

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

A.D., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
FEDERAL EMERGENCY MANAGEMENT
AGENCY, Orlando, FL, Employer**

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**Docket No. 09-331
Issued: September 1, 2009**

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 November 17, 2008 appellant filed a timely appeal from an August 29, 2008 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, 2005 to August 2, 2008.

FACTUAL HISTORY

This case is before the Board for the fourth time. In a September 5, 2007 decision,¹ the Board set aside a February 2, 2007 decision of the Office determining appellant's pay rate as a temporary worker on an intermittent schedule working for less than one year. The Board remanded the case to the Office to obtain pay rate information for an employee similarly situated to appellant.²

In a July 17, 2008 letter, the Office requested that the employing establishment provide the annual earnings "of another employee (even if the employee did not work for a full year) in the same or similar employment status as [appellant], and performing the same or similar duties in the same or a neighboring location." The employee should be an individual who worked the greatest number of similar employment hours during the year immediately prior to appellant's date of injury. The Office instructed the employing establishment to exclude overtime pay.

The employing establishment submitted personnel forms dated October 19, 2004 to February 3, 2006, demonstrating that appellant was hired on October 15, 2004 as a temporary employee on an intermittent schedule with basic pay of \$27,131.00 a year. Payroll records showed that in 2004 appellant earned \$175.50 for 13 hours work in pay period 20 and \$1,040.00 for 80 hours of work in pay periods 21 and 22. This totaled \$2,256.50 for 173.50 hours of work. The employing establishment provided payroll records of a similarly situated employee hired at approximately the same time as appellant. The employee earned \$416.00 for 32 hours of work in pay period 20, \$1,040.00 for 80 hours of work in pay period 21 and \$448.00 for 32 hours of work in pay period 22. This totaled \$1,904.00 for 144 hours of work.

In an August 14, 2008 memorandum, the Office noted that appellant had no earnings outside of his federal employment for the year prior to November 1, 2004, the date of the accepted injury. Comparing appellant's earnings to those of a similarly situated employee for the four weeks prior to the date of injury showed that appellant earned \$303.87 a week and the other employee earned \$364.00 a week.

By decision dated August 29, 2008, the Office determined that appellant's pay rate for compensation purposes was \$364.00 a week. It determined that, under section 8114 of the Act,³ appellant's pay rate should be calculated based on an alternative method as specified in sections 8114(d)(2) and (3)⁴ because he was not a full-time regular employee during substantially the whole year prior to the November 1, 2004 injury. Under 8114(d)(3), the Office compared

¹ Docket No. 07-883 (issued September 5, 2007). On September 26, 2007 the Director filed a petition for reconsideration of the Board's September 5, 2007 decision and order, asserting that the Office properly calculated appellant's pay rate because there were no similarly situated employees. By order issued July 2, 2008, the Board denied the Director's petition for reconsideration, reiterating that the employing establishment made statements establishing that there were similarly situated employees.

² By decision dated May 20, 2008, the Office accepted a herniated C6-7 disc and mild bilateral carpal tunnel syndrome due to the accepted November 1, 2004 motor vehicle accident.

³ 5 U.S.C. § 8114.

⁴ *Id.* at § 8114(d)(2) and (3).

appellant's earnings with those of a similarly situated employee. Appellant earned \$1,215.50 in the year prior to the injury, divided by four weeks of work, to equal \$303.88 a week. Using the same formula, the Office determined that a similarly situated employee earned \$364.00 a week. Also under 8114(d)(3), it calculated appellant's earnings using the "150 formula," which provides that average annual earnings may not be less than 150 times the average daily wage the employee earned within one year preceding the injury. Appellant earned \$1,040.00 for 10 days of work, for a daily average of \$104.00. Multiplying \$104.00 by 150 and dividing by 52 weeks resulted in a \$300.00 average weekly wage. The Office determined that the first method provided the greater result of the two, concluding that appellant's pay rate was \$364.00 a week for compensation purposes.

LEGAL PRECEDENT

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.⁵

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 also 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.⁶ 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 1 year immediately preceding his injury.”

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

⁶ 5 U.S.C. § 8101(d); *Eric B. Petersen*, 57 ECAB 680 (2006).

In computing a claimant's pay rate, section 8114(e) of the Act provides for the inclusion of certain "premium pay" received.⁷ However, overtime pay, among other classifications of pay, is excluded from consideration in determining a claimant's rate of pay.⁸

ANALYSIS

The Board previously noted that section 8114(d)(3) of the Act⁹ applied to the computation of appellant's pay rate. Appellant was a temporary employee whose position would not have afforded him employment for substantially the whole year prior to the accepted injury.¹⁰ To properly determine his pay rate, the Board directed the Office to obtain payroll information for a similarly situated employee.

Payroll records showed that in pay periods 20 to 22 in 2004, appellant earned \$2,256.50 for 173.50 hours of work, for an average of \$303.87 a week. A similarly situated employee earned \$1,904.00 for 144 hours of work, resulting in an average of \$364.00 a week. Application of the "150 formula" under section 8114(d)(3)¹¹ to appellant's earnings resulted in a weekly wage of \$300.00. As appellant's pay rate was higher under the first formula, the Office properly based his compensation on weekly earnings of \$364.00. This is consistent with Office regulations stating that the Office should use the greater of the two alternatives.¹²

In applying section 8114(d)(3), the Board finds that the Office adequately considered all factors delineated therein, including 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.¹³ The Office obtained information regarding appellant's pay rate, employee status and work schedule. It also obtained 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. Therefore, the Office properly determined that appellant's pay rate for compensation purposes was \$364.00 a week.

⁷ 5 U.S.C. § 8114(e).

⁸ *Lottie M. Williams*, 56 ECAB 302 (2005).

⁹ 5 U.S.C. § 8114(d)(3).

¹⁰ Office procedures indicate the phrase substantially the whole year means 11 months. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4(a) (April 2002).

¹¹ 5 U.S.C. § 8114(d)(3).

¹² *Id.* See also *Monte Fuller*, 51 ECAB 571 (2000); *Robin Bogue*, 46 ECAB 488 (1995) (the Office should not use the 150 times formula prior to considering other factors as listed in section 8114 (d)(3)).

¹³ *Dale Mackelprang*, 57 ECAB 168 (2005); *Aquilline Braselman*, 49 ECAB 547 (1998).

CONCLUSION

The Board finds that the Office properly determined appellant's pay rate for compensation purposes for the period January 7, 2005 to August 2, 2008.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 29, 2008 is affirmed.

Issued: September 1, 2009
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