

**United States Department of Labor
Employees' Compensation Appeals Board**

C.W., Appellant)

and)

DEPARTMENT OF DEFENSE, FORT RILEY)
COMMISSARY, Fort Riley, KS, Employer)

**Docket No. 07-1357
Issued: December 18, 2007**

Appearances:

*Peter Charles Rombold, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 23, 2007 appellant, through her attorney, filed a timely appeal from an April 10, 2007 merit decision of the Office of Workers' Compensation Programs finding that she received an overpayment of compensation and denying waiver. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment decision.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$1,400.79 for the period July 11 to December 7, 2006 because she received compensation at an inaccurate pay rate; and (2) whether the Office properly denied waiver of the overpayment.

FACTUAL HISTORY

On July 8, 2004 appellant, then a 44-year-old sales store checker, filed a claim for a traumatic injury to her head, right arm and leg occurring on July 3, 2004 when she slipped and fell. At the time of injury, she worked from 9:00 to 2:00 five days per week.

The Office accepted the claim for an aggravation of right tibial tendon dysfunction and contusions of the head, right elbow and right lower leg. The Office also accepted that she sustained a recurrence of disability on January 6, 2005. Appellant resumed her regular employment duties on March 30, 2005. She sustained another recurrence of disability on October 20, 2005. On March 6, 2006 appellant underwent a right medial displacement calcael osteotomy. At the time of her March 6, 2006 recurrence of disability, she worked 32 hours per week. Appellant returned to part-time limited-duty employment on July 11, 2006. The Office paid her compensation for a loss of wage-earning capacity by applying the *Shadrick*¹ formula to her actual earnings. The Office found that the current earnings for appellant's date-of-injury position were \$506.34, the same amount as her current pay rate for compensation purposes, and used this figure to determine the compensation owed for each period.²

On January 16, 2007 the employing establishment informed the Office that appellant worked 24 hours per week as a GS-3, Step 6 sales store checker earning \$11.88 per hour. On August 8, 2004 she began working 32 hours per week as a meatcutting worker earning \$13.10 per week. Appellant presently earned \$16.40 per hour working 32 hours per week as a WG 5, Step 3. The current hourly rate for her date-of-injury position was \$12.85 per hour. The employing establishment further indicated that the updated pay rate for appellant's date-of-injury position from July 11, 2006 to January 7, 2007 was \$12.62 per hour.

The Office recalculated the amount of compensation owed to appellant for the period July 11 to December 7, 2006 using the *Shadrick* formula. The Office determined that the current weekly earnings in her date-of-injury position were \$302.88 by multiplying the updated hourly wage of \$12.62 by 24 hours. The Office found that appellant actually earned \$4,364.95 from July 11 to December 7, 2006 and had a weekly pay rate of \$203.70. The Office divided her actual weekly-earning capacity of \$203.70 by her current date-of-injury pay rate of \$302.88 and found that she had a 67 percent loss of wage-earning capacity. The Office multiplied the 67 percent wage-earning capacity by appellant's March 6, 2006 recurrent pay rate of \$506.34 to find a wage-earning capacity of \$339.25. The Office subtracted \$339.25 from \$506.34 to find a loss of wage-earning capacity of \$167.09. The Office multiplied her loss of wage-earning capacity by the three-fourth rate for an appellant with a dependent and found that she was entitled to weekly compensation of \$125.32. The Office concluded that appellant was entitled to \$2,685.38 in compensation from July 11 to December 7, 2006 but actually received \$4,086.17, which created an overpayment of \$1,400.79.

On January 17, 2007 the Office notified appellant of its preliminary determination that she received an overpayment of \$1,400.79 because it paid her at an inaccurate pay rate from July 11 to December 7, 2006. The Office indicated that it had calculated her pay rate based on a finding that she worked 32 rather than 24 hours per week on the date of injury. The Office advised appellant of its preliminary determination that she was not at fault in the creation of the overpayment. The Office informed her that she should complete the enclosed overpayment

¹ See *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403(c).

² By letter dated September 5, 2006, the Office explained its calculation of appellant's pay rate based on the employing establishment's information that she earned \$15.77 per hour and worked 32 hours per week at the time her disability recurred on March 6, 2006.

recovery questionnaire and submit financial documents to support waiver of the overpayment. Within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence or a precoupment hearing.

