

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES L. WOODS and DEFENSE LOGISTICS AGENCY,
ADMINISTRATIVE SUPPORT CENTER WEST, Stockton, CA

*Docket No. 98-53; Submitted on the Record;
Issued September 9, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant is entitled to a schedule award for the June 17, 1996 employment injury; and (2) whether the Office of Workers' Compensation Programs properly adjusted appellant's compensation to reflect his wage-earning capacity in the position of light-duty material handler.

On June 17, 1996 appellant, then a 40-year-old material handler, sustained the employment injury. The Office accepted appellant's claim for a lumbar strain. He stopped working on June 18, 1996 and returned to work for the employing establishment as a light-duty material handler effective March 17, 1996. On June 10, 1997 appellant filed a claim, Form CA-7, for a schedule award.

In a report dated May 29, 1997, appellant's treating physician, Dr. Barry Green, a Board-certified orthopedic surgeon, considered appellant's history of injury, performed a physical examination, reviewed diagnostic tests including x-rays, a magnetic resonance imaging scan, a bone scan and a computerized tomography myelogram and diagnosed sprain, lumbar spine and degenerative disc disease at L4-5. He noted on physical examination of the lumbar spine and lower extremities that appellant had tenderness in the left lower "lumbar." Dr. Barry stated that the pinprick test did not reveal any changes in sensation in the lower extremities and appellant had no list or limp. He stated that appellant should be able to perform sedentary, light, and in some cases, medium work based on the Department of Labor's *Dictionary of Occupational Titles*. Dr. Barry stated that appellant could lift a maximum of 20 to 50 pounds and frequently lift 10 to 25 pounds. He stated that appellant reached maximum medical improvement on May 27, 1997 although his restrictions would apply for six months, at which time appellant should be reevaluated. Further, Dr. Barry stated that based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fourth edition 1994), appellant had a 5 percent whole person impairment referring to page 110, Table 72, using the diagnosis-related estimates model under category II. He stated that clinical signs of lumbar injury were present without radiculopathy or loss of motion segment integrity. In an attending physician's

report dated June 3, 1997, Dr. Carey C. Alkire, a Board-certified orthopedic surgeon, who had referred appellant to Dr. Green concurred with Dr. Green's conclusion.

In a report dated September 8, 1997, the district medical adviser reviewed Dr. Barry's May 29, 1997 report and found that appellant had no percent impairment to his lower extremities.

By decision dated September 8, 1997, the Office denied the claim for a schedule award, stating that appellant's injury did not cause permanent impairment to a schedule member listed in section 8107 of the Federal Employees' Compensation Act.

By decision dated September 9, 1997, the Office reduced appellant's compensation to zero based on his capacity to earn wages as a light-duty material handler. The Office found that appellant's actual earnings in the modified position fairly and reasonably represented his wage-earning capacity.

The Board finds that appellant has not met his burden that he is entitled to a schedule award.

The schedule award provision of the Act¹ provides for compensation to employees sustaining permanent impairment from loss or loss of use of specified members of the body. The Act's compensation schedule specifies the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body. The Act does not, however, specify the manner by which the percentage loss of a member, function, or organ shall be determined. The method used in making such a determination is a matter that rests in the sound discretion of the Office.² For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants.³

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.⁴ As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back⁵ or an impairment of the whole person,⁶ no claimant is entitled to such an award.⁷ A claimant, however, may be

¹ 5 U.S.C. § 8107 *et seq.*

² *Arthur E. Anderson*, 43 ECAB 691, 697 (1992); *Danniel C. Goings*, 37 ECAB 781, 783 (1986).

³ *Arthur E. Anderson*, *supra* note 2 at 697; *Henry L. King*, 25 ECAB 39, 44 (1973).

⁴ *George E. Williams*, 44 ECAB 530, 533 (1993); *William Edwin Muir*, 27 ECAB 579, 581 (1976).

⁵ *See* 5 U.S.C. § 8107(c); *George E. Williams*, *supra* note 4.

⁶ *See Gordon G. McNeill*, 43 ECAB 140, 145 (1990); *Rozella L. Skinner*, 37 ECAB 398, 402 (1986).

⁷ *E.g., Timothy J. McGuire*, 34 ECAB 189, 193 (1982).

entitled to a schedule award for permanent impairment to a lower extremity even though the cause of the impairment originated in the spine.⁸

In the present case, Dr. Barry's May 27, 1997 report establishes that appellant had a problem with his lumbar spine but not with his lower extremities. He stated that appellant had no radiculopathy and he found that appellant's sensation in his legs was not affected. Dr. Barry also stated that appellant had a 5 percent impairment of the whole person. Since a back injury or impairment of the whole person is not covered by the schedule, appellant is not entitled to a schedule award.

The Board also finds that the Office properly adjusted appellant's compensation based on his actual earnings as a light-duty material handler.

Under section 8115(a) of Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent his wage-earning capacity, or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.⁹

In this regard, the Board has stated that 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.¹⁰ Loss of wage-earning capacity is, however, a measure of loss of capacity to earn wages and not merely a measure of actual wages lost.¹¹ Therefore actual wages are the preferred measure of wage-earning capacity only if they fairly and reasonably represent such capacity.¹² The Board has explained that this view constitutes a natural extension of the general principle of workers' compensation law that wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions, rather than in an artificial setting such as a make shift position or other position at retained pay not necessarily reflective of true wage-earning capacity.¹³

⁸ *George E. Williams*, *supra* note 4; *Rozella L. Skinner*, *supra* note 6 at 402.

⁹ *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *petition for recon. denied*, Docket No. 92-118 (issued February 11, 1993); *see also* 5 U.S.C. § 8115(a).

¹⁰ *Clarence D. Ross*, 42 ECAB 556 (1991).

¹¹ *See Billy R. Beasley*, 45 ECAB 224 (1993).

¹² *Michael E. Moravec*, 46 ECAB 492 (1995).

¹³ *Id.*

In the present case, the Office found that appellant's actual wages as a light-duty material handler fairly and reasonably represented his wage-earning capacity and therefore relied on those wages in determining appellant's compensation. Appellant had been performing the position of light-duty material handler since March 17, 1996 and had actual earnings equal to his date-of-injury position. There is no evidence of record that appellant's actual earnings did not represent his wage-earning capacity. The Office therefore properly reduced appellant's wage-earning capacity to zero based upon appellant's actual earnings in the light-duty material handler position.

The decisions of the Office of Workers' Compensation Programs dated September 8 and 9, 1997 are hereby affirmed.

Dated, Washington, D.C.
September 9, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member