

The issues are: (1) whether appellant received a \$35,466.50 overpayment of compensation as she received compensation for total disability after she returned to work from February 1, 2007 to September 5, 2008 and also received compensation based on an inaccurate loss of wage-earning capacity determination from September 6 to November 22, 2008; (2) whether she was at fault in the creation of the overpayment; and (3) whether the Office properly determined that it would recover the overpayment by withholding \$130.00 from continuing compensation payments.

### **FACTUAL HISTORY**

On June 28, 2005 appellant, then a 33-year-old transportation security screener, filed a claim alleging that she sustained an injury to her right ankle and top of foot when a passenger accidentally kicked her where she had undergone surgery.<sup>1</sup> She stopped work on June 28, 2005.

The Office accepted the claim for a right ankle contusion and sprain. In its acceptance letter, it advised appellant that if she returned to work she must notify it immediately to avoid an overpayment of compensation. The Office stated, "If you receive a compensation check which includes payment for a period you have worked, return it to us immediately to prevent an overpayment of compensation."

The Office paid appellant compensation for disability beginning August 13, 2005. On November 14, 2005 it began paying her by direct deposit.

On April 4, 2007 appellant indicated on a (Form EN1032) that she began working on February 1, 2007 as a correctional officer for the state of North Carolina. She provided earnings of \$12.00 a hour. In a June 5, 2008 EN1032 form, appellant related that she earned \$1,354.45 a month beginning February 2008 working for the North Carolina Department of Corrections.

The Office informally calculated appellant's wage-earning capacity based on the information she provided in the June 5, 2008 EN1032 form. It paid her compensation from August 3 to September 5, 2008 based on its finding that she had actual earnings of \$338.61 a week and a 51 percent wage-earning capacity. The Office calculated her weekly compensation due at \$255.25 a week or \$1,021.00 every four weeks.

On September 26, 2008 the Office requested updated pay rate information from the employing establishment. On September 29, 2008 it paid appellant compensation from September 6 through 27, 2008 of \$852.50 based on its calculation that she had a wage-earning capacity of 48 percent.

A wage and tax statement (Form W-2) showed that appellant earned \$27,590.17 in 2007. In an October 7, 2008 internal memorandum, the Office calculated her pay rate based upon the salary provided on her W-2 form. It noted that appellant began working on February 1, 2007 and so divided \$27,590.17 by 48 weeks, to find a weekly pay rate of \$574.80. The Office began paying her on September 28, 2008 based on its calculation that she had an 89 percent wage-earning capacity.

On October 14, 2008 the North Carolina Department of Corrections indicated that appellant worked from January 29, 2007 to the present full time as a correctional officer earning \$545.00 a week or \$13.64 a hour as of March 1, 2008. Appellant earned an additional 53 cents an hour as of July 1, 2008. On December 17, 2008 the Office reduced her compensation

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<sup>1</sup> The Office previously accepted that appellant sustained a bilateral ankle sprain on September 15, 2004 in file No. xxxxxx344.

effective February 1, 2007 based on her actual earnings of \$566.80 a week as a correctional officer, which it found yielded a wage-earning capacity of 81 percent.<sup>2</sup>

On December 21, 2008 appellant alleged that she worked only 13 days a month and earned only \$502.02 a week.<sup>3</sup> On January 29, 2009 the Office informed her that she needs to support her allegation that she worked only 13 days a month.<sup>4</sup>

On April 29, 2009 the North Carolina Department of Corrections indicated that appellant earned a base salary of \$24,451.62 from February 1 to December 31, 2007 with an additional \$2,001.41 for premium pay, \$237.67 for holiday pay and \$318.07 for straight time. From January 1 to December 31, 2008 appellant earned \$28,920.00 with an additional \$4,768.88 for premium pay, \$660.48 for holiday pay and \$115.94 for straight time. On May 13, 2009 the employing establishment again provided updated pay rate information for her date-of-injury pay band.

On May 14, 2009 the Office determined that appellant had a wage-earning capacity of \$562.69 a week in 2007 and \$662.79 a week in 2008 based on the information provided by the State of North Carolina. It applied the formula set forth in *Albert C. Shadrick*<sup>5</sup> formula to calculate the amount of compensation she should have received in 2007 and 2008.

