



it 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. In the second appeal,<sup>3</sup> the Board issued a decision on May 6, 2002 reversing the Office's June 2, 2000 decision on the grounds that it improperly reduced appellant's compensation effective June 5, 2000 based on his capacity to earn wages as a retail store manager. In a decision dated November 25, 2003, the Board set aside the Office's September 24, 2002 decision and remanded the case for further development of the evidence.<sup>4</sup> The Board found that the Office did not provide adequate findings and reasoning for its determination regarding the amount of compensation to which appellant was entitled for periods between September 1992 and June 2000.

In the fourth appeal,<sup>5</sup> the Board issued a decision on February 3, 2005 which set aside the March 9, 2004 Office decision.<sup>6</sup> The Board again found that the Office did not provide adequate findings and reasoning for its determination regarding the amount of compensation to which appellant was entitled for periods between September 1992 and June 2000. It noted that a proper calculation of appellant's compensation initially required the compilation of accurate figures for his base salary, locality pay, New York City retention pay, administrative uncontrollable overtime (AUO) pay, Sunday pay, holiday pay and night differential pay. However, the Office did not provide any description of those amounts it had determined to be accurate and suitable for inclusion in its calculations.

In a fifth appeal,<sup>7</sup> the Board issued a decision on August 10, 2006 which set aside the December 16, 2005 decision of the Office. The Board again found that the Office did not provide adequate findings and reasoning for its determination regarding the amount of

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<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 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. He indicated that he did not earn any income in this position after December 31, 1998.

<sup>3</sup> Docket No. 00-2334 (issued May 6, 2002).

<sup>4</sup> Docket No. 03-135 (issued November 25, 2003).

<sup>5</sup> Docket No. 04-1042 (issued February 3, 2005).

<sup>6</sup> By decision dated March 9, 2004, the Office determined the amount of compensation to which appellant was entitled between September 1992 and June 2000. It found that it properly calculated adjustments in pay for the period September 7, 1992 to July 11, 1997, but errors were made in the calculations for the periods July 12, 1997 to December 31, 1998 and January 1, 1999 to June 4, 2000 and that further adjustments in pay were due to appellant. Therefore, it issued checks to appellant in the amounts of \$4,817.14 and \$2,802.68 to account for these errors.

<sup>7</sup> Docket No. 06-556 (issued August 10, 2006).

compensation to which appellant was entitled.<sup>8</sup> In the sixth appeal,<sup>9</sup> the Board issued a decision on February 4, 2008 which set aside the December 14, 2006 decision of the Office.<sup>10</sup> The Board found that the Office properly determined that appellant's pay rate calculations should be based on the pay he received effective August 18, 1992, the date of his second recurrence of disability, and that the Office properly determined that his pay effective August 18, 1992 for pay rate purposes was \$1,481.85.<sup>11</sup> However, the Office's evaluation of the compensation appellant received between September 1992 and June 2000 was incomplete. The Office needed to apply the formula derived from *Albert Shadrick*,<sup>12</sup> to determine appellant's loss of wage-earning capacity.<sup>13</sup> The Board remanded that case to the Office for further development regarding the amount of compensation appellant was entitled to receive between September 1992 and June 2000. The facts and the circumstances of the case are set forth in the Board's prior decisions and are incorporated herein by reference.

On remand the Office obtained a document from the Social Security Administration (SSA), entitled "Itemized Statement of Earnings," which indicated that appellant earned \$18,264.96 of income in 1992 and \$9,232.80 of income in 1995 from the employing establishment and \$19,000.00 of income in 1997 and \$14,000.00 of income in 1998 from PJSC Inc. A recurrence of disability form annotated by the employing establishment on September 16, 2002, added to the record on May 23, 2008, noted that appellant stopped working for the employing establishment on August 18, 1992 and last received pay on September 7, 1992.<sup>14</sup>

In a June 4, 2008 decision, the Office explained its payment of compensation to appellant for the period September 7, 1992 to June 4, 2000. Regarding the period September 7, 1992 to July 11, 1997, he previously received compensation benefits for this period based on a weekly pay rate of \$1,339.52. Appellant received \$264,450.55 for this period as documented in a printout added to the record on March 18, 2002. Appellant's compensation for the period

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<sup>8</sup> The Office indicated that it had calculated appellant's adjusted weekly pay rate for determining pay rates by using figures derived from his pay on August 18, 1992, the date of his second recurrence of disability. It stated that appellant's pay was higher on August 18, 1992 than on December 20, 1991, the date of his first recurrence of disability.

