

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SAMUEL A. FASOLO and DEPARTMENT OF THE ARMY,  
PICATINNY ARSENAL, Picatinny, NJ

*Docket No. 98-1015; Submitted on the Record;  
Issued March 3, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
BRADLEY T. KNOTT

The issue is whether the Office of Worker's Compensation Programs properly reduced appellant's compensation based upon his actual earnings as a model maker.

In the present case, the Office has accepted that appellant, then a 50-year-old engineering technician, sustained a L4 subluxation and disc displacement as a result of a fall on March 5, 1993. By letter dated February 3, 1997,<sup>1</sup> the Office found that appellant had been reemployed as a model maker with wages of \$460.35 per week since July 18, 1996, that the duties of this position reflected appellant's work tolerance limitations as established by the weight of the medical evidence and that the position reflected appellant's training, education and work experience. The Office advised appellant that his compensation benefits would be adjusted to reflect his ability to earn wages in his new position.

The Board finds that the Office's February 3, 1997 decision adjusted appellant's compensation based upon his actual earnings as a model maker, but does not constitute a formal wage-earning capacity determination. The Board also finds that this case is not in posture for decision as to whether the Office properly reduced compensation benefits for the period of time during which appellant had actual earnings.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation<sup>2</sup>

In the present case, the record reflects that appellant received temporary total disability benefits from May 1994 until July 1996. In July 1996 appellant accepted a part-time light-duty position, for which he reported for duty on July 18, 1996. Section 8115(a) of the Federal

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<sup>1</sup> The Office's February 3, 1997 letter was accompanied by appeal rights.

<sup>2</sup> *Mary E. Jones*, 40 ECAB 1125 (1989).

Employees' Compensation Act<sup>3</sup> 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." The record also reflects that appellant only worked for a few hours on July 18, 1996 and was thereafter placed on sick leave and leave without pay while undergoing evaluation of a heart condition. On September 27, 1996 appellant was advised by the employing establishment that he would be placed on absence without leave unless he returned to work on October 2, 1996. Appellant did not return to work. On December 11, 1996 appellant was advised by the employing establishment that he was removed from federal service, effective December 11, 1996, for excessive absence without leave.

In determining whether an Office decision constitutes a formal wage-earning capacity determination or a reduction of compensation based upon actual earnings, the Board has stated in *Lawrence D. Price*,<sup>4</sup> that a formal wage-earning capacity determination based upon actual earnings must determine whether the actual wages earned fairly and reasonably represented appellant's wage-earning capacity. The Office's February 3, 1997 decision, did not make any findings that appellant's actual earnings did in fact "fairly and reasonably" represent his wage-earning capacity. The Board also notes that the Office's procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days.<sup>5</sup>

As the record does not reflect that appellant had actually worked in the position for 60 days and as the Office's February 3, 1997 decision, did not make findings as to whether appellant's actual earnings "fairly and reasonably" represented his wage-earning capacity, the Board finds that the February 3, 1997 decision was not a formal loss of wage-earning capacity determination.

Where actual earnings are of a sporadic or intermittent nature that do not represent wage-earning capacity, actual wages are deducted using the formula developed in *Albert C. Shadrick*,<sup>6</sup> from continuing compensation payments.<sup>7</sup> Since this was not a formal wage-earning capacity determination, reduction of compensation using the *Shadrick* formula should have been performed only for the period appellant had actual wages.<sup>8</sup>

The record reflects that the Office may have continued to reduce appellant's compensation benefits during periods of time that he had no actual earnings. On remand, the

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<sup>3</sup> 5 U.S.C. § 8115(a).

<sup>4</sup> 47 ECAB 121 (1995).

<sup>5</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

<sup>6</sup> 5 ECAB 376 (1953).

<sup>7</sup> See *Lawrence D. Price*, *supra* note 4.

<sup>8</sup> *Id.*

Office shall verify that appellant's compensation benefits were reduced only during periods of actual earnings.

The decision of the Office of Workers' Compensation Programs dated February 3, 1997 is set aside and remanded for further action.

Dated, Washington, D.C.  
March 3, 2000

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member