United States Department of Labor
Employees' Compensation Appeals Board

ALAKHIR SHAHEED DANIELS, Appellant	)	
and	)	**Docket No. 06-166**
	)	**Issued: March 15, 2006**
DEPARTMENT OF HOMELAND SECURITY, FEDERAL EMERGENCY MANAGEMENT AGENCY, Orlando, FL, Employer	)	

Appearances:
Alakhir Shaheed Daniels, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On November 2, 2005 appellant filed an appeal of an August 30, 2005 decision of the Office of Workers' Compensation Programs regarding his pay rate and an October 25, 2005 decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501(d)(3), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether the Office properly determined appellant's pay rate for compensation purposes for the period January 7 to September 3, 2005; and (2) whether the Office properly denied appellant's September 20, 2005 request for reconsideration.

FACTUAL HISTORY

The Office accepted that, on November 1, 2004, appellant, then a 36-year-old mobile home inspector, sustained a neck strain and chest contusion in a work-related motor vehicle

accident. Appellant stopped work on November 22, 2004 and did not return. He received compensation beginning on January 7, 2005. His position was abolished as of March 15, 2005.

In a March 1, 2005 teleconference, the employing establishment indicated that appellant worked from 7:00 a.m. to 7:00 p.m. seven days a week. He was hired on October 15, 2004 at a field office. As of November 1, 2004, appellant's pay rate was $13.00 an hour. He worked from approximately October 15 to November 22, 2004.

In a March 3, 2005 daily roll payment worksheet, the Office noted that appellant's weekly pay rate as of November 23, 2004 was $1,092.00, based on an 84-hour-a-week schedule working 12 hours a day, 7 days a week. In response to question 16 on the form regarding whether appellant was an intermittent employee, the Office checked a box "no."

In June 24, 2005 letters, the Office requested additional information regarding appellant's pay and schedule. In a July 5, 2005 note, appellant responded that he worked at a private sector concrete cutting company from May 1, 2000 to July 22, 2003 earning $15.50 an hour. He stated that his "current government pay rate" was $13.12 an hour. In a July 27, 2005 letter, the employing establishment stated that appellant was a temporary employee with an intermittent tour of duty. At the time of injury, appellant's gross pay was $1,040.00 every 2 weeks or $13.00 an hour, based on 40-hour-a-week schedule, without special pay increments, Sunday premiums or holiday pay. In an August 30, 2005 telephone conference, the employing establishment stated that appellant's position was temporary and would not have lasted for an entire year even had he not been injured.

By decision dated August 30, 2005, the Office found that appellant had been paid at an incorrect pay rate for the period January 7 to September 3, 2005. It noted that, under 5 U.S.C. § 8114(d)(3), "the average annual earnings shall not be less than 150 times the employee's average daily wage earned in the particular employment during the year just before the injury. In most cases this means 150 times the daily wage on the date of injury." However, appellant's pay rate was calculated incorrectly, as if he was a "full-time regular employee … 84 hours per week. ($13.00 x 84 = $1,092.00)." The Office found that as appellant "did not demonstrate the ability to work full time for the year prior to the injury … [his] pay rate should have been based on the following '150' formula. [He] earned $1,040.00 for 10 days of work at $13.00 per hour … an average daily wage of $104.00. $104.00 x 150/52 = $300.00. Therefore $300.00 [was appellant's] correct weekly pay rate not $1,092.00." The Office noted that, as appellant was paid at an erroneously high pay rate, this created an overpayment of compensation but that this issue would be adjudicated by a future decision.

In a September 20, 2005 letter, appellant requested reconsideration. He submitted a September 6, 2005 letter from Concrete Cutting and Breaking, Inc. stating that appellant was a full-time employee in the Miami branch from February 14 to July 24, 2000. A federal tax form indicated that in 2000 appellant earned $9,675.88 at Concrete Cutting and Breaking, Inc. He also submitted an undated letter from Speedy Concrete Cutting, Inc., stating that appellant was employed as a production worker from July 29, 2000 to June 23, 2003 at an hourly pay rate of $13.50.

By decision dated October 25, 2005, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support thereof was irrelevant and therefore insufficient to warrant a merit review. The Office explained that appellant's private sector employment was irrelevant to determining his pay rate as this employment was more than one year prior to his work injury.

LEGAL PRECEDENT -- ISSUE 1

Pay rate for compensation purposes is defined by the Act and in Office regulations as the employee's pay at the time of injury, time disability began or when compensable disability recurred, if the recurrence began more than six months after the employee resumed regular full-time employment with the United States, whichever is greater.[1]

Sections 8114(d)(1) and (2) of the Act provide methodology for computation of pay rate for compensation purposes, by determination of average annual earnings at the time of injury. Sections 8114(d)(1) and (2) of the Act specify 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. 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.[2]

ANALYSIS -- ISSUE 1

The Office found that appellant should not have received compensation based on a full-time pay rate for the period January 7 to September 3, 2005 as he was a temporary, intermittent employee. The Office held that the appropriate pay rate should be calculated using the 150 formula under 5 U.S.C. § 8143(d). However, the Board finds that there are discrepancies in the facts of this case that require further development of appellant's pay rate for compensation purposes.

From approximately October 15 to November 22, 2004, appellant worked as a mobile home inspector for the employing establishment. The employing establishment indicated that appellant worked from 7:00 a.m. to 7:00 p.m. seven days a week, a total of 84 hours a week. However, in a July 27, 2005 letter, it noted that appellant's work schedule was only 40 hours a week. There are no pay stubs, earnings and leave statements or other salary records in evidence to resolve this discrepancy. Therefore, it is not possible to determine from the evidence of record how many hours a week appellant worked.

As to appellant's hourly pay rate, the employing establishment stated that appellant earned $13.00 an hour. Appellant contended that he earned $13.12 an hour. The employing

[1] 5 U.S.C. § 8101(4); 20 C.F.R. § 10.5(s); *see John M. Richmond*, 53 ECAB 702 (2002).

[2] 5 U.S.C. § 8101(d); *see Ricardo Hall*, 49 ECAB 390 (1998).

establishment indicated that appellant earned $1,040.00 every two weeks, but the Office calculated that appellant earned $1,092.00 each week. The evidence requires development on whether or not appellant's tour of duty was intermittent or a fixed schedule. The employing establishment stated that appellant had fixed hours of work, from 7:00 a.m. to 7:00 p.m., seven days a week. In a March 3, 2005 worksheet, the Office indicated that appellant was not an intermittent tour employee. Yet in its August 30, 2005 decision, the Office calculated appellant's pay rate based on his working an intermittent tour rather than being a full-time employee.

The case will be remanded to the Office for further development regarding appellant's pay rate. The Office shall determine whether appellant's date-of-injury position was intermittent, the number of hours he worked each week and his salary. Following this and any other development deemed necessary, the Office shall issue an appropriate decision in the case. As the case must be remanded for further development, the second issue in the case regarding whether the Office's October 25, 2005 decision denying reconsideration of the August 30, 2005 decision is moot.

CONCLUSION

The Board finds that the case is not in posture for a decision and must be remanded to the Office for further development on the pay rate issue.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 25 and August 30, 2005 are set aside and the case remanded for further development consistent with this opinion.

Issued: March 15, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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