United States Department of Labor
Employees' Compensation Appeals Board

DALE MACKELPRANG, Appellant	)	
and	)	**Docket No. 05-1401**
	)	**Issued: October 24, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Phoenix, AZ, Employer	)	

Appearances:
Dale Mackelprang, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 20, 2005 appellant filed a timely appeal of a June 15, 2005 decision of the Office of Workers' Compensation Programs, affirming that his pay rate for compensation purposes was properly determined to be $830.00 per week. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this pay rate issue.

ISSUE

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

FACTUAL HISTORY

On October 25, 2004 appellant, then a 56-year-old modified distribution clerk, filed an occupational disease claim (Form CA-2) alleging that he sustained a left inguinal hernia causally related to his federal employment. The Office accepted the claim for a left inguinal hernia. On January 3, 2005 appellant submitted a claim for compensation (Form CA-7) for the period

January 6 to February 19, 2005. The hernia surgery was rescheduled and appellant stopped working on January 28, 2005.

The reverse of the January 3, 2005 Form CA-7 reported that appellant's weekly pay was $866.56 per week, plus $86.66 in Sunday premium pay and $47.40 in night differential pay. A compensation payment for the period January 28 to February 4, 2005 was issued based on a pay rate of $1,000.62 per week.

In a memorandum dated February 14, 2005, the Office noted that the employing establishment reported that, for the prior two years, appellant had worked in a modified position at six hours per day. The employing establishment indicated that appellant had a prior claim (OWCP File No. 13-1148837) and received leave without pay for the remainder of his work schedule. The employing establishment submitted evidence with respect to appellant's actual earnings in the year prior to his work stoppage on January 28, 2005. The records provide that appellant worked an average of 32.38 hours per week and earned $35,784.97 over 52 weeks or an average of $688.17 per week. With respect to premium pay, appellant earned an average of $141.83 per week, for a total average pay of $830.00 per week. The Office began paying compensation based on a pay rate of $830.00 per week.

In a letter dated February 23, 2005, appellant's representative argued that the pay rate was incorrect. The representative argued that appellant did not work full eight-hour shifts because the employing establishment "refused to accommodate his work schedule," and appellant had demonstrated the ability to work full time. In a letter dated March 8, 2005, appellant stated that his full-time annual salary of $45,061.00 should be used as his base pay and combined with premium pay. In a letter dated March 14, 2005, appellant stated that it was unfair to base average annual earnings on hours worked, as it did not include leave used. He also reported that he had some earnings from union activity ($469.86) and teaching ($4,095.45) in 2004 and he submitted W-2 forms.

By decision dated March 28, 2005, the Office found that appellant's pay rate for compensation purposes was $830.00 per week.

Appellant requested reconsideration on March 30, 2005, contending that the job bidding sheet for his position showed him as a full-time employee with an annual salary of $45,061.00. In a letter dated April 4, 2005, appellant again argued that his pay rate should be based on a full-time base salary of $45,061.00.

By decision dated June 15, 2005, the Office reviewed the case on its merits and denied modification of the March 28, 2005 decision.

LEGAL PRECEDENT

Under 5 U.S.C. § 8101(4), "'monthly pay' means the monthly pay at the time of injury or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, if the recurrence begins more than [six] months after the injured employee resumes regular full-time employment with the United States, whichever is greater.…"

Section 8114(d) of the Federal Employees' Compensation Act provides four different methods for determining the "average annual earnings" depending on the character and duration of the employment:

> "(1) If the employee worked in the employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay --
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> > (A) was fixed, the average annual earnings are the annual rate of pay; or
> >
> > (B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for the particular employment or the average thereof, if the daily wage has fluctuated by 300, if he was employed on the basis of a 6-day workweek 280, if employed on the basis of a 5 1/2-day week and 260, if employed on the basis of a 5-day week.
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> "(2) If the employee did not work in employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury, but the position was one which would have afforded employment for substantially a whole year, the average annual earnings are a sum equal to the average annual earnings of an employee of the same class working substantially the whole immediately preceding year in the same or similar employment by the United States, in the same or neighboring place, as determined under paragraph (1) of this subsection.
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> "(3) If either of the foregoing methods of determining the average annual earnings cannot be applied reasonably and fairly, the average annual earnings are a sum that reasonably represents the annual earning capacity of the injured employee in the employment in which he was working at the time of the injury having regard to the previous earnings of the employee in federal employment and of other employees of the United States in the same or most similar class working in the same or most similar employment in the same or neighboring location, other previous employment of the employee or other relevant factors. However, the average annual earnings may not be less than 150 times the average daily wage the employee earned in the employment during the days employed within 1 year immediately preceding his injury.
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> "(4) If the employee served without pay or at nominal pay, paragraphs (1), (2) and (3) of this subsection apply as far as practicable, but the average annual earnings of the employee may not exceed the minimum rate of basic pay for GS-15. If the average annual earnings cannot be determined reasonably and fairly in the manner otherwise provided by this section, the average annual earnings shall be determined at the reasonable value of the service performed, but not in excess of $3,600.00 a year."[1]

[1] 5 U.S.C. § 8114(d).

ANALYSIS

The record establishes that appellant stopped working on January 28, 2005. His average annual earnings at that time are determined by section 8114(d). The employing establishment indicated that appellant had been working for approximately two years prior to his work stoppage as a modified distribution clerk, five days a week at approximately six hours per day. Appellant therefore worked in the employment during substantially the whole year immediately preceding the injury. His annual rate of pay was not fixed; he was paid by the hour based on the number of hours worked, which varied slightly week to week. Section 8114(d)(1)(B) requires that the average daily wage is multiplied by 260 (52 multiplied by 5) if the employee was employed on a five-day workweek. In this case, the employing establishment indicated that appellant earned $35,784.97 over 52 weeks, based on five days per week or $688.17 per week. Under section 8114(d)(1)(B), appellant's base pay rate is $688.17 per week. The Office then included the average premium pay earned of $141.83 per week to find a total pay rate of $830.00 per week.

Appellant contended that other provisions of section 8114(d) were applicable and would result in a higher pay rate, without submitting probative evidence to support this argument. This is not a case, for example, where the evidence indicated that 8114(d)(1)(B) was inappropriate because appellant was not employed on the basis of a five-day workweek.[2] Appellant contends that his base pay should be based on a full-time position, noting that the job description for his position is a full-time position. The evidence of record, however, clearly establishes that appellant was not working full time in the year prior to the date of injury and commencement of disability. Section 8114(d)(1)(B) is based on actual hours worked and that is the appropriate method of determining pay rate in this case. Appellant referred to some earnings in private employment, but concurrent dissimilar earnings are not used to determine pay rate.[3] The Board finds that the Office properly determined appellant's rate of pay in this case.

CONCLUSION

The Board finds that the Office properly determined appellant's pay rate for compensation purposes based on his earnings in the modified distribution clerk position.

[2] *See William A. Archer,* 55 ECAB ____ (Docket No. 04-1138, issued August 27, 2004) (appellant was a rural carrier working on an "as needed" basis).

[3] *See Steven J. Rose,* 44 ECAB 211, 218 (1992); *Irwin E. Goldman,* 23 ECAB 6 (1971), *petition for recon., denied,* 23 ECAB 46 (1971).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 15 and March 28, 2005 are affirmed.

Issued: October 24, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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