On May 15, 2009 the Office advised appellant of its preliminary determination that she received an overpayment of \$35,446.50 because she began working on February 1, 2007 but received compensation for total disability until September 5, 2008. It included in this amount the overpayment appellant received because she was paid based on an inaccurate loss of wage-earning capacity from September 6 to November 22, 2008. The Office notified her of its preliminary determination that she was at fault in the creation of the overpayment from September 6 to November 22, 2008 because she underreported her actual earnings and from February 1, 2007 to September 5, 2008 because she accepted a payment she knew or should have known was incorrect. It found that appellant earned an average of \$562.69 a week from February 1 to December 31, 2007 for a wage-earning capacity of 80 percent and earned an average of \$662.79 a week in 2008, for a wage-earning capacity of 93 percent. The Office calculated the overpayment by subtracting the amount that she should have received from February 1, 2007 to November 22, 2008 based on her loss of wage-earning capacity, \$6,678.98, from the amount that she actually received during this period, \$42,125.48, to find an overpayment of \$35,446.50. It requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, the Office advised her that, 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 prerecoupment hearing.

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<sup>2</sup> By decision dated January 21, 2009, the Office suspended appellant's compensation under 5 U.S.C. § 8123 for failing to attend a scheduled medical appointment.

<sup>3</sup> In a letter dated January 17, 2007, received by the Office on January 22, 2009, the North Carolina Department of Correction indicated that appellant would start work on January 29, 2007 and earned \$26,104.00 a year.

<sup>4</sup> By decision dated April 7, 2009, the Office denied appellant's claim for a schedule award.

<sup>5</sup> 5 ECAB 376 (1953); 20 C.F.R. § 10.403(c).

On June 10, 2009 appellant completed an overpayment recovery questionnaire. She asserted that she was without fault in creating the overpayment as she had informed the Office in writing of her employment. Appellant listed monthly income of \$1,558.32 and expenses of \$2,510.57.

By letter dated June 30, 2009, the Office informed appellant's attorney that it had received the overpayment recovery questionnaire but had not received a copy of the overpayment action request form.<sup>6</sup> It enclosed another copy of the appeal rights from the May 15, 2009 preliminary determination. On July 7, 2009 appellant's attorney requested reconsideration of the preliminary overpayment determination.

On July 14, 2009 the Office requested additional information regarding appellant's overpayment recovery questionnaire. Appellant responded with the information on July 27, 2009.

By decision dated August 5, 2009, the Office determined that appellant received an overpayment of compensation of \$35,466.50. It found that she was at fault in creating the overpayment because she accepted payments that were erroneous and underreported her monthly wages. The Office indicated that it would withhold \$130.00 from continuing compensation payments to repay the overpayment.

On appeal, appellant's attorney contends that she provided all information to the Office and established that she would experience hardship in repaying the debt.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102 of the Federal Employees' Compensation Act<sup>7</sup> provide that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>8</sup> When an overpayment has been made to an individual 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 the individual is entitled.<sup>9</sup>

A claimant is not entitled to receive total disability compensation and actual earnings for the same period. Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.<sup>10</sup>

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<sup>6</sup> On June 16, 2009 the Office reinstated appellant's compensation after she agreed to attend a scheduled second opinion examination. It further advised her of its informal reduction of her compensation effective April 11, 2009 based on its wage-earning capacity determination.

<sup>7</sup> 5 U.S.C. §§ 8101-8193.

<sup>8</sup> *Id.* at § 8102.

<sup>9</sup> *Id.* at § 8129(a).

<sup>10</sup> *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

### ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for a right ankle contusion and sprain. Appellant stopped work on June 28, 2005 and received compensation for total disability beginning August 13, 2005. On February 1, 2007 she began working for the State of North Carolina. The Office, however, continued to pay appellant compensation for total disability. When an employee has earnings from employment, she is not entitled to receive total disability benefits and actual earnings for the same time period.<sup>11</sup> Consequently, appellant received an overpayment of compensation. The Office determined that it paid her compensation for total disability from February 1, 2007 to September 5, 2008 and paid her compensation based on a loss of wage-earning capacity determination beginning September 6, 2008. However, it began paying appellant based on an informal loss of wage-earning capacity determination on August 3, 2008 rather than September 5, 2008. The case, consequently, is remanded for the Office to determine the amount of the overpayment of compensation that arose because she received compensation for total disability while she had earnings from nonfederal employment.

