



gave out.” The Office accepted his claim for lumbar strain and a herniated disc at the L4-5 level. Appellant received compensation for temporary total disability on the periodic rolls.

On April 22, 2005 Dr. Thomas J. Whalen, the attending internist, reported that appellant could perform sedentary work as defined by the Department of Labor, *Dictionary of Occupational Titles* (DOT) for only four hours a day. The Office referred appellant to vocational rehabilitation services.

The Office rehabilitation counselor found that appellant was able to perform the job of repair order clerk, based on the medically determinable residuals of the accepted injury and taking into consideration all significant preexisting impairments and pertinent nonmedical factors. She reported: “The job is being performed in sufficient numbers so as to make it reasonably available to the claimant within his/her commuting area. It is available full and part time.” The Office rehabilitation counselor reported a wage rate of \$756.00 per week and identified the source of this wage data as the New Mexico Department of Labor 2004 Wage Survey.

Appellant notified the Office that he had found work as a clerk at a men’s clothing store beginning October 31, 2005. The job was part-time 4 hours a day, 20 hours a week -- and paid \$5.50 an hour. He thanked the Office: “I appreciate your help and the excellent resume and coaching you have done with me is largely responsible for me attaining this position.”

In her final report, the Office rehabilitation counselor stated:

“Injured worker found work on his own working 20 hours a week in retail sales at a men’s clothing store earning \$5.50 per hour. The other jobs identified would have utilized his past skills and would have paid more. He has successfully held that job over 60 days.”

On February 21, 2006 the Office proposed to reduce appellant’s compensation. The Office found that appellant was no longer totally disabled for work and had the capacity to earn wages working four hours a day as a repair order clerk earning \$378.00 a week. The Office found that the constructed position was medically and vocationally suitable and fairly and reasonably represented his wage-earning capacity.

Appellant’s attorney contacted the New Mexico Department of Labor, who referred him to a state employee familiar with the 2004 Wage Survey. The attorney asked whether there was any way to know what percentage of the 470 positions identified for the relevant title number were full-versus part-time positions. The state employee responded on March 6, 2006:

“About 60 occupations listed in the DOT are combined into the OES [Occupational Employment Statistics] code 43-5061 [Production, Planning and Expediting Clerks]. As noted, the estimated employment for OES Code 43-5061 in the Albuquerque area is 470. We do not know what percentage of these positions are full time or part time nor do we know how many of these positions are direct matches for DOT Code 221.382-022 [repair order clerk].”

By decision dated March 27, 2006, the Office finalized the reduction of appellant's compensation.

In an April 27, 2006 decision, the Office reviewed the merits of appellant's case and denied modification of its March 27, 2006 decision. The Office found that the constructed position of repair order clerk was more representative of appellant's ability to earn wages than the actual position of retail sales clerk, based on his education and experience. The Office also found that evidence from a state employee of unknown experience or position did not invalidate the opinion of the Office rehabilitation counselor on the issue of availability.

### **LEGAL PRECEDENT**

Section 8102(a) of the Federal Employees' Compensation Act provides that the United States "shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty."<sup>1</sup> Section 8106(a) provides in pertinent part as follows:

"If the disability is partial, the United States shall pay the employee during the disability monthly monetary compensation equal to 66<sup>2</sup>/<sub>3</sub> percent of the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability, which is known as his basic compensation for partial disability."<sup>2</sup>

In determining compensation for partial disability, the wage-earning capacity of an employee is determined by the employee's actual earnings if the employee's actual earnings fairly and reasonably represent his or her wage-earning capacity."<sup>3</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>4</sup>

If the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.<sup>5</sup>

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<sup>1</sup> 5 U.S.C. § 8102(a).

<sup>2</sup> *Id.* at § 8106(a).

<sup>3</sup> *Id.* at § 8115(a).

<sup>4</sup> *Don J. Mazurek*, 46 ECAB 447 (1995).

<sup>5</sup> 5 U.S.C. § 8115(a).

