



found that the Office failed to meet its burden of proof to terminate compensation benefits effective August 14, 1995 on the grounds that he refused an offer of suitable work.<sup>2</sup> By decision dated June 19, 2001, the Board found that the Office failed to meet its burden of proof to terminate compensation benefits on the grounds that employment-related disability had ceased as of January 29, 1996.<sup>3</sup> The history of the case is set forth in the Board's prior decisions and is incorporated herein by reference.

On April 11, 1997 the employing establishment submitted an investigative memorandum with respect to appellant's gambling activities commencing in 1994. The memorandum refers to sworn statements from race track security personnel that they observed appellant approximately four times per week up to six hours per day. Between May 11, 1994 and August 14, 1995, the memorandum stated that appellant went to the race track on at least 128 days. With respect to earnings, the memorandum states that appellant "won at least \$324,533.00 in 1994 and \$245,739.00 in 1995 from his gambling activities (Exhibit 57)."<sup>4</sup>

By letter dated April 1, 1999, the Office advised appellant that he was last paid compensation benefits for wage loss on August 14, 1995. The Office noted that appellant had earnings from gambling and requested that he submit claims for compensation as well as tax returns for the periods claimed. Appellant filed a claim for compensation (Form CA-7) on July 13, 2001, claiming compensation from August 14, 1995 to February 1, 1999.

In a decision dated August 16, 2001, the Office terminated appellant's compensation for wage loss effective August 14, 1995. The Office determined that, based on the evidence from the investigative memorandum, from May 11, 1994 to August 14, 1995, appellant had \$570,272.00 in earnings from gambling activity. The Office found that appellant's wage-earning capacity was represented by his actual earnings, and since these wages exceeded his date of injury wages, appellant had no loss of wage-earning capacity.

Appellant requested a hearing and submitted tax returns for the years 1995 to 2000. For the year 1995, appellant reported \$253,994.00 in "other income," \$587.00 in wages, and \$714.00 in interest income. The tax form also deducts \$253,994.00 in gambling losses, with a taxable income of \$1,300.00. In 1996 appellant reported \$31,774.00 in gambling income, with \$31,774.00 in gambling losses; for 1997 appellant reported \$241,264.00 in gambling income, and \$231,990.00 in gambling losses; for 1998, \$31,627.00 in gambling income, with \$27,687.00 in losses; the 1999 return reported \$9,153.00 in gambling income and \$9,153.00 in gambling losses; the 2000 tax return reported no earnings.

In a decision dated April 17, 2002, an Office hearing representative affirmed the August 16, 2001 decision. The hearing representative noted appellant's adjusted gross incomes, without discussing specific gambling income or losses, and found that the gambling activity was not a hobby or an investment.

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<sup>2</sup> Docket No. 96-1560 (issued August 26, 1998).

<sup>3</sup> Docket No. 99-2559 (issued June 19, 2001).

<sup>4</sup> Exhibit 57 is identified in the memorandum as a "gambling ledger" but is not included in the record.

## LEGAL PRECEDENT

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.<sup>5</sup>

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.<sup>6</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>7</sup>

## ANALYSIS

In the present case, the Office made a determination that appellant's gross income from his gambling activities from May 1994 to August 1995 represented his wage-earning capacity. The Board has held that earnings from gambling activities must be reported to the Office, and the failure to report such earnings may result in a forfeiture of compensation under 5 U.S.C. § 8106(b).<sup>8</sup> In addition, earnings from self-employment must be reported regardless of whether the employment activity resulted in a profit.<sup>9</sup>

The case on appeal, however, is not a forfeiture case. The Office has made a determination as to appellant's wage-earning capacity based on his actual earnings. The issue of wage-earning capacity raises different considerations from those raised in a forfeiture decision. With respect to self-employment earnings, the Board has held that gross earnings may not be appropriate for a wage-earning capacity determination. In *Thomas F. Jordan*,<sup>10</sup> the Board noted that direct expenses in conducting a business must be deducted from self-employment gross earnings before determining wage-earning capacity. The Board found that it would be inequitable to calculate a loss of wage-earning capacity based on self-employment gross income, as it did not allow for the costs of the self-employment activity.

In this case, appellant had self-employment earnings from his gambling activities. The tax return he submitted for 1995 shows that, while appellant \$253,994.00 in gambling earnings, he reported \$253,994.00 in gambling losses. Tax returns from 1996 to 2000 show that all or substantially all reported income from gambling was offset by reported losses from gambling

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<sup>5</sup> *Gregory A. Compton*, 45 ECAB 154 (1993).

<sup>6</sup> 5 U.S.C. § 8115(a).

<sup>7</sup> *Dennis E. Maddy*, 47 ECAB 259 (1995).

<sup>8</sup> *See Fred A. Cooper, Jr.*, 44 ECAB 498 (1993).

<sup>9</sup> *See James H. Hopkins*, 48 ECAB 281 (1997).

<sup>10</sup> 47 ECAB 382 (1996).

activity. The Office did not request or secure any evidence with respect to appellant's 1994 tax return, nor is there additional evidence regarding the tax returns of record. The findings as to the 1994 earnings are apparently based on the brief statement in the April 11, 1997 investigative memorandum.

Based on the evidence of record, the Office has failed to support its finding that gross income from May 1994 to August 1995 was appropriate for a wage-earning capacity determination in this case. The 1995 tax return reports \$253,994.00 in gambling losses; no probative evidence was provided as to 1994 losses. The Office failed to determine the extent of gambling losses during the 15-month period prior to August 14, 1995, and failed to consider the effect of the claimed losses on the self-employment earnings and the capacity to earn wages. The Office did not cite any authority to support the use of gross income from gambling activity, without consideration of reported costs or losses, in a wage-earning capacity determination. Although actual wages are generally the best measure of wage-earning capacity, the evidence in this case indicates that gross income from gambling activity was not an appropriate basis for a wage-earning capacity determination under 5 U.S.C. § 8115. Under such circumstances, the Board finds that the Office failed to meet its burden of proof in this case.

### **CONCLUSION**

The Board finds that the Office did not meet its burden of proof in terminating appellant's compensation based on a finding that appellant had no loss of wage-earning capacity.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated April 17, 2002 and August 16, 2001 are reversed.

Issued: May 25, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member