# United States Department of Labor
# Employees' Compensation Appeals Board

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| **ERIC B. PETERSEN, Appellant** | ) | |
| **and** | ) | **Docket No. 05-1931** |
| | ) | **Issued: July 13, 2006** |
| **DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, Bakersfield, CA, Employer** | ) | |

*Appearances:*
*Eric B. Petersen, pro se*
*Thomas G. Giblin, Esq.,* for the Director

Oral Argument April 6, 2006

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge

### *JURISDICTION*

On September 19, 2005 appellant filed a timely appeal of a March 31, 2005 merit decision and an August 1, 2005 nonmerit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review both these decisions.

### *ISSUES*

The issues are: (1) whether the Office used the proper rate of pay for appellant's compensation payments beginning August 30, 1992; and (2) whether the Office, pursuant to 5 U.S.C. § 8128(a), properly refused to reopen the case for further review of the merits.

### *FACTUAL HISTORY*

On September 1, 1992 appellant, then a 56-year-old subcontractor, filed a claim for compensation for a traumatic injury sustained on August 30, 1992 when fuel splashed over his face and into his mouth. By decision dated November 18, 1992, the Office denied appellant's claim on the basis that he was not an employee of the Federal Government at the time of this injury. By decision dated March 17, 1993, the Office vacated the November 18, 1992 decision

and found that appellant was a federal employee and that the August 30, 1992 incident resulted in chronic chemical pneumonitis.[1]

On May 6, 1993 appellant filed a claim for compensation for a period of wage loss from August 30 to October 15, 1992. On this Form CA-7, the employing establishment stated that appellant's hourly pay rate was $10.90, and that his work week was Sunday through Saturday. In a May 6, 1993 letter, the employing establishment stated that when appellant was injured on August 30, 1992 he was on a daily rather than an hourly rate of pay, that the hourly rate was $10.90, and that the daily rate was $174.40, as his work as a fire supervisor required him to work eight hours and be on standby for eight hours. It noted that he worked most of the standby time, that his pay did not reflect any overtime pay whatsoever, that he had to be put on a daily rate of pay because of the unusual requirements of the fire, that a daily rate of pay did not appear on appellant's emergency firefighter time report (Form 288) because the form was set up only for hourly rates and that his pay would have been the same amount whether an hourly or daily rate of pay was shown. Appellant's emergency firefighter time reports for August 21 to 31, 1992 reflect that he worked 6 hours on August 21, 19.5 hours on August 22 and 16 hours per day each day from August 23 through 29, 1992. He was paid for these hours of work at a rate of $10.90 per hour. Under the terms of July 1990 contracts, Petersen Equipment agreed to provide medical, communication and rescue units and generators and light fixtures for the period July 2, 1990 to April 30, 1993. The contract states that the operator would be furnished by the government and paid AD-4 wages, which were $10.90 per hour, per the Interagency Fire Business Management Handbook. Appellant's August 30, 1992 injury occurred while he was functioning as the operator of the equipment specified in the contracts.

On April 28, 1994 the Office advised appellant that compensation was being paid for temporary total disability for the period October 5, 1992 to September 15, 1993. Compensation continued until February 10, 1997, when the Office issued a decision terminating compensation on the basis that appellant no longer had any condition related to his August 30, 1992 employment injury. This decision was affirmed by an Office hearing representative in a December 11, 1997 decision. On April 16, 1998 the Office found that medical evidence submitted after these Office decisions created a conflict of medical opinion which was resolved by an impartial medical specialist concluding that appellant's asthma was permanently aggravated by his August 30, 1992 injury and that he was unable to return to the job he held when he was injured.

The Office paid appellant compensation for temporary total disability from October 16, 1993 to January 30, 1999 at a pay rate of $436.00 per week, and placed him on the periodic rolls at this rate. In a June 9, 2000 letter to the Office, appellant contended that the pay rate used to compute his compensation was incorrect, as his pay when he was injured was $174.40 per day. In June 29, 2000 letters, the Office requested that the employing establishment provide the number of hours appellant worked in the year before his August 30, 1992 employment injury, and that appellant provide further information on the amount he earned as a firefighter in 1991. In a September 19, 2000 letter, the employing establishment advised the Office that at the time of

[1] On April 28, 1994 the Office added aggravation of asthma as a condition related to the August 30, 1992 employment injury.

his August 30, 1992 employment injury he was paid by the Forest Service, and that it was unable to locate any record of payments made to appellant in 1991.

By decision dated March 31, 2005, the Office found that $436.00 per week was the proper rate of pay on which to base appellant's compensation payments.

On March 31, 2005 the Office requested that the Forest Service provide documentation that appellant was an employee of the Federal Government rather than a contractor at the time of his August 30, 1992 employment injury. In an April 11, 2005 letter, the Forest Service replied, "When Petersen Equipment provided the operator, the government considered the individual an employee for OWCP and tort claims purposes.… Each incident that he was dispatched to was paid by the ordering forest or agency, and only the ordered equipment and services were paid for."

By letter dated April 30, 2005, appellant requested reconsideration of the Office's March 31, 2005 decision. He contended that his pay rate should be based on a 16-hour workday and a 7-day workweek. By decision dated August 1, 2005, the Office found that appellant's request for reconsideration was insufficient to require a review of the merits of his case.

