

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

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**L.H., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Bunker Hill, IL, Employer**

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**Docket No. 10-1509  
Issued: April 20, 2011**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Judge

COLLEEN DUFFY KIKO, Judge

MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On May 12, 2010 appellant filed a timely appeal from an April 15, 2010 merit decision of the Office of Workers' Compensation Programs' which found that her actual earnings represented her wage-earning capacity. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> and 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 determined appellant's actual earnings as a modified rural carrier associate fairly and reasonably represented her wage-earning capacity.

**FACTUAL HISTORY**

On July 28, 2003 appellant, then a 43-year-old rural mail carrier, filed an occupational disease claim for bilateral hand and elbow conditions as a result of repetitive work tasks. The Office accepted the claim for bilateral carpal tunnel syndrome and bilateral ulnar nerve

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

syndrome and authorized several surgeries after which she returned to full-time work.<sup>2</sup> By decision dated November 23, 2004, appellant received a schedule award for 11 percent impairment of both upper extremities. She underwent an authorized left ulnar nerve surgery on June 5, 2005. On July 24, 2006 appellant received an additional schedule award for seven percent impairment of the left arm. Another schedule award for six additional percent impairment of the left arm was issued on June 14, 2007. Appellant underwent authorized left ulnar open reduction and fixation surgery on April 18, 2008 and right wrist nonunion ulnar shortening osteotomy on February 12, 2009.

On July 15, 2009 appellant returned to work eight hours a day in a modified rural carrier position with wages of \$1,172.64 per week. The position required her to case mail four hours a day; answer telephones, sort and purge paperwork, data entry; and scan incoming parcels, verify key inventory four hours a day. The physical requirements of the position entailed sitting, standing, walking, bending/stooping, twisting, pushing/pulling, simple grasping up to eight hours, fine manipulation and reaching above shoulder up to four hours and lifting up to 10 pounds intermittently up to eight hours. A July 21, 2009 functional capacity evaluation indicated that appellant tested out at a sedentary physical demand level, which included only 10 pounds of occasional lifting.

On August 3, 2009 appellant's attending physician Dr. Mark Greatting, a Board-certified orthopedic surgeon, noted appellant was going to have surgery with regard to her right trigger thumb. He also reviewed the results of a July 21, 2009 functional capacity evaluation and discussed permanent work restrictions, which he outlined in an August 3, 2009 duty status report. Dr. Greatting stated that appellant was limited to lifting/carrying 10 pounds intermittently for eight hours a day, pulling and pushing no more than 10 pounds three hours a day and fine manipulation and reaching above shoulder for four hours a day.

On August 19, 2009 the Office expanded the claim to include right trigger thumb. Appellant stopped work September 15, 2009 to undergo authorized right trigger thumb surgery. The Office paid appropriate benefits. Appellant returned to the modified rural carrier position on September 21, 2009 and continued working in that capacity.

On November 25, 2009 the employing establishment confirmed that the current pay rate for the job and step of rural carrier associate when appellant was injured was \$60,978.00 per annum or \$1,172.64 per week and the pay rate for appellant's current position as modified rural carrier associate was also \$60,978.00 per annum or \$1,172.64 per week.

By decision dated November 27, 2009, the Office found that appellant had been employed as a full-time modified rural carrier associate effective July 15, 2009 and had actual earnings of \$1,172.65 per week, which was equivalent to the pay rate for the position she held at the time of her injury. It concluded that the job represented her wage-earning capacity and reduced her wage-loss compensation to zero. The Office noted that the decision did not affect appellant's entitlement to medical benefits.

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<sup>2</sup> Appellant underwent right carpal tunnel release on November 11, 2003; left carpal tunnel release on November 25, 2003; left ulnar transposition and decompression surgery on February 10, 2004; right ulnar anterior transposition on February 24, 2004; and left carpal tunnel release redo surgery on June 29, 2004.

On December 8, 2009 appellant disagreed with the Office's decision and requested a telephonic hearing, which was held March 1, 2010. In an undated statement, she asserted that she could only work on very limited restrictions and could not perform her regular job. Appellant also stated that she was not a modified rural carrier associate, which is classified as a substitute. At the hearing, her attorney argued that appellant's modified position was a make work job. Appellant testified that she was working in a classified position where others could bid on her job and counsel withdrew his argument that appellant's modified position was a make work job. She testified that while she was not working her former job and was earning wages equal to or more than her regular job, the modified position did not include a mileage allowance. No additional evidence was submitted.