Subsequent to August 3, 2008, the Office paid appellant compensation based on its determination of her loss of wage-earning capacity. As noted, when an employee has earnings from employment, appellant is not entitled to receive temporary total disability benefits and actual earnings for the same time period.<sup>12</sup> Under these circumstances, the Office offsets actual earnings pursuant to the *Shadrick* formula. If a reduction of benefits based upon actual earnings is not accompanied by a determination that the actual earnings "fairly and reasonably" represent wage-earning capacity, an informal reduction of benefits utilizing the *Shadrick* formula is proper rather than a formal loss of wage-earning capacity determination. The Office did not find that appellant's actual earnings fairly and reasonably represented her wage-earning capacity and thus properly provided an informal determination of the amount owed based on what it believed to be her actual earnings using the *Shadrick* formula.<sup>13</sup> It paid her compensation from August 5 to September 5, 2008 based on its finding that she had a 51 percent wage-earning capacity, from September 6 to 27, 2008 based on its finding of a 48 percent wage-earning capacity and from September 28 to November 22, 2008 based on its finding of an 89 percent wage-earning capacity. The Office subsequently received information from the State of North Carolina showing that in 2008 appellant had a 93 percent wage-earning capacity. Therefore, appellant received an overpayment of compensation from August 3 to November 22, 2008.

Appellant has not submitted any evidence showing that she did not receive an overpayment of compensation. As previously discussed, the case is remanded to the Office to reconsider the amount of the overpayment.

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<sup>11</sup> *Daniel Renard*, 51 ECAB 466 (2000); 20 C.F.R. § 10.403(c).

<sup>12</sup> *Id.*

<sup>13</sup> 5 U.S.C. § 8106(a).

## **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(b) of the Act<sup>14</sup> provides that “[a]djustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.” Section 10.433 of the Office’s implementing regulations<sup>15</sup> provides that in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

“(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

“(2) Failed to provide information which he or she knew or should have known to be material; or

“(3) Accepted a payment which he or she knew or should have known to be incorrect.”

The Board has held that an employee who receives payments from the Office in the form of direct deposit may not be at fault the first time incorrect funds are deposited into her account, as the acceptance of the resulting overpayment lacks the requisite knowledge.<sup>16</sup> The Board has also held in cases involving a series of incorrect payments, where the requisite knowledge is established by a letter or telephone call from the Office or simply with the passage of time and a greater opportunity for discovery, the claimant will be at fault for accepting the payments subsequently deposited.<sup>17</sup> Previous cases have held that receiving one or two erroneous direct deposit payments does not necessarily create the requisite knowledge to find that a claimant was at fault in the creation of the overpayment.<sup>18</sup> The Board has found fault in cases where incorrect payments were made over longer periods of time or for substantially greater amounts than previously received.<sup>19</sup>

## **ANALYSIS -- ISSUE 2**

On February 1, 2007 appellant returned to nonfederal employment. She advised the Office on a EN1032 form dated April 4, 2007 of her return to work. From February 1, 2007 through August 2, 2008 she received compensation for total disability from the Office after she returned to nonfederal employment. In finding appellant at fault for the creation of the

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<sup>14</sup> *Id.* at § 8129(b).

<sup>15</sup> 20 C.F.R. § 10.433.

<sup>16</sup> *W.P.*, 59 ECAB 514 (2008); *Tammy Craven*, 57 ECAB 689 (2006).

<sup>17</sup> *See Tammy Craven*, *supra* note 16.

<sup>18</sup> *Id.* at n.6.

<sup>19</sup> *Id.* at n.7.

overpayment for this period, the Office determined that she accepted payments through direct deposit that she knew or should have known to be incorrect.

The Board has found the claimant to be at fault in cases where she is receiving compensation checks through direct deposit which involve a series of payments over several months with clear knowledge that the payments are incorrect.<sup>20</sup> It is not appropriate, however, to make a finding that a claimant has accepted an overpayment *via* direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from the Office or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.<sup>21</sup>

Appellant received compensation by direct deposit for total disability from the time she resumed work on February 1, 2007 to August 2, 2008. Since Office regulations define fault by what the claimant knew or should have known at the time of acceptance, one of the consequences of electronic fund transfers is that in many cases the claimant will not be at fault for accepting the first incorrect payment because the requisite knowledge is lacking at the time of deposit and the Board so finds in this case as there is no evidence of record to show the period covered by this direct deposit.<sup>22</sup> A finding that appellant is without fault does not mean, however, that the claimant may keep the money, but rather that the Office must consider eligibility for waiver for this period. The case will, therefore, be remanded to the Office for a determination of the exact period she is not at fault and whether she is entitled to waiver for this period.

