



## **FACTUAL HISTORY**

Appellant, a 51-year-old former pipefitter, sustained a traumatic injury in the performance of duty on April 2, 1982. The Office accepted his claim for fracture of the left distal radius and left carpal tunnel syndrome. Appellant received appropriate wage-loss compensation and returned to work, in a limited-duty capacity on August 3, 1988. However, due to budgetary constraints, the employing establishment discharged him effective October 7, 1990. The Office subsequently placed appellant on the periodic compensation rolls. On July 1, 1997 the Office determined that the selected position of salesman, general hardware represented his wage-earning capacity. Accordingly, the Office adjusted appellant's compensation benefits to reflect his wage-earning capacity as a salesman effective July 2, 1997.

On April 18, 2002 the Office issued a preliminary determination that appellant received an overpayment in the amount of \$9,061.75.<sup>2</sup> Additionally, the Office found that he was not at fault in creating the overpayment. Appellant requested a hearing.

By decision dated October 28, 2002, the Office hearing representative set aside the April 18, 2002 preliminary determination. The hearing representative found that the Office's calculations regarding appellant's entitlement to compensation for certain periods should have been the subject of a separate formal decision, with accompanying appeal rights. The hearing representative noted that, although entitled, appellant had not received wage-loss compensation for the period May 25 to June 21, 1997. He calculated that the compensation owed appellant for this period would reduce the overpayment by approximately \$2,000.00. Accordingly, the hearing representative remanded the case for the Office to issue an entitlement decision and a corrected preliminary determination concerning overpayment.

The Office issued a December 3, 2002 decision finding that appellant was entitled to wage-loss compensation from September 1, 1996 through March 31, 1997 based on actual earnings of \$660.00. The Office also found that appellant's was entitled to compensation at the basic statutory rate two-thirds in the amount of \$2,048.22 for the period May 25 through June 21, 1997.<sup>3</sup> Lastly, the Office found that appellant was entitled to compensation at the basic rate from June 22, 1997 through June 15, 2001.

In a separate notice dated December 3, 2002, the Office stated that a preliminary determination had been made that appellant had received an overpayment of compensation in the amount of \$7,013.53 and that appellant was determined to be without fault in the creation of the overpayment.

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<sup>2</sup> The overpayment was largely attributable to appellant's receipt of compensation at the augmented (3/4) rate rather than the basic (2/3) rate.

<sup>3</sup> The Office stated that the previously unpaid compensation would be applied to reduce the amount of appellant's existing overpayment.

On January 8, 2003 appellant requested a hearing.<sup>4</sup> The Office denied his request in a decision dated February 11, 2003. The Office found that appellant's January 8, 2003 request was untimely.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee is entitled to augmented compensation for a husband, wife, unmarried child or wholly dependent parent, as those terms are defined under the Federal Employees' Compensation Act and applicable regulations.<sup>5</sup>

If an employee returns to work and has earnings, he is not entitled to receipt of temporary total disability benefits and actual earnings for the same time period. The Office, therefore, offsets actual earnings.<sup>6</sup>

### **ANALYSIS -- ISSUE 1**

The Office's December 3, 2002 decision addressed three aspects regarding appellant's right to wage-loss compensation. The first, was whether he was entitled to augmented compensation prior to his June 16, 2001 marriage. There is no indication from the record that appellant was entitled to compensation at the augmented rate prior to his June 16, 2001 marriage. Appellant did not have any qualifying dependents before June 16, 2001; therefore, compensation awarded for periods prior to June 16, 2001 should be computed at the basic statutory rate.

The second issue addressed by the December 3, 2002 decision was the impact of appellant's actual earnings on his entitlement to wage-loss compensation. For the period September 1, 1996 through March 31, 1997, the Office reduced his total disability compensation to reflect his actual earnings while self-employed. Based on financial information provided by appellant, the Office determined that appellant had actual earnings of \$660.00 during the period September 1, 1996 through March 31, 1997, while self-employed as a small appliance repairman. His actual earnings during this 7-month period averaged \$21.00 per week.

The December 3, 2002 decision did not constitute a formal wage-earning capacity determination, but was a reduction of compensation using the *Shadrick* formula.<sup>7</sup> When an employee returns to work and has earnings, he is not entitled to receipt of temporary total disability benefits and actual earnings for the same time period.<sup>8</sup> Under these circumstances, the Office offsets actual earnings pursuant to the *Shadrick* formula. If a reduction of benefits, based

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<sup>4</sup> Although appellant referenced both the December 3, 2002 preliminary overpayment determination and the Office's December 3, 2002 decision concerning his entitlement to wage-loss compensation, he did not clearly indicate whether he was seeking a prerecoupment hearing or a hearing regarding the Office's finding of entitlement and the applicable compensation rate or whether he desired a hearing on both matters.

<sup>5</sup> 5 U.S.C. § 8101(a); 20 C.F.R. § 10.405(a) (1999).