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>6</sup>

### ANALYSIS

The Office issued its March 27, 2006 decision reducing appellant's compensation based on his capacity to earn wages in the constructed position of repair order clerk. At that time, he had actual earnings as a retail sales clerk at a men's clothing store. But in neither the February 21, 2006 proposed reduction of compensation or the March 27, 2006 final decision did the Office address this matter. Because the Office made no finding that appellant's actual earnings did not fairly and reasonably represent his wage-earning capacity, the Board will reverse the Office's March 27, 2006 decision reducing his compensation based on a constructed position.<sup>7</sup> The Office did not meet its burden of proof.

The Office addressed appellant's actual earnings when it reopened his case for a merit review on April 27, 2006. The Office explained that the mean salary for the type of position for which he was rated was \$20.54 an hour. The Office noted that appellant had obtained a four-year degree, took multiple classes in electricity and refrigeration and had attempted to test for a journeyman electrician, "which further supports the fact that the position of a [r]epair [o]rder [c]lerk is more representative of the claimant's ability to earn wages than that of a [r]etail [s]ales [c]lerk earning minimum wage of \$5.50 an hour."

The Office properly determined that actual earnings of \$5.50 an hour did not fairly and reasonably represent appellant's capacity to earn wages, given his education and experience and capacity to earn significantly higher wages. The Office's finding is consistent with the opinion of the Office rehabilitation counselor that other jobs, including the constructed position of repair order clerk, would have utilized appellant's past skills and would have paid more. Wage-earning capacity is determined by actual earnings only if they fairly and reasonably represent the claimant's wage-earning capacity. As there is sufficient evidence to establish that minimum wage was not the best measure of appellant's wage-earning capacity, the issue becomes whether appellant had the capacity to earn wages in the constructed position of repair order clerk.

Dr. Whalen, the attending internist, reported that appellant could perform sedentary work for only four hours a day. If appellant can work only part time, the Office must find a position within his work limitations that is reasonably available on a part-time basis.<sup>8</sup> The Office rehabilitation counselor reported that the job of repair order clerk was being performed in sufficient numbers so as to make it reasonably available to appellant within his commuting area and added that the job was "available full and part time." A fair reading of this statement is that the constructed position was reasonably available on both a full- and part-time basis.

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<sup>6</sup> *Harold S. McGough*, 36 ECAB 332 (1984).

<sup>7</sup> *Radames Delgado-Serrano*, 47 ECAB 650 (1996) (finding that it was improper for the Office to use a constructed position to represent the employee's wage-earning capacity where it did not first determine whether actual earnings fairly and reasonably represented the employee's wage-earning capacity).

<sup>8</sup> *Chester John Marzec*, 32 ECAB 1386, 1389 (1981).

But the Office rehabilitation counselor cited no source for her information on the availability of this job in the open labor market.<sup>9</sup> She did cite the New Mexico Department of Labor 2004 Wage Survey as the source of wage data. Appellant's attorney contacted the New Mexico Department of Labor. Correspondence in the record supports that the New Mexico Department of Labor referred appellant's attorney to one of its employees who was familiar with the 2004 Wage Survey. The Office fairly impeaches this employee as a man "of unknown experience or position," but his opinion is rehabilitated by evidence that the New Mexico Department of Labor identified him as someone who could speak with authority on the 2004 Wage Survey.<sup>10</sup> After confirming that there were an estimated 470 positions in the Albuquerque area for "production, planning and expediting clerks," positions similar to and including the constructed position of repair order clerk, the New Mexico Department of Labor employee reported: "We do not know what percentage of these positions are full time or part time nor do we know how many of these positions are direct matches for DOT Code 221.382-022 [repair order clerk]."

The Board finds that this evidence raises a substantial question regarding the critical element of availability. The only source of information cited by the Office rehabilitation counselor does not appear to distinguish between full- and part-time positions. The record does not substantiate the Office's finding that the constructed position was reasonably available to appellant on a part-time basis. The Board will reverse the Office's April 27, 2006 decision.

### **CONCLUSION**

The Board finds that the Office did not meet its burden of proof to justify modification of appellant's compensation. The Office's March 27, 2006 decision did not address his actual wages and the evidence did not support the Office's April 27, 2006 finding of availability.

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<sup>9</sup> There is no designated box for this source on Form CA-66.

<sup>10</sup> The employee's statement itself supports his familiarity with the subject.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 27 and March 27, 2006 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: February 23, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board