U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES T. CUMMINGS and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Kansas City, MO

Docket No. 02-644; Submitted on the Record;
Issued June 3, 2003

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant was not entitled to wage-loss compensation for nonfederal, concurrent employment.

On June 28, 2001 appellant, then a 41-year-old health technician, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1). Appellant alleged that on February 14, 2001 he sustained hepatitis C as a result of a needle stick while in the performance of duty. The Office accepted that appellant sustained a needle stick injury. According to the reverse of the claim form, appellant did not immediately stop working; the record does indicate that appellant was off work from July 16 to 27, 2001.

On August 3 and September 4, 2001 appellant filed claims for compensation (Form CA-7) for the period July 16 to September 8, 2001. Appellant alleged that he was unable to work at his nonfederal, concurrent employment as of July 16, 2001 due to treatment for his needle stick injury.

By decision dated October 4, 2001, the Office denied the claim for compensation. The Office found that the nonfederal, concurrent employment could not be included in determining compensation pay rate or entitlement to compensation for wage loss.

The Board finds that the Office properly determined that appellant was not entitled to wage-loss compensation with respect to his nonfederal, concurrent employment.

In the present case, appellant had worked at the employing establishment in a full-time position since September 1999. At the time of injury, he was also working full time in the evenings as a laboratory technician at a local hospital. Appellant has claimed compensation as of July 16, 2001, on the grounds that his federal employment injury caused disability for his nonfederal, concurrent employment. The issue of whether concurrent similar employment may

be considered in determining pay rate for compensation purposes must be resolved by application of 5 U.S.C. § 8114.

Section 8114(d) of the Federal Employees' Compensation 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--
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> > "(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 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 5½-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 of 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.
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> "(3) 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 the injury having regard to the previous earnings of the employee in Federal employment, and of other employees of the United States 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."

The Board has recognized that there are circumstances where a claimant's pay rate may include nonfederal, concurrent employment. In *Ricardo Hall*,[1] the employee's federal position was a temporary general mechanic. At the time of injury, he also had earnings from a private home repair business. Applying the statutory guidelines of section 8114(d), the Board found that the employee did not work in his temporary position for substantially the whole year prior to the injury, nor would the position have afforded employment for substantially a whole year. Accordingly, his pay rate was properly computed under section 8114(d)(3), and the Board has recognized that the language in section 8114(d)(3) provides that "earnings from concurrent employments [would] be combined in determining the pay rate for compensation purposes only if the concurrent employments were related."[2] In *Hall*, the Board found that the concurrent employment should be included in a pay rate determination; the case was remanded to properly determine the amount of concurrent earnings.

In *Irwin E. Goldman*,[3] the employee worked in a part-time federal position as a postal clerk, while he held a concurrent full-time position in private employment. The Board found that, although appellant worked substantially the whole year prior to the injury, section 8114(d)(1) could not be applied reasonably and fairly to a part-time worker that clearly had the wage-earning capacity of a full-time employee. Accordingly, the Board applied section 8114(d)(3) and held that appellant's pay rate should be determined by the pay rate of a full-time postal clerk.

As the Board noted in *Hall*, the inclusion of concurrent similar employment has not been extended to pay rate determinations under section 8114(d)(1) or (2). In *David E. Costa*,[4] the employee's federal position was a police officer; at the time of the employment injury, he performed part-time police work for a local police department. The Board found that, although the employee did not work in his federal position for substantially the whole year, the position would have afforded employment for substantially the whole year prior to the injury. Therefore the employee's pay rate was determined under section 8114(d)(2), not section 8114(d)(3). The Board distinguished the holding in *Hall*, and found that nonfederal, concurrent earnings would not be included under section 8114(d)(1) or (2). Since section 8114(d)(2) was applicable, the Office had properly excluded the part-time nonfederal, concurrent earnings.

In the instant case, appellant worked in a full-time position for substantially the whole year prior to the injury. Section 8114(d)(1) is therefore applicable in this case. The clear language of section 8114(d)(1) indicates that it was intended to cover precisely the situation presented here. Only under circumstances where section 8114(d)(3) is applicable has the Board recognized that nonfederal, concurrent earnings may be included in a compensation pay rate determination. Section 8114(d)(3) is not applicable in this case and, therefore, the nonfederal, concurrent employment is not included for compensation purposes. Appellant is entitled to

[1] 49 ECAB 390 (1998).

[2] *Id.*, quoting *Michael A. Wittmen*, 43 ECAB 800 (1992).

[3] 23 ECAB 6 (1971).

[4] Docket No. 98-1971 (issued July 25, 2000).

compensation only for the period that he was disabled for his full-time federal position, and his pay rate is based on his federal earnings in accord with section 8114(d)(1).

The decision of the Office of Workers' Compensation Programs dated October 4, 2001 is affirmed.

Dated, Washington, DC
June 3, 2003

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member