

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NANCY E. TERRY and U.S. POSTAL SERVICE,
POST OFFICE, St. Louis, Mo.

*Docket No. 97-1700; Submitted on the Record;
Issued March 16, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant had no loss of wage-earning capacity as a result of her March 26, 1994 work injury.

The Board has duly reviewed this case record and finds that it is not in posture for decision.

In the present case, the Office has accepted that appellant, a rural carrier associate, sustained a right hand crush injury causing contusion and fracture of the right hand as a result of a March 26, 1994 motor vehicle collision. Appellant returned to a limited-duty position at the employing establishment on September 16, 1994.¹ By decision dated August 24, 1995, the Office found that appellant had no loss of wage-earning capacity. In an accompanying memorandum to the Director, the claims examiner stated that on the date of injury appellant was working one day a week and had weekly salary for compensation purposes of \$84.32. The claims examiner further stated that as appellant currently had actual earnings of \$84.32 a week, she had no loss of wage-earning capacity. An Office hearing representative affirmed the January 24, 1997 decision.

The Office's regulations provide for payment of partial disability compensation at section 10.303.² This regulation provides that compensation for partial disability is payable at 66 2/3 percent (or at 75 percent if the employee has a dependent) of the difference between the employee's pay rate for compensation purposes and the employee's wage-earning capacity.³ In

¹ The record also reflects that appellant had concurrent dissimilar employment as a clerk at Fridley's Market on the date of injury, to which she was able to return on May 14, 1994.

² 20 C.F.R. § 10.303.

³ 20 C.F.R. § 10.303(a).

the present case, the Office found that appellant was not entitled to compensation for partial disability because there was no difference between appellant's pay rate for compensation purposes and her wage-earning capacity following the injury.

At the time of the injury, appellant has testified that she worked from two to two and a half days a week, eight hours a day as a substitute carrier on two routes. A 1993 W2 form issued by the employing establishment indicates that appellant earned \$8,673.65 during 1993. A pay rate determination memorandum for the file, dated October 6, 1994, indicates that appellant's hourly wage rate on the date of injury was \$10.54, and that her daily wage rate was \$84.32. The Office claims examiner in this pay rate memorandum multiplied appellant's daily wage of \$84.32 times 150 to equal average annual earnings of \$12,648.00, and then divided this amount by 52 to equal an average weekly pay rate of \$243.23. The Office thereafter used this weekly pay rate of \$243.23 as the basis for payment of wage-loss benefits.

The Federal Employees' Compensation Act provides the methodology to be used for computation of pay rate at section 8114.⁴ 5 U.S.C. § 8114(c) provides that the monthly pay at the time of injury is deemed one-twelfth of the average annual earnings of the employee at that time. Subsection(d)⁵ provides for determination of average annual earnings. 5 U.S.C. § 8114(d)(3) was used by the Office in determining appellant's average weekly pay rate in its October 6, 1994 memorandum. This section of the Act provides that "the average annual earnings may not be less than 150 times the average daily wage the employee earned in the employment during the days employed within one year immediately preceding his injury."⁶

The Office in its decisions dated August 24, 1995 and January 24, 1997, without any apparent documentation of record, concluded that prior to the injury appellant only worked eight hours a week, earning \$84.32 per week. The Office thereafter determined that appellant's pay rate for compensation purposes was \$84.32 per week. The Board concludes that the Office's finding that appellant's pay rate for compensation purposes was \$84.32 per week is not consistent with the evidence of record that appellant worked more than one day a week, with the Internal Revenue Service W2 forms of record which indicate that appellant earned some \$8,673.65 from the employing establishment during 1993. Most importantly, the Office's determination that appellant's pay rate for compensation purposes was \$84.32 per week, is not consistent with the Office's own prior determination of appellant's average weekly pay rate of \$243.23, which is consistent with 5 U.S.C. § 8114(d).

On remand the Office shall determine appellant's pay rate for compensation purposes pursuant to 5 U.S.C. § 8114 and shall thereafter determine appellant's partial disability rate pursuant to 20 C.F.R. § 10.303. The Office shall thereafter issue an appropriate decision.

⁴ 5 U.S.C. § 8114.

⁵ 5 U.S.C. § 8114(d).

⁶ 5 U.S.C. § 8114(d)(3).

The decision of the Office of Workers' Compensation Programs dated January 24, 1997 is hereby set aside and this case is remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, D.C.
March 16, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member