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

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| **A.D., Appellant** | ) | |
| **and** | ) | **Docket No. 07-883** |
| | ) | **Issued: September 5, 2007** |
| **DEPARTMENT OF HOMELAND SECURITY, FEDERAL EMERGENCY MANAGEMENT AGENCY, Orlando, FL, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On February 12, 2007 appellant filed an appeal of a February 2, 2007 decision of the Office of Workers' Compensation Programs regarding his pay rate. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

### ***ISSUE***

The issue is whether the Office properly determined appellant's pay rate for compensation purposes for the period January 7 to September 3, 2005.

### ***FACTUAL HISTORY***

This is the third appeal before the Board. By decision date November 30, 2006, the Board set aside a November 4, 2005 decision of the Office finding an overpayment of compensation related to accepted November 1, 2004 injuries.[1] The Office used the formula set

[1] Docket No. 06-1398 (issued November 30, 2006).

forth at 5 U.S.C. § 8114(d)(3) to determine appellant's pay rate, asserting that he was a temporary employee whose position was abolished as of March 15, 2005, less than one year after he was hired. The Board remanded the case to determine appellant's hourly pay rate, employee status and work schedule. The law and the facts of the case as set forth in the Board's prior decision and order are hereby incorporated by reference.[2]

On remand of the case, the Office conducted additional development to verify appellant's pay rate, work schedule and employee status. In a December 13, 2006 letter, the Office requested that appellant submit documents verifying his pay rate and status. In a second December 13, 2006 letter, the Office requested that the employing establishment submit "payroll record, personnel records or other appropriate written documentation verifying [appellant's] hourly pay rate and biweekly pay rate." The Office also requested documentation of "overtime, premium or other pay in addition to his regular wages" and records verifying appellant's work schedule.[3]

In a December 16, 2006 letter, appellant asserted that he earned more than $13.00 an hour and that he worked 84 hours a week on a fixed schedule of 12 hours a day for 7 days. He submitted statements of earnings and leave. For the pay period October 17 to 30, 2004, appellant worked 80 regular hours, 3.50 hours "overtime over 8" and 123.50 hours overtime at the premium rate. He worked 203.50 hours during the pay period and earned $3,445.25 gross salary. Appellant's annual salary was listed as $27,131.00. For the pay period October 31 to November 13, 2004, he worked 80 regular hours and 141.50 hours of overtime at the premium rate. He worked 221.50 hours during the pay period and earned $3,728.25 gross salary. Both statements indicate that appellant worked an intermittent schedule.

In a November 13, 2004 temporary employee time and attendance worksheet, appellant noted that, for each day of the period October 31 to November 13, 2004, he worked from 5:00 a.m. to 8:30 p.m. or later.

Appellant submitted a copy of the employing establishment's July 27, 2005 response to an Office inquiry regarding his employment status and pay rate. This form states that appellant was hired as a temporary employee on an intermittent schedule, with an hourly pay rate of $13.00 for a two-week, 80-hour pay period. He earned $1,040.00 a pay period. It was noted that appellant worked 200 hours overtime for the pay period beginning October 31, 2004 and 70 hours overtime for the pay period beginning November 14, 2004.

By decision issued February 2, 2007, the Office affirmed the May 19, 2006 decision, finding that appellant was paid compensation based on an incorrect pay rate for the period January 7 to September 3, 2005. The Office found that the employing establishment's July 27, 2005 response and the two earnings and leave statements were sufficient to establish that appellant was a temporary employee on an intermittent schedule, earning $13.00 an hour or

[2] The Office continued to pay appellant wage-loss compensation based on a weekly pay rate of $300.00.

[3] In a January 29, 2007 telephone memorandum, the Office stated that the employing establishment did not respond to the December 13, 2006 letter. The Office noted that the information appellant submitted was sufficient to calculate appellant's pay rate and issue a decision.

$1,040.00 a pay period. The Office found that, using the 150 formula, appellant's correct pay rate for compensation purposes was $300.00 a week.

