

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**S.H., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Johnstown, PA, Employer**

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**Docket No. 08-2315  
Issued: June 23, 2009**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On August 22, 2008 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated November 20, 2007 and April 24 and August 14, 2008 concerning his rate of pay. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUE**

The issue is whether the Office properly computed appellant's rate of pay for purposes of calculating his schedule award.

**FACTUAL HISTORY**

This is the third appeal in this case.<sup>1</sup> By decision dated July 2, 2007, the Board set aside November 20 and July 19, 2006 decisions of the Office denying appellant's claim for a schedule

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<sup>1</sup> See Docket No. 07-428 (issued July 2, 2007); Docket No. 05-1993 (order dismissing appeal issued February 2, 2006). On January 16, 2004 appellant, then a 40-year-old part-time flexible mail handler, sustained a sprain and strain of the right knee and leg and right plica syndrome of the right knee.

award. By order dated February 2, 2006, the Board dismissed his appeal at his request. The facts of the previous Board decision are incorporated herein by reference.

On June 13, 2003 the employing establishment issued a notice to appellant that a February 25, 2002 removal was rescinded and he should report to work on June 15, 2003. In a September 4, 2003 letter, appellant, a representative of the employing establishment and a union representative agreed that the letter would constitute full and final settlement of the award for reinstatement and back pay resulting from a June 5, 2003 arbitration decision. It was agreed that appellant would receive back pay for the period March 27<sup>2</sup> through June 7, 2002 but would waive back pay on and after June 8, 2002.<sup>3</sup>

On March 23, 2004 the employing establishment advised the Office that appellant was a permanent employee working part time. During the year immediately preceding his January 16, 2004 employment injury, he earned \$6,687.49 for 451 hours of work and leave. In a daily roll payment worksheet, the employing establishment advised that appellant was on the pay rolls for one year prior to the January 16, 2004 employment injury, but received pay for only 15 weeks at the rate of \$445.83 per week.

There are documents of record showing that appellant's hourly pay rate was \$16.43 and his annual pay amount was \$34,174.00.

On April 7, 2004 the Office advised appellant that his weekly pay rate had been established as \$455.83. On May 2, 2004 appellant indicated that he worked only 15 weeks prior to his January 16, 2004 injury because the employing establishment improperly terminated him until his reinstatement on June 13, 2003. He argued that he worked more than 40 hours a week before his termination in February 2002. The record shows that appellant returned to work in pay period 15 in 2003. He then worked pay periods 16, 21 through 24 and 26 in 2003 and pay periods 1 and 2 in 2004. Appellant was off work pay periods 17 through 20 and 24 and he did not use leave for these pay periods.

By decision dated November 20, 2007, the Office granted appellant a schedule award based on 10 percent right lower extremity impairment for 28.8 weeks, from January 16 to August 5, 2006. Appellant was paid at the three-fourths rate for claimants with dependents, \$341.87 (three-fourths of his \$455.83 weekly pay as of his January 16, 2004 date of injury).<sup>4</sup>

On November 26, 2007 appellant requested reconsideration. He stated that his hourly pay rate was \$16.43 and his weekly pay rate was \$657.20 (40 hours multiplied by \$16.43) plus cost-of-living increases. Appellant stated that he had been reinstated to his position with back

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<sup>2</sup> Appellant received pay for the period February 20 through March 27, 2002.

<sup>3</sup> Appellant received unemployment compensation for July 20, 2002 to June 7, 2003. The employing establishment did not feel that he was entitled to back pay for the entire period covered by the removal because he did not seek other employment when he was removed from his position in 2002.

<sup>4</sup> In this appeal, appellant is contesting the rate of pay used to calculate his schedule award for permanent impairment to his right lower extremity, not the impairment rating.

pay and that his earnings history for the one year prior to the date of injury should be the basis of his compensation.

By decision dated April 24, 2008, the Office denied modification of the November 20, 2007 decision, on the grounds that the evidence was insufficient to warrant modification.

On May 10, 2008 appellant requested reconsideration. He asserted that the Office used an incorrect pay rate because it included unemployment compensation in determining his weekly pay rate prior to his January 16, 2004 employment injury.<sup>5</sup> Appellant stated that his hourly pay rate at the time of his injury was \$16.43 and he worked an average of 44.87 hours a week prior to his dismissal on February 25, 2002 which was rescinded on June 13, 2003.<sup>6</sup>

By decision dated August 14, 2008, the Office denied modification of the April 24, 2008 decision.

### **LEGAL PRECEDENT**

Section 8107 of the Federal Employees' Compensation Act provides that compensation for a schedule award shall be based on the employee's "monthly pay."<sup>7</sup> For all claims under the Act, compensation is to be based on the pay rate as determined under section 8101(4) which defines "monthly pay" as:

“[T]he 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>8</sup>

Sections 8114(d)(1) and (2) of the Act<sup>9</sup> 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) specify methods of computation for employees who worked in the employment for substantially the whole year prior to the date of injury and for employees who

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<sup>5</sup> The record shows that the Office did not include appellant's unemployment compensation in determining his pay rate for the year prior to his January 16, 2004 employment injury.

