

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

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**D.S., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Farmingdale, NY, Employer**

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**Docket Nos. 06-1408 &  
06-2061  
Issued: March 1, 2007**

*Appearances:*  
*Paul Kalker, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On February 17, 2006 appellant filed a timely appeal from the January 20, 2006 merit decision of the Office of Workers' Compensation Programs, which denied modification of wage-earning capacity.<sup>1</sup> On September 8, 2006 he filed a timely appeal from the Office's June 27, 2006 merit decision, which denied a recurrence of disability.<sup>2</sup> Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the Office's January 20 and June 27, 2006 decisions.

**ISSUES**

The issues are: (1) whether the Office properly determined appellant's loss of wage-earning capacity based on his actual wages in 2001; if so, (2) whether he met his burden of proof to show a modification of the October 27, 2004 loss of wage-earning capacity determination; and

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<sup>1</sup> The Board docketed the appeal as Docket No. 06-1408.

<sup>2</sup> The Board docketed this appeal as Docket No. 06-2061.

(3) whether the Office properly issued its June 27, 2006 decision denying appellant's claim of recurrence beginning August 1, 2003.

### **FACTUAL HISTORY**

On the prior appeal,<sup>3</sup> the Board found that the case was not in posture for decision on whether specific periods of disability were causally related to appellant's March 13, 1996 employment injury. The Office had accepted that appellant, a 37-year-old letter carrier, sustained depression and aggravation of heart disease in the performance of duty when someone left a photograph of male genitalia on his workstation. The Board remanded the case for further development. The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.

On November 4, 2002 the Office calculated appellant's wage-earning capacity for 1999, 2000 and 2001 based on his actual earnings in those years. On April 15, 2003 the Office notified appellant that it was reducing his monetary compensation based on the \$30,876.41 he earned as a counter helper at Bagel Boss Hicksville, Inc. in 2001.

Appellant stopped work on August 1, 2003 to undergo open heart surgery.

On October 27, 2004 the Office issued a formal decision adjusting appellant's monetary compensation to reflect his capacity to earn actual wages of \$30,876.41 as a counter helper at Bagel Boss beginning in 2001.

A January 14, 2005 report from Dr. Patrick J. Monteleone, an attending cardiologist, supported that symptomatology precluded appellant from working after the August 1, 2003 surgery:

“[Appellant's] level of symptomatology would keep him from functioning as a letter carrier. He will need to avoid extremes of temperature and prolonged standing but should be able to work at least on a part time basis in a seated capacity indoors. At this time it is undetermined whether [appellant] will be able to make a full enough recovery to allow him to ultimately return to work as a letter carrier at a later date.”

On October 19, 2005 appellant requested reconsideration of the Office's October 27, 2004 wage-earning capacity decision, which he argued overstated his wage-earning capacity. He also filed a claim that he sustained a recurrence of total disability beginning August 1, 2003. Appellant argued that he was entitled to a reinstatement of compensation because he stopped work due to a change in the nature and extent of his injury-related condition.

In a decision dated January 20, 2006, the Office denied modification of its October 27, 2004 wage-earning capacity decision. The Office found that appellant submitted no evidence to

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<sup>3</sup> Docket No. 00-417 (issued August 10, 2001).

establish that the October 27, 2004 decision was incorrect concerning his ability to work dating back to 2001. Appellant filed an appeal to the Board on February 17, 2006.<sup>4</sup>

In a decision dated June 27, 2006, the Office denied appellant's claim of recurrence. The Office found that the record contained absolutely no medical evidence to establish how the cardiac surgery on August 1, 2003 was in any way related to the 1996 incident in which a photograph of male genitalia was left at appellant's workstation.

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

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>5</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  $66\frac{2}{3}$  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>6</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>7</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>8</sup>

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

The record establishes that in 2001 appellant worked as a counter helper at Bagel Boss Hicksville, Inc. A Form W-2 from 2001 establishes that he earned \$30,876.41 in that employment.<sup>9</sup> This evidence, together with the pay history provided by Bagel Boss,

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<sup>4</sup> Because appellant requested reconsideration of the October 27, 2004 wage-earning capacity decision and because he also argued a material change in the nature and extent of his injury-related condition, the Office's January 20, 2006 decision both affirmed the October 27, 2004 determination and denied appellant's request for modification. The Board will address these two issues separately.

<sup>5</sup> 5 U.S.C. § 8102(a).

<sup>6</sup> *Id.* at § 8106(a).

<sup>7</sup> *Id.* at § 8115(a).

<sup>8</sup> *Don J. Mazurek*, 46 ECAB 447 (1995).

