



hold on a coworker's right arm during a training exercise. OWCP accepted that he sustained a sprain of his right elbow (radial collateral ligament) and forearm, right carpal tunnel syndrome, and lesion of the right radial nerve. On the same form, appellant's immediate supervisor indicated that his regular schedule involved working from 9:30 p.m. to 6:00 a.m. on Sunday, Monday, Tuesday, Friday, and Saturday for 40 hours per week.<sup>2</sup>

On November 29, 2012 appellant filed a claim for compensation (Form CA-7) alleging wage-loss compensation for total disability beginning November 18, 2012 and continuing through December 1, 2012. On the Form CA-7, a human resources official for the employing establishment indicated that appellant was sent home on November 18, 2012 because no work was available within his medical restrictions.<sup>3</sup> Appellant received disability compensation on the daily rolls beginning November 18, 2012. He later filed several claims for disability after December 1, 2012 and continuing.<sup>4</sup>

In a July 3, 2014 e-mail to OWCP, an employing establishment official noted:

“When an employee has two separate basic tours of duty on Sunday, he or she is entitled to Sunday premium pay for performing work during each tour of duty. For example, if an employee works 8 hours during a basic tour of duty that begins on Saturday and ends on Sunday, and also works 8 hours during a basic tour of duty that begins on the same Sunday and ends on Monday, the employee is entitled to 16 hours of Sunday premium pay.”

In an undated letter received on September 26, 2014, appellant requested a formal decision with appeal rights on the issue of his pay rate for compensation purposes.

On October 17, 2014 appellant filed a Form CA-7 claiming a schedule award due to his accepted work injuries.

In a December 9, 2014 decision, OWCP granted appellant a schedule award for 14 percent permanent impairment of his right upper extremity. The award ran from November 16, 2014 to September 17, 2015 for 43.68 weeks. It was based on an impairment rating conducted on December 2, 2014 by an OWCP medical adviser using the October 31, 2014 examination findings of Dr. Michael S. McManus, an attending Board-certified occupational medicine physician.

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<sup>2</sup> The record reflects that appellant had a base salary (including locality adjustment) of \$47,333.16 per year at the time of his July 12, 2012 work injury.

<sup>3</sup> The human resources official indicated on the form that, on and about November 18, 2012, appellant had a base salary of \$22.68 per hour (GS-6/Step 7), night differential pay of \$2.27 per hour, and Sunday premium pay of \$5.67 per hour.

<sup>4</sup> In a Form CA-7 dated February 25, 2014, appellant claimed that his wage-loss compensation should include five hours of “gun up” pay for each two-week pay period between August 30, 2012 and February 25, 2014.

In a March 30, 2015 letter, counsel argued that appellant received “gun up” pay that constituted administratively uncontrollable overtime (AUO) which should be included in appellant’s pay rate calculations.

By decision dated April 29, 2015, OWCP determined that appellant had a weekly pay rate of \$1,046.87. It noted that the initial period of compensation claimed was November 18 to December 1, 2012, as reported on the initial Form CA-7 received on November 29, 2012. OWCP pointed out that the effective pay rate date was determined to be the date that appellant’s disability began, *i.e.*, November 18, 2012. Per the initial Form CA-7, appellant’s hourly rate on November 18, 2012 was \$22.68 per hour, night differential pay was \$2.27 per hour, and Sunday premium pay was \$5.67 per hour. Appellant’s schedule was noted to be a fixed 40 hour per week schedule, with shifts from 9:30 p.m. to 6:00 a.m. on Sunday, Monday, Tuesday, Friday, and Saturday. OWCP explained that the weekly base rate was calculated as follows: \$22.68 per hour times 2,087 hours per year equaled \$47,333.16 in base wages per year. It noted that \$47,333.16 base wages per year divided by 52 weeks per year equaled a weekly base pay rate of \$910.25.

