

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

G.S., Appellant)

and)

DEPARTMENT OF THE INTERIOR,)
NATIONAL PARK SERVICE, Mariposa, CA,)
Employer)

Docket No. 15-0861
Issued: December 15, 2015

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 9, 2015 appellant filed a timely appeal from a February 18, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$244.02 for the period November 17 to January 2, 2015 because OWCP used an inaccurate pay rate; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether it properly determined that it would recover the overpayment by deducting the full amount from appellant's next continuing compensation payment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 28, 2014 appellant, then a 25-year-old maintenance worker, filed a traumatic injury claim (Form CA-1) alleging that on October 26, 2014 he injured his right knee when he slipped on loose rock. On the claim form the employing establishment indicated that appellant was a temporary employee working 10 hours a day, four days per week. Appellant stopped work on the date of injury.

OWCP accepted appellant's claim for sprains of the lateral collateral and cruciate ligaments of the right knee, a tear of the right medial meniscus, and derangement of the right posterior horn of the medial meniscus.

In a telephone call dated December 16, 2014, appellant advised that his temporary appointment ended on November 15, 2014. He planned to work in another job after the appointment ended but there was not much work available outside the park. Appellant received continuation of pay from October 27 to November 16, 2014. He was paid compensation benefits beginning November 17, 2014.

In a December 16, 2014 pay rate memorandum, OWCP calculated a provisional pay rate of \$551.25 using the 150-formula.² It multiplied appellant's hourly rate of \$19.11 by 10, the number of hours per day that he worked, to find a total daily pay rate of \$191.10. OWCP multiplied \$191.10 by 150 and divided by 52 which yielded a total weekly pay rate of \$551.25. It paid him compensation for total disability of \$1,470.00 for the period November 17 to December 12, 2015 using a pay rate of \$551.25.

On December 22, 2014 the employing establishment indicated that appellant worked in a temporary position not to exceed six months, or 1040 hours, per year. Appellant earned gross pay of \$18,345.60. The employing establishment related that a similar employee with the same appointment and working in the same or similar job for the year immediately preceding the injury earned \$19,874.40.

On January 6, 2015 OWCP issued appellant compensation of \$874.77 for total disability from December 13, 2014 to January 2, 2015 using a weekly pay rate of \$382.20. It based its pay rate determination on the earnings of a similarly situated employee who worked the greatest number of hours in the year preceding his injury and earned \$19,874.40. OWCP divided \$19,874.40 by 52 to find a pay rate of \$382.20.

On January 9, 2015 the employing establishment specified that appellant worked from 2010 to 2014 as a temporary employee eligible for but not guaranteed rehire. It provided SF-50s documenting his appointment as a temporary employee not to exceed 1040 hours in 2010, 2011, 2013, and 2014.

² The 150-formula is set forth at 5 U.S.C. § 8114(d)(3). It provides that "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 or her injury."

In a report of telephone call dated January 9, 2015, the employing establishment related that appellant worked 104 ten-hour days in the year preceding his injury, or 1040 hours. It divided 1040 hours by 8 to find a total of 130 days worked. The employing establishment advised that appellant earned \$18,345.60 in gross compensation for the year preceding his injury, which when divided by 130 yielded a daily average wages of \$141.12. It applied the 150-formula (\$141.12 times 150 days divided by 52 weeks), to find a weekly pay rate of \$407.08.

By letter dated January 14, 2015, OWCP informed appellant that it had recalculated his pay rate and adjusted his compensation for temporary disability. It noted that the employing establishment hired him for a six-month appointment of 1040 hours. Appellant worked 104 days prior to his injury on October 26, 2014.³ He received continuation of pay from October 27 to November 16, 2014, when his appointment ended. OWCP paid appellant compensation from November 17 through December 12, 2014 based on a weekly pay rate of \$551.25. For the period December 13, 2014 through January 2, 2015, it paid him compensation using a pay rate of \$382.20. OWCP notified appellant that it had recalculated his pay rate based on information provided by the employing establishment. It found that he earned \$18,345.60 working 1040 hours or 104 days. OWCP divided \$18,345.60 by 104, which yielded daily average earnings of \$176.40. Using the 150-formula, it multiplied \$176.40 by 150 and then divided by 52 to find a weekly pay rate of \$508.85. In an accompanying worksheet, OWCP calculated that using the 150-formula yielded a higher pay rate than using the pay rate of another employee in the same class.

