

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WANDA DARLING and U.S. POSTAL SERVICE,
POST OFFICE, Beaumont, Tex.

*Docket No. 96-1534; Submitted on the Record;
Issued May 21, 1998*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$1,541.70 for the period October 2 through October 20, 1994; (2) whether the Office properly determined that appellant was not "without fault" in creation of the overpayment; and (3) whether the Office properly required repayment by withholding \$200.00 every four weeks from her continuing compensation.

On January 25, 1986 appellant, a 49-year-old mailhandler, experienced a sharp pain in her chest and both shoulders, which she claimed was caused by repeatedly lifting mail over her shoulders. Appellant filed a Form CA-1 claim for a traumatic injury on the date of injury based on the injury to her left shoulder and chest, which was accepted by the Office for cartilaginous ligamentous chest strain and costochondritis.

In a letter to the employing establishment dated September 13, 1994, Dr. Gordon Irving, a direct patient care physician, at the University Center for Pain Medicine and Rehabilitation in Houston, Texas, stated that appellant had been treated there on numerous occasions for her employment-related chest pain and that they were now recommending a pain management program involving three intensive weeks of physical therapy, psychotherapy, education and occupational therapy. Dr. Irving, therefore, requested that appellant be excused from work from October 3 through October 21, 1994. The Office granted this request. Appellant was required to stay in a local hotel during this period.

Appellant filed a Form CA-8 claim for total disability on September 29, 1994 for the period from October 2 through October 20, 1994. On December 15, 1994 the Office issued a check to appellant in the amount of \$938.34 representing compensation for total disability for the claimed period.

By letter dated January 25, 1995, appellant questioned the amount of the payment and asserted that she was entitled to an amount of compensation greater than the \$938.34 awarded by the Office.

By letter dated February 9, 1995, the Office responded to appellant's December 9, 1994 letter. The Office stated that she had been issued a check in the amount of \$938.34 representing temporary total disability from October 3 to October 21, 1994, and then described to appellant the manner in which her compensation had been calculated. The Office stated that appellant's total disability for the 19 days was \$1,430.25, or \$11.58 per hour, times 152 hours [19 days] times 75 percent, plus the applicable consumer price index, which equaled \$938.34.

On the same date of its explanatory letter, February 9, 1995, the Office issued an erroneous payment of \$1,541.70 to appellant.

By letter dated February 23, 1995, the Office informed appellant that the check she received in the amount of \$1,541.70 had been sent to her erroneously, and that the check should have been sent to the hotel where she stayed from October 2 to October 20, 1994. The Office requested that appellant either return the check to the Office or submit payment of \$1,541.70 to a hotel representative, and advised her that in the event she failed to return the payment it would undertake overpayment proceedings.

In a follow-up letter dated March 20, 1995, the Office informed appellant that it was making its final request to return the check issued to her on February 9, 1995 in the amount of \$1,541.70, and again advised her to submit a payment in that amount to either the Office or to a hotel representative. The Office further advised appellant that if it did not hear from her within 15 days, it would undertake overpayment proceedings.

In a handwritten letter to the Office dated March 22, 1995, appellant stated that she had cashed and spent the money from the \$1,541.70 check, to which she thought she was entitled. She stated that no longer had the \$1,541.70 to return to the Office, and asked what other recourse there was for her to reimburse the Office or the hotel.

The Office replied to appellant by letter dated April 6, 1995. The claims examiner stated he had enclosed an overpayment recovery questionnaire to determine how best to recover her \$1,541.70 debt created by her refusal to return the incorrectly issued check due the hotel where she stayed from October 2 through October 20, 1994.

