



## **FACTUAL HISTORY**

On December 24, 1980 appellant, then a 25-year-old shipwright, sustained an employment-related injury when he fell through an open hatch.<sup>1</sup> The claim was accepted for bilateral medial meniscus tear, lumbosacral strain and herniated disc at L4-5 and he underwent numerous surgical procedures and received wage-loss compensation based on the date-of-injury pay rate of \$328.40 a week. Appellant returned to light duty in January 1982. On October 31, 1983 he was granted a schedule award for an 11 percent impairment of the left leg. Appellant was terminated effective January 20, 1984, due to physical inability to perform his work duties. At that time his pay rate was \$9.68 an hour or \$387.20 a week. He has not worked since that time and was returned to the periodic rolls effective February 28, 1984. Appellant's compensation was based on a weekly pay rate of \$328.40.

Numerous attempts at vocational rehabilitation were unsuccessful. In 1999 the Office determined that a conflict in medical evidence was created between appellant's attending Board-certified orthopedic surgeon, Dr. Roy T. Lefkoe, and Dr. Steven J. Valentino, a Board-certified osteopath specializing in orthopedic surgery, regarding his ability to work.<sup>2</sup> On August 9, 1999 the Office referred appellant to Dr. Maxwell Stepanuk, a Board-certified osteopath specializing in orthopedic surgery, for an impartial evaluation. In a September 13, 1999 report, Dr. Stepanuk noted his review of the record including the history of injury and appellant's chief complaint of low back and bilateral lower extremity pain. On examination appellant was 5'10" tall and weighed 274 pounds. He had considerable pain in the lumbar paravertebral musculature with muscle spasms. Bilateral straight leg raising examination was positive. Appellant was wearing a brace on his left knee which was more symptomatic than the right with considerable pain in both knees. Dr. Stepanuk diagnosed chronic myofascitis, degenerative disc disease with herniations at L3-4 and L5, bilateral lower extremity radiculopathies, status post left L3-4 and L4-5 laminotomies and degenerative arthritis of both knees and advised that appellant had nonindustrial bilateral carpal tunnel syndrome and injuries to both shoulders. He opined that appellant's residual complaints were directly related to the December 24, 1980 employment injury, based on objective findings of advanced degenerative arthritis and disc herniations. In a work capacity evaluation dated September 14, 1999, Dr. Stepanuk advised that appellant could work four hours daily with alternating activities of two hours of sitting, walking, standing, operating a motor vehicle, pushing, pulling and lifting with 15-minute breaks and a five-pound weight limitation.

Appellant was referred to Susan Snedden, a rehabilitation counselor, on January 6, 2000. On June 13, 2000 rehabilitation services were interrupted because appellant had left knee surgery. On May 11, 2000 Dr. Stepanuk reviewed a November 19, 1999 lumbar spine magnetic resonance imaging (MRI) scan which showed degenerative disc disease and bulging at L3-4, L4-5 and L5-S1 and a left lower extremity MRI scan dated March 9, 2000, which showed advanced arthritis with meniscal degeneration with a probable tear. He advised that this review did not change the opinions expressed in the September 14, 1999 work capacity evaluation.

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<sup>1</sup> This case has been before the Board on two prior occasions.

<sup>2</sup> Dr. Lefkoe advised that appellant could work restricted duty for two hours a day and Dr. Valentino advised that he could work eight hours of restricted duty daily.

Rehabilitation services were resumed and, as appellant was unable to secure employment, on February 13, 2001, Ms. Snedden identified the position of check cashier, as within appellant's work restrictions and qualifications and reasonably available in the local labor market. By letter dated April 24, 2001, the Office proposed to reduce appellant's compensation benefits based on his capacity to earn wages as a check cashier. The job classification for the check cashier position indicated that the part-time weekly wage was \$135.00.

