

FACTUAL HISTORY

On November 18, 2002 appellant, then a 53-year-old material handler-inspector, filed a traumatic injury claim alleging that on November 16, 2002 he injured both wrists, his left shoulder and low back when he slipped while climbing out of a stack of pallets. The Office accepted the claim for left shoulder sprain, bilateral wrist sprain and lumbosacral strain. The Office authorized right carpal tunnel release of the right wrist and knee arthroscopy. On November 14, 2003 the Office placed appellant on the periodic rolls for temporary total disability.

In a January 28, 2003 claim for compensation (Form CA-7) appellant requested compensation for the period January 28 to February 14, 2003.¹ He reported other wage loss to include mandatory overtime and night and overtime pay. The employing establishment reported a base hourly salary of \$21.18 plus an hourly additional pay for environment of 92 cents. It was noted that appellant worked 10-hour days six days a week. He subsequently filed CA-7 claim forms including requesting compensation for 20 hours of mandatory overtime and hazard pay of \$.95 per hour.²

In a February 5, 2003 memorandum, the employing establishment noted that appellant “receives environmental pay and up until his injury, was working mandatory overtime which consisted of 10-hour workdays, six days a week.”

In a February 13, 2003 earnings breakdown, the employing establishment reported appellant, as of the date of injury, was WG level 9 step 5 earning \$21.18 per hour with a 10 percent night differential or \$2.12 and overtime hourly rate of \$31.77. A February 13, 2003 earnings breakdown noted that appellant worked 80 hours a pay period with 36 hours overtime and two weeks paid night differential. On November 14, 2003 the Office placed appellant on the periodic rolls for temporary total disability at a weekly pay rate of \$1,270.80.

On March 30, 2004 a conference was held regarding whether the Office properly determined appellant’s pay rate for compensation purposes. The issue of mandatory overtime and whether it should be included in the pay rate determination was discussed. The employing establishment indicated that it would submit evidence regarding the amount of mandatory overtime earned by appellant in the year prior to the injury.

On April 22, 2004 the employing establishment provided information regarding appellant’s overtime wages and hazard pay for one-year prior to the injury. It noted appellant’s hourly pay rate as \$20.21 or \$808.40 per week. The employing establishment reported that appellant was paid \$11,407.57 in overtime pay and \$427.11 for overtime/hazard pay for the period November 18, 2001 to November 16, 2002. An attached sheet for the period November 18, 2001 to November 16, 2002 reported biweekly pay of \$1,616.80 for the period November 18, 2001 to April 6, 2002 and \$1,694.40 for the period April 7 to November 16, 2002.

¹ On the form appellant also requested other wage loss for the period November 16, 2002 to return.

² On the forms requesting compensation for the period March 31 to April 25, 2003 he noted a new pay-rate of \$22.09 per hour effective April 6, 2003.

Additional total wages for the period included \$1,392.48 hazard pay for regular hours, \$11,407.57 for overtime and \$427.11 for overtime/hazard.

By notice dated October 4, 2004, the Office advised appellant of its preliminary determination that a \$5,032.21 overpayment had occurred as he was incorrectly paid a pay rate of \$1,270.80 for the period March 1, 2003 through January 24, 2004. The Office decreased appellant's pay rate to \$886.85 for the period January 25 to April 17, 2004. Following a March 31, 2004 conference, the Office determined the correct pay rate as \$1,062.78. The Office found that the net amount of the payment for the period January 28, 2003 to April 17, 2004 was \$50,590.39. Using the correct pay rate of \$1,062.78 for this period, the Office found that appellant should have been paid \$45,588.18, which resulted in a difference of \$5,032.21. The Office made a preliminary finding that appellant was without fault in the creation of the overpayment.

In an April 23, 2004 worksheet appellant's weekly pay was adjusted from \$1,270.80 to \$1,062.78. The Office reached the pay rate by dividing \$1,392.48 hazard pay for regular hours, \$11,407.57 for overtime and \$427.11 for overtime/hazard by 52. This resulted in a weekly pay of \$26.78 for hazard pay, \$219.38 for overtime and \$8.22 for overtime hazard. The Office then added \$26.78, \$219.38, \$8.22 and \$808.40 which resulted in a weekly pay rate of \$1,062.78.

Appellant submitted an overpayment recovery questionnaire (Form OWCP-20) on August 4, 2005. He noted that his monthly income was \$2,606.00 and that his wife's income was \$496.00 for a total monthly income of \$3,102.00. Monthly expenses included \$300.00 for rent or mortgage, \$700.00 for food, \$200.00 for clothing, \$600.00 for utilities, \$1,200.00 for miscellaneous expenses; \$200.00 for Macy's credit cards;³ \$100.00 for mobile and Tex and \$100.00 for Sears. Under funds on hand, appellant reported a \$1,000.00 checking overdraft, \$13,000.00 in savings for a total of \$12,000.00. He submitted copies of credit card bills for Macy's, Shell and Sears and copies of three checks.

