

FACTUAL HISTORY

This is appellant's second appeal before the Board in this case. By decision dated March 15, 2006,¹ the Board remanded the case to the Office to clarify appellant's employment status, work schedule, type of tour and hourly pay rate. Evidence of record indicated both that appellant worked 40 hours a week and 84 hours a week. Also, the employing establishment stated that appellant earned \$13.00 an hour, while appellant contended that he earned \$13.12 an hour. Also, while the employing establishment indicated that appellant earned \$1,040.00 every two weeks, the Office calculated that appellant earned \$1,092.00 each week. Additionally, the employing establishment stated that appellant had fixed hours of work, from 7:00 a.m. to 7:00 p.m., seven days a week. However, in a March 3, 2005 worksheet, the Office indicated that appellant was not an intermittent tour employee. The law and the facts of the case as set forth in the Board's prior decision are hereby incorporated by reference.

By notice dated August 31, 2005, the Office advised appellant of its preliminary determination that a \$19,189.78 overpayment of compensation had occurred in his case as he was "incorrectly paid using a pay rate of \$1,092.00 instead of the correct pay rate of \$300.00 as explained in [the Office's] decision of August 30, 2005." The Office noted that appellant's correct compensation entitlement for January 7 to September 30, 2005 was \$8,890.22. Appellant was paid \$28,080.00 for that period, a difference of \$19,189.78. The Office made the preliminary finding that appellant was without fault in creation of the overpayment.

On September 14, 2005 appellant requested that the Office make a decision on fault and possible waiver of the overpayment based upon the written evidence of record. He asserted that recovery of the overpayment would cause him financial hardship.

Appellant submitted an overpayment recovery questionnaire (Form OWCP-20) on September 20, 2005. He stated that his home was valued at \$21,000.00 but had sustained severe hurricane damage. Appellant noted that he had \$400.00 in a savings account, \$3,000.00 in stocks and bonds. He did not submit information concerning his debts or expenses. Appellant also submitted a federal tax form showing that in 2000 he earned \$9,675.88 at Concrete Cutting and Breaking, Inc.

By decision dated November 4, 2005, the Office found a \$19,189.78 overpayment of compensation in appellant's case as he was "paid at too high a pay rate as explained in [the Office's] decision of August 30, 2005." The Office directed recovery of the overpayment at \$200.00 a month beginning December 25, 2005. The Office found appellant without fault but that waiver should not be granted as appellant did not submit a complete response to the overpayment recovery questionnaire.

In a November 7, 2005 statement of earnings and employment (Form EN1032), appellant reported working from August 13 to November 1, 2000 for a private-sector mobile home company, earning \$3,180.00 every two weeks.

¹ Docket No. 06-166 (issued March 15, 2006).

On April 20, 2006 the Office held a conference call with an employing establishment workers' compensation specialist. The Office noted that the issues to be resolved were appellant's work schedule, hourly pay rate, bi-weekly earnings and tour of duty. The employing establishment confirmed that appellant worked overtime but that these hours were not reported to the Office on a Form CA-1030 completed on July 27, 2005. The employing establishment stated that appellant earned \$1,040.00 every two weeks exclusive of overtime. However, appellant's hourly pay rate required verification by payroll and supporting documentation would be sent to the Office. The employing establishment asserted that appellant had an intermittent tour of duty and was hired as a temporary employee.

By decision dated May 19, 2006, the Office found that appellant was paid at an incorrect pay rate for the period January 7 to September 3, 2005. The Office found that appellant earned "\$1,040.00 for 10 days of work at \$13.00 per hour," an average daily wage of \$104.00. Using the "150" formula, the Office found that \$104.00 multiplied by 150/52 equaled a \$300.00 weekly pay rate for compensation purposes. The Office noted that the employing establishment did not submit documentation verifying that appellant earned \$13.00 an hour and could not "submit a year prior earnings for a similar employee."

LEGAL PRECEDENT -- ISSUE 1

Pay rate for compensation purposes is defined by the Act and in Office regulations as the employee's pay at the time of injury, time disability began or when compensable disability recurred, if the recurrence began more than six months after the employee resumed regular full-time employment with the United States, whichever is greater.²

Sections 8114(d)(1) and (2) of the Act provide methodology for computation of pay rate for compensation purposes, by determination of average annual earnings at the time of injury. Sections 8114(d)(1) and (2) of the Act specify methods of computation of pay for employees who worked in the employment for substantially the whole year prior to the date of injury and for employees who did not work the majority of the preceding year, but for whom the position would be available for a substantial portion of the following year. Section 8114(d)(3) of the Act provides an alternative method for determination of pay to be used for compensation purposes when the methods provided in the foregoing sections of the Act cannot be applied reasonably and fairly.³

ANALYSIS -- ISSUE 1

In the Board's March 15, 2006 decision, the Board directed the Office to clarify appellant's hourly pay rate, tour of duty and employment status. On remand of the case, the Office conducted an April 20, 2006 conference call with an employing establishment workers' compensation specialist, who confirmed that appellant was a temporary employee on an intermittent tour of duty. She stated that, while appellant was paid overtime, the employing

² 5 U.S.C. § 8101(4); 20 C.F.R. § 10.5(s); see *John M. Richmond*, 53 ECAB 702 (2002).

³ 5 U.S.C. § 8101(d); see *Ricardo Hall*, 49 ECAB 390 (1998).

establishment did not report this to the Office. The specialist asserted that she believed appellant earned \$1,040.00 every two weeks for the period January 7 to September 3, 2005 but that the payroll office would have to verify his hourly pay rate and submit additional documentation to the Office.

The Board finds that appellant's hourly pay rate remains in question as the employing establishment did not submit the additional documentation. Also, there is no documentation to verify that the \$1,040.00 weekly amount noted or that this amount did not include overtime pay. It cannot be ascertained from the record what appellant was paid and on what basis. Thus, the Board cannot make an informed decision as to whether or not appellant was paid compensation at an incorrect pay rate. Therefore, the case is remanded to the Office to obtain payroll records, personnel records or other appropriate documentation verifying appellant's hourly pay rate and bi-weekly pay rate. The Office shall obtain documentation showing if appellant received overtime, premium or other pay in addition to his regular wages. The Office shall also obtain any additional records needed to verify appellant's work schedule or any other aspect of his pay relevant to the issues in this case. Following this and all other development deemed necessary, the Office shall issue an appropriate decision in the case.

As the case must be remanded for further development on the pay rate issue, the second and third issues regarding the overpayment are moot.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 19, 2006 and November 4, 2005 are set aside and the case remanded for further action consistent with this decision and order.

Issued: November 30, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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