

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

C.M., Appellant)

and)

DEPARTMENT OF THE INTERIOR,)
NATIONAL PARK SERVICE, Gatlinburg, TN,)
Employer)

Docket No. 13-1638
Issued: April 16, 2014

Appearances:
Lenin V. Perez, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 1, 2013 appellant, through his representative, filed a timely appeal of a May 17, 2013 decision of the Office of Workers' Compensation Programs (OWCP) adjusting his compensation based on a loss of wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act¹ (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 reduced appellant's compensation based on its finding that his actual earnings as a modified seasonal laborer fairly and reasonably represented his wage-earning capacity.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal, appellant's representative argued that the loss of wage-earning capacity determination failed to consider appellant's loss of salary due to his inability to find nonfederal work outside of his seasonal appointment.

FACTUAL HISTORY

On August 17, 2010 appellant, then a 23-year-old seasonal laborer, broke his pelvis, injured the middle part of his body and sustained a small laceration above the right eye when a tree fell on him while walking along a trail. His salary grade was WG03. OWCP accepted the claim for open scalp wound without complications, right fracture of the pelvis and closed bilateral fracture of the sacrum and coccyx and esophageal reflux. It placed appellant on the periodic rolls in receipt of temporary total disability.

On December 14, 2011 Dr. Scott T. Smith, an attending Board-certified orthopedic surgeon, advised that appellant was capable of working with restrictions. The restrictions included no lifting more than 50 pounds for less than two hours; no steep grade hiking; and up to two hours of stooping, bending and squatting.

On March 26, 2012 the employing establishment offered appellant the position of modified laborer which included job duties that fell within his restrictions. The period of employment was from May 20 to November 3, 2012.

Appellant accepted the job offer and returned to work on May 21, 2012.

On September 19, 2012 OWCP proposed to reduce appellant's wage-loss compensation to zero based on his return to work in a modified labor position earning \$563.09 a week working 40 hours a week. It noted that at the time of his injury he was a seasonal employee. The employing establishment was obliged to offer appellant at least a seasonal job and his five-month appointment met that obligation. OWCP further noted that appellant had demonstrated his ability to perform the assigned duties for at least two months and, therefore, the modified laborer position was considered suitable to the limitations of his partial disability.

By decision dated October 31, 2012, OWCP finalized the proposal to reduce appellant's wage-loss compensation. It found that his earnings as a modified seasonal laborer fairly and reasonably represented his wage-earning capacity. Because appellant's actual weekly earnings (\$563.09) met or exceeded the current wages of his date-of-injury position, OWCP determined that appellant had no loss of wage-earning capacity.²

Appellant requested a hearing before an OWCP hearing representative, which was held on February 19, 2013.

In a March 7, 2013 statement, appellant's representative contended that the loss of wage-earning capacity decision was erroneous because the work restrictions caused by his accepted employment injury prevented gainful work outside of the employing establishment.

² Appellant's weekly pay at the time of his injury was \$563.09.

In May 17, 2013 decision, OWCP's hearing representative affirmed the October 31, 2012 decision.

LEGAL PRECEDENT

An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.³ An employee's actual earnings generally best reflect his or her wage-earning capacity.⁴ Absent evidence that actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning capacity.⁵ Compensation payments are based on the wage-earning capacity determination and OWCP's finding remains undisturbed until properly modified.⁶

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 of duty are at least equivalent to those of the date-of-injury job; (2) whether the job is part-time (unless the claimant 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.⁷ Additionally, a makeshift or odd-lot position designed to meet an injured employee's particular needs will not be considered representative of one's wage-earning capacity.⁸

Assuming the position is both vocationally and medically suitable and conforms to the above-noted criteria, the position will generally be deemed to represent the employee's wage-earning capacity after he has successfully performed the required duties for at least 60 days.⁹

ANALYSIS

OWCP accepted that appellant sustained an open scalp wound without complications, right fracture of the pelvis and closed bilateral fracture of the sacrum and coccyx and esophageal reflux due to an August 17, 2010 employment injury.

³ 5 U.S.C. § 8115(a); 20 C.F.R. §§ 10.402, 10.403; *see W.B.*, Docket No. 09-934 (issued January 11, 2010); *Alfred R. Hafer*, 46 ECAB 553 (1995).

⁴ *H.N.*, Docket No. 09-1628 (issued August 19, 2010); *J.C.*, 58 ECAB 700 (2007); *Connie L. Potratz-Watson*, 56 ECAB 316 (2005); *Hayden C. Ross*, 55 ECAB 455 (2004).

⁵ *Id.*

⁶ *See Harley Sims, Jr.*, 56 ECAB 320 (2005); *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (October 2009).

⁸ *A.J.*, Docket No. 10-619 (issued June 29, 2010) (a makeshift/odd-lot position generally lacks a position description with specific duties, physical requirements and a work schedule).

⁹ *Supra* note 7 at Chapter 2.814.7(c)(1).

The employing establishment offered appellant the position of seasonal modified laborer position within the restrictions established by Dr. Smith. Appellant accepted the position and returned to work on May 21, 2012. As he was in a temporary position at the time of his injury, OWCP may use actual wages in a temporary position to determine his wage-earning capacity.¹⁰ The position must be available for at least 90 days in order to be appropriate.¹¹ The record establishes that appellant's temporary, seasonal position was for more than 90 days as the period of employment was from May 20 to November 3, 2012. Consequently, OWCP properly found that the wages in his position of modified seasonal laborer fairly and reasonably represented his wage-earning capacity

On appeal, appellant's representative argues that OWCP failed to take into consideration the wages he would have earned outside of the seasonal job he performed for the employing establishment. He argued that either the employing establishment should offer appellant employment for the year within his medical restrictions, that he be rehabilitated or receives compensation for the six months he was not employed as a result of work restrictions caused by the employment injury. No evidence was submitted to support appellant's conditions regarding his inability to obtain employment during the period he was not employed by the employing establishment. As noted, he was employed in a seasonal position at the time of his injury. The employing establishment was not required to offer appellant yearly employment.

CONCLUSION

The Board finds that appellant's actual earnings as a modified seasonal laborer fairly and reasonably represented his wage-earning capacity.

¹⁰ *Supra* note 7; *see also* A.P., 58 ECAB 198 (2006); *Connie L. Potratz-Watson*, *supra* note 4.

¹¹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 17, 2013 is affirmed.

Issued: April 16, 2014
Washington, DC

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

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

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