

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KENNETH E. RUSH and DEPARTMENT OF JUSTICE,
BORDER PATROL, Nogales, AZ

*Docket No. 98-321; Submitted on the Record;
Issued October 6, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of \$1,259.52; and (2) whether the Office properly determined that appellant was at fault in creating the overpayment, and therefore was not entitled to waiver of recovery.

In the present case, the Office accepted that appellant sustained a right knee strain in the performance of duty on April 18, 1996. Appellant began receiving compensation for temporary total disability. He returned to work on November 18, 1996. The record indicates that appellant received a compensation payment dated December 7, 1996, covering the period November 10 to December 7, 1996 and a payment dated January 4, 1997, covering the period December 8, 1996 through January 4, 1997.

By letter dated February 12, 1997, the Office advised appellant that a preliminary determination had been made that an overpayment of \$3,149.22 had been created. The Office explained that the amount of the overpayment had been calculated by taking the gross daily compensation (\$1,603.20 divided by 28) of \$57.26, multiplying it by the number of days overpaid through December 7, 1996 (27, based on a return to work on November 11, 1996), and then adding the gross compensation for December 8, 1996 to January 4, 1997. With respect to fault, the Office determined that appellant was at fault in creating the overpayment.

By decision dated March 26, 1997, the Office modified its preliminary determination to conclude that the amount of the overpayment was \$1,259.52. The Office indicated that appellant had returned the January 4, 1997 compensation payment, in the net amount of \$1,488.88, and also found that appellant did not return to work until November 18, 1996, and therefore he was entitled to an additional seven days of gross compensation of \$400.82. The overpayment of \$3,149.22 was therefore reduced by \$1,889.70, for a total overpayment of \$1,259.52. The Office finalized its determination that appellant was at fault in creating the overpayment and was not entitled to waiver of recovery of the overpayment.

The Board has reviewed the record and finds that there was an overpayment of compensation.

When an employee returns to work and ceases to have any loss of wages, compensation for wage loss is no longer payable.¹ In this case, there is no dispute that the Office issued payments for compensation after appellant had returned to full-time work, and therefore an overpayment was created.

The Board further finds that the case is not in posture with respect to the exact amount of the overpayment.

In the present case, there were two compensation payments issued after appellant returned to work on November 18, 1996; the gross compensation amount was \$1,603.20 for each payment, the net amount, after deduction of health benefits and optional life insurance premiums, was \$1,488.88. The Office based its overpayment calculations on the gross amount of compensation paid. As the Board noted in *Sandra K. Neil*,² this is improper if the health benefits and life insurance premiums were deducted from appellant's wages during the same period, because appellant does not derive any benefit from the Office deductions. In this case, appellant has actually submitted pay stubs for the period November 10 to 23, 1996 and December 22, 1996 to January 4, 1997, which show that full deductions for health benefits and life insurance premiums were made from appellant's regular wages.

The case will therefore be remanded to the Office with respect to the amount of the overpayment. On remand, the Office should confirm that health benefits and life insurance premiums were deducted from November 24 to December 21, 1996. If so, then the actual amount of the overpayment is limited to the net compensation received in the December 7, 1996 payment (\$1,488.88), minus the net daily compensation (\$1,488.88 divided by 28) from November 10 to 17, 1996.

The Board further finds that the Office properly determined that appellant was at fault in creating the overpayment, and therefore not entitled to waiver of recovery.

Section 8129(b) of the Federal Employees' Compensation Act³ provides: "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."⁴ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.⁵

On the issue of fault, 20 C.F.R. § 10.320(b) provides in pertinent part: "An individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a

¹ See *Donny T. Gala*, 39 ECAB 1357 (1988).

² 40 ECAB 924 (1989).

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8129(b).

⁵ *Gregg B. Manston*, 45 ECAB 344 (1994).

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.”

The Office found that appellant had accepted a payment which he knew or should have known was incorrect. With respect to the December 7, 1996 compensation payment, the evidence clearly indicates that appellant knew the payment was incorrect. Appellant’s spouse explained in a February 16, 1997 letter to the Office that when the December 7, 1996 payment was received, she and appellant were aware that appellant was only entitled to approximately one week of compensation during the period covered, but it was necessary to use the money to pay for monthly expenses and repay debts.⁶ The regulations, however, clearly state that an individual is at fault if a payment is accepted that the individual knew or should have known was incorrect. In this case, the probative evidence indicates that appellant knew the December 7, 1996 compensation payment was incorrect, and therefore he is at fault in creating the resulting overpayment.⁷ Since he is at fault, he is not entitled to waiver of recovery of the overpayment.

The decision of the Office of Workers’ Compensation Programs dated March 26, 1997 is affirmed with respect to fact of overpayment and fault; it is set aside and remanded for further action with respect to the amount of the overpayment.

Dated, Washington, D.C.
October 6, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

⁶ The Board notes that appellant granted power of attorney to his wife with respect to, *inter alia*, benefits from government programs or civil service.

⁷ In the unlikely event that the employing establishment failed to deduct health benefits or life insurance from wages during the period November 24 to December 21, 1996, the Office should make a new determination as to fault for any resulting overpayment.