

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GURVEST J. CASTILLE and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Denver, CO

*Docket No. 01-2134; Submitted on the Record;
Issued September 13, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the pay rate used for compensation purposes is correct.

On January 5, 1998 appellant, then a 38-year-old casual mailhandler who had been hired for the holiday season, filed a traumatic injury claim (Form CA-1) for mental and physical injuries sustained when he was involved in a hostage situation on December 24, 1997. By letter dated February 18, 1998, the employing establishment advised that appellant had been hired as a seasonal casual employee for 7.45 hours per day and his employment was to end on December 31, 1997. Pay rate information indicated that he was paid \$10.00 per hour with no night, Sunday or other premium pay.

On March 10, 1998 the Office of Workers' Compensation Programs accepted that appellant sustained an employment-related post-traumatic stress disorder and resolved back strain. He received continuation of pay for 45 days for the period December 24, 1997 to February 13, 1998 and, thereafter, was placed on the periodic rolls. The pay rate used for compensation purposes was the rate for a temporary worker, without evidence of a full year's prior nonfederal earnings, *i.e.*, \$214.90 per week.

By letter dated March 31, 1998, the Office requested that the employing establishment furnish pay rate information on an enclosed Office Form EN1030. The record contains two Forms EN1030, one which was stamped-received by the Office on April 9, 1998, a copy of which was faxed to the Office by appellant's attorney on May 12, 1998. The second EN1030 was stamp-received by the Office on April 13, 1998 and a signed copy was faxed to the Office on June 2, 1998.

The EN1030 submitted April 9, 1998 indicates that appellant held a casual, full-time appointment with gross pay of \$800.00 and no night differential, special pay, Sunday premium or holiday pay. It further indicated that appellant had not worked in federal employment for 11 months in the year prior to the injury, that he had worked 4 weeks prior to the date of injury and that he would have been afforded employment for 11 months had he not been injured.

The EN1030 form submitted on April 13, 1998, which includes a date-stamp of April 2, 1998 from "ICCO Denver District," indicates that appellant was a temporary, Christmas casual seasonal employee who had received \$985.00 in pay with \$3.15 in additional pay, no Sunday premium or holiday pay and that he had not worked in federal employment for 11 months prior to the injury, rather, he had been employed for 2 weeks. It further provided that the position would not have afforded employment for 11 months had he not been injured, specifically stating, "no -- Christmas position only." The form further advised that information regarding the annual earnings of "another employee with the same kind of appointment and working in a job with the same or similar duties ... working the greatest number of hours in similar employment" had been requested and would be provided upon receipt.

By decision dated June 24, 1998, the Office determined that appellant was not entitled to a higher pay rate for compensation purposes. In a letter dated February 21, 2001, appellant requested reconsideration, stating that his pay rate should be based on his full-time employment as a medical technician at Porter Memorial Hospital. He attached a copy of a state license indicating that he was a certified nurse aide. In a May 9, 2001 letter, the Office requested that appellant provide proof of income for the 12 months preceding the December 24, 1987 employment injury, which was to include job title, dates of employment and rate of pay. He was also furnished with an authorization to obtain earnings data from the Social Security Administration (SSA) and was given 30 days to submit the requested information. On June 8, 2001 the Office requested that the SSA submit earning data for appellant for the period 1996 through 2000. Appellant submitted a reply dated July 2, 2001 with signed releases for the SSA, but he did not submit the additional requested information.

By decision dated July 24, 2001, the Office found that appellant's compensation rate was correct. The Office noted that no verification of prior wages was submitted and, therefore, the casual employee formula was used to determine appellant's compensation rate. The instant appeal follows.

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

With respect to the calculation of appellant's pay rate for compensation purposes, the Federal Employees' Compensation Act provides for different methods of computation of average annual earnings depending on whether the employee worked in the employment, in which she was injured substantially for the entire year immediately preceding the injury and would have been afforded employment for substantially a whole year, except for the injury.¹ 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 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 rate of pay; or

¹ 5 U.S.C. § 8114(d)(1), (2); see *Billy Douglas McClellan*, 46 ECAB 208, 212-13 (1994).

(B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for the 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 workweek, 280 if employed on the basis of a 5 1/2-day week and 260 if employed on the basis of a 5-day week.

