

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANCIS J. CARTER and DEPARTMENT OF THE NAVY,
MARE ISLAND NAVAL SHIPYARD, Vallejo, CA

*Docket No. 00-1789; Submitted on the Record;
Issued April 11, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's actual earnings fairly and reasonably represented his wage-earning capacity.

The Office accepted that appellant sustained a lumbosacral strain in the performance of duty on February 17, 1981. Appellant underwent lumbar surgeries and returned to work in August 1988. On August 2, 1995 he sustained a recurrence of total disability. Appellant underwent vocational rehabilitation and on June 28, 1999 began work as a customer service representative at \$10.00 per hour.

By decision dated August 30, 1999, the Office determined that appellant's actual earnings fairly and reasonably represented his wage-earning capacity and reduced his compensation. In a letter dated September 15, 1999, appellant requested a review of the written record. He argued that the Office had improperly applied the *Shadrick*¹ formula in calculating his loss of wage-earning capacity.

In a decision dated January 18, 2000, the Office hearing representative affirmed the prior decision.

The Board finds that the Office properly determined appellant's loss of 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

¹ *Albert C. Shadrick*, 5 ECAB 376 (1953).

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

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 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.⁴

The record indicates that appellant returned to work on June 28, 1999 at \$10.00 per hour, or \$400.00 per week. There is no indication that the job was temporary, part-time, seasonal or otherwise not appropriate for a wage-earning capacity determination.⁵ As noted above, generally wages earned are the best measure of a wage-earning capacity.

Appellant did not contest the finding that actual earnings fairly and reasonably represented his wage-earning capacity. He argues that the actual calculation of his loss of wage-earning capacity was incorrect. The Board finds that the Office properly determined appellant's wage-earning capacity applying the *Shadrick* formula.

The method of determining wage-earning capacity based on actual wages was outlined in the *Shadrick* decision and is codified at 20 C.F.R. § 10.403. The initial step is to compare the actual current earnings with the earnings at the time of injury. Then, as the *Shadrick* decision points out, the earnings in the date-of-injury position must be updated to reflect the current earnings of an employee in the date-of-injury position; the Board stated that "reasonableness and fairness require that such earnings be adjusted so as to eliminate the effect of economic factors in cases where salaries and earnings have been affected by inflationary tendencies."⁶ In this case, the Office compared current actual earnings of \$400.00 with the current pay rate for the date-of-injury position, a WG-5, step 2 employee, of \$585.20. This results in a wage-earning capacity of 68 percent; this percentage is then applied to the "pay rate for compensation purposes," which is defined in the Office's regulations as the employee's pay at the time of injury, time disability began, or when compensable disability recurred, if the recurrence began more than 6 months after the employee resumed regular full-time employment with the United States, whichever is greater.⁷ In this case, the Office used the pay rate on August 2, 1995, the date of recurrence of disability, of \$908.80. Applying the 68 percent wage-earning capacity to \$908.80 results in a wage-earning capacity of \$617.98 per week or a loss of wage-earning capacity of \$290.82.

It is appellant's argument that the initial comparison, of \$400.00 actual earnings to \$585.20, the current WG-5, step 2 pay rate, was incorrect. Appellant argues that the Office should have used the current pay rate for a GS-12, step 4 position, the position appellant held at the time of the recurrence of disability in August 1995. This would not, however, be consistent

³ 5 U.S.C. § 8115(a).

⁴ *Dennis E. Maddy*, 47 ECAB 259 (1995).

⁵ *Monique L. Love*, 48 ECAB 378 (1997).

⁶ *Shadrick*, *supra* note 1 at 384.

⁷ 20 C.F.R. § 10.5(s).

with the principles of wage-earning capacity as noted in *Shadrick*. The loss of wage-earning capacity percentage is a measurement based on the earnings at the time of injury, updated to current levels, compared with the current actual earnings. The purpose of the comparison is to measure the effect of the original injury on the subsequent capacity to earn wages. The Board has held that “the percentage of loss of the employee’s wage-earning capacity is to be determined by taking into account the type of work he was performing at the time of injury and the present pay rate he would be earning in that work but for the injury and resulting physical impairment.”⁸ It is well established that factors such as subsequent promotions are not considered; “the comparison must be made between the pay of the step of the grade in which appellant was working at the time of the injury and the current pay of that same grade step.”⁹ The only appropriate method for determining loss of wage-earning capacity, and the only method contemplated by *Shadrick*, is to utilize the current pay rate of the date-of-injury position in calculating the percentage of loss of wage-earning capacity.

The Board accordingly finds that in this case the Office properly calculated appellant’s loss of wage-earning capacity by comparing his current actual earnings with the current pay for a WG-5, step 2 employee. The Office then properly applied the percentage derived to the pay rate for compensation purposes. There is no evidence of error in the wage-earning capacity determination in this case.

The decision of the Office of Workers’ Compensation Programs dated January 18, 2000 is affirmed.

Dated, Washington, DC
April 11, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

⁸ *Melvin Hoff, Sr.*, 27 ECAB 458, 462 (1976).

⁹ *Fabian W. Fraser*, 9 ECAB 865, 868-69 (1958).