

**United States Department of Labor
Employees' Compensation Appeals Board**

R.H., Appellant

and

**DEPARTMENT OF THE ARMY, CPAC-ARMY
ARMOR CENTER, Fort Knox, KY, Employer**

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**Docket No. 07-2217
Issued: March 25, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 29, 2007 appellant filed a timely appeal from a July 20, 2007 decision of the Office of Workers' Compensation Programs that found that he received an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant received an overpayment in compensation in the amount of \$12,406.75 for the period June 14, 2006 through April 14, 2007; (2) whether the Office properly determined that he was at fault in accepting the overpayment and was therefore not entitled to waiver; and (3) whether the Office properly required repayment of the overpayment by deducting \$600.00 every four weeks from appellant's continuing compensation.

FACTUAL HISTORY

On July 31, 2006 the Office accepted that appellant, then a 36-year-old lead firefighter/hazmat technician, sustained a back sprain in the course of his federal duties on

April 12, 2006, when he stopped work. He was placed on the periodic rolls on October 4, 2006. At that time appellant was informed that he would receive compensation based on a weekly pay rate of \$1,610.53 at the $\frac{3}{4}$ augmented rate, effective June 14, 2006. An Office memorandum dated October 4, 2006 provides that appellant worked a 144-hour week. On October 13, 2006 appellant acknowledged that he understood the conditions under which he could receive wage-loss compensation and he continued to receive compensation based on a weekly pay rate of \$1,610.53 through April 14, 2007. Office worksheets and computer print-outs contained in the record indicates that appellant should have received wage-loss compensation based on a weekly pay rate of \$1,226.67. The error occurred because an incorrect number of hours were entered into the pay rate worksheet for the number of hours appellant worked in a biweekly tour in excess of 106 hours.¹ On January 9, 2007 the Office accepted that appellant sustained a herniated disc at L2-3. He returned to modified duty on May 2, 2007 and by letter dated May 18, 2007, the Office reduced his compensation accordingly.

On May 31, 2007 the Office issued a preliminary finding that an overpayment in compensation in the amount of \$12,406.75 had been created for the period June 14, 2006 through April 14, 2007. The Office explained that, the overpayment resulted because appellant had been paid at an incorrect pay rate for this period, noting that his compensation was incorrectly based on a weekly pay rate of \$1,610.53 when it should have been based on a weekly pay rate of \$1,226.67. The Office stated that he had received compensation of \$49,402.59 for this period when he should have received \$36,995.84, yielding an overpayment in compensation of \$12,406.75. The Office found appellant to be at fault in the creation of the overpayment because he accepted payments that he knew or should have known were incorrect.

Appellant stopped work again on June 4, 2007 and was returned to the periodic rolls effective July 8, 2007. On July 20, 2007 the Office finalized the overpayment decision. The Office found that appellant was at fault in the creation of the overpayment, noted that he had not responded to the preliminary overpayment finding and ordered repayment by deducting \$600.00 every four weeks from his continuing compensation.

LEGAL PRECEDENT -- ISSUE 1

Under the Federal Firefighters Overtime Pay Reform Act of 1998, in determining the rate of pay for firefighters with regular tours of duty which generally consists of 24-hour shifts, pay rate for compensation purposes is determined as follows:

“(a) Annual salary / 2756 (53 hours of regular pay per week X 52 weeks) = firefighter hourly rate.

“(b) Firefighter hourly rate x 106 hours = bi-weekly base pay.

“(c) Firefighter hourly rate x 1.5 = ‘firefighter overtime’ rate.

¹ The record shows that, in computing the weekly pay rate, the Office initially added 72 hours to appellant’s biweekly tour, when 38 hours was the correct number of hours.

“(d) ‘Firefighter overtime’ rate x number of hours in regular tour in excess of 106 hours = bi-weekly ‘firefighter overtime.’

“(e) Bi-weekly base pay + bi-weekly ‘firefighter overtime’ / 2 = weekly pay rate.”

Most 24-hour shift firefighters have a regular bi-weekly tour of 144 hours (six 24 hours shifts) consisting of 106 regular hours and 38 “firefighter overtime” hours; thus, 38 hours (144-106) would be used in step (d) above.

