

**United States Department of Labor  
Employees' Compensation Appeals Board**

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| ROLANDO TORRES, Appellant              | ) |                                |
|  | ) |                                |
| and                                    | ) | <b>Docket No. 04-819</b>       |
|  | ) | <b>Issued: August 24, 2004</b> |
| DEPARTMENT OF JUSTICE, IMMIGRATION     | ) |                                |
| & NATURALIZATION SERVICE, Brownsville, | ) |                                |
| TX, Employer                           | ) |                                |
|  | ) |                                |

*Appearances:*  
Rolando Torres, *pro se*  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chairman  
WILLIE T.C. THOMAS, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On February 5, 2004 appellant filed a timely appeal from the merit decision of the Office of Workers' Compensation Programs' hearing representative dated November 10, 2003, which found that he received an overpayment in the amount of \$2,373.49 and that he was not without fault in the creation of the overpayment. The hearing representative also ordered appellant to repay the overpayment in the amount of \$50.00 each month. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this overpayment case.

**ISSUES**

The issues are: (1) whether the Office properly determined that appellant received an overpayment in the amount of \$2,373.49 during the period May 21 through July 23, 2000; and (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment and, therefore, ineligible for waiver of the overpayment.

## **FACTUAL HISTORY**

On March 29, 2000 appellant, then a 31-year-old immigration inspector, filed a traumatic injury claim alleging that on March 28, 2000 he was struck in the right knee while attempting to detain a male subject. He stopped work on the date of injury and received continuation of pay from March 29 through May 20, 2000. By letter dated May 4, 2000, the Office accepted appellant's claim for a tear of the right anterior cruciate ligament (ACL).

On May 9, 2000 appellant filed a claim (Form CA-7) for wage loss. On the form, the employing establishment indicated appellant's base, premium and Sunday pay rates. Appellant was paid compensation beginning May 21, 2000.

Appellant underwent right knee surgery to reconstruct the ACL on May 24, 2000. In a June 15, 2000 letter, the Office advised appellant that he would be placed on the periodic rolls effective June 18, 2000.

The Office issued a compensation check to appellant on July 15, 2000 for the period June 18 through July 15, 2000.<sup>1</sup> Subsequently, the Office received a July 14, 2000 letter from appellant, indicating that he did not receive compensation for the period May 21 through June 17, 2000. By check dated July 29, 2000, appellant received compensation in the amount of \$1,713.00 for wage loss for this period.

In an August 1, 2000 letter, the Office advised appellant that a check for the period May 21 through June 17, 2000 had been reissued. The Office further advised appellant that if he had already received and cashed a check for the above period, he could not cash the new check. The Office informed appellant that if both checks were cashed, he would be overpaid and the overpayment would be recovered along with interest charges.

Appellant returned to full-time limited-duty work at the employing establishment on July 24, 2000. He returned to full-duty work on September 2, 2000. In an October 12, 2000 letter, the employing establishment advised the Office that appellant worked overtime, which included night differential and holiday pay, during the period March 1999 through March 2000 and submitted records documenting receipt of these payments.

In a September 21, 2001 letter, appellant advised the Office about his new mailing address and requested that any correspondence regarding his claim and "outstanding back pay from year 2000" be mailed to his new address.

The Office issued a compensation check to appellant on January 11, 2002 in the amount of \$2,373.49 for the period May 21 through July 23, 2000. The check contained the notation "[compensation] from May 21, 2000 to July 23, 2000." The Office's check was based on a pay rate of \$1,054.31 per week, which included premium pay. The amount of the check, \$2,373.49, represented the difference between the compensation appellant should have received based on the corrected pay rate and the compensation he previously received for the subject period.

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<sup>1</sup> The Office issued a check to appellant in the amount of \$491.57 for the period July 16 through 23, 2000, based on a pay rate of \$664.90 per week by check dated September 22, 2000.

By check dated April 12, 2002, the Office issued another compensation check to appellant in the amount of \$2,373.49 for the period May 21 through July 23, 2000. The check contained the notation, “[compensation adjusted] for premium pay May 21, 2000 thru July 23, 2000.”

By letter dated September 10, 2002, the Office advised appellant of a preliminary determination that an overpayment of compensation had occurred in the amount of \$2,373.49. The Office found that appellant received two duplicate checks for premium pay for the period May 21 through July 23, 2000. The Office stated that the first check was dated January 11, 2002 and the second check was dated April 12, 2002. The Office determined that appellant was at fault in the creation of the overpayment because the front of the checks listed the same period of compensation. The Office further stated that both checks were signed and deposited by appellant into an account with the same number. Appellant was advised that he could request a telephone conference, a final decision based on the written evidence only, or a hearing within 30 days of the date of this letter if he disagreed that the overpayment occurred, if he disagreed with the amount of the overpayment and if he believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof.

