

On March 16, 2002 appellant, then a 23-year-old casual letter carrier, filed a traumatic injury claim alleging that she sustained injury to her left upper thigh on that date when she was struck by a moving motor vehicle in the performance of duty. The Office accepted her claim for

contusion of the left thigh on April 24, 2002. Appellant received continuation of pay from March 18 through April 30, 2002.

On March 18, 2002 an employing establishment physician, Dr. J. Patterson, specializing in occupational medicine, released appellant to return to work eight hours a day with restrictions. Dr. Jamesetta W. Tate, a general practitioner, examined appellant on March 19, 2002 and released her to return to work with restrictions on March 20, 2002. Appellant's attending physician, Dr. Charles P. Murphy, a Board-certified orthopedic surgeon, continued to support her ability to work eight hours a day with restrictions from April 2 through July 9, 2002.

In a letter dated June 12, 2002, the employing establishment informed appellant that her current casual position would end at the close of business on June 22, 2002 and that new positions would become available on June 29, 2002.

Appellant requested wage-loss compensation from April 30 to July 12, 2002. The employing establishment reported her pay as \$12.00 an hour and stated that she did not work a fixed 40-hour work schedule. Appellant used six hours of leave without pay on May 28, 29, 30 and 31, 2002 as well as June 3, 2003. She used this leave without pay due to "rest/body ache." Appellant also used five hours of leave without pay on June 14, 2002 for the same reasons as well as three hours on June 10, 2002 and 0.5 hours on June 11, 2002 for doctor's appointments. Appellant's absence analysis indicated that she used leave without pay up to two hours a day from May 1 through 14, 2002 and May 18 through 22, 2002. She used eight hours of leave without pay from May 27 through June 6, 2002 and used various amounts of leave without pay, up to eight hours a day, from June 7 through June 22, 2002.

On June 18, 2002 appellant's attorney stated that appellant was entitled to compensation for lost wages as she was earning significantly less than she did prior to her injury. In a letter dated July 3, 2002, he noted that she received her full wages from March 16 to April 30, 2002. The Office granted appellant compensation for 27 hours of lost wages from April 30 to June 14, 2002 in the amount of \$216.00. Her attorney again asserted that she was entitled to compensation for lost wages due to her light-duty work on July 30, 2002.

Appellant filed additional claims for compensation covering the period July 13 through November 1, 2002.<sup>1</sup> She also claimed that she had developed low back pain due to her accepted employment injury on March 16, 2002.

In a report dated September 17, 2002, Dr. Christopher E. Marrero, a Board-certified orthopedic surgeon, found that appellant was totally disabled due to her hip and back conditions which he related to the March 16, 2002 employment injury.

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<sup>1</sup> Following the Office's November 17, 2002 decision, appellant continued to submit claims for wage-loss compensation.

By decision dated November 17, 2002, the Office denied appellant's claim for wage-loss compensation from July 13 to November 1, 2002, finding that she had no disability due to the accepted employment injury.<sup>2</sup>

Appellant requested an oral hearing on December 6, 2002. She testified at the oral hearing on August 26, 2003 and noted that she began working at the employing establishment on September 24, 2001 under a one-year contract. Appellant testified that prior to her injury she worked 8 to 10 hours a day and that following her injury she worked 4 to 6 hours a day. She stated that she did not receive a written light-duty job offer and described her light-duty job as: "[S]itting down at the desk, stamping the mail that they bring back to me marked 'Return to sender.' I would stamp the mail and then rubberband (sic) it and put it for the other clerks to carry." Appellant stated that she was the only employee performing this job. Her attorney noted that she worked 92 days after her injury.

By decision dated October 21, 2003, the hearing representative affirmed the Office's November 17, 2002 decision and found that appellant's physicians had not released her to return to full duty, but that the termination of her light-duty position was not a basis for payment of compensation as she was a temporary employee. The hearing representative found that a retroactive wage-earning capacity determination was appropriate. He stated:

"The employer provided modified employment of sitting while stamping mail. [Appellant] was employed in her light[-]duty position for more than 60 days when the employer terminated her temporary job on the basis that her contract had expired. Because the claimant was a temporary employee, the fact that her temporary job expired does not entitle her to compensation. [Appellant] asserted there were no other employees performing similar work on a regular basis. The Office's procedures state that it is not necessary to show that the position was generally available. [Appellant's] actual employment is deemed to reflect her wage[-]earning capacity."<sup>3</sup>

Appellant requested reconsideration of this decision on December 8, 2003 and argued that the hearing representative failed to consider whether she sustained any loss of wage-earning capacity based on a comparison between her actual earnings after the March 16, 2002 employment injury and her preinjury earnings. In support of this request, appellant submitted her earnings statements for pay period 26 in 2001 through pay period 14 in 2002.

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<sup>2</sup> The Office listed appellant's date of injury as June 19, 2001 rather than March 16, 2002.

<sup>3</sup> The hearing representative also remanded the case to the Office to determine whether appellant sustained a low back injury as a result of her March 16, 2002 employment injury and to issue an appropriate decision. The Office's November 17, 2002 decision denying her claim for a recurrence of total disability on or after July 13, 2002 was based on an analysis of the medical evidence addressing her back injury. As these issues are intertwined and in an interlocutory state, the Board will not address either the issue of whether appellant sustained a back injury as a result of her March 16, 2002 employment injury or whether this back injury resulted in a recurrence of total disability on or after July 13, 2002 in this appeal. *See* 20 C.F.R. § 501.2(c).

