

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

MADELYN Y. GRANT, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Houston, TX, Employer**

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**Docket No. 06-164
Issued: April 18, 2006**

Appearances:
Madelyn Y. Grant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 28, 2005 appellant filed a timely appeal from the October 6, 2005 merit decision of the Office of Workers' Compensation Programs, which found that she received a \$3,309.91 overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this overpayment decision.¹

ISSUES

The issues are: (1) whether appellant received a \$3,309.91 overpayment of compensation because the employing establishment incorrectly reported her night differential and Sunday premium; and (2) whether the Office properly denied waiver.

¹ The Board has no jurisdiction to review the Office's September 29, 2005 decision notifying appellant that it was terminating collection of a separate overpayment of \$361.04, as this decision did not adversely affect her. 20 C.F.R. § 501.3(a). Appellant does not appeal the Office's October 7, 2005 decision finding that she no longer had a loss of wage-earning capacity because she was now reemployed as a modified processing clerk with earnings that met or exceeded the current rate of her date-of-injury position.

FACTUAL HISTORY

On August 30, 2003 appellant, then a 42-year-old clerk, sustained an injury in the performance of duty when she was hit by a “crab cage” full of standard mail bundles. The Office accepted her claim for displacement of the lumbar intervertebral disc without myelopathy.²

On February 5, 2004 the employing establishment reported that appellant’s annual salary on the date of injury was \$37,900.00 with a night differential of \$34.25 per week and a Sunday premium of \$36.44 per week. Appellant received compensation for partial disability on the periodic rolls beginning January 25, 2004.

On June 27, 2005 the employing establishment notified the Office that appellant’s premium pay was not correctly reported: “Although the District Injury Compensation Office reported a straight pay rate for both Sunday premium and night differential, as you can see by the spreadsheet, the premium pays were not consistent from one pay period to the next. In fact, there were a number of pay periods that she received no premium pay.” The employing establishment attached a spreadsheet showing the night differential and Sunday premium paid for each pay period during the year prior to the date of injury.

On August 19, 2005 the Office made a preliminary determination that appellant received a \$3,390.91 overpayment of compensation because the employing establishment reported an incorrect night differential and Sunday premium. The Office explained how it calculated this amount:

“The overpayment was calculated by first establishing correct pay rate based on correct night differential of \$16.31 per week and Sunday premium of \$19.40 per week. The correct pay rate was then entered into the *Shadrick* formula for calculation of loss of wage-earning capacity since claimant returned to work for four hours a day and this office was paying claimant for four hours per day. A report of what the claimant was paid at the incorrect pay rate was run, claimant was paid from September 25, 2003 to August 6, 2005 a total of \$31,547.03. For the same time period with correct pay rate the claimant should have only been paid \$28,156.12, a difference of \$3,390.91, which is the overpayment.”

The Office found appellant without fault in the creation of the overpayment and requested that she complete and submit an enclosed overpayment recovery questionnaire. It noted:

“In order for [the Office] to consider the question of waiver or to determine a reasonable method for collection, you must complete and submit the enclosed Form OWCP-20. Attach supporting documents to Form OWCP-20, including copies of income tax returns, bank account statements, bills and canceled checks,

² Appellant sustained another injury on November 19, 2003 when a double-stacked hamper struck the back of the chair in which she was sitting. The Office accepted that claim for cervical and lumbar strain. OWCP No. 162068977.

pay slips, and any other records which support the income and expenses listed. Under 20 C.F.R. § 10.438, failure to submit the requested information within 30 days will result in the denial of waiver, and no further request for waiver shall be considered until the requested information is furnished.”

Appellant submitted three pages of the four-page questionnaire, which she signed and dated August 24, 2005. On an overpayment action request, she requested waiver.

In a final decision dated October 6, 2005, the Office found that appellant was not at fault in the matter of the overpayment and denied her request for waiver. The Office noted that she did not complete Part I of the overpayment recovery questionnaire or Part II regarding income. The Office determined that appellant had not proven that recovery would result in undue hardship.

