



## **FACTUAL HISTORY**

On April 1, 2004 appellant, then a 50-year-old rubber worker leader, filed a traumatic injury claim alleging that on March 27, 2003 he felt pain in his left shoulder when he picked up a road wheel. By letter dated April 25, 2003, the Office accepted appellant's claim for disorders of the bursae and tendons in the left shoulder region.

On May 20, 2003 appellant completed a direct deposit sign-up form authorizing the Office to send his compensation payments to his bank for deposit to his account. On May 30, 2003 the Office determined that appellant's weekly base pay rate was \$774.53 which included \$764.97 (\$19.06 per hour multiplied by 40.13461538 hours per week) as his base weekly rate and \$9.56 for night differential pay. Thereafter, appellant received a compensation check dated June 14, 2003 in the amount of \$1,668.78 for the period May 18 through June 14, 2003. In a letter dated June 16, 2003, the Office advised appellant about the terms under which he was entitled to receive compensation and instructed him that, in order to avoid an overpayment of compensation, he should notify the Office immediately when he returned to work and that, if he worked for any portion of the period for which a payment was made, he must return that compensation check to the Office. On July 12, 2003 appellant received a compensation check in the amount of \$2,017.32 for the period June 15 through July 12, 2003.

On July 14, 2003 appellant returned to full-time modified work as a rubber worker leader based on physical restrictions prescribed by Dr. Gregory Richter, his treating Board-certified family practitioner, and Dr. Remon A. Fino, an Office referral physician. By letter dated September 16, 2003, the Office advised appellant that on that date it became aware of his return to work on July 14, 2003. The Office further advised him that he had received compensation by direct deposit in the amount of \$2,017.32 for the period July 13 through August 9, 2003 and the same amount for the period August 10 through September 6, 2003.<sup>1</sup> The Office requested that he submit a check or money order for \$4,034.64 and apologized for the overpayment he received. A copy of the September 16, 2003 letter was also provided to the employing establishment. Appellant did not respond to the Office's letter.

By letter dated March 5, 2004, the Office advised appellant of a preliminary determination that an overpayment of compensation had occurred in the amount of \$4,034.64. The Office found that he had returned to work on July 14, 2003 and received two compensation payments during the period July 13 through September 6, 2003. The Office further found that appellant was at fault in the creation of the overpayment because he accepted two payments that he knew or should have known to be incorrect as its September 16, 2003 letter informed him that he was not entitled to such payments. 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

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<sup>1</sup> The compensation check for the period July 13 through August 9, 2003 is dated August 9, 2003 and the compensation check for the period August 10 through September 6, 2003 is dated September 6, 2003.

questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days.

On April 1, 2004 appellant requested that the Office grant a 30-day extension for submitting financial information. He explained that he had undergone right shoulder surgery on March 3, 2004 which was performed by Dr. Carey C. Alkire, a Board-certified orthopedic surgeon, and approved by the Office. He was released from the hospital several days later and was required to take several prescription drugs which prevented him from performing his daily activities. Appellant did not receive the March 5, 2004 preliminary determination letter until March 11, 2004. He contended that creation of the overpayment was not his fault and requested waiver of recovery of the overpayment.

On April 2, 2004 the Office denied appellant's request for a 30-day extension. The Office stated that he had known about the overpayment since at least September 16, 2003 when he and the employing establishment were advised about it. The Office further stated that appellant should have known that he was not entitled to either of the two checks he received because he had returned to work on July 14, 2003. The Office noted that he had not made an effort to discuss repaying the overpayment until it received an electronic mail message on April 1, 2004 regarding his request for an extension to submit the requested financial information.

On April 5, 2004 appellant returned to full-time modified work as a rubber worker leader. By decision dated April 5, 2004, the Office finalized the preliminary determination regarding the fact of overpayment, the amount of the overpayment and finding of fault. The Office ordered appellant to repay the overpayment in full.

In a June 22, 2004 decision, the Office found that appellant's actual earnings as a modified rubber worker leader, which became effective July 14, 2003, fairly and reasonably represented his wage-earning capacity. The Office further found that appellant's actual earnings of \$907.17 per week met or exceeded the current wages of \$877.56 per week for the job he held at the time of his injury. The Office noted that the decision did not affect appellant's entitlement to ongoing medical benefits.

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

Section 10.500(a) of the Office's implementing regulations provides as follows:

"Benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury...."<sup>2</sup>

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<sup>2</sup> 20 C.F.R. § 10.500.

## **ANALYSIS -- ISSUE 1**

Appellant returned to full-time modified work as a rubber worker leader on July 14, 2003 but he received compensation in the amount of \$2,017.32 for the period July 13 through August 9, 2003 and the same amount for the period August 10 through September 6, 2003, totaling \$4,034.64. As appellant returned to work, at full salary, he was not entitled to compensation for any subsequent period. Further, he has not submitted any evidence showing that he did not receive an overpayment of compensation or contesting the existence and amount of overpayment. The Board finds that an overpayment was created in the amount of \$4,034.64.

