

June 1, 2004 working four hours a day. She increased her work hours to six hours a day on August 5, 2004. Appellant returned to full-time light duty on December 1, 2004.

Appellant submitted a duty status report dated June 16, 2006 providing additional work restrictions due to low back pain. A duty status report dated July 26, 2006 found that she was totally disabled for two days due to low back strain. On August 28, 2006 appellant's attending physician Dr. Pocosso Vaillarica, Board-certified in physical medicine and rehabilitation, diagnosed acutely exacerbated lumbosacral disc syndrome and stated that she had reinjured her back in the performance of duty. Dr. Vaillarica requested authorization for additional physical therapy.

The Office contacted the employing establishment on June 5, 2007 and was informed that appellant worked 40 hours a week with a pay rate of \$49,219.00 per year. The employing establishment stated that appellant was "presently out of work for another matter not related to this claim..."

By decision dated June 5, 2007, the Office found that appellant returned to full-time work as a modified letter carrier on December 1, 2004 earning \$875.35 per week and that her actual earnings in this position fairly and reasonably represented her wage-earning capacity. The Office stated that as she had performed the duties of the position for more than a year, the position "is considered suitable to your partially disabled condition." The Office found that appellant's actual earnings exceeded the wages of the position she held when injured and that her entitlement to compensation for wage loss ended the date she was reemployed with no loss in earning capacity and "your compensation payments have been terminated under this claim number."

Appellant telephoned the Office on June 11, 2007 contending that she was required to work beyond her work restrictions and was reinjured. She stated that she had not worked since July 2006. Appellant filed a notice of recurrence of disability on June 25, 2007 and alleged that she sustained a recurrence of total disability due to her January 21, 2004 employment injury on July 24, 2006.¹ She stated that on July 24, 2006 while delivering a parcel she aggravated the pain in her back and right leg.

Appellant requested reconsideration by letter dated June 25, 2007. She stated that she returned to work following a January 21, 2004 injury as a router which required limited walking. Appellant alleged that her supervisor, John Turner increased the walking requirements of her light-duty position and informed her that she was not walking fast enough. Appellant stated that on July 24, 2006 while delivering an express parcel she reinjured her back. She placed the parcel down and experienced pain and numbness in her lower back and right leg. Appellant stated that she had not returned to work since July 24, 2006 and was still receiving medical treatment. She indicated that the Office had denied this claim for a new injury and alleged that the July 24, 2006 incident should be considered a recurrence of disability. Appellant filed a claim for compensation for the period September 7, 2006 through June 25, 2007.

¹ As the Office has not issued a final decision on this claim, the Board will not address this for the first time on appeal. 20 C.F.R. § 501.2(c).

Appellant submitted a report dated June 6, 2007 from Dr. Benjamin Cohen, a Board-certified orthopedic surgeon, noting that she injured her low back in July 2006. Dr. Cohen diagnosed mechanical low back pain and radiculitis.

By decision dated July 30, 2007, the Office denied modification of the June 5, 2007 wage-earning capacity determination. The Office reviewed the evidence appellant submitted following the June 5, 2007 decision and found that she had implicated a new employment injury rather than a change in her accepted injury-related condition. The Office found that its initial decision was not in error, that appellant had not sustained a change in her injury-related condition and that there was no evidence that she had been rehabilitated.

LEGAL PRECEDENT -- ISSUE 1

Section 8115(a) of the Federal Employees' Compensation Act² 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 reasonable 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.³

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 of 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.⁴ The Office procedure manual provides in relevant part as follows:

"Factors Considered. To determine whether the claimant'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.

"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."⁵

² 5 U.S.C. §§ 8101-8193, § 8115(a).

³ *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

⁵ *Id.* at § 2.814.7a

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 his wage-earning capacity and "the work stoppage did not occur because of any change in his injury-related condition affecting the ability to work."⁶

The formula for determining loss of wage-earning capacity based on actual earnings,⁷ was developed in *Albert C. Shadrick*,⁸ has been codified by regulation at 20 C.F.R. § 10.403.⁹ 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.¹⁰

ANALYSIS -- ISSUE 1

In this case, appellant returned to full-time light-duty work on December 1, 2004. The Office issued a decision on June 5, 2007 finding that her actual earnings fairly and reasonably represented her wage-earning capacity. As she was earning more than her date-of-injury position she was not entitled to further compensation benefits after December 1, 2004. At the time the Office issued its June 5, 2007 decision the record supported that appellant had performed her light-duty position for at least 60 days, there was no evidence that her wages did not fairly and reasonably represent her wage-earning capacity as her kind of appointment and tour of duty were similar to her date-of-injury position and the employing establishment indicated that appellant had stopped work due to a separate matter not related to her January 2004 employment injury. Therefore, the Board finds that the Office properly issued the June 5, 2007 wage-earning capacity determination.

LEGAL PRECEDENT -- ISSUE 2

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless the original rating was in error, there is a material change in the nature and extent of the injury-related condition or that the employee has been retrained or otherwise vocationally rehabilitated. The burden of proof is on the party attempting to show a modification of the wage-earning capacity.¹¹

ANALYSIS -- ISSUE 2

Appellant requested reconsideration of the June 5, 2007 decision, contending that the original wage-earning capacity determination was in error or that she had sustained a material

⁶ *Id.* at § 2.814.7e

⁷ *Hayden C. Ross*, 55 ECAB 455, 463-64 (2004).

⁸ 5 ECAB 376 (1953).

⁹ 20 C.F.R. § 10.403.

¹⁰ *Id.* at § 10.403(d).

¹¹ *Swartz*, *supra* note 3 at 280.

change in the nature and extent of the injury-related condition. She stated that she stopped work on July 24, 2006. Appellant described the events of July 24, 2006 as delivering an express parcel which resulted in the reinjury of her back. She stated that she placed the parcel down and experienced pain and numbness in her lower back and right leg. The Office's regulations define a traumatic injury as a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected.¹² Based on appellant's description of the events of July 24, 2006, the Office properly determined that she experienced a new traumatic injury rather than a recurrence of disability or other change in the nature and extent of the injury-related condition resulting from her accepted January 2004 employment injury. Appellant was able to identify as to the time, place of occurrence and the member of the body affected by the external strain of placing the express parcel down. The Board finds that she has identified a new traumatic injury. For this reason, appellant has failed to establish that the June 5, 2007 wage-earning capacity determination was in error or that she has sustained a material change in the nature and extent of her injury-related condition.

As appellant did not meet her burden of proof in establishing that there was a material change in the nature and extent of her January 2004 injury-related condition or that the original determination was in fact erroneous and did not suggest that she was vocationally rehabilitated, she has failed to establish that the June 5, 2007 wage-earning capacity determination should be modified.

CONCLUSION

The Board finds that the Office properly determined on June 5, 2007 that appellant's limited-duty position fairly and reasonably represented her wage-earning capacity. The Board further finds that appellant failed to meet her burden of proof to modify the June 5, 2007 wage-earning capacity determination.

¹² 20 C.F.R. § 10.5(ee).

ORDER

IT IS HEREBY ORDERED THAT the July 30 and June 5, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 24, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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