Appellant, through his attorney, disagreed with the proposed reduction. In an April 30, 2001 report, Dr. Lefkoe advised that appellant's condition had deteriorated since he was seen by Dr. Stepanuk in September 1999 and that he could not work. On August 22, 2001 the Office again referred appellant to Dr. Stepanuk for examination. In a September 5, 2001 report, Dr. Stepanuk reviewed the record, appellant's complaints and findings on physical examination. He diagnosed chronic myofasciitis, degenerative disc disease at L3-4 and L5, disc fragment at L4-5, bilateral lower extremity radiculopathies, status post laminectomy and bilateral advanced arthritis of the knees. Dr. Stepanuk opined that appellant was quite incapacitated secondary to his lumbar and knee conditions but could perform the sedentary duties of a check cashier for four hours a day.

On September 28, 2001 the Office finalized the reduction of compensation, effective October 7, 2001, finding that appellant had the wage-earning capacity of a check cashier, for four hours per day. It applied the *Shadrick* formula based on a weekly pay rate of \$328.40 and found that appellant had the capacity to earn weekly wages of \$68.96 or a loss of wage-earning capacity of \$259.44 per week which yielded weekly compensation at the augmented  $\frac{3}{4}$  rate of \$194.58.<sup>3</sup>

On October 5, 2001 appellant, through his attorney, requested a hearing. He submitted a May 14, 2001 report from Dr. Lefkoe who reviewed the check cashier position. Dr. Lefkoe reiterated that appellant's condition had deteriorated and advised that he could not work. At the hearing held on March 6, 2002, appellant testified regarding his work and medical history, his daily activities and his medical condition. He stated that he still drove and did not use a cane but could not wear regular clothes or shoes because they were too confining. Appellant argued that he could not perform the check cashier position because he could not sit for four hours, could not climb stairs and could not concentrate. By decision dated June 17, 2002, an Office hearing representative affirmed the September 28, 2001 decision.

On August 13, 2002 appellant requested reconsideration and submitted a July 9, 2002 report from Dr. Lefkoe who noted that appellant had worsening trochanteric bursitis of the right hip and degenerative changes of the knees. Dr. Lefkoe reiterated his previous findings and conclusion, advising that appellant was incapable of gainful employment.

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<sup>3</sup> The formula for determining loss of wage-earning capacity based on actual earnings, was developed in *Albert C. Shadrick*, 5 ECAB 376 (1953), has been codified by regulation at 20 C.F.R. § 10.403. Subsection (d) of this regulation provides that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings by the current pay rate for the job held at the time of injury. Office procedures indicate that a determination regarding whether actual wages fairly and reasonably represent wage-earning capacity should be made after a claimant has been working in a given position for more than 60 days. *Hayden C. Ross*, 55 ECAB 455 (2004).

By decision dated November 12, 2002, the Office denied modification of the June 17, 2002 decision.

On February 21, 2003 appellant again requested reconsideration and submitted a January 7, 2003 report in which Dr. Lefkoe noted that he had fallen at home when his left knee gave way and developed a large hematoma on his back. In a January 16, 2003 report, Dr. Jeffrey D. Petersohn, Board-certified in anesthesiology and pain management, advised that appellant continued to have symptoms of degenerative disease of the lumbar spine, hips and knees. He stated that appellant did not wish additional surgery and advised that he was totally disabled. On January 27, 2003 Dr. Lefkoe noted increased back and hip pain.

In a merit decision dated June 18, 2003, the Office again denied modification of the wage-earning capacity determination.

On November 6, 2003 appellant, through his attorney, requested reconsideration. In a November 3, 2003 report, Ronald L. Rosenberg, Ph.D., a rehabilitation counselor and licensed psychologist, reviewed the medical and vocational rehabilitation records, the history of injury and appellant's continued complaints of pain and discomfort in his lower back and knees. He performed vocational testing and advised that appellant had "a strong constellation" of medical problems including chronic pain that greatly impeded his functioning and raised significant doubts about his employability, noting that he had a significant emotional overlay, was on antidepressant medication and was distraught and depressed over his medical status which compounded his significant physical problems. Dr. Rosenberg concluded that appellant was disabled from all employment. Dr. Lefkoe also found that appellant could not work.

