

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

IRMA E. SORIANO, Appellant

and

**U.S. POSTAL SERVICE, AIR MAIL CENTER,
San Francisco, CA, Employer**

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**Docket No. 04-839
Issued: March 16, 2005**

Appearances:
Irma E. Soriano, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On February 10, 2004 appellant filed a timely appeal of the November 3, 2003 merit decision of the Office of Workers' Compensation Programs, which found that she received an overpayment of compensation in the amount of \$1,502.49. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant received an overpayment in the amount of \$1,502.49 for the period March 10 to April 19, 2003; (2) whether the Office properly determined that appellant was at fault in accepting the overpayment; and (3) whether the Office properly required repayment of the overpayment by deducting \$150.00 every four weeks from appellant's continuing compensation.

FACTUAL HISTORY

Appellant, a 45-year-old former distribution clerk, has an accepted claim for bilateral shoulder strain, tenosynovitis of the right arm, and right rotator cuff syndrome, which arose on or

about September 19, 1997. The Office also accepted brief depressive reaction due to pain resulting from the accepted orthopedic conditions. Appellant had been receiving wage-loss compensation for temporary total disability and on March 10, 2003, she returned to work on a part-time basis as a data conversion operator with weekly wages of \$409.21. Although the Office was aware of appellant's scheduled return to duty on March 10, 2003, it continued to pay wage-loss compensation for total disability through April 19, 2003.

On May 2, 2003 the Office issued a preliminary finding of overpayment in the amount of \$1,502.49 for the period March 10 to April 19, 2003. The Office explained that the overpayment resulted from appellant's continued receipt of wage-loss compensation for total disability after her March 10, 2003 return to part-time employment. Additionally, the Office indicated that appellant was at fault because she accepted a payment she knew or should have known was incorrect.

On May 30, 2003 appellant requested a telephone conference with the Office on the issue of fault and possible waiver of the overpayment. Appellant stated that she disagreed with the finding of fault. She noted that she provided information from her doctor and submitted her direct deposit request and that the Office had 39 days to make the necessary adjustments.¹

On August 14, 2003 the Office formally advised appellant that her wage-loss compensation was being reduced effective March 10, 2003 to reflect her part-time earnings as a data conversion operator. The Office informed her that her new four-week compensation rate would be \$1,467.00, as reflected in the check she received for the period beginning April 20, 2003.

In a decision dated November 3, 2003, the Office issued a final decision on the \$1,502.49 overpayment. The Office reiterated that appellant was at fault and ordered repayment by deducting \$150.00 every four weeks from appellant's continuing compensation.

LEGAL PRECEDENT -- ISSUE 1

If an employee returns to work and has earnings, she is not entitled to receipt of temporary total disability benefits and actual earnings for the same time period. The Office, therefore, offsets actual earnings.²

ANALYSIS -- ISSUE 1

For the period March 10 to April 19, 2003, the Office paid appellant \$3,650.60 for temporary total disability. The Office subsequently reduced appellant's wage-loss compensation to reflect her earnings as a part-time data conversion operator. The Office took into account appellant's actual earnings during the period March 10 to April 19, 2003 and properly

¹ Appellant later submitted an overpayment recovery questionnaire, but she did not schedule a telephone conference with the Office.

² *Daniel Renard*, 51 ECAB 466, 469 (2000); 20 C.F.R. § 10.403(c) (1999).

determined her wage-earning capacity.³ Based on appellant's earnings of \$409.21 per week beginning March 10, 2003, the Office determined that appellant was entitled to wage-loss compensation of \$2,148.11 for the period March 10 to April 19, 2003. The record supports the Office's finding that appellant was overpaid \$1,502.49 for the period March 10 to April 19, 2003.

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of the Act and the implementing regulations, 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.⁴ Section 10.433 of the implementing regulations specifically provides that the Office may consider waving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁵ The regulation further provides that each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from the Office are proper.⁶ Under the regulations a recipient will be found to be at fault with respect to creating an overpayment if the recipient "[a]ccepted a payment which he or she knew or should have known to be incorrect."⁷

ANALYSIS -- ISSUE 2

The Office found appellant at fault on the basis that she knew or should have known that the payments she received were incorrect. However, the Office provided no factual basis to support its finding. Neither the May 2, 2003 preliminary determination nor the November 3, 2003 final decision identified facts or included rationale to support the Office's finding of fault. The Office simply concluded that appellant was at fault because she knew or should have known that the payments she received were incorrect.

Appellant had been receiving her monthly wage-loss compensation payments via electronic funds transfer. The overpayment in this case covered a relatively short period of

³ The Office did not issue a formal wage-earning capacity determination, but instead reduced appellant's compensation using the *Shadrick* formula. See *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403(c) (1999). When an employee returns to work and has earnings, she is not entitled to receipt of temporary total disability benefits and actual earnings for the same time period. *Daniel Renard*, *supra* note 2. Under these circumstances, the Office offsets actual earnings pursuant to the *Shadrick* formula. If a reduction of benefits based upon actual earnings is not accompanied by a determination that actual earnings "fairly and reasonably" represent wage-earning capacity, an informal reduction of benefits utilizing the *Shadrick* formula is proper rather than a formal loss of wage-earning capacity determination. As the Office in this case did not find that appellant's actual earnings fairly and reasonably represented her wage-earning capacity, the August 14, 2003 informal reduction of benefits was proper.

⁴ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437 (1999).

⁵ 20 C.F.R. § 10.433(a) (1999).

⁶ *Id.*

⁷ *Id.*

approximately six weeks. The Office was aware that appellant anticipated returning to duty several weeks prior to her eventual start date. Additionally, the Office received notification on March 10, 2003 that appellant had in fact returned to work that day. Appellant only worked part time beginning March 10, 2003, therefore, she was entitled to receive some amount of wage-loss compensation following her return to duty. However, she could not be expected to determine on her own the exact amount of wage-loss compensation she would be entitled to receive.⁸ Furthermore, because the funds were deposited directly into her bank account, appellant was not in a position to immediately decline acceptance of the amounts paid by the Office. Given the particular circumstances, including the brief period of time for which compensation was overpaid; the Board finds that appellant was without fault in either creating or accepting the overpayment.⁹ Accordingly, the Office's November 3, 2003 finding of fault is reversed. The case is remanded to the Office to determine whether appellant is entitled to waiver of recovery of the overpayment.¹⁰

CONCLUSION

The Board finds that appellant received an overpayment in the amount of \$1,502.49 for the period March 10 to April 19, 2003. The Board also finds that appellant was without fault in either the creation or acceptance of the overpayment.

⁸ Appellant was entitled to approximately 60 percent of the funds she received for the period March 10 to April 19, 2003.

⁹ See *William F. Salmonson*, 54 ECAB ____ (Docket No. 02-1448, issued October 9, 2002).

¹⁰ The Office's decision to recover the overpayment by deducting \$150.00 every 28 days from appellant's continuing compensation is set aside pending resolution of the issue of waiver of recovery. 20 C.F.R. § 10.441(a) (1999).

ORDER

IT IS HEREBY ORDERED THAT the November 3, 2003 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part, and the case is remanded for further action consistent with this decision.

Issued: March 16, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member