

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CHARLIE CARRUTH and DEPARTMENT OF THE NAVY,  
NAVAL SHIPYARD, Charleston, SC

*Docket No. 99-660; Submitted on the Record;  
Issued May 19, 2000*

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DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$5,175.24 overpayment of compensation for the period April 16 to July 15, 1995; (2) whether the Office properly determined that appellant was at fault in creating the overpayment of compensation and that, therefore, the overpayment was not subject to waiver; and (3) whether the Office properly required repayment of the overpayment by deducting \$100.00 from appellant's compensation payments every 28 days.

The Board finds that appellant received a \$5,175.24 overpayment of compensation for the period April 16 to July 15, 1995.

On August 20, 1993 appellant, then a 43-year-old welder, sustained an employment-related cervical strain and cervicalgia. He received compensation for periods of disability. By letter dated March 12, 1997, the Office made a preliminary determination that appellant received a \$5,175.24 overpayment of compensation for the period April 16 to July 15, 1995 which was not subject to waiver because he was at fault in its creation. He requested a hearing and, by decision dated and finalized December 14, 1998, an Office hearing representative finalized the preliminary determination.<sup>1</sup> Appellant was terminated from the employing establishment effective April 11, 1995 for failure to perform his position. He received total disability compensation for the period April 16 to July 15, 1995 despite the fact that he also received severance pay for this period. The record contains evidence which shows that appellant received \$5,175.24 in compensation for the period April 16 to July 15, 1995 but he was not entitled to receive this amount because he had received severance pay for this period. Therefore, the Office properly determined that he received a \$5,175.24 overpayment.

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<sup>1</sup> The record also contains a March 21, 1998 preliminary determination regarding a \$444.79 overpayment but the record does not contain a final decision regarding this matter and it is not currently before the Board.

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

Section 8129(a) of the Federal Employees' Compensation Act<sup>2</sup> provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.<sup>3</sup> The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "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 this subchapter or would be against equity and good conscience."<sup>4</sup> No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.

In determining whether an individual is not "without fault" or alternatively, "with fault," section 10.320(b) of Title 20 of the Code of Federal Regulations provides in relevant part:

"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."<sup>5</sup>

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

With respect to whether an individual is without fault, section 10.320(c) of the Office's regulations provides in relevant part:

"Whether an individual is 'without fault' depends on all the circumstances surrounding the overpayment in the particular case. The Office will consider the individual's understanding of any reporting requirements, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported, efforts to comply with reporting requirements, opportunities

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 5 U.S.C. § 8129(a).

<sup>4</sup> 5 U.S.C. § 8129(b).

<sup>5</sup> 20 C.F.R. § 10.320(b).

to comply with reporting requirements, understanding of the obligation to return payments which were not due and ability to comply with any reporting requirements (e.g., age, comprehension, memory, physical and mental condition).”<sup>6</sup>

The record contains evidence that shows appellant knew or should have known that he could not concurrently receive total disability compensation from the Office and severance pay from the employing establishment. He initially signed a waiver of severance pay on April 12, 1995 in which he stated that he was fully aware of the impact of severance pay on continuing health benefits. Appellant further showed that he knew he could not receive concurrent Office and severance payments by noting that he waived his severance pay pending the outcome of his compensation claim with the Office. On April 13, 1995 he canceled the waiver of severance pay. Appellant noted that he wished to collect severance pay and “understands all penalties.”<sup>7</sup> At the hearing, he testified that he thought that the severance payments were actually part of his payments from the Office. However, appellant also testified that the payments he thought were Office payments, but were actually severance payments from the employing establishment, were received through direct deposit into his bank account, *i.e.*, the usual method through which he received payments from the employing establishment. The record also contains a document which advised him of the amount of the severance payments he would receive and therefore appellant should have been able to distinguish the severance payments from the Office payments of compensation.

Even though the Office may have been negligent in continuing to issue appellant checks for total disability while he received severance pay from the employing establishment, this does not excuse appellant’s acceptance of such checks which he knew or should have been expected to know was incorrect and should have been returned to the Office.<sup>8</sup> For the above reasons, appellant knew or should have known he received \$5,175.24 in compensation to which he was not entitled and therefore the Office properly found that he was at fault in its creation.

The Board further finds that the Office properly required repayment of the overpayment by deducting \$100.00 from appellant’s compensation payments every 28 days.

Section 10.321 of Title 20 of the Code of Federal Regulations provides in pertinent part:

“Whenever an overpayment has been made to an individual who is entitled to further 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,

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<sup>6</sup> 20 C.F.R. § 10.320(c).

<sup>7</sup> Appellant was also put on notice by an April 7, 1995 termination notice which indicated that if he received compensation from another source, such as disability retirement, he would be required to pay back any severance pay received.

<sup>8</sup> *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

and any other relevant factors, so as to minimize any resulting hardship upon such individual.”<sup>9</sup>

The record supports that, in requiring repayment of the overpayment by deducting \$100.00 from appellant’s compensation payments every 28 days, the Office took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.321 and found that this method of recovery would minimize any resulting hardship on appellant. Therefore, the Office properly required repayment of the overpayment by deducting \$100.00 from appellant’s compensation payments every 28 days.<sup>10</sup>

The decision of the Office of Workers’ Compensation Programs dated and finalized December 14, 1998 is affirmed.<sup>11</sup>

Dated, Washington, D.C.  
May 19, 2000

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>9</sup> 20 C.F.R. § 10.321(a); *see Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

<sup>10</sup> The Office hearing representative noted that appellant completed an overpayment questionnaire which showed he had \$1,860.00 in monthly income. She noted that appellant also had \$1,815.00 in monthly expenses but that a number of these expenses were not adequately documented despite prior requests to provide such documentation. The Office hearing representative deducted a \$100.00 monthly expense for maintenance which duplicated another \$100.00 expense on a credit card.

<sup>11</sup> The record contains a December 28, 1998 decision in which the Office made a determination regarding appellant’s \$5,175.24 overpayment. This decision concerns the same issues which were appropriately considered by the Office hearing representative in her December 28, 1998 decision and the later decision is not currently before the Board.