

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of HAROLD R. SHIGLEY and DEPARTMENT OF THE ARMY,  
FORT CHAFFE, Ark.

*Docket No. 97-685; Submitted on the Record;  
Issued March 2, 1999*

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DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's wage-earning capacity beginning April 5, 1993 based on his actual earnings.

On March 22, 1983 appellant, then a 32-year-old mobile equipment servicer, filed a claim alleging that he sustained injury on March 7, 1983 to his neck and shoulder while in the performance of duty. The Office accepted appellant's claim for right shoulder strain and cervical strain. Appellant received appropriate compensation for total disability. The record indicates that in 1985 appellant was referred for rehabilitation counseling, and he received training in industrial electronics. However, vocational rehabilitation efforts were unsuccessful and ceased in 1987. Appellant remained on the compensation rolls.

On February 18, 1993 rehabilitation efforts were reopened. In a June 14, 1993 report, Ms. Jeannie Philpott, a rehabilitation counselor, noted that appellant was in the process of starting his own business in heating and air conditioning installation for residential and commercial buildings and that he had a license in the field from the State of Arkansas. She noted that appellant was found capable of working four to five hours a day, but that the general labor market did not support permanent part-time employment.

Appellant submitted Office Form CA-1032, beginning in 1987, in which he reported on his employment activities. He reported working sporadically in heating and air conditioning repair until April 1, 1993 when he worked for 20 hours a week. In a CA-1032 form dated October 26, 1993, appellant reported earnings of \$1,620.00 for the period April 1 to October 26, 1993. In letters to the Office dated between July 14 and October 28, 1994, appellant further addressed his business activities. He noted that he started a business on April 5, 1993 which he owned and ran, borrowing \$15,000.00 in a bank loan. Appellant listed total income of \$26,274.52 and indicated that total business expenses amounted to \$38,136.42, resulting in a loss of approximately 12,000.00. He closed his business on December 1, 1993. Appellant indicated

that he supervised workers on jobs installing and repairing heating and air conditioning equipment, but had no idea what it would cost to hire someone to do the work he performed.

By decision dated September 21, 1995, the Office found that appellant had been self-employed as an air and heating equipment installation and repair supervisor effective April 5, 1993 with average weekly wages of \$750.70. The Office determined that appellant's actual earnings in self-employment fairly and reasonably represented his wage-earning capacity and that rehabilitation efforts had been unsuccessful.

On October 13, 1995 appellant requested reconsideration, contending that as he had business losses resulting from his self-employment the Office was in error in finding he earned \$750.70 per week. By decision dated November 6, 1995, the Office denied appellant's reconsideration request. In subsequent decisions dated July 31 and November 13, 1996, the Office denied modification of the September 21, 1995 wage-earning capacity determination.

The Board finds that appellant's self-employment as an air and heating equipment installation and repair supervisor reasonably reflects his wage-earning capacity.

Once the Office had made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction in such benefits.<sup>1</sup>

Office regulations provide 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 based on loss of wage-earning capacity.<sup>2</sup> Section 8115 of the Federal Employees' Compensation Act provides that the wage-earning capacity of an employee is determined by actual earnings if such actual earnings fairly and reasonably represent the wage-earning capacity.<sup>3</sup> 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>4</sup> In *Thomas F. Jordan*,<sup>5</sup> the Board addressed how to determine the actual earnings of a claimant who becomes self-employed for purposes of determining his loss of wage-earning capacity. The Board stated:

“A self-employed claimant has expenses associated with conducting business which must be paid from the receipts of the business. It therefore would be inequitable to calculate a loss of wage-earning capacity on the basis of a claimant's gross earnings from self-employment as that would not allow for the

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<sup>1</sup> *Louis P. McKenna*, 46 ECAB 328 (1994).

<sup>2</sup> *Paul D Farnsley*, 46 ECAB 341 (1994).

<sup>3</sup> *Michael E. Moravec*, 46 ECAB 492 (1995).

<sup>4</sup> *Id*; see also *Joseph Haley*, 46 ECAB 639 (1995).

<sup>5</sup> 47 ECAB 382 (1996).

costs of conducting the business. However, the net profit in conducting a business would not necessarily fairly and reasonably represent a claimant's actual wage-earning capacity because some of the deductions made from business, such as depreciation, are accounting measures that are not direct expenses that appellant must pay as part of continuing his business."<sup>6</sup>

The Board noted as a claimant who is self-employed possesses the business record of his expenses, the burden is on the employee to describe these costs to the Office and explain the association of such costs to his or her business.<sup>7</sup> The fact that the business venture may prove ultimately unsuccessful for commercial reasons does not support the conclusion that the employee remains totally disabled or has no wage-earning capacity.

In the present case, appellant advised the Office that he embarked in self-employment in the field of air condition and heating supply and repair on April 5, 1993. The record reflects that appellant worked in his business, supervising workers on jobs installing and repairing heating and air conditioning equipment. He advised the Office that his business was operated at a loss. Total business expenses, including "labor, taxes and a bank loan" were listed in the amount of \$38,136.42. Total income from "sales and services" were listed in the amount of \$26,274.52, resulting in a loss of \$11,861.90. Appellant closed his business on December 1, 1993. Appellant stated that he sold property to pay the business loans and received \$7,400.00 after the loans were paid off.

In determining appellant's actual earnings, the record reflects that appellant had returned to other than full-time year round work and the Office properly averaged his reported income for the 35 week period he worked to calculate actual earnings of \$750.70.<sup>8</sup> The Office then applied the *Shadrick* formula, comparing the average pay rate for the entire period worked to the pay rate of the date of injury job in effect at the end of the period of actual earnings, to determine that appellant's actual earnings from self-employment exceeded the current base rate for the grade and step of the position he held at the time of injury. The Office advised appellant that it was reducing his compensation for wage-loss but that he remained entitled to compensation for medical benefits for residuals of the accepted injury. The Office noted that appellant did not submit additional financial information to substantiate annual gross sales, expenses and income and that it had relied on the general information provided. The Office also found that appellant did not demonstrate that the dissolution of his business was due to his accepted employment

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<sup>6</sup> *Id.* at 386.

<sup>7</sup> *Id.* at 387.

<sup>8</sup> Reported income of \$27,274.52 divided by 35 weeks of work from April 5 to December 1, 1993. See Federal (FECA) Procedure Manual, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(d)(4).

injuries but rather due to a lack of success with the business venture.<sup>9</sup> The Board finds that the Office properly determined appellant's wage-earning capacity based on his actual earnings from self-employment. Appellant has not produced any documentation to show how separate expenses and earnings from his business venture were calculated. Without a more thorough accounting, the Office properly relied upon the amount he reported as income during the period of his self-employment in making its wage-earning capacity determination.

The decisions of the Office of Workers' Compensation Programs dated November 13, 1996 is affirmed.

Dated, Washington, D.C.  
March 2, 1999

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>9</sup> Appellant submitted reports from Dr. Gordon McCraw, his attending physician, who indicated that appellant continued to have residuals from his accepted employment injuries. While Dr. McCraw noted that appellant was "essentially disabled" since 1983 and could not return to gainful employment without retraining, the Board notes that these reports are insufficient to establish total disability for work during the relevant period of 1993 or that appellant stopped work due to his employment-related conditions.