appellant would ever return to any type of gainful employment. When the employing establishment offered a modified limited-duty position to accommodate appellant's significant medical restrictions, the attending physician gave only guarded approval for appellant to perform the duties on a trial basis. When appellant attempted to perform the duties, he experienced symptoms and had to take medication frequently. Further, the record indicates that appellant was not required to perform some of the duties of the position because of his complaints of pain. His supervisor told him, "Just do what you can." This evidence tends to support that the employment appellant returned to beginning August 5, 1995 was sheltered or makeshift and not reasonably available in the open market. That the employing establishment paid appellant at a retained pay rate to do what he could, even over a period of time, is insufficient evidence to establish that his actual earnings in that position fairly and reasonably represented his wage-earning capacity. The Office failed to discharge its burden of proof.

The August 23, 1996 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, D.C.  
March 22, 1999

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

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<sup>4</sup> *Id.* at 41.