On September 25, 2002 appellant disagreed with the preliminary finding and requested a prerecoumpment hearing, which was held on August 20, 2003. In a September 25, 2002 letter, appellant requested waiver of the overpayment because he was not aware that the check he received was an overpayment, he was no longer able to work at his former duty station and had to transfer to his current duty station, which was out of state due to the type of injury he sustained, he was denied a schedule award<sup>2</sup> and repayment of the overpayment would cause severe financial hardship to his family. Appellant explained that, when he received the check, he believed it was the remainder of the balance due to him since the payment was almost two years overdue. Appellant further explained that, while he was under the workers’ compensation program, he received three payments and figured that the check was part of the amount that he was never paid. Appellant stated that on several occasions he tried to contact the Office about miscalculations in his pay noting that the Office failed to calculate his base, holiday, night differential and overtime pay. Appellant further noted that his financial status deteriorated as a result of the Office’s error. He stated that he was unable to perform the duties of his former position of immigration inspector after his employment-related injury and that he accepted a position of a lower grade and pay.<sup>3</sup> Appellant alleged that he was entitled to a schedule award for permanent impairment of his right knee. Regarding repayment of the overpayment, appellant stated that it would cause severe financial hardship as he was the sole provider of his household, his wife was seven months’ pregnant and she was not working and they were using their savings to purchase a new home in December 2002. He concluded that the creation of the overpayment was not his fault. Appellant submitted a completed Form OWCP-20 and supporting documentation along with his request for a prerecoumpment hearing.

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<sup>2</sup> On January 9, 2001 appellant filed a Form CA-7 for a schedule award, which was denied by the Office on April 7, 2001.

<sup>3</sup> The record reveals that appellant is currently employed at the Department of Homeland Security, Bureau of Customs and Border Protection, in Memphis, Tennessee.

At the hearing, appellant noted the notations on the January 11 and April 12, 2002 checks, regarding the type of compensation that was being paid. He testified that as the two checks were worded differently, he figured that they were for an amount that was still owed to him from a previous claim that took almost two years to be paid and that he was not at fault for depositing both checks into his bank account. Appellant further testified that he did not understand that he had received a duplicate payment as it appeared to him that the January 11, 2002 check covered additional compensation for regular wage loss due to him for the period May 21 through July 23, 2000, while the April 12, 2002 check covered compensation for premium pay for wage loss for the same period. On September 8, 2003 appellant submitted additional financial records.

By decision dated November 10, 2003, the hearing representative finalized the Office's preliminary determination regarding the fact of overpayment, the amount of the overpayment and finding of fault. The hearing representative ordered repayment of the overpayment in the amount of \$50.00 a month.

### **LEGAL PRECEDENT -- ISSUE 1**

Compensation benefits are computed based on an employee's pay rate during the relevant timeframe.<sup>4</sup> In computing one's pay rate, section 8114(e) of the Federal Employees' Compensation Act provides for the inclusion of certain "premium pay" received.<sup>5</sup> However, overtime pay, among other things, is excluded from consideration in determining one's rate of pay.<sup>6</sup> As pay rate is a critical component in the determination of the amount of compensation to which one is entitled, an incorrect pay rate may result in either the underpayment or overpayment of compensation.<sup>7</sup>

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<sup>4</sup> 5 U.S.C. §§ 8101(4), 8114; *see Marco Padilla*, 51 ECAB 202, 207-08 (1999).

<sup>5</sup> 5 U.S.C. § 8114(e).

<sup>6</sup> *Id.*

<sup>7</sup> *See generally Monte Fuller*, 51 ECAB 571 (2000) (discussion of proper determination of pay rate).

### **ANALYSIS -- ISSUE 1**

The record establishes that the Office issued a compensation check to appellant for wage-loss compensation in the amount of \$2,373.49, on January 11, 2002 covering the period May 21 through July 23, 2000. On April 12, 2002 the Office issued a separate check to appellant in the same amount for wage loss “compensation adjusted for premium pay” for the same period based on employing establishment records documenting appellant’s receipt of this pay.<sup>8</sup> Appellant cashed both checks and deposited them into his bank account. As appellant received a duplicate payment for the same period in question, the Board finds that an overpayment was created in the amount of \$2,373.49.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(b) of the Act<sup>9</sup> 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>10</sup> Thus, the Office may not waive the overpayment of compensation unless appellant was without fault.<sup>11</sup> Adjustment or recovery must therefore be made when an incorrect payment has been made to an individual who is with fault.<sup>12</sup>

On the issue of fault, section 10.433 of the Office’s regulations, provides that an individual will be found at fault if he or she has done any of the following:

“(1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known was incorrect.”<sup>13</sup>

With respect to whether an individual is without fault, section 10.433(b) of the Office’s regulations provides in relevant part:

“Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the

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<sup>8</sup> The Board notes that although the employing establishment advised the Office in its October 12, 2000 letter that appellant worked “overtime,” which included night differential and holiday pay, it appears that the Office did not include overtime pay in its recalculation of appellant’s pay rate.

