

(2) whether appellant established that modification of the loss of wage-earning capacity (LWEC) determination was warranted.

On appeal counsel contends that the LWEC decision should be set aside because it was based on a position that was not *bona fide* and, therefore, not suitable for an LWEC determination. He argues that although the tools and parts attendant position was a classified position it cannot be used to determine an LWEC because the lifting requirement was modified from 40 pounds to conform to appellant's physical restrictions of 10 pounds.

FACTUAL HISTORY

OWCP accepted that on January 14, 2014 appellant, a 50-year-old full-time heavy mobile equipment repairer, sustained a closed fracture of the left metacarpal bone while removing a fender in the performance of duty.

In an August 11, 2014 report, Dr. Mark Brenner, an orthopedic surgeon and appellant's attending physician, determined that appellant had reached maximum medical improvement and provided the following permanent restrictions: no lifting with the left hand of objects greater than 10 pounds.

On October 6, 2014 the employing establishment offered appellant a permanent, limited-duty position with a full-time schedule of eight hours per day, five days a week. The position was titled a tools and parts attendant. The duties included receiving, storing, identifying, and issuing tools, parts, and equipment used by shop personnel. The physical requirements did not require lifting over 10 pounds with the left hand. Appellant accepted the job offer on October 7, 2014, which was to be effective October 19, 2014. The Notification of Personnel Action form (SF-50) from the Office of Personnel Management also indicated that the position had an effective date of October 19, 2014.

By decision dated December 16, 2014, OWCP reduced appellant's compensation to zero based on its determination that his actual wages as a limited-duty tools and parts attendant which appellant accepted on October 7, 2014, fairly and reasonably represented his wage-earning capacity.

On January 6, 2015 appellant, through counsel, requested reconsideration.³

By decision dated February 9, 2015, OWCP denied modification of its December 16, 2014 wage-earning capacity determination.

LEGAL PRECEDENT -- ISSUE 1

Under section 8115(a) of FECA, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and,

³ On February 4, 2015 appellant, through counsel, requested a schedule award. By decision dated March 26, 2015, OWCP granted appellant a schedule award for one percent permanent impairment of the left hand.

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.⁴

OWCP procedures state that, after a claimant has been working for 60 days, it will make a determination as to whether actual earnings fairly and reasonably represent wage-earning capacity.⁵ The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,⁶ has been codified at section 10.403 of OWCP regulations. OWCP first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury position.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP did not meet its burden of proof to reduce appellant's compensation to zero.

By decision dated December 16, 2014, OWCP reduced appellant's compensation to zero, finding that his actual earnings as a limited-duty tools and parts attendant fairly and reasonably represented his wage-earning capacity. The Board finds that OWCP's December 16, 2014 wage-earning capacity decision was erroneous. OWCP procedures provide that a wage-earning capacity determination should not be made until the injured employee has completed 60 days of employment.⁸ The record establishes that on October 6, 2014 the employing establishment offered appellant a full-time, limited-duty position as a tools and parts attendant with restrictions of no lifting over 10 pounds with the left hand. Appellant accepted the job offer on October 7, 2014. However, the position was not effective until October 19, 2014. The Notification of Personnel Action form (SF-50) from the Office of Personnel Management further establishes that the limited-duty position had an effective date of October 19, 2014. There is no evidence in the record supporting that appellant worked in the position offered by the employing establishment for more than 60 days prior to OWCP's December 16, 2014 decision.⁹ Consequently, OWCP failed to establish that appellant performed the job for at least 60 days prior to its wage-earning capacity determination.

The Board, therefore, finds that OWCP failed to follow its established procedures as it did not show that appellant performed the limited-duty tools and parts attendant position

⁴ See *Dennis E. Maddy*, 47 ECAB 259 (1995).

⁵ See *L.J.*, Docket No. 14-0970 (issued August 21, 2014); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.815.5 (June 2013) and Chapter 2.814.7(c) (October 2009).

⁶ 5 ECAB 376 (1953).

⁷ 20 C.F.R. § 10.403(d).

⁸ See *supra* note 6.

⁹ See *W.D.*, Docket No. 11-0157 (issued September 8, 2011) (the Board reversed OWCP's decision as there was no evidence in the record supporting that the employee worked in any position offered by the employing establishment for more than 60 days prior to its October 11, 1995 LWEC determination).

consistently for 60 days.¹⁰ Thus, OWCP failed to meet its burden to reduce appellant's compensation to zero and its December 16, 2014 wage-earning capacity determination will be reversed.

CONCLUSION

The Board finds that OWCP improperly reduced appellant's compensation to zero based on its determination that his actual wages as a limited-duty tools and parts attendant fairly and reasonably represented his wage-earning capacity.¹¹

ORDER

IT IS HEREBY ORDERED THAT the December 16, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 28, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁰ See *L.M.*, Docket No. 10-0949 (issued December 1, 2010).

¹¹ In view of the Board's decision, the issue regarding modification of the LWEC determination is moot.