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

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| **D.C., Appellant** | ) | |
| **and** | ) | **Docket No. 12-76** |
| | ) | **Issued: June 18, 2012** |
| **U.S. POSTAL SERVICE, NASHUA PRIORITY MAIL PROCESSING CENTER, Nashua, NH, Employer** | ) | |

*Appearances:*
*Alan J. Shapiro, Esq.,* for the appellant
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On October 20, 2011 appellant, through her attorney, filed a timely appeal of the August 24, 2011 merit decision of the Office of Workers' Compensation Programs concerning a wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 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 OWCP properly determined that appellant's actual earnings as a receptionist fairly and reasonably represented her wage-earning capacity.

On appeal, counsel contends that OWCP's August 24, 2011 decision is contrary to fact and law.

[1] 5 U.S.C. § 8101 *et seq.*

## ***FACTUAL HISTORY***

OWCP accepted that on May 3, 2001 appellant, then a 35-year-old casual label clerk, sustained a lumbar subluxation as a result of lifting tubs of labels at work.[2] It paid her wage-loss compensation for total disability from June 26 through October 26, 2001. Effective November 4, 2011, OWCP placed appellant on the periodic rolls and she began to receive compensation every 28 days through April 19, 2010.

By letter dated February 11, 2009, OWCP referred appellant to a vocational rehabilitation counselor based on the August 18 and December 5, 2008 medical reports from Dr. Gary J. LaTourette, a Board-certified orthopedic surgeon and OWCP referral physician, who found that appellant could work with restrictions.[3] In a May 10, 2009 report, the rehabilitation counselor advised that appellant could perform the positions of receptionist, reservation clerk and information clerk based on her vocational test results and that the identified positions were performed in sufficient numbers and were reasonably available in her commuting area.[4]

By letter dated July 29, 2009, OWCP advised appellant that it proposed to reduce her wage-loss compensation benefits to reflect her ability to earn wages as a reservation clerk or receptionist as the identified positions were within her medical restrictions. On July 30, 2009 it approved her enrollment in a 45-day computer training program from August 18 through November 23, 2009. Appellant was expected to complete the program by October 15, 2009 and no later than October 23, 2009. She completed the training on October 15, 2009.

On March 21, 2010 appellant was offered and accepted a full-time reservation/check-in representative position at USA Airways, Inc. in Las Vegas, Nevada. She was scheduled to start work on March 22, 2010 at an hourly rate of $11.00, 40 hours per week. On March 23, 2010 appellant underwent an emergency appendectomy. She was released to return to work on April 14, 2010 but USA Airways, Inc. gave her position to another employee.

[2] In an August 15, 2001 decision, OWCP denied appellant's request for authorization of pelvic reconstruction surgery that she underwent on January 30, 2001, finding the surgery not causally related to her May 3, 2001 employment injury.

[3] In the August 18, 2008 report, Dr. LaTourette advised that appellant could perform modified-duty work. He stated that she needed retraining for a position outside the employing establishment because it did not have an available position within her restrictions. Dr. LaTourette restricted appellant from lifting more than 10 pounds and repeated bending and stooping. Appellant required a sedentary position that would allow her to walk around after sitting for approximately one hour. Dr. LaTourette recommended additional diagnostic testing before he could determine whether her accepted condition had resolved as there were two conflicting magnetic resonance imaging (MRI) scans regarding whether she had a herniated lumbar disc and degenerative changes in the lumbar spine. In a work capacity evaluation dated August 28, 2008, he advised that appellant could sit up to 45 minutes, walk carrying no more than 5 pounds and operate a motor vehicle at and to and from work 30 to 45 minutes. Appellant could push, pull or lift 5 to 10 pounds. In the December 5, 2008 report, Dr. LaTourette advised that an August 28, 2008 lumbar MRI scan demonstrated a bulge rather than herniation. A June 4, 2008 nerve conduction study showed no neuropathy.

[4] On April 25, 2005 appellant advised OWCP that she had moved to Henderson, Nevada.

On April 19, 2010 appellant accepted and began work as a full-time receptionist/ dispatcher at the Wynn Hotel in Las Vegas. She earned $12.00 per hour. On May 21, 2010 appellant advised the vocational rehabilitation counselor that beginning on May 24, 2010 her work hours would be reduced from 40 hours per week to 30 to 35 hours per week. She was also offered a full-time receptionist position at the Players Club located inside the Ellis Island Casino in Las Vegas earning $9.00 per hour, 40 hours a week. On May 20, 2010 appellant stopped work at the Wynn Hotel.