In its April 29, 2015 decision, OWCP then calculated the weekly premium pay. Night differential pay of \$2.27 per hour times 2,087 hours per year equaled \$4,737.49 night differential pay per year and this figure divided by 52 weeks per year equaled \$91.11 weekly night differential pay. OWCP indicated that Sunday premium pay of \$5.67 per hour times the product of 8 hours per week divided by 40 hours per week was then multiplied by 2,087 hours per year to derive \$2,366.67 in Sunday premium pay per year. The \$2,366.67 figure for Sunday premium pay per year was divided by 52 weeks to equal \$45.51 in weekly Sunday premium pay. The total pay rate was derived by adding the weekly base pay rate, night differential pay, and Sunday premium pay: \$910.25 per week, \$91.11 per week, and \$45.51 per week equaled a \$1,046.87 weekly pay rate.

### **LEGAL PRECEDENT**

Section 8105(a) of FECA 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>5</sup> Section 8101(4) of FECA defines “monthly pay” for purposes of computing compensation benefits as follows: “[T]he 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,

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<sup>5</sup> 5 U.S.C. § 8105(a). Section 8110(b) of FECA provides that total disability compensation will equal three fourths of an employee’s monthly pay when the employee has one or more dependents. 5 U.S.C. § 8110(b).

whichever is greater...”<sup>6</sup> OWCP’s regulations define “disability” as “the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.”<sup>7</sup>

In computing pay rate, section 8114(e) provides for the inclusion of certain premium pay received and, where the evidence indicates additional amounts received in Sunday premium or night differential pay fluctuated or may have fluctuated, OWCP determines the amount of additional pay received during the one-year period prior to injury.<sup>8</sup> Section 8114(e)(1) provides that, in computing an employee’s monthly pay for compensation purposes, overtime pay is not included.<sup>9</sup> OWCP has administratively determined, however, that premium pay for AUO under 5 U.S.C. § 5545(c)(2), is to be included in pay rate calculations.<sup>10</sup>

The relevant part of section 5545(c)(2) provides:

“The head of an agency, with the approval of the [Office of Personnel Management (OPM)] may provide that -- an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled, overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for regularly scheduled overtime, night, and Sunday duty, and for holiday duty. Premium pay under this paragraph is an appropriate percentage, not less than 10 percent nor more than 25 percent, of the rate of basic pay for the position, as determined by taking into consideration the frequency and duration of irregular, unscheduled overtime duty required in the position.”<sup>11</sup>

### ANALYSIS

On July 12, 2012 appellant sustained a work-related injury and OWCP accepted sprain of his right elbow (radial collateral ligament) and forearm, right carpal tunnel syndrome, and lesion

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<sup>6</sup> 5 U.S.C. § 8101(4). In an occupational disease claim, the date of injury is the date of last exposure to the employment factors which caused or aggravated the claimed condition. *Patricia K. Cummings*, 53 ECAB 623, 626 (2002). The Board has held that if an employee has one recurrence of disability which meets the requirements of 8101(4), any subsequent recurrence would also meet such requirements and would entitle the employee to a new recurrence pay rate. *Carolyn E. Sellers*, 50 ECAB 393 (1999).

<sup>7</sup> 20 C.F.R. § 10.5(f).

<sup>8</sup> 5 U.S.C. § 8114(e); *Lottie M. Williams*, 56 ECAB 302 (2005).

<sup>9</sup> *Id.* at § 8114(e)(1); *Calvin E. King*, 51 ECAB 394 (2000).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.6(b)(7) (March 2011).

<sup>11</sup> 5 U.S.C. § 5545(c)(2); *see also* FECA Program Memorandum No. 106 (issued October 30, 1969) (provides for inclusion of premium pay in pay rate for compensation purposes under section 5545(c)(2)); FECA Bulletin No. 89-26 (issued September 29, 1989) (by administrative determination, pursuant to section 5545(c)(2), OWCP includes premium pay for AUO in computing compensation).

of the right radial nerve. He received disability compensation on the daily rolls beginning November 18, 2012. In September 2014, appellant requested a formal decision with appeal rights on the issue of his pay rate for compensation purposes. By decision dated April 29, 2015, OWCP determined that appellant had a weekly pay rate of \$1,046.87.

The Board finds that OWCP's calculation of appellant's pay rate for compensation purposes is in need of further development. In order to explain which aspects of OWCP's pay rate calculation need development, the Board will discuss the various components of its calculation.

