

collapsed.¹ The Office accepted the claim for cervical and back strains. Appellant returned to work at four hours per day on October 24, 1991; she received compensation for wage loss for the remaining four hours per day. By decision dated October 17, 1994, the Office determined that appellant's actual earnings fairly and reasonably represented her wage-earning capacity. Appellant began receiving compensation of \$993.00 every four weeks based on her loss of wage-earning capacity.

By letters dated January 7, 2000 and January 5, 2001, the Office advised appellant that her case was undergoing a review to determine if appropriate compensation payments were being made. The Office advised appellant that she should complete the enclosed Form CA-1032 with respect to any earnings or employment. On May 1, 2001 the Office suspended appellant's compensation on the grounds that she had not completed the Form CA-1032. The Office received the requested information on May 31, 2001 and appellant's compensation was reinstated.

The record indicates that prior to May 1, 2001 appellant had been receiving compensation every four weeks; in a payment dated April 21, 2001, covering the period March 25 to April 21, 2001, appellant received \$1,184.00 in net compensation. Upon reinstatement of her compensation, the Office issued a \$1,184.00 payment, dated June 8, 2001, for the period April 22 to May 19, 2001. On June 16, 2001 the Office issued a payment of \$2,276.00 for the period May 20 to June 16, 2001.

Appellant stopped working on June 18, 2001 and on September 15, 2001 filed a notice of recurrence of disability (Form CA-2a). By letter dated March 26, 2002, the Office accepted the recurrence of disability.

In a letter dated January 2, 2004, the Office advised appellant of a preliminary determination that an overpayment of \$1,092.00 was created, because she received compensation for the period May 20 to June 16, 2001 at the rate for temporary total disability, rather than the loss of wage-earning capacity compensation rate. The Office also made a preliminary determination that appellant was at fault in creating the overpayment, as she had accepted a payment that she knew or should have known was incorrect. Appellant was advised of the actions she could pursue within 30 days and the information needed to waive the overpayment.

By decision dated February 10, 2004, the Office finalized its preliminary determinations with respect to the amount of overpayment and fault. An accompanying overpayment action form indicated that full payment of the overpayment was requested from appellant.

LEGAL PRECEDENT -- ISSUE 1

Once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings.² When a claimant is

¹ The record indicates that appellant also filed traumatic injury claims on December 16, 1977, October 16, 1979 and May 28, 1982.

² *Roy Matthew Lyon*, 27 ECAB 186, 189-90 (1975).

entitled to compensation based on a partial loss of wage-earning capacity, receipt of compensation for temporary total disability constitutes an overpayment of compensation.³

ANALYSIS -- ISSUE 1

In the present case, the Office determined, by decision dated October 17, 1994, that appellant's part-time position fairly and reasonably represented her wage-earning capacity. Appellant began receiving compensation based on her loss of wage-earning capacity. The Office applied the *Shadrick*⁴ formula using appellant's actual earnings of \$330.80 per week, resulting in a loss of earning capacity of \$353.18 per week, for a net compensation of \$993.00 every 28 days. The wage-earning capacity determination was not modified and appellant remained entitled to compensation based on loss of wage-earning capacity. As of April 21, 2001, appellant received \$1,184.00 every four weeks. The Office issued a payment dated June 16, 2001 for the four-week period May 20 to June 16, 2001 in the amount of \$2,276.00, representing compensation for temporary total disability. Appellant was entitled to \$1,184.00 for this period based on her loss of wage-earning capacity. The Board accordingly finds that appellant received an overpayment of \$1,092.00 in this case.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Federal Employees' Compensation Act⁵ provides: "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 the Act or would be against equity and good conscience."⁶ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.⁷

On the issue of fault, 20 C.F.R. § 10.433 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."

ANALYSIS -- ISSUE 2

The Office determined that appellant had accepted a payment that she knew or should have known was incorrect. In this case, appellant began receiving compensation in 1994 based on a loss of wage-earning capacity, and as of April 21, 2001 she was receiving \$1,184.00 every four weeks. When her compensation was reinstated after a temporary suspension in May 2001,

³ See *Alfonso S. Gonzalez*, 45 ECAB 2000 (1993).

⁴ *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403.

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 5 U.S.C. § 8129(b).

⁷ *Gregg B. Manston*, 45 ECAB 344 (1994).

she received a \$1,184.00 payment dated June 8, 2001 for the period April 22 to May 19, 2001. On June 16, 2001 the Office issued a payment of \$2,276.00 for the period May 20 to June 16, 2001. At the time appellant accepted this payment she did not have a reasonable basis to believe that it represented a correct payment. Based on the history of compensation payments made to appellant since 1994, she should have known that a payment exceeding her prior payments by more than a \$1,000.00 was incorrect. The Board therefore finds that appellant accepted a June 16, 2001 payment that she should have known was incorrect. Under section 10.433, she is at fault and therefore is not entitled to waiver of the overpayment.

On appeal appellant notes that she stopped working on June 18, 2001 and she alleges that she was not properly paid compensation for temporary total disability during the period she was off work. The record indicates only that the Office advised appellant that it accepted a recurrence of disability. There are no adverse Office decisions with respect to a recurrence of disability as of June 18, 2001; therefore, the Board lacks jurisdiction over this issue.⁸ Appellant may pursue issues regarding the recurrence of disability in an appropriate manner with the Office.

CONCLUSION

The Board finds that the June 16, 2001 payment of \$2,276.00 for temporary total disability created an overpayment of compensation of \$1,092.00. The Board further finds that appellant should have known that the payment was incorrect; she therefore is not “without fault” under 5 U.S.C. § 8129 and is not entitled to waiver of the overpayment.

⁸ The Board also notes that the Office requested full payment of the overpayment, and advised appellant to contact the Office within 30 days if she was unable to refund the entire amount so that appropriate arrangements for recovery could be made. The Office did not issue a final decision with respect to recovery of the overpayment from continuing compensation, and the Board will not address the issue. *See Levon H. Knight*, 40 ECAB 658, 665 (1989).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 10, 2004 is affirmed.

Issued: September 27, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member