<sup>9</sup> The Office's October 27, 2004 decision misidentified this as appellant's weekly wage. The decision also noted that he worked 20 hours a week, while Bagel Boss provided a pay history showing his working 40-hour weeks.

demonstrates appellant's capacity to earn these wages over a substantial period of time. There is no evidence that the position was make-shift, temporary, seasonal or otherwise inappropriate for a wage-earning capacity determination.<sup>10</sup> The Board has long recognized that actual earnings are generally the best measure of wage-earning capacity, as they more reasonably reflect the claimant's employment capacity in the open labor market and more reliably gauge that capacity than such secondary methods as an opinion from a vocational rehabilitation adviser.<sup>11</sup> The Board will, therefore, affirm the January 20, 2006 decision with respect to the determination of wage-earning capacity.

Appellant argues that he earned less than \$30,876.41, but this in itself does not mean that he did not retain the capacity to earn the wages he received in 2001. Compensation for loss of wage-earning capacity is based upon loss of one's capacity to earn, not on wages actually lost.<sup>12</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Once the loss of wage-earning capacity 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, in fact, erroneous. The burden of proof is on the party attempting to show modification of the award.<sup>13</sup>

### **ANALYSIS -- ISSUE 2**

Appellant contends that there was a material change in the nature and extent of his injury-related condition. He stopped work to undergo cardiac surgery on August 1, 2003 but he submitted no medical evidence addressing whether the condition for which he underwent surgery was injury related, that is, whether it was in any way related to the incident that occurred at work on March 13, 1996, when someone left a lewd photograph on his case. Dr. Monteleone submitted a number of follow-up reports, but none of them attempted to connect the 2003 surgery to the 1996 employment incident. On January 14, 2005 the cardiologist reported that symptomatology following the 2003 surgery precluded appellant from working, but again, he did not relate the surgery to the 1996 incident. He did not explain how disabling post-surgery symptomatology represented a material change in appellant's injury-related condition. Because the medical evidence does not support appellant's argument that there was a material change in the nature and extent of his injury-related condition, the Board will affirm the Office's January 20, 2006 decision to deny modification of the October 27, 2004 determination.

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<sup>10</sup> *Linda Thompson*, 51 ECAB 694 (2000).

<sup>11</sup> *Loni J. Cleveland*, 52 ECAB 171 (2000).

<sup>12</sup> *Ronald M. Yokota*, 33 ECAB 1629 (1982).

<sup>13</sup> *Daniel J. Boesen*, 38 ECAB 556 (1987).

### **LEGAL PRECEDENT -- ISSUE 3**

If a formal decision on loss of wage-earning capacity is issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss, in which instance the Office will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity determination.<sup>14</sup>

When appellate procedure is invoked by an appeal, the decision appealed from should not be changed before the appellate body has had a chance to render its decision. This is an elementary proposition long recognized. Any other course would nullify the purpose of an appellate function and create constant confusion in the cases. Any action which disturbs the status of the case as appealed from must necessarily be regarded as a nullity; otherwise, orderly appeal process would break down.<sup>15</sup>

### **ANALYSIS -- ISSUE 3**

With a formal loss of wage-earning capacity determination in place, the proper standard of review was not whether appellant sustained a recurrence of disability on August 1, 2003, but whether the Office should modify its October 27, 2004 decision according to the customary criteria for modifying a formal loss of wage-earning capacity determination. As the Office already issued its January 20, 2006 decision denying modification, appellant's claim of recurrence became superfluous.

There is another reason for setting aside the Office's June 27, 2006 decision. After the Office denied modification on January 20, 2006, appellant filed an appeal to the Board. From that point forward, the Board had jurisdiction over the issue of modification. The Office may not exercise concurrent jurisdiction over the same issue on appeal. Because appellant's claim of recurrence effectively raised the issue of modification, the Office had no jurisdiction to issue a decision that might affect the issue before the Board. The Office's June 27, 2006 decision is therefore null and void.<sup>16</sup>

### **CONCLUSION**

The Board finds that the Office properly determined appellant's loss of wage-earning capacity based on his actual wages in 2001. The Board finds that appellant has not met his burden of proof to show a modification of the October 27, 2004 loss of wage-earning capacity determination. The Board also finds that the Office improperly issued its June 27, 2006 decision denying appellant's claim of recurrence.

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<sup>14</sup> *Sharon C. Clement*, 55 ECAB 552 (2004); *Katherine T. Kreger*, 55 ECAB 121 (2004); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9.a (December 1995).

<sup>15</sup> *Douglas E. Billings*, 41 ECAB 880 (1990), quoting *George H. Thamer*, 37 ECAB 88 (1948).

<sup>16</sup> See *Oren E. Beck*, 33 ECAB 1551 (1982) (while appealing the Office's finding that he had disability or permanent impairment of the lungs due to his asbestos-related disease, the Office had no jurisdiction to issue a decision denying review of the decision on appeal).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 20, 2006 decision of the Office of Workers' Compensation Programs is affirmed. The Office's June 27, 2006 decision is set aside.

Issued: March 1, 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