By decision dated June 3, 2004, the Office reviewed appellant's claim on the merits and declined to modify the October 21, 2003 decision, finding that she had not met her burden of proof in establishing a loss of wage-earning capacity.

### **LEGAL PRECEDENT -- ISSUE 1**

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.<sup>4</sup>

The Office's regulation define a recurrence of disability as the inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn.<sup>5</sup> However, the Office's procedure manual specifically excludes from the definition of a recurrence of disability a work stoppage caused by termination of a temporary appointment, if the claimant was a temporary employee at the time of the injury.<sup>6</sup>

Section 8115(a) of the Federal Employees' Compensation Act<sup>7</sup> provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonably represent the wage-earning capacity. 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.<sup>8</sup>

The Office's procedure manual states that when an employee cannot return to the date-of-injury job because of disability due to work-related injury or disease, but does return to alternative employment, the claims examiner must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's wage-earning capacity.<sup>9</sup> The procedure manual provides in relevant part as follows:

*"Factors Considered.* To determine whether [appellant's] work fairly and reasonably represents his or her wage-earning capacity, the claims examiner should consider whether the kind of appointment and tour of duty ... are at least equivalent to those of the job held on the date of injury. Unless they are, the [claims examiner] may not consider the work suitable.

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<sup>4</sup> *Hayden C. Ross*, 55 ECAB \_\_\_\_ (Docket No. 04-136, issued April 7, 2004).

<sup>5</sup> 20 C.F.R. § 10.5(x).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3b(2)(a) (May 1997).

<sup>7</sup> 5 U.S.C. §§ 8101-8193, § 8115(a).

<sup>8</sup> *Selden H. Swartz*, 55 ECAB \_\_\_\_ (Docket No. 02-1164, issued January 15, 2004).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

“For instance, reemployment of a temporary or casual worker in another temporary or casual [U.S. Postal Service] position is proper, as long as it will last at least 90 days and reemployment of a term or transitional [U.S. Postal Service] worker in another term or transitional position is likewise acceptable.”<sup>10</sup>

In addition, the Office’s procedure manual provides that the Office can make a retroactive wage-earning capacity determination if appellant worked in the position for at least 60 days, the position fairly and reasonably represented her wage-earning capacity and “the work stoppage did not occur because of any change in her injury-related condition affecting the ability to work.”<sup>11</sup>

The formula for determining loss of wage-earning capacity based on actual earnings,<sup>12</sup> was which developed in *Albert C. Shadrick*,<sup>13</sup> has been codified by regulation at 20 C.F.R. § 10.403.<sup>14</sup> 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.<sup>15</sup>

### ANALYSIS

Appellant, a temporary employee, sustained an employment injury on March 16, 2002 and her physicians released her to return to light-duty work on March 20, 2002. The record does not contain a copy of the light-duty job requirements, however, she testified at the oral hearing that she sat and stamped mail. The employing establishment informed appellant on June 12, 2002 that her temporary appointment would expire on June 22, 2002. She worked the light-duty position for 92 days. Appellant alleged that while working in the light-duty position she had a loss of earnings. The Office denied compensation for a recurrence of disability on or after July 13, 2002 on the grounds that her temporary appointment expired and that there was no objective medical evidence establishing a recurrence of total disability due to her accepted employment injury. Appellant then requested an oral hearing and the hearing representative affirmed the Office’s November 17, 2002 decision by attempting to perform a retroactive wage-earning capacity determination. He found that she had successfully performed the light-duty position for 60 days and that her actual earnings represented her wage-earning capacity. However, the hearing representative did not address the central issue in any wage-earning capacity determination, whether appellant sustained a loss of wage-earning capacity as a result of her injury, resulting disability and return to light-duty work. He failed to determine whether

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<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.7a (July 1997).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.7.e (July 1997).

<sup>12</sup> *Hayden C. Ross*, 55 ECAB \_\_\_\_ (Docket No. 04-136, issued April 7, 2004).

<sup>13</sup> 5 ECAB 376 (1953).

<sup>14</sup> 20 C.F.R. § 10.403.

<sup>15</sup> 20 C.F.R. § 10.403(d).

appellant sustained a loss of wage-earning capacity, as alleged, as a result of her return to work and the actual wages she earned and which he found fairly and reasonably represented her wage-earning capacity. The hearing representative did not mention appellant's earnings in her date-of-injury position and did not compare these earnings to her actual earnings in the light-duty position. Due to this defect in the hearing representative decision, the failure to comply with the Office's regulation in determining whether appellant sustained a loss of wage-earning capacity as a result of her accepted partial disability, the Board must reverse the case.<sup>16</sup>

### **CONCLUSION**

The Board finds that the Office failed to determine if appellant sustained any loss of wage-earning capacity as a result of her accepted employment injury. Therefore, the Office's decision finding that her actual earnings represent her wage-earning capacity and concluding that she was not entitled to further compensation benefits must be reversed.<sup>17</sup>

### **ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' decisions dated June 3, 2004 and October 21, 2003 are reversed.

Issued: January 6, 2005  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>16</sup> See *Afegalai L. Boone*, 53 ECAB \_\_\_\_ (Docket No. 01-2224, issued May 15, 2002).

<sup>17</sup> Due to the disposition of this issue, it is not necessary for the Board to address whether the Office properly denied modification of the wage-earning capacity decision on June 3, 2004.