



arthroscopic surgery with rotator cuff repair on January 6, 2006. On March 2, 2006 he accepted a modified job offer with no lifting and returned to work on March 6, 2006. Appellant accepted subsequent modified job offers on April 11, May 2 and 30, 2006.

In a report dated June 27, 2006, Dr. Robert Landsberg, appellant's orthopedic surgeon, advised that appellant had reached maximum medical improvement and should have permanent restrictions of maximum lifting of 20 pounds with the left arm at the side, 10 pounds with the left arm away from the side and no overhead lifting.

On June 27, 2006 appellant accepted a modified job offer of a city carrier with weight limitations of 20 pounds with his left arm at the side and 10 pounds with his left arm away from the body.

In a report dated October 6, 2006, Dr. Landsberg advised that appellant's work restrictions were permanent. He reiterated appellant's weight limitations of 20 pounds with the left arm at the side and 10 pounds with the left arm away from the body.

By decision dated November 16, 2006, the Office found that appellant's actual earnings as a modified city carrier fairly and reasonably represented his wage-earning capacity.

On December 28, 2006 appellant requested an oral hearing before an Office hearing representative. By decision dated January 30, 2007, the Office denied his request for a hearing on the grounds that it was untimely filed.

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

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>1</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>2</sup> 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 his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or if the employee has no actual wages, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.<sup>3</sup>

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<sup>1</sup> *Hayden C. Ross*, 55 ECAB 455 (2004).

<sup>2</sup> 20 C.F.R. §§ 10.402, 10.403 (2006); see *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

<sup>3</sup> 5 U.S.C. § 8115(a) (2000); see *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

Office procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days.<sup>4</sup>

### **ANALYSIS -- ISSUE 1**

On June 27, 2006 appellant accepted a modified city carrier position with physical requirements which met his permanent work restrictions as described by Dr. Landsberg. He worked in this capacity for more than 60 days prior to the Office's November 16, 2006 wage-earning capacity decision. There is no indication that the job was temporary, part time, seasonal or otherwise not appropriate for a wage-earning capacity determination.<sup>5</sup> There is no evidence that appellant's actual earnings did not fairly and reasonably represent his wage-earning capacity.

The formula for determining loss of wage-earning capacity based on actual earnings developed in *Albert C. Shadrick*,<sup>6</sup> 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.<sup>7</sup> In the instant case, as a modified letter carrier, appellant's actual earnings are identical to the current pay rate of the job held at the time of injury. Appellant therefore has no loss of wage-earning capacity.

The Board finds that the Office properly determined appellant's loss of wage-earning capacity.

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

A claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted in writing, within 30 days of the date of the decision for which a hearing is sought.<sup>8</sup> If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.<sup>9</sup> The Board has held that the Office, in its broad discretionary authority in the administration of the Act,<sup>10</sup> has the power to hold hearings in certain

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<sup>4</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*. Chapter 2.814.7(c) (July 1996).

<sup>5</sup> *Monique L. Love*, 48 ECAB 678 (1997).

<sup>6</sup> 5 ECAB 376 (1953).

<sup>7</sup> 20 C.F.R. § 10.403 (d) (1999); see *Afegalai L. Boone*, 53 ECAB 533 (2002).

<sup>8</sup> 20 C.F.R. § 10.616(a) (2004).

<sup>9</sup> *Claudio Vazquez*, 52 ECAB 496 (2001).

<sup>10</sup> 5 U.S.C. §§ 8101-8193.

circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.<sup>11</sup> The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.<sup>12</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that the Office properly denied appellant's request for an oral hearing on the grounds that it was untimely filed. Appellant requested an oral hearing on December 28, 2006, more than 30 days after the date of the November 16, 2006 decision. He was not entitled to a hearing as a matter of right.

After it determined that appellant's request was untimely, the Office properly exercised its discretion by determining that the issue could be equally well addressed by requesting reconsideration and submitting new evidence. The Board finds that the Office acted within its discretion in denying appellant's hearing request as untimely, because he failed to file the request within the statutory time frame.

### **CONCLUSION**

Appellant's actual earnings as a modified rural carrier fairly and reasonable represent his wage-earning capacity. The Office properly denied appellant's request for an oral hearing as untimely filed.

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<sup>11</sup> *Marilyn F. Wilson*, 52 ECAB 347 (2001).

<sup>12</sup> *Claudio Vazquez*, *supra* note 9.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 30, 2007 and November 16, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 20, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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