

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WILLIAM D. SCHILLING and DEPARTMENT OF THE ARMY,  
WHITE SANDS MISSILE RANGE, White Sands, NM

*Docket No. 03-1525; Submitted on the Record;  
Issued September 26, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly computed appellant's pay rate for compensation purposes for the period October 28, 2002 to March 29, 2003.

The Office accepted that, on October 31, 1994, appellant, then a 55-year-old firefighter/fire inspector, sustained a fractured left radius when he tripped and fell, necessitating surgical excision of the radial head with a silastic implant.<sup>1</sup> By decision dated July 11, 1995, the Office awarded appellant a schedule award for a 19 percent permanent impairment of the left upper extremity.<sup>2</sup> The Office also accepted that he sustained a recurrence of disability commencing October 18, 2001,<sup>3</sup> necessitating surgery on December 13, 2001.<sup>4</sup> The employing establishment stated that, as of October 18, 2001, appellant worked a "variable 72[-]h[ou]r work week."

Appellant's attending orthopedic surgeon, Dr. Bean, found that appellant reached maximum medical improvement as of April 26, 2002. On May 16, 2002 appellant claimed an additional schedule award. The employing establishment certified that, as of October 18, 2001, appellant's regular duty tour was 72 hours per week,<sup>5</sup> with an annual base pay of \$38,906.00,

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<sup>1</sup> At the time of the injury, appellant worked 56 hours per week, with one 24-hour shift.

<sup>2</sup> The July 11, 1995 schedule award is not before the Board on the present appeal.

<sup>3</sup> The October 31, 1994 injury was assigned claim No. A16-0251786. The October 18, 2001 claim for recurrence of disability was assigned claim No. 16-202747. As of December 9, 2002, the Office doubled the two claims under claim No. A16-0251786.

<sup>4</sup> Dr. James W. Bean, an attending orthopedic surgeon, removed the radial head implant, shortened the radial neck, debrided synovitis and transposed the subcutaneous ulnar nerve.

<sup>5</sup> Appellant worked 24 hours on Monday and Wednesday and 8 hours on Tuesday, Thursday and Friday.

plus \$30,336.16 per annum in premium pay. In an October 28, 2002 report, an Office medical adviser reviewed Dr. Bean's reports and determined that appellant sustained an additional seven percent impairment to the left upper extremity according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

In a January 17, 2003 schedule award worksheet, the Office noted that appellant's annual salary was \$38,906.00, with a weekly base pay rate of \$748.19. The Office also noted that appellant did not receive any night differential or Sunday premium pay. Based on these calculations, on January 29, 2003, the Office issued a schedule award for a seven percent impairment of the left upper extremity, using \$748.19 as the weekly base pay rate. The period of the award ran from October 28, 2002 to March 29, 2003.

Appellant filed his appeal with the Board on May 30, 2003. He did not contest the medical basis of the schedule award. Rather, appellant asserted that the base pay rate of the schedule award should have included his premium pay and a 72-hour work week.<sup>6</sup>

The Board finds that the case is not in posture for decision.

Compensation is based on an employee's monthly pay, which is defined under section 8101(4) of the Federal Employees' Compensation Act<sup>7</sup> as the greatest of the rate of pay at the time of injury, the rate of pay at the time disability begins or the rate of pay at the time compensable disability recurs if the recurrence begins more than six months after an injured employee resumes regular full-time employment with the United States.<sup>8</sup> In this case, the Office determined correctly that appellant's pay as of the October 18, 2001 recurrence of disability was the highest of the three pay rates and that a recurrent pay rate was appropriate as appellant had returned to full-time employment for more than six months following the October 31, 1994 injury.

However, the Office erred by not making findings to determine if appellant's premium pay should be included in calculating the pay rate for the January 29, 2003 schedule award. As of October 18, 2001, appellant's annual base pay was \$38,906.00, plus \$30,336.16 per annum in premium pay. In issuing the January 29, 2003 schedule award, the Office used only appellant's base pay of \$38,906.00 in determining his rate of pay. The Office did not include appellant's premium pay of \$30,336.16 per year.

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<sup>6</sup> Appellant submitted additional evidence accompanying his request for appeal. The Board may not consider such evidence for the first time on appeal that was not before the Board at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant may submit this evidence to the Office accompanying a valid request for reconsideration.

<sup>7</sup> 5 U.S.C. § 8101(4).

<sup>8</sup> *Jeffrey T. Hunter*, 52 ECAB 503 (2001).

Generally, premium pay is included in determining a claimant's weekly pay rate.<sup>9</sup> The rules governing the determination of appropriate pay rates for firefighters are contained in an April 2001 amendment to FECA Bulletin No. 01-08, incorporating changes mandated by the Federal Firefighters Overtime Pay Reform Act of 1998.<sup>10</sup> FECA Bulletin No. 01-08 sets forth two formulae for determining a firefighter's pay rate, one for firefighters who generally work 24-hour shifts and the other for "firefighters with an extended tour built on top of a 40-hour basic workweek." Although the record demonstrates that appellant worked a 72-hour workweek, there is insufficient evidence to determine which of the two formulae is appropriate for determining appellant's pay rate.

The case will be remanded to the Office for further development to determine appellant's rate of pay, taking into account his pay as of October 18, 2001, the amount of his premium pay for the year prior to October 18, 2001<sup>11</sup> and to clarify his status as either a "24-hour shift" or "extended tour" employee as set forth in FECA Bulletin No. 01-08. After this and any other development as it may find necessary, the Office should issue an appropriate decision.

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<sup>9</sup> *Jack R. Lindgren*, 35 ECAB 676 (1984); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Continuation of Pay and Initial Payments*, Chapter 2.807(11) (August 2000). Chapter 2.807(11) of the Office's procedure manual provides, in relevant part, that an employee's "regular pay is his or her average weekly earnings, including premium, night or shift differential, holiday pay, Sunday premium pay except to the extent prohibited by law, or other extra pay, including FLSA pay for firefighters, emergency medical technicians and others who earn and use leave on the basis of their entire tour of duty."

<sup>10</sup> FECA Bulletin No. 01-08 was initially issued on January 31, 2001. A revision was issued on April 23, 2001; *see also Gerald W. Hillard*, Docket No. 01-2111 (issued May 28, 2002).

<sup>11</sup> *See* Federal (FECA) Procedure Manual Part 2 -- Claims, *Applying Increments of Pay*, Chapter 2.900.8(a)-(b)(2)(h) (April 2002). Where the evidence of record indicates that "the amount or percentage paid for premium, Sunday, night differential, shift pay, FLSA extra pay or firefighters extra pay actually or may have varied during the year prior to the injury, the [Office] should determine the amount of additional pay received during that year and add it to the reported base pay." *See also Ralph W. Moody*, 42 ECAB 364 (1991).

The decision of the Office of Workers' Compensation Programs dated January 29, 2003 is hereby set aside and the case remanded for further development consistent with this decision and order.

Dated, Washington, DC  
September 26, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member