On October 8, 2004 appellant's counsel requested a precoupment hearing which was held on July 26, 2005. At the hearing appellant testified that his hourly wage rate was \$21.18. He testified there was no mortgage on his house, but the \$300.00 represented property taxes. Appellant testified that his miscellaneous expenses included car insurance, gasoline, mobile telephone, newspapers, subscriptions, internet service and maintenance. He testified he currently owed \$1,000.00 due to overdrafts on his checking account.

By decision dated November 14, 2005, an Office hearing representative found that appellant was paid at an incorrect pay rate for the period January 28, 2003 to April 17, 2004. The Office hearing representative finalized the overpayment determination that an overpayment in the amount of \$5,032.21 had been created for the period January 28, 2003 to April 17, 2004. She noted that there was no mortgage on appellant's home and that he had \$12,000.00 in a savings account. The Office hearing representative noted that appellant listed expenses of \$3,400.00 including \$1,200.00 of miscellaneous unitemized expenses. She noted that appellant's

³ The record contains a copy of two Macy's credit card bills. One is for Mrs. Kenneth Horan noting a balance of \$1,206.89 as of July 6, 2005. The minimum repayment amount was \$31.00. The second Macy's credit card was for V.C. Horan in the amount of \$1,016.52 as of June 11, 2005. The minimum monthly payment was \$25.00.

monthly income of \$3,100.00 exceeded his expenses. In reaching this determination she disallowed the unitemized expenses and found that appellant could adjust his credit card payments. The Office hearing representative found that appellant was not entitled to waiver of the overpayment and that the overpayment would be collected by deducting \$250.00 every 28 days from his compensation payments.

LEGAL PRECEDENT

Pay rate for compensation purposes is defined by the Federal Employees' Compensation Act and in Office regulations as the employee's pay at the time of injury, time disability began or when compensable disability recurred, if the recurrence began more than six months after the employee resumed regular full-time employment with the United States, whichever is greater.⁴

Sections 8114(d)(1) and (2) of the Act provide methodology for computation of pay rate for compensation purposes, by determination of average annual earnings at the time of injury. Sections 8114(d)(1) and (2) of the Act specify methods of computation of pay for employees who worked in the employment for substantially the whole year prior to the date of injury and for employees who did not work the majority of the preceding year, but for whom the position would be available for a substantial portion of the following year. Section 8114(d)(3) of the Act provides an alternative method for determination of pay to be used for compensation purposes when the methods provided in the foregoing sections of the Act cannot be applied reasonably and fairly.⁵

ANALYSIS

The Office found that an overpayment was created because an incorrect pay rate was used in payments covering the period January 28, 2003 to April 17, 2004. The evidence relevant to appellant's pay rate include CA-7 forms, a February 13, 2003 earnings breakdown and a sheet detailing appellant's wages, overtime pay and overtime/hazard pay for the period November 18, 2001 to November 16, 2002 and a March 23, 2004 worksheet. In calculating appellant's pay rate on the March 23, 2004 worksheet the Office used the weekly pay rate of \$808.40 supplied by the employing establishment. This figure is arrived at by using the salary appellant was paid for the period November 18, 2001 to April 6, 2002. For the period April 7 to November 16, 2002, the date of appellant's injury, he received biweekly wages of \$1,694.40. This equates to \$847.20 per week or \$21.18 per hour. As noted above the pay rate should be determined as of the date of injury. On November 16, 2002 appellant was earning \$847.20 per week not \$804.40, the amount given by the employing establishment. He was earning \$847.20 as of November 16, 2002 not \$808.40 as noted by the employing establishment and used by the Office. The Office, therefore, used an incorrect pay rate in determining appellant's entitlement to compensation. The correct pay rate would be found by adding \$26.78 for hazard pay, \$219.38 for overtime pay, \$8.22 for overtime/hazard pay and \$847.20 for weekly salary. The Board will affirm the fact of overpayment, but remand to the Office to calculate the amount of the overpayment.

⁴ 5 U.S.C. § 8101(4); 20 C.F.R. § 10.5(s); see *John M. Richmond*, 53 ECAB 702 (2002).

⁵ 5 U.S.C. § 8101(d); see *Ricardo Hall*, 49 ECAB 390 (1998).

With regard to issues two and three, as the calculation of the overpayment appears to be in error and it is unclear how the Office determined the overpayment amount, this case will be remanded to the Office for recalculation. On remand, the Office should reevaluate the issues of amount of overpayment, waiver and recovery from continuing compensation, in order to preserve appellant's right to appeal,⁶ as they currently are not in posture for decision.

CONCLUSION

The Board finds that the Office properly determined fact of overpayment. However, the Board finds further development is required on the amount of the overpayment as the Office incorrectly calculated the rate of pay. Given that the amount of overpayment is in question, this case is not in posture for a decision on the issues of waiver and recovery.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 14, 2005 affirmed with respect to the fact of overpayment. It is remanded for further development consistent with this decision on the issues of amount of the overpayment, waiver and rate of recovery.

Issued: March 19, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

⁶ *James Tackett*, 54 ECAB 611 (2003).