Regarding the remainder of the overpayment created from February 1, 2007 to August 2, 2008, even though the Office may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payment she knew or should have known to be incorrect.<sup>23</sup> The Office advised appellant in its August 28, 2005 letter accepting her claim that she had to immediately report if she returned to work to avoid an overpayment. It was not reasonable for her to believe that she could earn money from employment and receive compensation from the Office for total disability.<sup>24</sup> Thus, after appellant's receipt of the first direct deposit for which fault may not be imputed to her, she knew or should have known, under the reasonableness standard delineated above, that the subsequent direct deposits were in error. Consequently, recover for the overpayment created for this period may not be waived.

From August 2 to November 22, 2008 appellant received compensation based on an inaccurate loss of wage-earning capacity determination. The Office found that she was at fault in

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<sup>20</sup> *Karen K. Dixon*, 56 ECAB 145 (2004).

<sup>21</sup> *See K.H.*, Docket No. 06-191 (issued October 30, 2006).

<sup>22</sup> *See Karen K. Dixon*, *supra* note 20.

<sup>23</sup> *J.K.*, 60 ECAB \_\_\_\_ (Docket No. 08-1716, issued January 8, 2009); *William E. McCarty*, 54 ECAB 525 (2003).

<sup>24</sup> *See L.C.*, 59 ECAB 569 (2008) (in applying the tests to determine fault, the Office applies a "reasonable person" test).

creating the overpayment for this period because she made an incorrect statement about a material fact in underreporting her earnings. On a June 5, 2008 EN1032 form, appellant related that she earned \$1,354.45 a month as of February 2008 or \$16,253.40 a year. After receiving this information, on August 3, 2008 the Office informally reduced her compensation based on the earnings she reported on the EN1032 form. It paid appellant's compensation from August 3, 2008 until September 27, 2008 based on its calculation that she had a wage-earning capacity of around 50 percent. On April 29, 2009, however, the employing establishment related that she earned \$28,920.00 from January 1 through December 31, 2008 plus premium pay. A claimant has an obligation to show good faith and exercise a high degree of care in reporting events that might affect the amount of her compensation.<sup>25</sup> The EN1032 form advised appellant that a false or evasive answer to any question could be grounds for severe penalties. As she did not provide the Office with accurate information regarding her earnings on the June 5, 2008 EN1032 form, she is not without fault in creating the overpayment from August 3 to September 27, 2008.

Subsequent to September 28, 2008, the Office began paying appellant based on information it received from her W-2 form. It paid her compensation from September 28 to November 22, 2008 based on its finding that she had an 89 percent wage-earning capacity. The Office later determined that appellant had a wage-earning capacity during this period of 93 percent. The difference in amount, however, was not created because of her failure to report a material fact but because discrepancies in information provided by the employing establishment. Consequently, the Board finds that appellant is not at fault in creating the overpayment from September 28 to November 22, 2008. On remand, the Office should determine if she is entitled to waiver for this period.

On appeal, appellant's attorney contends that she provided the Office with all requested information and that recovery of the overpayment would create a hardship. For the portions of the overpayment that she is not without fault in creating, however, she is not entitled to waiver of the overpayment.

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation as she received compensation for total disability after she returned to work from February 1, 2007 through August 2, 2008 and also received compensation based on an inaccurate loss of wage-earning capacity determination from August 2 to November 22, 2008. The Board finds, however, that the case is not in posture for decision regarding the amount of the overpayment. The Board further finds that she was not at fault for the first direct deposit of compensation after February 1, 2007 but was at fault for the overpayment commencing subsequent to the first direct deposition of compensation. The case is remanded for a determination of waiver for the period covered by the first direct deposit.<sup>26</sup> The Board further finds that appellant is without fault in creating the overpayment from September 28 to November 22, 2008. On remand, the Office should consider whether she is eligible for waiver for this portion of the overpayment.

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<sup>25</sup> See *F.C.*, 59 ECAB 190 (2007).

<sup>26</sup> In view of the Board's finding that the Office must consider waiver for a portion of the overpayment, it is premature to address the issue of recovery.



**ORDER**

**IT IS HEREBY ORDERED THAT** the August 5, 2009 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside. The case is remanded for further proceedings consistent with this opinion of the Board.

Issued: December 16, 2010  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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