



On April 22, 2005 the Office made a preliminary determination that appellant received an overpayment of \$529.10, from August 23, 2003 to December 25, 2004 and on January 11, 2005 because an incorrect night differential inflated his pay rate for compensation purposes. The Office also made a preliminary determination that he was without fault in the matter because there was no way he should have known the Office had applied an incorrect pay rate. The Office asked appellant to complete an overpayment recovery questionnaire and submit supporting financial documents, such as copies of income tax returns, bank account statements, bills and canceled checks, pay slips and other records to support the income and expenses shown on the questionnaire. The Office notified him of the importance of this financial information:

“This information will help us decide whether or not to waive the overpayment. If waiver is not granted, the information will be used to decide how to collect the overpayment. We will not try to collect the overpayment until we reach a final decision on your request for waiver.

“Also please note that under 20 C.F.R. § 10.438, we will deny waiver if you fail to furnish the information request on the enclosed Form OWCP-20 (or other information we need to address a request for waiver) within 30 days. We will not consider any further request for waiver until the requested information is furnished.”

In a decision dated June 16, 2005, the Office finalized its preliminary determinations, finding that appellant received an overpayment of \$529.10, because of an incorrect pay rate. The Office denied waiver and advised that the entire amount of the overpayment would be withheld from appellant’s next compensation check.

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

Under the Federal Employees’ Compensation Act, monetary compensation for total or partial disability due to an employment injury is paid as a percentage of monthly pay.<sup>1</sup> When compensation is paid on a weekly basis, the weekly equivalent of the monthly pay is deemed one-fifty-second of the average annual earnings.<sup>2</sup> The pay rate shown on Form CA-7 may be used in computing the average annual earnings. When it is reported on an hourly basis, the amount shown is multiplied by the hours worked per day, thus arriving at the daily pay rate which is in turn converted to a weekly basis.<sup>3</sup> It has been determined administratively that an employee’s pay rate will include night differential.<sup>4</sup> The amount reported may be added to the base pay reported and the weekly pay rate determined accordingly.<sup>5</sup>

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<sup>1</sup> 5 U.S.C. §§ 8105, 8106.

<sup>2</sup> *Id.* § 8114(c).

<sup>3</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900.9.a.1(c) (September 1990).

<sup>4</sup> *Id.* Chapter 2.900.5.b.1.

<sup>5</sup> *Id.* Chapter 2.900.9.a.2(g).

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

On the Form CA-7 appellant completed on October 9, 2003, the employing establishment reported that his pay rate on the date of injury was \$18.79 per hour. The employing establishment also reported that he was earning \$1.50 per hour in night differential. Appellant's weekly pay rate was, therefore, \$811.60. When the Office calculated his pay rate for compensation purposes, however, it assumed that his night differential was \$18.79 per hour or a straight 10 percent of his hourly rate. This caused an erroneous increase in the weekly pay rate to \$826.76, which the Office used to determine compensation from August 23, 2003 through January 11, 2005.<sup>6</sup>

To determine the amount of the overpayment, the Office subtracted the gross compensation appellant should have received at the correct pay rate, \$28,326.30, from the gross compensation he actually received at the incorrect pay rate, \$28,855.40.<sup>7</sup> The difference, \$529.10, represents the amount of compensation appellant received as a result of the erroneous night differential. The Board will affirm the Office's June 16, 2005 decision on the issues of fact and amount of overpayment.

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

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.<sup>8</sup> If the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless; (1) adjustment or recovery of the overpayment would defeat the purpose of the Federal Employees' Compensation Act; or (2) adjustment or recovery of the overpayment would be against equity and good conscience.<sup>9</sup>

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<sup>6</sup> On appeal appellant submitted benefit statements to show that he received compensation at a weekly pay rate of \$762.87. The Office did pay compensation at this rate from November 14, 2003 through April 16, 2004, which explains the benefit statements submitted. However, on May 7, 2004, the Office determined that an underpayment occurred during this period because the weekly pay rate should have been \$826.76. After deducting an overpayment for four hours of disability not actually claimed, the Office paid appellant the balance of the underpayment to "correct" his compensation for that period. The submitted benefit statements, therefore, do not reflect the final pay rate applied.

<sup>7</sup> The Office calculated the overpayment based on days and hours lost from August 23, 2003 through December 25, 2004 and on January 11, 2005.

<sup>8</sup> 20 C.F.R. § 10.433(a) (1999).

<sup>9</sup> *Id.* § 10.434. Recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (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. *Id.* § 10.436. Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt. *Id.* § 10.437(a). 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. *Id.* § 10.437(b).

The 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. This information will also be used to determine the repayment schedule, if necessary.<sup>10</sup>

Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.<sup>11</sup>

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

Although the Office found that appellant was without fault in the matter of the overpayment, he nonetheless bears responsibility for providing the financial information necessary to support waiver. On April 22, 2005 the Office asked him to complete an overpayment recovery questionnaire and submit supporting financial documents. The Office explained the importance of this financial information and advised appellant that it would deny waiver if he failed to furnish the information within 30 days. He did not complete and submit the questionnaire and he submitted no financial information. Under these circumstances, Office regulations mandate denial of waiver. The Board will affirm the Office's June 16, 2005 decision on the issue of waiver.

### **LEGAL PRECEDENT -- ISSUE 3**

Section 8129 of the Act provides that, when an overpayment has been made to an individual 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 the individual is entitled.<sup>12</sup> The implementing regulations provide that, when an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to the Office the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, the Office shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.<sup>13</sup>

### **ANALYSIS -- ISSUE 3**

When the Office advised appellant that the entire amount of the overpayment would be withheld from his next compensation check in order to repay the debt in full, it gave no apparent consideration to any factor. The Office simply announced what action it was taking. Because

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<sup>10</sup> *Id.* § 10.438(a).

<sup>11</sup> *Id.* § 10.438(b).

<sup>12</sup> 5 U.S.C. § 8129(a).

<sup>13</sup> 20 C.F.R. § 10.441(a) (1999).

regulations require the Office to take relevant factors into account so as to minimize any hardship, the Board must set aside the Office's June 16, 2005 decision on the issue of recovery.

The size of the overpayment, which may be small relative to many overpayments the Board has occasion to review, but which is no less significant, creates no exception to the consideration required by 20 C.F.R. § 10.441(a). Further, although a claimant's failure to submit an overpayment recovery questionnaire and supporting financial documents mandates a denial of waiver under Office regulations, it does not excuse the Office from taking into account the probable extent of future payments, the rate of compensation and any other relevant factors so as to minimize any hardship when recovery is made by decreasing later payments of compensation.

### **CONCLUSION**

The Board finds that appellant was without fault in the matter of the \$529.10 overpayment he received from August 23, 2003 through December 25, 2004 and on January 11, 2005. The Board also finds that the Office properly denied waiver. The Board further finds that the Office did not follow regulations when it determined that the overpayment should be deducted in full from appellant's next compensation check.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the June 16, 2005 decision of the Office of Workers' Compensation Programs is affirmed on the issues of fact of overpayment, amount of overpayment and waiver. The June 16, 2005 decision is set aside on the issue of recovery.

Issued: September 30, 2005  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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