

FACTUAL HISTORY

Appellant, a 47-year-old safety and occupational health specialist, injured her left lower extremity in the performance of duty on August 12, 2002.¹ The Office initially accepted her claim for left knee sprain, and later expanded the claim to include aggravation of left knee osteoarthritis and joint ankylosis, left lower leg. Additionally, it authorized a November 14, 2002 arthroscopic chondroplasty and a December 17, 2007 left total knee arthroplasty.

Thus far appellant has received three schedule awards totaling 78 percent impairment of the left lower extremity. On January 30, 2004 the Office awarded 25 percent impairment, which covered a 72-week period from August 6, 2003 through December 21, 2004. Appellant received an additional three percent impairment on October 18, 2006. This award covered 8.64 weeks from December 22, 2004 until February 20, 2005. The Office granted an additional 50 percent impairment of the left lower extremity on October 8, 2008. This latest award covered a 144-week period beginning September 17, 2008.²

The current appeal stems from the pay rate the Office utilized in awarding compensation pursuant to the January 30, 2004 and October 18, 2006 schedule awards. Both decisions relied on a weekly pay rate of \$849.18, effective November 14, 2002. It is not readily discernible from the record how the Office determined appellant's weekly pay rate of \$849.18. The November 14, 2002 effective date was chosen because it coincided with appellant's Office-approved surgery and represented the first date she stopped work following her August 12, 2002 injury.

The August 13, 2002 Form CA-1 indicated that appellant's then-current hourly pay rate was \$19.84, which represented a weekly rate of \$793.60. An October 7, 2002 notification of personnel action (Standard Form/SF 50-B) confirmed the pay rate information provided on the CA-1.³ Appellant was reassigned to another facility in Montgomery, AL effective October 6, 2002. Due to a difference in locality pay, the reassignment resulted in a slight

¹ Appellant continued to work following her August 12, 2002 employment injury. In October 2002, she transferred from the U.S. Penitentiary (USP) in Leavenworth, KS to a federal prison camp in Montgomery, AL. Appellant remained with the employing establishment until September 2005, when she accepted a position with the Department of the Army.

² The October 8, 2008 award was based on the district medical adviser's September 26, 2008 finding of 75 percent impairment of the left lower extremity. The Office reduced the latest award by the 25 percent impairment previously awarded in 2004, but neglected to similarly offset the 3 percent award appellant received on October 18, 2006.

³ Prior to transferring to the federal prison camp in Montgomery, AL appellant had an annual salary of \$41,412.00, which when divided by 2,087 hours represents an hourly rate of \$19.84.

decrease in salary. Rather than earning a base salary of \$41,412.00 as she did in Leavenworth, KS, appellant earned only \$41,169.00 in Montgomery, AL. This new pay rate corresponded to an hourly rate of \$19.73, and a weekly rate of \$789.20.⁴

On January 9, 2003 appellant filed a claim for compensation (Form CA-7) beginning November 14, 2002.⁵ The employing establishment indicated that appellant's base pay at the time of injury (August 12, 2002) was \$19.84 per hour. When she stopped work on November 14, 2002, her hourly rate was \$19.73.⁶ The employing establishment provided identical pay rate information in a June 12, 2003 Form CA-7 appellant had filed for a schedule award.

A February 7, 2003 request for personnel action (SF 52) indicated that appellant's then-current annual adjusted basic pay rate was \$43,733.00, which corresponded to a weekly rate of \$838.20, and an hourly rate of \$20.95.⁷ The request was for a "career promotion" to GS-11, step 1 effective February 9, 2003, with a new adjusted basic pay of \$46,689.00.

The October 7, 2002 SF 50-B and the February 7, 2003 SF 52 revealed that appellant's base weekly pay rate increased from \$789.20 to \$838.20 at some point prior to her February 2003 promotion to GS 11, step 1. This evidence also clearly contradicted the Office's prior determination that appellant earned \$849.18 when she stopped work on November 14, 2002 to undergo surgery.

By decision dated July 20, 2007, the Branch of Hearings and Review vacated the Office's October 18, 2006 schedule award. Although the hearing representative concurred with the additional award of three percent for the left lower extremity, she found that the record required further development in order to determine appellant's pay rate effective November 14, 2002.