## ***LEGAL PRECEDENT***

Pay rate for compensation purposes is defined by the Federal Employees' Compensation 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.[4]

Sections 8114(d)(1) and (2) of the Act explain how to compute a claimant's pay rate for compensation purposes by determining his or her 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.[5] Section 8114(d)(3) provides, in pertinent part:

> "[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 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 [one] year immediately preceding his injury."

In computing a claimant's pay rate, section 8114(e) of the Act provides for the inclusion of certain "premium pay" received.[6] However, overtime pay, among other classifications of pay, is excluded from consideration in determining a claimant's rate of pay.[7]

## ***ANALYSIS***

Appellant did not work substantially the whole year immediately preceding his November 1, 2004 injury. He worked from approximately October 15 to November 22, 2004. The position in which appellant was employed at the time of this injury was abolished as of March 15, 2005. It would not have afforded him employment for substantially the whole year.

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

[5] 5 U.S.C. § 8101(d); *Eric B. Petersen*, 57 ECAB ___ (Docket No. 05-1931, issued July 13, 2006).

[6] 5 U.S.C. § 8114(e).

[7] *Lottie M. Williams*, 56 ECAB ___ (Docket No. 04-1001, issued February 3, 2005).

Thus, sections 8114(d)(1) and 8114(d)(2) of the Act do not apply. It was, therefore, appropriate for the Office to apply section 8114(d)(3) to determine appellant's pay rate for compensation purposes.

To properly determine appellant's pay rate, the Board directed the Office to clarify his hourly pay rate, employee status and whether he received overtime pay. On remand of the case, appellant submitted earnings and leave statements covering the period October 17 to November 13, 2004, a November 13, 2004 time and attendance sheet for temporary employees and a July 27, 2005 employing establishment form response. The Board finds that these documents are sufficient to establish that appellant was hired as a temporary employee on an intermittent schedule with an hourly pay rate of $13.00 or $1,040.00 a pay period, exclusive of overtime. The Office then applied the "150 formula" under section 8114(d)(3) to determine appellant's pay rate, relying on this calculation in its February 2, 2007 decision.

In applying section 8114(d)(3), however, the Board finds that the Office did not adequately consider all factors delineated therein, particularly the earnings 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.[8] The Office requested information regarding appellant's pay rate, employee status and work schedule. But the Office did not request that the employing establishment provide the annual earnings of another employee with the same kind of appointment and working in a job with the same or similar duties who worked the greatest number of hours during the year immediately prior to the injury. The record does not contain evidence regarding the wages of any other employees. Therefore, the case shall be remanded to the Office for further development.[9] On remand, the Office shall obtain information regarding the annual earnings of another employee in the same or similar employment status as appellant and performing the same or similar duties in the same or a neighboring location. Following this and all other development deemed necessary, the Office shall issue an appropriate decision in the case.

## ***CONCLUSION***

The Board finds that the case is not in posture for a decision.

[8] *Dale Mackelprang*, 57 ECAB ___ (Docket No. 05-1401, issued October 24, 2005); *Aquilline Braselman*, 49 ECAB 547 (1998).

[9] *Joseph A. Matais*, 56 ECAB ___ (Docket No. 04-1745, issued December 7, 2004); *Aquilline Braselman*, *supra* note 8 and *Wilbert A. Cavaco*, 32 ECAB 1764 (1981) (in *Matais*, *Braselman* and *Cavaco*, the Board found that the Office correctly determined that the claimant's wages should be calculated under 5 U.S.C. § 8114(d)(3) but that the Office did not properly consider the wages of an employee of the same or similar class as the claimant, working in a same or similar employment in the same or neighboring location for the year prior to the claimant's employment injuries. The Board remanded these cases to the Office to obtain this information). *See also J.L.*, Docket No. 06-357 (issued August 25, 2006) (to determine the claimant's pay rate under 5 U.S.C. § 8114(d)(3), the Board directed the Office to obtain information regarding the wages of an employee of the same or similar class, employment and location as the claimant, a temporary disaster assistance employee working an intermittent schedule for less than one year prior to her injury).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs date February 2, 2007 is set aside and the case remanded for further development consistent with this decision.

Issued: September 5, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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