On May 29, 2010 appellant began working at the Ellis Island Casino as a receptionist from 4:00 p.m. to 12:00 a.m., Tuesday through Saturday. On July 20 and 29, 2010 she advised the vocational rehabilitation counselor that she continued to work at the Ellis Island Casino.

In an August 19, 2010 report, Dr. Jimmy John Nobleza Novero, an attending Board-certified neurologist, advised that appellant could not return to work. He stated that a MRI scan showed a pinched nerve. Dr. Novero restricted appellant from continuous standing and sitting more than four hours. He recommended that she remain off work until further testing was completed and the results were discussed with her. In an August 24, 2010 report, Dr. Novero advised that appellant's pinched nerve was exacerbated by prolonged standing and sitting.

In an August 23, 2010 report, Dr. LaTourette advised that a June 26, 2010 lumbar MRI scan demonstrated that appellant had a three-millimeter disc protrusion with impingement of the existing L5 nerve root. He further advised that the original MRI scan performed on July 7, 2001 revealed disc herniation. The August 28, 2008 lumbar MRI scan showed a disc bulge greater on the left with mild neural foraminal narrowing to the left. It was estimated that this degenerative signal was two millimeters extending to the left with mild facet arthropathy and mild neural foraminal narrowing on the left. Dr. LaTourette stated that since 2001 appellant had objective findings of disc herniation on the left side of her lumbar spine and symptoms. He advised that this condition was caused by lifting and throwing tote bags, which was totally consistent with the present findings and findings that were present in the summer of 2001. Dr. LaTourette listed findings on physical examination which included an absent Achilles reflex that was consistent with MRI scan findings. He diagnosed herniated nucleus pulposus at the L5-S1 level with impingement of the S1 nerve root and probably impingement of the L5 nerve root. Dr. LaTourette opined that appellant's May 3, 2001 employment injury was the sole cause of this problem although it had progressed because it had not been properly treated since the date of injury. He further opined that the accepted lumbar subluxation was still present. Dr. LaTourette advised that appellant could work six hours a day. He recommended that she be allowed to stand and sit periodically throughout this period. Dr. LaTourette restricted appellant from lifting more than 10 pounds. He advised that she should remain off work while being treated with an epidural block and evaluated by a spine surgeon.

On October 19, 2010 OWCP requested that Dr. LaTourette explain how appellant's newly diagnosed lumbar condition was causally related to the accepted injury. Dr. LaTourette was also asked to explain why appellant had residuals of the accepted condition and why she could not work eight hours a day with the restrictions he listed or continue performing her receptionist duties while undergoing testing.

In a December 14, 2010 report, Dr. LaTourette advised that his diagnosis of herniated nucleus pulposus at L5-S1 was not a new diagnosis. It was a continuation of the diagnosis that appellant had all along and was directly related to her May 3, 2001 employment injury. Dr. LaTourette stated that she had significant objective findings to support her low back pain of 9 to 10 on a scale of 0 to 10. The objective findings included L5-S1 anular tear and protruding disc that was directly impinging on the descending left S1 nerve root and an absent Achilles reflex on the left. Dr. LaTourette reiterated his prior opinion that appellant could work six hours a day with alternate sitting and standing frequently.

In a March 3, 2011 decision, OWCP determined that appellant's actual wages as a receptionist at Ellis Island Casino fairly and reasonably represented her wage-earning capacity as she demonstrated an ability to perform the duties of the job for more than two months. It reduced her compensation to zero because her actual wages exceeded the current wages of the job she held when injured.

By letter dated March 9, 2011, appellant, through her attorney, requested a telephone hearing with an OWCP hearing representative.

During the June 1, 2011 telephone hearing, appellant stated that she worked in a full-time customer service job at the Ellis Island Casino that required her to give out cards to individuals who placed them in machines and played a game while earning points for free meals and hotel stays. She thought the position would be more like a receptionist position that allowed her to sit and stand as needed. Appellant stated that she was not allowed to sit in the position. She stood on a cement floor and had to argue with management to get a mat to stand on to help the numbness she experienced while standing. Appellant's pain for which she sought medical treatment worsened over two and one-half months. She was advised by her vocational rehabilitation counselor that she would obtain approval for the position from OWCP although it was not a receptionist position. Appellant's attorney contended that her job at the Ellis Island Casino should not be used to determine her wage-earning capacity as the duties of the position were outside her physical restrictions.

