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Memorandum

When OWCP Denies Compensation Based on a Previous Lost Wage Earning Capacity (LWEC) Determination

Some employees who have had their medically suitable job withdrawn by the Postal Service as a result of the National Reassessment Process (NRP) are being denied wage-loss compensation by OWCP because of a previous LWEC decision. How does this happen?

OWCP procedures establish that after an employee with an accepted claim has returned to work for sixty days, the claims examiner (CE) will determine if the salary that the claimant is being paid fairly and reasonably represents that employee's actual wage-earning capacity. If the CE determines that the employee's pay does represent his or her actual ability to earn a wage, then a formal LWEC decision is issued.

When injured Postal Service employees return to full-time work following their injuries, whether returning without restrictions, or to a limited duty or rehabilitation job (OWCP calls such medically restricted jobs "light duty"), the Postal Service pays them the salary that they would have acquired had there been no injury or disability (See Chapter 546.143.e. of the ELM).

Therefore, they have been restored to their normal wage and have not lost any capacity to earn a wage. In such cases the CE will determine that there is no loss of wage-earning capacity and will issue a formal decision indicating that the employee has a 0% LWEC.

The Employees' Compensation Appeals Board (ECAB) has ruled repeatedly that once a formal LWEC has been issued, it can only be changed in three circumstances:

- The original LWEC rating was in error;
- The claimant's medical condition has changed; or
- The claimant has been vocationally rehabilitated, *i.e.* is working in a new job which pays at least 25% more than the current pay of the job he or she was working when the original LWEC was performed.

So, as a result of these policies, this is what can happen. An employee returns to work following a disabling workplace injury, and subsequently receives a 0% LWEC as described above. Then, as a result of the NRP the modified job is withdrawn. Based on the loss of the medically suitable assignment, the employee files a CA-2a, *Notice of Recurrence* and a CA-7 (or 7a), *Claim for Compensation.* OWCP would review the claim and probably accept the recurrence of disability claim, but would not authorize the payment of wage-loss compensation because the claimant has a 0% LWEC rating and none of the three permitted reasons for changing that determination exist. A formal decision would be issued with accompanying appeal rights.

It is our opinion that most claimants who find themselves in this unfortunate situation and who receive such a decision would want to exercise their appeal rights, and we have prepared a **guide** which lays out the argument that we believe would apply in most circumstances.

draft

Dear Sirs:

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

I am appealing the OWCP decision dated (_____) which denied me wage loss compensation. This decision stated that I was not entitled to compensation because a Loss of Wage Earning Capacity (LWEC) evaluation was conducted after I returned to work following my disability, and a formal decision was issued at that time declaring that I had a 0% LWEC.

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

I believe that the facts establish that original LWEC determination was in error since it was not based on an actual, bona fide, or "funded", position. Using terminology found in other federal agencies, my limited (light) duty job did not represent an established, classified position, but consisted of *ad hoc*, unclassified duties. Therefore, the limited (light) duty job that I was performing when the LWEC rating took place was an odd-lot, or make-shift position.

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 a 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.

My limited (light) duty job was created to meet my particular needs and was not available to other employees. In the Postal Service a "funded", or "classified" position, is called a "duty assignment". A duty assignment is a set of duties and responsibilities within recognized positions regularly scheduled during specific hours of duty. These individually identified and numbered duty assignments make up the "authorized complement" of any Postal Service installation. To seek assignment to one of these specific duty assignments, an employee must submit a written request.

The limited (light) duty job in which I was working when the LWEC was performed was not a duty assignment and not part of the authorized complement. It was created solely for me, would not exist except for the Postal Service's obligation to provide me with medically suitable employment, and would disappear as soon as I left it. It was never available for bid or application by any other employee. 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.

Therefore, I am requesting that the LWEC be declared in error and set aside, and that the decision denying me wage loss compensation be vacated.

2-0814-7 Determining WEC Based on Actual Earnings

c. Issuance of Decision.

(1) After the claimant has been working for 60 days, the CE will determine whether the claimant's actual earnings fairly and reasonably represent his or her WEC. If so, a formal decision should be issued no later than 90 days after the date of return to work. If not, the CE should proceed with a constructed LWEC by asking the Rehabilitation Specialist (RS) to identify two suitable jobs and applying the factors set forth under 5 U.S.C. 8115(a) (see paragraph 8 below). Only one job may ultimately form the basis of a WEC determination.

2-0814-8 Determining WEC Based on Constructed Position

8. Determining WEC Based on Constructed Position. In some situations, vocational rehabilitation efforts do not succeed, and the claimant's WEC must be determined on the basis of a position deemed suitable but not actually held. In making this determination, the test is whether the claimant's WEC based on the selected job appears reasonable, giving due regard to the factors specified in 5 U.S.C. 8115. A Federal or other civil service position in which the claimant is not actually employed may not be used to make an LWEC decision (see Rudy Solovic, 28 ECAB 105, Charles Brown, 31 ECAB 435, and Ann Rich, 34 ECAB 277). See also J.E., Docket No. 08-1582 (issued March 3, 2009). ECAB held that it was inappropriate for OWCP to base appellant's wage-earning capacity on the constructed position of eligibility worker, as the position is a state or government position and there was no evidence as to whether the position was available in the general labor market.