

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of IRENE C. WHITE and DEPARTMENT OF HEALTH & HUMAN SERVICES,  
SOCIAL SECURITY ADMINISTRATION, Culpeper, Va.

*Docket No. 97-315; Submitted on the Record;  
Issued November 10, 1998*

---

DECISION and ORDER

Before GEORGE E. RIVERS, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly found appellant to be at fault in the creation of an overpayment of \$490.41, thereby precluding waiver of recovery of this amount.

Appellant's notice of occupational disease, filed on November 22, 1995, was accepted for bilateral carpal tunnel syndrome, based on the February 7, 1996 report of Dr. W. Bartley Hosick, a Board-certified orthopedic surgeon. Appellant underwent release surgery on her right hand on February 20, 1996 and returned to light-duty work on April 9, 1996. Subsequently, appellant stopped work on May 13, 1996 because of pain. Release surgery on her left hand was scheduled for June 3, 1996 but had to be postponed. Dr. Hosick released appellant to work on June 5, 1996 until her rescheduled surgery on June 17, 1996.

On June 20, 1996 appellant contacted the Office to report that she had received no compensation for the period from May 13 through June 5, 1996 and had been out of work since the surgery. The Office informed appellant that it had received no claim form. On July 1, 1996 appellant again contacted the Office about the same period and lack of compensation.

On July 9, 1996 appellant telephoned the Office and stated that she was claiming wage loss from May 13, 1996 through the present. The claims examiner noted that the employing establishment had delayed in submitting the proper forms and promised appellant to expedite her compensation check.

On July 11, 1996 the Office informed appellant that she would be paid compensation under the conditions set forth in its letter. Among those conditions were the following:

*"In order to avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK. Each payment made through the Office's automated system will include the period for which payment is made. *If you have worked for any portion of this period, you must return the check to this Office.* Otherwise, an overpayment of compensation may result."*  
(Emphasis added.)

Appellant signed this form on July 21, 1996.

On July 12, 1996 a check for \$2,750.42, covering May 13 through June 22, 1996 was issued to appellant. On July 20, 1996 a check for \$2,007.98, covering June 23 through July 20, 1996 was issued to appellant.

On July 31, 1996 the employing establishment informed the Office that appellant had returned to work on June 7, 1996 and had worked until June 14, 1996. The Office explained that appellant had been paid wage-loss compensation for 96 hours from June 6 through June 22, 1996. Based on the employing establishment's information, the Office determined that appellant had worked 37.5 hours from June 7 through June 14, 1996.

On August 9, 1996 the Office issued a preliminary determination that appellant was at fault in creating an overpayment of \$490.41 because she had received compensation for 48 hours during June 7 through 14, 1996 but had been entitled to only 10.5 hours. The Office noted that appellant should have been aware that she was not entitled to compensation during a period in which she had no wage loss.

Appellant requested a telephone conference, which was held on September 13, 1996. She explained that she was not at fault because she informed the Office that she had returned to work, but only for a week. Appellant stated that she thought the payments were due to her because she had submitted all her forms but had not received any compensation payments until July 20, 1996 Appellant added that she used the money to catch up on her overdue bills.

On October 8, 1996 the Office determined that appellant was at fault in the creation of the overpayment on the grounds that she knew she had worked during the period for which she was claiming wage loss.

The Board finds that appellant was with fault in the creation of the overpayment.<sup>1</sup>

Section 8129(a)<sup>2</sup> of the Federal Employees' Compensation Act provides that when an overpayment of compensation occurs "because of an error of fact or law," adjustment or recovery shall be made by decreasing later payments to which the individual is entitled. Section 8129(b)<sup>3</sup> provides that an overpayment of compensation shall be recovered by the Office 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 be against equity and good conscience.<sup>4</sup> Therefore, adjustment or recovery must be made when an incorrect payment has been made to an individual who is found to be with fault.<sup>5</sup>

---

<sup>1</sup> The record shows that the Office terminated its efforts to collect the overpayment on October 8, 1996 on the grounds that collection would not be cost effective.

<sup>2</sup> 5 U.S.C. §§ 8101-8193. (1974); § 8129(a).

<sup>3</sup> 5 U.S.C. § 8129(b).