On January 14, 2015 OWCP notified appellant of its preliminary determination that he received an overpayment of \$244.02 for the period November 17, 2014 to January 2, 2015 because it paid him at an inaccurate pay rate. It found that, for the period November 17 through December 12, 2014, it paid appellant \$1,470.00 in compensation for 16 days using a pay rate of \$551.25 per week. OWCP determined that it should have paid him \$1,083.05 using a pay rate of \$508.35. It subtracted \$1,083.05 from \$1,470.00 to find an overpayment of \$386.95. OWCP further found that, for the period December 13, 2014 through January 2, 2015, it paid appellant \$874.77 for 21 days of compensation using a pay rate of \$382.20 per week. It calculated that it should have paid him \$1,017.70 for this period, which created an underpayment of \$142.23. OWCP subtracted the underpayment of \$142.23 from the overpayment of \$386.95 to find a total overpayment of \$244.72. It further advised appellant of its preliminary determination that he was without fault in the creation of the overpayment.⁴ OWCP requested that he complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, OWCP notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a precoupment hearing.

By decision dated February 18, 2015, OWCP finalized its finding that appellant received an overpayment of compensation in the amount of \$244.02. It determined that he was without

³ OWCP indicated that appellant worked 104 hours rather than days before his injury; however, it is apparent that this is a typographical error.

⁴ OWCP determined the overpayment by subtracting \$142.23 from \$386.95, which yields \$244.72 rather than \$244.02.

fault in creating the overpayment but denied waiver as he failed to submit the overpayment recovery questionnaire supported by financial information. OWCP found that it would recover the overpayment by deducting the full amount from appellant's next compensation check.

On appeal appellant disagrees with OWCP's calculations. He asserts that multiplying \$551.25 per week by 16 days does not equal \$1,470.00 and that multiplying \$508.00 by 16 days does not equal \$1,083.05. Appellant maintains that OWCP should have paid him \$2,033.40 for each period, citing OWCP's procedures. He alleges that he received an underpayment of compensation.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA⁵ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁶ When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.⁷

An employee is paid compensation for total disability equal to a percentage of his monthly pay.⁸ To calculate monthly pay, the initial issue is the determination of the specific time when the employee's monthly pay will be calculated. Under 5 U.S.C. § 8101(4), the monthly pay is determined at the time of injury, the time disability begins, or the time compensable disability recurs, if the recurrence begins more than six months after a return to regular full-time employment.

Once the proper time period is determined, OWCP calculates appellant's pay rate using 5 U.S.C. § 8114(d). This section provides:

“Annual average earnings are determined as follows:

(1) If the employee worked in the employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay --

(A) was fixed, the average annual earnings are the annual rate of pay; or

(B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for particular employment, or the average thereof if the daily wage has fluctuated, by 300 if he was employed on the basis of a 6-day

⁵ 5 U.S.C. § 8102.

⁶ *Id.* at § 8102(a).

