

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LUCRETIA F. NAPPER and U.S. POSTAL SERVICE,
POST OFFICE, Gaithersburg, MD

*Docket No. 99-2584; Submitted on the Record;
Issued April 11, 2001*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$1,006.38 for September 27 through October 11, 1997; and (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment, which was, therefore, not subject to waiver of recovery.

On January 17, 1996 appellant, a 40-year-old mailhandler, injured her right wrist and right elbow while pulling mail. The Office accepted appellant's claim for lateral epicondylitis, right elbow, epicondyle release surgery and stellate ganglion blocks. Appellant returned to work on April 8, 1996 on limited duty and stopped working on August 20, 1996. The Office paid appropriate compensation.

By letter dated May 23, 1997, the Office notified appellant that "[f]ull compensation is payable only while you are unable to perform the duties of your regular job because of your accepted employment-related condition." The letter advised appellant "[t]o avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK. (Emphasis in the original.) Return to us any compensation check received after you go back to work."

On September 27, 1997 appellant returned to work with the employing establishment. By letter dated November 24, 1997, the Office notified appellant that because she returned to work on September 27, 1997 she was not entitled to compensation payments and instructed her to return the check dated November 8, 1997. The letter advised appellant that an overpayment for September 27 through October 11, 1997 in the amount of \$1,006.38 had been created. The Office informed appellant that she could repay the overpayment immediately, with a personal check, or the Office would undertake formal action and payment would be recovered from her salary.

By letter dated January 21, 1998, the Office made a preliminary determination that an overpayment of compensation had occurred in the amount of \$1,006.38, covering September 27 through October 11, 1997. The Office found that appellant was at fault in creating the overpayment because the May 23, 1997 letter advised her to return any check she received after she returned to work and thus she should have known that she could not earn wages and receive compensation for total disability for the same period.

The Office informed appellant that if she disagreed with the decision she could, within 30 days, submit evidence or argument to the Office, or request a preresoupment hearing with the Branch of Hearings and Review.

Appellant completed and signed the enclosed Form OWCP-20 on February 10, 1998. In a handwritten note accompanying the form, appellant claimed that upon receiving the November 7, 1997 check, she immediately contacted a claims examiner, whom she said gave her the choice of either returning the check and waiting for a correct one to be reissued, or keeping the check and waiting to be notified about the amount of the overpayment. Appellant stated that she informed the claims examiner she had bills to pay and needed the money immediately. The claims examiner then told her that she could keep the check and that the Office had already begun the necessary paperwork and would notify appellant of the amount of the overpayment. Appellant also claimed that her new job did not pay night differential and that she used the check to help cover the difference.

Appellant requested a preresoupment hearing, which was held on October 21, 1998. Appellant essentially reiterated her previous assertions regarding why she was not at fault in creating the overpayment. The hearing representative advised appellant to submit another Form OWCP-20 if her financial situation had changed in any way. Appellant did not submit an updated Form OWCP-20.

By decision dated June 1, 1999, the Office found that appellant was at fault in creating the overpayment of compensation from September 27 through October 11, 1997, which amounted to \$1,006.38.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,006.38 for the period September 27 through October 11, 1997.

The record shows the Office incorrectly issued a check for temporary total disability covering September 27 through October 11, 1997. During that time she had returned to work and was, therefore, no longer totally disabled. Therefore, an overpayment had occurred in the amount of \$1,006.38.

The Board further finds that appellant was not without fault in creation of the overpayment.

Section 8129 of the Federal Employees' Compensation Act¹ 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." No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.²

In determining whether an individual is with fault, section 10.433(a) of the Office's regulations provides in relevant part:

"A recipient who has done any of the following will be found to be at fault with respect to the creation of an overpayment--

- (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. (This provision applies only to the overpaid individual.)"³

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment.

Even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment which she knew or should have expected know she was not entitled.⁴ Appellant was informed by the Office in its May 23, 1997 letter that she was not entitled to full compensation when she returned to work and was advised that she should return to the Office any compensation check received after she returned to work. Because appellant returned to full-time employment on September 27, 1997 and was, therefore, no longer totally disabled, she knew or should have known that she was no longer entitled to the amount of weekly compensation she had been receiving.⁵ Upon her receipt of the first disability check from the Office following her return to work, appellant had a duty to return the check issued for total disability, as instructed in the May 1997 notice to her, because she had returned to work during the period covered by this check. Instead, appellant cashed this check and used the money to pay her bills, as she herself admitted.

¹ 5 U.S.C. § 8129(a)(b).

² *Bonnye Mathews*, 45 ECAB 657 (1994).

³ 20 C.F.R. § 10.433(a).

⁴ *See Russell E. Wageneck*, 46 ECAB 653 (1995).

⁵ Although appellant claimed that an Office claims examiner advised her that it was permissible to deposit the check, she has provided no corroboration for this assertion.

For these reasons, the Board finds that, under the circumstances of this case, the Office properly found that appellant knew or should have known that the check issued by the Office subsequent to appellant's return to work on September 27, 1997 was in error. As appellant was not without fault under the third standard outlined above, recovery of the overpayment of compensation in the amount of \$1,006.38 may not be waived.

The June 1, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
April 11, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member