By letter dated February 15, 2007, appellant's attorney argued that she was properly paid because she worked 32 hours per week on the date of her recurrence of disability. He further enclosed appellant's request for a telephone conference. Appellant disagreed with fact and amount of the overpayment and requested waiver.

On March 9, 2007 the Office informed appellant that she must submit the overpayment recovery questionnaire before it could schedule a telephone conference and provided her two weeks within which to submit the requested information. The Office notified her that it would issue a final decision if it did not receive the questionnaire. The Office further noted that, while appellant worked 32 hours per week at the time of her recurrence of disability, she worked only 24 hours per week at the time of her employment injury. The Office explained that it must compare her current earnings with her date-of-injury earnings in order to properly calculate her compensation. On March 22, 2007 the Office informed appellant's attorney that a telephone conference could be scheduled upon the return of the overpayment recovery questionnaire. The Office referenced its March 9, 2007 letter.

By decision dated April 10, 2007, the Office finalized its finding that appellant received an overpayment of \$1,400.79 for the period July 11 through December 7, 2006 because she was paid at an inaccurate rate. The Office found that she was without fault in the creation of the overpayment. As she did not submit financial documentation, the Office determined that she had not established that she was entitled to wavier of the overpayment. The Office requested that appellant submit the entire amount in a lump sum to repay the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act³ provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of duty. Section 8106(a) provides in pertinent part as follows:

“If the disability is partial, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of the difference between [her] monthly pay and [her] monthly wage-earning capacity after the beginning of the partial disability, which is known as [her] basic compensation for partial disability.”⁴

The formula for determining loss of wage-earning capacity based on actual earnings, developed in the case of *Shadrick*, has been codified at section 104.3 of the Office's regulations.⁵

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8106(a).

⁵ See *supra* note 1.

Under the *Shadrick* formula, the Office first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's actual earnings by the current, or updated, pay rate for the position held at the time of injury. The employee's wage-earning capacity in dollars is computed by first multiplying the pay rate for compensation purposes, defined in 20 C.F.R. § 10.5(a) as the pay rate at the time of injury, the time disability begins, or the time disability recurs, whichever is greater, by the percentage of wage-earning capacity. The resulting dollar amount is then subtracted from the pay rate for compensation purposes to obtain loss of wage-earning capacity.⁶

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained an aggravation of right tibial tendon dysfunction and head, right elbow and right lower leg contusions due to a July 3, 2004 employment injury. At the time of injury, she worked 24 hours per week as a sales store checker. Appellant sustained a recurrence of disability on January 6, 2005 and returned to her regular employment duties on March 30, 2004. She experienced subsequent recurrences of disability on October 20, 2005 and March 6, 2006. At the time of her March 6, 2006 recurrence of disability, she worked 32 hours per week. Appellant returned to part-time employment on July 11, 2006.

The Office paid appellant compensation for a loss of wage-earning capacity beginning July 11, 2006 using the *Shadrick* formula. The Office found that the current earnings for her date-of-injury position was \$506.34 based on its finding that she worked 32 hours per week at the time of her employment injury. According to the employing establishment, however, appellant worked only 24 hours at the time of her injury. In order to properly apply the *Shadrick* formula, the Office must obtain accurate figures for the current rate of pay for the job held when injured and the employee's current actual earnings. If any of the initial figures are inaccurate, any calculation under the *Shadrick* formula will be inaccurate even if the formula is properly applied.⁷ As the Office inaccurately paid appellant compensation based on its finding that she worked 32 rather than 24 hours at the time of her employment injury, she received an overpayment of compensation.

The Office recalculated the amount of compensation owed to appellant from July 11 to December 7, 2006 using the correct information. The Office determined the current weekly earnings in her date-of-injury position were \$302.88 by multiplying the updated hourly wage of \$12.62 by 24 hours. The Office found that appellant actually earned \$4,364.95 from July 11 to December 7, 2006 and had a weekly pay rate of \$203.70. The Office divided her actual weekly earning capacity of \$203.70 by her current date-of-injury pay rate of \$302.88, which yielded a wage-earning capacity of 67 percent. The Office multiplied the 67 percent wage-earning capacity percentage by \$506.34, her recurrent pay rate, to find a wage-earning capacity of \$339.25. The Office subtracted \$339.25 from \$506.34 to find a loss of wage-earning capacity of \$167.09. The Office multiplied appellant's loss of wage-earning capacity by the three-fourth dependent rate and found that she was entitled to weekly compensation of \$125.32. The Office

⁶ *Albert C. Shadrick*, *supra* note 1; 20 C.F.R. § 10.403(e).

