



## **FACTUAL HISTORY**

This case has been before the Board on two prior occasions.<sup>1</sup> By decision dated December 24, 1987, the Board reversed an Office decision which terminated appellant's compensation benefits, finding that the medical evidence relied upon by the Office was insufficient to meet its burden of proof.<sup>2</sup> In a May 2, 2005 decision, the Board found that appellant was not a "learner" within the meaning of 5 U.S.C. § 8113(a) and was thus not entitled to wage-loss compensation as a journeyman level shipfitter.<sup>3</sup> The facts as set forth in the previous Board decisions are incorporated herein by reference.

Appellant continued to receive compensation at the three-quarters augmented rate because he had a dependent son, Philip, who was born on January 5, 1984. By letter dated August 8, 2002, appellant's attorney informed the Office that appellant was not sure whether Philip, who was 18 at the time, would be attending college, scheduled to begin on October 2, 2002. In a letter dated October 18, 2002, he informed the Office that Philip had chosen not to further his schooling.

On May 21, 2003 the Office issued a preliminary finding that an overpayment in compensation in the amount of \$2,185.72 had been created.<sup>4</sup> The Office explained that the overpayment resulted because appellant had received compensation at the augmented 3/4 rate after his dependent son Philip reached 18 years of age and elected not to attend college. The Office found appellant at fault in the creation of the overpayment because he accepted a payment which he knew or reasonably should have known was incorrect. He was informed of the actions he could take in response, and, on June 17, 2003, appellant requested a hearing.

At the hearing, held on May 19, 2004, appellant testified that Philip completed high school on June 8, 2002 but that he did not find out until mid-September 2002 that his son had not returned to school. He acknowledged that he was not entitled to augmented compensation after that time. Appellant testified regarding his finances, and submitted an overpayment questionnaire and other financial information. These indicated that appellant had a monthly income of \$2,076.00, monthly expenses of \$2,291.00, and savings of \$80.00

By decision dated July 8, 2004, an Office hearing representative found that an overpayment in compensation in the amount of \$2,185.72 had been created because appellant continued to receive compensation at the augmented rate for the period June 8, 2002 through May 17, 2003 although he had ceased to have an eligible dependent. The hearing representative

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<sup>1</sup> On June 27, 1985 appellant, then a 28-year-old apprentice shipfitter, sustained an injury to his right knee while in the performance of his federal duties.

<sup>2</sup> Docket No. 87-906 (issued December 26, 1987).

<sup>3</sup> Docket No. 04-1917 (issued May 2, 2005).

<sup>4</sup> The record contains: Office computer worksheets showing compensation rates based on appellant's wage-earning capacity at the two-thirds and three-quarter rates for the period 1987 to 2004; print outs for the compensation appellant received at the three-quarters rate from June 8, 2002 through May 17, 2003, or \$19,713.86 and what he would have received for this period at the 2/3 rate, or \$17,528.14; and an overpayment worksheet which shows that an overpayment in compensation of \$2,185.72 had been created.

further found appellant not at fault for the period June 8 through September 30, 2002 because he reasonably believed his son would be attending school that fall, and determined that, for that period, the overpayment equaled \$726.96. The hearing representative, however, found appellant at fault for the period October 1, 2002 through May 17, 2003 because he accepted payment he knew or reasonably should have known was incorrect, and determined that the overpayment for that period was \$1,458.76.<sup>5</sup>

The hearing representative then applied waiver analysis to the \$726.96 overpayment arising from June 8 to September 30, 2002. He determined that, as appellant's monthly expenses exceeded his monthly income, recovery of this portion of the overpayment would defeat the purpose of the Act and recovery of the \$726.96 overpayment was waived. However, as appellant was at fault in the creation of the \$1,458.76 overpayment, he was not entitled to waiver for that amount. The hearing representative noted the factors of section 10.441(a) of Office regulations, *i.e.*, 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 hardship. He also noted that federal claims collection regulations provide that debts owed to the government should be collected in full, and if an installment plan is accepted, the installments should be large enough to collect the debt promptly, and therefore the repayment schedule should be at a rate large enough to collect the overpayment in a reasonable period of time and also minimize any hardship on the claimant. The hearing representative considered these factors and set a repayment schedule of \$156.00 per month or \$144.00 from each four-week period of appellant's continuing compensation.

