

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

T.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Atlanta, GA, Employer**

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**Docket No. 08-1712
Issued: July 14, 2009**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 2, 2008 appellant, through his representative, filed a timely appeal from an April 30, 2008 merit decision of the Office of Workers' Compensation Programs' hearing representative, who affirmed his loss of wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether the Office used the proper pay rate to calculate appellant's loss of wage-earning capacity. Appellant's representative argues that the Office's decision is contrary to fact and law.

FACTUAL HISTORY

On September 20, 2000 appellant, then a 35-year-old letter carrier, sustained an injury in the performance of duty when he was involved in a motor vehicle accident. He stopped work at that time. The Office accepted appellant's claim for cervical strain, lumbar strain and left hip

contusion. Appellant was released to return to full duty without restrictions on November 7, 2000.¹

The Office authorized a cervical discectomy and arthrodesis at C4-6, which was performed on April 17, 2006. Appellant again stopped work. He received compensation for temporary total disability on the periodic rolls. The Office based appellant's compensation for wage loss on his April 17, 2006 pay rate. Appellant accepted a modified position and returned to work on September 5, 2007.

In a decision dated November 8, 2007, the Office found that appellant's actual earnings as a modified city carrier fairly and reasonably represented his wage-earning capacity, as he had demonstrated his ability to perform the duties of that position for more than two months. Because appellant's actual earnings met or exceeded the current wages of the job he held when injured, the Office reduced his entitlement to compensation for wage loss on the date he was reemployed with no loss in earning capacity.

During a telephonic hearing on February 11, 2008, appellant's representative agreed that the issue was whether the Office used the correct pay rate when calculating the loss of wage-earning capacity.

In a decision dated April 30, 2008, an Office hearing representative affirmed the November 8, 2007 decision. The hearing representative found that the Office properly calculated appellant's wage-earning capacity by comparing his actual earnings with the current pay rate of his date-of-injury position.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.² "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.³

If the disability is partial, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent⁴ of the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability, which is known as his basic compensation for partial disability.⁵

"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

¹ Appellant sustained a recurrence on June 3, 2002. He returned to work by December 4, 2002.

² 5 U.S.C. § 8102(a).

³ 20 C.F.R. § 10.5(f).

⁴ Augmented compensation for dependents is 75 percent. 5 U.S.C. § 8110(b)(2).

⁵ *Id.* at § 8106(a).

recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.⁶

In determining compensation for partial disability, the wage-earning capacity of an employee is determined by the employee's actual earnings if the employee's actual earnings fairly and reasonably represent his wage-earning capacity.⁷ 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.⁸

In the case of *Albert C. Shadrick*,⁹ the Board set forth the principle that if current actual earnings are used as one of the factors in computing an employee's wage-earning capacity, then the current increased wage for the employee's original job should also be used to avoid any distortions caused by changes in business conditions since the injury. Following this principle, the Office established the *Shadrick* formula as the method of computing compensation when determining an injured worker's wage-earning capacity.¹⁰

After the claimant has been working for 60 days, the Office will determine whether the claimant's actual earnings fairly and reasonably represent his wage-earning capacity. If so, a formal decision should be issued no later than 90 days after the date of return to work. The Office will determine the claimant's monetary entitlement using the *Shadrick* formula.¹¹

ANALYSIS

Following the *Shadrick* formula, the Office properly compared appellant's actual earnings as a modified city carrier, effective September 5, 2007, to the current pay rate of his date-of-injury job. The pay rates were the same, showing that appellant returned to work on September 5, 2007 at a retained pay rate with no wage loss. By definition, he had no disability because he had no incapacity because of the employment injury to earn the wages he was receiving at the time of injury.

Dividing actual earnings as a modified city carrier by the current pay rate of the date-of-injury job, the Office determined that appellant's wage-earning capacity was 100 percent. The Office then applied this percentage to appellant's monthly pay, as defined by section 8101(4) of the Act. The Board notes that the Office correctly selected appellant's monthly pay when

⁶ *Id.* at § 8101(4); *John D. Williamson*, 40 ECAB 1179 (1989).

⁷ 5 U.S.C. § 8115(a).

⁸ *Don J. Mazurek*, 46 ECAB 447 (1995).

⁹ 5 ECAB 376 (1953).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.2 (December 1993). For the formula itself, see *id.*, *Computation of Compensation*, Chapter 2.901.15.c (December 1995).

¹¹ *Id.* at Chapter 2.814.7.c (July 1997).

disability began -- or more accurately recurred -- as a result of his April 17, 2006 authorized cervical spine surgery. This is the pay rate appellant's representative wanted to make sure the Office had used, and the Office did. The Office multiplied appellant's recurrent pay rate by 100 percent, which, when subtracted from the recurrent pay rate, left no loss of wage-earning capacity. The Office attached a computation of compensation worksheet to its November 8, 2007 decision showing how it applied the *Shadrick* formula and calculated the earning capacity. Appellant's representative will note that the Office applied the 100 percent wage-earning capacity (item 4) to the pay rate effective April 17, 2006, when appellant underwent surgery. The Board will affirm the Office's April 30, 2008 decision.

CONCLUSION

The Board finds that the Office used the proper pay rate to calculate appellant's loss of wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the April 30, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 14, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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