

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RALPH D. FLANAGAN and DEPARTMENT OF THE NAVY,  
MARE ISLAND NAVAL SHIPYARD, Vallejo, Calif.

*Docket No. 96-2526; Submitted on the Record;  
Issued June 16, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that an overpayment was created in the amount of \$15,003.26 because appellant received payment of schedule awards and temporary total disability compensation at an improper pay rate; (2) whether appellant was at fault in the creation of the overpayment; (3) whether the Office abused its discretion by ordering repayment of the overpayment by deduction of \$200.00 from each of appellant's continuing periodic compensation benefits.

In the present case, the Office has accepted that appellant, a hazardous waste handler, sustained a ruptured biceps tendon of the right arm in the performance of his federal employment on December 20, 1989. On March 19, 1991 the Office granted appellant a schedule award for a five percent permanent loss of use of the right arm. The notice of award of compensation advised appellant that he would receive 15.60 weeks of compensation during the period October 10, 1990 to January 27, 1991. The notice stated that appellant's weekly pay rate was \$701.20 and that therefore his weekly compensation rate would be \$525.90. On August 26, 1991 the Office granted appellant a schedule award for an additional nine percent loss of use of the right arm. The Office again noted that appellant's weekly compensation rate would be \$525.90 based upon a weekly pay rate of \$701.20. The Office indicated that appellant would receive \$15,521.89 during the period January 28 to August 12, 1991, for 28.08 weeks of compensation. On February 23, 1993 the Office granted appellant a schedule award for an additional 21 percent permanent impairment of the right upper extremity. The Office again noted appellant's weekly compensation rate to be \$525.90 based upon a weekly pay rate of \$701.20, and stated that he would receive \$37,130.65 for the period August 13, 1991 to November 13, 1992, for 65.52 weeks of compensation. The record furthermore indicates that appellant received disability compensation benefits paid at the \$701.20 weekly pay rate for four hours on August 20, 1993 and three hours on October 8, 1993, totaling \$103.30. Appellant also received disability compensation for 16 hours of leave without pay from June 1 to June 3, 1994 in the amount of \$363.00, paid at the \$701.20 weekly pay rate.

On November 10, 1994 the Office issued a preliminary decision that an overpayment of \$15,003.26 had occurred because appellant received payment of his schedule awards and disability compensation through June 3, 1994 at an incorrect pay rate. Appellant was also advised that a preliminary finding had been made that he was at fault in this matter. The Office explained that appellant was paid a schedule award from October 10, 1990 through November 13, 1992 based on an incorrect pay rate of \$701.20 per week. As appellant's correct pay rate was \$13.22 per hour, or \$528.80 per week, effective the date of injury, December 20, 1989, appellant had received an overpayment of compensation. Further, the Office noted that appellant had been paid temporary total disability benefits on August 20 and October 8, 1993 and from June 1, to June 3, 1994 at the incorrect pay rate. The Office also noted that while the CA-7 had incorrectly stated appellant's pay rate as \$701.20, the correct rate had been provided on the CA-1. The Office indicated that appellant's recurrent pay rate, effective June 1, 1994, of \$17.16 per hour or \$686.40 per week, was also less than the pay rate he had been paid.

In a decision dated July 15, 1996, the Office hearing representative found that an overpayment existed in the amount of \$15,003.26; that appellant was at fault in the creation of the overpayment; and that appellant would repay the debt from his continuing compensation at the rate of \$200.00 per month.<sup>1</sup>

The Board finds that appellant did receive an overpayment of compensation in the amount of \$15,003.26.

In the present case, appellant is not contesting that he received an overpayment of compensation. The record does document that appellant's schedule awards and disability compensation benefits through June 3, 1994 were paid at a weekly pay rate of \$701.20 per week, while the correct pay rate was \$528.80, until June 1, 1994 when appellant became eligible for a recurrent pay rate of \$686.40. The record documents that appellant received \$61,322.88, while he should have received \$46,319.62, therefore he did receive an overpayment of compensation in the amount of \$15,003.26.

The Board also finds that appellant was at fault in creation of the overpayment of compensation in the amount of \$14,970.19 as he knew or should have known that his schedule award was paid at an improper pay rate.

