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

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| **E.C., Appellant** | ) | |
| **and** | ) | **Docket No. 07-1634** |
| | ) | **Issued: March 10, 2008** |
| **U.S. POSTAL SERVICE, POST OFFICE, Hammond, IN, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*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 May 30, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' wage-earning capacity decision dated April 13, 2007. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### ***ISSUE***

The issue is whether appellant's actual earnings as a modified letter carrier fairly and reasonably represent her wage-earning capacity.

### ***FACTUAL HISTORY***

On January 12, 2004 appellant, then a 55-year-old letter carrier, slipped on ice at work. She did not completely stop work but began working reduced hours. Appellant began a limited-duty assignment on April 21, 2004. The Office accepted her claim for right hip contusion, lumbosacral spondylosis and congenital spondylolysis. On August 9, 2005 it authorized a spinal fusion at L4-5. The Office paid appellant wage-loss compensation for hours she was unable to work. On September 29, 2005 she was placed on the periodic rolls.

In a January 17, 2006 letter, Lillie M. Evans, an employing establishment injury compensation specialist, provided a corrected salary history regarding appellant's pay rate. She explained that an error had occurred as appellant's records were never updated to reflect the change in her pay schedule, grade and step. The error occurred in 2002 and was not realized until about a year prior. Ms. Evans advised that appellant's supervisors had been working to correct the error. When appellant first began working for six hours per day on January 12, 2004, she was paid at Level 1, Step C at a yearly salary of $38,815.00. However, Ms. Evans indicated that appellant should have been paid at Level 2, Step C at a salary of $42,242.00. She added that when appellant became disabled on August 8, 2004 she was paid at Level 1, Step E at a salary of $43,211.00 but she should have been paid at Level 2, Step E at a salary of $44,019.00.

Appellant returned to light-duty work for four hours a day, five days a week on February 22, 2006.

In an April 3, 2006 report, Dr. Nitin Khanna, a Board-certified orthopedic surgeon and treating physician, opined that appellant was post single level decompression and instrumental fusion. He opined that she reached maximum medical improvement and had permanent restrictions comprised of sedentary-type duties for four hours a day. Dr. Khanna noted that a functional capacity evaluation might be considered but he was concerned that it might cause appellant's pain to worsen. In a duty status report, also dated April 3, 2006, he advised that appellant could lift or carry for four hours per day not to exceed two pounds on a continuous basis or five pounds on an intermittent basis; and sitting for no more than four hours per day.

By letter dated May 11, 2006, the Office provided the employing establishment with a copy of Dr. Khanna's restrictions, and requested whether appellant could be provided a position that complied with the restrictions. The Office also requested verification of appellant's grade/step and salary on January 12, 2004.

In an April 3, 2006 addendum, Dr. Khanna noted permanent restrictions of lifting and carrying of no more than five pounds, four hours per day; intermittent standing up to four hours per day; intermittent walking up to one hour per day; no climbing, kneeling, bending or stooping, twisting; pulling or pushing; simple grasping intermittently for up to four hours per day; fine manipulation intermittently up to four hours a day; reaching above the shoulder, intermittently four hours a day; and no driving or operating machinery. He indicated that appellant should perform primarily sedentary work. On July 17, 2006 Dr. Khanna opined that appellant could work four hours a day provided that she did not do any casing, and could only do intermittent reaching for no more than one hour per day. He also indicated that appellant needed to work earlier in the day "due to medication."

On September 18, 2006 the employing establishment offered appellant a rehabilitation job offer as a modified letter carrier, Level 2, Step G at $47,276.00 per year effective October 28, 2006. The employing establishment advised that the hours were from 9:00 a.m. to 1:00 p.m. and noted that the specific physical requirements included seated work at a letter case table, lining out customer information on cards weighing approximately one ounce or less, checking and verifying carrier edit books while seated, consolidation of "AVUS receipts" while

seated, verifying packages for next day delivery, scanning delivery confirmation packages within weight restrictions, answering telephones and other duties within her restrictions.[1]

On September 25, 2006 appellant signed the job offer "under protest." The record indicates that she continued working four hours per day.

On October 16, 2006 Kelli Rowland, an employing establishment injury compensation specialist, provided the Office with a copy of the limited-duty job offer. She confirmed that on the date of injury, appellant was a Level 1, Step C city letter carrier. Ms. Rowland also confirmed that appellant's salary was $38,815.00 per year. She indicated that today, a Level 1, Step C would earn $42,783.00 per year. Ms. Rowland noted that appellant was being rehabbed as a modified letter carrier at Level 2, Step G, earning $47,276.00 per year. She noted that today a Level 2, Step G would have earned $43,198.00.

