

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CATHY RECCHIE and DEPARTMENT OF JUSTICE,  
FEDERAL PRISON SYSTEM, Miami, FL

*Docket No. 99-2560; Submitted on the Record;  
Issued October 10, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, PRISCILLA ANNE SCHWAB,  
VALERIE D. EVANS-HARRELL

The issue is whether appellant received an overpayment in the amount of \$2,013.09 and, if so, whether appellant was at fault in the creation of this overpayment.

The Office of Workers' Compensation Programs accepted that appellant's September 13, 1996 employment injury, which occurred when a food cart fell on her, resulted in a low back strain, a neck contusion and a herniated disc at C6-7. Appellant received continuation of pay from September 13 to October 28, 1996.

On October 24, 1996 appellant filed a claim for compensation beginning October 29, 1996. By check dated November 15, 1996, the Office paid appellant compensation for total disability from October 29 to November 15, 1996.

In a letter to the employing establishment dated November 19, 1996, appellant stated: "Effective October 29, 1996, the Department of Labor has compensated me for my injury leave. Before the workers' compensation became available, I was paid through my annual leave. At this time, I am requesting to be put on leave without pay status, (LWOP) while I am on medical leave, receiving workers' compensation."

On December 9, 1996 appellant filed a claim for compensation from October 29 to November 15, 1996; on this for she indicated that she received leave pay from October 27 through November 23, 1996.

On February 20, 1997 appellant filed a claim for compensation from October 28, 1996 to February 20, 1997; on this form she indicated that she received leave pay from October 28 through December 7, 1996. An earnings and leave statement for the period December 8 through 21, 1996 indicated that appellant received 80 hours of annual leave pay during this period. By check dated March 7, 1997, the Office paid appellant compensation for total disability for the period December 8, 1996 to March 1, 1997. Appellant returned to work on April 30, 1997.

By letter dated September 13, 1997, the Office advised appellant that its records indicated that she received an overpayment of compensation from October 29 to November 15, 1996 and December 8 to 21, 1996, as she received both compensation for total disability and paid leave during these periods. The Office further advised appellant that she was entitled to buy back leave only during the period November 16 through December 7, 1996.

On October 24, 1997 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$2,013.09, which arose because she received compensation for total disability and paid leave from October 29 to November 15, 1996 and December 8 to 21, 1996. The Office further preliminarily found that appellant was at fault in the creation of this overpayment of compensation on the basis that she should reasonably have known she was not entitled to compensation for wage loss for the same dates she received leave pay from the employing establishment.

In response to the Office's preliminary determination, appellant stated that the employing establishment did not explain conditions to her and that she believed that she was entitled to the payments she received from the Office.<sup>1</sup> By decision dated November 3, 1998, the Office found that appellant received an overpayment of compensation in the amount of \$2,013.09 and that she was at fault in the creation of this overpayment.

Section 8129(a) of the Federal Employees' Compensation Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation, which meets the tests set forth as follows in section 8129(b): "Adjustment 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 the Act or would be against equity and good conscience."<sup>2</sup> No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.

In determining whether an individual is not "without fault" or, alternatively, "with fault," section 10.320 of Title 20 of the Code of Federal Regulations states in pertinent part:

"An individual is with fault in the 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

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<sup>1</sup> Appellant initially requested a hearing, but this request was withdrawn by her authorized representative.

<sup>2</sup> 5 U.S.C. § 8129.

“(3) With respect to the overpaid individual only, accepted a payment, which the individual knew or should have been expected to know was incorrect.”<sup>3</sup>

The Board finds that appellant received an overpayment of compensation in the amount of \$2,013.09. Sections 8116 and 8118 of the Act state that an employee may not receive paid leave for the same period during which he or she receives compensation.<sup>4</sup> Since appellant received paid leave from the employing establishment from October 29 to November 15, 1996 and from December 8 to 22, 1996, the amount of compensation she received during this period constitutes an overpayment of compensation.

The Board further finds that appellant was at fault in the creation of the overpayment of compensation. Appellant’s November 19, 1996 letter to the employing establishment, written four days after the Office sent appellant a check for compensation for the period October 29 to November 15, 1996, noted that she had received both compensation and paid leave and requested that she be placed in a leave-without-pay status. This letter clearly indicates that appellant knew that she was not entitled to both compensation and leave during the same period. By the time the Office issued appellant a check for compensation for the period December 8, 1996 to March 1, 1997, accompanied by a letter advising her of the period covered by this check, appellant had received pay from the employing establishment for annual leave used from December 8 to 22, 1996. When she accepted the Office’s check for this period, she knew or should have known that she was not entitled to that portion of the check covering December 8 to 22, 1996, the period she was paid for annual leave.

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<sup>3</sup> 20 C.F.R. § 10.320(b).

<sup>4</sup> See *Lee B. Bass*, 40 ECAB 334 (1988).

The decision of the Office of Workers' Compensation Programs dated November 3, 1998 is affirmed.

Dated, Washington, DC  
October 10, 2000

David S. Gerson  
Member

Priscilla Anne Schwab  
Alternate Member

Valerie D. Evans-Harrell  
Alternate Member