

On July 7, 1992 appellant, then a 33-year-old distribution clerk, filed an occupational disease claim alleging that she developed a right shoulder and neck condition due to factors of her federal employment. At the time of her injury, appellant was earning \$28,584.00 per year

and entitled to both night differential pay and Sunday premium pay. The Office accepted appellant's claim for cervical strain and right shoulder strain on September 29, 1992. It authorized surgery on March 17, 1993. Appellant underwent arthroscopy of the right shoulder with subacromial decompression and mini-repair of the rotator cuff on March 30, 1993. She returned to full-time light-duty work on February 3, 1994 on her original duty tour. The Office granted appellant schedule awards for five percent impairment of her right arm.

In a letter dated February 15, 1994, appellant stated that she was working full time and requested a rehabilitation position. She accepted a general clerk, modified, position on June 9, 1995 with a salary of \$34,105.00 per year. Appellant's work schedule was from 8:30 a.m. to 5:00 p.m. and her scheduled days off were Sunday and Monday. In an undated handwritten note, appellant stated:

"I worked Tour I from 10:00 (p.m.) to 6:30 a.m.. At this point I am willing to take as volunteer to Tour II work from 8:30 a.m. to 5:00 (p.m.). I was also aware that there was work available for me in Tour I with my restrictions."

In a decision dated October 18, 1995, the Office determined that the general clerk, modified, position fairly and reasonably represented appellant's wage-earning capacity. It reduced appellant's compensation benefits to zero as her actual earnings in this position meet or exceeded the wages of her date-of-injury position. The Office's decision did not include any pay rate calculations.

Appellant filed a recurrence of disability claim on March 10, 2005 alleging that she had developed a left shoulder condition due to the limited range of motion of her right shoulder. She stated that she used her left arm for overhead lifting and reaching above the shoulder. Appellant stopped work on March 10, 2005 and returned to work on March 29, 2005.

On September 5, 2005 appellant submitted a claim for compensation requesting night differential pay and Sunday premium pay for the period June 10, 1995 through July 22, 2005. She also submitted a statement in support of this claim, dated September 5, 2005, noting that she began working in day position on June 10, 1995. Appellant believed this position was permanent, but the employing establishment recently eliminated the general clerk (modified) position and returned her to her date-of-injury position. Appellant stated: "The reason I was again assigned to Tour I job was because the department was under the impression that I was being paid the night differential and weekend premium, which was not true." She alleged that she was ordered by management to write a statement that the change in shifts was voluntary, but that at the time she felt she had no choice but to accept the sedentary day job due to restrictions from her right shoulder injury. Appellant requested compensation from the lost night pay differential and Sunday premium pay.

In a letter dated September 7, 2005, the Office requested additional factual and medical evidence in support of appellant's consequential injury claim. Dr. Edward D. Campbell, Jr., a Board-certified orthopedic surgeon, examined appellant on June 13, 2005 and stated that appellant had undergone a rotator cuff repair and subacromial decompression. In a note dated July 20, 2005, Dr. Campbell stated: "At this stage, based on her repetitive motion and the fact that she had a rotator cuff on the opposite side that was repaired 10 years ago from a similar-type

injury, it certainly appears that the rotator cuff tear, based on her history is really job related on the left.” He continued to recommend light-duty work.

The employing establishment responded to appellant’s allegations regarding her loss pay on February 7, 2006 and denied that appellant was forced onto the day shift.

By decision dated February 9, 2006, the Office denied appellant’s claim for a consequential left shoulder injury finding that Dr. Campbell attributed her left shoulder condition to her job duties rather than as a consequence of the right shoulder injury.¹

In a separate decision dated February 9, 2006, the Office denied appellant’s claim for disability compensation consisting of night differential pay and Sunday premium pay for the period June 10, 1995 through July 22, 2005 on the grounds that she had failed to submit evidence establishing that these lost wages were incidental to her accepted right shoulder condition. The Office stated:

“Since the [employing establishment] had work available in your original work shift that had ND [night differential] and SP [Sunday premium], but you declined that work shift and volunteered to work a different work which did not include ND and SP, this Office finds that the lost wages of ND and SP were not incidental to your disability or any medical treatment such that you are entitled to wage-loss compensation.”

The employing establishment submitted a statement dated February 10, 2006 from Connie McCarthy regarding appellant’s change of work schedule. Ms. McCarthy stated that appellant requested placement in the rehabilitation program and wanted to work day hours. She further denied forcing appellant to write a statement that she had volunteered for the day shift position. Ms. McCarthy included a letter dated June 6, 1995 to appellant’s supervisor, requesting approval for a transfer of appellant, noting, “[Appellant] is presently assigned to Tour I, but can no longer case mail.”