⁷ *Id.* at § 8129(a)

⁸ *Id.* at § 8106(a).

workweek, 280 if employed on the basis of a 5-day week, and 260 if employed on the basis of a 5-day week.⁹

(2) If the employee did not work in employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury, but the position was one which would have afforded employment for substantially a whole year, the average annual earnings are a sum equal to the average annual earnings of an employee for the same class working substantially the whole immediately preceding year in the same or similar employment by the United States in the same or neighboring place as determined under paragraph (1) of this subsection.”¹⁰

If sections 8114(d)(1) and (2) of FECA are not applicable, such as in cases where the date-of-injury employment was seasonal work that would not have provided employment for substantially the whole year preceding the injury, section 8114(d)(3) provides as follows:

“If either of the foregoing methods of determining the average annual earnings cannot be applied reasonably and fairly, the 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 injury having regard to the previous earnings of the employee in [f]ederal 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.”¹¹

ANALYSIS -- ISSUE 1

OWCP accepted that appellant, a temporary employee, sustained sprains of the lateral collateral and cruciate ligaments of the right knee, a tear of the right medial meniscus, and derangement of the right posterior horn of the medial meniscus as the result of an October 26, 2014 employment injury. Appellant received continuation of pay from October 27 to November 16, 2014, when his temporary appointment ended and compensation from OWCP for disability beginning November 17, 2014. As appellant stopped work at the time of his injury, his

⁹ *Id.* at § 8114(d).

¹⁰ *Id.* at § 8114(d)(1), (2).

¹¹ *Id.* at § 8114(d)(3); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4 (March 2011).

pay rate for compensation purposes is based on his monthly pay at the time his injury occurred on October 26, 2014.¹²

Appellant did not work substantially the whole year immediately preceding the injury and was not employed in a position that would have afforded employment for substantially a whole year.¹³ Consequently, sections 8114(d)(1) and (2) of FECA are not applicable in determining his pay rate. Instead, appellant's pay rate must be determined in accordance with section 8114(d)(3).¹⁴

OWCP initially paid compensation from November 17 through December 12, 2014 based on a weekly pay rate of \$551.24. It calculated the pay rate by multiplying his hourly wages of \$19.11 by 10 hours per day, which yielded \$191.10. Applying the 150-formula, OWCP multiplied \$191.10 by 150 and divided by 52 to find a weekly pay rate of \$551.24. It subsequently found that appellant received an overpayment of compensation during this period because he received wage-loss compensation at an incorrect pay rate. Based on information provided by the employing establishment, OWCP found that he worked 1040 hours or 104 days and earned \$18,345.60. It divided \$18,345.60 by 104, to find daily average earnings of \$176.40. Utilizing the 150-formula, OWCP multiplied \$176.40 by 150 and divided by 52 to find a weekly pay rate of \$508.85.

The Board finds that the case is not in posture for decision regarding whether the amount of overpayment of compensation as OWCP incorrectly calculated his weekly pay rate. OWCP found that he worked 10 hours a day for a total of 1040 hours, or 104 total days. It calculated appellant's daily average wage as \$176.40 based on its finding that he worked 104 days, and used this daily wage in determining his weekly pay rate using the 150-formula. Appellant worked, however, 10 hours per day and four days per week, or a 40-hour workweek. The 150-formula is based on a five-day workweek or 40 hours per week. As appellant worked a 40-hour week, OWCP should have divided 1040 by eight hours to find that he worked the equivalent of 130 days.¹⁵ Consequently, the Board will remand the case for OWCP to recalculate his pay rate for compensation purposes. On remand, OWCP should consider which provision of section 8114(d)(3) would afford appellant the highest earnings on which to base his pay rate for compensation purposes. After such further development, it shall determine the amount of overpayment of compensation and, if necessary, issue an appropriate decision.¹⁶

¹² *Id.* at § 8101(4).

¹³ OWCP procedures indicate the phrase substantially the whole year means 11 months. Federal (FECA) Procedure Manual, *supra* note 11.

¹⁴ *See supra* note 11.

¹⁵ *See A.G.*, Docket No. 08-2265 (issued September 28, 2009). This was consistent with the employing establishment calculation on January 9, 2015.

¹⁶ In view of the Board's disposition of the overpayment, the issues of waiver and recovery of the overpayment are moot.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether the amount of overpayment of compensation as OWCP must recalculate his pay rate for compensation purposes.

ORDER

IT IS HEREBY ORDERED THAT the February 18, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 15, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board