<sup>9</sup> Docket No. 07-562 (issued February 4, 2008).

<sup>10</sup> In the December 14, 2006 decision, the Office concluded that the proper figure for appellant's pay on August 18, 1992 was \$1,481.85 and asserted that it had paid appellant correct amounts of compensation for periods between September 1992 and June 2000.

<sup>11</sup> Although the record contains some references to August 19, 1992 as the date the \$1,481.84 pay rate became effective, the actual date it became effective is August 18, 1992.

<sup>12</sup> 5 ECAB 376 (1953).

<sup>13</sup> In particular, the Board noted that it was unclear how much money appellant earned between September 7, 1992 and June 4, 2000.

<sup>14</sup> In an August 5, 1999 letter added to the record on May 23, 2008, the employing establishment indicated that appellant did not return to work after August 18, 1992 and that he was removed from the employing establishment rolls on April 25, 1995. The Office indicated that it appeared that the monies received in 1995 represented leave owed to appellant at the time he was removed from the employing establishment rolls.

September 7, 1992 to July 11, 1997 was recalculated using the proper weekly pay rate of \$1,481.84, effective August 18, 1992. The Office found that he should have received \$292,381.64 in compensation for this period. Appellant was issued a supplemental check in the amount of \$27,931.09 on September 6, 2002.<sup>15</sup> The *Shadrick* formula was not applied for the period September 7, 1992 to July 11, 1997 as appellant had no earnings during this period.<sup>16</sup>

The Office also explained its payment of compensation to appellant for the period July 12, 1997 to December 31, 1998. It stated that appellant had a weekly pay rate of \$1,481.84 for this period and that he earned \$19,000.00 in 1997 and \$14,000.00 in 1998 as documented by the SSA earnings document received on April 1, 2008. The Office concluded that, based on actual earnings, appellant had a wage-earning capacity of \$429.37 per week.<sup>17</sup> The current pay during this period for the job held when injured (GS-13, Step 1) was calculated to be \$1,753.08 per week.<sup>18</sup> The Office applied the *Shadrick* formula to calculate appellant's loss of wage-earning capacity for the period July 12, 1997 to December 31, 1998.<sup>19</sup> Appellant was entitled to receive \$72,973.00 in compensation for the period July 12, 1997 to December 31, 1998 but initially had received only \$58,173.07 for this period. The Office noted that appellant had initially received a lesser amount because errors had been made in previous applications of the *Shadrick* formula.<sup>20</sup> It indicated that these mistakes were discovered in 2002 and 2004 and supplemental checks were issued to appellant. The Office issued appellant a check in the amount of \$9,982.79 on September 6, 2002 and a \$4,817.14 check on March 12, 2004 for a total supplemental amount of \$14,799.93.

Regarding the period January 1, 1999 to June 4, 2000, the Office found that appellant previously received compensation benefits for this period based on a weekly pay rate of \$1,339.52. Appellant received \$86,221.14 for this period. The Office indicated that appellant's compensation for the period January 1, 1999 to June 4, 2000 was recalculated using the proper weekly pay rate of \$1,481.84, effective August 18, 1992 and concluded that he should have

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<sup>15</sup> In performing its calculation, the Office applied consumer price index (CPI) increases and the 75 percent rate for claimants with qualifying dependents.

<sup>16</sup> The Office attached documents memorializing its calculations and its supplemental payments to appellant.

<sup>17</sup> In reaching this conclusion, the Office stated, "Your actual weekly earnings were computed as follows. You earned \$19,000.00 (1997) and \$14,000.00 (1998). This was documented both by W2 and SSA-581 forms (received April 1, 2008). \$19,000.00 plus \$14,000.00 = \$33,000.00. \$33,000.00 x 7 days/week divided by 538 days (from July 12, 1997 to December 31, 1998) = \$429.37 per week for the period July 12, 1997 to December 31, 1998." The record reflects that on July 12, 1997 appellant began working as a manager in an Athlete's Foot Shoe Store which he operated.

<sup>18</sup> This figure was comprised of the sum of \$59,163.00 (base salary), \$5,413.41 (locality pay), \$9,318.17 (New York City retention pay); \$16,144.10 (AUO pay (base salary plus locality pay times 25 percent), \$476.74 (night differential pay); \$399.69 (Sunday pay) and \$244.93 (holiday pay) divided by 52 weeks. These amounts were derived from documents produced in August 2001.