By letter dated November 15, 2006, Mary Banks, an employing establishment injury compensation specialist, provided the Office with a copy of the rehabilitation job offer. She confirmed that appellant signed the offer on September 25, 2006, effective October 28, 2006. Appellant accepted the offer under protest related to the location of the job offer and the scheduled off days. Ms. Banks advised that appellant was placed in the location of her preference but changing the scheduled off days was not feasible. Appellant accepted the job offer on November 22, 2006.

In letters dated November 28, 2006, Ms. Banks confirmed that appellant was working as a modified letter carrier, Level 2, Step G, since October 28, 2006. She confirmed that, on the date of injury, appellant was a Level 1, Step C city letter carrier with a salary of $38,815.00 per year. Ms. Banks indicated that the current salary for a Level 1, Step C would earn $42,783.00 per year. Additionally, she noted that the current salary for a modified letter carrier, rehabilitation job Level 2, Step G was $42,576.00, and noted that appellant was a Level 2, Step G, earning $47, 276.00 per year.

On January 5, 2007 the Office noted that Ms. Banks confirmed that appellant had completed 60 days of successful work in the rehabilitation job assignment. The Office also confirmed that appellant was a "01/C" on January 12, 2004.

By decision dated January 8, 2007, the Office found that appellant's actual earning as a part-time, modified letter carrier fairly and reasonably represented her wage-earning capacity. She had demonstrated the ability to perform the duties for two months or more. The Office noted that appellant was reemployed as a modified letter carrier for four hours a day effective October 28, 2006 with weekly wages of $454.58. The Office found that the position was suitable to her partially disabled condition and her entitlement to compensation would be reduced effective December 24, 2006 according to the provisions of 5 U.S.C. §§ 8106 and 8115. The Office's wage-earning capacity worksheet indicated that appellant's weekly pay rate on April 21, 2004 was $798.12.

[1] An earlier offer by the employing establishment was rejected by appellant as it violated her restrictions.

On January 16, 2007 appellant requested a review of the written record. She enclosed a copy of the wage calculation sheet and explained that the Office used the incorrect rate of pay for her date-of-injury position. Appellant alleged that the Office used a pay rate of Step 01/C as her pay rate on October 28, 2006. This rate was equivalent to $822.75 per week. Appellant contended that the correct rate should be Level 2, Step G. She stated that she had spoken to Ms. Evans, who noted that the wage-rate information was never correctly entered, and that the error remained uncorrected. The calculation sheet contained an annotation from L. Poindexter, "SCS," who acknowledged that he verified appellant's level as 02, Step G.

Appellant enclosed a notification of personnel action with an effective date of November 16, 2002. It contained an annotation that appellant should have been in Level 2 effective November 16, 2002. The form indicated that appellant's grade and step was "02/B" with a salary of $37,897.00. She also included a Form CA-7 and noted that it was submitted incorrectly.

By letter dated March 2, 2007, the Office requested that the employing establishment provide comments or additional evidence. It did not respond.

In an April 13, 2007 decision, the Office hearing representative affirmed the Office's January 8, 2007 decision.

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

Section 8115(a) of the Federal Employees' Compensation Act[2] provides, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by her actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[3] If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, her wage-earning capacity is determined with due regard to the nature of her injury, her degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect her wage-earning capacity in her disabled condition.[4] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[5]

[2] 5 U.S.C. § 8115.

[3] *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

[4] *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

[5] *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

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

The Office accepted appellant's claim for right hip contusion and sciatic right leg, and authorized a spinal fusion.

Appellant began working a part-time limited-duty position as a modified letter carrier, effective October 28, 2006. The modified letter carrier position complied with the restrictions provided by Dr. Khanna in his April 3 and July 17, 2006 reports which advised that appellant could work four hours a day provided she did not do any casing, only performed intermittent reaching for no more than one hour per day and worked early in the day "due to medication." He provided restrictions on lifting and carrying more than five pounds, four hours per day; intermittent standing up to four hours per day; intermittent walking up to one hour per day; no climbing, kneeling, bending or stooping, twisting; pulling or pushing; simple grasping intermittently for up to four hours per day; fine manipulation intermittently up to four hours a day; reaching above the shoulder, intermittently four hours a day; and no driving or operating machinery. Dr. Khanna indicated that appellant should perform primarily sedentary work. The modified letter carrier position was a Level 2, Step G at $47,276.00 per year effective October 28, 2006. The employing establishment noted that the hours were from 9:00 a.m. to 1:00 p.m. and included seated work at a letter case table, lining out customer information on cards weighing approximately one ounce or less, checking and verifying carrier edit books while seated, consolidation of AVUS receipts while seated, verifying packages for next day delivery, scanning delivery confirmation packages within weight restrictions, answering telephones and other duties within her restrictions. On January 5, 2007 the Office confirmed that appellant had completed 60 days of successful work in the job. The Board finds that the modified letter carrier position that appellant began working on October 28, 2006 is consistent with her work restrictions and abilities. Appellant worked in the position for over 60 days. Her performance of this position in excess of 60 days is persuasive evidence that the position represents her wage-earning capacity.[6] Moreover, there is no evidence that the position was seasonal, temporary or make-shift work designed for appellant's particular needs.[7]

