

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARL WHITE and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Kansas City, MO

*Docket No. 03-2096; Submitted on the Record;
Issued February 4, 2004*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's claim for additional compensation based on night differential pay for the period April 1 through December 31, 2002.

Appellant, a 50-year-old housekeeping aid, filed a claim for benefits based on a traumatic injury on November 1, 2000, alleging that he injured his right arm while lifting a trash bag from a garbage container on October 30, 2000. He missed one day of work, then returned to work on November 2, 2000. In a report dated December 21, 2000, Dr. Tayyaba N. Tariq, a specialist in orthopedic surgery, noted pain and tenderness in appellant's right elbow and recommended surgery, which he performed on December 22, 2000. In a memorandum dated January 5, 2001, the Office indicated that appellant needed to submit medical evidence to support authorization for the surgery and his entitlement to continuation of pay to cover the days off from work for his work injury, the surgery and subsequent recovery. The Office recommended continuation of pay, but noted that if the surgery was not accepted appellant would be charged with sick or annual leave. Appellant returned to light duty on January 22, 2001, and the Office authorized continuation of pay from December 21, 2000 through January 15, 2001. The Office accepted his claim on August 10, 2001 for a right elbow strain and retroactively approved the December 22, 2000 elbow surgery.

On January 16, 2002 the Office granted appellant a schedule award for a 10 percent permanent impairment of the right arm for the period December 30, 2001 to August 5, 2002, for a total of 31.20 weeks of compensation.

In a Form CA-7 dated August 13, 2002, appellant requested compensation for wage loss based on night differential pay for April 1 through August 13, 2002. In a Form CA-7 dated January 3, 2003, he requested compensation for wage loss based on night differential pay for August 23 through December 31, 2002. In these forms appellant indicated that, prior to his work injury, he had been paid at the hourly rate of \$8.61 per hour plus an additional \$.65 for night differential.

In a memorandum of conference between the employing establishment and the Office on January 17, 2003, the Office indicated that an overpayment had occurred. The Office noted that, after appellant began working light duty on January 22, 2001, he received compensation for wage loss at the hourly rate of \$8.61 per hour, plus \$.65 for night differential and holiday, his wages prior to his injury, plus an additional \$.65 for night differential pay. Therefore, appellant had incorrectly been paid twice for night differential pay.

By decision dated April 14, 2003, the Office denied appellant's claim for wage loss based on night differential for the period April 1 through December 31, 2002. The Office stated that he was not due any additional compensation based on night differential because he had been paid weekly compensation at an incorrect weekly rate, \$395.26, which included his night differential twice, instead of the correct rate of \$345.56 plus night differential of \$26.09, for a weekly pay rate of \$371.65.

The Board finds that the case is not in posture for decision.

In this case, the Office, in its April 14, 2003 decision, denied compensation for wage loss based on night differential because it had determined that appellant had been receiving compensation based on an incorrect weekly rate which included his night differential twice, over a period of seven months. The Office specifically notified appellant on May 9, 2003 that he had received an overpayment of compensation in the amount of \$549.84 for the period December 30, 2001 through August 5, 2002. The record shows that the Office incorrectly paid appellant \$9,349.65, representing compensation for temporary total disability from December 30, 2001 through August 5, 2002, paid at the weekly rate of \$395.26. This constituted an error on the part of the Office, as appellant should have received compensation in the amount of \$8,799.81, representing total disability compensation from December 30, 2001 through August 5, 2002 at the correct, applicable rate of \$371.65. This was calculated by taking his hourly wage, as of October 30, 2000, the date of injury -- \$8.61.00 -- times 2087 (total hours worked in the year prior to October 30, 2000) to arrive at an annual salary of \$17,969.07 and dividing this figure by 52 weeks, which amounted to \$345.56. This was supplemented by night differential pay -- \$.65 times 2087, for an additional annual sum of \$1,356.55, which divided by 52 amounts to an additional \$26.09 per week, for the total, correct pay rate of \$371.65.¹ Based on these calculations, the Office properly found that appellant received an overpayment of compensation in the amount of \$549.84 from December 30, 2001 through August 5, 2002.² The Office, however, subsequently found, in a June 30, 2003 decision, that appellant did not have to repay this amount due to the prohibitive cost required to collect it and administratively terminated his claim.

However, the Office erred in finding that appellant was not entitled to additional compensation after the schedule award expired merely because the pay rate it used for compensation purposes was too high for the period of the schedule award. This determination deals solely with the compensation that appellant was already paid based on wage loss and for his schedule award. The Office did not consider appellant's claim that he was entitled to

¹ These calculations are reflected in an Office payroll worksheet dated April 21, 2003.

² The Office found that appellant was without fault in the creation of this overpayment.

additional compensation after his schedule award expired. Appellant may in fact be entitled to additional compensation based on either night differential or some other premium pay, which he was earning at the time of his injury. The Office, however, failed to make any findings in this regard. The Board therefore will set aside the Office's April 14, 2003 decision and remand it for the Office to make findings regarding whether appellant is entitled to additional compensation for the period April 1 through December 31, 2002 based on either night differential or other premium pay, which he may have earned prior to his work injury, but can no longer obtain in his current light-duty job.

The decision of the Office of Workers' Compensation Programs dated April 14, 2003 is set aside and the case is remanded for further action in accordance with this decision of the Board.

Dated, Washington, DC
February 4, 2004

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member