In a handwritten letter to the Office dated April 18, 1995, appellant requested a waiver of recovery of overpayments and any interest accrued, and requested a preresoupment hearing. In a letter accompanying the request, appellant stated that she was not at fault in creating the overpayment because she thought that the \$1,541.70 check she received from the Office on February 15, 1995 represented additional compensation due her for the period of temporary total disability from October 2 to October 20, 1995. She alleged she was not made aware that the payment had been sent to her erroneously until March 22, 1995, when she telephoned the Office about another matter. Appellant claimed that she was without fault in creating the overpayment and that recovery of the overpayment would constitute a severe financial hardship that would deprive her and her dependents of the ability to meet ordinary and necessary living expenses. In

addition, appellant submitted a completed Form OWCPA-20 outlining her income and assets as well as her household expenses and debts, plus checks and financial statements documenting her statements.

On April 27, 1995 the Office issued a preliminary determination that an overpayment had occurred in the amount of \$1,541.70 for the period October 2 through October 20, 1994. The claims examiner found that appellant was with fault in the matter because she had been informed by correspondence dated February 23, March 20 and April 6, 1995 that the Office had erred in issuing a check to her in the amount of \$1,541.70, but that she had yet to either return the check or pay the hotel for the expenses she incurred from October 2 to October 20, 1994. The claims examiner stated that it was apparent appellant accepted payment which she knew or should have been expected to know was incorrect, thus resulting in an overpayment of \$1,541.70. The Office advised appellant that if she disagreed with the fact or amount of the overpayment she could submit new evidence in support of her contention. The Office further advised appellant that when she was found without fault in the creation of the overpayment, recovery might not be made if it could be shown that such recovery would defeat the purpose of the law or would be against equity and good conscience.

In addition, the Office informed appellant that if she felt entitled to a waiver instead of repaying the overpayment, she could request a prerecoupment hearing with the Branch of Hearings and Review, or she could make her request directly with the Office. The Office further informed appellant that she should submit a detailed explanation of her reasons for seeking waiver, fully complete and submit the enclosed overpayment recovery questionnaire, and attach any supporting documents in his possession. The Office specifically requested appellant to submit any relevant financial documents, including income tax returns, bank account statements, bills and canceled checks reflecting payments, pay slips and other records to support income and expenses listed on the enclosed questionnaire. The Office also noted that pursuant to 20 C.F.R. § 10.324,¹ the failure to furnish the financial information requested on the questionnaire within 30 days would result in a denial of waiver of the overpayment, and that no further request for waiver would be considered until the requested information was furnished.

In response, appellant, on May 9, 1995, replied on the questionnaire sent by the Office that she was requesting a hearing on the issue of fault and waiver of overpayment. In a letter dated October 20, 1995, the Office scheduled a hearing for November 30, 1995. However, appellant requested cancellation of the proposed hearing by letter dated November 7, 1995 and an Office hearing representative granted appellant's request by letter dated November 22, 1995. The hearing representative agreed to review appellant's case based on the written record.

In a decision dated March 1, 1996, the hearing representative found that appellant was at fault in creating the overpayment of compensation. The hearing representative stated that in light of the Office's February 9, 1995 letter, indicating that it had calculated the correct amount of her disability compensation to be \$938.34 and depicting the method of its calculation and its February 23, March 20 and April 6, 1995 letters, advising appellant that it had erred in issuing payment for \$1,541.70, she had accepted a payment, which she either knew or should have

¹ 20 C.F.R. § 10.324.

known was incorrect, and was therefore at fault in creating the overpayment of compensation. The hearing representative further found that as appellant was at fault in creating the overpayment of compensation, recovery of the overpayment could not be waived.

The hearing representative also found that recovery of the overpayment, and any applicable interest, by deductions from appellant's continuing compensation benefit payments in the amount of \$200.00 per month, would not deprive appellant of income required to meet ordinary and necessary living expenses. The hearing representative stated that appellant listed \$2,400.00 in monthly income on the overpayment recovery questionnaire, but did not list the partial disability compensation payment she received every 28 days in the amount of \$745.00. The hearing representative therefore concluded that appellant's total household income was approximately \$3,100.00.

