



## **FACTUAL HISTORY**

OWCP accepted that on February 23, 2013 appellant, then a 53-year-old mail processing clerk, developed bilateral carpal tunnel syndrome as a result of his federal employment duties.

On August 6, 2013 appellant filed Forms CA-7 for compensation beginning April 13, 2013 and continuing.<sup>2</sup>

In an August 14, 2013 (Form CA-110) telephone note, a claims examiner reported that appellant was entitled to 1.5 hours of Sunday premium for work from his 5:00 p.m. to 1:30 a.m. Saturday shift.

In an August 14, 2013 pay rate memorandum, OWCP noted that appellant worked 40 hours per week full time with the fixed schedule of Tuesday through Saturday from 5:00 p.m. to 1:30 a.m. Appellant's pay rate date was noted as April 16, 2013, the date disability began, with an annual salary of \$53,840.00. His annual salary was divided by 52 to calculate a weekly rate of \$1,035.38. Appellant's annual Sunday premium of \$1,795.86 was divided by 52 to calculate a weekly rate of \$34.54 a week for the 1.5 hours a week of Sunday work. The claims examiner noted that appellant was receiving Sunday premium because his fixed schedule shift on Saturday night rolled into Sunday, resulting in 1.5 hours of Sunday premium per week. Appellant's weekly night differential was determined to be 10 percent of \$25.88 per hour times 35 hours a week at night differential to equal \$90.60. Combining the weekly base pay rate of \$1,035.38 to the weekly Sunday premium of \$34.54 and the weekly night differential of \$90.60, his pay rate totaled \$1,160.52.

Appellant received wage-loss compensation for temporary total disability from April 16, 2013 to February 3, 2014, and partial disability during the period February 4 through June 27, 2014 after he returned to part-time light-duty work.<sup>3</sup>

On September 24, 2014 appellant filed a claim for a schedule award (Form CA-7).

In a preliminary determination dated October 24, 2014, OWCP found that an overpayment of \$1,407.78 arose from April 16, 2013 to June 27, 2014, because appellant was paid at an incorrect pay rate. It found him without fault and explained that he should have received compensation based on a weekly pay rate of \$1,101.76 instead of \$1,160.52. OWCP explained that the initial weekly pay rate had included incorrect amounts for Sunday premium and night differential, resulting in a weekly overpayment of \$58.76. It based its pay rate calculation on the date disability began, April 16, 2013 and noted that appellant worked a fixed

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<sup>2</sup> On the reverse side of the form, the employing establishment's human resource specialist reported that appellant worked 40 hours per week and stopped work on April 13, 2013. As of April 13, 2013, appellant's base pay rate was \$53,840.00 per year, \$1,795.86 per year for Sunday premium, and \$1,870.89 per year for night differential.

<sup>3</sup> The Board notes that, on March 6, 2014, OWCP issued a preliminary finding that an overpayment of \$630.38 arose from January 12 to February 8, 2014 because appellant had returned to work on February 4, 2014 for four hours a day, but continued to receive wage-loss compensation. On March 27, 2014 OWCP informed him that it had received his check for \$630.38 as repayment of his overpayment of compensation. Appellant's overpayment account was deemed fully liquidated and administratively closed.

schedule and was entitled to the same amount of Sunday premium and night differential regularly.<sup>4</sup> However, the employing establishment provided a yearly amount for these premiums when OWCP should have requested the weekly, or hourly amounts. Moreover, OWCP calculated 10 percent of the night differential, but this figure was not verified by the employing establishment as being correct.

Hourly rates were then obtained from the employing establishment which established an hourly pay rate of \$6.45 for Sunday premium and an hourly rate of \$1.62 for night differential. At \$6.45 per hour for 1.5 hours per week, appellant was entitled to \$9.68 weekly for Sunday premium. For the night differential, at \$1.62 per hour for 35 hours per week, he was entitled to \$56.70 weekly. Adding the weekly base pay rate of \$1,035.38 with the new \$9.68 weekly Sunday premium rate and \$56.70 weekly night differential rate, a weekly pay rate of \$1,101.76 was obtained. A memorandum containing the calculation of the noted overpayment for the period April 16, 2013 to June 27, 2014, explained that appellant was paid \$40,708.46 when he was actually entitled to \$39,300.68, resulting in an overpayment of \$1,407.78. Appellant was informed that, if he wished a waiver of the overpayment, he was to submit financial information and a completed overpayment recovery questionnaire (OWCP-20) within 30 days.

On November 10, 2014 appellant contested the overpayment decision and requested a waiver of recovery of the overpayment. He stated that the \$6.45 hourly Sunday premium and \$1.62 hourly night differential rates were correct. However, appellant argued that he was entitled to 8 hours per week for Sunday premium as opposed to the 1.5 hours weekly rate calculated by OWCP in its overpayment decision, alleging that when any period of a daily shift includes Sunday premium pay, the entire daily shift is to be paid at the Sunday premium pay rate. No other evidence was provided and he did not submit the overpayment recovery questionnaire with supporting financial documentation.

By decision dated November 24, 2014, OWCP affirmed the overpayment in the amount of \$1,407.78 for the period April 16, 2013 to June 27, 2014, because appellant had been paid at an incorrect pay rate. As to his argument regarding Sunday premium pay, it noted that pay rate information had to be based on that furnished by the employing establishment. OWCP found that appellant was without fault in the creation of the overpayment, but denied waiver of recovery because he had failed to submit the requested OWCP-20 form and financial documentation to determine his income, expenses, liabilities, or funds. It requested payment of the full amount within 30 days.<sup>5</sup>

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<sup>4</sup> The senior claims examiner used April 16, 2013, the date disability began, to calculate appellant's pay rate which was determined to be more than the February 23, 2013 date-of-injury rate.

