

FACTUAL HISTORY

On December 14, 2005 appellant, then a 39-year-old forestry technician (assistant helitack manager), sustained a traumatic injury in a helicopter accident. She returned to limited duty the following day, no longer able to work on fires. The Office accepted appellant's claim for cervical and lumbar strain and for contusions to the neck, lower back and right knee.²

Appellant lost wages intermittently for medical appointments and physical therapy. The Office paid compensation beginning January 30, 2006 based on the pay rate when injured. On May 15, 2006 appellant underwent low back surgery. It thereafter paid compensation based on the pay rate when disability began. After further developing the evidence, the Office corrected the pay rate to reflect the sporadic additional pay appellant had received in the year prior to her injury and surgery, including hazard pay, Sunday premium and night differential (but not including the \$392.64 she earned in holiday pay). The corrected weekly pay rate was \$731.59 effective December 14, 2005 and \$825.86 effective May 15, 2006.

A later payroll review showed that appellant had gross earnings of \$19,860.92 from January 30 to May 14, 2006, or an average of \$1,324.06 a week. She had gross earnings of \$44,082.29 from May 15, 2006 to March 3, 2007, or an average of \$1,049.58 a week and appellant had gross earnings of \$51,708.87 from March 4 to October 27, 2007, or an average of \$1,520.85 a week.³

On December 11, 2007 the Office made a preliminary finding that appellant received a \$5,413.47 overpayment from January 30, 2006 to October 27, 2007. The Office determined that her actual earnings during this period -- including additional pay, particularly overtime and Fair Labor Standards Act overtime premium -- were greater than appellant would have received had she not been injured and was still working her date-of-injury position. The Office concluded that appellant was therefore not entitled to the \$5,413.47 in compensation she had received during the period. It further concluded that appellant was without fault in the creation of the overpayment.

In a decision dated January 17, 2008, the Office finalized its preliminary findings. It found that appellant was not at fault in creating a \$5,413.47 overpayment from January 30, 2006 to October 27, 2007.

On appeal, appellant stated that she had to take many hours of leave without pay for various appointments, physical therapy and surgeries. She stated that she had received \$5,413.47 in total compensation from the Office: "So if the OWCP office feels that I have been overpaid \$5,413.47, does that mean that I will not be reimbursed for any of my LWOP?" Appellant added: "All I am asking for is that someone to examine my case and explain to me how I can owe OWCP \$5,413.47. When that is exactly the amount that they have paid me. Shouldn't I be

² The Office later accepted post-traumatic stress disorder, acquired spondylolisthesis, closed dislocation of L4-5, aggravation of lumbar spinal stenosis, derangement of the posterior horn of the right meniscus, derangement of the anterior horn of the medial meniscus, torn medial meniscus and derangement of the anterior horn of the lateral meniscus.

³ Appellant had a second surgery on March 4, 2007.

reimbursed for loss of wages and my loss of Hazard Pay according to Section 8 of OWCP form CA-7?”

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁴ “Disability” means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.⁵

Section 8106 of the Act provides that if the disability is partial, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of the difference between her monthly pay⁶ and appellant's monthly wage-earning capacity after the beginning of the partial disability, which is known as her basic compensation for partial disability.⁷ In determining compensation for partial disability, except permanent partial disability compensable under 5 U.S.C. §§ 8107-8109, the wage-earning capacity of an employee is determined by her actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity.⁸

Section 8105 of the Act provides that 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 appellant's monthly pay, which is known as her basic compensation for total disability.⁹

If a claimant has returned to work following an accepted injury or the onset of an occupational disease and must leave work and lose pay or use leave to undergo treatment, examination or testing, compensation should be paid for wage loss under 5 U.S.C. § 8105 while undergoing the medical services and for a reasonable time spent traveling to and from the location where services were rendered.¹⁰

⁴ 5 U.S.C. § 8102(a).

⁵ 20 C.F.R. § 10.5(f) (1999).

⁶ “Monthly pay” means 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. 5 U.S.C. § 8101(4).

⁷ *Id.* at § 8106(a).

⁸ *Id.* at § 8115(a).

⁹ *Id.* at § 8105(a).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900.17.a (January 1991).

ANALYSIS

The Office determined that appellant's actual earnings after the December 14, 2005 employment injury were greater than her pay rate at the time of injury or her pay rate at the time disability began on May 15, 2006. It concluded that she had no loss of wage-earning capacity.¹¹ The Office reasoned that because appellant was not entitled to compensation for partial disability under section 8106 of the Act, she was not entitled to compensation for any wage loss.

Even an employee with no loss of wage-earning capacity is entitled to compensation under section 8105 of the Act when she leaves work and loses pay to undergo medical examination or treatment for the accepted injury or when temporary total disability arises from approved surgery. The record shows that the Office compensated appellant for intermittent wage loss resulting from medical appointments, physical therapy and surgery. From December 14, 2005 to October 27, 2007, these payments amounted to \$5,413.47 in compensation. The Board finds that appellant remains entitled to this compensation notwithstanding her actual earnings after the injury.

Because appellant's actual earnings do not establish that the Office erroneously paid compensation under section 8105 for intermittent wage loss resulting from medical appointments, physical therapy and surgery, the Office has not established that appellant received an overpayment of compensation from January 30, 2006 to October 27, 2007. The Board will therefore set aside the Office's January 17, 2008 overpayment decision.

Appellant contends that the Office should reimburse her for loss of hazard pay. It did correct appellant's pay rates to reflect sporadic additional pay in the year prior to her injury and surgery, including hazard pay, Sunday premium and night differential, but not holiday pay. So loss of hazard pay, at least, is fully accounted for in the corrected pay rates that apply to those periods when appellant missed work for medical appointments, physical therapy and surgery.¹² But the Office did not calculate the corrected December 14, 2005 pay rate until May 24, 2007 and did not calculate the corrected May 15, 2006 pay rate until October 30, 2006. It remains unclear whether the Office paid appellant the difference between compensation previously paid and compensation adjusted for sporadic additional pay in the prior year, including but not limited to hazard pay. Upon return of the case record, the Office should determine whether it paid appellant the difference, and if not, the amount to be adjusted.

CONCLUSION

The Board finds that the Office has failed to establish that appellant received an overpayment of compensation from October 27, 2007 to January 30, 2006.

¹¹ So even though appellant was less able to earn hazard pay after the injury, her actual earnings significantly increased, showing that the injury caused no compensable loss in her capacity to earn wages.

¹² Appellant received \$3,335.56 in hazard pay in the year prior to her December 14, 2005 injury (all between the 13th and 22nd pay periods in 2005). The Office therefore added \$64.15 ($\$3,335.56 / 52$) to her base weekly pay rate to reflect what she had earned in hazard pay in the prior year. Because she earned an additional \$161.56 in hazard pay in the first pay period in 2006, the Office added \$67.25 ($\$3,497.12 / 52$) to her base weekly pay rate on May 15, 2006, the date disability began following surgery.

ORDER

IT IS HEREBY ORDERED THAT the January 17, 2008 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: January 7, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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