U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SCOTT O. LUNCEFORD and DEPARTMENT OF THE ARMY, ARMY CORPS OF ENGINEERS, JOHN DAY DAM, The Dalles, OR

Docket No. 00-1372; Submitted on the Record;
Issued February 8, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's actual earnings in the position of power plant mechanic fairly and reasonably represents his wage-earning capacity.

The Office accepted that on October 19, 1993 appellant, then a 43-year-old laborer, fell and sustained fractures of the second, third and fourth lumbar vertebrae, intercostal nerve injury, abdominal and chest contusions, cervical strain, headaches, a herniated T9-10 disc requiring surgery on May 3, 1994 and neurogenic bladder disorder.[1] At the time of his injury, appellant worked as a power plant mechanic, classified by the employing establishment as "WB-5324-00109." He received appropriate compensation for temporary total disability while he was off work from October 19, 1993 through late June 1996.

Appellant returned to work at the employing establishment in June 1996, in the modified duty, retained pay position of power plant mechanic, WB-5352-00109. The position description notes that it was "for use only by [appellant]," and that he would perform "light duty within prescribed physical restrictions. All requirements for physical effort have been modified to fit the physical limitations of [appellant] as caused by his on-the-job injury."

On June 2, 1997 appellant accepted assignment as a power plant mechanic leader, WB-5324-00109, requiring mechanical duties as needed, preparing oral and written reports, scheduling equipment usage, and supervising up to three mechanics. He was offered this position due to his experience as a power plant mechanic and employee leader at the employing establishment.

[1] In a May 18, 1998 decision, the Office awarded appellant a schedule award for a five percent permanent impairment of the penis caused by neurologic dysfunction associated with his spinal injuries. This decision is not before the Board on the present appeal.

In an October 2, 1998 letter and associated personnel documents, the employing establishment stated that, as of October 19, 1993, appellant was employed as a power plant mechanic, WB-5324-00109, with a pay rate of $21.09 per hour, and that the current pay rate for the same grade and step was $24.72 per hour. Appellant's current position was power plant mechanic, WB-5352-00109, with a pay rate of $24.72 per hour. The employing establishment noted that appellant had performed the power plant mechanic position for more than 60 days since his return to work.

By decision dated October 6, 1998 and finalized October 13, 1998, the Office reduced appellant's wage-loss compensation to zero on the grounds that he no longer had any loss of wage-earning capacity. The Office found that that on October 19, 1993 when appellant was injured, he was "employed as a power plant mechanic WB-5324-00109…. After [his] injury [he was] reassigned to the position of power plant mechanic WB-5352-00109. The current pay rate for both positions is $24.72 per hour."

Appellant disagreed with this decision and requested an oral hearing, held August 25, 1999. At the hearing, he asserted that his duties entailed writing equipment requisitions, issuing tools, preparing reports, using a computer and fax machine, but that he did not perform the duties of a power plant mechanic.[2] Appellant asserted that he was performing the duties of an order clerk and would earn only $9.95 per hour performing such work in the open labor market, and was therefore entitled to compensation for the difference between that wage and his salary as a power plant mechanic.[3] He conceded that he was working full time at the same rate of pay as before he was injured.

By decision dated November 8, 1999, the Office hearing representative affirmed the October 6, 1998 decision, finding that appellant had no loss of wage-earning capacity. The hearing representative found that appellant's actual earnings in the modified, retained pay position were identical to those of his date-of-injury position. The hearing representative further found appellant's assertion that he should be compensated for wage loss as he had no actual loss of wages. The hearing representative noted that it was the prerogative of the employing establishment to formulate and classify positions, and there was no indication that appellant's title of power plant mechanic was erroneous.[4]

The Board finds that appellant's actual earnings in the position of power plant mechanic fairly and reasonably represents his wage-earning capacity.

[2] Appellant's testimony regarding his job duties was corroborated by the testimony of supervisors Richard Fadness, Larry Chamberlain and Don Kumm.

[3] At the hearing, Richard J. Ross, a vocational evaluator, retained by appellant's attorney representative, testified that appellant's duties were those of an order clerk and not a power plant mechanic, and that the average hourly rate for an order clerk in the private sector was $9.95 per hour.

[4] Appellant also filed a claim for October 5, 1999 lumbar strain when his right leg gave way while walking down a flight of stairs A14-346582. On December 14, 1999 the Office accepted the claim for an October 5, 1999 lumbar strain. Appellant does not appeal this decision, or assert that it was in any way adverse.

Under section 8115(a) of the Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.[5] In this regard, the Board has stated, "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."[6]

In the present case, the Office accepted that, on October 19, 1993, appellant sustained fractures at L2-4, a herniated T9-10 disc, intercostal nerve injury, a cervical strain, abdominal and chest contusions, and neurogenic bladder disorder. He returned to work in June 1996 in the modified, retained pay position of power plant mechanic.

The Office determined in its decision dated and finalized November 8, 1999 that appellant had no loss of wage-earning capacity as of October 6, 1998, based on his actual earnings as a power plant mechanic at the employing establishment beginning in June 1996. As appellant had performed the position for more than two years, the Office determined that the position fairly and reasonably represented appellant's wage-earning capacity. At the time the Office issued its loss of wage-earning capacity determination on October 6, 1998, appellant was in a retained pay position and therefore had no loss of wage-earning capacity.[7] This determination is consistent with section 8115(a) of the Act as cited above.

Appellant asserts that as he returned to work in a modified, retained pay position, actual earnings were not the best measure of his ability to earn wages in the open labor market. Although in some circumstances factors other than actual wages may be used to determine wage-earning capacity, such factors should only be considered after a determination has been made regarding the appropriateness of using actual wages to evaluate wage-earning capacity.[8] However, appellant has not submitted sufficient evidence to indicate that more than two years of actual wages are not the preferred method of determining his wage-earning capacity.

The Board has held that actual earnings do not fairly and reasonably represent a claimant's wage-earning capacity where the actual earnings are derived from a make-shift position designed for claimant's particular needs.[9] The record indicates that appellant was not performing all of the duties described for the position of power plant mechanic. Appellant has not however submitted the necessary evidence to establish that the position he filled would not exist except for the need to accommodate his work restrictions.

As of June 2, 1997, appellant was assigned as a power plant mechanic leader, WB-5324-00109, a quasi-supervisory position requiring mechanical duties as needed, but also consisting of

[5] 5 U.S.C. § 8115(a).

[6] *Michael E. Moravec*, 46 ECAB 192 (1995); *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989).

[7] *Domenick Pezzetti*, 45 ECAB 787 (1994).

[8] *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

[9] *William D. Emory*, 47 ECAB 365 (1996).

administrative, clerical duties at his supervisor's discretion. This assignment was given appellant because of his experience and expertise, and not because of his physical disabilities. The Board finds that this is a further indication, irrespective of pay rate, that appellant's duties were appropriate, and fairly and reasonably represented his wage-earning capacity.

Consequently, the Board finds that the Office's determination that the position of power plant mechanic fairly and reasonably represented appellant's wage-earning capacity was proper under the law and facts of this case.

The decision of the Office of Workers' Compensation Programs dated November 8, 1999 is hereby affirmed.

Dated, Washington, DC
February 8, 2002

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member