<sup>5</sup> By decision dated December 31, 2014, OWCP granted appellant a schedule award claim for two percent permanent impairment of the right upper extremity (hand) and one percent permanent impairment of the left upper extremity (hand). It determined that he was entitled to \$6,048.66 for the period September 2 to October 23, 2014, but as he had an outstanding overpayment amount of \$1,407.78, OWCP deducted that amount from his \$6,048.66 schedule award, resulting in a \$4,640.88 schedule award. By letter dated December 31, 2014, OWCP informed appellant that his overpayment of \$1,407.78 was withheld from his schedule award and thus, repaid in full. The overpayment account was deemed fully liquidated and closed.

## LEGAL PRECEDENT

Section 8102(a) of FECA 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 his or her duty.<sup>6</sup> Section 8129(a) of FECA provides, in pertinent part:

“When an overpayment has been made to an individual under this subchapter 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 an individual is entitled.”<sup>7</sup>

An employee is paid compensation for total disability equal to a percentage of his or her monthly pay.<sup>8</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 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.”

OWCP procedures further provide that night or shift differential is to be included in the pay rate determination and it is to also include any extra compensation for Sunday or holiday work paid to regular employees of the postal service.<sup>9</sup> The procedures note that extra compensation for performing work on Sundays or holidays paid to regular employees of the postal service will be included in computing an employee’s pay rate.<sup>10</sup> It also notes, citing 5 U.S.C. § 5546(a), that for health professionals working for the Department of Veterans Affairs, extra pay is usually paid when an employee’s regular work schedule includes an eight-hour

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<sup>6</sup> 5 U.S.C. § 8102(a).

<sup>7</sup> *Id.* at § 8129(a).

<sup>8</sup> *Supra* note 4 at § 8106(a).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rate*, Chapter 2.900.6(b)(3) (March 2011).

<sup>10</sup> *Id.*

period, any part of which falls on a Sunday or described as being within the period commencing at 12:00 a.m. Saturday and ending at 12:00 a.m. Sunday.<sup>11</sup>

5 U.S.C. § 5546(a) states that “[a]n employee who performs work during a regularly scheduled [eight]-hour period of service which is not overtime work as defined by section 5542(a) of this title a part of which is performed on Sunday is entitled to pay for the entire period of service at the rate of his basic pay, plus premium pay at a rate equal to 25 percent of his rate of basic pay.”<sup>12</sup>

### ANALYSIS

The Board finds that this case is not in posture for a decision. The case must be remanded to OWCP for further development.<sup>13</sup>

In its November 24, 2014 preliminary determination, OWCP provided a discussion of the amounts of premium pay appellant received annually in addition to base pay. It explained that the initial weekly pay rate had included incorrect amounts for Sunday premium and night differential, resulting in a weekly overpayment of \$58.76. At \$6.45 per hour for 1.5 hours per week, OWCP determined that appellant was entitled to \$9.68 weekly for Sunday premium for 1.5 hours of Sunday premium pay weekly because his Saturday shift spanned from 5:00 p.m. to 1:30 a.m., establishing Sunday work from 12:00 a.m. to 1:30 a.m.

Appellant contested the preliminary overpayment decision and stated that, although the \$6.45 Sunday premium and \$1.62 night differential hourly rates were correct, he argued that he was entitled to 8 hours per week for Sunday premium as opposed to the 1.5 hours used by OWCP.

The Board finds that the November 24, 2014 OWCP decision failed to address appellant’s argument and did not provide adequate facts and findings for its determination that he received a \$1,407.78 overpayment for the period April 16, 2013 to June 27, 2014.<sup>14</sup>

In the November 24, 2014 decision, OWCP generally stated that appellant’s pay rate “must be determined according to pay rate information furnished by the employing establishment.” No further explanation was provided. In the absence of a detailed explanation as to the proper handling of Sunday premium pay the Board will remand the case to OWCP for

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<sup>11</sup> See *supra* note 9 at Chapter 2.900.6(b)(4) as it relates to health professionals working for the Department of Veterans Affairs. See also generally *Paul W. Catalano*, 24 ECAB 170 (1973).

<sup>12</sup> 5 U.S.C. § 5546(a).

<sup>13</sup> *A.F.*, Docket No. 13-1514 (issued September 25, 2014).

<sup>14</sup> 5 U.S.C. § 8124(a) provides that OWCP shall determine and make a finding of facts and make an award for or against payment of compensation. 20 C.F.R. § 10.126 provides in pertinent part that the final decision of OWCP shall contain findings of fact and a statement of reasons.

further development of appellant's pay rate, as to the fact, and amount of the claimed overpayment of compensation.<sup>15</sup>

Upon remand, OWCP shall determine appellant's pay rate and, after such further development as necessary, issue a *de novo* decision containing findings of fact and a statement of reasons.

**CONCLUSION**

The Board finds that the case is not in posture for a decision as to fact and amount of overpayment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 24, 2014 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.<sup>16</sup>

Issued: May 5, 2016  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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<sup>15</sup> Given the disposition of this case, a determination on eligibility for waiver of recovery of the overpayment and recovery of the overpayment, by deducting the amount of overpayment from his December 31, 2014 schedule award, is premature.

<sup>16</sup> James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.