However, the Board notes that the record contains conflicting information regarding appellant's rate of pay on the date of injury or the date that disability began. Appellant's primary argument on appeal is that the Office utilized the incorrect salary to determine her pay rate. In order to calculate appellant's pay rate, the Office would have to use appellant's monthly pay.[8] Monthly pay is defined as the monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment

[6] Office procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

[7] *Elbert Hicks*, 49 ECAB 283 (1998).

[8] *See* 5 U.S.C. § 8106(a) (if the disability is partial, the Office shall pay the employee during the disability compensation equal to the difference between her monthly pay and her monthly wage-earning capacity).

with the United States, whichever is greater.[9] It appears that the Office is using April 21, 2004 as the date her disability began. However, the amount that appellant was being paid at that time is unclear.

The Board notes that the formula for determining loss of wage-earning capacity based on actual earnings developed in *Albert C. Shadrick*,[10] has been codified by regulation at 20 C.F.R. § 10.403. Subsection (d) of this regulation provides that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings by the current pay rate for the job held at the time of injury.[11] As noted above, the Office calculated appellant's compensation and utilized a weekly pay rate of $798.12, effective April 21, 2004. However, the record contains conflicting information regarding appellant's pay rate on the date of injury, and the Board is unable to determine which rate of pay was greater, or if the Office utilized the corrected pay rate information provided by the employing establishment. For example, in a January 17, 2006 letter, Ms. Evans, an injury compensation specialist from the employing establishment, provided a corrected salary history regarding appellant's pay rate. She explained that an error had occurred in the employing establishment's records which were never updated to reflect the change in appellant's pay schedule, grade and step. She further noted that the error had occurred in 2002 and was not discovered until approximately a year earlier. Another injury compensation specialist, Ms. Banks, indicated that, when appellant first began working for six hours per day on January 12, 2004, she was paid at Level 1, Step C at a yearly salary of $38,815.00, but noted that she should have been paid at Level 2, Step C at a salary of $42,242.00. Additionally, she added that when appellant became disabled on August 8, 2004 she was paid at Level 1, Step E at a salary of $43,211.00, but she should have been paid at Level 2, Step E at a salary of $44,019.00. Furthermore, on October 16, 2006, Kelli Rowland, another injury compensation specialist from the employing establishment, noted that, on the date of injury, appellant was a Level 1, Step C city letter carrier. However, appellant continued to note that an error remained regarding her salary on the date of injury. Appellant contends that she was a Level 2, when she was injured, but she was incorrectly paid at a Level 1 rate.

The Board notes that Office procedures and Board precedent contemplate that when there are pay rate discrepancies they must be clarified.[12] Office procedures address clarifying pay rate discrepancies, noting that the employing establishment or claimant may challenge, correct, or expand on the evidence in the original reports with respect to terms of employment, amount of pay, or types and amounts of increments. When this happens, the Office must clarify any material discrepancies in the record before establishing a pay rate for compensation purposes. This can be done by letter or by a telephone call followed by written confirmation.[13]

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[9] 5 U.S.C. § 8101(4).

[10] 5 ECAB 376 (1953).

[11] 20 C.F.R. § 10.403 (d); *see Afegalai L. Boone*, 53 ECAB 533 (2002).

[12] *See Ricardo Hall*, 49 ECAB 390 (1998); *Gary Vancura*, 40 ECAB 427 (1989).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.2(d)(1) (April 2002).

As the evidence contains discrepancies which have not been adequately explained, the Board concludes that the case must be remanded for further development and a *de novo* decision with detailed findings on how appellant's rate of pay was on the date disability began. Thereafter, the Office should compute the rate of pay in accordance with the corrected pay information provided by the employing establishment.

## ***CONCLUSION***

The Board finds that the position of a modified letter carrier that appellant held commencing October 28, 2006 was an appropriate limited-duty job which the Office properly determined represented her wage-earning capacity. However, the case is not in posture regarding the rate of pay which was used to determine her wage-earning capacity and the case must be remanded.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the April 13, 2007 decision of the Office of Workers' Compensation Programs is affirmed in part and remanded in part.

Issued: March 10, 2008
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