U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN PROCK and DEPARTMENT OF AGRICULTURE, STANISLAUS NATIONAL FOREST, Sonora, CA

Docket No. 02-2191; Submitted on the Record;
Issued February 5, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's pay rate for compensation purposes.

On September 1, 1999 appellant, then a 22-year-old emergency firefighter, sustained an employment-related injury when he lost his footing, slipped and fell backwards at work. He sustained an L2 compression fracture, which the Office accepted. Appellant stopped work on October 20, 1999 and returned to full, light duty on April 3, 2000 as a forestry aide.[1]

By letters dated December 17, 1999, the Office had instructed the employing establishment and appellant to complete portions of a Form CA-1030.

The Office received information from the employing establishment, including a Form CA-1030, indicating that appellant was a temporary, full-time, seasonal employee who worked 26 weeks in the year prior to his September 1, 1999 injury; it noted that appellant was not "employed" for 11 months prior to the injury. With respect to whether appellant would have been afforded employment for 11 months had the employee not been injured, it was noted that appellant would not have been afforded employment because he was seasonal. With respect to the portion of the form requesting 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, the employing establishment indicated that the earnings were the same and the employee that would be most similar would be a Forestry Aid. It was noted that the "hot shot" was a 20-man crew and except for the captains, all schedules were the same.

By letter dated February 22, 2000, the Office advised appellant that he would receive $899.64 every four weeks.

[1] The record reflects that appellant was appointed and approved as a Forestry Aid on June 26, 1997 for seasonal work. It appears that appellant continued to work in this capacity and he was again appointed on May 9, 1999 in the same capacity.

By memorandum dated October 11, 2000, the Office determined that appellant was entitled to hazard pay and revised his base rate to $11.21 per hour or $258.69 per week. The Office noted that the 150 formula would be more advantageous than figures noted in the January 13, 2000 response from the employing establishment.[2]

On September 18, 2001 the Office again referred to the 150 formula and calculated appellant's pay rate using 8 hours per day times the hourly rate of $11.21 per hour for a weekly rate of $258.69. By letter of the same date, the Office advised appellant's representative that appellant's pay rate was $995.00[3] per 28-day cycle.

By letters dated August 27, September 19, November 29 and December 20, 2001, appellant's representative requested information regarding how appellant's pay rate was calculated.

By letter dated March 1, 2002, appellant's representative alleged that the method used by the Office in calculating appellant's pay rate was incorrect. He alleged that appellant worked 1773.50 hours during the preceding one-year period and received a total gross pay of $22,307.57. He indicated that this would amount in a pay rate of $754.63 per week. The representative explained that he took $22,307.57 divided by 29.56 weeks worked (1773.50 total hours divided by 60 hours per week) (10 hours per day times 6 days a week). He provided the paystubs and explained that the Office had used the minimum amount instead of the actual hours.

By letter dated March 6, 2002, appellant's representative provided additional time and attendance records for appellant and indicated that the total hours appellant worked in 1999 were 2,160 hours and he indicated that this equated to 36 weeks and amounted in $27,166.68 per year.

By letter dated March 7, 2002, the Office advised appellant's representative regarding his pay rate. They advised that the "150" referred to the formula used to calculate the compensation rate for emergency firefighters, not the number of hours worked. The Office stated that appellant was a temporary seasonal worker in noncareer status, on a hotshot crew, in short an emergency firefighter. The Office indicated that the Federal Employees' Compensation Act indicates that the workday and workweek for fighters recruited on an emergency basis may exceed eight hours per day and five days a week and on an actual daily basis, the daily pay rate is the number of hours actually worked times the hourly pay rate reported, the compensation rate would be computed on the workweek reported. Further, the Office indicated: "[IN OTHER CASES THE MINIUMUM WEEKLY PAY RATE IS DETERMINED BY THE FOLLOWING FORMULA: Hourly wage x number of hours per day x 150 days divided by 52.]" They advised that appellant's hourly rate was $8.03 per hour at the time of his injury and other pay factors included (hazard pay, night differential, etc.) to equate to $11.21 per hour. The Office applied the hourly wage to the statutory formula and stated that appellant's average weekly earnings were $11.21 x 8 hours per day x 150 days divided by 52 weeks = $258.69. Further, the Office advised

[2] Although the Office noted that the formula would be more advantageous, there is no explanation as to how the Office derived at this conclusion.

[3] The Office indicated that $955.00 on one part of the letter, but finalized with $995.00, which appears to be the calculation derived on the preceding page.

appellant that section 8112 of the Act states " ... [t]he monthly rate of compensation for disability ... may not be less than 75 percent of the monthly pay of the minimum rate of basic pay for GS-2 or the amount of the monthly pay of the employee, *which ever is less.*" The Office stated that the current pay rate for a GS-2 is $7.65 per hour, $360.00 per week, $15,912.00 per year and $1,326.00 per month which calculated to $1,326.00 x 75 percent = $994.50, which was rounded up to $995.00. The Office compared this to appellant's weekly pay of $258.69 per week x 52 weeks divided by 12 months = $1,120.99 per month. The Office noted that section 8112 indicated use of the lesser amount, or $995.00. The Office noted that appellant was not being paid as a GS-2, stating the GS-2 reference was in regards to the minimum compensation calculation as outlined in section 8112 of the Act.