<sup>6</sup> The Office's procedure manual notes that part-time flexible employees in the postal service are usually scheduled for 25 or more hours a week but may, in fact, work a full-time schedule. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.3.b.(2)(a) (October 2005). Appellant submitted evidence that he worked more than 40 hours a week for 19 out of 22 weeks from pay period 21 in 2001 through pay period 5 in 2002.

<sup>7</sup> See 5 U.S.C. § 8107(a).

<sup>8</sup> See *id.* at § 8101(4).

<sup>9</sup> *Id.* at § 8114(d)(1)(2).

did not work the majority of the preceding year, but for whom the position would have afforded employment for substantially the whole year if the employee had not been injured.<sup>10</sup>

The Office's procedure manual provides methodology for computing weekly pay on an annual, daily and hourly basis.<sup>11</sup> Section 2.900.10.c provides that, for postal employee's, the employee's hourly pay rate is multiplied by 2080 (hours), then divided by 52 (weeks) to determine the weekly pay rate.

### ANALYSIS

Section 8107 of the Act provides that compensation for a schedule award shall be based on the higher of the employee's "monthly pay" at the time of injury or the time disability begins or the time of a compensable recurrence of disability. In this case, the applicable pay rate is the pay rate at the time of the January 16, 2004 employment injury.

As noted, sections 8114(d)(1) and (2) of the Act specify methods of computation 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 have afforded employment for substantially the whole year if the employee had not been injured. In this case, sections 8114(d)(1) and (2) do not apply because, although appellant's position would have afforded employment for substantially the whole year prior to the January 16, 2004 employment injury, if not for the removal in 2002, appellant did not, in fact, work substantially the whole year in 2003 because he did not work for five pay periods during the period following his reinstatement. The record shows that he did not receive pay for pay periods 17 through 20 and 25 in 2003. The reason that appellant did not work or use leave for these five pay periods is not explained in the record.

The applicable method for determining appellant's weekly pay rate is found in section 2.900.10.c of the Office's procedure manual which provides that, for postal employees, the employee's hourly pay rate is multiplied by 2080 (hours), then divided by 52 (weeks). The record shows that appellant's hourly pay rate was \$16.43. Multiplying \$16.43 by 2080 equals \$34,174.40, divided by 52 equals a \$657.20 weekly pay rate. In this case, the employing establishment did not pay appellant the hourly rate of \$16.43 when he returned to work in 2003. Appellant received \$6,687.49 for 451 hours of work and leave. \$6,687.49 divided by 451 hours equals an hourly pay rate of \$14.83. There is no explanation of record as to why the employing establishment did not pay appellant at the \$16.43 hourly rate for the 451 hours of work and leave in 2003. The Office determined that appellant's weekly pay rate was \$445.83 by dividing \$6,687.49 by the 15 weeks of work and leave in 2003.<sup>12</sup> However, its computation is not correct

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<sup>10</sup> The Office defines "substantially the whole year" as "at least 11 months." Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4.a (October 2005).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.10 (October 2005).

<sup>12</sup> Appellant worked an average of 30 hours a week during the 15 weeks in 2003 (451 divided by 15). However, prior to his removal in February 2002, appellant worked more than 40 hours a week for 19 of 22 weeks. There is no explanation in the record as to why appellant worked fewer hours per week following his reinstatement in 2003.

if appellant was not paid at the correct hourly rate. If appellant's correct hourly pay rate was \$16.43, his weekly pay rate was \$657.20 using the formula in section 2.900.10.c of the Office's procedure manual (\$16.43 multiplied by 2080 equals \$34,174.40, divided by 52 equals \$657.20). Multiplying \$657.20 by the three-fourths figure for employees with dependents equals \$492.90, rather than the \$341.87 weekly amount used by the Office in computing appellant's schedule award. On remand, the Office should determine whether the employing establishment used an incorrect pay rate for the 15 weeks in 2003. If it finds that appellant was entitled to an hourly pay rate of \$16.43 in 2003 and a weekly pay rate of \$657.20, using the procedure manual formula at section 2.900.10, it should then recalculate the amount of his schedule award.

The Board finds that this case must be remanded for further development on the issue of appellant's hourly and weekly pay rate. After such further development as the Office deems necessary, it should issue an appropriate decision on the amount of appellant's schedule award.

### **CONCLUSION**

The Board finds that this case is not in posture for a decision. Further development is needed on the issue of appellant's correct hourly and weekly pay rate. After such further development as the Office deems necessary, it should issue an appropriate decision.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs' dated August 14, April 24, 2008 and November 20, 2007 are set aside and the case is remanded for further action consistent with this decision.

Issued: June 23, 2009  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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