

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

SALVATOR A. SCHEMBARI, Appellant

and

**U.S. POSTAL SERVICE, SHERMAN OAKS
STATION, Sherman Oaks, CA, Employer**

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**Docket No. 05-1309
Issued: December 6, 2005**

Appearances:
Anthony M. Amoscato, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 1, 2005 appellant, through counsel, filed a timely appeal from the April 28, 2005 merit decision of the Office of Workers' Compensation Programs' which found him at fault in creating a \$22,467.56 overpayment of benefits after he returned to work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this overpayment decision.

ISSUES

The issues are: (1) whether an overpayment was created in the amount of \$22,467.56 for the period May 24, 2004 to January 22, 2005; and (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment, thus, precluding waiver of recovery. On appeal appellant contends that he returned the checks in question to the Office and never cashed them.

FACTUAL HISTORY

On September 18, 2003 appellant, a 45-year-old customer service manager, filed a traumatic injury claim alleging that he injured his back and neck on that date when he was rear ended at a traffic stop. Appellant stopped work on September 18, 2003 and returned to work five hours per day on May 24, 2004. The Office accepted the claim for cervical and lumbar strains.

In a letter dated October 30, 2004, appellant's counsel returned two checks dated August 7 and September 4, 2004, in the amount of \$3,692.72 each. The August 7, 2004 check covered the period July 11 to August 7, 2004. The period August 8 to September 4, 2004 was covered by the September 4, 2004 check.

In a January 12, 2005 report of telephone call, the employing establishment informed the Office that appellant returned to work on May 24, 2004 working five hours per day. The employing establishment advised that appellant was an exempt employee "and as a result he is paid full salary at [eight] hours, even though he is only working only [five] hours."

On January 25, 2005 the Office received copies of appellant's daily work and leave breakdown and POC sheet for the period March 8, 2003 to January 7, 2005. The time sheet revealed that appellant returned to work on May 24, 2004 and it noted eight hours under the work column.

The record contains evidence that appellant returned checks dated October 30 and November 27, 2004. These checks were each in the amount of \$3,600.72. The October 30, 2004 check covered compensation for the period October 3 to 30, 2004. Compensation for the period October 31 to November 27, 2004, was covered by the check dated November 27, 2004.

On February 24, 2005 the employing establishment offered appellant a modified job as a manager of customer services working four hours per day, which he accepted.

By letter dated January 29, 2005, the Office advised appellant of its preliminary determination that an overpayment in the amount of \$26,068.28 occurred because he was paid compensation for total disability for the period May 24, 2004 to January 22, 2005, while being paid for eight hours of work even though he was working five hours per day. In calculating the amount of overpayment, the Office noted that appellant "actually received \$33,453.72 for the period." It was noted that appellant returned two checks (each in the amount of \$3,692.72 for a total of \$7,385.44) thereby resulting in a total overpayment amount of \$26,068.28. The Office found that he was at fault in the creation of the overpayment because appellant knew or should have known that he was not entitled to receive compensation for total disability after he returned to work without any loss of pay. The Office requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) and copies of supporting financial documents within 30 days if he disagreed with the fact or amount of the overpayment. The Office further advised of his right to request a precoupment hearing or a telephone conference. There was no response from appellant.

By letter dated April 19, 2005, received by the Office on April 22, 2005, appellant's counsel returned a compensation check dated January 22, 2005, covering the period

December 26, 2004 to January 22, 2005, in the amount of \$3,600.72. Counsel stated that appellant was returning the check as he “is no longer off of work.”

By decision dated April 28, 2005, the Office finalized the overpayment determination in the amount of \$22,467.56 and the finding of fault. The Office noted that appellant’s counsel returned a compensation check in the amount of \$3,600.72 thereby reducing the overpayment to \$22,467.56. The Office requested payment in full within 30 days and that if payment was not received, the Office would request the employing establishment “to offset the claimant’s salary as an alternative means of recovery.”

LEGAL PRECEDENT

Section 8129(a) of the Federal Employees Compensation Act¹ 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 time period.²

ANALYSIS

In order for the Board to properly review the overpayment decision on appeal, the Office must make appropriate findings based on the evidence of record. The Office determined that an overpayment of \$22,467.56 was created because appellant received compensation from May 24, 2004 to January 22, 2005, although he had returned to work and had no wage loss. In order to confirm the continuing compensation payments, the record should establish the specific payments that were made, the date issued and the compensation period covered by the specific payments. The Board finds that the record is devoid of any evidence that compensation was paid for the period in question except for the checks returned by appellant. These checks were dated August 7 and September 4, 2004, in the amount of \$3,692.72 each while the checks dated October 30 and November 27, 2004 and January 22, 2005 were each in the amount of \$3,600.72. There is no other evidence with respect to the individual payments issued during the relevant time period. Moreover, the record supports appellant’s contention that he returned checks dated August 7, September 4, October 30 and November 27, 2004 and January 22, 2005 to the Office and never cashed otherwise negotiated the payments. The August 7, 2004 check covered the period July 11 to August 7, 2004. The period August 8 to September 4, 2004 was covered by the September 4, 2004 check. The October 30, 2004 check covered the period October 3 to October 30, 2004 and the period October 31 to November 27, 2004 was covered by the check dated November 27, 2004. A check dated January 22, 2005 covered the period December 26, 2004 to January 22, 2005. There is no record of any computer printouts establishing the payment

¹ 5 U.S.C. § 8129(a).

² 5 U.S.C. § 8116(a).

of compensation for the period May 24 to July 10, 2004.³ Therefore, the Office has failed to establish that an overpayment occurred in this case.⁴

CONCLUSION

The Board finds that the Office failed to establish that there was an overpayment of compensation in the amount of \$22,467.56.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 28, 2005 is reversed.

Issued: December 6, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

³ See *William P. Tippets*, Docket No. 03-1755 (issued July 29, 2004) (the Board found that the Office failed to establish that an overpayment existed as the record contained no evidence of the specific amount appellant received for the period in question or the specific amount he was entitled to receive at the correct rate).

⁴ In light of the Board's resolution of the first issue, the remaining issues in this case are moot.