U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DANIEL SHAW and U.S. DISTRICT COURT,
NORTHERN DISTRICT OF IOWA, Cedar Rapids, Iowa

Docket No. 97-1680; Submitted on the Record;
Issued April 14, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's rate of pay for compensation purposes.

On January 21, 1988 appellant, then a 46-year-old court reporter, filed a claim for cervical spondylosis. He stated that in September 1986, he had noticed a sharp pain between his shoulder blades while working on a five to six-week civil lawsuit. Appellant noted that he had undergone surgery in January 1987 for a two level spinal fusion but one level of fusion did not take. He attributed his condition to his job, indicating that he would have to transcribe the testimony of people talking at speeds averaging 225 words a minute, which would require him to remain motionless for up to 2 hours at a time except for his fingers and hands. Appellant indicated that he would work from as early as 7:30 a.m. to as late as 11:00 p.m. and would at times take testimony or wait for a jury verdict on Saturdays.

In a February 11, 1988 report, Dr. Earl Y. Bickel, a Board-certified orthopedic surgeon, stated that appellant's cervical pain was related to his work. He commented that appellant worked 6½ to 8 hours and occasionally 10 hours a day as a court reporter which necessitated flexion, extension and rotatory movements of his neck. Dr. Bickel indicated that this activity came under the category of multiple small injuries. He stated that the initial surgery on January 29, 1987, in which a fusion of C5-6 and C6-7 was performed, was related to appellant's job. He indicated that appellant's degenerative disc disease was a gradual progression. Dr. Bickel commented that after the surgery appellant had additional symptoms with breakdown of the fusion grafts. The Office accepted appellant's claim for cervical radiculopathy and cervical fusion of C5-6 and C6-7.

On October 17, 1994 appellant underwent surgery for cervical spinal stenosis at C3-4 and C4-5, in which Dr. Charles Clark, a Board-certified orthopedic surgeon, performed a cervical laminoplasty, C3-6 with rib allograft. On December 1, 1994 appellant filed a claim for compensation for the period after September 24, 1994. He indicated that all pay would be

terminated December 12, 1994. Appellant reported that he received $46,518.00 in annual salary. He indicated that he also received income from court transcriptions. He submitted administrative regulations from the employing establishment indicating that in his position, he was required by law to provide transcripts to the court. The regulations indicated that an official court reporter would be paid for transcripts provided in certain categories of cases by parties to a law suit, including the federal government if it was a party to the suit, at rates set by the Judicial Conference, the administrative body for the employing establishment. Appellant contended that payments made in these circumstances should be included in his rate of pay.

The Office accepted appellant's surgery as related to his employment. It began payment of temporary total disability compensation, effective December 12, 1994 based on appellant's salary of $46,518.00. Appellant did not return to work. In a May 3, 1995 report, Dr. Ellen Ballard, a Board-certified physiatrist, stated that appellant should not work as a court reporter.

In a November 1, 1996 note, appellant again contended that the money he received for court transcripts should be included in his pay for compensation purposes. He stated that he earned as much as $60,000.00 annually over and above his salary for the transcripts he produced as part of his job. He argued that attending court proceedings and producing transcripts were equal parts of his job. In a February 16, 1997 letter, appellant indicated that he was paid a salary and received payment for transcripts produced as part of his job. He again indicated that the employing establishment considered recording testimony and transcribing it as equal parts of his job. Appellant commented that he served at the pleasure of the employer and could be sanctioned or fired for failing to produce transcripts when requested to do so.

In a March 26, 1997 decision, the Office rejected appellant's claim for inclusion of transcription fees in his pay rate on the grounds that there was no provision in the Office's procedures for inclusion of those earnings as part of his pay rate for compensation purposes.

The Board finds that the Office improperly determined appellant's rate of pay for compensation purposes.

Under the Federal Employees' Compensation Act an employee's compensation is based on his monthly pay as determined under sections 8101(2) and 8114.[1] The Act does not specifically or completely state what is to be included within the definition of an employee's monthly pay. Larson states: "In computing actual earnings as the beginning point of wage-basis calculation, there should be included not only wages, and salary but any thing of value received as a consideration for his work as, for example, tips, bonuses, commissions, and room and board, constituting real economic gain to the employee."[2] An employee's pay, therefore, would include any salary or payment he received for the performance of his duties for his employer unless restricted by law. Under section 8114(e) the value of subsistence and quarters, any form of remuneration in kind for services and premium pay are specifically included in an employee's earnings. The only payments for an employee that are excluded by section 8114(e) are overtime

[1] 5 U.S.C. §§ 8101(2); 8114.

[2] Larson, *The Law of Workers' Compensation* § 60.12(a).

pay, additional pay or allowance authorized outside of the United States for differential in cost of living or other specials circumstances or bonus or premium pay for extraordinary service including pay or bonus for hazardous service in time of war. Appellant's pay for transcripts does not appear to fall under any of these exclusions as it was not overtime pay and did not involve service outside of the United States or performance of extraordinary service.

The Office used appellant's pay as of December 12, 1994, the date his disability recurred, as the basis for calculation of his compensation. Appellant, however, has contended that the fees he received for transcripts of court proceedings, should be included in the computation of his pay rate. The employing establishment instructions indicate that appellant, as an official court reporter, was permitted by law to receive payment for transcripts he produced as part of his duties in addition to his salary.[3] The fees he was allowed to charge for these transcripts were set by the employer. Payment was received from both the federal government and by private individuals for official, certified transcripts required in court proceedings. However, such payment was allowed by law and by the employing establishment and the amount was set under the regulations of the employing establishment. Even though payment was received from others than appellant's employer, the payment was made for the product of the duties he performed for his salaried position. He was, therefore, being paid for work performed within the performance of his duties.

Even if it can be said that appellant was self-employed when he received payment for transcripts prepared in his federal employment, the amount received for those transcripts would appear to be considered part of his pay rate. In *Irwin E. Goldman,*[4] the Board held that the pay an employee receives from employment concurrent with his federal employment can be combined with his pay from his federal employment for purposes of determining his pay rate for compensation if the concurrent jobs are related or similar. In this case, payment by private parties for transcripts prepared by appellant could be considered related or similar to the pay he received for preparing the transcripts and submitting the transcripts to the courts as its official record of the legal proceedings. Therefore, appellant would be entitled to have the payment he received for transcripts he prepared as a court reporter combined with the salary he received as a court reporter for determining his pay rate.

Under these circumstances the pay appellant received for transcripts should be considered part of the pay he received for performance of his duties and must be included in his rate of pay. Under section 8114, the rate of pay for compensation purposes to account for appellant's receipt of payment for transcripts he produced would be based on the amount he received in the year before he stopped working due to his employment-related condition. The case must, therefore, be returned to the Office for further calculation of appellant's pay rate for compensation purposes.

[3] 28 U.S.C. § 753(f).

[4] 23 ECAB 6 (1971).

The decision of the Office of Workers' Compensation Programs, dated March 26, 1997, is hereby reversed.

Dated, Washington, D.C.
April 14, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member