

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

S.C., Appellant)

and)

DEPARTMENT OF THE NAVY, MARINE)
CORP BASE DISPENSORY CAMP YERMO,)
Barstow, CA, Employer)

**Docket No. 17-1856
Issued: March 7, 2018**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 31, 2017 appellant filed a timely appeal from an August 1, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether OWCP properly reduced appellant's wage-loss compensation benefits to reflect his actual earnings in his private employment as a safety manager.

On appeal appellant contends that OWCP improperly calculated his loss of wage-earning capacity as it failed to consider overtime earned in evaluating his pay rate in his date-of-injury position.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On September 19, 2011 appellant, then a 57-year-old heavy mobile equipment mechanic, injured his shoulders and lower back when opening fire doors. His regular work hours were from 6:30 a.m. through 4:00 p.m., Monday through Friday.³ On November 9, 2011 OWCP accepted appellant's claim for acromioclavicular sprain, sprain of the shoulders and upper arms bilaterally, as well as bilateral calcifying tendinitis. The employing establishment terminated his employment on April 30, 2012. Appellant filed a claim for compensation (Form CA-7) and the employing establishment indicated that he earned \$27.94 per hour and that he worked a 40-hour per week schedule of Monday, Tuesday, Wednesday, Thursday, and Friday. The employing establishment did not include any night differential or other premium pay. Appellant underwent arthroscopic subacromial decompression of his right shoulder on November 8, 2012.

OWCP referred appellant for vocational rehabilitation services beginning on April 4, 2014. By decision dated June 15, 2016, it found that the constructed position of manager-merchandise fairly and reasonably represented his wage-earning capacity and reduced his wage-loss compensation benefits effective June 26, 2016. Appellant appealed that decision to the Board, and by decision dated April 4, 2017, the Board found that OWCP failed to meet its burden of proof to reduce appellant's wage-loss compensation benefits based on his capacity to earn wages in the constructed position of manager-merchandise.⁴

On June 19, 2017 OWCP restored appellant's compensation benefits retroactively to June 26, 2016. On May 26, 2017 appellant returned to work in the private sector as a safety specialist with a biweekly salary of \$2,453.60.

By decision dated August 1, 2017, OWCP found that appellant's actual earnings as a safety specialist fairly and reasonably represented his wage-earning capacity and reduced his wage-loss compensation benefits to zero as his actual earnings met or exceeded the current wages of his date-of-injury position. It determined that his salary as a heavy mobile equipment mechanic was \$1,121.36 at the time disability began and was \$1,190.39 per week effective May 26, 2017. Appellant's actual earnings as a safety specialist were \$1,226.80 per week on May 26, 2017. OWCP determined that his percentage of wage-earning capacity was 103 percent by dividing his earnings as a safety specialist by the current pay rate for a heavy mobile equipment mechanic. It concluded that appellant had no loss of earning capacity and therefore was not entitled to further wage-loss compensation benefits.

² Docket No. 16-1898 (issued April 4, 2017).

³ This schedule indicates that appellant worked more than 40 hours per week.

⁴ *Supra* note 1.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of proving that disability has ceased or lessened in order to justify termination or modification or termination of compensation benefits.⁵

Under 5 U.S.C. § 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. Generally, wages actually earned are the best measure of 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, developed in the case of *Albert C. Shadrick*,⁷ has been codified at section 10.403(c)-(e) of OWCP's regulations.⁸ Under the *Shadrick* formula, OWCP calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's actual earnings by the current or updated pay rate for the position held at the time of injury.⁹ The employee's wage-earning capacity in dollars is computed by first multiplying the pay rate for compensation purposes, defined in 20 C.F.R. § 10.5(a) as the pay rate at the time of injury, the time disability begins, or the time disability recurs, whichever is greater, by the percentage of wage-earning capacity. The resulting dollar amount is then subtracted from the pay rate for compensation purposes to obtain loss of wage-earning capacity.¹⁰ Overtime pay, or extra hours worked in excess of standard are not to be included in computing an employee's pay rate as such extra pay is earned only if the actual hours are worked¹¹ and is considered to be overtime pay for the purposes of 5 U.S.C. § 8114(e).¹²

⁵ *P.C.*, Docket No. 16-1714 (issued October 18, 2017); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁶ *C.M.*, Docket No. 16-1638 (issued October 6, 2017); *E.W.*, Docket No. 14-0584 (issued July 29, 2014); *Dennis E. Maddy*, 47 ECAB 259, 262 (1995).