<sup>6</sup> *Daniel Renard*, 51 ECAB 466, 469 (2000); 20 C.F.R. § 10.403(c) (1999).

<sup>7</sup> See *Albert C. Shadrick*, 5 ECAB 376 (1953). The formula developed in the *Shadrick* decision has been codified by regulation at 20 C.F.R. § 10.403 (1999).

<sup>8</sup> *Daniel Renard*, *supra* note 6.

upon actual earnings, is not accompanied by a determination that actual earnings “fairly and reasonably” represent wage-earning capacity, an informal reduction of benefits utilizing the *Shadrick* formula is proper rather than a formal loss of wage-earning capacity determination. As the Office in this case did not find in the December 3, 2002 decision that appellant’s actual earnings fairly and reasonably represented his wage-earning capacity, the informal reduction of benefits was proper. In this case, the Office took into account appellant’s actual earnings during the period September 1, 1996 through March 31, 1997 and properly determined his wage-earning capacity.<sup>9</sup>

The last issue addressed by the December 3, 2002 decision was appellant’s entitlement to wage-loss compensation during the period May 27 through June 21, 1997. The Office awarded compensation in the amount of \$2,048.22. He does not take issue with the finding of entitlement and the Board finds no error with the amount of compensation awarded. Appellant, however, takes exception to the Office’s stated intent to offset his alleged overpayment by the \$2,048.22 in unpaid benefits. The question of the propriety of offsetting appellant’s alleged overpayment by the amount of previously unpaid benefits is premature as a final determination on the overpayment issue has not yet been rendered by the Office. As such, any matters pertaining to the fact, extent and recovery of the overpayment are not presently before the Board.

### **LEGAL PRECEDENT -- ISSUE 2**

In response to a preliminary notice of an overpayment, section 10.432 of the Office’s regulations provides that appellant may request a precoupment hearing within 30 days of the written notice of overpayment.<sup>10</sup> Failure to request the hearing within this 30-day time period shall constitute a waiver of that right.<sup>11</sup>

Regarding the Office’s December 3, 2002 decision on entitlement to wage-loss compensation, any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought. A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of the decision for which a hearing is sought.<sup>12</sup> However, the Office has discretion to grant or deny a request that was made after this 30-day period.<sup>13</sup> In such a case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.<sup>14</sup>

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<sup>9</sup> The Office calculated that appellant’s average weekly earnings of \$21.00 represented a loss of wage-earning capacity of \$479.00 when compared to his date-of-injury weekly earnings of \$494.00.

<sup>10</sup> 20 C.F.R. § 10.432 (1999).

<sup>11</sup> *Id.*; *Jan K. Fitzgerald*, 51 ECAB 659, 664 (2000).

<sup>12</sup> 20 C.F.R. § 10.616(a) (1999).

<sup>13</sup> *Herbert C. Holley*, 33 ECAB 140 (1981).

<sup>14</sup> *Rudolph Bermann*, 26 ECAB 354 (1975).

## ANALYSIS -- ISSUE 2

Appellant's January 8, 2003 hearing request did not clearly indicate whether he desired a prerecoupment hearing or a hearing regarding his entitlement to compensation or both. As the request was general in nature, but addressed both the overpayment issue and the compensation issue, appellant's request is considered a request for a hearing on both issues.

Appellant's hearing request is dated January 8, 2003, which is more than 30 days after the Office's December 3, 2002 preliminary notice of overpayment. Because of the untimely nature of the January 8, 2003 request, he also waived his right to a prerecoupment hearing regarding the preliminary notice of overpayment issued on December 3, 2002.<sup>15</sup>

Appellant's hearing request is also more than 30 days after the Office's December 3, 2002 decision regarding his entitlement to wage-loss compensation. As such, appellant is not entitled to a hearing as a matter of right. Moreover, the Office considered whether to grant a discretionary review and correctly advised appellant of the opportunity to request reconsideration.<sup>16</sup> Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's request for a hearing on the issue of his entitlement to wage-loss compensation.

## CONCLUSION

The Board finds that the Office properly determined that appellant was not entitled to augment compensation prior to June 16, 2001. The Office also properly determined appellant's wage-loss compensation from September 1, 1996 through March 31, 1997 based on actual earnings of \$660.00. Additionally, they correctly found that appellant was entitled to compensation in the amount of \$2,048.22 for the period May 25 through June 21, 1997. The Board also finds that appellant failed to file a timely request for a hearing and, therefore, the Office properly denied his January 8, 2003 request.

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<sup>15</sup> 20 C.F.R. § 10.432 (1999); *Jan K. Fitzgerald, supra* note 11.

<sup>16</sup> The Office mistakenly noted that the overpayment issue could be pursued on reconsideration. As the Office had not yet issued a final determination on the overpayment issue it could not yet be addressed on reconsideration. However, appellant may pursue reconsideration on the issues of entitlement to wage-loss compensation and the appropriate compensation rate.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated February 11, 2003 and December 3, 2002 are affirmed.

Issued: February 17, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member