

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PAUL M. COLOSI and DEPARTMENT OF JUSTICE,  
FEDERAL BUREAU OF INVESTIGATION, New York, NY

*Docket No. 03-135; Submitted on the Record;  
Issued November 25, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether appellant received proper pay for periods between September 1992 and June 2000.

This is the third appeal in the present case. In the first appeal,<sup>1</sup> the Board issued a decision and order on July 23, 1998, in which it reversed the August 11, 1995 decision of the Office of Workers' Compensation Programs on the grounds that the Office improperly terminated appellant's compensation because he refused an offer of suitable work.<sup>2</sup> The Board determined that the Office failed to establish that the modified special agent position offered to appellant by the employing establishment was suitable.<sup>3</sup> In the second appeal,<sup>4</sup> the Board issued a decision and order, in which it reversed the June 5, 2000 decision of the Office on the grounds that the Office improperly reduced appellant's compensation effective June 5, 2000, based on his capacity to earn wages as a retail store manager. The Board found that the Office did not establish that appellant was physically capable of performing the retail store manager position. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

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<sup>1</sup> Docket No. 96-778 (issued July 23, 1998).

<sup>2</sup> On December 29, 1987 appellant, then a 30-year-old special agent, sustained employment-related subluxations at C3-4, T10-11 and L4-5 and cervical, thoracic and lumbar strains. On May 21, 1991 he sustained an injury, which was accepted for employment-related sciatica, myalgia, myositis and thoracic and lumbar sprains. Appellant stopped work for various periods and received disability compensation from the Office. He sustained recurrences of disability on December 20, 1991 and August 18, 1992, which were accepted as related to the May 21, 1991 employment injury. Beginning July 12, 1997, appellant began working as a manager in an Athlete's Foot Shoe Store, which he operated. Appellant indicated that he did not earn any income in this position after December 31, 1998.

<sup>3</sup> In particular, the Board found that the medical evidence did not show that appellant was physically capable of commuting from his home to the worksite for the offered job in New York City.

<sup>4</sup> Docket No. 00-2334 (issued May 6, 2002).

On numerous occasions, appellant alleged that he was entitled to additional compensation due to various errors the Office had made regarding his wage-earning capacity during different periods, base salary at various pay grades and steps, locality pay, New York retention pay, administrative uncontrollable overtime (AUO) pay, night pay, Sunday pay and holiday pay.<sup>5</sup> Over an extended period, the Office attempted to resolve these problems by periodically calculating appellant's compensation. This process included requesting pay information from appellant and his former employers.

The most extensive calculations of record were performed by Robert Paine, an Office claims examiner. Mr. Paine memorialized his calculations in several documents, including those dated August 6, 23, 30 and 31, 2001. He requested additional information relevant to appellant's pay rate from various sources, including the employing establishment and other former employers. Each time he received new information, Mr. Paine updated his calculations. The August 30 and 31, 2001 documents, contain the most complete account of Mr. Paine's calculations.

In the August 30 and 31, 2001 documents, Mr. Paine provided information relevant to the calculation of appellant's pay rate for three dates: May 21, 1991 (date of injury); December 20, 1991 (date of first recurrence of disability); and August 18, 1992 (date of second recurrence of disability). This information included appellant's pay grade and step, base pay, locality pay, AUO pay, New York retention pay, night pay, Sunday pay and holiday pay. Mr. Paine indicated that these figures were based on pay stubs and other forms submitted by appellant and the employing establishment.<sup>6</sup> He noted that he was "fairly confident" that the figures for December 20, 1991 and August 18, 1992 were correct.<sup>7</sup> Mr. Paine noted, however, that the figure for New York pay retention on May 21, 1991 appeared to be incorrect as the figure for that date should not be greater than the figure for December 20, 1991. Despite this concern, Mr. Paine performed calculations and provided tentative figures for appellant's total pay per week for the three dates.<sup>8</sup> He also provided wage-earning capacity calculations for the period July 12, 1997 to December 31, 1998.<sup>9</sup> Mr. Paine based these calculations on the assumption that appellant earned \$19,000.00 in 1997 working as a manager for his Athlete's Foot Store and

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<sup>5</sup> For example, appellant periodically raised concerns that the proper grade levels for his work as a special agent were not used. The record contains copies of documents, which memorialize some of the dates that appellant received step increases.

