

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD LITZLER and DEPARTMENT OF AGRICULTURE,
KLAMATH NATIONAL FOREST, Yreka, CA

*Docket No. 99-35; Submitted on the Record;
Issued July 14, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
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 his employment injuries.

The record indicates that the Office accepted that appellant sustained injuries to his low back in the performance of duty on February 12, June 13 and December 13, 1991. At the time of the injuries, appellant was working as a temporary worker with the employing establishment. He returned to light-duty work on July 20, 1992 and his employment was terminated due to lack of funds on January 9, 1993.

By decision dated July 6, 1993, the Office determined that appellant's employment from July 20, 1992 to January 8, 1993 fairly and reasonably represented his wage-earning capacity. The Office further determined that he had no loss of wage-earning capacity and therefore his compensation was terminated. This decision was reversed by an Office hearing representative in a decision dated October 3, 1994. The hearing representative stated that the evidence established that the light-duty position was a part-time position.¹

The record contains an Office memorandum dated February 13, 1995 indicating that the employing establishment had stated that the employment offered to appellant from July 20, 1992 was a full-time position, but appellant had chosen to work only part time. By decision dated February 13, 1995, the Office again determined that the light-duty position fairly and reasonably represented appellant's wage-earning capacity. The Office concluded that "actual wages meet or exceed the wages of the job held when injured and no loss of wages has occurred." The Office therefore terminated appellant's compensation.

¹ A part-time position is generally not appropriate for a wage-earning capacity determination when the claimant was a full-time employee on the date of injury. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997).

In a decision dated June 23, 1998, an Office hearing representative affirmed the wage-earning capacity determination.

The Board has reviewed the record and finds that the Office improperly terminated appellant's compensation based on his wage-earning capacity.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction of compensation benefits.²

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.³ If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.⁴

The formula for determining loss of wage-earning capacity, developed in the *Albert C. Shadrick* decision,⁵ has been codified at 20 C.F.R. § 10.303. The Office first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.⁶

As the above language illustrates, there are two methods for determining wage-earning capacity: (1) determining that actual earnings fairly and reasonably represent wage-earning capacity; and then calculating loss of wage-earning capacity by applying the *Shadrick* formula to the actual earnings; and (2) if actual earnings do not fairly and reasonably represent wage-earning capacity, then a constructed position may be used, based on the factors enumerated under section 8115 and in accord with established procedures, followed by application of the *Shadrick* formula.

In the present case, the Office stated that the light-duty position from July 20, 1992 to January 8, 1993 fairly and reasonably represented wage-earning capacity.⁷ The Board notes that

² *Gregory A. Compton*, 45 ECAB 154 (1993).

³ 5 U.S.C. § 8115(a).

⁴ *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *see also* 5 U.S.C. § 8115(a).

⁵ 5 ECAB 376 (1953).

⁶ 20 C.F.R. § 10.303(b).

⁷ The Board notes that the Office may perform a retroactive wage-earning determination if appellant worked in the position for at least 60 days, the earnings fairly and reasonably represented wage-earning capacity and the work stoppage was not due to the employment injury. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.817(e) (May 1997).

the issue is whether the actual earnings fairly and reasonably represented appellant's wage-earning capacity. If the Office makes a determination that actual earnings fairly and reasonably represent wage-earning capacity, then a calculation is made as to the loss of wage-earning capacity, applying the *Shadrick* formula to the actual earnings. In this case, the Office, however, simply stated that actual earnings met or exceeded the date-of-injury wages, without further explanation.

The record contains no support for the conclusion that actual wages met or exceeded date-of-injury wages. The Office makes no specific findings as to date-of-injury wages. It is evident that his actual wages during the period July 20, 1992 to January 8, 1993 were not based on 40 hours per week. The record contains pay records for the entire period and appellant was paid an hourly wage based on hours worked, which varied but generally averaged five to six hours per day.

In reviewing the Office decisions dated February 13, 1995 and June 23, 1998, it appears that the Office did not use actual wages earned, but instead determined that appellant *could* have worked full time, because the employing establishment indicated that the position was available full time.⁸ The Office then found that the wages appellant could have earned would meet or exceed date-of-injury wages. This determination is inconsistent with the underlying prior conclusion that the actual wages fairly and reasonably represented appellant's wage-earning capacity. In determining that appellant could have worked full time, but did not, the Office quite clearly is concluding that actual earnings did not represent his wage-earning capacity. In that case, the Office must proceed with the alternative method of using a constructed position and follow established procedures for a wage-earning capacity determination based on a constructed position. These procedures include referral to a rehabilitation specialist and selection of an appropriate position, based on proper evaluation of the medical and other relevant evidence.⁹ There is no indication that the Office followed its procedures in this case.

The Board accordingly finds that the Office failed to properly determine appellant's wage-earning capacity. It is the Office's burden of proof to terminate compensation and it did not meet its burden to terminate.

⁸ The hearing representative found that appellant "was employed in a full-time capacity for the period in question, but only worked part-time hours by his own volition."

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.8 (December 1993).

The decision of the Office of Workers' Compensation Programs dated June 23, 1998 is reversed.

Dated, Washington, D.C.
July 14, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member