

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of TAMMI L. WRIGHT and U.S. POSTAL SERVICE,  
PADDOCK BRANCH POST OFFICE, Ocala, FL

*Docket No. 98-1662; Submitted on the Record;  
Issued April 7, 2000*

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DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation occurred in appellant's case in the amount of \$2,737.29; and (2) whether the Office properly found that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

On December 21, 1995 appellant, then a 35-year-old rural letter carrier, sustained a low back strain and herniated disc in the performance of duty. By letter dated June 6, 1996, the Office advised appellant that she would be paid compensation from May 9 until August 17, 1996 or until she returned to work and specified the amount of the compensation benefits. Appellant was advised to notify the Office upon her return to work to avoid an overpayment of compensation.

The record shows that appellant returned to work on August 7, 1996 working four hours a day and returned to full-time work on January 8, 1997. The record also shows that she received compensation benefits for total disability for that period.

By letter dated January 23, 1998, the Office advised appellant had it had made a preliminary determination that an overpayment of compensation had occurred in her case in the amount of \$2,737.29 because she had returned to work on August 7, 1996 with a loss of wage-earning capacity but continued to receive compensation benefits based on total disability through January 8, 1997. The Office advised that it had made a preliminary finding that appellant was at fault in the creation of the overpayment because she was aware, or reasonably should have been aware, that she was not entitled to compensation benefits based on total disability after she had returned to work. Appellant was advised to submit new evidence or argument if she disagreed with the fact or amount of the overpayment or believed that the overpayment occurred through no fault of hers and she felt that recovery of the overpayment should be waived.

On February 17, 1998 appellant submitted a completed overpayment questionnaire, Form OWCP-20, which included her monthly expenses and income. She indicated that the Office had been late in the past in providing her compensation checks and she therefore did not know the period of time covered by the checks in question. Appellant requested waiver of recovery of the overpayment.

By decision dated April 6, 1998, the Office issued a final decision stating that an overpayment in the amount of \$2,737.29 had occurred in appellant's case and that she was at fault in the creation of the overpayment and was therefore not entitled to waiver of recovery of the overpayment.

The Board finds that the Office properly determined that an overpayment of compensation benefits occurred in this case.

The record establishes that appellant returned to work at the employing establishment for four hours per day from August 7, 1996 to January 8, 1997 but received compensation benefits for total disability for that same period. Therefore, the record establishes that the Office correctly determined that appellant received an overpayment of compensation benefits in the amount of \$2,737.29 for the period August 7, 1996 to January 8, 1997.

The Board further finds that the Office improperly determined that appellant was at fault in the creation of the overpayment of compensation.

Section 8129 of the Federal Employees' Compensation Act provides that an overpayment of compensation shall be recovered by the Office 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."<sup>1</sup> Thus the Office may not consider a waiver of the overpayment of compensation in this case unless appellant was without fault.

In determining whether an individual is with fault, section 10.320(b) of the Office's regulations provides that an individual is with fault in the creation of an overpayment who: made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or failed to furnish information which the individual knew or should have known to be material; or, with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. However, in order for the Office to establish that appellant was with fault in creating the overpayment of compensation, the Office must establish that, at the time appellant received the compensation checks in question, she knew or should have known that the payment was incorrect.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8129.

<sup>2</sup> See *Robin O. Porter*, 40 ECAB 421 (1989).

The Office determined that appellant was at fault in creating the overpayment because it had informed her by letter dated June 6, 1996 that she would receive compensation benefits each four weeks from May 9 through August 17, 1996 or until she returned to work and specified the amount of compensation which she would receive. However, the Board has held that form letters cannot be used to establish what a claimant knew or should have known with regard to the receipt of a subsequent payment because it contains no information regarding the period covered by a specific subsequent check.<sup>3</sup> The Board has explained that where the record contains no evidence that an employee was apprised by the Office, as of the time he or she accepted compensation checks, of the specific period the checks covered so as to put the employee on notice that he or she was being paid incorrectly for a period of time during which the employee worked, the employee cannot be found at fault in the creation of the resulting overpayment.<sup>4</sup> In the present case, the Office failed to produce copies of the checks or other relevant payment records provided to appellant demonstrating notation of the dates covered by the checks that appellant improperly received and therefore it has not established that she knew or should have known she received improper payments of compensation. Therefore, appellant cannot be found to be at fault in the creation of the overpayment of compensation on that basis and the case will be remanded to the Office for consideration of waiver of recovery of the overpayment.<sup>5</sup>

The decision of the Office of Workers' Compensation Programs dated April 6, 1998 is affirmed in part and set aside in part and the case is remanded for further action consistent with this decision of the Board.

Dated, Washington, D.C.  
April 7, 2000

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member

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<sup>3</sup> *Claude T. Green*, 42 ECAB 274, 279 (1990).

<sup>4</sup> *Id.*

<sup>5</sup> *Beverly E. Labbe*, 50 ECAB \_\_ (Docket No. 98-39, issued July 6, 1999).