



sprain. On March 7, 2003 Dr. Harold Markowitz, a Board-certified orthopedic surgeon, performed surgery for a right shoulder arthroscopy.

On March 28, 2003 the Office issued appellant \$1,869.59, which represented payment for compensation for the period March 7 through 28, 2003. However, in a letter to appellant also dated March 28, 2003, the Office noted that it had received a call from the employing establishment notifying it that appellant had received advanced sick leave for the same period. The Office informed appellant that this meant there was an overpayment and advised appellant that the check issued on March 28, 2003 needed to be returned. By letter dated March 28, 2003, the employing establishment notified the Office that appellant had been granted 240 hours of advanced sick leave for the period March 1 through April 5, 2003. The employing establishment further noted that, although a Form CA-7 was not filed by appellant, the Office paid appellant disability compensation.

By letter dated August 8, 2003, the Office made a preliminary finding that appellant had been overpaid in the amount of \$1,869.59. Appellant did not file a timely response. By decision dated May 5, 2004, the Office made final the determination that appellant received an overpayment in compensation of \$1,869.59. The Office found that appellant had received a payment that he knew or should have known to be incorrect and, accordingly, he was at fault in the creation of the overpayment. For this reason, the overpayment was not subject to waiver.

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

Section 8129(a) of the Federal Employees' Compensation Act<sup>1</sup> provides in pertinent part:

“When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”

Section 8116(a) of the Act provides that an employee who is receiving compensation for an employment injury may not receive wages for the same period.<sup>2</sup>

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

Appellant received a check for \$1,869.59 for compensation for the period March 7 through 28, 2003. However, the employing establishment stated that appellant also received advanced sick leave for this period. Appellant was notified by letter dated March 28, 2003 that he was to return the check but did not do so. Appellant was sent a preliminary

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<sup>1</sup> 5 U.S.C. § 8128(a).

<sup>2</sup> 5 U.S.C. § 8116(a).

overpayment notice on August 8, 2003, but he did not file a timely response.<sup>3</sup> As appellant was not entitled to receive wages in the form of advanced sick leave at the same time he received compensation for disability under the Act, an overpayment occurred in the amount of \$1,869.59.

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

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payment he or she receives from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to, or the amount of, benefits. 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 he or she knew or should have known to be incorrect; or (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 to be incorrect (this provision applies only to the overpaid individual).<sup>4</sup>

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 complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.<sup>5</sup>

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

In the present case, the Office found appellant at fault in the creation of the overpayment based on its determination that he accepted a payment that he knew or should have known to be incorrect. The Board finds that appellant was at fault in creating the overpayment of compensation, and therefore, the overpayment is not subject to waiver. The check dated March 28, 2003 was clearly marked as compensation paid for the period March 7 to 28, 2003. Appellant also received advanced sick leave for this time period. Appellant knew or should have known that he was not entitled to compensation benefits for the same period he had requested and received wages in the form of advanced sick leave. Moreover, by letter dated March 28, 2003, the Office advised appellant of this fact and to immediately return the check. The Board finds that appellant accepted a payment he knew or should have known to be incorrect and he is at fault in the creation of the overpayment. Since appellant is at fault in the creation of the overpayment, waiver of recovery of the overpayment is precluded.

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<sup>3</sup> Although appellant urges on appeal that he at no time received any such notification, it is presumed in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. This presumption arises when it appears from the record that notice was properly addressed and duly mailed. The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the Office itself, will raise the presumption that the original was received by the addressee. *Levi Drew, Jr.*, 52 ECAB 442, 444 (2001).

<sup>4</sup> 20 C.F.R. § 10.433(a).

<sup>5</sup> 20 C.F.R. § 10.433(b).

**CONCLUSION**

The Board finds that appellant was at fault in receiving an overpayment in the amount of \$1,869.59 and therefore the overpayment was not subject to waiver.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 5, 2004 is affirmed.

Issued: December 15, 2004  
Washington, DC

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member