



strain/sprain on October 6, 2004. It entered appellant on the periodic rolls on January 12, 2005. The Office later expanded his claim to include lumbar sprain/strain, L5-S1 disc herniation and with radiculopathy and lumbar fusion as work related.

On August 29, 2005 appellant's attending physician, Dr. Kamshad Raiszadeh, a Board-certified orthopedic surgeon, performed an L5 laminectomy and decompression of the L5 nerve root due to a L5-S1 herniated disc. He continued to support appellant's total disability for work through January 25, 2006. In reports dated April 12 and May 24, 2006, Dr. Raiszadeh found that appellant was capable of working light duty. He recommended that appellant work 4 hours a day with no lifting over 15 pounds, no baggage handling and no prolonged walking or standing over 20 minutes.

In a report dated June 28, 2006, Dr. Raiszadeh noted appellant's history of injury and medical history. He performed a physical examination finding that appellant had limited range of motion in his spine, but normal sensation and motor examination. Dr. Raiszadeh reviewed x-rays and found a solid fusion and good position of instrumentation. He diagnosed L5-S1 disc injury with back and radicular symptoms which was improved after lumbar interbody fusion. Dr. Raiszadeh opined that appellant's objective signs of disability were his mild limitation of lumbar range of motion and the surgical fusion with instrumentation. He listed appellant's subjective signs of disability as occasional back discomfort with no significant radiating pain which could increase to moderate pain with increased lifting or bending. Dr. Raiszadeh found that appellant could sit for up to 45 minutes without discomfort and had no difficulty standing if allowed to change positions. He opined that appellant's condition was permanent and stationary and that appellant had "50 percent of preinjury capacity for performing bending, stooping, lifting, pushing, pulling and climbing...." Dr. Raiszadeh stated that appellant could not return to his date-of-injury position. On August 8, 2006 he noted that appellant experienced increased back pain. Dr. Raiszadeh opined that this was likely "a self-limited aggravation of the symptoms that should return to baseline." He completed a work restriction evaluation on October 13, 2006 and indicated that appellant could work four hours a day. Dr. Raiszadeh restricted appellant to 20 minutes each of walking and standing as well as lifting up to 15 pounds for 20 minutes a day. The employing establishment stated that there were no appropriate permanent light-duty positions available for appellant on October 11, 2006.

The Office referred appellant for a second opinion evaluation on October 24, 2006 with Dr. Thomas J. Sabourin, a Board-certified orthopedic surgeon. In a report dated November 13, 2006, Dr. Sabourin provided appellant's history of injury and medical history. He noted that appellant reported constant back pain with radiation which occurred regardless of activity. Dr. Sabourin found that appellant's lumbar range of motion was "grossly normal" and that appellant did have pain with forward flexion and extension. He diagnosed degenerative disc disease and thoracic strain and sprain. Dr. Sabourin opined that appellant could work in a limited capacity eight hours a day including sitting, walking and standing for six hours a day. He recommended periodic rest periods of sitting and standing lasting one to two minutes. Dr. Sabourin found that appellant could push and pull up to 20 pounds for four hours a day and could squat, kneel and climb for two hours a day each. He indicated that appellant should not twist, bend or stoop. Dr. Sabourin indicated that appellant might need to stand or sit for rest periods of one to two minutes. The Office provided Dr. Raiszadeh with a copy of Dr. Sabourin's

report and informed him that this report would provide the basis for appellant's rehabilitation position.

The Office referred appellant for vocational rehabilitation services on January 3, 2007. The vocational rehabilitation counselor identified the positions of order clerk and merchant patroller as within appellant's work restrictions and reasonably available in sufficient numbers in appellant's commuting area. In a letter dated April 18, 2007, the Office informed appellant that it would provide 90 days of placement services beginning April 23, 2007 to help him obtain employment as either an order clerk or a merchant patroller.

Dr. Raiszadeh completed a work capacity evaluation on July 10, 2007 and indicated that appellant could work six hours a day, sitting, walking and standing for six hours each. He further found that appellant could push and pull up to 20 pounds for four hours a day and that appellant could lift up to 20 pounds for two hours a day. Appellant could also squat, kneel and climb for two hours. He required breaks of 1 to 2 minutes every 20 minutes.

