U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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

Docket No. 03-2051; Submitted on the Record;
Issued November 26, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, WILLIE T.C. THOMAS

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

This is the second appeal in this case.[1] On the first appeal, the Board reviewed a July 25, 2002 decision, by which the Office computed appellant's pay rate compensation and found that it was unclear from the record whether the Office considered that all of the factors in calculating appellant's pay rate or properly afforded him the status of a "career seasonal" employee as opposed to an "emergency firefighter" for the purposes of pay rate computation and his loss of wage-earning capacity. Therefore, the Board directed the Office to clarify appellant's pay rate for compensation purposes. The complete facts of this case are set forth in the Board's February 5, 2003 decision and are herein incorporated by reference.

In accordance with the Board's decision, the Office obtained the necessary information to clarify appellant's prior employment status.

On remand, in accordance with the Board's prior decision, by letter dated May 6, 2003, the Office contacted appellant and requested additional information from appellant including whether he was employed in the private sector one year prior to his date of injury, his position earnings and whether he was currently employed. In a May 7, 2003 letter, the Office requested that the employing establishment submit copies of appellant's SFA-50's pertaining to the conditions of his hiring for the years 1997 to 1999.

In a May 13, 2003 memorandum, the Office noted that Pam Smith, a representative from the employing establishment, called concerning the hiring and SF-50's of appellant. Ms. Smith noted that appellant was hired as a temporary seasonal worker as a forestry aide (T152 N2011). She added that he did work on a hot shot crew fighting forest fires, however, he was not recruited

[1] Docket No. 02-2191 (issued February 5, 2003).

on an emergency basis as a firefighter. The Office clarified that appellant was not a firefighter recruited on an emergency basis but rather a forestry aid hired under nonemergency conditions as a temporary seasonal worker with no eligibility to be converted to career seasonal.

On May 13, 2003 the Office received the SF-50's for appellant showing that he was hired as a forestry aide on a temporary appointment with seasonal work.

By letter dated May 23, 2003, the Office requested that the employing establishment provide the earnings of another employee working the greatest number of hours during the year prior to the injury in the same or most similar class.[2] By letter of the same date, the Office requested that appellant indicate what he did after he left the forest service in 1999 and the details of the position.

On May 23, 2003 the Office received a 1998, wage and tax statement and responses from appellant regarding his subsequent employment after the forest service, including that he drove a crawler from the end of November to the end of December and that he was not currently employed.

By decision dated July 23, 2003, the Office determined that appellant's pay status, pay rate and compensation were correct.

The Board finds that the Office properly determined appellant's employment status and, therefore, properly computed appellant's pay rate.

Sections 8114(d)(1) and (2) of the Federal Employees' Compensation Act provide for computation of pay rates for compensation purposes, specifying methods of computation of pay for employees who worked in the employment for substantially the whole year prior to the date of injury and for employees who did not work the majority of the preceding year, but for whom the position would be available for a substantial portion of the following year.[3] Section 8114(d)(3) of the Act provides an alternative method for determination of pay to be used for compensation purposes, when the methods provided in the foregoing sections of the Act cannot be applied reasonably and fairly.[4]

Section 8114(d)(3) provides:

> "[T]he 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 class working in the same or most similar employment in the same or neighboring location, other previous employment of the employee or

[2] Earlier in the record, it was noted that the "hot shot" was a 20-man crew and except for the captains, all schedules were the same.

[3] 5 U.S.C. § 8114(d)(1), (2).

[4] 5 U.S.C. § 8114(d).

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 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.[5]

In this case, the Office originally indicated that appellant was an emergency firefighter, however, on remand, the Office subsequently determined that appellant was actually a forestry aid hired under nonemergency conditions as a temporary seasonal worker with no eligibility to be converted to career conditional and further that he would not have been provided with employment for substantially the whole year. Therefore, although appellant was originally categorized as an emergency firefighter recruited on an emergency basis instead of as a forestry aid hired under nonemergency conditions as a temporary seasonal worker, the Office properly determined that appellant's pay should be calculated under section 8114(d)(3) of the Act. In its original decision, the Office then applied a formula set forth in the Federal (FECA) Procedure Manual to aid in the application of section 8114(d)(3) to emergency firefighters. The Board held, however, that it was unclear from the record whether the Office ever considered whether appellant might have been a "career seasonal" employee, which requires a different method of pay rate computation and directed the Office to clarify appellant's employment status.

On remand, the Office determined that its original determination was in error as it had now determined that appellant was a forestry aid hired under nonemergency conditions as a temporary seasonal worker with no eligibility to be converted to career conditional. The employing establishment also indicated that appellant's pay was the same as that of others except for a crew captain, which appellant was not, therefore, determined that a similarly situated employee would have the same wages. Appellant provided his employment records that showed that he worked 14 pay periods or 28 weeks and earned $9,618.22 with overtime. The information from the employing establishment also showed that the total number of hours worked one year prior to the injury was 867 regular hours and the Office determined that overtime hours were not to be included, although hazard, night and Sunday and dirty work pay were to be included. The record reflects that the Office properly considered pursuant to the procedure manual, the annual earning capacity of the injured employee in the employment, in which he was working at the time of injury, requested information regarding previous earnings of the employee in federal 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 and other relevant factors. Further, the Office considered the additional data on earnings provided by appellant and his representative in calculating appellant's pay rate and explained that overtime hours could not considered as the Act did not apply to appellant as he was not a firefighter.[6] The Office

[5] *Monte Fuller*, 51 ECAB 571 (2000).

[6] Public Law 105-277, the Firefighters Overtime Pay Reform Act of 1998.

subsequently explained how appellant's earning were calculated and determined that he was not owed additional monies.

As the information from the employing establishment clearly establishes that appellant was not a career seasonal employee, the Board finds that, in its July 25, 2002 and July 23, 2003 decisions, the Office properly computed appellant's pay rate pursuant to the average annual earnings section of the procedure manual and he is not due additional compensation based on the wages of a career seasonal employee.[7]

The decision of the Office of Workers' Compensation Programs dated July 23, 2003 is hereby affirmed.

Dated, Washington, DC
November 26, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.0900.4(a)(1) (b) and (c) (May 7, 2003).