



## **FACTUAL HISTORY**

On July 23, 2000 appellant, then a 45-year-old firefighter, filed a claim for an injury to his lower back in the performance of duty. The Office accepted his claim for lumbosacral neuritis and lumbar disc displacement. Appellant stopped work on July 24, 2000. On January 14, 2002 he underwent an anterior retroperitoneal mobilization for spinal reconstruction.

Appellant returned to work as an automotive equipment dispatcher on July 1, 2002. In a report of telephone call dated October 7, 2002, a claims examiner informed him that he would receive a special payment of \$6,582.14 for July 3 to October 5, 2002 and payments in the amount of \$1,940.00 every four weeks as “comp[ensation] for loss of pay beginning July 13, 2002 when he began his new job.”<sup>1</sup>

On April 29, 2003 the Office reduced appellant’s compensation effective July 3, 2002, on the grounds that his actual earnings as an automotive equipment dispatcher fairly and reasonably represented his wage-earning capacity. The Office utilized the formula developed in the *Shadrick* decision and calculated appellant’s four-week compensation as \$979.00.<sup>2</sup>

The Office, in a worksheet dated May 23, 2003, calculated that appellant should have received \$9,976.64 in compensation for the period July 3, 2002 through April 19, 2003.

On May 23, 2003 the Office notified appellant of its preliminary determination that he had received an overpayment of compensation in the amount of \$10,269.43. The Office informed him that he should have received \$9,976.64 in compensation instead of \$20,246.07 for the period July 3, 2002 through April 19, 2003. The Office found that appellant was at fault in the creation of the overpayment as he should have known that his wages as an automotive dispatcher together with his compensation payments from the Office exceeded his earnings as a firefighter.

By letter dated June 10, 2003, appellant requested a prerecoupment hearing. He submitted a signed overpayment questionnaire on July 21, 2003.

At the hearing, held on April 27, 2004, appellant did not dispute either the fact or amount of overpayment. He stated, however, that after he received his first check he called the Office and talked with a claims examiner who told him that it was the amount he was “supposed to get” and not to “worry about it.” The hearing representative requested that appellant complete another overpayment questionnaire within 30 days containing current information, including his wife’s earnings and explained that he needed documentation supporting the financial information provided.

Appellant did not submit another overpayment questionnaire or supporting financial documentation within the time allotted.

---

<sup>1</sup> The Office computer records show that appellant received compensation from July 13 to October 5, 2000 in the amount of \$6,582.14 and compensation for four weeks beginning October 6, 2002 in the amount of \$1,940.00.

<sup>2</sup> The formula for determining loss of wage-earning capacity based on actual earnings, developed in *Albert C. Shadrick*, 5 ECAB 376 (1953), has been codified by regulation at 20 C.F.R. § 10.403.

In a decision dated July 21, 2004, the hearing representative affirmed the finding that appellant received an overpayment in the amount of \$10,269.43, for the period July 3, 2002 through April 19, 2003. He reversed, however, the finding that appellant was at fault in the creation of the overpayment. The hearing representative noted that the record supported that he called the Office regarding the amount of his check on October 7, 2002 and received assurances from a claims examiner that he had received the correct amount. The hearing representative determined that appellant could not have known that he received incorrect payments in view of the statements of the Office claims examiner. He found, however, that appellant was not entitled to waiver as he failed to submit a current completed overpayment recovery questionnaire, including his wife's income and supported by financial documentation. The hearing representative determined that the case would be "returned to the district office for commencement of collection procedures for the total amount of the overpayment, \$10,269.43."

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

5 U.S.C. § 8106(a) provides:

"If the disability is partial, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability, which is known as his back compensation for partial disability."<sup>3</sup>

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

The Office determined that appellant received an overpayment of \$10,269.43, for the period July 13, 2002 through April 19, 2003, because it failed to properly reduce his compensation based on his actual earnings. Pursuant to section 8106(c), an employee who is partially disabled is entitled to 66 2/3 percent of the difference between his monthly pay and his wage-earning capacity when the partial disability begins.<sup>4</sup> Computer records together with telephone logs from the Office show that, from July 3, 2002 through April 19, 2003, appellant received \$20,246.07, in compensation instead of the \$9,976.64, to which he was entitled based on his partial disability. The difference between the amount of compensation he received, \$20,246.07 and the amount of compensation he should have received, \$9,976.64, is \$10,269.43. Appellant does not dispute either fact or amount of overpayment.

---

<sup>3</sup> 5 U.S.C. § 8106(a).