The vocational rehabilitation counselor completed a report covering the period June 20 to July 19, 2007 and stated that appellant had not maintained contact with his office and that job placement was scheduled to end on July 23, 2007. He stated job leads had been forwarded to appellant, but that he did not anticipate that appellant would return to work through job placement efforts. The vocational rehabilitation counselor opined that appellant was vocationally and physically capable of performing the position of order clerk. The job description included processing orders for material or merchandise through the mail, by telephone or in person. This position was sedentary, requiring lifting up to 10 pounds occasionally. The vocational rehabilitation counselor confirmed with the state employment service that the position was performed in sufficient numbers so as to make it reasonably available to appellant within his commuting area. He found that appellant met the specific vocational preparation of three to six months as he was a high school graduate and completed a certificate program in computer networking as well as having experience as a computer network technician which required customer service skills.

In a letter dated September 5, 2007, the Office proposed to reduce appellant's compensation benefits based on his capacity to earn wages eight hours a day as an order clerk at the rate of \$640.00 per week. It found that appellant's date-of-injury pay rate was \$492.60 per week and that he therefore had no loss of wage-earning capacity in the constructed position. The Office reviewed Dr. Raiszadeh's reports and found that he had suggested varying abilities to work. It also noted that Dr. Raiszadeh had not responded to Dr. Sabourin's report. The Office concluded that Dr. Sabourin's report was entitled to the weight of the medical opinion evidence as his report was supported with detailed objective and subjective findings. It found that the position of order clerk was within appellant's physical abilities and that this position "fairly and reasonably" represented his wage-earning capacity.

Appellant responded on September 12, 2007 and disagreed with the Office's findings. He alleged that Dr. Sabourin's report was not sufficient to establish his physical restrictions. Appellant submitted a note from Dr. Raiszadeh dated July 10, 2007 which stated that appellant continued to require medication for pain control. Dr. Raiszadeh found that appellant was neurovascularly intact with no numbness and no significant paraspinal muscle spasm. He noted

that appellant had persistent symptoms likely due to disc irritation at L4-5 and that his condition was permanent and stationary.

The Office initially reduced appellant's compensation benefits to zero based on his capacity to earn wages in the constructed position of order clerk on October 29, 2007 effective November 25, 2007. The Office stated that appellant had not submitted additional evidence or argument in response to the proposed reduction. In a letter dated November 5, 2007, appellant alleged that his compensation should have been reduced not cancelled and that he did respond to the proposed reduction of compensation. By decision dated November 9, 2007, the Office informed appellant that the proposed reduction of his compensation was final effective November 25, 2007. The Office reviewed appellant's responses to the proposed reduction and found that he failed to submit evidence establishing that he was not physically capable of working as an order clerk eight hours a day. The Office concluded, "Evidence on file still indicates that you are physically capable of working light duty eight hours a day, earning \$640.00 per week as an order clerk and that the position of order clerk is medically and vocationally suitable for you and fairly represents your wage-earning capacity."<sup>1</sup>

### **LEGAL PRECEDENT**

Under section 8115(a) of the Federal Employees' Compensation Act,<sup>2</sup> in determining compensation for partial disability, the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonable represent the wage-earning capacity. 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> If the actual earnings do not fairly and reasonably represent his or her wage-earning capacity, or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her 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 disability condition.<sup>4</sup>

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, *Dictionary of Occupational Titles* or otherwise available in the open 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 labor market should be made through contact with the state employment service or other applicable service. Finally, application of the

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<sup>1</sup> Appellant requested a schedule award on July 10, 2007. As the Office has not issued a final decision on this issue, the Board may not address this issue for the first time on appeal. 20 C.F.R. § 501.2(c).

<sup>2</sup> 5 U.S.C. §§ 8101-8193, 8115(a).

<sup>3</sup> *Selden H. Swartz*, 55 ECAB 272 (2004).

<sup>4</sup> *Harley Sims, Jr.*, 56 ECAB 320, 323 (2005).

principles set forth in *Albert C. Shadrick*,<sup>5</sup> and codified section 10.403(d) of the Office's regulations<sup>6</sup> will result in the percentage of employee's loss of wage-earning capacity.

The Act provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>7</sup> The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician of an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.<sup>8</sup>

### ANALYSIS

Appellant has not returned to work. The Office must base its determination of whether he is capable of performing work based on the nature of his injury and the degree of his physical impairment. The Board finds that there is an unresolved conflict of medical opinion evidence between appellant's attending physician, Dr. Raiszadeh, a Board-certified orthopedic surgeon and the Office referral physician, Dr. Sabourin, a Board-certified orthopedic surgeon, regarding appellant's ability to work eight hours a day.