Section 8102(a) of the Federal Employees’ Compensation Act² provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.³ Section 8129(a) of the Act provides, in pertinent part:

“When an overpayment has been made to an individual under this subchapter 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 an individual is entitled.”⁴

ANALYSIS -- ISSUE 1

The Board finds that an overpayment in compensation in the amount of \$12,406.75 was created because appellant was paid at an incorrect compensation rate for the period June 14, 2006 through April 14, 2007. The Office worksheets and computer print-outs contained in the case record indicate that for this period his compensation was based on a weekly pay rate of \$1,610.53 when it should have been based on a weekly pay rate of \$1,226.67, because the number of hours in his biweekly tour in excess of 106 hours was incorrectly computed based on 72 additional hours, when it should have been based on 38 additional hours, to total the 144 biweekly hours appellant worked prior to his injury. The total compensation appellant received for this period was \$49,402.59 whereas, if the proper weekly pay rate had been applied, he would have received compensation of \$36,995.84. He therefore received an overpayment in compensation of \$12,406.75.⁵

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act provides that an overpayment in compensation shall be recovered by the Office unless “incorrect payment has been made to an individual who is without fault and

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8102(a).

⁴ 5 U.S.C. § 8129(a).

⁵ See *Janet A. Condon*, 55 ECAB 591 (2004).

when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.”⁶

Section 10.433(a) of the Office’s regulations provides that the Office:

“[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from [the Office] are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in creating an overpayment: (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (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).”⁷

Section 10.435 of Office regulations provides that the fact that the Office may have erred in making the overpayment does not by itself relieve the individual who received the overpayment from liability for repayment if the individual also was at fault in accepting the overpayment. The Office may find the individual not at fault if acceptance of an incorrect payment occurred because the individual relied on misinformation given in writing by the Office.⁸

ANALYSIS -- ISSUE 2

In this case, the Office found that appellant was at fault in the creation of the overpayment in compensation because he accepted compensation payments that he should have known were incorrect. The Board, however, finds that the Office failed to provide sufficient explanation for the fault determination.⁹ The preliminary notice stated that appellant should have realized that the compensation he received was greater than the wages he had been earning at the time of the employment injury. The record before the Board, however, does not contain any specific pay information such as earnings and leave statements regarding appellant’s earnings prior to the employment injury other than to indicate that his base annual salary was \$41,483.00. While the record contains worksheets that computed appellant’s earnings based on the formula described above, there is no indication in the record that this information was provided to him at the time he was placed on the periodic roll. On appeal, appellant stated that “matters of pay [were] difficult to calculate seeing that prior to my injury I had several deductions withheld from my pay.” The pertinent issue is what appellant knew or should have known with respect to his

⁶ 5 U.S.C. § 8129; *see Linda E. Padilla*, 45 ECAB 768 (1994).

⁷ 20 C.F.R. § 10.433 (1999); *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

⁸ *Id.* at § 10.435(a), (b)(1).

⁹ *See Janet A. Condon*, *supra* note 5.

pay rate. There is no evidence in this case that the Office provided him with the relevant evidence regarding the calculation of his compensation.

The Office bears the burden of proof in showing that a claimant is with fault in the matter of an overpayment in compensation.¹⁰ In applying the tests to determine fault, a “reasonable person” test applies.¹¹ In the absence of any evidence that the Office adequately explained, at the time appellant accepted the compensation payments, how the benefits were calculated or provided other relevant evidence regarding his entitlement to compensation, the Board finds that the Office did not meet its burden of proof to establish that he was at fault in the creation of the overpayment in compensation.¹² The case will therefore be remanded to the Office for further proceedings consistent with this opinion of the Board.

CONCLUSION

The Board finds that the Office properly determined that an overpayment in compensation in the amount of \$12,406.75 had been created but that the case is not in posture for decision regarding whether appellant was at fault in the creation of the overpayment. In view of the Board’s finding regarding the fault determination, the issue of whether the Office properly required repayment is moot.¹³

¹⁰ *Id.*

¹¹ *See Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

¹² *Supra* note 7.

¹³ The Board notes that appellant submitted evidence with his appeal to the Board. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence of record which was before the Office at the time it rendered its final decision. 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 20, 2007 be affirmed in part and set aside in part and the case remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: March 25, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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