



the rear of his delivery vehicle when a motorist struck him, pinning him between the two vehicles. Appellant underwent surgery that same day. OWCP accepted the claim for left tibia compound comminuted mid-shaft fracture and open reduction internal fixation (ORIF) fractured tibial shaft. Approximately, eight months following his injury, he returned to work in a full-time, limited-duty capacity. On February 9, 2000 appellant underwent surgery to remove hardware implanted during his left tibia ORIF. He returned to limited-duty work approximately one month later.

On February 7, 2001 appellant accepted a rehabilitation job offer as a modified letter carrier. The position included a combination of office/clerical duties, carrier duties and light custodial work. His carrier duties included casing mail, preparing delivery point sequence mail for other carriers, delivering express mail, maintaining/updating change of address cards for carrier routes, maintaining/updating carrier route books and maintaining carrier case labels. The office/clerical duties included filing, data input, ordering supplies and stocking the customer lobby with supplies, generating reports under supervisory direction and answering customer inquires in person and *via* telephone. Appellant's custodial duties included light dusting and sweeping as directed by his supervisor. All of the above-noted duties and any additionally assigned duties were to conform to appellant's physical restrictions, which included no bending, kneeling, stooping or twisting, intermittent sitting (five to six hours/day), intermittent standing (one to two hours/day), up to eight hours of intermittent fine manipulation, simple grasping and reaching above shoulder level. The restrictions also included a 10-pound weight limit on pushing, pulling, lifting and carrying, which was to be performed intermittently at 5-to 10-minute intervals over the course of an eight-hour workday.<sup>2</sup> The modified letter carrier position paid an annual salary of \$39,426.00 (\$758.19 per week). Appellant assumed his new duties on February 10, 2001.

On July 19, 2001 appellant sustained another employment-related traumatic injury. He reportedly injured his lower back bending over to remove a tray of mail from a cart. The tray weighed approximately 15 pounds. OWCP accepted that appellant sustained a lumbar sprain (xxxxxx962). Appellant was excused from all work through July 30, 2001. He resumed his modified letter carrier duties on July 31, 2001.

Appellant's physician, Dr. Kasamias, provided permanent work restrictions on August 7, 2001. These included eight hours sitting, two to three hours standing, two to three hours walking, one to two hours stairs, no ladders, occasional bending and no kneeling, stooping or twisting. Appellant could lift/carry up to 20 pounds and push/pull up to 20 pounds. Additionally, he was permitted to case mail, but he could not perform any type of mail delivery, including walking door-to-door, milk stop door-to-door, in vehicle box-to-box and no express/priority mail delivery.

By decision dated September 17, 2001, OWCP found that appellant's modified letter carrier position, which was effective February 10, 2001, fairly and reasonably represented his wage-earning capacity. It indicated that, since February 10, 2001, he had "continuously" worked in the position of modified letter carrier "without incident." Having worked in this position for

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<sup>2</sup> Although the February 5, 2001 job offer did not specifically identify the medical evidence relied upon, the identified physical restrictions were derived in part from a March 10, 2000 report from Dr. Athanasios D. Kasamias.

60 days or more, OWCP concluded that the modified letter carrier position fairly and reasonably represented appellant's wage-earning capacity. Because appellant's earnings as a modified letter carrier equaled or exceeded the current earnings of his date-of-injury position, he had zero percent loss of wage-earning capacity.

After providing full-time, limited-duty work for more than nine years, the employing establishment abolished appellant's modified letter carrier position pursuant to the national reassessment process (NRP). Beginning August 7, 2010, the employing establishment offered him only two hours of limited-duty work per day. Appellant's new duties as a "carrier technician" involved casing mail for just two hours each day. On August 13, 2010 he filed a claim for wage-loss compensation (Form CA-7) beginning August 7, 2010.

By decision dated November 5, 2010, OWCP denied appellant's claim for wage-loss compensation because he failed to establish a basis for modifying the September 17, 2001 wage-earning capacity determination.

Appellant requested an oral hearing, which was held on March 3, 2011. At the hearing, appellant's representative argued that the modified letter carrier position was based on "a hodgepodge of duties" culled from various crafts within the postal service. He characterized the February 5, 2001 modified letter carrier position as makeshift, odd-lot and sheltered and noted that it had been specifically designed to meet appellant's particular needs.

In a May 12, 2011 decision, the hearing representative found that appellant had not established a basis for modifying OWCP's September 17, 2001 wage-earning capacity determination. Accordingly, the hearing representative affirmed the November 5, 2010 decision.