By decision dated April 15, 2010, an Office hearing representative affirmed the November 27, 2009 decision.

### **LEGAL PRECEDENT**

Section 8115(a) of the Act provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his earnings fairly and reasonably represent his wage-earning capacity.<sup>3</sup> 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<sup>4</sup> and actual earnings will be presumed to fairly and reasonably represent wage-earning capacity only in the absence of contrary evidence.<sup>5</sup>

### **ANALYSIS**

Appellant was a full-time rural carrier associate at the time of her injury on January 21, 2003. The Office accepted her claim for bilateral carpal tunnel syndrome, bilateral ulnar nerve syndrome and right trigger thumb and authorized several surgeries for those conditions. Appellant accepted a permanent limited-duty job as a modified rural carrier associate effective July 15, 2009 with wages of \$1,172.65 per week. On August 3, 2009 Dr. Greatting reviewed the results of a July 21, 2009 functional capacity evaluation and issued permanent medical work restrictions, which limited her to no more than 10 pounds lifting/carrying for eight hours a day, no more than 10 pounds pulling and pushing for three hours a day; and no fine manipulation and reaching above shoulder for more than four hours a day. The modified rural carrier associate position was in compliance with the medical restrictions set forth by him of up to 10 pounds of lifting for eight hours a day and up to four hours of fine manipulation and reaching above shoulder up to four hours a day. While Dr. Greatting listed more restrictive limitations on the amount of time and weight for pulling and pushing, his restrictions are generally consistent with the requirements of the job appellant performed and there is no

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<sup>3</sup> 5 U.S.C. § 8115(a).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (July 1997); see *William D. Emory*, 47 ECAB 365 (1996).

<sup>5</sup> See *Mary Jo Colvert*, 45 ECAB 575 (1994).

indication that she was not able to perform the modified position. Appellant performed the position of modified rural carrier for more than 60 days after September 21, 2009, when she returned following her authorized right trigger thumb surgery and received actual earnings based on her employment. The evidence establishes that she was able to perform the modified rural carrier duties.

The Office properly determined that appellant's actual earnings as a modified rural carrier fairly and reasonably represented her wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity must be accepted as such measure.<sup>6</sup> The Office determined that appellant's current position provided her with a wage-earning capacity equal to the wages of the position she held at the time of her injury. The current pay rate for the job and step of rural carrier when she was injured was \$60,978.00 per annum or \$1,172.64 per week. The pay rate for appellant's current position was also \$60,978.00 per annum or \$1,172.64 per week. On November 27, 2009 the Office confirmed that she had completed 60 days of successful work in the modified position. The Board finds that the modified rural carrier position that appellant began working on July 15, 2009 and resumed on September 21, 2009 following her right trigger thumb surgery is consistent with her work restrictions and abilities. Appellant worked in the position for over 60 days. Her performance of this position in excess of 60 days is persuasive evidence that the position represents her wage-earning capacity.<sup>7</sup> There is no evidence that the position was seasonal, temporary or makeshift work designed for appellant's particular needs.<sup>8</sup> While appellant's attorney initially alleged that the position was makeshift in nature and designed to meet appellant's particular needs, this argument was withdrawn after she confirmed that she was working in a classified position where others could bid on her job. The fact that the modified rural carrier position was open for others to bid on and work supports that the position was not a makeshift or odd-lot position designed for appellant's particular needs and her actual earnings in the position fairly and reasonably represent her wage-earning capacity. The Office properly determined that appellant had no loss of wage-earning capacity as her actual wages met or exceeded the current pay rate for the position she held at the time of injury.<sup>9</sup>

Appellant asserted that, since she no longer receives a mileage allowance that her date of injury position provided, she has not been fairly compensated for her loss of income. The Office procedures do not list the use of a private vehicle as an administrative inclusion or allowance in computing an employee's pay rate.<sup>10</sup> There is no other evidence supporting that the Office improperly determined appellant's wage-earning capacity.

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<sup>6</sup> *Dennis E. Maddy*, 47 ECAB 259 (1995).

<sup>7</sup> *See supra* note 4.

<sup>8</sup> *Elbert Hicks*, 49 ECAB 283 (1998).

<sup>9</sup> *Gregory A. Compton*, 45 ECAB 154 (1993).

<sup>10</sup> *See supra* note 4 at Chapter 2.900.7(b) (December 1995).

**CONCLUSION**

The Board finds that the Office properly determined that appellant's actual earnings fairly and accurately represented her wage-earning capacity.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 15, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 20, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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