On January 26, 2004 appellant filed a Form CA-2a, claim for recurrence of disability alleging that on January 4, 2003 he fell backwards at home because his left knee gave out. He requested the difference between his reduced compensation and full compensation from January 4, 2003 forward. By letter dated February 23, 2004, the Office informed appellant of the evidence needed to support his recurrence claim. Appellant resubmitted reports from Dr. Lefkoe dated January 7, 2003 to February 3, 2004. Dr. Lefkoe reiterated his findings and conclusions.

By decision dated March 26, 2004, the Office denied appellant's recurrence claim.

In March 2004, the Office referred appellant to Dr. Maurie D. Pressman, a Board-certified psychiatrist, for a second opinion evaluation. In an April 21, 2004 report, Dr. Pressman noted the history of injury, appellant's medical history and findings on psychiatric evaluation. He diagnosed depressive disorder, single episode and numerous orthopedic difficulties including disc disease and degenerative arthritis of both knees with incapacity due to continuing pain and inability to move, work or be useful. Dr. Pressman advised that appellant's depression was due to the December 24, 1980 employment injury and that these had a cumulative wearing-down effect upon his psyche, compounded by his continual pain, inability to sleep or move around or engage in rewarding activities of life. He recommended psychotherapy and concluded that appellant could not work.

In a May 24, 2004 decision, the Office accepted that appellant sustained a consequential major depression, but denied modification of the prior wage-earning capacity decisions. Appellant received compensation retroactive to November 3, 2003, based on a weekly pay rate of \$328.40 and began psychotherapy with Dr. Harry Doyle.

On September 20, 2004 appellant, through his attorney, filed an application for review with the Board of the March 26 and May 24, 2004 Office decisions. By order dated March 2, 2005, the Board remanded the case to the Office for reconstruction of the case record.<sup>4</sup> The Office reconstructed the record and on September 15, 2005 reissued the March 26 and May 24, 2004 decisions.<sup>5</sup> On January 20, 2006 appellant, through his attorney, filed an application for review with the Board. By order dated September 1, 2006, the Board again remanded the case to the Office for reconstruction as the record forwarded to the Board was incomplete.<sup>6</sup>

On November 6, 2006 the Office<sup>7</sup> found that appellant was entitled to full compensation for the period January 4 to November 2, 2003.<sup>8</sup> It also found that appellant was not entitled to increased compensation for the period September 28, 2001 to January 4, 2003.

On November 10, 2006 appellant, through his attorney, requested a hearing, that was held on March 21, 2007.<sup>9</sup> At the hearing, counsel argued that, based on the opinion of Dr. Rosenberg, appellant had depression since the 1990s and was entitled to compensation for the period September 28, 2001 to January 4, 2003.

By decision dated June 13, 2007, an Office hearing representative affirmed the November 6, 2006 decision.

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<sup>4</sup> Docket No. 04-2278 (issued March 2, 2005).

<sup>5</sup> The Office also reissued an August 30, 2004 decision approving an attorney's fee of \$649.00. On January 17, 2006 an Office hearing representative vacated a February 28, 2005 Office decision and remanded the case to the Office for further development regarding a claimed right hip condition. On June 30, 2006 the Office accepted the consequential condition of underlying trochanteric bursitis of the right hip.

<sup>6</sup> Docket No. 06-600 (issued September 1, 2006).

<sup>7</sup> The reconstructed record contains numerous reports describing appellant's condition after compensation benefits were resumed in January 2003 and also older reports from Dr. Lefkoe, Drs. M. Darryl Antonacci and Robert Booth, a Board-certified in orthopedic surgery, Drs. Petersohn and Shailen Jalali, a Board-certified in anesthesiology and pain management, Dr. Steven Mandel, a Board-certified neurologist, and Dr. Vidyadhar Chitale, a Board-certified neurosurgeon, who did not discuss appellant's ability to work.

