



Appellant submitted claims for compensation (Form CA-7) commencing October 19, 2013. He began receiving compensation for wage loss based on a pay rate of \$742.87 per week.

In a note dated September 3, 2014, the employing establishment stated that appellant had been hired on August 24, 2013, at an hourly rate of \$15.00. It stated that he worked nine days and earned \$845.55 in 56.37 hours of work. An SF-50 personnel form indicated that appellant was hired as a city carrier assistant (CCA). The form stated that the appointment expiration date was August 15, 2015. A CA-110 telephone call memorandum dated September 3, 2014 reported that, although the employing establishment originally provided a pay rate for the year prior, this was for "an old position of Letter Carrier and not a similar CCA."

By letter dated September 3, 2014, OWCP requested that the employing establishment provide information as to appellant's employment, including whether the position would have afforded employment for 11 months but for the injury. It also requested earnings as to a similar employee as to the kind of work and appointment held by appellant.

In a letter also dated September 3, 2014, OWCP advised appellant that it had made a preliminary finding that an overpayment of \$12,345.00 had occurred due to an incorrect pay rate for compensation purposes. It found that, for the period October 26, 2013 to August 23, 2014, he should have been paid \$11,692.15. The calculation was based on a daily wage of \$93.95 multiplied by 150, or \$271.01 per week. OWCP found that appellant had been paid \$24,037.15 for the period, based on a pay rate of \$742.87 at 37 hours per week. In addition, it found that he was not at fault in creating the overpayment and advised him of the actions he may take with respect to the preliminary findings.

On September 8, 2014 OWCP received a copy of the September 3, 2014 note from the employing establishment. There is also a document that refers to a comparison of earnings one year prior to September 7, 2013. There are two columns listing earnings -- one column shows earnings of \$38,629.25, or \$742.87 per week. Another column has earnings of \$1,947.25, or \$37.45 per week. No additional explanation is provided.

Appellant requested waiver of an overpayment and submitted an OWCP-20 questionnaire on September 18, 2014.

By decision dated October 23, 2014, OWCP denied waiver of an overpayment of \$12,345.00. It found that appellant did not submit supporting financial documents sufficient to establish waiver of the overpayment.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee is paid compensation for total disability equal to a percentage of his or her monthly pay.<sup>2</sup> 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

---

<sup>2</sup> 5 U.S.C. § 8106(a).

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, the pay rate is determined under 5 U.S.C. § 8114(d). This section provides a specific methodology for determining pay rate:

“(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 workweek, 280 if employed on the basis of a 5½-day week, and 260 if employed on the basis of a 5-day week.

“(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 of 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.

“(3) 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 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 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.”

### **ANALYSIS -- ISSUE 1**

In the present case, OWCP found that an overpayment of \$12,345.00 occurred from October 26, 2013 to August 23, 2014. It had paid compensation based on a pay rate of \$742.87 at the time of injury, and found the correct pay rate was \$271.01 per week at the time of injury. The Board finds that OWCP did not make adequate findings in this regard.

The evidence from the employing establishment confirmed that appellant did not work in the CCA position for substantially one whole year prior to the date of injury on

September 7, 2013. Therefore the next step under 5 U.S.C. § 8114(d) is to determine “if the position was one which would have afforded employment for substantially a whole year.” As noted above, if the position would have afforded employment for substantially the whole year, then the pay rate is the earnings of an employee of “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.”

OWCP requested that the employing establishment provide relevant evidence on the issue in a September 3, 2014 letter. Yet on the same date, it issued a preliminary determination of an overpayment, with no indication in the record that any relevant response had been received. The preliminary determination briefly stated that the employing establishment “advised that [appellant] was not expected to work over 11 month[s]” without providing any further explanation. The September 3, 2014 note from the employing establishment did not indicate that the position was temporary or make any statement as to whether the position would have afforded employment for substantially a whole year. The SF-50 form indicated only that the appointment would expire on August 15, 2015, or approximately two years after appellant was hired.

The Board accordingly finds that OWCP did not make adequate findings as to why applying 5 U.S.C. § 8114(d)(2) was not appropriate in this case. OWCP applied 5 U.S.C. § 8114(d)(3), which requires that the pay rate will be no less than 150 times the average daily wage. This section is only to be used if 5 U.S.C. § 8114(d)(2) cannot be applied reasonably and fairly. OWCP did not properly find that 5 U.S.C. § 8114(d)(2) was inappropriate based on the evidence of record.

Moreover, even if it were determined that 5 U.S.C. § 8114(d)(3) was applicable, a proper application of this section requires more than a simple calculation of 150 times an average daily wage. As the Board noted in *A.D.*, the employing establishment still needs to provide information regarding earnings of similar employees, and OWCP needs to make proper findings in accord with factors enumerated in 5 U.S.C. § 8114(d)(3).<sup>3</sup>

The case will accordingly be remanded to OWCP for proper findings as to an overpayment of compensation. Since OWCP has not properly made findings with respect to the correct pay rate, the fact and amount of overpayment are not in posture for decision.<sup>4</sup> The case will be remanded to OWCP for further development and a proper decision on the overpayment issues presented. In view of the Board’s holding, the issue of waiver will not be addressed at this time.

### **CONCLUSION**

The Board finds the case must be remanded to OWCP for proper findings with respect to an overpayment of compensation based on an incorrect pay rate for compensation purposes.

---

<sup>3</sup> Docket No. 07-883 (issued September 5, 2007).

<sup>4</sup> See *K.S.*, Docket No. 11-2085 (issued May 10, 2012).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 23, 2014 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: March 9, 2015  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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