



## **FACTUAL HISTORY**

On July 5, 2005 appellant, then a 48-year-old nurse, filed a traumatic injury claim alleging that she sustained a wrist injury in the performance of duty. The Office accepted her claim for right wrist strain, right-sided de Quervain's disease and tendinitis of the right wrist and forearm. It paid compensation for loss of night differential pay for intermittent periods between June 20, 2005 and August 2, 2008.

On August 1, 2006 appellant returned to full-time duty, working a day shift, as a modified nurse. The employing establishment informed the Office that appellant's position became permanent on September 4, 2008; that her actual pay rate in effect on September 4, 2008 was \$66,367.00; and that the current pay rate for the job and step at the time of injury was \$55,740.00.

By decision dated November 6, 2008, the Office reduced appellant's wage-loss compensation to zero, on the grounds that her actual wages exceeded the current wages of the position she held on the date of injury. As she had demonstrated that she was able to perform the duties of her modified position for two months or more, the Office found that appellant's current weekly wages of \$1,276.29 fairly and reasonably represented her wage-earning capacity. Accordingly, her entitlement to wage-loss compensation was reduced to zero.

The record contains a loss of wage-earning capacity worksheet, which reflects that the Office calculated appellant's weekly pay rate on the date of injury by adding her base pay rate (\$976.98) to her weekly premium pay (\$95.06), for a total weekly pay rate of \$1,072.03.<sup>2</sup> The Office noted that the amount of premium pay received on the date of injury was 9.73 percent of her base pay. In order to calculate the current pay rate for the position held on the date of injury, it added the current weekly base pay rate for the job when injured ( $\$55,740.00/52 = \$1,071.92$ ) to an amount equal to 9.73 percent of the current weekly base pay rate (\$104.30, representing premium pay), for a total of \$1,176.22 per week. Noting that her actual weekly earnings of \$1,276.29 were greater than the current pay of the job held at the time of injury, the Office determined that she had no loss of wage-earning capacity effective September 4, 2008.

On December 5, 2008 appellant requested a review of the written record. She contended that she should continue to receive compensation for night differential. Appellant stated that, as her modified position did not permit her to work the night shift, as she had before her injury, she was not receiving all of the benefits to which she was entitled.

By decision dated March 10, 2009, the Office hearing representative affirmed the November 6, 2008 decision, finding that appellant's actual earnings exceeded the amount she would have been earning at the same grade and step, had she never been injured.

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<sup>2</sup> The Board notes that the loss of wage-earning capacity worksheet contains a mathematical error. The Office's Form CA-816 correctly indicates that appellant's pay rate when the disability began was \$1,072.03. Its mathematical error on the loss of wage-earning capacity worksheet, reflecting the pay rate to be \$1,071.92, is harmless, as it does not affect the outcome of the case.

## LEGAL PRECEDENT

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 her wage-earning capacity.<sup>3</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 wage-earning capacity, must be accepted as such measure.<sup>4</sup>

In the case of *Albert C. Shadrick*,<sup>5</sup> 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.<sup>6</sup>

The formula developed in the *Shadrick* decision has been codified at 20 C.F.R. § 10.403(d), which provides that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings or the pay rate of the position selected by the Office, by the current pay rate for the job held at the time of the injury.<sup>7</sup>

Section 8114(e) of the Act provides that, in addition to annual base pay, certain items will be included in the computation of pay, such as the value of subsistence and quarters, premium pay and any form of remuneration in kind for services.<sup>8</sup>

## ANALYSIS

In the instant case, appellant does not contest that her earnings in her modified position fairly and reasonably represents her wage-earning capacity. Rather, she contends that she should continue to receive premium shift differential pay, due to her inability to work a night shift in her current position. However, the record reflects that the Office took into account the night differential in computing appellant's pay rate and properly applied the *Shadrick* formula in determining that she had no loss of wage-earning capacity.

The Office properly found that appellant's earnings in her modified nursing position fairly and reasonably represented her wage-earning capacity as she had demonstrated that she was able to perform the duties of the job for two months or more. It properly compared

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<sup>3</sup> 5 U.S.C. § 8115(a).

<sup>4</sup> *Don J. Mazurek*, 46 ECAB 447 (1995).

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

<sup>6</sup> 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).

<sup>7</sup> 20 C.F.R. § 10.403(d).

<sup>8</sup> 5 U.S.C. § 8115(e).

appellant's actual weekly earnings (\$1,276.29) to the current pay rate for the job and step she held when injured (\$1,176.22). As her actual wages exceeded the current wages of the position she held on the date of injury, the Office correctly reduced her compensation for wage loss to zero.

Appellant contends that she is entitled to premium shift differential pay because she was working the night shift when her injury occurred. The Board finds that the Office properly included appellant's receipt of premium pay in its calculation of her pay rate.<sup>9</sup> Noting that the amount of premium pay received on the date of injury was 9.73 percent of her base pay, the Office added the current weekly base pay rate for the job when injured ( $\$55,740.00/52 = \$1,071.92$ ) to an amount equal to 9.73 percent of the current weekly base pay rate (\$104.30, representing premium pay), in order to calculate the current weekly pay rate for the position held on the date of injury (\$1,176.22). The Board notes that, even though she does not presently receive premium pay, appellant's actual earnings exceed those she received at the time of injury when she was working the night shift. Therefore, she is not entitled to wage-loss compensation benefits under the Act.<sup>10</sup>

Appellant also contends that the Office's decision denies her within-grade increases, restoration of leave and other rights and benefits based on length of service. The Board has held that the probability that an employee, if not for the injury-related condition, might have had greater earnings, is not proof of a loss of wage-earning capacity and does not afford a basis for payment of compensation under the Act.<sup>11</sup> The test is whether appellant had the capacity to earn the wages she was receiving at the time of injury, or under *Shadrick*, the current pay rate of her date-of-injury position. Because appellant demonstrated capacity through actual earnings over a period of time, the Office properly reduced her compensation for disability to zero.

### CONCLUSION

The Board finds that the Office properly reduced appellant's compensation for wage loss to zero on the grounds that her actual earnings demonstrated no loss of wage-earning capacity due to her accepted employment injury.

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<sup>9</sup> *Id.*

<sup>10</sup> See *Domenick Pezzetti*, 45 ECAB 787 (1994) (holding that the claimant had no loss of wage-earning capacity at the time he was in retained pay because he had at least equivalent earnings to his date-of-injury position).

<sup>11</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated March 10, 2009 and November 6, 2008 are affirmed.

Issued: February 3, 2010  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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