<sup>8</sup> The Office thus accepted that appellant sustained a recurrence of disability on January 4, 2003.

<sup>9</sup> In a preliminary decision dated March 29, 2007, the Office found that an overpayment in compensation in the amount of \$9,331.97 had been created because appellant continued to receive augmented compensation after his son's 18<sup>th</sup> birthday on October 25, 2003. On April 30, 2007 it finalized the overpayment decision. Appellant did not file an appeal of this decision with the Board.

## LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>10</sup> An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.<sup>11</sup>

Section 8115 of the Federal Employees' Compensation Act<sup>12</sup> and Office regulations provide that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.<sup>13</sup> The Office must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which it relies must provide a detailed description of the condition.<sup>14</sup> Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.<sup>15</sup>

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office for selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits that employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service.<sup>16</sup> Finally, application of the principles set forth in *Albert C. Shadrick*<sup>17</sup> will result in the percentage of the employee's loss of wage-earning capacity.<sup>18</sup>

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<sup>10</sup> *James M. Frasher*, 53 ECAB 794 (2002).

<sup>11</sup> 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

<sup>12</sup> 5 U.S.C. §§ 8101-8193.

<sup>13</sup> 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson*, *supra* note 11.

<sup>14</sup> *William H. Woods*, 51 ECAB 619 (2000).

<sup>15</sup> *John D. Jackson*, *supra* note 11.

<sup>16</sup> *James M. Frasher*, *supra* note 10.

<sup>17</sup> 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

<sup>18</sup> *James M. Frasher*, *supra* note 10.

In determining an employee's wage-earning capacity based on a position deemed suitable, but not actually held, the Office must consider the degree of physical impairment, including impairments resulting from both injury related and preexisting conditions, but not impairments resulting from post injury or subsequently acquired conditions. Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.<sup>19</sup>

Section 8123(a) of the Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>20</sup> When the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.<sup>21</sup>

### ANALYSIS -- ISSUE 1

The Board finds that Dr. Stepanuk's referee opinion is entitled to special weight and establishes that appellant had the capacity to earn wages as a clerk cashier for four hours a day for the period September 3, 2001 to January 4, 2003. Following left knee surgery in June 2000, vocational rehabilitation services were resumed but appellant was unable to secure employment. On February 13, 2001 Ms. Snedden, the vocational rehabilitation counselor, identified four positions she felt fit appellant's capabilities. The Office determined that appellant had the capacity to earn wages as a clerk cashier based on Dr. Stepanuk's September 5, 2001 report.

Dr. Stepanuk, who first examined appellant in September 1999, reviewed MRI scans in May 2000 and reexamined appellant in September 2001. He again reviewed the record, appellant's complaints and noted findings on physical examination. Dr. Stepanuk diagnosed chronic myofasciitis, degenerative disc disease at L3-4 and L5, disc fragment at L4-5, bilateral lower extremity radiculopathies, status post laminectomies and bilateral advanced arthritis of the knees. While Dr. Stepanuk opined that appellant was quite incapacitated secondary to his lumbar and knee conditions, he advised that appellant could perform the sedentary duties of a check cashier for four hours a day.

Appellant's attending orthopedic surgeon, Dr. Lefkoe, advised that he was totally disabled during this period. However, he had been on one side of the conflict in medical evidence. The Board has held that an additional report from a claimant's physician, which essentially repeats earlier findings and conclusions, is insufficient to overcome the special weight accorded to an impartial medical specialist's report.<sup>22</sup>

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<sup>19</sup> *John D. Jackson*, *supra* note 11.

<sup>20</sup> 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

<sup>21</sup> *Manuel Gill*, 52 ECAB 282 (2001).

<sup>22</sup> *Roger G. Payne*, 55 ECAB 535 (2004).