On remand, the Office requested additional information from the employing establishment regarding appellant's pay rate as of November 14, 2002. In an October 10, 2007 e-mail, William G. Howell, Jr., appellant's previous supervisor at USP Leavenworth, stated that she was a GS-9, step 4 on November 14, 2002, and that she worked a full-time schedule, Monday through Friday, 7:30 a.m. to 4:00 p.m. He also indicated that appellant was not entitled to any night differential and/or Sunday premium pay at the time. Mr. Howell submitted a copy of the February 7, 2003 SF 52. He noted that effective November 14, 2002 appellant's base pay

⁴ The October 7, 2002 SF 50-B listed appellant as a GS-9, step 3, but according to the Office of Personnel Management (OPM) 2002 salary table "2002-RUS" (Locality Pay Area -- Rest of U.S.) her new base salary of \$41,169.00 corresponded to a GS-9, step 4. The listed basic pay of \$37,895.00 also corresponded to a GS-9, step 4 under OPM's 2002 general schedule salary table.

⁵ She wanted to repurchase sick leave used for her November 14, 2002 surgery and subsequent recuperation.

⁶ The employing establishment also noted that additional pay for night differential was 10 percent of base pay and Sunday premium pay was 25 percent of base. During pay period 22 (November 3 to 16, 2002) appellant earned eight hours of Sunday premium pay (\$39.44) and three hours of night differential (\$5.91).

⁷ The SF 52 identified appellant as a GS-9, step 4. However, the listed basic pay of \$40,255.00 is equivalent to a GS-9, step 5 according to OPM's 2003 general schedule salary table.

rate, including locality pay, was \$43,733.00. Mr. Howell further noted that effective February 9, 2003 appellant was promoted to GS-11, step 1, with an annual salary of \$46,689.00.

The Office also received a November 8, 2007 letter from Michele Cottingham, employee services manager at USP Leavenworth. She indicated that appellant was a GS-9, step 3 on November 14, 2002. Ms. Cottingham provided a computer printout of appellant's October 7, 2002 SF 50-B showing an annual salary of \$41,169.00. She also noted that, while she did not have any of appellant's time and attendance records for the referenced period, it was unlikely that appellant would have been entitled to night differential and/or Sunday premium pay.

In a November 15, 2007 e-mail, Mr. Howell indicated that between August 2001 and August 2002 appellant received \$96.20 for holiday pay and \$23.42 for night differential.

By decision dated November 19, 2007, the Office found that appellant's pay rate effective November 14, 2002 was \$794.01. It accepted Ms. Cottingham's annual salary information (\$41,169.00) as it was consistent with the pay rate information included on the January 9 and June 12, 2003 CA-7 forms. The Office also credited appellant with premium pay of \$119.62 based on Mr. Howell's November 15, 2007 e-mail. This figure did not include the eight hours of Sunday premium pay (\$39.44) and three hours of night differential (\$5.91) appellant received during pay period 22 (November 3 to 16, 2002).

In a decision dated July 15, 2008, the Branch of Hearings and Review set aside the Office's November 19, 2007 decision and remanded the case for further development. The hearing representative agreed with the Office's determination that appellant's base annual salary as of November 14, 2002 was \$41,169.00. However, the hearing representative remanded the case for further development regarding the amount of premium pay appellant received during the one-year period that preceded her November 14, 2002 work stoppage.

On remand, the Office twice requested that the employing establishment provide information regarding appellant's receipt of premium pay. The employing establishment did not respond. Appellant submitted earnings and leave statements for several pay periods between September 9, 2001 and November 16, 2002. She documented 35 hours of night differential, 8 hours of Sunday premium pay and 5 hours of holiday pay.

By decision dated December 15, 2008, the Office found that appellant's weekly pay rate as of November 14, 2002 was \$795.19. It relied on an annual base salary of \$41,169.00 and premium pay of \$180.95 for the period November 14, 2001 through November 13, 2002.⁸ In a decision dated December 8, 2009, the Branch of Hearings and Review affirmed the Office's December 15, 2008 decision.

⁸ The premium pay included 23 hours of night differential (\$45.31), 8 hours of Sunday pay (\$39.44) and 5 hours of holiday pay (\$96.20).

