

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

L.A., Appellant)	
)	
and)	Docket No. 08-168
)	Issued: March 6, 2009
DEPARTMENT OF LABOR, MINE, SAFETY & HEALTH ADMINISTRATION, Denver, CO, Employer)	
)	

Appearances: *Case Submitted on the Record*
John S. Evangelisti, Esq., for the appellant
Miriam D. Ozur, for the Director

**ORDER GRANTING PETITION FOR RECONSIDERATION
AND VACATING DECISION**

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

On October 23, 2007 appellant filed an application seeking review of a September 7, 2007 merit decision of the Office of Workers' Compensation Programs denying his claim for a recurrence of disability. The appeal was docketed as No. 08-168.

On September 19, 2008 the Board issued a decision and order in the above-entitled matter, setting aside the Office's September 7, 2007 decision and remanding the case for further development. The Board found that the Office had improperly adjudicated appellant's claim as one for recurrence of disability, rather than as a request for modification of a wage-earning capacity determination. On October 24, 2008 the Director of the Office filed a petition for reconsideration. Appellant and his representative were served with a copy of the Director's petition. On October 29, 2008 appellant's representative submitted a response to the Director's petition.

The Board, having duly considered the Director's petition for reconsideration, finds that the Board's September 19, 2008 decision was based on an error of fact. Therefore, the Director's

petition for reconsideration should be granted,¹ and the Board's September 19, 2008 decision should be vacated.

In its September 19, 2008 decision, the Board stated that the Office had issued a formal loss of wage-earning capacity (LWEC) determination on July 20, 2005, finding that appellant's actual earnings in his light-duty position since July 1, 2004 fairly and reasonably represented his wage earning-capacity. Based upon this finding of fact, the Board found that the issue presented by appellant's recurrence claim was whether the July 20, 2005 LWEC should be modified, and remanded the case to the Office for such a determination.² A careful review of the record, however, reflects that, although appellant's compensation benefits were reduced on July 20, 2005, based upon his actual wages at that time, the Office made no finding that his light-duty position fairly and reasonably represented his wage-earning capacity, or that he had successfully performed the position for 60 days, as required by statute and Office procedures.³ Further, the July 20, 2005 letter contained no appeal rights. Therefore, the Office's July 20, 2005 letter did not constitute a formal wage-earning capacity determination, but rather was an informational letter advising appellant of a reduction in his compensation. As no formal wage-earning capacity determination was made in this case, the Office properly adjudicated appellant's claim as a recurrence of disability claim.

IT IS HEREBY ORDERED THAT the petition for reconsideration be granted. It is further ordered that the Board's September 19, 2008 decision is vacated.

Issued: March 6, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹ See *Virginia Faye Gabbert (Byron Lowell Gabbert)*, 21 ECAB 149, 150 (1969).

² The Board has held that when a wage-earning capacity determination has been issued and a claimant submits evidence with respect to disability for work, the Office must evaluate the evidence to determine whether a modification of his LWEC is warranted. See *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon Clement*, 55 ECAB 552 (2004).

³ 5 U.S.C. § 8115 (a) (the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity); Federal (FECA) Procedure Manual, Chapter 2.814.7.