U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board
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In the Matter of KAY FOUST <u>and</u> U.S. POSTAL SERVICE,
POST OFFICE, Tacoma, WA

Docket No. 02-1764; Submitted on the Record;
Issued December 2, 2002
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DECISION and ORDER

Before   ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's actual earnings from March 24 to June 29, 2001 fairly and reasonably represented her wage-earning capacity.

On February 22, 2001 appellant, then a 36-year-old letter carrier, filed a claim alleging that she sustained an injury on February 13, 2001 when she tripped and fell while in the performance of duty. The reverse of the claim form indicated that appellant was a casual employee with a flexible schedule. Appellant worked in a temporary light-duty position until June 29, 2001, when her casual appointment ended. The Office accepted the claim for a lumbar strain with radiculopathy and subluxation of the lumbar spine.

In a decision dated May 13, 2002, the Office determined that her actual earnings from March 24 to June 29, 2001 fairly and reasonably represented her wage-earning capacity. The Office also determined that appellant had no loss of wage-earning capacity.

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

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.[1] 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.[2]

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[1] 5 U.S.C. § 8115(a).

[2] *Dennis E. Maddy,* 47 ECAB 259 (1995).

At the time of injury appellant was a "casual" employee with the employing establishment, with a part-time flexible tour of duty.[3] Appellant returned to work in a temporary, part-time light-duty position. Although generally a temporary or part-time position is not appropriate for a wage-earning capacity determination, if the job held at the time of injury was temporary or part time, an equivalent position may be used to determine wage-earning capacity.[4] Office procedures state, "reemployment of a temporary or casual worker in another temporary or casual employing establishment position is proper, as long as it will last at least 90 days.…"[5]

In this case, the record indicates that on February 22, 2001 appellant signed an offer for a "temporary limited[-]duty job assignment" to answer telephones and perform other administrative duties as required. The assignment was to begin on February 22, 2001 with no specific ending date. There is also a similar job offer dated April 19, 2001. According to an Office memorandum dated May 13, 2002, the employing establishment reported that appellant worked from March 24 to June 29, 2001 in the limited-duty position. Based on this evidence, appellant worked more than 90 days in the position.

Since appellant was a temporary employee at the time of injury, the Board finds that actual earnings from a temporary position that lasted for more than 90 days may be used to determine appellant's wage-earning capacity. The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,[6] has been codified at 20 C.F.R. § 10.403. The Office initially compares the actual earnings with the current pay rate for the date-of-injury position.

In this regard, the Board notes that in a March 19, 2002 letter, appellant cites 5 U.S.C. § 8114(d)(2) and states that another part-time flexible coworker had averaged almost 40 hours per week and yet appellant's light-duty assignment was only for approximately 29 hours per week. At the time of injury, however, appellant was a casual employee and there is no evidence that she worked 40 hours per week. According to the employing establishment, at the time of injury appellant had been working approximately 28.6 hours per week since being hired in November 2000. As a temporary employee in a position that would not have afforded employment for substantially a whole year, appellant's pay rate is determined under section 8114(d)(3).[7] This section provides that average annual earnings are a sum reasonably representing the earning capacity of the injured employee, having regard to previous earnings of the employee in federal employment, other federal employee in the same or similar class working in the same or similar employment, or other relevant factors. In this case, it is reasonable to use appellant's average weekly earnings of $371.77 at the time of injury, which

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[3] As the Board noted in *Afegalai L. Boone,* 53 ECAB ___ (Docket No. 01-2224, issued May 15, 2002), a causal employee is a temporary appointment, of up to two 90-day terms in a calendar year; *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.3 (December 1995).

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

[5] *Id.* at Chapter 2.814.7(a) (July 1997).

[6] 5 ECAB 376 (1953).

[7] 5 U.S.C. § 8114(d)(3).

represent a part-time flexible letter carrier working approximately 28.6 hours per week at $13.00 per hour.

In the light-duty job, appellant continued to earn $13.00 per hour, working approximately 29.2 hours per week for average weekly earnings of $405.35. The Board finds that since appellant's actual earnings were equal to or greater than the current date-of-injury pay rate, the Office properly determined that appellant had no loss of wage-earning capacity.

The decision of the Office of Workers' Compensation Programs dated May 13, 2002 is affirmed.

Dated, Washington, DC
        December 2, 2002

                                              Alec J. Koromilas
                                              Member

                                              David S. Gerson
                                              Alternate Member

                                              A. Peter Kanjorski
                                              Alternate Member