The Board finds that OWCP properly determined that appellant's base salary should be calculated with respect to its amount on the date disability began, November 18, 2012.<sup>12</sup> The Board notes that the record contains a Form CA-7 completed on November 29, 2012 by human resources official for the employing establishment showing that, at or about the time disability began November 18, 2012, appellant had a salary at the GS-6/step 7 level which equaled an hourly base wage of \$22.68. OWCP multiplied this figure times 2,087 work hours per year to derive an annual base salary of \$47,333.16 per year.<sup>13</sup> However, there is no document in the record precisely identifying appellant's annual base salary on November 18, 2012.

On appeal, counsel argued that appellant received "gun up" pay for the 30 minutes he "armed up" prior to starting work each day and that such pay should be included in the calculation of his pay rate as AUO.

The Board finds that the record presently does not contain evidence that appellant received additional pay for AUO of the type described in 5 U.S.C. § 5545(c)(2), in the form of "gun up" pay or any other form of pay. The type of AUO contemplated by section 5545(c)(2) is premium pay that is paid on an annual basis as a percentage of an employee's base pay, regardless of the actual hours worked.<sup>14</sup> The record does not currently show that appellant received this type pay such that he received AUO pay within the meaning of FECA. As noted above, any wages appellant might have received for working overtime are to be excluded from OWCP's pay rate for compensation purposes determination.<sup>15</sup> The Board also notes, however, that it remains unclear from the record whether OWCP asked the employing establishment if appellant received AUO in the year prior to his injury.

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<sup>12</sup> See *supra* note 6 regarding the pay rate standards of 5 U.S.C. § 8101(4). In the present case, there is no basis for use of a recurrent pay rate as there was no recurrence beginning "more than six months after the injured employee resumes regular full-time employment with the United States." Moreover, there is no indication that appellant earned more on the date of injury, July 12, 2012, than on the date disability began, November 18, 2012. See *id.*

<sup>13</sup> The General Accountability Office has determined that the average work year has 2,087 work hours. The record also contains a Standard Form 50 showing that appellant went from the GS-6/step 6 level to the GS-6/step 7 level on August 14, 2011 and thus had an annual salary of \$47,331.00 on that date.

<sup>14</sup> See *supra* notes 10 and 11.

<sup>15</sup> See *supra* note 9; see also *M.W.*, Docket No. 11-0759 (issued September 15, 2011).

The Board further finds that the matter of appellant's Sunday premium and night differential pay, and its inclusion in the calculation of appellant's pay rate, is also in need of further development. The Board notes that when there is fluctuation of premium pay, such as Sunday premium and night differential pay, OWCP determines the amount of additional pay received during the one-year period prior to injury.<sup>16</sup> A human resources official for the employing establishment indicated on the Form CA-7 appellant completed on November 29, 2012 that appellant had night differential pay of \$2.27 per hour and Sunday premium pay of \$5.67 per hour. However, there is no indication in the record whether appellant's Sunday premium and night differential pay fluctuated and, if so, how much additional pay in these categories he received during the one-year period prior to injury. OWCP appears to have based its calculations on a determination that, in the year prior to the injury, appellant had eight hours of Sunday premium pay each week and 2,087 hours of night differential pay in total, but it did not identify the source for these figures. It is not clear from the record that these calculations are accurate. For example, with regard to the calculation of Sunday premium pay, there is some suggestion in the record that appellant might have received 16 hours of Sunday premium pay for each Sunday worked.

Under FECA, although it is the burden of an employee to establish his or her claim, OWCP also has a responsibility in the development of the factual evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.<sup>17</sup> Therefore, the case shall be remanded to OWCP for further development of appellant's pay rate for compensation purposes in accordance with this decision of the Board. After carrying out this development, OWCP shall issue a *de novo* decision regarding appellant's pay rate.

### **CONCLUSION**

The Board finds that the case is not in posture for decision regarding whether OWCP properly determined appellant's pay rate for compensation purposes.

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<sup>16</sup> See *supra* note 8.

<sup>17</sup> *Willie A. Dean*, 40 ECAB 1208, 1212 (1989); *Willie James Clark*, 39 ECAB 1311, 1318-19 (1988).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 29, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: July 1, 2016  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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