

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

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**K.V., Appellant**

**and**

**U.S. POSTAL SERVICE, PROCESSING &  
DISTRIBUTION FACILITY, Anaheim, CA,  
Employer**

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**Docket No. 11-145  
Issued: July 22, 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 October 25, 2010 appellant, through her attorney, filed a timely appeal from an August 13, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying modification of a wage-earning capacity determination. 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 this case.

**ISSUE**

The issue is whether appellant has established that OWCP's wage-earning capacity determination should be modified.

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

## **FACTUAL HISTORY**

On February 26, 1999 appellant, then a 38-year-old postal clerk, filed an occupational disease claim alleging that she sustained low back pain radiating into both legs due to factors of her federal employment. OWCP accepted her claim for lumbar strain and an acceleration of a lumbar degenerative condition. It authorized a June 8, 1999 lumbar laminectomy and fusion.<sup>2</sup> Appellant stopped work on December 5, 1998 and returned to part-time modified employment on March 20, 2000.

On August 2, 2001 appellant accepted a July 6, 2001 rehabilitation job offer as a modified mail processor working six hours a day five days per week. The job offer provided that work assignments would be in strict compliance with her medical restrictions. The duties of the position included sorting mail and required no lifting over five pounds, bending, squatting, climbing, kneeling, pushing or pulling. The employing establishment informed appellant that the job offer was “created specifically for you.” Appellant returned to work on August 17, 2001.

On August 30, 2001 OWCP informally reduced appellant’s compensation based on her actual earnings as a modified mail carrier working 30 hours a week effective August 17, 2001.

In a supplemental report dated October 4, 2001, Dr. Michael A. Kropf, an attending Board-certified orthopedic surgeon, diagnosed status post fusion and chronic lumbar pain syndrome. He found that appellant could work five hours per day.

On October 4, 2001 the employing establishment revised its July 6, 2001 job offer and reduced appellant’s work hours to five hours per day effective October 6, 2001. The job offered provided, “All work assignments will be in strict compliance with your medical restrictions imposed by your treating physician. Please bear in mind that this limited-duty job offer is only valid throughout your recovery period and *is not* a permanent position.” (Emphasis in the original.) Appellant accepted the position on October 10, 2001.

By decision dated July 25 2002, OWCP reduced appellant’s compensation based on its finding that her actual earnings as a part-time modified mail processor working five hours per day effective October 6, 2001 fairly and reasonably represented her wage-earning capacity.

In a duty status report dated October 23, 2008, Dr. Kropf found that appellant should work no more than four days per week and no more than two consecutive days. On February 2, 2009 appellant filed a notice of recurrence of disability on March 3, 2008 due to her accepted employment injury based on Dr. Kropf’s reduction in work hours. She indicated that she missed time from work due to the alleged recurrence of disability beginning October 31, 2008. Appellant also filed a claim for compensation beginning October 31, 2008.

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<sup>2</sup> By decision dated October 5, 2000, OWCP denied appellant’s claim for compensation from July 15 to 28, 2000, August 12 to 26, 2000 and August 26 to September 15, 2000 as the medical evidence was insufficient to show that she was totally disabled from employment.

On April 30, 2009 the employing establishment offered appellant a position working four and a half hours per day. OWCP paid her compensation for the difference in wages from her five-hour-a-day position.

By decision dated October 9, 2009, OWCP found that appellant did not sustain a recurrence of disability on October 31, 2008. It determined that she failed to establish modification of the July 2002 wage-earning capacity determination.

Appellant filed claims for compensation due to wage loss as a result of a reduction in hours under the National Reassessment Program. On November 4, 2009 OWCP advised her that it proposed to terminate her compensation as she did not establish modification of its formal wage-earning capacity determination. On February 2, 2010 OWCP finalized its termination of appellant's compensation for intermittent wage-loss due to the National Reassessment Program (NRP).

On February 20, 2010 appellant, through her attorney, requested a telephone hearing. At the telephonic hearing, held on June 16, 2010, she related that her work hours varied beginning October 2008 due to the NRP. Appellant's attorney asserted that she had returned to a position created for her and that she should receive compensation due to its withdrawal.