In an August 24, 2011 decision, an OWCP hearing representative affirmed the March 3, 2011 decision. He found that the receptionist position at Ellis Island Casino which was performed by appellant for at least 60 days fairly and reasonably represented her wage-earning capacity. The hearing representative further found that the medical evidence submitted by appellant did not establish a work stoppage due to a change in the nature of her accepted condition. He determined that the evidence established that appellant was not a full-time employee on the date of injury. The hearing representative found, contrary to appellant's attorney's contention that she earned $9,000.00 while working at the employing establishment, that she earned $5,103.21 during this period.

## ***LEGAL PRECEDENT***

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[5] Disability means the incapacity, because of

[5] 5 U.S.C. § 8102(a).

an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.[6]

In determining compensation for partial disability, the wage-earning capacity of an employee is determined by the employee's actual earnings if the employee's actual earnings fairly and reasonably represent her wage-earning capacity.[7] 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.[8]

In the case of *Albert C. Shadrick*,[9] the Board set forth the principle that, if current actual earnings are used as one of the factors in computing an employee's wage-earning capacity, then the current increased wage for the employee's original job should also be used to avoid any distortions caused by changes in business conditions since the injury. Following this principle, OWCP established the *Shadrick* formula as the method of computing compensation when determining an injured worker's wage-earning capacity.[10]

The Federal (FECA) Procedure Manual provides that OWCP may make a retroactive wage-earning capacity determination if an employee has worked in the position for at least 60 days, the position fairly and reasonably represented her wage-earning capacity and the work stoppage did not occur because of any change in the injury-related condition affecting the ability to work.[11]

## ***ANALYSIS***

OWCP accepted that on May 3, 2011 appellant sustained a lumbar subluxation due to performing her work duties on that date. Appellant returned to work on April 19, 2010 in a full-time receptionist/dispatcher position at the Wynn Hotel and worked in this position until May 20, 2010. Subsequently, on May 29, 2010, she began working at the Ellis Island Casino in a full-time receptionist position. In a March 3, 2011 decision, OWCP determined that appellant's actual wages as a receptionist at the Ellis Island Casino fairly and reasonably reflected her wage-earning capacity as she held the position for more than 60 days. It terminated her wage-loss compensation as she now was earning greater wages than she did in her date-of-

[6] 20 C.F.R. § 10.5(f).

[7] 5 U.S.C. § 8115(a).

[8] *Don J. Mazurek*, 46 ECAB 447 (1995).

[9] 5 ECAB 376 (1953).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.2 (December 1993). For the formula itself, *see id.*, Computation of Compensation, Chapter 2.900.16.c (January 1991).

[11] *Id.* at Chapter 2.814.7(c) (December 1993).

injury job. The March 3, 2011 decision constitutes a retroactive wage-earning capacity determination.[12]

The Board finds that OWCP improperly reduced appellant's compensation on March 3, 2011 based on her actual earnings in a receptionist position she performed from May 29 through August 19, 2010. Appellant argued that her actual earnings as a full-time receptionist at Ellis Island Casino did not fairly and reasonably represent her wage-earning capacity as the duties of the position were outside her physical restrictions. She contended that a receptionist position would allow her to sit and stand as needed, but she worked in a customer service position that required her to stand on a cement floor handing out cards to individuals who placed them in machines and played while earning points for free meals and hotel stays. Appellant stated that she was not allowed to sit in this position. She had to stand on a mat to help with the numbness she experienced while standing. The Board notes that the case record does not contain a description of the work duties to be performed or of the specific physical requirements of the receptionist position, as required.[13] OWCP found only that the position was suitable because appellant had demonstrated her ability to perform the duties for more than two months. It did not address how such employment fairly or reasonably represented her wage-earning capacity as required by its procedures.[14] OWCP did not address appellant's position at the Ellis Island Casino as part of its adjudication. Consequently, it did not fully consider all criteria for making a retroactive wage-earning capacity determination.[15]

## ***CONCLUSION***

The Board finds that OWCP improperly reduced appellant's compensation to zero based on its determination that her actual earnings as a receptionist fairly and reasonably represented her wage-earning capacity.

[12] *Id.*

[13] *Id.* at Chapter 2.814.a.1 (June 1997).

[14] *Id.* at Chapter 2.814.7(e).

[15] *Id.*; *see also Selden H. Swartz*, 55 ECAB 272 (2004).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the August 24, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 18, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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