“(2) If the employee did not work in employment in which [s]he was employed at the time of h[er] injury during substantially the whole year immediately preceding the injury, but the position was one which would have afforded employment for substantially a whole year, the average annual earnings are a sum equal to the average annual earnings of an employee for the same class working substantially the whole immediately preceding year in the same or similar employment by the United States in the same or neighboring place as determined under paragraph (1) of this subsection.”²

If sections 8114(d)(1) and (2) of the Act are not applicable, section 8114(d)(3) provides as follows:

“If either of the foregoing methods of determining the average annual earnings cannot be applied reasonably and fairly, the average annual earnings are a sum that reasonably represents the annual earning capacity of the injured employee in the employment in which [s]he was working at the time of injury having regard to the previous earnings of the employee in [f]ederal employment and of other employees of the United States in the same or most similar class working in the same or most similar employment in the same or neighboring location, other previous employment of the employee or other relevant factors. However, the average annual earnings may not be less than 150 times the average daily wage the employee earned in the employment during the days employed within 1 year immediately preceding his injury.”

In this case, the evidence shows that appellant did not work in the employment in which he was injured substantially for the entire year immediately preceding the injury. Rather, the record indicates that he had merely worked a little more than two weeks.³ Thus, sections 8114(d)(1) and (2) of the Act are not applicable to the computation of appellant’s pay rate. Given the inapplicability of sections 8114(d)(1) and (2) of the Act, the Office properly applied section 8114(d)(3) to determine appellant’s pay rate for compensation purposes.⁴ The Office

² *Id.*

³ Appellant indicated that he began work on December 7, 1997. He stopped work on the date of injury, December 24, 1997.

⁴ See *Randy L. Premo*, 45 ECAB 780, 782 (1994) (holding that section 8114(d)(3) of the Act provides an alternative method for determination of the pay rate to be used for compensation purposes when the methods provided in sections 8114(d)(1) and 8114(d)(2) cannot be applied reasonably and fairly).

found that the current pay rate was the same as the pay rate on the date of injury which was calculated for compensation purposes to be \$214.90 per week.⁵

In the instant case, appellant, who was a Christmas seasonal employee who worked two weeks, did not work substantially the whole year prior to the injury and was not employed in a position that would have afforded employment for substantially a whole year. Section 8114(d)(3), therefore, would apply. In applying section 8114(d)(3), the Office properly noted that the employment which appellant had during the year prior to the injury was not of a similar nature.⁶ The Board, however, finds that, as the record before it contains two Form EN1030s that have conflicting pay rate information, the case must be remanded to the Office for a determination regarding appellant's rate of pay in accordance with section 8114(d)(3).

Furthermore, while the Office calculated the average annual earnings based on the statutory minimum of 150 times the daily wage, the Office did not demonstrate that it properly considered the factors enumerated in section 8114(d)(3). The purpose of section 8114(d)(3) is to determine the annual earning capacity for an employee that closely approximates his or her true preinjury earning capacity.⁷ The Board has held that the Office must consider the factors listed in section 8114(d)(3) prior to application of the 150 statutory minimum calculation.⁸ Specifically, in the instant case the Office did not ascertain earnings information regarding annual earnings of another employee with the same kind of appointment and working in a job with the same or similar duties ... working the greatest number of hours in similar employment. Because this information was not submitted by the employing establishment and because the record contains conflicting information on separate EN1030 forms, the case will be remanded to the Office for determination of the pay rate at the time of injury in accordance with section 8114(d)(3). Once the pay rate at the time of injury is properly determined, the Office can then make a determination as to whether appellant's compensation was underpaid. After such further development as the Office deems necessary, it should issue an appropriate decision with regard to the issue presented.

⁵ 20 C.F.R. § 10.5(20) defines "pay rate for compensation purposes" as the employee's pay, as determined by 5 U.S.C. § 8114, at the time of injury or the time disability begins, or the time disability recurs if the recurrence begins more than six months after the employee resumes full- time employment with the United States, whichever is greater.

⁶ The record indicates that, while appellant asserted that he had been employed as a medical technician, he submitted no verification of employment.

⁷ *Robin Bogue*, 46 ECAB 488 (1995).

⁸ *Id.*

The decision of the Office of Workers' Compensation Programs dated July 24, 2001 is hereby vacated and the case is remanded to the Office for proceedings consistent with this opinion of the Board.

Dated, Washington, DC
September 13, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member