U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JACOB B. GARCIA and GENERAL SERVICES ADMINISTRATION, FEDERAL SUPPLY SERVICE, Denver, CO

Docket No. 01-553; Submitted on the Record;
Issued December 14, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the position of warehouse forklift operator fairly and reasonably represents appellant's wage-earning capacity.

On November 14, 1978 appellant, then a 41-year-old warehouseman, was injured in the performance of duty when he was struck in the left elbow by a heavy box while unloading a railcar. The Office of Workers' Compensation Programs initially accepted the claim for traumatic bursitis of the left elbow, but later expanded the claim to include epicondylitis. Appellant received compensation for intermittent periods of wage loss. He was offered a light-duty position after his work injury and continued working until July 8, 1993 when he was advised that light duty was no longer available.[1] Appellant began receiving compensation on the periodic rolls effective July 25, 1983.

Appellant first received treatment for his work injury at the local hospital where he was fitted with a splint and cast. He came under the care of Dr. Roger Bichon, an internist, on December 4, 1978, who diagnosed chronic bursitis and prescribed a course of steroid injections. Appellant, however, continued to complain of left elbow pain and was referred to Dr. Walter Robinson, a Board-certified orthopedic surgeon. In a May 27, 1980 report, Dr. Robinson diagnosed chronic lateral epicondylitis with probable tearing of the underside of the extensor carpi radialis brevis of the left elbow. He later performed surgery consisting of an extensor fasciotomy of the left elbow on May 29, 1980. Following the surgical procedure, Dr. Robinson released appellant to light-duty work effective September 29, 1980 with a 25-pound lifting restriction. Dr. Robinson later opined on August 6, 1982 that appellant had permanent weakness in the left arm due to work injury and considered appellant's medical restrictions to be equally permanent.

[1] Appellant's regular job as a warehouseman required him to perform lifting in excess of 70 pounds. Appellant was working with a 30-pound lifting restriction in light duty during July 1983 when he sustained a heart attack. His medical restrictions for the heart condition were that he could not lift over 50 pounds.

After the employing establishment withdrew appellant's light-duty work, the Office placed appellant in a rehabilitation program to facilitate his return to work.

In a June 26, 1984 report, an Office rehabilitation counselor noted that appellant had undergone extensive testing that showed a significant memory dysfunction and need for special training. The vocational plan was for transition from appellant's regular job as a warehouseman to a supply position following proper training.

Appellant subsequently accepted a job offer extended by the employing establishment for a "reconstructed" warehouse worker/forklift operator beginning May 13, 1985. A copy of the job position for the reconstructed position indicates that the employing establishment modified a warehouseman position with the result that the physical requirement no longer exceeded appellant's lifting restriction of 30 pounds.

On March 10, 1986 appellant was transferred from his "reconstructed" position to a job as a tools and part attendant. During the following year, appellant received two unsatisfactory ratings, a letter of warning and a notice of proposed removal from the tools and part attendant job for the reason that he was deemed unfit to carry out his duties.

Appellant alleges that he took medical retirement on October 28, 1997 to avoid termination.

On July 29, 1999 the Office issued a "Retroactive Loss of Wage-Earning Capacity Formal Decision," in which the Office determined that the position of a modified warehouseman fairly and reasonably represented appellant's wage-earning capacity. The Office thereby adjusted appellant's compensation effective May 13, 1985 to reflect a zero percent loss of wage-earning capacity.

Appellant disagreed with the decision and requested a hearing, which was held on July 10, 2000.

In a September 14, 2000 decision, an Office hearing representative affirmed the Office's July 29, 1999 decision.

The Board finds the Office improperly determined appellant's loss of wage-earning capacity based on her actual earnings in the modified warehouseman position.

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions, given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.[2] Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the

[2] *Hattie Drummond*, 39 ECAB 904 (1988); *see* 5 U.S.C. § 8115(a); A. Larson, *The Law of Workers' Compensation* § 57.22 (1989).

employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.[3]

In accordance with the concept of wage-earning capacity described above, when the Office makes a medical determination of partial disability and of the specific work restrictions, the claimant's case should be referred to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, which fits the employee's capabilities in light of his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.[5]

In this case, the Board notes that the position of a modified warehouseman which appellant accepted on May 12, 1985 was specifically tailored to meet his medical restrictions. The record indicates that the warehouseman position appellant worked in prior to his work injury required heavy lifting in excess of 70 pounds. Only after appellant's work injury was this position modified to accommodate appellant's 30-pound lifting restriction for the left shoulder. There is no indication that this job existed as described in the position description prior to or after appellant's retirement. Appellant's contention is that the position in which he was employed from October 25, 1993 to February 28, 1995 may have been makeshift work, which cannot be used as the basis of an employee's wage-earning capacity.[4] If the duties performed by appellant were not those normally performed by a warehouseman, this is an indication that the position was makeshift and is not representative of appellant's wage-earning capacity.[5] When the evidence raises a serious question of whether a position actually performed by an employee for a limited period in the past may have been a makeshift position, the Office cannot use this position as representative of that employee's wage-earning capacity without investigating this question.[6] The use of what may be an inappropriate position as the basis of an employee's wage-earning capacity will be more closely scrutinized where the Office applies its loss of wage-earning capacity decision prospectively, that is, to a period after the employee no longer was working in the position used as representative of his or her wage-earning capacity.[7]

In its September 14, 2000 decision, the Office did not address appellant's contention that the modified warehouseman position did not fairly and reasonably represent his wage-earning capacity. The case will be remanded to the Office for an appropriate investigation of this contention, to be followed by a decision addressing whether appellant's actual earnings in the

[3] *Steven M. Gourley*, 39 ECAB 413 (1988).

[4] *Samuel J. Chavez*, 44 ECAB 431 (1993).

[5] *James Jones, Jr.*, 39 ECAB 678 (1988).

[6] *Mary Jo Colvert*, 45 ECAB 575 (1994).

[7] *See Albert L. Poe*, 37 ECAB 684 (1986). (Although medical evidence indicated the employee was not physically capable of performing the duties of the position he held for almost six years, the Board allowed the Office to use this position as representative of his wage-earning capacity during the period he actually was employed in the position, but not after he retired from it.)

position of a modified warehouseman fairly and reasonably represented his wage-earning capacity.

The decisions of the Office of Workers' Compensation Programs dated September 14, 2000 is hereby set aside and the case remanded to the Office for further action consistent with this decision.

Dated, Washington, DC
December 14, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member