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

Section 8129(b) of the Federal Employees' Compensation Act<sup>3</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>4</sup> Thus, the Office may not waive the overpayment of compensation unless appellant was without fault.<sup>5</sup> Adjustment or recovery must therefore be made when an incorrect payment has been made to an individual who is with fault.<sup>6</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>7</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 complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.”<sup>8</sup>

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<sup>3</sup> 5 U.S.C. § 8129(b).

<sup>4</sup> *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

<sup>5</sup> *Norman F. Bligh*, 41 ECAB 230 (1989).

<sup>6</sup> *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

<sup>7</sup> 20 C.F.R. § 10.433(a).

<sup>8</sup> *Id.* at § 10.433(b).

## ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in the creation of the overpayment. 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 he accepted were incorrect.<sup>9</sup> On May 20, 2003 appellant authorized the Office to deposit his compensation checks directly to his bank account. Thereafter, he received a check on June 14, 2003 for \$1,668.78 and another on July 12, 2003 for \$2,017.32. After appellant returned to full-time modified work on July 14, 2003, two additional compensation deposits were made on August 9 and September 6, 2003, each for \$2,017.32. When the August 9 and September 6, 2003 deposits were made, appellant should have known that he was not entitled to them. They were in the same amount as the July 12, 2003 payment he received when he was not working. Further, by letter dated June 16, 2003, the Office fully explained the terms under which appellant was entitled to receive compensation and specifically instructed him that, in order to avoid an overpayment of compensation, he should notify the Office immediately when he returned to work and that, if he worked for any portion of the period for which a payment was made, he must return that compensation payment to the Office. Under these circumstances, the Board finds that appellant knew or should have known that he was accepting the August 9 and September 6, 2003 payments to which he was not entitled. Pursuant to section 8129(b) of the Act and 10.433(3) of the implementing regulations, the Board finds that appellant is not without fault in creating the overpayment and, therefore, is not entitled to waiver of the overpayment.<sup>10</sup>

## LEGAL PRECEDENT -- ISSUE 3

Under section 8115(a) of the Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.<sup>11</sup> Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.<sup>12</sup> The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Shadrick* decision,<sup>13</sup> has been codified at 20 C.F.R. § 10.403. The actual earnings in the position are compared with the current wages of the date-of-injury position to determine loss of wage-earning capacity.<sup>14</sup>

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<sup>9</sup> *Diana L. Booth*, *supra* note 6.

<sup>10</sup> The Board does not have jurisdiction over the means of recovery of the overpayment. The Board's jurisdiction is limited to instances, in which recovery is sought against continuing compensation benefits under the Act. *See* 5 U.S.C. § 8129; *Beverly E. Labbe*, 50 ECAB 440, 443 (1999); *Levon H. Knight*, 40 ECAB 658, 665 n. 6 (1989).

<sup>11</sup> 5 U.S.C. § 8115(a).

<sup>12</sup> *See Monique L. Love*, 48 ECAB 378 (1997).

<sup>13</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953).

<sup>14</sup> *Id.*

### ANALYSIS -- ISSUE 3

The Office accepted that on March 27, 2003 appellant sustained disorders of the bursae and tendons in the left shoulder region. He returned to full-time modified work as a rubber worker leader effective July 14, 2003. Following his March 3, 2004 right shoulder surgery, appellant returned to his full-time modified rubber worker leader position on April 5, 2004.<sup>15</sup> He satisfactorily worked in the modified position and the record does not contain evidence showing that this position was part-time, sporadic, seasonal or temporary work.<sup>16</sup> Moreover, the record does not reveal that the position was a makeshift position designed for appellant's particular needs.<sup>17</sup>

Actual earnings are generally the best measure of wage-earning capacity, and the Board finds no contrary evidence in this case. The Office first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the "current" pay rate of the job held when injured.<sup>18</sup> In this case, the evidence of record reveals that appellant's date-of-injury position currently earned \$877.56 per week. Appellant is earning \$907.17 per week in the full-time modified rubber worker leader position ( $907.17 \div 877.56$ ), resulting in no loss of wage-earning capacity. As there was no loss of wage-earning capacity the Board finds that, based on the evidence of record, appellant's actual earnings as a modified rubber worker leader fairly and reasonably represent his wage-earning capacity and the Office properly determined that he had no loss of wage-earning capacity.<sup>19</sup>

### CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment in the amount of \$4,034.64 during the period July 13 through September 6, 2003. The Board further finds that the Office properly determined that appellant was at fault in the creation of the overpayment. In addition, the Board finds that the Office properly determined that appellant's actual earnings as a modified rubber worker leader fairly and reasonably represented his wage-earning capacity.

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<sup>15</sup> Appellant used advanced sick leave for his right shoulder surgery rather than file a claim for wage-loss compensation (Form CA-7).

<sup>16</sup> See *William D. Emory*, 47 ECAB 365 (1996).

<sup>17</sup> *Id.*

<sup>18</sup> *Albert C. Shadrick*, *supra* note 13.

<sup>19</sup> *Monique L. Love*, *supra* note 12. The Office's federal procedure manual provides that after a claimant has been working for 60 days, the Office will determine whether actual earnings fairly and reasonably represent the employee's wage-earning capacity and issue a formal decision. Federal (FECA) Procedure Manual, Part 2 -- *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c)(1) (December 1993).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 22 and April 5, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 8, 2005  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member