



not work again at the employing establishment, which terminated his employment on February 23, 1973.

In early 1977, appellant secured a job as a sales person with Motosport, Incorporation a private employer. He was employed by various private employers until May 6, 1982. On August 4, 1982 he filed a claim for compensation beginning April 26, 1982 and on August 9, 1982 he filed a claim for a recurrence of disability. The Office accepted that he sustained a recurrence of disability due to his September 9, 1971 knee injury and began payment of compensation for temporary total disability on May 6, 1982 based on his pay rate on September 9, 1971, \$157.20 per week.

In response to a February 16, 2005 telephone call from appellant, the Office advised him, by letter dated February 17, 2005, that there was no provision under the Federal Employees' Compensation Act that would allow private sector wages to be used in calculating a pay rate for a recurrence of disability. In a March 1, 2005 letter, appellant stated that he was entitled to a different rate of compensation and disagreed with the Office's February 17, 2005 letter.

By decision dated April 4, 2005, the Office found that appellant was not entitled to compensation based on the rate of pay he was earning in private industry at the time of his recurrence of disability on May 6, 1982 because he never returned to regular full-time duty with the United States after his accepted injury. Appellant requested a review of the written record and stated that, when he was able to return to work, his old job had been abolished. By decision dated August 12, 2005, an Office hearing representative found that appellant was barred by statute from receiving compensation for total disability beginning May 6, 1982, based on the pay he was receiving in a private sector job at that time because he never returned to full-time employment with the United States after his September 9, 1971 employment injury. The hearing representative found that appellant's compensation must be based on his pay rate at the time of his injury on September 9, 1971.

### **LEGAL PRECEDENT**

In all situations under the Act, compensation is based on the pay rate as determined under section 8101(4), which defines monthly pay as: "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..."<sup>1</sup> A former employee of the United States who, due to an injury sustained in the performance of federal government duty, sustains a recurrence of disability while employed in nonfederal employment can receive compensation based on his or her pay rate in the nonfederal employment, but only if, in the interim, he or she returned to work for the federal government in full-time employment.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8101(4).

<sup>2</sup> *Dr. Alan T. Webb*, 47 ECAB 395 (1996).

**ANALYSIS**

The Office properly based appellant's compensation payments beginning May 6, 1982, when he sustained a recurrence of disability while working in nonfederal employment, on his rate of pay on the date of his injury, September 9, 1971. Following this employment injury, appellant never returned to regular full-time employment with the United States. For this reason, the third alternative of section 8101(4) does not apply. Appellant's disability began on the date of his injury or at the latest six days later on September 15, 1971, when his pay rate was the same as on the date of injury.<sup>3</sup> He is not entitled to compensation beginning May 6, 1982 based on his pay rate in nonfederal employment on that date.

**CONCLUSION**

The Office properly determined appellant's rate of pay for his compensation for a recurrence of disability beginning May 6, 1982.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 12 and April 4, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 1, 2006  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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<sup>3</sup> The employing establishment reported that appellant's pay stopped on September 15, 1971, but did not state whether appellant worked between September 9 and 15, 1971. Appellant has stated that he did not.