LEGAL PRECEDENT

The amount of compensation paid is a function of the injured employee's pay rate.⁹ Monthly pay for compensation purposes 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..., whichever is greater."¹⁰

ANALYSIS

The Office paid both the January 30, 2004 and October 18, 2006 schedule awards based on a weekly pay rate of \$849.18 that presumably was in effect on November 14, 2002. The record, however, does not support such a finding. Citing the February 7, 2003 SF 52, appellant argued that the Office should have paid her based on an annual salary of \$43,733.00 effective November 14, 2002. This annual salary represented a weekly pay rate of \$838.20, which was less than the pay rate upon which the Office previously relied. The record does not support a weekly base salary of \$838.20 effective November 14, 2002. While it is clear appellant earned that amount just prior to her February 2003 promotion, the precise date when her salary increased from \$41,169.00 to \$43,733.00 is not evident from the record.

The October 7, 2002 SF 50-B showed that appellant's weekly salary decreased from \$793.60 to \$789.20 effective October 6, 2002. This was due to a locality pay adjustment when appellant was reassigned to the federal prison camp in Montgomery, AL. The Office properly relied on the October 7, 2002 SF 50-B to establish appellant's base annual salary (\$41,169.00) as of November 14, 2002. However, this figure was lower than what appellant earned as of August 12, 2002 when she was injured (\$41,412.00). The Act provides that monthly pay for compensation purposes 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..., *whichever is greater.*"¹¹ In this instance the Office chose the date disability began, which was approximately three months after appellant injured herself on August 12, 2002 but it overlooked the fact that appellant's November 14, 2002 base salary was less than her August 12, 2002 date of injury salary.

Because appellant's base salary was greater when she sustained injury on August 12, 2002, this figure should have been used for purposes of determining her compensation under the January 30, 2004 and October 18, 2006 schedule awards. In addition to her base annual salary of \$41,412.00 (\$793.60 per week), she documented 32 hours of night differential and 5 hours of holiday pay for the one-year period preceding her August 12, 2002 injury. Appellant's earnings and leave statements corroborated Mr. Howell's November 15, 2007 e-mail that indicated she received \$96.20 for holiday. However, her 32 hours of night differential would exceed the \$23.42 Mr. Howell credited her with receiving between August 2001 and August 2002.

⁹ 20 C.F.R. §§ 10.401(b), 10.404(b) (2009).

¹⁰ 5 U.S.C. § 8101(4) (2006); see *Samuel C. Miller*, 55 ECAB 119, 120 (2003).

¹¹ 5 U.S.C. § 8101(4) (Emphasis added).

According to the employing establishment, night differential represented 10 percent of the base hourly wage. Appellant documented 32 hours of night differential between September 9, 2001 and January 12, 2002. Her highest annual salary during that time frame was \$35,335.00 (GS-7), which represents an hourly rate of \$16.93. Thus, appellant's night differential premium will be calculated based on \$1.69 per hour. Her total night differential (32 hours) is \$54.08. Combined with her holiday pay of \$96.20, appellant's total premium pay was \$150.28 for the year preceding August 12, 2002. Her annual salary and premium pay totaled \$41,562.28, which represents a date-of-injury weekly pay rate of \$796.40.¹² This figure exceeds the \$795.19 weekly salary the Office found in its December 8, 2009 decision. Accordingly, the Office's latest decision shall be modified to reflect a date-of-injury weekly pay rate of \$796.40.¹³

CONCLUSION

Appellant's date-of-injury pay rate was \$796.40. The January 30, 2004 and October 18, 2006 schedule awards were based on an incorrect weekly pay rate of \$849.18 presumably in effect on November 14, 2002. Those awards and the Office's December 8, 2009 decision are modified to reflect an applicable weekly pay rate of \$796.40 effective August 12, 2002.

¹² $\$41,562.28 \div 2,087 = 19.91 \times 40 = \796.40

¹³ Appellant claimed she did not receive a copy of the September 15, 2009 hearing transcript. The record indicates that the Office mailed her a copy on September 23, 2009. On February 11, 2010 the Office sent appellant a copy of the entire case record. Although she initially argued she was deprived the opportunity to review the transcript to determine if it was correct, appellant has now had a copy of the transcript for at least six months and she has not since provided any additional information, comments or argument to suggest that the transcript was either incomplete or inaccurate.

ORDER

IT IS HEREBY ORDERED THAT the December 8, 2009 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: January 5, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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