

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

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**A.P., Appellant** )

and )

**DEPARTMENT OF AGRICULTURE, FOREST )  
SERVICE, Ironwood, MI, Employer** )  
\_\_\_\_\_ )

**Docket No. 06-1428  
Issued: November 29, 2006**

*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, Chief Judge  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On June 14, 2006 appellant filed a timely appeal of a May 19, 2006 merit decision of an Office of Workers' Compensation Programs' hearing representative regarding a wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether the Office properly determined appellant's actual earnings as an information receptionist fairly and reasonably represented his wage-earning capacity.

**FACTUAL HISTORY**

On July 9, 2002 appellant, then a 26-year-old firefighter, filed a traumatic injury claim (Form CA-1) alleging that he sustained a left knee injury while climbing a hill. The claim form indicated that appellant was paid at \$11.32 per hour. The Office accepted the claim for left medial meniscal tear and left knee internal derangement

The employing establishment reported in an October 10, 2003 letter that appellant had been employed at the time of injury as an emergency casual firefighter. An enclosed personnel handbook regarding the hiring of such emergency firefighters stated, "Such hiring is of uncertain or purely temporary duration, and shall be terminated when other employment methods can be initiated." The employing establishment indicated that appellant had worked on several emergency assignments from June to September 2002, ranging from 6- to 16-day assignments. According to the employing establishment, more emergency crews were dispatched that year than in previous years.

On October 20, 2004 the employing establishment offered appellant a position as an information receptionist. The position was a temporary position from November 1, 2004, not to exceed February 5, 2005, at 40 hours per week. The pay rate was \$12.79 per hour. On October 27, 2004 the employing establishment indicated that the position began on November 2, 2004. Appellant accepted the position and began working on November 2, 2004.

By decision dated January 5, 2005, the Office determined appellant's actual wages as an information receptionist fairly and reasonably represented his wage-earning capacity. The Office determined that appellant's actual wages met or exceeded his date-of-injury wages. Therefore, he did not have a loss of wage-earning capacity.<sup>1</sup>

Appellant requested a hearing, which was held on March 22, 2006. At the hearing appellant acknowledged that an emergency firefighter position was temporary by nature because he was called to work only when there was a fire to fight, but it was not equivalent to a temporary job that only lasts for 90 days. Appellant argued that in the firefighter position one is constantly recalled, while the information receptionist position is a temporary job that lasts for a fixed period.

By decision dated May 19, 2006, the Office hearing representative affirmed the January 5, 2005 decision.

### **LEGAL PRECEDENT -- ISSUE 1**

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.<sup>2</sup> 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.<sup>3</sup>

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<sup>1</sup> The Office found that current pay rate for date-of-injury position was \$468.77 per week, based on a full-time position at \$11.68 per hour. The Office indicated that appellant had been working in nonfederal employment as a full-time firefighter at the time of injury. The actual wages were \$513.32 per week, based on a pay rate of \$12.79 per hour.

<sup>2</sup> 5 U.S.C. § 8115(a).

<sup>3</sup> *Dennis E. Maddy*, 47 ECAB 259 (1995).

The Office's procedure manual provides guidelines for determining wage-earning capacity based on actual earnings:

“a. *Factors considered.* To determine whether the claimant's work fairly and reasonable represents his or her WEC [wage-earning capacity], the CE [claims examiner] should consider whether the kind of appointment and tour of duty (see FECA PM 2-900.3) are at least equivalent to those of the job held on date of injury. Unless they are, the CE may not consider the work suitable.

“For instance, reemployment of a temporary or casual worker in another temporary or casual (USPS) position is proper, as long as it will last at least 90 days, and reemployment of a term or transitional (USPS) worker in another term or transitional position is likewise acceptable. However, the reemployment may not be considered suitable when:

“(1) *The job is part-time* (unless the claimant was part-time worker at the time of injury) or sporadic in nature;

“(2) *The job is seasonal* in an area where year-round employment is available....

“(3) *The job is temporary* where the claimant's previous job was permanent.”<sup>4</sup>

### **ANALYSIS -- ISSUE 1**

The evidence reflects that appellant's firefighter position at the time of injury was a temporary position. If a temporary job, then the Office may use actual wages from a temporary position such as the information receptionist position.<sup>5</sup> The record clearly establishes that the emergency firefighter position was a temporary job. Appellant was hired for short-term periods as needed to assist in fighting fires. The hiring was of “uncertain and purely temporary duration.” Appellant acknowledged that the job was temporary in nature. He argued that, since he was generally rehired on a consistent basis during the summer of 2002, that it should not be treated as a temporary job equivalent to the information receptionist position. There is, however, no authority for recognizing different categories of temporary positions in a wage-earning capacity determination. The emergency firefighter job was, as the evidence shows, temporary in nature. Therefore the Office may use actual wages in a temporary position to make a wage-earning capacity determination in this case.

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<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997).

<sup>5</sup> If the claimant is not in a temporary position at the time of injury, a temporary job is not appropriate for a wage-earning capacity determination. See *Pamela J. Darling*, 49 ECAB 286 (1998).

Appellant worked in the position more than 60 days,<sup>6</sup> and the temporary position was available for more than 90 days. Therefore the Office properly followed its procedures in its wage-earning capacity determination. As noted above, actual wages are generally the best measure of wage-earning capacity. The Board finds that the Office properly determined actual wages earned in the information receptionist position fairly and reasonably represented wage-earning capacity. The Office found that actual wages exceeded the current pay rate of the date-of-injury position, and there is no contrary evidence.<sup>7</sup> Accordingly, the Office properly found appellant had no loss of wage-earning capacity.

### **CONCLUSION**

The Office properly determined that actual wages as an information receptionist fairly and reasonably represented appellant's wage-earning capacity.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 19, 2006 is affirmed.

Issued: November 29, 2006  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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<sup>6</sup> The procedure manual states that after the claimant has been working for 60 days, the Office will determine whether actual earnings fairly and reasonably represent wage-earning capacity. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

<sup>7</sup> Wage earning capacity is determined by comparing the current pay rate for the date-of-injury position with the actual wages earned. 20 C.F.R. § 10.403 (1999). The Office used a current pay rate for a full-time firefighter, even though appellant had been in a temporary firefighter position. A pay rate for a full-time position may be used for a non full-time worker if there are concurrent similar earnings showing the worker had the capacity to work full time. *See Irwin E. Goldman*, 23 ECAB 6 (1971).