LEGAL PRECEDENT -- ISSUE 1

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.³ If disability is partial, the United States shall pay the employee during the disability monthly compensation equal to 66 2/3 percent of the difference between the employee’s monthly pay and the employee’s monthly wage-earning capacity after the beginning of the partial disability.⁴ The Office has administratively determined that night differential and premium pay for work on Sundays will be included in computing an employee’s pay rate.⁵

ANALYSIS -- ISSUE 1

The record shows that the Office paid compensation based on a weekly pay rate of \$799.54. This was one-fifty-second of \$37,900.00, appellant’s annual rate of pay on the date of injury, plus a regular night differential of \$34.25 per week and Sunday premium of \$36.44 per week. The record contains a compensation payment history showing the amount of each compensation check issued for the period September 25, 2003 through August 6, 2005. Total compensation paid was \$31,547.03.

It was not until June 27, 2005 that the employing establishment clarified that appellant’s night differential and Sunday premium pay were sporadic over the 26 pay periods prior to her August 30, 2003 injury. The employing establishment provided the Office with a spreadsheet itemizing the hours and premiums paid for each of the pay periods. Night differential totaled \$1,008.67 for the year, for an average of \$19.40 per week. Sunday premium totaled \$848.05, for an average of \$16.31.⁶ Appellant’s correct weekly pay rate, then, was \$764.56. At this rate she

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8106(a). 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. *Id.* at § 8114(c).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.7.b (April 2002).

⁶ The Office harmlessly transposed these figures in its August 19, 2005 preliminary determination.

should only have received \$28,156.12 in compensation from September 25, 2003 through August 6, 2005, as shown by a compensation worksheet on August 11, 2005.

The Board finds that appellant received an overpayment of \$3,390.91 from September 25, 2003 through August 6, 2005. The Board will affirm the Office's October 6, 2005 decision on the fact and amount of the overpayment.⁷

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.⁸ 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.⁹

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.¹⁰

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.¹¹

⁷ In its October 6, 2005 decision, the Office inadvertently noted that the amount of the overpayment was \$3,309.91. The Board recognizes that this is a simple juxtaposition of digits and affirms the Office's decision based on the correct amount of \$3,390.91.

⁸ 20 C.F.R. § 10.433(a) (1999).

⁹ *Id.* at § 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.* at § 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.* at § 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.* at § 10.437(b).

¹⁰ *Id.* at § 10.438(a).

¹¹ *Id.* at § 10.438(b).

ANALYSIS -- ISSUE 2

Although appellant was without fault in creating the \$3,390.91 overpayment that arose from September 25, 2003 through August 6, 2005, she nonetheless bears responsibility for providing the financial information necessary to support her request for waiver. She submitted only a partially completed overpayment recovery questionnaire, listing no income, no expenses for food or clothing, \$619.00 a month for rent or mortgage, \$615.00 for utilities and \$525.00 for installments on loans. Although the Office asked her to attach supporting financial documents, including copies of income tax returns, bank account statements, bills and canceled checks, pay slips and any other records supporting the income and expenses listed, appellant submitted no supporting documentation. The Office explained that this information was necessary to consider the question of waiver and to determine a reasonable method for collection. And the Office properly explained that failure to submit the requested information within 30 days would result in the denial of waiver. Because appellant failed to submit the requested financial information, she left the Office no choice but to deny her request for waiver.¹² The Board will affirm the Office's October 6, 2005 decision on the issue of waiver.¹³

CONCLUSION

The Board finds that appellant received an overpayment of \$3,390.91 from September 25, 2003 through August 6, 2005 because the employing establishment incorrectly reported her night differential and Sunday premium. The Board also finds that the Office properly denied waiver of the overpayment.

¹² See text accompanying note 11.

¹³ On August 11, 2005 the Office notified appellant that her compensation was terminated effective July 30, 2005 because she was recently reemployed as a modified clerk with wages of \$900.13 per week, which met or exceeded the wages of the job she held when she was injured. Appellant received compensation, however, through August 6, 2005, creating an overpayment of \$361.04 over those eight days. In a final decision dated September 29, 2005, the Office administratively terminated the collection of this debt because it was less than \$700.00 and the costs of collection were anticipated to exceed the amount recoverable. Termination of collection action, or the "write-off" of a bad debt, is an administrative action that is different from waiver or compromise. Termination of collection action does not forgive the debt, since the Office may collect it at a later date. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300.14(d) (May 2004). The \$3,390.91 overpayment currently before the Board also extends through August 6, 2005, overlapping the smaller overpayment for which the Office terminated collection efforts and subjecting \$22.18 of that smaller overpayment to collection.

ORDER

IT IS HEREBY ORDERED THAT the October 6, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 18, 2006
Washington, DC

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

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