<sup>6</sup> The record contains numerous documents detailing forms of pay appellant received in addition to base pay. A number of the figures Mr. Paine used were derived from pay stubs, dating from the early 1990s, that appellant submitted in early August 2001.

<sup>7</sup> He acknowledged that he did not always use documents that precisely pinpointed the various figures for the three dates in question and noted that some of the figures were derived from documents, which were dated near in time to the three dates.

<sup>8</sup> Mr. Paine stated that appellant earned \$1,301.83 per week on May 21, 1991; \$1,351.43 per week on December 20, 1991; and \$1,481.84 per week on August 18, 1992.

<sup>9</sup> He indicated that appellant's wage-earning capacity for this period was \$429.37 per week.

\$14,000.00 in 1998, working as a manager in the same store.<sup>10</sup> He also started to calculate appellant's wage-earning capacity for the period January 1, 1999 to June 4, 2000, but he did not complete the calculation.

In an undated document added to the record in September 1991, Mr. Paine expressed his concern that additional information needed to be obtained regarding the calculation of appellant's compensation and indicated that certain figures, which he compiled needed to be confirmed as accurate. For example, he indicated that appellant's correct locality pay needed to be confirmed, that his salary, during the period July 12, 1997 to December 31, 1998, needed to be checked and that a decision had to be made regarding how to calculate his wage-earning capacity during the period January 1, 1999 to June 4, 2000. By the time that this document was produced, Mr. Paine transferred to another position with the Office and he did not play an active role thereafter in appellant's claim.

After Mr. Paine stopped working on appellant's case it appears that Debra Ross, a senior claims examiner, took responsibility for calculating the correct amount of his compensation.<sup>11</sup> In a letter dated July 9, 2002, Ms. Ross advised appellant that she was in the process of calculating "adjustments" for three periods: December 20, 1991 to December 31, 1998; January 1, 1999 to June 4, 2000; and June 5, 2000 to July 13, 2002. She indicated that the adjustments for the first period would be "based upon the study of records performed by Mr. Paine." Ms. Ross stated that the adjustments for the latter two periods would reflect appellant's change from partial to total disability. She indicated that effective July 14, 2002 appellant's compensation checks would reflect a compensation pay rate of \$1,481.84 and a finding of temporary total disability.

In early September 2002, appellant received checks in the amounts of \$27,931.09, \$9,982.79 and \$6,344.63. The record contains three calculation sheets, which pertain to the three checks sent to appellant. Each sheet lists the amounts of compensation appellant should have received and the amounts of compensation he actually received for various sub-periods during the three periods delineated in the Office's September 24, 2002 decision: September 7, 1992 to July 11, 1997; July 12, 1997 to December 31, 1998; and January 1, 1999 to June 4, 2000. The sheets identified various "compensation rates" for the listed sub-periods. The record also contains two forms, which contain wage-earning capacity calculations -- one which incorporates appellant's pay rate on December 20, 1991 (date of first recurrence of disability) and another, which incorporates his pay rate on August 18, 1992 (date of second recurrence of disability).<sup>12</sup>

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<sup>10</sup> The record contains documents pertaining to appellant's salary while he worked as a manager at the Athlete's Foot Store, including tax forms and declarations from the parent company of the store regarding average salaries for managers.

<sup>11</sup> In November 2001, the employing establishment sent the Office additional information about appellant's pay, including some figures for base pay, locality pay, AUO pay and other forms of pay.

<sup>12</sup> The record contains a calculation sheet covering the period June 5, 2000 to July 13, 2002, which indicates that appellant should have received \$147,626.00 during this period but actually only received \$54,749.43. The sheet indicated that the "manual adjustment due claimant" was \$88,002.09. On September 6, 2001 appellant received a check in the amount of \$88,002.09. The correctness of the compensation paid for this period, or the period after July 13, 2002, is not a subject of the present appeal.