The Board finds that Dr. Stepanuk provided well-rationalized evaluations in which he clearly found that appellant could work four hours a day as a clerk cashier. His opinion is entitled to the special weight accorded an impartial examiner and therefore constitutes the weight of the medical evidence to establish that appellant had the physical capabilities to perform the selected position.<sup>23</sup>

In a February 13, 2001 report, the Office rehabilitation counselor provided a job description of cashier clerk, advised that the position was sedentary, which was within appellant's medical restrictions and qualifications. The counselor noted that the position was available both full and part time in sufficient numbers so as to make it reasonably available within appellant's commuting area and that the wage for the position was \$135.00 per week part time.

The Board finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the position of clerk cashier represented his wage-earning capacity on October 7, 2001.<sup>24</sup> The weight of the evidence of record establishes that he had the requisite physical ability, skill and experience to perform the position of clerk cashier and that such a position was reasonably available within the general labor market of his commuting area. The Office therefore properly determined that the position of clerk cashier reflected appellant's wage-earning capacity.<sup>25</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>26</sup> Office's procedure manual provides that, "[i]f a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."<sup>27</sup> Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in

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<sup>23</sup> *William H. Woods, supra* note 14.

<sup>24</sup> *James M. Frasher, supra* note 10.

<sup>25</sup> *James Smith, 53 ECAB 188 (2001).*

<sup>26</sup> *Katherine T. Kreger, 55 ECAB 633 (2004).*

<sup>27</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).



fact, erroneous.<sup>28</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>29</sup>

In addition, Chapter 2.814.11 of the Office's procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated. Office procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met. If the Office is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.<sup>30</sup>

### ANALYSIS -- ISSUE 2

On August 13, 2002 appellant first requested that the Office modify the September 13, 2001 wage-earning capacity decision. Once a formal wage-earning capacity decision is in place, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.<sup>31</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>32</sup>

The Board finds that appellant did not submit sufficient evidence to show that the Office's September 13, 2001 wage-earning capacity determination was erroneous.<sup>33</sup> There is no evidence of record that this decision was in error or that appellant was retrained or otherwise vocationally rehabilitated and the medical evidence submitted is insufficient to show that there was a material change in the nature and extent of the injury-related condition beginning in August 2002.

As noted, while Dr. Lefkoe has opined that appellant remained totally disabled during the period October 7, 2001 to January 4, 2003 and was on one side of the conflict in medical evidence resolved by Dr. Stepanuk.<sup>34</sup> Both Dr. Rosenberg and Dr. Pressman found that appellant was totally disabled due to a consequential emotional condition. Their reports, however, were

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<sup>28</sup> *Stanley B. Plotkin*, 51 ECAB 700 (2000).

<sup>29</sup> *Id.*

<sup>30</sup> See Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.814.11 (June 1996).

<sup>31</sup> *Stanley B. Plotkin*, *supra* note 28.

<sup>32</sup> *Id.*

<sup>33</sup> *Katherine T. Kreger*, *supra* note 26; *Sharon C. Clement*, 55 ECAB 552 (2004); Federal (FECA) Procedure Manual, *supra* note 6.

<sup>34</sup> *Roger G. Payne*, *supra* note 22.

dated November 3, 2003 and April 21, 2004 respectively, after appellant was again receiving full wage-loss compensation. Neither physician specifically mentioned appellant's condition or ability to work during the period in question. These reports are insufficient to establish that the September 28, 2001 wage-earning capacity determination should be modified for the period October 7, 2001 to January 4, 2003. In this case, appellant has not submitted medical evidence to establish a material change in the nature and extent of his employment-related conditions.<sup>35</sup>

### **LEGAL PRECEDENT -- ISSUE 3**

Under section 8101(4) of the Act, "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 recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.<sup>36</sup> Monetary compensation for total or partial disability due to an employment injury is paid as a percentage of monthly pay.<sup>37</sup>

The determination of pay rates for compensation purposes requires a number of calculations, including the application of certain figures to a computation known as the *Shadrick* formula.<sup>38</sup> Prior to initiating a calculation using the *Shadrick* formula, one must obtain accurate figures for the adjusted weekly pay rate, the current rate of pay for the job held when injured and the current actual earnings. If any of these initial figures are inaccurate, any calculation under the *Shadrick* formula will be inaccurate even if the formula is applied in a proper manner.<sup>39</sup>