The hearing representative found that while appellant listed over \$5,000.00 in regular monthly household expenses, some of the listed expenses were duplicative and many other expenses were not documented.² The hearing representative therefore concluded that appellant was financially able to reimburse the Office for the \$1,541.70 payment she owed in \$200.00 monthly installments.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,541.70 for the period from October 2 through 20, 1994. The record shows the Office incorrectly issued a check to appellant in the amount of \$1,541.70, and that appellant admittedly accepted this check.

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

Section 8129 of the Federal Employees' Compensation Act³ 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.⁴

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

² The hearing representative noted, for example, that although appellant claimed that she paid \$1,695.36 a month in unreimbursed medical expenses, only some of her medical expenses were documented and that the expenses covered a period of several months, rather than one month. The hearing representative stated that appellant did not indicate whether these expenses represented a one-time medical expenses or were regular monthly expenses. In addition, the hearing representative noted that appellant listed \$200.00 to \$300.00 for clothing expenses but also listed \$130.00 a month for credit card and department store expenses, and that she paid \$679.00 per month for insurance not withheld from income but did not provided documentation for this expense.

³ 5 U.S.C. § 8129(a)(b).

⁴ *Bonnye Mathews*, 45 ECAB 657 (1994).

“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
- (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”⁵

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 known she was not entitled to.⁶ In the instant case, appellant should have been aware that she was not entitled to the \$1,541.70 payment upon receipt of the Office’s February 9, 1995 letter, describing the method by which it calculated her temporary total disability benefits from October 3 to October 21, 1994 and arrived at the sum of \$938.34. Even if she sincerely believed she was entitled to an amount greater than that, appellant should have reasonably suspected that an additional payment of \$1,541.70 far exceeded the actual amount, to which she was entitled based on the Office’s February 9, 1995 letter. Upon receipt of the \$1,541.70 payment, appellant had a duty to contact the Office and inquire as to whether acceptance of this payment was appropriate. Additionally, two weeks after receipt of the \$1,541.70 check, the Office clearly stated in its February 23, 1995 letter, that it had mistakenly issued the check and that appellant was required to either return the check to the Office or remit payment to a representative of the hotel where she stayed from October 2 through October 20, 1994. Appellant, however, did not respond to the Office’s inquiries until March 22, 1995, when she informed the Office that she had already spent the entire payment and could only repay the \$1,541.70 pursuant to some type of installment plan.

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 in the amount of \$1,541.70, which she received on February 15, 1993, 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 \$1,541.70 may not be waived. Thus, the decision of the hearing representative dated March 1, 1996 is affirmed.

The Board further finds that the Office properly required repayment by withholding \$200.00 every 4 weeks from appellant’s continuing compensation.

⁵ 20 C.F.R. § 10.320(b).

⁶ See *Russell E. Wageneck*, 46 ECAB 653 (1995).

Section 10.321(a) of the regulations⁷ provides:

“[W]henever an overpayment of compensation has been made to an individual who is entitled to future 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 instant case, the hearing representative considered appellant’s income, expenses, assets and general financial circumstances and found that, as appellant’s total monthly income was approximately \$3,100.00 and that her adjusted living expenses were either exaggerated or duplicative, recovery of the overpayment by withholding \$200.00 every 4 weeks from her continuing compensation payments would not cause undue hardship.⁸ The Board finds that the Office arrived at this repayment schedule giving due regard to the factors set forth in section 10.321 and that the repayment schedule was not unreasonable under the circumstances.⁹

The decision of the Office of Workers’ Compensation Programs dated March 1, 1994 is hereby affirmed.

Dated, Washington, D.C.
May 21, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

⁷ 20 C.F.R. § 10.321(a).

⁸ See *Forrest E. Brown, II*, 44 ECAB 278 (1992); see *Robert C. Schenck*, 38 ECAB 531 (1987).

⁹ *Id.*