By decision dated September 24, 2002, the Office advised appellant of its determination regarding the calculation of three compensation checks it sent him for periods between September 1992 and June 2000. The Office indicated that the \$27,931.09 check covered the period September 7, 1992 through July 11, 1997 and was calculated using the weekly pay rate of \$1,481.84 times 75 percent (based on total disability) minus amounts previously paid at the incorrect pay rate of \$1,339.52 times 75 percent. It noted that the \$9,982.79 check covered the period July 12, 1997 through December 31, 1998 and was calculated using the weekly pay rate of \$1,481.84 times 75 percent (plus a loss in wage-earning capacity amount of \$429.37) minus amounts previously paid at the incorrect pay rate of \$1,339.52 times 75 percent (plus a loss in wage-earning capacity amount of \$442.04). The Office indicated that the \$6,344.63 check covered the period January 1, 1999 through June 4, 2000 and was calculated using the weekly pay rate of \$1,481.84 times 75 percent (based on total disability) minus amounts previously actually paid at the incorrect pay rate of \$1,339.52 times 75 percent (based on total disability). Regarding the method of calculation for the checks, the Office stated:

“All pay rates used for calculation for these checks were based upon a study of your file and the result of the research and calculations performed by Mr. Paine. You state that he told you that check would be ‘approximately’ \$32,000.00 for the period September 7, 1992 to July 11, 1997. Although Mr. Paine did perform very detailed study of the pay information, when the actual adjustment was calculated, the figures were entered into the computer for exact calculations and to be sure [that] all cost-of-living increases were properly applied.”

The Board finds that the case is not in posture for decision regarding whether appellant received proper pay for periods between September 1992 and June 2000.

Section 8105(a) of the Federal Employees’ Compensation Act provides: “If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to  $66 \frac{2}{3}$  percent of his monthly pay, which is known as his basic compensation for total disability.”<sup>13</sup> Section 8101(4) of the Act defines “monthly pay” for purposes of computing compensation benefits as follows: “[T]he monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater....”<sup>14</sup>

In the present case, appellant alleged that the Office had made errors in determining his compensation between September 1992 and June 2000, due to mistakes in calculations regarding his wage-earning capacity during different periods, base salary at various pay grades and steps, locality pay, New York retention pay, AUO pay, night pay, Sunday pay and holiday pay. In response to appellant’s concerns, the Office further developed the record and determined that he was due additional compensation. It sent appellant a \$27,931.09 check covering the period

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<sup>13</sup> Section 8110(b) of the Act provides that total disability compensation will equal three fourths of an employee’s monthly pay when the employee has one or more dependents.

<sup>14</sup> 5 U.S.C. § 8101(4).

September 7, 1992 through July 11, 1997, a \$9,982.79 check covering the period July 12, 1997 through December 31, 1998 and a \$6,344.63 check covering the period January 1, 1999 through June 4, 2000.

In its September 24, 2002 decision, the Office attempted to explain its rationale for issuing checks in these amounts. However, the Board finds that the Office did not provide adequate findings and reasoning for its determination regarding the amount of compensation, to which appellant was entitled between September 1992 and June 2000. In determining a claimant's entitlement to compensation, the Office is required by statute and regulation to make findings of fact.<sup>15</sup> Office procedure further specifies that a final decision of the Office must include findings of fact and provide clear reasoning, which allows the claimant to "understand the precise defect of the claim and the kind of evidence which would tend to overcome it."<sup>16</sup> These requirements are supported by Board precedent.<sup>17</sup>

The Board notes that the deficiencies in the Office's September 24, 2002 decision do not allow appellant to adequately understand the basis for the Office's determination regarding his entitlement to compensation. The Office indicated that its determination relied heavily on calculations performed by Mr. Paine, an Office claims examiner who had previously worked on the case. However, he produced a series of complex computations over a period of time and it remains unclear what aspects of Mr. Paine's calculations the Office ostensibly adopted. A proper calculation of appellant's compensation initially requires the compilation of accurate figures for his base salary, locality pay, New York retention pay, AUO pay, night pay, Sunday pay and holiday pay as measured on various dates. However, the Office did not provide any description of what figures it had determined to be accurate and suitable for inclusion in its calculations. Nor did the Office provide adequate explanation of the method it used to calculate appellant's compensation. For example, as noted above, calculation of a claimant's pay rate requires assessing his pay at the time of injury, the time disability begins, or the time compensable disability recurs, depending on the given circumstances of the case. The Office, however, did not provide any description of its reasoning with regard to this aspect of calculating compensation.<sup>18</sup>