### **ANALYSIS -- ISSUE 3**

In determining appellant's pay rate for compensation purposes beginning on January 20, 1984 when he stopped work because his light duty had been withdrawn, again in its September 28, 2001 decision and upon his return to total disability effective January 4, 2003, the Office based appellant's compensation on an incorrect pay rate. The record reflects that appellant's compensation was based on his date-of-injury pay rate of \$8.21 an hour or \$328.40 per week. While this was the correct pay rate to be used for the period immediately following employment injury on December 24, 1980, he returned to a limited-duty position at the employing establishment in August 1982. Appellant continued to work until his light duty was withdrawn and he stopped work on January 20, 1984, 17 months later. At that time his pay rate was \$9.68 an hour or \$387.20 per week.

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<sup>35</sup> *Stanley B. Plotkin*, *supra* note 28.

<sup>36</sup> 5 U.S.C. § 8101(4); *see Teresa A. Ripley*, 56 ECAB 528 (2005).

<sup>37</sup> *L.H.*, 58 ECAB \_\_\_\_ (Docket No. 06-1691, issued June 18, 2007).

<sup>38</sup> *Supra* note 3.

<sup>39</sup> *Paul M. Colosi*, 56 ECAB 294 (2005).

When appellant was returned to the periodic rolls in 1984, his compensation was based on the date-of-injury pay rate of \$328.40. In the *Shadrick* formula to determine appellant's wage-earning capacity, the \$328.40 weekly pay rate was again used. When he was returned to total disability effective November 3, 2003, his compensation was again based on a weekly pay rate of \$328.40. Subsequently, the Office accepted that appellant sustained a recurrence of disability on January 4, 2003 and his compensation was based on a weekly pay rate of \$328.40.

In applying section 8101(4) of the Act, the Office is to determine monthly pay by determining the date of the greater pay rate, based on the date of injury, date of disability or the date of recurrent disability.<sup>40</sup> Since appellant returned to full-time employment with the employing establishment in August 1982 and continued in that position until January 1984, the proper pay rate for compensation purposes would be his pay rate on January 20, 1984, the date of his recurrent disability or \$387.20 per week.

The Board notes that the record is unclear what appellant's earning capacity beginning October 7, 2001 would have been in the check cashier position for four hours a day. The job classification completed by Ms. Snedden on February 13, 2001 provided that weekly wages for a part-time check cashier were \$135.00 yet in applying the *Shadrick* formula in the September 28, 2001 wage-earning capacity decision, the Office used a figure of \$68.96 a week. The case will therefore be remanded for the Office to determine appellant's correct compensation beginning January 20, 1984, to determine the weekly wages of the clerk cashier position for four hours a day during the period that the loss of wage-earning capacity was in place, *i.e.*, October 7, 2001 to January 4, 2003 and the correct pay rate for compensation purposes upon his return to total disability effective October 4, 2003.<sup>41</sup>

### CONCLUSION

The Board finds that the Office met its burden of proof in reducing appellant's wage-earning capacity based on his capacity to earn wages in the constructed position of clerk/cashier and that he did not meet his burden of proof to modify the wage-earning capacity determination. The Board, however, finds that the Office used an improper pay rate for compensation purposes and that the record is unclear regarding the weekly pay rate for the selected position of check cashier. The case must be remanded to the Office for determination of appellant's correct rate of compensation beginning January 24, 1984.

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<sup>40</sup> R.S., 58 ECAB \_\_\_\_ (Docket No. 06-1346, issued February 16, 2007).

<sup>41</sup> *Paul M. Colosi, supra* note 39.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 13, 2007 be affirmed in part and set aside in part and remanded to the Office for determination of the proper pay rate for compensation purposes.

Issued: October 2, 2008  
Washington, DC

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

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board