<sup>4</sup> *Id.*

## LEGAL PRECEDENT -- ISSUE 2

To determine whether recovery of an overpayment from an individual who is without fault would defeat the purpose of the Federal Employees' Compensation Act, the first test under section 8129(b), as specified in section 10.436, provides:

“(a) The beneficiary from whom [the Office] seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and

“(b) The beneficiary’s assets do not exceed a specified amount as determined by [the Office] from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents.”<sup>5</sup>

Section 10.437 of the regulation covers the equity and good conscience standard and provides:

“(a) Recovery of an overpayment is considered against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.

“(b) Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse. In making such a decision, [the Office] does not consider the individual’s current ability to repay the overpayment.

(1) To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and the action was based chiefly or solely in reliance on the payments or on the notice of payment. Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.

(2) To establish that an individual’s position has changed for the worst, it must be shown that the decision made would not otherwise have been made, but for the receipt of benefits and that this decision resulted in a loss.”<sup>6</sup>

The fact that a claimant was without fault in creating the overpayment does not necessarily preclude the Office from recovering all or part of the overpayment; the Office must exercise its discretion in determining whether waiver is warranted under either of these two

---

<sup>5</sup> 20 C.F.R. § 10.436.

<sup>6</sup> 20 C.F.R. § 10.437.

standards.<sup>7</sup> The waiver of or refusal to waive an overpayment of compensation by the Office rests within its discretion pursuant to statutory guidelines.<sup>8</sup>

Section 10.438 of the regulation provides that, “[t]he individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office]. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience.”<sup>9</sup>

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

The hearing representative properly determined that appellant was not at fault in the creation of the overpayment because the record established that he telephoned a claims examiner on October 7, 2002 questioning the amount of his compensation and the claims examiner told him that the amount was accurate and that he should expect monthly payments in the amount of \$1,940.00 every four weeks. Accordingly, as he is without fault in the creation of the overpayment, he is entitled to waiver if it is established that recovery would either “defeat the purpose of the Act” or “be against equity and good conscience.” At the hearing, the hearing representative requested that appellant submit a complete overpayment recovery questionnaire describing his current financial situation and supported by documentation. Appellant, however, did not submit the requested information and thus, he did not provide the financial information necessary to show that recovery of the overpayment would defeat the purpose of the Act. The Office’s regulation provides that failure to provide the requested information regarding income, expenses and assets within 30 days of the request shall result in denial of waiver and that no further request for waiver shall be considered until the requested information is furnished.<sup>10</sup> As appellant failed to submit a complete financial questionnaire supported by documentation within 30 days as requested by the hearing representative, he does not qualify for waiver under the “defeat the purpose of the Act” standard.<sup>11</sup>

Further, appellant has not alleged and the evidence does not demonstrate that he relinquished a valuable right or changed his position for the worse in reliance on the erroneous amount of compensation benefits received in this case. As appellant has not shown that recovery

---

<sup>7</sup> *Linda Hilton*, 52 ECAB 476 (2001).

<sup>8</sup> *Rudolph A. Geci*, 51 ECAB 423 (2000).

<sup>9</sup> 20 C.F.R. § 10.438.

<sup>10</sup> *Id.*

<sup>11</sup> *Marlon G. Massey*, 49 ECAB 650, 652 (1998).

would “defeat the purpose of the Act” or would “be against equity and good conscience,” the Board finds that the Office properly denied waiver of recovery of the overpayment.<sup>12</sup>

On appeal appellant contends that the hearing representative did not inform him that he had only 30 days within which to submit the overpayment recovery questionnaire and did not tell him that he needed to submit receipts. He further stated that the hearing representative provided him with the overpayment recovery questionnaire form but not accompanying information. The hearing transcript, however, establishes that the hearing representative told appellant that with his newly completed overpayment recovery questionnaire he needed to include “documentation supporting every entry....” The hearing representative further stated that he was “going to ask [appellant] to return this to the London, Kentucky address within the next 30 days.”

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$10,269.43 for the period July 3, 2002 through April 19, 2003, because his compensation was not accurately adjusted to reflect his actual earnings. The Board further finds that the Office properly denied waiver of recovery of the overpayment.

---

<sup>12</sup> The hearing representative did not determine a specific method of recovery of the overpayment and, therefore, it is not before the Board at this time. The Board notes, however, that as it appears that appellant is entitled to further compensation payments, section 10.441(a) provides that the Office “shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstance of the individual and any other relevant factors, so as to minimize any hardship. 20 C.F.R. § 10.441(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 21, 2004 is affirmed.

Issued: March 14, 2005  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member