



On February 7, 2007 appellant accepted a position as a modified clerk. He returned to work on February 20, 2007. By decision dated May 2, 2007, the Office found that appellant's actual earnings as a modified clerk effective February 20, 2007 fairly and reasonably represented his wage-earning capacity determination. It reduced his compensation to zero as his wages met or exceeded those of the job he held when injured.

On February 22, 2008 appellant filed a notice of recurrence of disability on October 16, 2007 causally related to his February 1, 1993 work injury. He stopped work on October 17, 2007. Appellant related that on October 16, 2007 he experienced an increase in pain.

In a progress report dated October 18, 2007, Dr. Timothy P. Sesi, a Board-certified psychiatrist, evaluated appellant for complaints of increased pain. On examination he found "increased myofascial findings." Dr. Sesi stated, "[Appellant] has had some increased pain with some increased duties at work. I am going to put him off work for the next couple of weeks. I would like things to 'calm down a bit with regards to his back.'" He recommended a magnetic resonance imaging (MRI) scan study.

On November 14, 2007 Dr. Sesi described appellant's findings of pain and paresthesias with stiffness and trigger points on examination. He took him off work pending an MRI scan study. In an accompanying form report, Dr. Sesi diagnosed a disc herniation and found that appellant was unable to work. On December 6, 2007 he found no changes on examination and again requested an MRI scan study. Dr. Sesi opined that appellant should remain off work. On January 17, 2008 he again requested approval for an MRI scan study "to find out what the status of [appellant's] herniated disc is and what the next option of treatment would be for him.... [Appellant] remains on an off-work basis."

By letter dated March 5, 2008, the Office requested that appellant submit a detailed medical report from his attending physician addressing how his condition worsened such that he could not perform the duties of a modified clerk.

On February 26 and 28, 2008 Dr. Sesi again found that appellant was disabled pending an MRI scan study. In a report dated March 20, 2008, he stated:

"As I have related in the past, [appellant] had a previous back injury from 1993. [Appellant] went through an extensive workup at that time as well as therapy and medications and eventually went back to a work status. He had been on restricted work. [Appellant] then had acute worsening of his back pain in October 2007. He had increased pain and discomfort at that time. [Appellant] had noticed increased pain with increased duties at work as noted in my office note of October 18, 2007. At that time I kept him off work, we put him on some pain medication and we had him continue with some home exercises....

"This current injury, by history, is an exacerbation of a previous injury. There can be no other explanation as to why he was working and doing reasonably well, enough so that he could continue working, but then had a flare-up at work."

Dr. Sesi again recommended an MRI scan study.

By decision dated May 29, 2008, the Office found that appellant had not established that modification of its wage-earning capacity determination was warranted. On June 22, 2008 appellant requested a telephonic hearing.

An MRI scan study of the lumbar spine, performed on June 17, 2008, revealed multilevel degenerative disc disease and displacement superimposed on a congenitally narrow spinal canal, with a broad-based disc protrusion at L3-4 causing severe central canal and biforaminal narrowing and effacement of the descending L4 nerve roots bilaterally. The study also showed moderate central canal stenosis at L4-5 and L5-S1 affecting the nerve roots bilaterally.

In a progress report dated July 22, 2008, Dr. Sesì recommended a surgical evaluation. On September 4, 2008 Dr. Steven M. Rapp, a Board-certified neurosurgeon, discussed the February 1, 1993 work injury, the microdiscectomy in 1993 and the revision of the discectomy in 1994. He noted that, in September 2007, appellant experienced increased back pain with numbness and tingling into the lower extremities. Dr. Rapp reviewed the June 2008 MRI scan study and stated, “These films are suggestive of an L3-4 disc herniation with significant stenosis. There is also slight stenosis at L2-3. It is more likely than not that this is an aggravation of [appellant’s] previous condition, which was aggravated by his work.”<sup>1</sup>

In a statement received November 10, 2008, appellant argued:

“It is my contention and belief that my current condition and disability are a result of the natural progressive worsening of my previously accepted work-related injury, a disc herniation at L3/L4 through both the natural progression and pathology of the injury and through the possible exacerbation of the injury’s symptoms through the culminating effects, the dynamics and natural conditions of the job requirements as had been modified by the [employing establishment] on August 31, 2007 which included extended walking, extended periods of standing and sitting as well as the physical rigors and demands of entering and exiting a seated position, not addressed in my restrictions and this worsening did occur without a single and or specific event or trauma intervening.”

Appellant noted that his 2008 MRI scan study showed that his conditioned had worsened since the previously MRI scan study of November 2000.

A telephonic hearing was held on November 3, 2008.<sup>2</sup> Appellant related that he experienced increased pain and paralysis sensation in both legs. He asserted that extended standing performing his modified work duties “aggravated the existing condition.”

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<sup>1</sup> An October 21, 2008 lumbar myelogram and computerized tomography myelogram revealed multilevel degenerative disc and facet changes with multiple levels of central canal stenosis and bilateral foraminal narrowing.