⁷ 5 ECAB 376 (1953).

⁸ 20 C.F.R. § 10.403(c)-(e).

⁹ *Id.* at § 10.403(c)-(d).

¹⁰ 20 C.F.R. § 10.403(e).

¹¹ *Id.* at Chapter 2.0900.7.a. (1); see *K.J.*, Docket No. 16-0089 (issued July 1, 2016) (drawing a distinction between Administratively Uncontrolled Overtime (AUO) under 5 U.S.C. § 5545(c)(2) and other forms of overtime for pay rate purposes).

¹² 5 U.S.C. § 8114(e)(1). Under 5 U.S.C. § 8114(e)(1), overtime pay shall not be taken into account in determining the employee's effective pay rate. While OWCP has administratively determined that certain premium pay, such as night and shift differentials, holiday and Sunday pay, and premium pay for AUO, shall be included for purposes of computing an employee's pay rate, the evidence before the Board does not suggest appellant's entitlement to this. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rate*, Chapter 2.900.6(b) (August 2012); *S.S.*, Docket No. 12-0707 (issued February 5, 2013).

ANALYSIS

Appellant returned to work as a safety specialist in private employment on May 26, 2017. He earned \$2,453.60 biweekly and \$63,793.60 annually. On August 1, 2017 OWCP issued a formal wage-earning capacity decision¹³ finding that appellant's actual earnings in private employment as a safety specialist effective May 26, 2017, fairly and reasonably represented his wage-earning capacity and reduced his wage-loss compensation benefits to zero.¹⁴

On appeal appellant does not contest that the earnings in his private employment fairly and reasonably represent his wage-earning capacity. Instead, he contends that his date-of-injury position included overtime pay which OWCP did not address in its pay rate calculations.

The Board finds that OWCP properly applied the *Shadrick* formula to determine that appellant had zero percent loss of wage-earning capacity. OWCP properly used his weekly pay rate of \$1,121.36 from the date disability began in line (1) of the *Shadrick* formula. Use of this figure was proper because it represented the highest figure of appellant's pay at the time of injury, the monthly pay at the time disability began, or the monthly pay at the time compensable disability recurred, if the recurrence began more than six months after the injury.¹⁵ In line (2) of the *Shadrick* formula, OWCP used his current annual salary for the date-of-injury position, \$1,190.39 per week. The Board notes that OWCP's calculation in this regard was proper. In line (3) of the *Shadrick* formula, OWCP used appellant's actual weekly earnings as a safety specialist effective May 26, 2017 of \$1,190.39 per week. It then divided his actual weekly earnings during the relevant time period (\$1,121.36) by the current pay rate for the job he held when injured (\$1,190.39) for a total wage-earning capacity percentage of 103 percent.

Because appellant's actual wages as a safety specialist exceeded the current wages of the position he held on the date of injury, OWCP correctly found that he was not entitled to additional wage-loss compensation. As noted above, appellant is not entitled to additional compensation for overtime worked in excess of the standard 40 hours in accordance with FECA.¹⁶ He has offered no authority to support that he should be compensated overtime pay for greater than 40 hours per week.¹⁷ The Board finds that OWCP properly calculated appellant's pay rate and entitlement to wage-loss compensation.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

¹³ *Id.* at Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815 (June 2013).

¹⁴ *G.B.*, Docket No. 17-0002 (issued June 12, 2017).

¹⁵ 5 U.S.C. § 8101(4); *A.L.*, Docket No. 16-1092 (issued May 9, 2017).

¹⁶ *T.G.*, Docket No. 11-1641 (issued March 15, 2012); *C.S.*, Docket No. 10-1487 (issued March 15, 2011); *Dempsey Jackson*, 40 ECAB 942 (1989).

¹⁷ *S.S.*, *supra* note 12.

CONCLUSION

The Board finds that OWCP properly reduced appellant's wage-loss compensation benefits to reflect his actual earnings in his private employment as a safety manager.

ORDER

IT IS HEREBY ORDERED THAT the August 1, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 7, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board