By decision dated August 13, 2010, a hearing representative affirmed the October 9, 2009 decision. She found that appellant had not established modification of the July 25, 2002 wage-earning capacity determination.

### **LEGAL PRECEDENT**

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.<sup>3</sup> Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>4</sup>

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.<sup>5</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>6</sup>

When a formal loss of wage-earning capacity determination is in place and light duty is withdrawn, the proper standard of review is not whether appellant sustained a recurrence of disability, but whether OWCP should modify its decision according to the established criteria for

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<sup>3</sup> See 5 U.S.C. § 8115 (determination of wage-earning capacity).

<sup>4</sup> *Sharon C. Clement*, 55 ECAB 552 (2004).

<sup>5</sup> *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

<sup>6</sup> *Id.*

modifying a formal loss of wage-earning capacity determination.<sup>7</sup> OWCP's procedures provide that when the employing establishment has withdrawn a light-duty assignment, which accommodated the claimant's work restrictions and a formal wage-earning capacity decision has been issued, the decision will remain in place, unless one of the three accepted reasons for modification applies.<sup>8</sup>

### ANALYSIS

OWCP accepted that appellant sustained lumbar strain and an acceleration of degeneration of the lumbar spine causally related to factors of her federal employment. On June 8, 1999 appellant underwent a lumbar laminectomy and fusion. On March 20, 2000 she returned to limited-duty employment on a part-time basis.

On July 6, 2001 the employing establishment offered appellant a position as a modified mail processor working six hours per day. The job consisted of sorting mail and did not require any lifting over five pounds. The employing establishment indicated that the position was specifically created for appellant and would be in compliance with her restrictions. Appellant began working in the position on August 17, 2001.

On October 4, 2001 the employing establishment revised its July 6, 2001 job offer to five hours per day beginning October 6, 2001. It advised appellant that the work assignments would strictly comply with her medical restrictions. The offer provided that the job was valid only while she recovered from her injury and emphasized that the position was not permanent.

In a decision dated July 25, 2002, OWCP reduced appellant's compensation after finding that her actual earnings as a part-time modified mail carrier working five hours per week beginning October 6, 2001 fairly and reasonably represented her wage-earning capacity. On April 30, 2009 appellant filed claims for compensation due to a reduction in work hours as a result of the NRP.<sup>9</sup>

Once a wage-earning capacity is in place, it can only be modified if appellant can show that her condition has materially worsened or if there is sufficient evidence to find that the original determination was in error.<sup>10</sup> OWCP based its wage-earning capacity determination on the October 6, 2001 position of part-time modified carrier. The employing establishment, however, specifically provided in its job offer that the offered position was not permanent. When determining whether earnings in alternative employment fairly and reasonably represent

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<sup>7</sup> *Id.*

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7(a)(5) (October 2005).

<sup>9</sup> Appellant also alleged that she sustained a recurrence of disability on October 31, 2008 due to her physician's finding that she could work only four hours per day. OWCP initially paid her compensation for lost time from work. In a decision dated October 9, 2009, it found that appellant did not establish an employment-related recurrence of disability. By decision dated February 2, 2010, OWCP purported to terminate appellant's compensation for intermittent wage loss as she did not establish modification of the established wage-earning capacity determination. However, it has the burden to terminate compensation.

<sup>10</sup> *See supra* note 5.

the employee's wage-earning capacity, OWCP may not consider the work suitable when the job is temporary and the employee's previous job was permanent.<sup>11</sup> It does not appear that appellant's date-of-injury position was temporary and there is no evidence that the October 6, 2010 limited-duty assignment was formally classified as a permanent position. Consequently, she has established that the July 25, 2002 wage-earning capacity should be modified. Upon return of the case record, OWCP should adjudicate appellant's claim for intermittent wage-loss compensation.

### **CONCLUSION**

The Board finds that appellant has established that OWCP's wage-earning capacity determination should be modified.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the August 13, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 22, 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

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<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997); *see also R.J.*, Docket No. 10-2114 (issued June 15, 2011).