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

Section 8129(a) of the Act 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.”<sup>6</sup>

The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay. Where the employee has one or more dependents as defined in the Act, the employee is entitled to have his or her basic compensation augmented at the rate of 8 1/3 percent for a total of 75 percent of monthly pay.<sup>7</sup>

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<sup>5</sup> The hearing representative correctly noted that, for the period June 8 through September 30, 2002, appellant received compensation totaling \$6,555.00 but was entitled to \$5,828.04, thus creating the \$726.96 overpayment, and for the period October 1, 2002 through May 17, 2003 he received \$13,158.86 in compensation and was entitled to \$11,700.10, yielding an overpayment of \$1,458.76.

<sup>6</sup> 5 U.S.C. § 8129.

<sup>7</sup> 5 U.S.C. § 8110(b).

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

The record in this case supports that appellant's compensation payments were at the augmented three-quarters rate through May 17, 2003 and that his son Philip was no longer a student beginning as of June 8, 2002. Appellant was therefore not entitled to compensation at the augmented three-quarters rate after that time.<sup>8</sup> The record shows that he received augmented compensation totaling \$19,713.86 for the period June 8, 2002 through May 17, 2003 when he should have received \$17,528.14 at the statutory two-thirds rate. The Board finds that an overpayment in compensation in the amount of \$2,185.72 had been created because appellant improperly received compensation at the augmented rate for the period June 8, 2002 through May 17, 2003.

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

Section 8129 of the Act provides that an overpayment in 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>9</sup>

Section 10.433(a) of the Office's regulation provides that the Office:

"[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. 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. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in creating an overpayment: (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or (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 to be incorrect. (This provision applies only to the overpaid individual)."<sup>10</sup>

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

The Board agrees with the Office's determination that appellant was not at fault for the period June 8 through September 30, 2002 because it was reasonable for him to believe that his

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<sup>8</sup> *Id.*

<sup>9</sup> 5 U.S.C. § 8129.

<sup>10</sup> 20 C.F.R. § 10.433; *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

son Philip would attend school that fall. The Office properly found that appellant was not at fault and entitled to waiver for the \$726.96 overpayment created during this period.<sup>11</sup>

Regarding the \$1,458.76 overpayment for the period October 1, 2002 through May 17, 2003, the Office applied the third standard under section 10.433, finding appellant at fault in the creation of the overpayment as he knew or should have known he was not entitled to receive augmented compensation if he had no eligible dependents. Appellant's attorney wrote the Office on October 18, 2002 that appellant's son Philip was no longer attending school. Appellant testified at the hearing that he found out in mid-September 2002 that Philip had not returned to school. He also acknowledged that he was not entitled to augmented compensation if his son was not in school. The Board finds that appellant was at fault under the facts and circumstances of this case, as appellant acknowledged that he knew he accepted payments which were incorrect as his son was not an eligible dependent under the relevant criteria after October 1, 2002.<sup>12</sup>

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

The Office's implementing regulation provides that, if an overpayment of compensation has been made to an individual entitled to further payments and 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**

The Board finds that the Office gave due regard to the relevant factors noted above in setting a rate of recovery of \$144.00 per compensation period. While appellant's reported

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<sup>11</sup> 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. 20 C.F.R. § 10.433(a). 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 Act; or (2) adjustment or recovery of the overpayment would be against equity and good conscience. 20 C.F.R. § 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. 20 C.F.R. § 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. 20 C.F.R. § 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. 20 C.F.R. § 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. 20 C.F.R. § 10.438(a).

<sup>12</sup> 20 C.F.R. § 10.433(a).

<sup>13</sup> 20 C.F.R. § 10.441(a).

monthly expenses exceeded his monthly income, an overpayment in compensation must be recovered in a reasonable manner. The Board therefore finds that the Office did not abuse its discretion<sup>14</sup> in finding that appellant should repay his overpayment at the rate of \$144.00 per compensation period.<sup>15</sup>

### **CONCLUSION**

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$2,185.72 because he received augmented compensation during the period June 8, 2002 through May 17, 2003 when he had no eligible dependents. The Board agrees with the Office's finding that appellant was not at fault for the period June 8 through September 30, 2002 and was thus entitled to waiver and that appellant was at fault in the creation of the overpayment of \$1,458.76 for the period October 1, 2002 through May 17, 2002 and not entitled to waiver for that period. Finally, the Board finds that the Office did not abuse its discretion by deducting \$144.00 from appellant's continuing compensation payments every 28 days.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 8, 2004 be affirmed.

Issued: April 18, 2006  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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<sup>14</sup> Abuse of discretion is generally shown through proof of manifest error, a clear unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. *See Wayne G. Rogers*, 54 ECAB 482 (2003).

<sup>15</sup> The Board notes that the overpayment was repaid by August 2005.