<sup>19</sup> The Office applied CPI increases and the 75 percent rate for claimants with qualifying dependents.

<sup>20</sup> The Office realized in September 2002 that it had used \$1,339.52 for the weekly pay rate rather than the proper figure of \$1,481.84 and realized in March 2004 that it had used \$429.37 for appellant's weekly wage-earning capacity rather than the proper figure of \$355.64.

received \$92,565.77 in compensation for this period. It issued appellant a supplemental check in the amount of \$6,344.63 on September 6, 2002.<sup>21</sup> The Office later discovered that health insurance premiums should not have been deducted from appellant's compensation for the period January 1, 1999 to June 4, 2000 as he did not have health insurance coverage during this period. Therefore, it issued appellant a supplemental check for \$2,802.69, the amount of the premiums, on March 12, 2004. The *Shadrick* formula was not applied for the period January 1, 1999 to June 4, 2000 as appellant had no earnings during this period. The Office concluded that these calculations showed that appellant was not entitled to any additional compensation for the period September 7, 1992 to June 4, 2000.

### **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."<sup>22</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>23</sup>

The formula set forth in *Shadrick*,<sup>24</sup> is used to calculate a claimant's wage-earning capacity. The calculation involves obtaining figures for adjusted weekly pay rate (per 5 U.S.C. § 8101(4)); current rate of pay for the job held when injured, and current actual earnings. The wage-earning capacity percentage is obtained by dividing current actual earnings by the current rate of pay for the job held when injured. The wage-earning capacity amount is calculated by multiplying the current rate of pay for the job held when injured times the wage-earning capacity percentage. The loss of wage-earning capacity figure is then obtained by subtracting the wage-earning capacity amount from the current rate of pay for the job held when injured. Finally, the compensation rate is obtained by multiplying the loss of wage-earning capacity figure times either 2/3 (no dependents) or 3/4 (one or more dependents) per 5 U.S.C. §§ 8105 and 8110.

### **ANALYSIS**

In a February 4, 2008 decision, the Board determined that the Office properly determined that appellant's pay rate calculations should be based on the pay he received effective August 18,

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<sup>21</sup> The Office applied CPI increases and the 75 percent rate for claimants with qualifying dependents.

<sup>22</sup> 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).

<sup>23</sup> 5 U.S.C. § 8101(4). In an occupational disease claim, the date of injury is the date of last exposure to the employment factors which caused or aggravated the claimed condition. *Patricia K. Cummings*, 53 ECAB 623, 626 (2002).

<sup>24</sup> See *supra* note 12.

1992, the date of his second recurrence of disability, and that the Office properly determined that his pay effective that date was \$1,481.85.<sup>25</sup> The Board further found, however, that the Office's evaluation of the correctness of the compensation appellant received between September 7, 1992 and June 4, 2000 was incomplete and that the Office needed to apply the *Shadrick* formula to determine appellant's loss of wage-earning capacity.<sup>26</sup> The Board remanded that case to the Office for further development regarding the amount of compensation appellant was entitled to receive between September 1992 and June 2000.

The Office obtained additional documentation on remand and issued a June 4, 2008 decision which provided further explanation of how it calculated appellant's compensation between September 7, 1992 and June 4, 2000. It concluded that it had already paid appellant all compensation to which he is entitled for this period. The Board has carefully reviewed the Office's explanation of its compensation calculations and payments to appellant for the period September 7, 1992 and June 4, 2000 as well as the documents presented by the Office to support these calculations and payments. The Board finds that the Office provided adequate explanation and documentation for its compensation calculations and payments and that appellant is not entitled to any additional compensation for the period September 7, 1992 to June 4, 2000.

The Board finds that the Office also provided adequate rationale and documentation to support its compensation payments for the period September 7, 1992 to July 11, 1997. The Office noted that appellant previously received compensation benefits for this period based on a weekly pay rate of \$1,339.52. Appellant received \$264,450.55 for this period as documented in a printout added to the record on March 18, 2002. The Office stated that appellant's compensation for the period September 7, 1992 to July 11, 1997 was recalculated using the proper weekly pay rate of \$1,481.84, effective August 18, 1992, and that he should have received \$292,381.64 in compensation for this period. The record reflects that appellant was appropriately issued a supplemental check in the amount of \$27,931.09 on September 6, 2002. The Office properly indicated that the *Shadrick* formula was not to be applied for the period September 7, 1992 to July 11, 1997 as appellant had no earnings during this period.<sup>27</sup>