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<sup>1</sup> The Board notes that after appellant filed his appeal to the Board on August 15, 1996 regarding the Office's July 15, 1996 overpayment decision, the Office issued a final decision regarding a loss of wage-earning capacity on October 1, 1996. As the decision before the Board on appeal concerned the overpayment of compensation and the Office's October 1, 1996 decision concerned an entirely different issue, wage-earning capacity, the October 1, 1996 decision is not null and void. The Board has previously explained that the only decisions of the Office which are null and void because the case is on appeal before the Board, are those decisions that change the status of the decision on appeal. *Douglas E. Billings*, 41 ECAB 880 (1990).

In determining whether an individual is with fault, section 10.320(b) of the Office's regulations provides in relevant part:

"An individual is without fault in creation of an overpayment who:

- (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) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."

In this case, the Office applied the third standard under section 10.320(b) of the Office's regulations, as noted above in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was with fault in creating the overpayment of compensation, the Office must establish that at the time appellant received the compensation checks in question, he knew or should have known that the payment was incorrect.

The Board finds that the evidence of record establishes that appellant knew or should have known that he was not entitled to receive his schedule awards at the weekly rate of \$701.20. The facts of the case establish that appellant's schedule awards were paid at a pay rate of \$701.20, even though during the time periods in question appellant actual pay rate was only \$528.80 per week. The notices of schedule award which appellant received, dated March 18 and August 26, 1991 and February 23, 1993 clearly advised appellant that the award was being paid at the weekly pay rate of \$701.20, an incorrect pay rate. Appellant upon receipt of these notices knew or should have know that he was receiving an overpayment of compensation.

Appellant has asserted that he should not be found at fault in creating the overpayment of compensation because the employing establishment and the Office erred in reporting and calculating his pay rate. The Board has held, however, the Office's mistake in issuing an incorrect payment, does not excuse appellant acceptance of a check which he knew or should have known was incorrect.<sup>2</sup> Consequently, the Office properly found that appellant was at fault in creating the overpayment of compensation in the amount of \$14,970.19, relating to the payment of appellant's schedule awards.

Regarding the overpayment of compensation caused by payment of the disability compensation at the improper pay rate through June 3, 1994, the Board finds that appellant is not at fault in this matter. While the record indicates that appellant received payment of disability compensation in the amount of \$463.30 for intermittent hours of work missed from August 20, 1993 to June 3, 1994, he should have received only \$433.23 of compensation, resulting in an overpayment of \$33.07. There is no documentation of record that appellant was informed of the pay rate at which these benefits were paid. On July 13, 1994 appellant was advised that as he

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<sup>2</sup> *Martin Boroian*, 40 ECAB 1260 (1989).

was in leave-without-pay status on June 1 and June 3, 1994, a check would be issued for 16 hours of compensation. This letter did not indicate the pay rate at which compensation would be paid. Based upon the evidence of record, the Board is unable to conclude that appellant knew or should have known that his intermittent disability compensation benefits were paid at an incorrect rate from August 20, 1993 through June 3, 1994. The Board therefore finds that appellant was not at fault in the creation of the overpayment in the amount of \$33.07. The Office must therefore exercise its discretion to determine whether waiver is appropriate in this case for the overpayment of compensation totaling \$33.07.

The Board finds that the case is not in posture for a decision on the issue of whether the Office abused its discretion by ordering repayment of the overpayment by deducting \$200.00 from each of appellant's continuing periodic compensation payments.

Section 10.321(a) the Office's regulations<sup>3</sup> provides: "Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any resulting hardship upon such individual." In the present case, the Office hearing representative, in determining the rate of repayment by deduction from appellant's continuing compensation payments, did not consider the factors set forth by this section. In particular, the Office hearing representative did not provide any explanation how deduction of \$ 200.00 from each of appellant's compensation payments would not result in undue hardship, as the Office hearing representative found that appellant's stated monthly expenses did exceed his stated monthly income and that appellant was experiencing a monthly deficit of \$270.64 each month. The case will therefore be remanded to the Office for a decision on the amount of the deduction giving due regard to the factors set forth in section 10.321(a) of the Office's regulations.<sup>4</sup>

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<sup>3</sup> 20 C.F.R. § 10.321(a).

<sup>4</sup> See *Alfonso S. Gonzalez*, 45 ECAB 200 (1993).

The decision of the Office of Workers' Programs dated July 15, 1996 is affirmed that appellant received an overpayment of compensation in the amount of \$15,003.26, and that appellant was at fault in accepting payment of compensation in the amount of \$14,970.19. The decision is set aside as to appellant's fault in the creation of the overpayment in the amount of \$33.07 and remanded for consideration of waiver of this overpayment amount. The decision is also set aside regarding the repayment of the overpayment and the case is remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, D.C.  
June 16, 1999

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member