## ***LEGAL PRECEDENT***

Section 8114(d) of the Federal Employees' Compensation Act[2] reads as follows:

"(d) 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 dally 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.
>
> "(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

[2] 5 U.S.C. § 8114(d).

> 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 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."

The Office's procedure manual addresses the pay rate of employees who do not work substantially the whole year immediately preceding their injuries, stating:

> "4(a)(1) *Career seasonal employment* is an arrangement where the employee regularly works just part of a calendar year, usually for the same general period each year and at the same type of job. Such workers often perform highly specialized duties (*e.g.*, forest firefighters).
>
> > "(a) An employee who has worked in such a position during more than one calendar year by prior written agreement with the employer is considered to be a career seasonal employee. Such an employee is entitled to receive compensation on the same basis as an employee with the same grade and step who has worked the whole year."
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> > * * *
> >
> > "(d) Employment during the year before the injury is not a factor. For example, compensation for a career seasonal firefighter paid at a GS-7 level, who had worked full time in such a position by mutual agreement during more than one calendar year, would be computed at the full-time year-round GS-7 salary, regardless of how much or how little the employee worked during the year prior to the injury."[3]

In *Frazier V. Nichol*, the Board found "that the Office's use of a full-time pay rate for career seasonal employees is an appropriate and fair administrative procedure, and use of this formula is appropriate under 5 U.S.C. § 8114(d)(3)."[4] The Board pointed out that such formulas

[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4 (December 1995) (October 1996).

[4] 37 ECAB 528, 537 (1986).

may not be complex enough to take into account every variable but that "the fact that a formula does not give every possible benefit to all the claims to which it is applied does not make the formula wrong, inappropriate or inconsistent with the statute or regulations."[5]

## ***ANALYSIS***

Appellant did not work substantially the whole year immediately preceding his August 30, 1992 employment injury, and the position in which he was employed at the time of this injury would not have afforded him employment for substantially the whole year. Thus sections 8114(d)(1) and (2) of the Act do not apply. His pay rate must therefore be determined under section 8114(d)(3) of the Act.

Appellant's status was that of a career seasonal employee, as shown by the three-year contract with Petersen Equipment. This contract, which was signed in July 1990, established an expectation that appellant's seasonal employment would continue on a regular recurring basis. The Office's use of the pay rate of a full-time permanent employee at the AD-4 rate of $10.90 per hour was appropriate under the first sentence of section 8114(d)(3) of the Act.[6]

The Office, however, did not consider the second sentence of section 8114(d)(3), which provides that 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 the injury. Appellant's average daily wage during the week immediately preceding his injury, as shown by his emergency firefighter time reports and the employing establishment's payments based on these reports, was $174.40, representing 16 hours of work per day at $10.90 per hour.[7] If his average daily wage was $174.40 for the days employed within one year immediately preceding his injury, his pay rate using the 150-times formula of the second sentence of section 8114(d)(3) of the Act would be greater than that of a full-time employee earning $10.90 per hour for 40 hours a week, and the 150-times formula would therefore have to be used, as this section provides that average annual earnings "may not be less" than the amount computed by using the 150-times formula.[8]

The evidence in the case record, however, is insufficient to establish whether appellant earned $174.40 per day during the days employed within one year immediately preceding his injury. The Office therefore should contact his federal employers[9] and ascertain the wages he earned each day he was employed for the one year immediately preceding his injury, which

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[5] *Id.* at 538.

[6] *Dan C. Boechler*, 53 ECAB 559 (2002).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.9b(2) (December 1995) states: "On an actual daily basis, the daily pay rate is the number of hours actually worked times the hourly pay rate reported…. Where more than eight hours are worked per day, actual hours worked shall be used in the computation."

[8] Application of the 150-times formula to appellant's daily wage of $174.40 results in a weekly pay rate of $503.08 ($174.40 x 150 ÷ 52), which is greater than the pay rate of $436.00 used by the Office.

[9] These appear to be the U.S. Forest Service and the Bureau of Land Management.

should then be averaged to arrive at an average daily wage. If application of the 150-times formula to these average daily wages results in a weekly pay rate greater than the $436.00 used by the Office, it should pay him at this greater pay rate.

The Office, however, is under no obligation to pay appellant as if he were a full-time permanent employee earning $174.40 per day, seven days per week, as he urges. The purpose of section 8114(d)(3) is to determine the annual earning capacity for an employee that would closely approximate his true preinjury earning capacity.[10] Application of the formula urged by appellant would not approximate his preinjury earnings in federal employment; it would far exceed them.[11]

## ***CONCLUSION***

Further development of the evidence is needed to determine whether the Office paid appellant at the correct rate of pay.[12]

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 31, 2005 is set aside and the case remanded to the Office for further development consistent with this decision of the Board, to be followed by an appropriate merit decision on appellant's rate of pay.

Issued: July 13, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

[11] $174.40 per day times 365 days in a year equals $63,656.00 per year. There is no indication appellant ever earned anywhere near this amount in federal employment.

[12] As the Board is remanding the case for further development and a decision on the merits of the pay rate issue, the nonmerit issue is moot.