The Office also paid proper compensation for the period January 1, 1999 to June 4, 2000. It found that appellant previously received compensation benefits for this period based on a weekly pay rate of \$1,339.52 and he received \$86,221.14 for this period. The Office stated that appellant's compensation for the period January 1, 1999 to June 4, 2000 was recalculated using the proper weekly pay rate of \$1,481.84. It concluded that he should have received \$92,565.77 in compensation for this period. The Office appropriately issued appellant a supplemental check in the amount of \$6,344.63 on September 6, 2002. It later discovered that health insurance premiums should not have been deducted from appellant's compensation for the period January 1, 1999 to June 4, 2000 as he did not have health insurance coverage during this period. The Office appropriately issued appellant a supplemental check for \$2,802.69 (the amount of the

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<sup>25</sup> See *supra* note 23 and accompanying text.

<sup>26</sup> See *supra* note 24 and accompanying text. In particular, the Board noted that it was unclear how much money appellant earned between September 7, 1992 and June 4, 2000.

<sup>27</sup> The Office attached documents memorializing its calculations and its supplemental payments to appellant. It applied the 75 percent rate for claimants with qualifying dependents.

premiums) on March 12, 2004. It found that the *Shadrick* formula was not to be applied for the period January 1, 1999 to June 4, 2000 as appellant had no earnings during this period.

The Board finds that Office provided adequate rationale and documentation to support its compensation payments for the period July 12, 1997 to December 31, 1998. The Office was correct in indicating that the *Shadrick* formula should be applied for this period as appellant had earnings between July 12, 1997 and December 31, 1998. It correctly noted that appellant had a weekly pay rate of \$1,481.84 for this period and that the current pay during this period for the job he held when injured (GS-13, Step 1) was \$1,753.08 per week.<sup>28</sup> The Office properly concluded that, based on actual earnings, appellant had a wage-earning capacity of \$429.37 per week during this period.<sup>29</sup> It also properly calculated other aspects of the *Shadrick* formula which were derived from these above-described figures, including the wage-earning capacity percentage, wage-earning capacity amount and the wage-earning capacity loss.<sup>30</sup> The Office properly indicated that it had corrected prior errors and issued appropriate supplemental checks such that appellant received \$72,973.00, the entire amount to which he was entitled for the period July 12, 1997 to December 31, 1998.<sup>31</sup> On appeal, appellant argued that he was entitled to a greater amount of compensation but he did not provide adequate support for this argument.<sup>32</sup>

### CONCLUSION

The Board finds that appellant received proper compensation for the period September 7, 1992 to June 4, 2000.

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<sup>28</sup> The Office properly applied cost-of-living increases in making this calculation.

<sup>29</sup> In reaching this conclusion, the Office stated, “Your actual weekly earnings were computed as follows. You earned \$19,000.00 (1997) and \$14,000.00 (1998). This was documented both by W2 and SSA-581 forms (received April 1, 2008). \$19,000.00 plus \$14,000.00 = \$33,000.00. \$33,000.00 x 7 days/week divided by 538 days (from July 12, 1997 to December 31, 1998) = \$429.37 per week for the period July 12, 1997 to December 31, 1998.” There is no indication that appellant’s actual wages between July 12, 1997 and December 31, 1998 did not fairly and reasonably represent his wage-earning capacity. See 5 U.S.C. § 8115(a); *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989).

<sup>30</sup> The Office applied the 75 percent rate for claimants with qualifying dependents.

<sup>31</sup> The Office realized in September 2002 that it had used \$1,339.52 for the weekly pay rate rather than the proper figure of \$1,481.84 and realized in March 2004 that it had used \$429.37 for appellant’s weekly wage-earning capacity rather than the proper figure of \$355.64. To rectify these errors, it issued appellant a check in the amount of \$9,982.79 on September 6, 2002 and a \$4,817.14 check on March 12, 2004.

<sup>32</sup> Appellant argued that his earnings during the relevant period were not as high as reported by the Office, but he did not provide adequate support for this argument. The Board notes that most of appellant’s calculations fail to acknowledge that his compensation must be paid at a 75 percent rate (for a claimant with at least one dependent). See *supra* note 22 and accompanying text.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' June 4, 2008 decision is affirmed.

Issued: April 10, 2009  
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