

the periodic compensation rolls at the 3/4 augmented rate, based on a weekly pay rate of \$877.34, and has not returned to work.

On May 26, 2009 appellant advised the Office that his pay rate was incorrect because it did not include premium pay.¹ By letter dated June 3, 2009, the employing establishment informed the Office that appellant's weekly schedule included a 12-hour shift every Sunday and night differential on a regular basis. On July 15, 2009 the employing establishment forwarded appellant's pay history for the period May 10, 2007 to May 12, 2008, including regular hours, overtime and Sunday hours. By letter dated August 19, 2009, the Office informed appellant that his compensation had been adjusted to reflect Sunday pay of \$21.07 a week, yielding a new weekly pay rate for compensation purposes of \$898.41. He reviewed compensation for Sunday premium pay.

In e-mails dated August 10 and 11, 2009, the employer noted that, while management routinely required employees to work overtime, it was relayed verbally not in writing. In an August 21, 2009 letter, the employing establishment informed the Office that appellant worked overtime every pay period because it was short-handed. There was nothing in writing that guaranteed the overtime work and, if an employee could not work overtime, the supervisor would accommodate the restriction.

By decision dated September 30, 2009, the Office found that appellant was not entitled to overtime pay pursuant to section 8114(e) of the Federal Employees' Compensation Act.²

LEGAL PRECEDENT

Section 8101(4) of the Act defines "monthly pay" for purposes of computing compensation benefits as follows: 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.³ In an occupational disease claim, the date of injury is the date of last exposure to the employment factors, which caused or aggravated the claimed condition.⁴ In computing pay rate, section 8114(e) provides for the inclusion of certain "premium pay" received, and where the evidence indicates additional amounts received in Sunday or night differential pay fluctuated or may have fluctuated, the Office determines the amount of additional pay received during the one-year period prior to injury.⁵ Section

¹ By decision dated March 16, 2009, the Office suspended appellant's compensation for failure to attend a scheduled physical examination. In a June 3, 2009 decision, an Office hearing representative reversed the March 16, 2009 decision, and appellant received appropriate retroactive compensation.

² 5 U.S.C. §§ 8101-8193.

³ *Id.* at § 8101(4); *see Dale Mackelprang*, 57 ECAB 168 (2005).

⁴ *R.S.*, 58 ECAB 362 (2007).

⁵ 5 U.S.C. § 8114(e); *Lottie M. Williams*, 56 ECAB 302 (2005).

8114(e)(1) provides that, in computing an employee's monthly pay for compensation purposes, overtime pay is not included.⁶ The Office has administratively determined, however, that "[p]remium pay for administratively uncontrollable overtime, including holiday pay" under 5 U.S.C. § 5545(c)(2) is to be included in pay rate calculations.⁷

The relevant part of section 5545(c)(2) states:

"The head of an agency, with the approval of the Office of Personnel Management may provide that -- an employee in a position in which the hours of duty cannot be controlled administratively and, which requires substantial amounts of irregular, unscheduled, overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for regularly scheduled overtime, night, and Sunday duty and for holiday duty. Premium pay under this paragraph is an appropriate percentage, not less than 10 percent nor more than 25 percent, of the rate of basic pay for the position, as determined by taking into consideration the frequency and duration of irregular, unscheduled overtime duty required in the position."⁸

ANALYSIS

The Board finds that appellant's pay rate for compensation purposes should be calculated as the pay rate of the date of injury. As noted above, monthly pay is determined with reference to the greater of the monthly pay at the time of injury, at the time disability begins, or at the time compensable disability recurs, if the recurrence begins more than six months after the employee resumes regular federal employment on a full-time basis.⁹ Appellant stopped work on the date of injury May 10, 2008. Although he returned to work for a brief period in August 2008, he returned to part-time work and did not work for more than six months. The proper pay rate is that of the date of injury. As provided by section 8114(e), the Office found that appellant was entitled to an additional \$21.07 per week for Sunday premium pay. It secured appellant's pay history for the year prior to his May 10, 2008 injury, which established that he earned a yearly total of \$1,095.38 in Sunday premium pay, or \$21.07 per week.

⁶ 5 U.S.C. § 8114(e)(1); *Calvin E. King*, 51 ECAB 394 (2000).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.7(b)(5) (December 1995).

⁸ 5 U.S.C. § 5545(c)(2); *see also* FECA Program Memorandum No. 106 (issued October 30, 1969) (provides for inclusion of premium pay in pay rate for compensation purposes under section 5545(c)(2)); FECA Bulletin No. 89-26 (issued September 29, 1989) (by administrative determination, pursuant to section 5545(c)(2), the Office includes premium pay for administratively uncontrollable overtime in computing compensation).

⁹ *Supra* note 3.

The Board also finds that appellant is not entitled to the inclusion of overtime pay for compensation purposes. The record supports that he worked and was compensated for overtime in almost every pay period in the year preceding his employment injury. This evidence, however, does not establish that the Office improperly excluded his overtime pay in determining his pay rate. The record does not establish that he received premium pay for administratively uncontrollable overtime of the type described in 5 U.S.C. § 5545(c)(2). Appellant submitted no evidence that the head of his agency, with the approval of the Office of Personnel Management, specifically provided for the payment of premium pay to its employees. Moreover, his pay history, while documenting the overtime worked, shows that the hours of overtime and amounts paid varied from pay period to pay period. The type of administratively uncontrollable overtime contemplated by section 5545(c)(2) is premium pay that is paid on an annual basis as a percentage of an employee's base pay, regardless of the actual hours worked. The employing establishment advised that appellant worked overtime because the employing establishment was short-handed but there was nothing in writing that guaranteed any employees overtime work. The Board finds that appellant's pay was earned for actual hours of overtime worked. This payment is to be excluded from the Office's pay rate determinations.¹⁰

CONCLUSION

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

¹⁰ See *Charles E. Zulauf*, Docket No. 02-1743 (issued May 18, 2004).

ORDER

IT IS HEREBY ORDERED THAT the September 30, 2009 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: July 8, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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