### **LEGAL PRECEDENT**

A wage-earning capacity determination is a finding 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> Actual wages earned is generally the best measure of wage-earning capacity.<sup>4</sup> In the absence of evidence showing that actual earnings do not fairly and reasonably represent the injured employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning capacity.<sup>5</sup> A determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made only after an employee has worked in a given position for more than 60 days.<sup>6</sup>

Factors to be considered in determining if a position fairly and reasonably represents the injured employee's wage-earning capacity include: (1) whether the kind of appointment and tour

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<sup>3</sup> 5 U.S.C. § 8115(a); see *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

<sup>4</sup> *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

<sup>5</sup> *Id.*

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (October 2009).

of duty are at least equivalent to those of the date-of-injury job; (2) whether the job is part time (unless the employee was a part-time worker at the time of injury) or sporadic in nature; (3) whether the job is seasonal in an area where year-round employment is available; and (4) whether the job is temporary where the claimant's previous job was permanent.<sup>7</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 erroneous.<sup>8</sup> The burden of proof is on the party seeking modification of the wage-earning capacity determination.<sup>9</sup>

A recurrence of disability includes an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his work-related injury or illness is withdrawn -- except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force (RIF).<sup>10</sup> Absent a formal wage-earning capacity determination and assuming the position was not withdrawn for cause or because of a RIF, the employee would be entitled to compensation based upon a showing of continuing injury-related disability for regular duty.<sup>11</sup> But when a formal wage-earning capacity determination is in place, the subsequent withdrawal of a light-duty assignment is not treated like a recurrence of disability.<sup>12</sup> Under those particular circumstances, OWCP shall review the claim for additional compensation as a request for modification of the wage-earning capacity determination and apply the above-noted criteria in determining whether modification is warranted.<sup>13</sup>

### ANALYSIS

Appellant currently argues that the September 17, 2001 wage-earning capacity determination was erroneous because the February 5, 2001 modified letter carrier position was an "odd-lot and sheltered position" and also "temporary in nature." This is essentially the same argument he presented when his case was pending before the Branch of Hearings & Review. The Board agrees that the September 17, 2001 wage-earning capacity determination was erroneous, but for reasons other than those advanced by appellant.

Whether a position fairly and reasonably represents one's wage-earning capacity is based on a number of factors. While the procedure manual outlines various factors that focus on the

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<sup>7</sup> *Id.* at Chapter 2.814.7(a).

<sup>8</sup> *Tamra McCauley*, 51 ECAB 375, 377 (2000).

<sup>9</sup> *Id.*

<sup>10</sup> 20 C.F.R. § 10.5(x).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7(a)(4) (October 2009).

<sup>12</sup> *Id.* at Chapter 2.1500.7(a)(5).

<sup>13</sup> *Id.*; *K.R.*, Docket No. 09-415 (issued February 24, 2010); *K.R.*, Docket No. 09-28 (issued September 16, 2009).

type of appointment and whether it is part-time, temporary or seasonal work, it goes without saying that any limited-duty assignment must also be consistent with the injured employee's then-current medical restrictions.<sup>14</sup> In this instance, the employing establishment patterned its February 5, 2001 rehabilitation job offer on medical restrictions that were almost a year old at the time and arguably stale. Moreover, Dr. Kasamias' March 10, 2000 restrictions precluded any type of mail delivery, including express/priority mail. Despite this particular limitation, the February 5, 2001 modified letter carrier position required that appellant "deliver express mail." When Dr. Kasamias updated appellant's restrictions in August 2001, he continued to preclude any type of mail delivery, including "EXPRESS/PRIORITY" mail. At the March 3, 2011 hearing, appellant testified that he had in fact delivered express mail as part of his modified letter carrier duties. The Board finds that the duties outlined in the February 5, 2001 rehabilitation job offer were not consistent with his then-applicable medical restrictions. As such, appellant's February 5, 2001 modified letter carrier position cannot be considered medically suitable.

It is also noteworthy that appellant sustained another employment-related injury on July 19, 2001, while performing his modified letter carrier duties. OWCP accepted that he sustained a lumbar sprain while reportedly bending over to remove a tray of mail that weighed approximately 15 pounds. Appellant missed almost two weeks of work due to his July 19, 2001 employment injury. Accepting that his low back injury occurred as alleged, the work he performed on July 19, 2001 as a modified letter carrier included medically-restricted activities of bending and lifting in excess of 10 pounds. OWCP's September 17, 2001 wage-earning capacity determination made no mention of appellant's July 19, 2001 employment-related back injury and the decision erroneously stated that he performed his modified letter carrier duties "continuously" since February 10, 2001 "without incident."

Generally, one's performance of a limited-duty position in excess of 60 days is persuasive evidence that the position represents the employee's wage-earning capacity.<sup>15</sup> While appellant worked as a modified letter carrier for at least 60 days, the analysis does not simply end there. In its September 17, 2001 wage-earning capacity determination, OWCP failed to recognize that at least part of his modified letter carrier duties were inconsistent with Dr. Kasamias' March 10, 2000 and August 7, 2001 work restrictions and limitations. Second, OWCP overlooked the fact that appellant injured his lower back on July 19, 2001 while performing work-related activities in excess of the limitations imposed by his treating physician. Lastly, it erroneously stated that he had performed his modified letter carrier duties "continuously" since February 10, 2001 "without incident."

Based on the above-noted errors, the Board finds that the original September 17, 2001 loss of wage-earning capacity (LWEC) determination was erroneous. Accordingly, appellant has established a basis for modifying the LWEC determination. As such, the September 17, 2001 decision does not bar an award of wage-loss compensation beginning August 7, 2010 based on the employer's NRP-related withdrawal of his previous full-time, limited-duty assignment.

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<sup>14</sup> See e.g., *E.C.*, 59 ECAB 397, 401-02 (2008).

<sup>15</sup> *Id.* at 402.

**CONCLUSION**

Appellant established that the September 17, 2001 wage-earning capacity determination was erroneous, thereby warranting modification.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 12, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 1, 2012  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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