



increased pay rate.<sup>1</sup> The Board remanded the case for the Office to further develop the factual evidence to determine whether he was entitled to premium pay for working weekends and holidays. The Board noted that appellant had submitted an August 14, 2000 memorandum of understanding from the employing establishment which provided that employees covered under the agreement could receive premium pay for work performed after the first eight hours of regularly scheduled work Monday through Friday and for work performed weekends and holidays. The Board instructed the Office to request that the employing establishment explain whether appellant was entitled to premium pay for work performed weekends and holidays based on the August 14, 2000 memorandum of understanding.

By letter dated April 8, 2009, the employing establishment reviewed the August 2000 memorandum of understanding, entitled “Memorandum of Understanding on Elimination of ROS(A) Personnel Work Rules.” It asserted that the memorandum applied only to personnel working on vessels in reduced operational status and not to all civilian mariners. The employing establishment explained that appellant was not assigned to a ship in reduced operational status and thus was not covered under the August 14, 2000 memorandum of understanding. It concluded that he was not entitled to premium pay.

By decision dated April 24, 2009, the Office denied appellant’s request that additional premium pay for work performed weekends, holidays and at night be included in his pay rate. It determined that the information from the employing establishment showed that he was not assigned to a vessel operating at reduced capacity and thus the memorandum of understanding providing premium pay for civilian mariners under limited circumstances was not applicable in his case.

On appeal, appellant contends that he was entitled to premium pay, citing his pay stubs and the August 2000 memorandum of understanding. He related that he understood that the memorandum of understanding did not apply to all civilian mariners but indicated that “it applies to personnel who are scheduled and assigned to work Saturdays, Sundays and Holidays. Therefore it can be utilized to establish my entitlement to premium pay.”

### **LEGAL PRECEDENT**

Section 8105(a) of the Federal Employees’ Compensation Act<sup>2</sup> 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.”<sup>3</sup> 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.<sup>4</sup> Pay rate for compensation purposes is defined in section 8101(4) as the

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<sup>1</sup> Docket No. 08-838 (issued January 12, 2009). The Office accepted that on November 5, 2002 appellant, then a 60-year-old able seaman, sustained an aggravation of lumbar degenerative disc disease in the performance of duty. It paid him compensation for disability beginning March 10, 2004.

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *Id.* at § 8105(a).

<sup>4</sup> *Id.* at § 8110(b).

monthly pay at the time of injury, the time disability begins or the time disability recurs, if the recurrence is more than six months after returning to full-time work, whichever is greater.<sup>5</sup>

Section 8114(e) of the Act provides that, in addition to annual base pay, certain items will be included in the computation of pay, such as the value of subsistence and quarters, premium pay and any form of remuneration in kind for services.<sup>6</sup> Section 8114(e) specifically provides that overtime pay is excluded in computing an employee's monthly pay for compensation purposes.<sup>7</sup>

When the job held at the time of injury includes elements of pay such as night or shift differential, extra compensation for work on Sundays and holidays or pay for administratively uncontrollable overtime, the Office must include the additional pay in the base pay.<sup>8</sup>

### ANALYSIS

Appellant alleged that he was entitled to premium pay for work performed weekends and holidays. As discussed, when the job held at the time of injury includes elements of pay such as night or shift differential, extra compensation for work on Sundays and holidays or pay for administratively uncontrollable overtime, the Office must include the additional pay in the base pay.<sup>9</sup>

In support of his request for premium pay, appellant submitted an August 14, 2000 memorandum of understanding which provided that in certain circumstances employees covered under the agreement received premium pay for work performed in excess of eight hours of regularly scheduled work Monday through Friday and for work performed on weekends and holidays. On prior appeal the Board determined that the Office had not sufficiently developed whether he was entitled to premium pay for work performed on weekends and holidays based on the provisions of the August 14, 2000 memorandum of understanding. The Board remanded the case for the Office to obtain an explanation from the employing establishment regarding whether the memorandum of understanding applied to appellant and established that he was entitled to premium pay.

By letter dated April 8, 2009, the employing establishment explained that the memorandum of understanding applied only to personnel working on vessels in reduced operational status. It noted that appellant was not working on a ship in reduced operational status and thus he was not covered under the provisions of the August 2000 memorandum of understanding. The employing establishment asserted that he was not entitled to premium pay.

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<sup>5</sup> *Id.* at §§ 8101(4); 8114; *see also* 20 C.F.R. § 10.5(s).

<sup>6</sup> *Id.* at § 8114(e).

<sup>7</sup> *Id.*

<sup>8</sup> *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.8(b) (December 1995).

<sup>9</sup> *Id.*

Appellant has not submitted any evidence showing that he worked on a vessel in reduced operational status. Consequently, the Board finds that the Office properly denied appellant's claim that premium pay should be included in his pay rate as he has not submitted evidence showing that he was entitled to premium pay under the terms of the August 2000 memorandum of understanding.

On appeal, appellant contends that his pay stubs show that he was receiving premium pay for weekends and holidays at the time of his injury. In the prior appeal, the Board noted that, by letter dated October 31, 2007, the employing establishment explained that the codes on the pay stubs represented his retention allowance and overtime pay rather than pay for work performed on weekends and holidays.<sup>10</sup> The employing establishment further provided that civilian mariners did not receive Sunday premium pay, holiday pay or night differential. Appellant has not established that the codes on his pay stubs represented pay for weekend and holiday work.

Appellant also asserts that the August 14, 2000 memorandum of understanding establishes that he was entitled to premium pay. As discussed, however, the employing establishment explained that it applied only to employees working on vessels in reduced operational service. Appellant has not submitted any evidence showing that he was assigned to a vessel in reduced operational service of that the employing establishment's explanation was incorrect and thus has not established the applicability of the August 14, 2000 memorandum of understanding in determining his pay rate.

#### **CONCLUSION**

The Board finds that the Office properly determined appellant's pay rate for compensation purposes.

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<sup>10</sup> The Office included retention pay in calculating appellant's pay rate. 5 U.S.C. § 8114(e) provides that overtime pay is not included in determining monthly pay.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 24, 2009 is affirmed.

Issued: March 23, 2010  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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