

RECEIVED SEP 01 2011

U.S. DEPARTMENT OF LABOR

OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 6 JAC
LONDON, KY 40742-8300
Phone: (904) 366-0100

August 31, 2011

Date of Injury:
Employee:

Dear Ms. _____ :

This concerns your compensation case and your request for reconsideration received 06/10/2011.

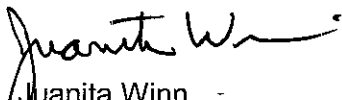
We have evaluated the evidence submitted in support of your request for review. Your case has been reviewed on its merits under Title 5, United States Code, Section 8128, in relation to your application including supporting evidence. It is determined that the prior decision should be vacated.

The reasons for this decision are outlined in the enclosure.

Therefore, the decision dated 09/22/2010 is vacated. Under separate decision a new loss of wage earning capacity determination will be issued based on the job of

In addition, the office will pay the difference between the incorrect partial disability paid on and after 1/1/2011 and the correct partial disability payments based on the actual earnings for the job of

Sincerely,


Juanita Winn
Senior Claims Examiner

PAUL FELSER
FELSER LAW FIRM, P.C.
PO BOX10267
SAVANNAH, GA 31412

NOTICE OF DECISION

Case Number:
Claimant Name:

ISSUE: The issue is whether the decision of 9/22/2010 should be modified. The 9/22/2010 decision found the position of _____ was medically and vocationally suitable and fairly and reasonably represented your wage-earning capacity.

REQUIREMENTS TO VACATE PRIOR DECISION: In order to modify or vacate a loss of wage earning capacity decision the evidence of record must establish one of the following:

1. The original decision was in error.
2. The injured worker's medical condition has changed.
3. The injured worker has been vocationally rehabilitated.

BACKGROUND: You were employed as a _____ with the _____ in _____. On _____, you filed Notice of Occupational Disease and Claim for Compensation for a right wrist condition, which you attributed to locking and unlocking doors 225 times in an 8 hour shift. The claim was initially accepted for right wrist tendonitis and later expanded to include the acceptance of mononeuritis of the right wrist. On 1/29/2009, you were referred for rehabilitation services. On 9/22/2010, this office issued a decision finding that the position of _____ fairly and reasonably represented your wage earning capacity. Compensation benefits were reduced accordingly to reflect the wage earning capacity. On 10/19/2010, a request for a Hearing was received. On 4/18/2011, the Office of Hearings and Review affirmed the 9/22/2010 decision.

Following the 4/18/2011, this office received the following evidence:

- 4/25/2011 prescription for Physical Therapy.
- 4/28/2011 Physical Therapy note and report.

On 6/10/2011, this office received a reconsideration request from the authorized attorney of record. In support of the request the following evidence was submitted:

- 2/14/2011 letter from _____
- 2/28/2011 letter addressed to the Hearing Representative.

On June 23, 2011, a copy of the request for reconsideration was forwarded to the employing agency for comments. The employing agency has not submitted any comments and the case is now in posture for a merit review.

DISCUSSION OF EVIDENCE: On 9/22/2010, the office issued a decision reducing your compensation payments on the basis the job of _____, with the _____, fairly and reasonably represented your wage earning capacity. The decision found the job was permanent and you worked the job for over 2 months demonstrating your ability to perform the job.

In support of reconsideration you submitted the argument that the job was not permanent and was in fact eliminated on 12/31/2010. You state you then took a job as a _____

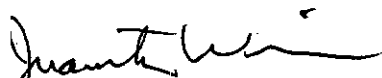
with the . You state the job is permanent and you experienced no lapse in employment. You began working the job on 1/3/2011 and continue to be employed in the job. In support of the argument you presented a signed letter from the , which verifies and supports the argument presented. The letter advises the job was temporary and you were then hired in the permanent position of earning \$23,700.00 effective 1/3/2011. It should be noted that although your letter explaining your new employment is dated 2/28/2011, this office received a completed form CA-1032 on 7/22/2011, upon which you state you are still employed in the position of with the

BASIS FOR DECISION: The evidence submitted in support of reconsideration supports the 9/22/2010 decision was issued in error, because the job of was a temporary position. In addition you were placed in the permanent job of and have worked that job for over 2 months. The evidence of record supports the 9/22/2010 should be vacated and the office should issue a new loss of wage earning capacity determination to reflect your earnings as a . The Employees' Compensation Appeals Board has ruled in the past regarding temporary employment that:

While wages actually earned are the best measure of a wage-earning capacity, this is only true if the evidence shows that the actual wages fairly and reasonably represents a claimant's wage-earning capacity. The Board has held that actual earnings do not fairly and reasonably represent a claimant's wage-earning capacity where the actual earnings are derived from a make-shift position designed for appellant's particular needs. Office procedures specifically direct a claims examiner to consider factors such as part time, sporadic, seasonal, or temporary work, when determining whether the position fairly and reasonably represents a claimant's wage-earning capacity. William D. Emory, 47 ECAB ____ (Docket No. 94-881, issued February 14, 1996).

It is generally improper for the Office to base an injured employee's wage-earning capacity on a temporary position. Pamela J. Darling, 49 ECAB ____ (Docket No 96-274, issued January 21, 1998).

CONCLUSION: The 9/22/2010, decision is vacated and by separate decision the office will issue loss of wage earning capacity determination based on your actual earnings as a


Juanita Winn
Senior Claims Examiner

August 30, 2011