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

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| **Z.S., Appellant** | ) | |
| **and** | ) | **Docket No. 06-1822** |
| | ) | **Issued: January 12, 2007** |
| **DEPARTMENT OF HOMELAND SECURITY, FEDERAL LAW ENFORCEMENT TRAINING CENTER, Glynco, GA, Employer** | ) | |

*Appearances:*
*Jeffrey P. Zeelander, Esq.,* for the appellant
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

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

### ***JURISDICTION***

On August 4, 2006 appellant filed a timely appeal from a July 24, 2006 schedule award decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

### ***ISSUE***

The issue is whether the Office used the proper pay rate in calculating appellant's schedule award.

### ***FACTUAL HISTORY***

The Office accepted that on March 22, 2002 appellant, then a 34-year-old customs inspector, sustained an acute left knee strain and left medial meniscus tear while running and squatting during training exercises. He did not stop work at the time of the injury. Appellant was followed conservatively through April 2002. He sought treatment in September 2004 from Dr. Gregory P. Charko, an attending Board-certified orthopedic surgeon. On October 14, 2004

Dr. Charko performed left knee arthroscopy, chondroplasty and a two-compartment synovectomy, authorized by the Office. He held appellant off work through November 11, 2004. Appellant returned to light duty on November 12, 2004 and to full duty on December 13, 2004.

Dr. George L. Rodriguez, an attending Board-certified physiatrist, submitted a June 21, 2005 report finding that appellant had reached maximum medical improvement. He opined that appellant had a two percent impairment of the left lower extremity according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). An Office medical adviser reviewed Dr. Rodriguez's report on September 8, 2005 and concurred with his impairment assessment.

In a January 13, 2006 letter, the Office requested that appellant provide pay stubs documenting his pay rate at the time of the March 22, 2002 injury. Appellant submitted earnings and leave statements showing a weekly pay rate of $499.20 for the period February 24 to April 20, 2002.

Appellant, through his representative, asserted that the schedule award should be based on a recurrent pay rate due to the surgery and work absence from October 14 to November 11, 2004. He submitted statements of earnings and leave showing that for the period October 3 to November 13, 2004, he used 127 hours of sick leave and 16 hours of "other leave." Appellant's weekly pay rate for this period varied from $915.36 to $1,120.74.

In a May 30, 2006 telephone memorandum, the Office stated that, if appellant had lost time from work due to the October 14, 2004 surgery, he would be entitled to a recurrent pay rate. It noted that it would perform preliminary calculations using the March 22, 2002 date-of-injury pay rate, with possible later adjustments.

By decision dated July 24, 2006, the Office granted appellant a schedule award for a two percent impairment of the left lower extremity. The period of the award ran from June 21 to July 31, 2005, based on a weekly pay rate of $998.40 at the 66 2/3 rate. The award was based on the March 22, 2002 date-of-injury pay rate.

## ***LEGAL PRECEDENT***

Section 8107 of the Federal Employees' Compensation Act[1] provides that compensation for a schedule award shall be based on the employee's monthly pay.[2] Section 8105(a) of the Act provides: If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability.[3]

[1] 5 U.S.C. §§ 8101-8193.

[2] 5 U.S.C. § 8107.

[3] 5 U.S.C. § 8105(a). Section 8110(b) of the Act provides that total disability compensation will equal three fourths of an employee's monthly pay when the employee has one or more dependents. 5 U.S.C. § 8110(b).

Section 8101(4) of the Act defines monthly pay for purposes of computing compensation benefits as follows: The monthly pay at the time of injury or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.[4] Office regulations provide that a recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition resulting from a previous injury or illness without a new or intervening injury.[5]

In applying section 8101(4), the statute requires the Office to determine monthly pay by determining the date of the greater pay rate, based on the date of injury, date of disability or the date of recurrent disability. The Board has held that rate of pay for schedule award purposes is the highest rate which satisfies the terms of section 8101(4).[6]

## ***ANALYSIS***

The Office accepted that appellant sustained a left knee strain and left medial meniscus tear on March 22, 2002. On July 24, 2006 it granted him a schedule award for a two percent impairment of the left lower extremity. The Office based this schedule award on the March 22, 2002 date-of-injury pay rate.[7] On appeal, appellant contends that the Office should have based the schedule award on his pay rate as of October 14, 2004, when he underwent surgery for the accepted injury and stopped work.

Appellant's date-of-injury pay rate was $499.20 a week. He did not miss time from work until the October 14, 2004 surgery, a procedure authorized by the Office. Appellant's physician held him off work from October 14 to November 11, 2004. The Board finds that he has established that he sustained a recurrence of disability in 2004 as defined by Office regulations.[8] Thus, appellant's period of disability from October 14 to November 11, 2004 is relevant in determining his rate of pay for purposes of the schedule award.[9]

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[4] 5 U.S.C. § 8101(4). The present case concerns a traumatic injury claim. In an occupational disease claim, the date of injury is the date of last exposure to the employment factors which caused or aggravated the claimed condition. *Patricia K. Cummings*, 53 ECAB 623, 626 (2002).

[5] 20 C.F.R. § 10.5(x).

[6] *Robert A. Flint*, 57 ECAB ___ (Docket No. 05-1106 issued February 7, 2006).

[7] Although the Office stated that appellant's date-of-injury pay rate was $998.40 a week, his earning and leave statements show that his weekly pay rate as of March 22, 2002 was $499.20 a week. The Board finds that this discrepancy is nondispositive, as the Office should not have relied on the March 22, 2002 pay rate.

[8] 20 C.F.R. § 10.5(x).

[9] This would constitute the date disability began, as appellant underwent authorized knee surgery on that date. *See* 5 U.S.C. § 8101(4); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Establishing a Pay Rate*, Chapter 2.900.2(b) (April 2002).

During the recurrence of disability, appellant used 143 hours of leave and his weekly pay rate varied from $915.36 to $1,120.74. The Board finds that appellant is entitled to a recurrent pay rate. The Office, therefore, improperly used the 2002 date-of-injury pay rate in calculating the July 24, 2006 schedule award.[10]

As the Office used an incorrect pay rate in calculating the schedule award, the case will be remanded to the Office for further action. On remand of the case, the Office shall undertake appropriate development to ascertain appellant's pay rate during the October 14 to November 11, 2004 recurrence of disability. The Office shall then issue an appropriate decision in the case and issue a *de novo* decision.

## ***CONCLUSION***

The Board finds that the Office did not use an appropriate pay rate in calculating appellant's schedule award. The case will be remanded to the Office for determination of the recurrent pay rate, recalculation of the schedule award and issuance of a *de novo* decision.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 24, 2006 is set aside and the case remanded for further development consistent with this opinion.

Issued: January 12, 2007
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[10] *Robert A. Flint, supra* note 6.