

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAFAEL BRITO and NEW JERSEY DEPARTMENT OF MILITARY & VETERANS AFFAIRS, ARMY AVIATION SUPPORT FACILITY, West Trenton, NJ

*Docket No. 02-1513; Submitted on the Record;
Issued October 8, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's loss of wage-earning capacity on or after January 27, 2002.

The Board finds that the Office did not properly determine appellant's wage-earning capacity.

In a decision dated January 22, 2002, the Office found that effective October 3, 2000 appellant was reemployed as a modified clerk with weekly wages of \$538.20. The Office further found that the position reflected the work tolerance limitations established by the weight of the medical evidence. One such limitation was that appellant was capable of working six hours per day. Accordingly, the Office adjusted appellant's compensation based upon his ability to earn wages of \$538.20 per week.

Generally, wages actually earned are the best measure of one's 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.¹

Appellant correctly notes that the Office based its calculation of weekly wages of \$538.20 on the mistaken belief that he worked six hours per day, five days per week.² Appellant, however, does not work an average of 30 hours per week. The record indicates that, because of appellant's compressed schedule, where he alternately works 5 days one week and 4 days the following week, he averages only 27 hours of work per week. Consequently, the Office erred in finding that appellant earned \$538.20 per week. The Office did not properly determine appellant's loss of wage-earning capacity.

¹ 5 U.S.C. § 8115(a); *see Penny L. Baggett*, 50 ECAB 559 (1999).

² Appellant earns an hourly wage of \$17.94.

The January 22, 2002 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
October 8, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member