Dr. Raiszadeh completed a detailed report on June 28, 2006 in which he noted appellant's history of injury and medical history. He performed a physical examination finding that appellant had limited range of motion in his spine, but normal sensation and motor examination. Dr. Raiszadeh reviewed x-rays and found a solid fusion and good position of instrumentation. He diagnosed L5-S1 disc injury with back and radicular symptoms which was improved after lumbar interbody fusion. Dr. Raiszadeh opined that appellant's objective signs of disability were his mild limitation of lumbar range of motion and the surgical fusion with instrumentation. He listed appellant's subjective signs of disability as occasional back discomfort with no significant radiating pain which could increase to moderate pain with increased lifting or bending. Dr. Raiszadeh found that appellant could sit for up to 45 minutes without discomfort and had no difficulty standing if allowed to change positions. He opined that appellant's condition was permanent and stationary and that he had "50 percent of preinjury capacity for performing bending, stooping, lifting, pushing, pulling and climbing..." Dr. Raiszadeh then completed a work restriction evaluation on October 13, 2006 and indicated that appellant could work four hours a day, 50 percent of his preinjury capacity. He restricted appellant to 20 minutes each of walking and standing as well as lifting up to 15 pounds for 20 minutes a day.

Dr. Sabourin completed a report on November 13, 2006 providing appellant's history of injury and medical history. He found that appellant's lumbar range of motion was "grossly

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<sup>5</sup> 5 ECAB 376 (1953).

<sup>6</sup> 20 C.F.R. § 10.403(d).

<sup>7</sup> 5 U.S.C. §§ 8101-8193, 8123.

<sup>8</sup> 20 C.F.R. § 10.321.

normal” and that appellant did have pain with forward flexion and extension and diagnosed degenerative disc disease and thoracic strain and sprain. Dr. Sabourin opined that appellant could work in a limited capacity eight hours a day including sitting, walking and standing for six hours a day. He recommended periodic rest periods of sitting and standing lasting one to two minutes. Dr. Sabourin found that appellant could push and pull up to 20 pounds for four hours a day and could squat, kneel and climb for two hours a day each. He indicated that appellant should not twist, bend or stoop. Dr. Sabourin indicated that appellant might need to stand or sit for a rest period of one to two minutes.

Following the Office’s informational letter that Dr. Sabourin’s physical restrictions would form the basis for appellant’s rehabilitation position,<sup>9</sup> Dr. Raiszadeh completed a work capacity evaluation on July 10, 2007 and indicated that appellant could work six hours a day, sitting, walking and standing for six hours each. He followed the remainder of Dr. Sabourin’s work restrictions as directed by the Office finding that appellant could push and pull up to 20 pounds for four hours a day and lift up to 20 pounds for two hours a day. Dr. Raiszadeh found that appellant could also squat, kneel and climb for two hours. He noted that appellant required breaks of 1 to 2 minutes every 20 minutes.

Drs. Sabourin and Raiszadeh both provided detailed reports with physical findings and concluded that appellant was not capable of returning to his date-of-injury position. However, they disagreed regarding the extent of appellant’s disability for work. Dr. Raiszadeh opined that appellant could work only four hours a day with restrictions, later amended to six after instruction from the Office, while Dr. Sabourin concluded that appellant could work eight hours a day with restrictions. Due to this unresolved conflict of medical opinion, the Office has not met its burden of proof to reduce appellant’s compensation benefits based on his capacity to earn wages as an order clerk eight hours a day.

### **CONCLUSION**

The Board finds that there is an unresolved conflict of medical opinion regarding appellant’s ability to work eight hours a day and that the Office, therefore, failed to meet its burden of proof to reduce appellant’s compensation benefits to zero based on his capacity to earn wages in the constructed position of order clerk.

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<sup>9</sup> Contrary to the Office’s assertion that it had requested comments from Dr. Raiszadeh regarding Dr. Sabourin’s findings, the Office instead provided Dr. Raiszadeh with a copy of Dr. Sabourin’s report and informed him that this report would provide the basis for appellant’s rehabilitation position.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 9, 2007 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 9, 2008  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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