<sup>2</sup> On October 29, 2008 Dr. Rapp reviewed the myelogram and recommended an inter body fusion at L3-4 and L4-5.

By decision dated January 9, 2009, the hearing representative affirmed the May 29, 2008 decision. He found that the medical evidence did not contain sufficient objective rationale showing how appellant sustained a material change in the extent of his injury-related condition beginning October 16, 2007.

### **LEGAL PRECEDENT**

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.<sup>3</sup> Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>4</sup>

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, in fact, erroneous.<sup>5</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>6</sup>

### **ANALYSIS**

The Office accepted that appellant sustained a herniated disc at L3-4 on February 1, 1993 in the performance of duty. On February 7, 2007 appellant accepted a position as a modified carrier. By decision dated May 2, 2007, the Office found that his actual earnings as a modified carrier fairly and reasonably represented his wage-earning capacity and established that he had no loss of wage-earning capacity. Appellant worked in the position until October 17, 2007, when he stopped alleging that he sustained an increase in pain.

Appellant has not alleged and the record does not support that the wage-earning capacity decision was in error. He argued that he sustained a material change in condition such that he was unable to perform his work as a modified carrier beginning October 16, 2007.<sup>7</sup>

On October 18, 2007 Dr. Sesí found an increase in myofascial findings on examination and related that he was taking appellant off work to "calm things down a bit with regards to his back." He recommended an MRI scan study. In November and December 2007 reports, Dr. Sesí opined that appellant should remain off work pending an MRI scan study to determine the condition of his herniated disc and need for further treatment. He did not, however, provide a

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<sup>3</sup> See 5 U.S.C. § 8115 (determination of wage-earning capacity).

<sup>4</sup> *Sharon C. Clement*, 55 ECAB 552 (2004).

<sup>5</sup> *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

<sup>6</sup> *Id.*

<sup>7</sup> In a statement dated November 10, 2008, appellant attributed his condition both to the natural progression of his injury and the performance of his work duties since the wage-earning capacity determination. If he believes that, new work factors caused or aggravated his condition, he should file an occupational disease claim.

firm diagnosis or explain how appellant's accepted work injury caused an increase in disability; thus, his opinion is of little probative value.<sup>8</sup>

In February 2008 reports, Dr. Sesi noted that appellant experienced an "acute worsening of his back pain in October 2007" which he attributed to "increased duties at work." He diagnosed an exacerbation of appellant's prior employment injury and stated that there was "no other explanation as to why he was working and doing reasonably well, enough so that he could continue working, but then had a flare-up at work." Dr. Sesi did not, however, provide medical reasoning demonstrating that his conclusion reached regarding disability was sound, logical and rational.<sup>9</sup> A medical opinion attributing a condition to an employment injury because the employee was asymptomatic before the injury but symptomatic after it is insufficient, without supporting rationale, to establish causal relationship.<sup>10</sup>

On September 4, 2008 Dr. Rapp discussed appellant's February 1, 1993 work injury and resulting medical treatment. He noted that, in September 2007, appellant experienced increased pain in his low back with numbness and tingling. Dr. Rapp interpreted a June 2008 MRI scan study as suggesting a disc herniation and significant stenosis at L3-4 and slight stenosis at L2-3. He attributed the findings on MRI scan study "more likely than not" to an aggravation of appellant's employment-related condition. Dr. Rapp's opinion that appellant "more likely than not" had sustained an aggravation of the accepted work injury is couched in speculative terms and thus of diminished probative value.<sup>11</sup> Further, he did not provide any rationale for his causation finding. A mere conclusion without the necessary rationale explaining how and why the physician believes that a claimant's accepted exposure could result in a diagnosed condition is not sufficient to meet a claimant's burden of proof.<sup>12</sup>

Appellant has not submitted medical evidence sufficient to establish that the May 2, 2007 wage-earning capacity determination should be modified. He has not met his burden of proof.

### CONCLUSION

The Board finds that appellant has not established that modification of the Office's wage-earning capacity determination is warranted.

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<sup>8</sup> See *C.F.*, 60 ECAB \_\_\_ (Docket No. 08-1102, issued October 10, 2008) (finding that pain is a symptom, not a compensable diagnosis); *T.M.*, 60 ECAB \_\_\_ (Docket No. 08-975, issued February 6, 2009) (a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

<sup>9</sup> *K.W.*, 59 ECAB \_\_\_ (Docket No. 07-1669, issued December 4, 2007).

<sup>10</sup> *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

<sup>11</sup> See *T.M.*, *supra* note 8; *D.D.*, 57 ECAB 734 (2006).

<sup>12</sup> *C.B.*, 60 ECAB \_\_\_ (Docket No. 08-2268, issued May 22, 2009).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated January 9, 2009 and May 29, 2008 are affirmed.

Issued: December 17, 2009  
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