

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**TRACY D. PATTEN, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Longview, WA, Employer**

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**Docket No. 04-1713  
Issued: December 23, 2004**

*Appearances:*  
*Tracy D. Patten, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

WILLIE T.C. THOMAS, Alternate Member  
MICHAEL E. GROOM, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On June 28, 2004 appellant filed a timely appeal of the March 22, 2004 merit decision of the Office of Workers' Compensation Programs, which affirmed the February 10, 2003 wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of appellant's claim.

**ISSUE**

The issue is whether appellant's actual earnings as a distribution clerk fairly and reasonably represent her wage-earning capacity.

**LEGAL PRECEDENT**

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 her wage-earning capacity.<sup>1</sup> 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.<sup>2</sup> The actual earnings in the position are compared with the current wages of the date-of-injury position to determine loss of wage-earning capacity.<sup>3</sup>

### ANALYSIS

The Board has given careful consideration to the issue involved, the parties' contentions on appeal and the entire case record. The Board finds that the decision of the hearing representative of the Office dated March 22, 2004 is in accordance with the facts and the law in this case, and hereby adopts the findings and conclusions of the Office hearing representative.<sup>4</sup>

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<sup>1</sup> 5 U.S.C. § 8115(a); *see Loni J. Cleveland*, 52 ECAB 171, 176-77 (2000).

<sup>2</sup> *Loni J. Cleveland*, *supra* note 1.

<sup>3</sup> 20 C.F.R. § 10.403(c) (1999); *Albert C. Shadrick*, 5 ECAB 376 (1953).

<sup>4</sup> Appellant had current weekly earnings of \$724.25 as a distribution clerk. Her employment in this capacity dated back to August 26, 2002. Office procedure provides 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. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993). Appellant worked as a distribution clerk in excess of 60 days. This fact constitutes persuasive evidence that the position represents her wage-earning capacity. Moreover, there is no evidence that the position of distribution clerk was seasonal, temporary or make-shift work designed for appellant's particular needs. *Elbert Hicks*, 49 ECAB 283 (1998). As appellant worked only six months in the year preceding her April 13, 1996 employment injury, the Office properly calculated appellant's date-of-injury pay rate as \$461.40 per week based upon the annual earnings of another similar employee. *See* 5 U.S.C. § 8114(d)(3); *Monte Fuller*, 51 ECAB 571, 575 (2000). The Office correctly applied this pay rate, appellant's actual earnings of \$724.25, and the current wages of the date-of-injury position to conclude that appellant had no loss of wage-earning capacity under the *Shadrick* formula.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 22, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 23, 2004  
Washington, DC

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member