

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

C.S., Appellant)

and)

U.S. POSTAL SERVICE, GENERAL MAIL)
FACILITY, Phoenix, AZ, Employer)

**Docket No. 07-1729
Issued: January 11, 2008**

Appearances:

*Dale Mackelprang, for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 18, 2007 appellant, through her attorney, filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated May 16, 2007 modifying her wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly reduced appellant's compensation on the grounds that her actual earnings in the part-time modified general worker position she held on July 10, 1995, fairly and reasonable represented her wage-earning capacity.

FACTUAL HISTORY

This case has previously been before the Board on appeal. On July 7, 1992 appellant a distribution clerk, filed an occupational disease claim alleging that she developed a right shoulder and neck condition. At the time of injury she was earning \$28,584.00 per year and was entitled to both night differential and Sunday premium pay. The Office accepted appellant's

claim for cervical strain and right shoulder strain on September 29, 1992. Appellant returned to full-time light-duty work on February 3, 1994 on her original tour. She requested and received a rehabilitation position of general clerk modified on Tour II working 8:30 a.m. to 5:00 p.m., Tuesday through Saturday on June 9, 1995 with a salary of \$34,105.00 per year with no night differential or Sunday premium pay. By decision dated October 18, 1995, the Office determined that the general clerk position fairly and reasonably represented appellant's wage-earning capacity. The Office reduced appellant's compensation benefits to zero and did not include any pay rate calculations. Appellant filed a claim for recurrence of disability on March 10, 2005. On September 5, 2005 she alleged that she was entitled to night differential pay and Sunday premium pay for the period June 10, 1995 through July 22, 2005. In its January 31, 2007 decision,¹ the Board found that appellant had not met her burden of proof in establishing a recurrence of disability or consequential injury as a result of her July 2, 1992 employment injury and affirmed the Office's February 9, 2006 decision regarding her claimed recurrence of disability. The Board further found that appellant had requested modification of her October 18, 1995 wage-earning capacity determination by alleging that she was entitled to premium pay and directed the Office to issue a *de novo* decision on this issue setting aside the Office's February 9 and July 6, 2006 decisions regarding her compensation. The facts and circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

In a letter dated March 7, 2007, the Office requested additional information from appellant regarding her night differential pay and Sunday premium pay at the time of injury in 1992. The Office allowed 30 days for a response. Appellant submitted a form completed by the employing establishment on June 8, 1995 indicating that on July 2, 1992 she was earning base pay of \$28,584.00 per year and had 37.5 hours per week of night pay at 10 percent and 16 hours of Sunday pay per week at 25 percent. Her representative argued that she was entitled to compensation based on her pay rate on June 10, 1995.

The Office contacted the employing establishment who reported that appellant was a level 6 step C on her date of injury and that the rate of pay for this position on June 10, 1995 was \$595.23 per week.² The current rate of pay for this position as of 2007 was \$768.80 per week with \$46.88 per week for night differential and \$76.88 per week for Sunday pay.

By decision dated May 16, 2007, the Office modified the October 18, 1995 wage-loss determination to reflect appellant's premium pay earnings for night differential and Sunday pay as a modified general clerk. The Office stated that appellant's employment as a modified general worker on June 10, 1995 fairly and reasonably represented her wage-earning capacity. The Office found that appellant was entitled to receive compensation at the augmented rate as she had one or more dependants. The Office performed the calculations based on appellant's weekly pay rate at the time of recurrence and performed the appropriate calculations. The Office issued appellant compensation covering the period June 10, 1995 through July 22, 2005 in the amount of \$23,626.05.

¹ Docket No. 06-1681 (issued January 31, 2007).

² At the time of injury, July 2, 1992, appellant was earning \$549.69 per week plus premium pays.

LEGAL PRECEDENT

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 2/3 percent of his monthly pay, which is known as his basic compensation for total disability."³ Under 5 U.S.C. § 8101(4), "monthly pay" means the 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.

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless the original rating was in error, there is a material change in the nature and extent of the injury-related condition or that the employee has been retrained or otherwise vocationally rehabilitated. The burden of proof is on the party attempting to show a modification of the wage-earning capacity.⁴

Section 8115(a) of the Act⁵ provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonable represent the wage-earning capacity. Generally, wage 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.⁶ The formula for determining loss of wage-earning capacity based on actual earnings,⁷ was which developed in *Albert C. Shadrick*,⁸ has been codified by regulations at 20 C.F.R. § 10.403.⁹ Subsection (d) of this regulation provides that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings by the current pay rate for the job held at the time of injury.¹⁰

ANALYSIS

Appellant returned to a modified general clerk position on June 9, 1995 working eight hours a day on Tour II from 8:00 a.m. to 5:00 p.m. with no work on Sunday. The medical evidence established that she could perform the duties of this position and she continued to earn

³ 5 U.S.C. § 8105(a). 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. 5 U.S.C. § 8110(b).

⁴ *Elbert Hicks*, 55 ECAB 151, 152 (2003).

⁵ 5 U.S.C. §§ 8101-8193, § 8115(a).

⁶ *Selden H. Swartz*, 55 ECAB 272 (2004).

⁷ *Hayden C. Ross*, 55 ECAB 455 (2004).

⁸ 5 ECAB 376 (1953).

⁹ 20 C.F.R. § 10.403.

¹⁰ *Id.* at 10.403(d).

wages in this position for more than 60 days. As there is no evidence that these wages did not fairly and reasonably represent her wage-earning capacity, appellant's actual earnings in this modified position must be accepted as the best measure of her wage-earning capacity.¹¹ The only question for determination is whether the Office properly calculated appellant's loss in wage-earning capacity based on her actual earnings in the modified general clerk position she held beginning June 9, 1995.

Appellant's date of injury was July 2, 1992. She has not sustained a compensable recurrence of disability, as the Office and the Board denied the March 10, 2005 claim for a consequential injury. Appellant's pay rate for compensation purposes must be based on her date-of-injury position in accordance with sections 8101(4) and 8105(a) of the Act.¹² While the Office properly determined that the original wage-earning capacity determination dated October 18, 1995 was erroneous as it failed to consider appellant's premium pays, the Office utilized the incorrect "recurrent" pay rate in determining appellant's loss of wage-earning capacity in the May 16, 2007 decision. On remand, the Office should properly determine appellant's wage-earning capacity by utilizing the correct weekly pay rate on date of injury including night differential and Sunday pay and completing the calculations in accordance with the Office's regulations.¹³

CONCLUSION

The Board finds that the Office utilized an incorrect pay rate in determining appellant's loss of wage-earning capacity.

¹¹ 5 U.S.C. § 8115(a); see *Lottie M. Williams*, 56 ECAB ____ (Docket No. 04-1001, issued February 3, 2005).

¹² 5 U.S.C. §§ 8101(4) and 8105(a).

¹³ 20 C.F.R. § 10.403(d).

ORDER

IT IS HEREBY ORDERED THAT the May 16, 2007 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision of the Board.

Issued: January 11, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board