

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

P.H., Appellant

and

**U.S. POSTAL SERVICE, CARRIER ANNEX,
Paducah, KY, Employer**

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**Docket No. 07-637
Issued: July 5, 2007**

Appearances:

*Jeffrey P. Zeelander, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 4, 2007 appellant timely appealed the October 4 and December 8, 2006 merit decisions of the Office of Workers' Compensation Programs which determined her wage-earning capacity.¹ Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant's earnings as a modified rural carrier fairly and reasonably represent her wage-earning capacity; and (2) whether she established a basis for modification of the Office's October 4, 2006 wage-earning capacity determination.

¹ The record also includes an October 5, 2006 schedule award and an October 24, 2006 finding of overpayment in the amount of \$556.55. Appellant's counsel has not specifically challenged either of these decisions on appeal. Accordingly, the Board will not exercise jurisdiction over the October 5 and 24, 2006 decisions.

FACTUAL HISTORY

Appellant, a 45-year-old rural carrier, was delivering mail on January 18, 2006 when she slipped and fell on an icy sidewalk. She broke her right ankle in the fall and underwent surgery the next day. The Office accepted the claim for closed bimalleolar fracture of the right ankle. Appellant received appropriate wage-loss compensation. On April 10, 2006 she returned to work as a modified rural carrier, with no loss in pay. The position involved answering the telephone, providing customer assistance, computer data input and filing from a seated position. At the time, appellant's physical restrictions included less than 15 minutes of standing and walking. She was also precluded from climbing, kneeling, bending, stooping, pulling, pushing, driving or operating machinery. The modified rural carrier position was in keeping with appellant's physical limitations. The position also included a lifting limitation of 10 pounds.²

In a report dated June 28, 2006, appellant's orthopedic surgeon, Dr. Burton N. Stodghill, advised that appellant had reached maximum medical improvement and that her work restrictions were permanent. According to Dr. Stodghill, appellant could stand for 20 minutes at a time, up to 2 hours a day. He imposed identical restrictions with respect to walking. Dr. Stodghill limited appellant to lifting and carrying no more than 20 pounds, however, she could push or pull up to 50 pounds. He also indicated that appellant could drive a vehicle for four hours, but she was still precluded from operating machinery. Additionally, the prior restrictions of no climbing, kneeling, bending and stooping remained in effect. On August 2, 2006 Dr. Stodghill reiterated his findings regarding appellant's permanent work restrictions. He also noted that she "would not be able to perform her complete job."

As of October 4, 2006 appellant continued to perform the duties of a modified rural carrier. The employing establishment advised the Office that it would accommodate her indefinitely.

By decision dated October 4, 2006, the Office found that appellant's actual earnings as a modified rural carrier fairly and reasonably represented her wage-earning capacity. The Office explained that appellant was reemployed on April 10, 2006 with no loss in earning capacity and she had performed the required job duties for more than two months.

With the assistance of counsel, appellant sought modification of the October 4, 2006 wage-earning capacity determination. Counsel argued that the position appellant had been performing was not suitable for determining her wage-earning capacity. He enclosed a copy of the May 9, 2006 limited-duty job offer appellant previously accepted. Counsel further argued that appellant did not have an actual job, but was assigned odd jobs throughout the course of a day. He also indicated that she had been assigned various managerial duties, but she was not a manager. Counsel did, however, acknowledge that appellant worked regularly and was being paid commensurate with her date-of-injury pay rate.

In a decision dated December 8, 2006, the Office denied modification of the October 4, 2006 wage-earning capacity determination.

² Appellant's driving restriction was lifted on April 28, 2006 and on May 9, 2006 the modified rural carrier position was amended to include one to two hours driving (personally owned vehicle).