<sup>4</sup> *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

<sup>5</sup> *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

The implementing regulation<sup>6</sup> provides that a claimant is with fault in the creation of an overpayment when he or she: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) failed to furnish information which the individual knew or should have known to be material; or (3) accepted a payment which the individual knew or should have been expected to know was incorrect. Any overpayment resulting from the Office's negligence does not permit an employee to accept compensation to which he knew or should have known he was not entitled.<sup>7</sup>

The Office has the burden of proof in establishing that appellant was with fault in helping to create the overpayment.<sup>8</sup> In determining whether a claimant is with fault, the Office will consider all pertinent circumstances including age, intelligence, education, and physical and mental condition.<sup>9</sup> Factors to be weighed are the individual's understanding of reporting requirements and the obligation to return payments which were not due, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported, and ability, efforts, and opportunities to comply with reporting requirements.<sup>10</sup>

Thus, an individual will be found to be with fault in the creation of an overpayment if the evidence shows either a lack of good faith or a failure to exercise a high degree of care in reporting changes in circumstances which may affect entitlement to, or the amount of, benefits.<sup>11</sup> It is axiomatic that no waiver is possible if the claimant is with fault in helping to create the overpayment.<sup>12</sup>

In this case, appellant was initially scheduled for surgery on June 3, 1996 but developed cellulitis. Dr. Hosick stated on June 5, 1996 that she could return to work within the restrictions on typing. Appellant worked eight hours on June 7, 11, 13 and 14, 1996 and 5.5 hours on June 12, 1996 and claimed leave without pay, unrelated to her work injury, on June 6 and 10, 1996.

Following her surgery, appellant telephoned the Office on June 20, 1996, stating that she had not received any payment for the period from May 13 through June 5, 1996 and did have surgery on her left wrist. She added that she had been out of work since then. On July 1, 1996 appellant again informed the Office that she had received no compensation for wage loss from May 13, 1996 through the present. On July 7, 1996 appellant called the Office and requested coverage of her leave without pay from May 13, 1998 through the present. She stated she was falling behind in her bills, and the Office responded that it would try to expedite her compensation check "to avoid hardship."

---

<sup>6</sup> 20 C.F.R. § 10.320(b).

<sup>7</sup> *Russell E. Wageneck*, 46 ECAB 653, 660 (1995).

<sup>8</sup> *Danny L. Paul*, 46 ECAB 282, 285 (1994).

<sup>9</sup> *Stephen A. Hund*, 47 ECAB \_\_\_\_ (Docket No. 94-559, issued March 7, 1996).

<sup>10</sup> *Henry P. Gilmore*, 46 ECAB 709, 719 (1995).

<sup>11</sup> *Ruth Moreno Rios*, 48 ECAB \_\_\_\_ (Docket No. 94-1977, issued July 14, 1997).

<sup>12</sup> *Linda E. Padilla*, 45 ECAB 768, 772 (1994).

Contrary to appellant's assertion that she received no compensation until July 20, 1996, a check was issued on July 12, 1996, covering the period from May 13 through June 22, 1996. Appellant was well aware that she had worked during this period. Appellant was also aware from her previous experience with carpal tunnel syndrome release surgery for her right hand in February 1996 -- that she was not entitled to wage-loss compensation for the hours she had been paid to work. Further, the July 11, 1996 letter to appellant stated clearly that if she had worked during the period of time noted on the compensation check, she must return the check to the Office.

Based on these circumstances, the Board finds that appellant accepted a payment which she knew or could be expected to know was incorrect.<sup>13</sup> Thus, the Office properly found her to be at fault in creating the overpayment. Therefore, no waiver of recovery of the overpayment is possible.<sup>14</sup>

The October 8, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.  
November 10, 1998

George E. Rivers  
Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member

---

<sup>13</sup> 20 C.F.R. § 10.320(b); *see John L. Wolf*, 48 ECAB \_\_\_\_ (Docket No. 95-1932, issued October 23, 1996) (finding that appellant was at fault in creating the overpayment because he knew that he could not receive both retirement benefits and disability compensation at the same time).

<sup>14</sup> *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994); *see Harold W. Steele*, 38 ECAB 245, (1986)(no waiver is possible if the claimant is at fault in helping to create the overpayment).