

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

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C.S., Appellant )

and )

**DEPARTMENT OF THE NAVY, PUGET  
SOUND NAVAL SHIPYARD, Bremerton, WA,  
Employer** )

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**Docket No. 07-2233  
Issued: March 19, 2008**

*Appearances:*  
*John Goodwin, Esq., for the appellant*  
*Office of Solicitor, for the Director*

Oral Argument February 19, 2007

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 3, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' August 24, 2007 decision determining his wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUE**

The issue is whether the Office properly found that appellant's actual earnings in the temporary position of traffic control person fairly and reasonably represented his wage-earning capacity.

**FACTUAL HISTORY**

This is the second time this case has been before the Board. In an August 6, 2007 decision, the Board reversed the Office's August 30, 2006 decision denying wage-loss claims for

the period March 24 to April 21, 2006. The facts and the conclusions of law contained in that decision are incorporated herein by reference.<sup>1</sup>

On May 16, 2005 appellant filed an occupational disease claim alleging that he had developed carpal tunnel syndrome as a result of employment activities. At the time his claim was filed, he was employed in a permanent position as a marine machinery mechanic. On September 13, 2005 appellant's claim was accepted for right carpal tunnel syndrome. The Office subsequently authorized carpal tunnel surgery, which was performed on February 3, 2006.

Appellant submitted March 13, 2006 progress notes from Dr. Brian Wicks, a Board-certified orthopedic surgeon, who indicated that appellant's fingers were much improved from the carpal tunnel release and that he was no longer experiencing numbness or cramping. In a March 13, 2006 patient status update form, Dr. Wicks stated that appellant was able to return to limited duty. Work restrictions included: a five-pound lifting limit with his right hand (occasionally); very limited repetitive twisting or gripping with his right hand (less than ½ hour per day); limited squatting and kneeling (occasionally); no vibratory and impact tools; no vertical ladders; and no overhead reaching.

The record contains a March 13, 2006 light-duty job offer from the employing establishment. The position offered was "traffic controller." Duties included monitoring traffic on a pier while industrial work was accomplished nearby. Appellant would be permitted to sit or stand. The position would require: no use of vibrating or impact tools; no use of his hands on a repetitive basis; no twisting or gripping motions; no climbing vertical ladders; no squatting; no kneeling; and no reaching overhead. The employing establishment stated that the position would remain available until appellant was released by his doctor to return to his position of record. On April 26, 2006 the Office informed appellant that it found the temporary position offered by the employing establishment to be medically suitable. Appellant accepted the limited-duty position and returned to work on April 26, 2006.

On May 2, 2006 the Office informed appellant that the March 13, 2006 job offer was incomplete. The Office provided appellant with pages one through four of the limited-duty assignment, which were not included in the original offer. Page two of the job offer reflected that the assignment was "temporary." Appellant continued to work in the modified position until June 27, 2007, when he underwent left carpal tunnel release surgery.<sup>2</sup>

By decision dated August 24, 2007, the Office terminated appellant's entitlement to compensation benefits under 5 U.S.C. §§ 8106 and 8115. Finding that his actual earnings met or exceeded the current wages of the date-of-injury job, the Office concluded that appellant had no loss in wage-earning capacity. The Office also stated that the position of traffic control person was considered suitable because appellant had demonstrated the ability to perform the duties of the job for two months or more.

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<sup>1</sup> Docket No. 06-2033 (issued August 6, 2007).

<sup>2</sup> Claim No. 142054287 was accepted by the Office for left carpal tunnel syndrome and left medial epicondylitis. Appellant underwent left carpal tunnel release surgery on June 27, 2007, and the Office began paying compensation for disability at that time. IFECs records reflect that appellant was terminated by the employing establishment on July 16, 2007, due to his physical inability to perform the assigned duties of his date-of-injury position.

### LEGAL PRECEDENT

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.<sup>3</sup> Disability means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.<sup>4</sup>

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 wage-earning capacity of the employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.<sup>5</sup> To determine whether the employee's work fairly and reasonably represents his wage-earning capacity, the Office should consider whether the kind of appointment and tour of duty are at least equivalent to those of the job held on date of injury. Unless they are, the Office may not consider the work suitable. The reemployment may not be considered suitable when the job is temporary where the employee's previous job was permanent.<sup>6</sup>

### ANALYSIS

The Board finds that the Office improperly determined that appellant's limited-duty position of traffic control person was suitable. Therefore, the Office's August 24, 2007 decision must be reversed.

The evidence establishes that the position offered to appellant was a temporary job. On March 13, 2006 the employing establishment offered appellant a position as a traffic control person. The job was not identified as permanent. The Board notes that the offer stated that the position would remain available until appellant was released by his doctor to return to his position of record. However, in its April 26, 2006 letter, finding the position suitable, the Office described the position as temporary. On May 2, 2006 the Office informed appellant that the employing establishment had failed to provide a complete copy of the job offer on March 13, 2006. Page two of the complete job offer clearly indicated that the assignment was temporary.

Office procedures are clear. When determining whether earnings in alternative employment fairly and reasonably represent the employee's wage-earning capacity, the Office may not consider the work suitable when the job is temporary and the employee's previous job was permanent. Appellant's date-of-injury position as a marine machinery mechanic was a permanent position. Because the record establishes that the position to which he returned in

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<sup>3</sup> 5 U.S.C. § 8102(a).

<sup>4</sup> 20 C.F.R. § 10.5(f) (1999).

<sup>5</sup> 5 U.S.C. § 8115(a).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7.a (July 1997).

April 2006 was not permanent, the Office may not consider the work suitable for a determination of wage-earning capacity.

The employing establishment's statement -- that the position would remain available until appellant was released by his doctor to return to his position of record -- does not convert the offer into one of permanent employment.<sup>7</sup> It does not erase the clear language of the complete job offer reflecting that the position offered was temporary, or the Office's characterization of the job as temporary in its suitability letter. Accordingly, the August 24, 2007 wage-earning capacity was erroneous and must be reversed.

**CONCLUSION**

The Office has not met its burden of establishing that appellant's actual earnings as a traffic control person fairly and reasonably represented his wage-earning capacity.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 24, 2007 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 19, 2008  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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<sup>7</sup> The Board notes that appellant's termination by the employing establishment on July 16, 2007, due to his physical inability to perform the duties of his job, corroborates the temporary nature of the limited-duty position.