⁷ *See Paul M. Colosi*, 56 ECAB ____ (Docket No. 04-1042, issued February 3, 2005).

subtracted the amount of compensation it should have paid appellant from July 11 to December 7, 2006, \$2,685.38, from the amount she actually received, \$4,086.17, to find an overpayment of \$1,400.79.

On appeal, appellant's attorney contends that appellant worked 32 rather than 24 hours on the date of her March 6, 2006 recurrence of disability. When a claimant has earnings, however, the Office reduces compensation in accordance with the *Shadrick* formula. As discussed, under *Shadrick*, a claimant's wage-earning capacity is expressed as a percentage by dividing actual earnings by the current earnings for the date-of-injury position. The wage-earning capacity percentage is then multiplied by the pay rate for compensation purposes. The Office found that appellant's pay rate for compensation purposes was her March 6, 2006 recurrent pay rate and utilized this in its *Shadrick* calculations.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act⁵ provides that an overpayment must be recovered unless "incorrect payment has been made to an individual who is without fault *and* when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience." (Emphasis added.) Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. The Office must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience.⁶

Section 10.436 of the implementing federal regulations⁷ provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause undue hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses and outlines the specific financial circumstances under which recovery may be considered to "defeat the purpose of the Act."

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt; and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.⁸

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary. Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.⁹

⁸ 20 C.F.R. § 10.436.

⁹ 20 C.F.R. § 10.438; *Linda Hilton*, 52 ECAB 476 (2001).

ANALYSIS -- ISSUE 2

The Office, in its preliminary notification to appellant of the existence of the overpayment, informed her that she needed to explain her reasons for seeking a waiver, complete the recovery questionnaire form and submit financial documents to support her claimed income and expenses. Appellant requested a telephone conference. The Office notified appellant that it would schedule a telephone conference upon receipt of the Form OWCP-20 overpayment recovery questionnaire. The overpayment recovery questionnaire is designed to obtain the financial information to determine whether adjustment or recovery would defeat the purpose of the Act. Appellant did not return the overpayment recovery questionnaire provided by the Office and did not otherwise submit financial evidence or supporting documentation to establish that recovery of the overpayment would defeat the purpose of the Act. Neither did she submit evidence to establish that recovery of the overpayment would be against equity and good conscience because, in reliance on the overpaid compensation, she relinquished a valuable right or changed her position for the worse. Although appellant is without fault in the creation of the overpayment, she nevertheless bears responsibility for providing the financial information necessary to support her request to waive recovery of the overpayment. Section 10.438 of the regulations states that a claimant who received an overpayment is responsible for providing information about income, expenses and assets to the Office so that it may determine whether recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.¹⁰ Failure to submit the information, which will also be used to determine a repayment schedule if necessary, without 30 days of a request from the Office, will result in a denial of a waiver of recovery of the overpayment and no further requests for waiver will be considered until the information is submitted.¹¹

Appellant submitted no evidence in this case to establish that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience. The Board finds that the Office did not abuse its discretion in refusing to waive recovery of the overpayment.

On appeal, appellant's attorney argued that he believed from the Office's March 22, 2007 letter that no action would be taken prior to the return of the overpayment recovery questionnaire. The Office, however, specifically told appellant to submit the overpayment recovery questionnaire within two weeks of its March 9, 2007 letter or it would issue a final decision.¹²

The Board notes that it does not have jurisdiction to review the Office's finding that the overpayment would be recovered in a lump sum. The Board's jurisdiction is limited to

¹⁰ 20 C.F.R. § 10.438(a).

¹¹ 20 C.F.R. § 10.438(b); *Robert B. Hutchins*, 52 ECAB 344 (2001).

¹² Appellant submitted new evidence subsequent to the Office's April 10, 2007 decision. The Board, however, has no jurisdiction to review new evidence on appeal; *see* 20 C.F.R. § 501.2(c).

reviewing those cases where the Office seeks recovery from continuing compensation under the Act.¹³

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$1,400.79 for the period July 11 to December 7, 2006 because she received compensation at an inaccurate rate. The Board further finds that the Office properly denied waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 10, 2007 is affirmed.

Issued: December 18, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

¹³ *Judith A. Cariddo*, 55 ECAB 348 (2004).