Moreover, it is important to note that Mr. Paine explicitly indicated that his calculations were merely provisional and that a fully accurate assessment of the compensation due appellant required the acquisition of additional information and the reconfirmation of figures, which had already been obtained. Therefore, the Office's ostensible reliance on the calculations of Mr. Paine is misplaced. In its September 24, 2002 decision, the Office appears to have incorporated Mr. Paine's wage-earning capacity calculations in connection with its determination of appellant's compensation for the period July 12, 1997 to December 31, 1998. In particular,

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<sup>15</sup> 5 U.S.C. § 8124(a) provides: "The [Office] shall determine and make a finding of facts and make an award for or against payment of compensation." 20 C.F.R. § 10.126 provides in pertinent part that the final decision of the Office "shall contain findings of fact and a statement of reasons."

<sup>16</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4 (July 1997).

<sup>17</sup> See *James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

<sup>18</sup> See *supra* notes 14 and 15 and accompanying text.

Mr. Paine expressed concern that his wage-earning calculations be recalculated as he was not sure of their accuracy. The calculation of wage-earning capacity is a complex process and the Office did not explain how it calculated appellant's wage-earning capacity and incorporated it into its determination regarding his entitlement to compensation for the periods in question.<sup>19</sup> Moreover, it remains unclear whether the record presently contains sufficient information to calculate appellant's wage-earning capacity.<sup>20</sup>

The record contains copies of worksheets produced in conjunction with the Office's September 24, 2002 decision, but these worksheets merely indicate amounts of compensation appellant was due during various sub-periods between September 1997 and June 2000 and do not contain any notable detail regarding the method of computation. After Mr. Paine stopped working on appellant's case, the record was supplemented with additional information from the employing establishment, but the Office did not indicate to what extent, if any, it incorporated this information into its analysis.<sup>21</sup>

Given the above-described deficiencies in the Office's determination regarding the compensation due appellant, the case shall be remanded to the Office for further consideration. The Office shall further evaluate appellant's case and provide a detailed discussion of the compensation due to him for the period September 1992 to June 2000, such that the above-noted concerns are adequately addressed. After such development it deems necessary, the Office shall issue an appropriate decision on this matter.

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<sup>19</sup> Section 8115(a) of the Act provides that 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." 5 U.S.C. § 8115(a). The Board has stated, "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." See *Floyd A. Gervais*, 40 ECAB 1045 (1989); *Clyde Price*, 32 ECAB 1932 (1981) for further explanation of the determination of wage-earning capacity based on actual wages.

<sup>20</sup> Mr. Paine based his calculations on the assumption that appellant earned \$19,000.00 in 1997 working as a manager for his Athlete's Foot Store and \$14,000.00 in 1998 working as a manager in the same store. However, there is limited evidence of record regarding appellant's earnings. An unsigned "S corporation" tax form for 1997, listing the name of the parent company for Athlete's Foot, provided the figure \$19,000.00 under the category "compensation of officers," but the document does not explicitly confirm that this is the amount appellant earned in 1997. In a letter dated March 17, 2000, the Office stated that appellant had indicated by telephone that he earned \$14,000.00 in wages in 1998, but there are no other documents of record to confirm this figure.

<sup>21</sup> Moreover, it is unclear whether the Office adequately addressed the possibility that appellant is entitled to additional compensation for improper deduction of health benefit premiums. The record indicates that the Office acknowledged some premiums were improperly deducted and attempted to rectify this problem by sending appellant compensatory checks. However, it is unclear from the record whether the Office fully compensated appellant for the improper premium deductions.

The decision of the Office of Workers' Compensation Programs dated September 24, 2002 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, DC  
November 25, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member