

ISSUES

The issues are: (1) whether the selected position of dispatcher, maintenance clerk, represents appellant's wage-earning capacity; and (2) whether appellant established a basis for modification of the Office's June 2, 2006 wage-earning capacity determination.

FACTUAL HISTORY

Appellant, a 48-year-old firefighter, injured his lower back while in the performance of duty on October 2, 1999. The Office initially accepted the claim for lumbar sprain, but later expanded the claim to include herniated nucleus pulposus at L4-5, L5-S1 and right knee internal derangement. Appellant returned to work on April 27, 2000. He worked part-time, limited duty until May 21, 2000, when he stopped work entirely. The Office returned appellant to the periodic compensation rolls effective August 13, 2000.

In a report dated January 11, 2005, appellant's treating physician, Dr. Ernesto H. Guido, a Board-certified neurologist, diagnosed lumbosacral degenerative disc disease and post-traumatic lumbosacral radiculitis, particularly involving the left lower extremity. He also diagnosed post-traumatic right knee pain with degenerative changes. Dr. Guido advised that appellant was unable to resume his prior duties as a firefighter, but was capable of performing light to moderate work. Appellant could lift 15 pounds frequently and lift 25 pounds occasionally. Dr. Guido anticipated an initial return to work at four hours a day, five days a week, with a potential gradual increase in work hours. Appellant was to avoid working on uneven ground, and avoid kneeling and squatting. Dr. Guido stated that appellant could occasionally bend and twist, but could not climb stairs. He also noted that appellant could use his feet for limited operation of foot controls, as long as it did not require repetitive high force. Dr. Guido further stated that appellant needed to be able to change his body posture while seated and alternate between standing and sitting, depending on which position was more comfortable.

In May 2005, the Office referred appellant to vocational rehabilitation, where a plan was devised to facilitate his return to gainful employment as a dispatcher, cashier/clerk, night watchman/guard, order clerk or telephone clerk. On June 27, 2005 appellant began working part time at Buck's Grocery & Meat Market as a cashier/clerk, earning \$5.15 per hour.³

On February 14, 2006 the Office adjusted appellant's wage-loss compensation based on his weekly earnings of \$103.00 as a clerk beginning June 27, 2005.

Dr. Walter A. Del Gallo, a Board-certified orthopedic surgeon and Office referral physician, examined appellant on March 30, 2006. He found that appellant was incapable of performing his prior duties as a firefighter, but was able to work part time in a limited-duty capacity. Dr. Del Gallo imposed permanent restrictions of four hours of work per day. Appellant was limited to two hours each of sitting, standing, walking, reaching and reaching above the shoulder. He could also push and pull up to two hours a day, with a 10-pound weight restriction. Appellant was able to lift for one hour each day, with a 20-pound restriction. Also,

³ Appellant found the position through his own personal contacts.

Dr. Del Gallo precluded squatting, kneeling, climbing, twisting, bending, stooping or operating a motor vehicle at work.

The grocery store where appellant had been working for approximately nine months closed on April 14, 2006, and thus, he was no longer employed.

In a decision dated June 2, 2006, the Office found that the selected position of dispatcher, maintenance clerk, with part-time weekly wages of \$165.00, was both medically and vocationally suitable and represented appellant's wage-earning capacity.⁴ Accordingly, the Office adjusted appellant's wage-loss compensation taking into account his ability to earn wages as a dispatcher, maintenance clerk.

On October 4, 2006 appellant requested reconsideration. He submitted additional medical records from Dr. Guido, including a June 29, 2006 permanent impairment rating. The report briefly addressed appellant's work status, noting that he was unable to return to his former work as a firefighter. Dr. Guido also commented that, while appellant previously performed some limited work activities, "most recently he had been unable to do any part-time work." He noted that appellant reported significant limitations in his activities of daily living due to persistent ongoing pain and limited capacity for ambulation. Dr. Guido referred appellant to Dr. Ryan N. Potter, a Board-certified anesthesiologist specializing in pain management. Dr. Potter subsequently administered a series of lumbar epidural steroid injections.

By decision dated October 18, 2006, the Office denied appellant's October 4, 2006 request for reconsideration.

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.⁵

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.⁶ 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

⁴ The Office previously issued a notice of proposed reduction of compensation on April 20, 2006.

⁵ See *Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

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

employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.⁷

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects appellant's vocational wage-earning capacity. The medical evidence the Office relies on must provide a detailed description of appellant's condition.⁸ Additionally, a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁹

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles*, or otherwise available in the open labor market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that the selected position of dispatcher, maintenance clerk is both medically and vocationally suitable and represents appellant's wage-earning capacity. The position is sedentary in nature and involves receiving telephone and written orders from plant departments for maintenance service, such as repair work, machine adjustments and renewals or installation of other plant property. The information is then relayed to the appropriate maintenance division. Additional responsibilities include recordkeeping and requisitioning supplies for maintenance and clerical workers. Appellant would be expected to exert force to 10 pounds occasionally. The position also requires applying a negligible amount of force frequently to lift, carry, push, pull or move objects. There is no climbing, balancing, stooping, kneeling, crouching or crawling required. The physical requirements of the position are in keeping with the limitations identified by Dr. Guido and Dr. Del Gallo on January 11, 2005 and March 30, 2006, respectively. The dispatcher, maintenance clerk position is identified as semi-skilled, requiring 30 days to 3 months of specific vocational preparation. Appellant satisfied this criteria based on his educational background and prior work experience. The record also indicates that the position is being performed on both a part-time and full-time basis in appellant's local labor market so as to make it reasonably available.

The full-time weekly salary for a dispatcher, maintenance clerk ranges from \$330.00 to \$770.00. The Office based its salary determination on the lowest weekly full-time rate

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

⁸ *Samuel J. Russo*, 28 ECAB 43 (1976).

⁹ *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

¹⁰ *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403(d).

identified, \$330.00, and divided that amount in half to find appellant capable of earning \$165.00 per week. The Board finds that the Office properly adjusted appellant's wage-loss compensation effective June 2, 2006 to reflect his ability to earn part-time wages as a dispatcher, maintenance clerk.

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

Although the Office's October 18, 2006 decision did not reference any applicable regulations, the wording of the decision indicates that the Office applied an incorrect legal standard in evaluating appellant's October 4, 2006 request for reconsideration.¹³ The Office found that the medical evidence submitted did not specifically address appellant's "ability or inability to perform work..." However, Dr. Guido indicated in his June 29, 2006 report that appellant previously performed some limited work activities, but "most recently he had been unable to do any part-time work." Because this information is relevant to the issue of whether there is a material change in the nature and extent of appellant's injury-related condition, the case is remanded to the Office to apply the correct legal standard for determining whether modification of the June 2, 2006 wage-earning capacity determination is warranted.

CONCLUSION

The Office properly determined that the selected position of dispatcher, maintenance clerk represented appellant's wage-earning capacity as of June 2, 2006. The Office, however, failed to properly adjudicate appellant's October 4, 2006 request for modification of the June 2, 2006 wage-earning capacity determination.

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

¹² *Id.*

¹³ The Office's reference to a "one year" time limitation and appellant's failure to raise "substantive legal questions" or submit "new and relevant evidence" strongly suggests that the Office applied the standard for reconsideration set forth under 20 C.F.R. §§ 10.606, 10.607 and 10.608.

ORDER

IT IS HEREBY ORDERED THAT the June 2, 2006 decision of the Office of Workers' Compensation Programs is affirmed. The October 18, 2006 decision denying reconsideration is set aside and the case is remanded to the Office for further action consistent with this decision.

Issued: July 24, 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