

finding that her actual wages represented her wage-earning capacity. Appellant thereafter requested a hearing before an Office hearing representative on the issue of her wage-earning capacity. At the hearing, she inquired about the compensation rate she would be paid in the event the Office awarded her compensation for a schedule award.¹ Appellant asserted that she had a dependent, her niece, whom she was taking care of following the death of her sister. The hearing examiner advised that appellant would be paid at the 75 percent rate if she had a dependent and at the 66 2/3 percent rate without a dependent. On May 23, 2006 the Office granted appellant schedule awards for a 12 percent impairment of her right upper extremity and a 12 percent impairment of her left upper extremity. The decision indicated that appellant was being paid weekly compensation at the 66 2/3 percent rate.

In a letter received by the Office on September 6, 2006, appellant informed the Office that she intended to submit evidence that she had a dependent.

By decision dated October 31, 2006, the Office denied modification of the May 23, 2006 schedule award decision. Appellant appealed this decision to the Board. She noted that she had attached a copy of a September 9, 2007 court order from the Circuit Court of Cook County, Illinois, Department of Juvenile Justice and Child Protection, awarding her legal guardianship of her niece.

In an August 7, 2007 decision,² the Board set aside the Office's May 23, 2006 decision. The Board found that the Office erred in relying on the Office medical adviser's opinion because he failed to specify the methods by which he calculated a 12 percent bilateral upper extremity rating. The Board remanded the case to the district Office for further development of the medical evidence. The complete facts of this case are set forth in the Board's January 24, 2007 decision and are herein incorporated by reference.

By telephone call and letter dated October 30, 2007, appellant informed the Office that she was not contesting the percentage of impairment made in her schedule award.³ Instead, she stated that she was appealing the 66 2/3 weekly compensation rate she claimed her niece as a dependent and entitlement to compensation at the 75 percent compensation rate. Appellant again attached the copy of the court order awarding her legal guardianship of her niece, along with her niece's birth certificate.

By letter dated November 6, 2007, the Office informed appellant that she was not eligible for compensation at the augmented rate of 75 percent unless she adopted her niece. It advised her that she needed to submit proof of adoption, such as a copy of the adoption papers, if she had legally and formally adopted her niece.

¹ By decision dated April 10, 2006, the Office found that appellant's actual earnings in her reemployment as a modified custodian with the employing establishment fairly and reasonably represented her wage-earning capacity. This decision is not at issue before the Board.

² Docket No. 07-707 (issued August 7, 2007).

³ Appellant also requested cancellation of the second opinion medical examination the Office scheduled for her pursuant to the Board's August 7, 2007 decision. The Office granted appellant's request.

By decision dated December 5, 2007, the Office reinstated the May 23, 2006 schedule award decision which granted appellant an award for 12 percent bilateral upper extremity impairment. It found that appellant was not entitled to augmented compensation at the 75 percent rate based on claiming her niece as a dependent.⁴ The Office found that legal guardianship of her niece did not qualify her as a dependent for the purpose of augmented compensation under the Act.

LEGAL PRECEDENT

Under 5 U.S.C. § 8110, a claimant is entitled to augmented compensation at the rate of 75 percent of her monthly pay if she has a dependent. Under this section a dependent includes an “unmarried child, while living with the employee or receiving regular contributions from the employee toward his support,” and who is either under 18 years of age or incapable of self-support because of physical or mental disability.⁵

Sections 8101(9) and 8110 state that only individuals specifically defined as a child under section 8110 would entitle an employee to augmented compensation for such a dependent. The term child in section 8101(9) of the Act provides for three specific relationships in addition to the biological relation between a parent and his or her natural child: stepchildren, adopted children and posthumous children. A niece or legal ward is not included among the definitions of a child pursuant to the Act.⁶

ANALYSIS

Appellant submitted a copy of a September 9, 2007 order from the Circuit Court of Cook County, Illinois, Department of Juvenile Justice and Child Protection, awarding her legal guardianship of her niece. The issue is whether appellant’s niece is a “child” as defined under section 8110. The Act provides that a “child” means one who ... is under 18 years of age or over that age and incapable of self-support, and includes stepchildren, adopted children and posthumous children, but does not include married children.”⁷ In *Aretha Hudson*,⁸ the Board held that a nephew is not a “child” under section 8101(9), and the guardian of a nephew is not entitled to augmented compensation under the Act. As noted in *Hudson*, nephews are not among the categories of persons included in the term “child” for purposes of the Act. The definition of “child” covers three specific relationships, in addition to the biological one between a person and

⁴ The birth certificate for appellant’s niece indicated that she was born on February 4, 1985 and therefore was a minor during the period of appellant’s schedule award.

⁵ 5 U.S.C. § 8110(3).

⁶ See *Louis L. Jackson, Sr.*, 39 ECAB 423 (1988), citing *Aretha Hudson*, 28 ECAB 169, 170 (1977) (where the Board held that appellant’s legal guardianship and support of her two minor nephews did not qualify the children as dependents pursuant to the Act, because appellant had not adopted the children). Both of these cases note the principle of statutory construction known as *expressio unis est exclusio alterius*, whereby the expression of specific persons or things in a statute implies an intent to exclude all others.

⁷ 5 U.S.C. § 8101(9).

⁸ *Aretha Hudson*, 28 ECAB 169 (1977).

her natural child. A niece is not included among the definitions of a child pursuant to the Act. There are other close relationships, such as that between a legal guardian and a ward, which are not included.

Accordingly, the Board finds that appellant's niece is not a "child" under section 8101(9) and not a dependent for the purposes of augmented compensation under section 8110 of the Act. The Office properly found that appellant is not entitled to augmented compensation at the 75 percent rate based on the legal guardianship of her niece. The Board will affirm the December 5, 2007 Office decision.

CONCLUSION

The Office properly determined that appellant was not entitled to augmented compensation based on claiming her niece as a dependent under section 8110 of the Act.

ORDER

IT IS HEREBY ORDERED THAT the December 5, 2007 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: September 22, 2008
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