<sup>9</sup> 5 U.S.C. § 8129(b).

<sup>10</sup> *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

<sup>11</sup> *Norman F. Bligh*, 41 ECAB 230 (1989).

<sup>12</sup> *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

<sup>13</sup> 20 C.F.R. § 10.433(a) (1999).

complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid."<sup>14</sup>

### **ANALYSIS -- ISSUE 2**

In this case, the Office applied the third standard in determining that appellant was at fault in the creation of the overpayment. In order for the Office to establish that appellant was with fault in creating the overpayment of compensation, the Office must show that, at the time appellant received the compensation checks in question, he knew or should have known that the payments were incorrect.<sup>15</sup> The evidence in the record, however, fails to establish that appellant accepted any compensation which he knew or should have known was incorrect.

Appellant believed that the April 12, 2002 check he received in the amount of \$2,373.49 was not an overpayment. Rather, he believed that the check was the remainder of the balance due to him since this payment was almost two years overdue. He stated that, while he was under the workers' compensation program, he received three payments and figured that the April 12, 2002 check was part of the amount that he was never paid. Appellant believed that the January 11, 2002 check which was also in the amount of \$2,373.49 was for additional compensation for regular wage loss for the period May 21 through July 23, 2000 and the April 12, 2002 check was for premium pay for wage loss for the same period. He indicated that he had attempted to contact the Office on several occasions to address miscalculations relating to his base, holiday, night differential and overtime pay rates. In a September 21, 2001 letter, appellant advised the Office of his new mailing address and requested that any correspondence regarding his claim and "outstanding back pay from year 2000" be mailed to this address.

The face of the January 11, 2002 check read "[compensation] from May 21, 2000 to July 23, 2000" while the face of the April 12, 2002 check read "[compensation adjusted] for premium pay May 21, 2000 thru July 23, 2000." Since the April 12, 2002 compensation check indicated that appellant was receiving "compensation adjusted" for premium pay, it was reasonable for him to consider this check as additional compensation. Based upon the wording on the January 11 and April 12, 2002 checks, appellant's belief that he was entitled to back pay for the year 2000 and the absence of any evidence showing that appellant knowingly accepted a payment for which he knew to be incorrect, the Board finds that, under these circumstances, the evidence is insufficient to establish that, at the time appellant received the April 12, 2002 check, he knew he had received an incorrect payment.<sup>16</sup>

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<sup>14</sup> *Id.* at § 10.433(b).

<sup>15</sup> *Diana L. Booth, supra* note 12.

<sup>16</sup> With regard to the hearing representative's finding that appellant must repay the overpayment in the amount of \$50.00 each month, the Board notes that the Office is not seeking recovery from continuing compensation benefits. The Board does not have jurisdiction under the Debt Collection Act, 5 U.S.C. § 5511 *et seq.*, to consider the matter of recovery of an overpayment against the assets of the salary of an employee. *See Beverly E. Labbe*, 50 ECAB 440, 443 (1999); *Levon H. Knight*, 40 ECAB 658 (1989). Further, the Board's jurisdiction is limited to instances in which recovery is sought against continuing compensation benefits under the Act. *Id.* In light of the above, the Board does not have jurisdiction over the method of recovery of the overpayment in this case.

Inasmuch as it has been determined that appellant was without fault in the creation of the overpayment in the amount of \$2,373.49, the Office may only recover the overpayment in accordance with section 8129(b) of the Federal Employees' Compensation Act,<sup>17</sup> if a determination has been made that recovery of the overpayment would neither defeat the purpose of the Federal Employees' Compensation Act nor be against equity and good conscience.<sup>18</sup> Therefore, the case should be remanded to the Office for further development with respect to whether appellant is entitled to waiver of the overpayment. After such further development as the Office may find necessary, it should issue a *de novo* decision on the issue of whether the overpayment should be waived.

### **CONCLUSION**

The Board finds that the Office properly determined that appellant received an overpayment in the amount of \$2,373.49 during the period May 21 through July 23, 2000. The Board, however, finds that the Office improperly determined that appellant was at fault in the creation of the overpayment.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the November 10, 2003 decision of the Office of Workers' Compensation Programs' hearing representative is set aside and the case is remanded for further consideration consistent with this decision.

Issued: August 24, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>17</sup> 5 U.S.C. § 8129(b).

<sup>18</sup> The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Federal Employees' Compensation Act or would be against equity and good conscience are set forth in 20 C.F.R. §§ 10.434, 10.436 and 10.437.