U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT L. CURRY and DEPARTMENT OF AGRICULTURE, BITTERROOT NATIONAL FOREST, Hamilton, MT

Docket No. 00-1407; Submitted on the Record;
Issued July 10, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant had received an overpayment in compensation; and (2) whether the Office properly denied appellant's request for waiver of recovery of the overpayment.

On April 14, 1988 appellant, then a 43-year-old heavy equipment operator, was plowing snow on a forest road when the blade of the snowplow hit a buried stump, wrenching the snowplow sharply and causing appellant to twist his back. The Office initially accepted appellant's claim for a lumbosacral strain and paid temporary total disability compensation for the period November 28 through December 2, 1988 and for the period beginning March 11, 1989. A magnetic resonance imaging (MRI) scan taken on May 4, 1989 showed a herniated disc at L4-5 on the left side. Appellant underwent surgery on May 16, 1989 for a left hemilaminectomy and discectomy at L4-5 and hemilaminectomy at L5-S1 on the right.

In an April 6, 1998 letter, the employing establishment offered appellant a full-time position as a program assistant. He accepted the position and returned to work on July 6, 1998. In a September 23, 1998 decision, the Office found that appellant did not have a loss of wage-earning capacity because his current actual earnings exceeded the current pay of his former position.

In an October 13, 1998 letter, the Office notified appellant that it had made a preliminary determination that he had received a $37,644.43 overpayment in compensation because an incorrect pay rate had been used in calculating his compensation since the April 14, 1988 employment injury. The Office indicated that it had used a pay rate of $530.00 a week but had determined that the correct pay rate should have been $435.06 a week. The Office further found that appellant was without fault in the creation of the overpayment. It informed appellant of his right to seek waiver of recovery of the overpayment if he established that recovery of the overpayment would defeat the purpose of the Federal Employees' Compensation Act to provide at least a subsistence income or would be against equity and good conscience. The Office also

informed appellant of his right to seek a prerecoupment hearing before an Office hearing representative.

In an October 19, 1998 letter, appellant requested a prerecoupment hearing and asked for waiver of recovery of the overpayment. The hearing was conducted on June 21, 1999. In a December 17, 1999 decision, the Office hearing representative found that appellant had received a $37,644.43 overpayment in compensation because his compensation had been based on an improper pay rate. The Office hearing representative further found that the overpayment should be compromised to $25,000.00, based on appellant's financial information but denied appellant's request for waiver of recovery of the overpayment based on appellant's reported assets. The hearing representative affirmed and made final the preliminary determination of the Office that appellant had received an overpayment of compensation with the amendment that the amount of the overpayment be compromised to $25,000.00.

The Board finds the case is not in posture for decision.

Before the Board can determine whether the Office properly refused to waive the alleged overpayment, the Board must first determine whether an overpayment actually occurred.[1] The Office initially based its calculation of appellant's pay rate on the information that he was paid $13.25 an hour at 40 hours per week, or $530.00 per week. The employing establishment, however, informed the Office that appellant was a (while actually employed) employee. In a February 21, 1989 letter, the employing establishment stated that appellant was guaranteed 16 full-time pay periods, with 10 pay periods guaranteed for only a minimum of four hours per week. The Office determined that in the year prior to his April 14, 1988 injury, appellant had earned $22,622.92, or an average of $435.06 per week. The Office found that $435.06 should have been appellant's pay rate for compensation purposes, and declared an overpayment of compensation.

Section 8114(d) of the Act provides:

"Average annual earnings are determined as follows:

"(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 --

(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 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 work week, 280 if employed on the basis of a 5½-day week, and 260 if employed on the basis of a 5-day week."

[1] *See Samuel L. Russo*, 28 ECAB 43 (1976).

The Office did not address the relevant provisions of section 8114 in determining that the correct pay rate was $435.06 per week. According to the evidence of record, appellant worked full time for 19 pay periods in the year prior to the employment injury, and during his part-time tour he averaged slightly over 31 hours a pay period or slightly over 15 hours a week. The record shows that there was no pay period in which appellant worked less than 12 hours. Under these circumstances, where appellant worked full time for 38 weeks in the year prior to the employment injury and worked part time during the other 14 weeks of the year, it can be concluded that appellant worked substantially the entire year prior to the employment injury. Accordingly, section 8114(d)(1) is the applicable section of the statute for calculation of appellant's average annual earnings.

As appellant's annual pay rate was not fixed, his pay rate is properly calculated under section 8114(d)(1)(B): his average daily wage is multiplied by 260. The Office must determine appellant's average daily wage, based on the number of days he worked during the year prior to the injury[2] and the wages earned, and then calculate the annual pay rate in accord with section 8114(d)(1)(B). The Office's attempt to use the average weekly earnings is not appropriate under the circumstances of this case.

The case will be remanded to the Office for a proper determination of appellant's pay rate. After such further development as is necessary, the Office should issue an appropriate decision on the issues presented. In view of the Board's findings, the waiver issue will not be considered on this appeal.

The decision of the Office of Workers' Compensation Programs, dated December 17, 1999, is set aside and the case remanded for further action consistent with this decision of the Board.

Dated, Washington, DC
July 10, 2002

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[2] The record indicates that during his part-time tour appellant did not work every day, and on some days he apparently worked only four hours.