Appellant requested reconsideration of the Office’s February 9, 2006 decision on April 8, 2006. She alleged that she was not offered work on Tour I at the time she took the rehabilitation position. Appellant alleged that she could not waive her compensation rights and that her handwritten note was unenforceable. She further noted that she was moved to Tour II due to her inability to case mail and as such, her loss of night differential pay and Sunday premium pay was incidental to her disability.

By decision dated July 6, 2006, the Office reopened appellant’s claim for consideration of the merits and denied modification of its February 9, 2006 decision, finding that appellant had not established entitlement to additional wage-loss compensation.

¹ The Office recommended that appellant file a claim for an occupational disease for this injury.

LEGAL PRECEDENT -- ISSUE 1

It is an accepted principle of workers' compensation law that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct.² In discussing the range of compensable consequences, once the primary injury is causally connected with the employment, then a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.³

A claimant bears the burden of proof to establish her claim for a consequential injury. As part of this burden, a claimant must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship.⁴ Causal relationship is a medical question that can generally be resolved only by rationalized medical opinion evidence.⁵ Rationalized medical evidence, is evidence which relates a work incident, work injury or factors of employment to a claimant's condition, with stated reasons of a physician.⁶ The opinion of the physician must be one of reasonable medical certainty and must be supported by medical rational explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.⁷

ANALYSIS -- ISSUE 1

Appellant alleged that she developed a left shoulder condition as a consequence of her accepted right shoulder condition. She stated that due to her limitations regarding reaching and lifting above her shoulder and head with her right arm, she was required to overuse her left shoulder for such activities. In support of her claim, appellant submitted reports from Dr. Campbell, a Board-certified orthopedic surgeon, noting that he performed a surgical repair of appellant's left shoulder and that appellant was limited to light-duty work as a result of this surgery. In his July 20, 2005 report, Dr. Campbell opined that as appellant's right shoulder condition resulted from her work duties, so did her left shoulder condition. He did not indicate that appellant's left shoulder condition was a consequence of her right shoulder injury, but instead appears to attribute this condition to unnamed but similar job duties which resulted in the accepted right shoulder condition. Appellant failed to submit any other medical opinion offering an opinion on the causal relationship between her accepted employment injury to her right shoulder and her alleged consequential left shoulder injury. As there is no medical evidence

² *Albert F. Ranieri*, 55 ECAB 598, 602 (2004); A. Larson, *The Law of Workers' Compensation* § 10.01 (2000).

³ *Charles W. Downey*, 54 ECAB 421, 422-23 (2003).

⁴ *Id.*

⁵ *Steven S. Saleh*, 55 ECAB 169, 172 (2003).

⁶ *Downey*, *supra* note 3.

⁷ *Id.*

attributing appellant's left shoulder condition to her accepted employment injury, she has not met her burden of proof in establishing a consequential injury and the Office properly denied her claim.

LEGAL PRECEDENT -- ISSUE 2

A wage-earning capacity decision is a determination that, a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁸

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.⁹

ANALYSIS -- ISSUE 2

Following appellant's submission of claim for compensation requesting Sunday premium pay and night differential pay from June 10, 1995 to July 22, 2005, the Office developed the evidence and determined that the issue presented was whether appellant had lost wages of night differential pay and Sunday premium pay incidental to her disability or any medical treatment such that she was entitled to wage-loss compensation. Under the circumstances of the case, however, the Board finds that the issue presented was whether the October 18, 1995 loss of wage-earning capacity determination should be modified.

Through the filing of the claim for compensation requesting Sunday premium pay and night differential pay from June 10, 1995, the date appellant began working in the Tour II general clerk, modified, position to July 22, 2005, appellant alleged that the original wage-earning capacity decision was incorrect as it was based on an incorrect pay rate. It is well established that either a claimant or the Office may seek to modify a formal loss of wage-earning capacity determination.¹⁰ The Board finds that appellant has requested modification of the October 18, 1995 loss of wage-earning capacity determination and entitled to a merit decision on that issue. On remand, the Office should develop the record as necessary and issue a *de novo* decision with regard to appellant's loss of wage-earning capacity.

CONCLUSION

The Board finds that appellant failed to meet her burden of proof in establishing that she developed a left shoulder condition and a consequence of her accepted right shoulder injury. The

⁸ *Katherine T. Kreger*, 55 ECAB 633, 634-35 (2004); *Sharon C. Clement*, 55 ECAB 552, 555-56 (2004).

⁹ *Id.*

¹⁰ *Gary L. Moreland*, 54 ECAB 638, 640 (2003).

Board further finds that the Office failed to properly address appellant's request for modification of the October 18, 1995 wage-earning capacity determination and that the case must be remanded for additional development and a proper decision on this issue.

ORDER

IT IS HEREBY ORDERED THAT the July 6 and February 9, 2006 decisions regarding appellant's claim for compensation are set aside and remanded for further development consistent with this decision of the Board. The February 9, 2006 decision denying her claim for a consequential injury is affirmed.

Issued: January 31, 2007
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