LEGAL PRECEDENT -- ISSUE 1

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.³

An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.⁴ 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 or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or if the employee has no actual wages, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.⁵

Actual wages earned is generally the best measure of wage-earning capacity.⁶ In the absence of evidence showing that actual earnings do not fairly and reasonably represent the injured employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning capacity.⁷ A determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made only after an employee has worked in a given position for more than 60 days.⁸

ANALYSIS -- ISSUE 1

Appellant's modified rural carrier position is in keeping with her permanent work restrictions as described by Dr. Stodghill. She has worked in this capacity for more than 60 days and has earned wages equal to or greater than the wages she earned at the time of her January 18, 2006 employment injury. On appeal, counsel does not take issue with appellant's ability to perform her assigned duties, nor does he dispute the amount of her current earnings. His primary challenge to the October 4, 2006 wage-earning capacity determination is that the Office should not have based its decision on the modified rural carrier position. Counsel argues that the position is unsuitable because it is not permanent and because it is an odd-lot job.

³ See *Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

⁴ 20 C.F.R. §§ 10.402, 10.403 (2006); see *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

⁵ 5 U.S.C. § 8115(a) (2000); see *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

⁶ *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

⁷ *Id.*

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (July 1997).

Factors to be considered in determining if a position fairly and reasonably represents the injured employee's wage-earning capacity include whether: (1) the kind of appointment and tour of duty are at least equivalent to those of the date-of-injury job; (2) the job is part time or sporadic in nature; (3) the job is seasonal in an area where year-round employment is available; and (4) the job is temporary where the claimant's previous job was permanent.⁹

Appellant's modified rural carrier position is not part-time, sporadic, seasonal or temporary. She is working the same tour of duty and is under the same job classification as she was on January 18, 2006 when she injured her right ankle. Appellant's actual wages equal or exceed the current wages of her date-of-injury position. As to whether her current position is permanent in nature, the record indicates that the employing establishment assured the Office on October 4, 2006 that it would accommodate appellant indefinitely. Furthermore, the May 9, 2006 job description does not identify the modified rural carrier position as a temporary assignment. Counsel's only other contention is that the modified rural carrier position is an odd-lot job, with varying assignments based on the available tasks at hand. There is no evidence of record to substantiate counsel's allegation that the position appellant has regularly performed since April 10, 2006 is an odd-lot job.¹⁰ Accordingly, the Board finds that appellant's actual earnings as a modified rural carrier fairly and reasonably represent her wage-earning capacity.

LEGAL PRECEDENT -- ISSUE 2

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 erroneous.¹¹ The burden of proof is on the party seeking modification of the wage-earning capacity determination.¹²

ANALYSIS -- ISSUE 2

Appellant does not allege a material change in the nature and extent of her injury-related condition. She also does not claim to have been retrained or otherwise vocationally rehabilitated. Thus, the only current basis for modifying the October 4, 2006 wage-earning capacity determination would be that the original determination was erroneous. In his October 11, 2006 reconsideration request, counsel alleged that appellant did not have a regular job of any sort, but

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997).

¹⁰ Whether a position is odd-lot or make-shift is more commonly addressed in constructed position wage-earning capacity determinations. See e.g., 50 ECAB 425, 433 (1999). Additionally, it is of particular significance in determining the applicable rate of pay when a recurrence of disability is claimed. See 20 C.F.R. § 10.5(s); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.5(a) (April 2002). The type of position and whether it constitutes "regular" federal employment is also relevant when determining if an employee is entitled to compensation when a light-duty job is eliminated due to downsizing. See 20 C.F.R. § 10.509. However, none of these issues are currently before the Board.

¹¹ *Tamra McCauley*, 51 ECAB 375, 377 (2000).

¹² *Id.*

simply odd jobs that were assigned over the course of each day. Counsel did not submit any evidence to support this allegation nor has he identified any other basis for modifying the October 4, 2006 wage-earning capacity determination. Consequently, the Office properly denied modification.

CONCLUSION

Appellant's actual earnings as a modified rural carrier fairly and reasonably represent her wage-earning capacity. Furthermore, she has not established a proper basis for modifying the Office's October 4, 2006 wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the December 8, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 5, 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