

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN E. PENN and DEPARTMENT OF THE NAVY,
PUBLIC WORKS CENTER, San Diego, CA

*Docket No. 98-914; Submitted on the Record;
Issued January 27, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's reemployment as a clerk, fairly and reasonably represented his wage-earning capacity.

On February 16, 1996 appellant, then a 56-year-old industrial equipment mechanic, filed an occupational disease claim, alleging that he sustained degenerative arthritis with hallux limitus due to wearing steel toe safety shoes as a condition of employment beginning April 26, 1989. Appellant stopped work February 5, 1996 and returned in a light-duty position beginning February 20, 1996.¹ The Office accepted appellant's claim for aggravation of bilateral degenerative arthritis of the first metatarsal joint. The Office also authorized right and left metatarsal implant surgery, and surgery was performed on the right foot. Appellant stopped work.

Appellant was selected for participation in the nurse intervention program in May 1996. Appellant received appropriate compensation for all periods of temporary total disability. On March 31, 1997 appellant returned work in a light-duty position as a clerk. However, appellant stopped work and on April 10, 1997, he filed an emotional condition claim, alleging that factors of his light-duty job caused his condition.² By letter dated April 16, 1997, the Office advised appellant that he had been offered a position as a clerk that was medically suitable and that his work stoppage after one week was construed as abandonment. Appellant was given 30 days to return to work and advised that failure to do so or provide an acceptable reason could result in implementation of the penalty provisions of section 8106 of the Federal Employees'

¹ Appellant filed a traumatic injury claim for fracture of his right big toe on April 19, 1989 for an injury that occurred February 9, 1989.

² On April 2, 1997 the Office of Personnel Management approved appellant's application for disability retirement.

Compensation Act. By letter dated May 20, 1997, the Office notified appellant that any final decision on his work stoppage would be held in abeyance pending resolution of his emotional condition claim. In a decision dated July 11, 1997, the Office denied appellant's emotional condition claim on the grounds that he did not establish fact of injury.³ On July 29, 1997 appellant was advised that he had 15 days to return to work in light of the denial of his stress claim. Appellant returned to work on July 30, 1997. He continued in this position until December 6, 1997 when the position was terminated due to a reduction-in-force. By decision dated December 22, 1997, the Office determined that appellant was reemployed as a clerk effective March 31, 1997 and that his actual wages in this position fairly and reasonably represented his wage-earning capacity.

The Board has duly reviewed the entire case record on appeal and finds that the Office properly determined that appellant's actual wages as a clerk fairly and reasonably represented his wage-earning capacity.

It is well established that once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.⁴ After it has determined that an employee has a disability causally related to his or her federal employment, the Office may not reduce compensation without establishing that the disability ceased or that it is no longer related to the employment. Section 8115(a) of the Act provides that in determining compensation for partial disability, 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.⁵ 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.⁶ After the Office determines that appellant's actual earnings fairly and reasonably represent his or her wage-earning capacity, application of the principles set forth in the *Alfred C. Shadrick*⁷ decision will result in the percentage of the employee's loss of wage-earning capacity.⁸

In this case, appellant returned to work on March 31, 1997 as a clerk with some physical restrictions. He stopped work claiming an emotional condition, but resumed work on July 30, 1997. Appellant worked in this position until it was terminated due to a reduction-in-force effective December 6, 1997.

³ The Office's decision concerning appellant's emotional condition claim was affirmed by the Board in Docket No. 98-915, issued December 22, 1999.

⁴ See *Lawrence D. Price*, 47 ECAB 120 (1995); *Charles E. Minniss*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

⁵ 5 U.S.C. § 8115(a); *Clarence D. Ross*, 42 ECAB 556 (1991).

⁶ *Hubert F. Myatt*, 32 ECAB 1994 (1981).

⁷ 5 ECAB 376 (1953).

⁸ See *Hattie Drummond*, 39 ECAB 904 (1988); *Shadrick*, *supra* note 7

The Office procedure manual sets forth the procedures for determining entitlement to compensation after reemployment and for determining wage-earning capacity. Where a reemployed claimant loses his position due to a true reduction-in-force which affects full-duty workers alike, the claims examiner should consider a retro-active LWEC determination. If a loss of wage-earning capacity determination has not been made and the claimant, as in this case, worked in the position for at least 60 days, the claims examiner is directed to consider a retroactive wage-earning capacity determination, “even if the claimant is a federal employee, since general availability of the job need not be considered for a position actually held.”⁹ Therefore, in this case, where appellant worked in the designated position for over 60 days after his return to work on July 30, 1997 and his work stoppage was not related to his accepted employment injury or any disability therefrom, in the absence of evidence to the contrary the Office properly determined retroactively that appellant’s position as a clerk fairly and reasonably represented his wage-earning capacity.

The formula for determining the loss of wage-earning capacity based on actual earnings, developed in the *Shadrick* decision, has been codified at 20 C.F.R. § 10.303. The Office first calculates the employee’s wage-earning capacity in terms of a percentage by dividing his actual earnings by his current date-of-injury pay rate. In this case, the Office properly used appellant’s actual earnings of \$401.92 per week and a current pay rate for his date-of-injury job of \$673.60 per week to determine that he had a 60 percent wage-earning capacity. The Office then multiplied the pay rate at the time of the injury, \$653.70, by the 60 percent the wage-earning capacity percentage. The resulting figure of \$392.16 is subtracted from appellant’s date-of-injury pay rate and appellant’s loss of wage-earning capacity is \$261.44. The Office multiplied this amount by the appropriate compensation rate and applicable cost-of-living adjustments were added. The Board finds that the Office properly determined that appellant’s actual earnings fairly and reasonably represented his wage-earning capacity and the Office properly reduced appellant’s compensation in accordance with the *Shadrick* formula.

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.812.12(b); *see also* Chapter 2.814.7(c) (December 1993) and 2.814.7(e) (May 1997).

The decision of the Office of Workers' Compensation Programs dated December 22, 1997 is hereby affirmed.

Dated, Washington, D.C.
January 27, 2000

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member