On July 25, 2002 the Office provided a formal decision regarding appellant's pay rate for compensation purposes. The Office noted that it had determined that appellant's appointment was that of a temporary employee, not to exceed one year, with a one-year extension possible, with no career status. It was determined that appellant was a member of a "hot shot" crew and fell into the category of an emergency firefighter.

The Board finds that this case is not in posture for decision on the issue of whether the Office properly calculated appellant's pay rate.

With respect to the calculation of appellant's pay rate for compensation purposes, the Act provides for different methods of computation of average annual earnings depending on whether the employee worked in the employment, in which he 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.[4] Section 8114(d) of the Act provides:

"Average annual earning 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 --
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> (A) was fixed, the average annual earnings are the rate of pay; or
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> (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.
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> (2) If the employee did not work in employment in which he was employed at the time of his 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

[4] 5 U.S.C. § 8114(d)(1), (2); *see Billy Douglas McClellan*, 46 ECAB 208, 212-13 (1994).

> 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."[5]

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 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 one year immediately preceding his injury."

Given the inapplicability of sections 8114(d)(1) and (2) of the Act, the Office correctly chose to apply section 8114(d)(3) to determine appellant's pay rate for compensation purposes.[6] It does not appear, however, that the Office properly applied section 8114(d)(3) in its entirety. The Office did not adequately consider the factors delineated therein, including appellant's previous earnings in federal employment and appellant's prior nonfederal employment. Further, the Office did not consider the additional on earnings provided by appellant and his representative in calculating appellant's pay rate.

In addition to the fact that the Office did not adequately consider all the relevant information in deriving at a figure for appellant's average annual earnings, it did not comply with the last sentence of 8114(d). When the Office calculated appellant's average annual earnings based on information it received from the employing establishment regarding actual earnings in the year prior to injury, it apparently did not compare this figure for average annual earnings to that which would be obtained from the formula delineated in the last sentence of 8114(d). This sentence dictates that the greater of the two figures should be used to determine a claimant's pay rate for compensation purposes.[7]

To calculate the average annual earnings of emergency firefighters, the Board is not convinced that the Office's procedure manual requires the use of the "150 times" formula to the exclusion of any other considerations. The procedure manual states: "On an actual daily basis,

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[5] *Id.*

[6] *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).

[7] See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4(c)(4), (5) (March 1996).

the daily pay rate is the number of hours actually worked times the hourly pay rate reported and compensation will be computed on the workweek reported. In other cases, the minimum weekly pay rate is determined by the following formula: Hourly wage x no. of hours per day x 150 days/52."[8] The phrase "In other cases" preceding the "150 times" formula implies that this formula is not to be used in all cases.

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. The Board has held that the Office must consider the factors listed in section 8114(d)(3) prior to application of the 150 times statutory minimum calculation.[9] Further, it appears that the Office used the lowest possible formula for appellant, based upon his categorization as a temporary seasonal worker and did not take into consideration that appellant had worked in this temporary capacity since June 26, 1997. Appellant should have received compensation on the same basis as an employee who worked at the same grade and step for a whole year and been afforded the status of a career seasonal employee.[10] As there is no indication the Office considered these factors in the present case before applying the "150 times" formula, the case will be remanded to the Office for such consideration, to be followed by an appropriate decision on appellant's rate of pay and his loss of wage-earning capacity.

Given that the Office failed to properly consider the relevant factors of section 8114(d) of the Act in determining appellant's pay rate for compensation purposes, the case should be remanded to the Office for further evidentiary development to be followed by an appropriate decision.[11]

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.9b(2) (December 1995).

[9] *Robin Bogue*, 46 ECAB 488 (1995).

[10] *See supra* note 7.

[11] *See Robin Bogue*, 46 ECAB 488, 490-91 (1995); *Estelle J. Boimah*, 42 ECAB 871, 881-82 (1991). Where a part-time or short-term employee has demonstrated the ability to work full time, the pay rate of an employee working full time in the job held by the injured employee should be used to compute compensation. In some cases, the Board has found that full-time work performed in another job during the year prior to an injury demonstrated an ability to perform full-time work in the job, in which the injury occurred. Therefore, a claimant who can establish that he or she worked for substantially the entire year prior to the injury is entitled to receive compensation on the same basis as a regular employee working in the same type of job; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4(c)(1) (December 1995).

The decision of the Office of Workers' Compensation Programs dated July 25, 2002 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, DC
February 5, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member