

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY ELLEN NEWTON and U.S. POSTAL SERVICE,
POST OFFICE, South Weymouth, MA

*Docket No. 00-981; Submitted on the Record;
Issued September 25, 2001*

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation in the amount of \$909.37 occurred; and (2) whether the Office properly found that appellant was at fault in the creation of the overpayment.

The Office accepted appellant's claim for a lumbar strain, herniated disc at L5-S1 and authorized a discectomy at L5-S1. On July 24, 1995 the Office notified appellant that she would receive compensation benefits from July 19 to December 9, 1995, or until she returned to work, whichever came first. In a report dated November 8, 1995, Dr. Robert J. Banco, appellant's Board-certified orthopedic surgeon, stated that appellant could return to work on November 20, 1995, for four hours a day for five days, on November 27, 1995, for six hours a day for five days and from December 4, 1995, for eight hours a day for five days in a light-duty position. In a report dated December 29, 1995, the employing establishment stated that appellant worked four hours a day from November 18, 1995, six hours a day from November 27, 1995, and eight hours a day from December 4, 1995.

By letter dated April 7, 1997, the Office made a preliminary determination that an overpayment to appellant had occurred in the amount of \$909.37. The Office stated that the overpayment occurred because the Office erroneously paid appellant \$909.37 from November 20 to December 4, 1995 after she had returned to work. The Office found that appellant was at fault in the matter of the overpayment. The Office informed appellant that, if she disagreed that the overpayment occurred, the amount of the overpayment, whether she was at fault, or whether she felt that the overpayment was no fault of her own and that recovery should be waived, she had the right to submit new evidence in support of her contention. The Office described the specific information that appellant should provide pertaining to her income and her expenses if she should seek a waiver of repayment. The Office stated that appellant could request a hearing, and advised her that, if it did not hear from her within 30 days, a decision would be made on the basis of the information currently on file. By decision dated November 19, 1999, the Office informed appellant that she was obligated to repay the Office the overpayment amount of \$909.37.

The Board finds that the Office properly found that appellant received an overpayment of compensation in the amount of \$909.37. The Office determined that appellant had been erroneously paid compensation benefits from November 20 to December 4, 1995 during which time she worked a part-time limited-duty schedule. Appellant did not reply to the Office's April 7, 1997 notice indicating that she had been overpaid by \$909.37 from November 20 to December 4, 1995. The Office, therefore, properly determined the amount of the overpayment.

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

Section 8129 of the Federal Employees' Compensation Act¹ 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.²

In determining whether an individual is with fault, section 10.433(a) of the Office's regulations provides in relevant part:

"A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (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 provide information which the individual 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."³

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment in accepting compensation benefits from November 20 to December 4, 1995, during which time she worked up to 20 hours a week from November 20, 1995, 30 hours a week from November 27, 1995, and 40 hours a week from December 4, 1995.⁴ Appellant was advised in the Office's July 24, 1995 notice that she would receive compensation benefits from July 19 to December 9, 1995, or until she returned to work, whichever came first. Appellant should have been aware that, as of November 20, 1995, when she returned to work for

¹ 5 U.S.C. § 8129(a)-(b).

² *Bonnye Mathews*, 45 ECAB 657 (1994).

³ 20 C.F.R. § 10.433(a).

⁴ The employing establishment reported that appellant worked four hours on November 20, 21 and 24, six hours a day on November 27, 28 and 29, and December 2, 1995, and eight hours on December 4, 1995.

four hours, that she was not entitled to receive compensation benefits for that same period, and for subsequent periods when she worked until December 5, 1995.

The decision of the Office of Workers' Compensation Programs dated November 19, 1999 is hereby affirmed.

Dated, Washington, DC
September 25, 2001

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member