

## **A Suggested Guide for Appealing an OWCP Decision Denying Modification of a Previous LWEC**

Dear Sirs:

My name is (\_\_\_\_\_), my address is (\_\_\_\_\_), and my OWCP file number is (\_\_\_\_\_).

I am appealing the OWCP decision dated (\_\_\_\_\_) which denied modification of my previous Lost Wage Earning Capacity (LWEC) determination.

As you know, the Employees' Compensation Appeals Board (ECAB) has ruled that once a formal LWEC decision has been issued, a request for modification must establish that one of three circumstances has occurred: that the original rating was in error, that the injury-related condition has worsened, or that the claimant has been vocationally rehabilitated.

I believe that the facts establish that original LWEC determination was in error because it was based on an odd-lot or make-shift job.

The ECAB has established in cases such as *Baggett, 50 ECAB 560*; *Wade, 37 ECAB 556 (1986)*; *Rowe, Docket No.88-1179 (issued September 27, 1988)*; and *Moss, Docket No. 89-846 (issued July 26, 1989)*, that wage earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.

They further established in *Woolever, 29 ECAB 114*, that an odd-lot or make-shift job is one which is designed for an employee's particular needs, and, therefore, it does not constitute an identifiable, regular position of a type readily available on the general labor market.

In *Emory, 47 ECAB 371*, and in *Weisman, 50 ECAB 418*, ECAB reiterates the principle that actual earnings do not fairly and reasonably represent a

claimant's wage earning capacity if those earnings are derived from a make-shift position designed for the claimant's particular needs.

These rulings apply to the job that I was performing when the LWEC determination was made. The limited (light) duty job to which I was assigned was designed for my particular medical needs, and was not a regular position of a type readily available to other Postal Service employees. It was created solely for me and would not exist except for the Postal Service's obligation to provide me with medically suitable employment. It was never available for bid or application by any other employee, and would cease to exist once I left it.

The reason that this job was not available to other employees in the Postal Service's general labor market is because it was not an actual, bona fide position. It was not a job that was "funded" or "classified", and therefore was not part of the authorized employment complement of the Postal Service. It was an *ad hoc* job consisting of various sub-duties that was created for me, based on my medical restrictions.

Therefore, it was an odd-lot or make-shift job as defined by the above referenced ECAB decisions, and any LWEC determination based on this assignment would be in error and should be modified.

The cited ECAB rulings regarding odd-lot or make-shift jobs are consistent with the injury compensation principles discussed in *Larson's Workers' Compensation Laws*. In *Volume 10, Section 57.51*, Larson specifically addresses the "Odd-lot Doctrine" and discusses various compensation law rulings relating to this subject. One of the principles that emerges from Larson's review that is particularly relevant to the application of the Postal Service's NRP is that a job would also be considered to be odd-lot if it is not regularly and continuously available under normal employment conditions.

I know that I did not lose my limited duty job as a result of a lay off or RIF since the Postal Service has neither invoked nor complied with their

contractual obligations as set forth in our collective bargaining agreement at *Article 6, No Layoffs or Reduction in Force*. Furthermore, the enclosed "*Employee Leave Information Letter, Complete Day/Partial Day*" provided to me by the Postal Service simply states that my work is no longer "necessary". Not only does this position underline the make-shift nature of the work that I was performing, but, obviously, demonstrates that the work on which my LWEC was based was not regular and continuous.

The principle underlying the requirement that employment in a limited duty job must remain regular and continuous (barring misconduct or lay off) is one of equity. It would be inequitable and inconsistent with the general principles of injury compensation if the Postal Service was permitted to offer an employee medically suitable employment, wait 60 days for the formal LWEC determination of 0% loss of earning capacity, and then tell the injured employee that the job on which the LWEC was performed is being withdrawn because the work is no longer "necessary". Then OWCP denies wage loss compensation based on the 0% LWEC, and the Postal Service has now neatly shed the financial burden of compensation costs for these employees.

Therefore, for all of the reasons stated above, I am requesting that the LWEC be declared in error and set aside, that the decision denying me wage loss compensation be vacated, and that I be approved for the appropriate compensation.

Thank you,

(signed)

