

FACTUAL HISTORY

On June 25, 1990 appellant, then a 33-year-old enumerator, filed a traumatic injury claim alleging that on June 22, 1990 she twisted her ankle while climbing a stairway. By letter dated September 6, 1990, the Office accepted her claim for right ankle sprain and began paying appropriate compensation benefits.

In a form dated February 7, 2002, appellant indicated that she worked for American Plumbing and Heating from February 2001 to February 2002 and earned approximately \$17,000.00 during this time period.

A notation of a call on November 26, 2004 indicates a conversation between the Office and the owner of American Plumbing and Heating who indicated that appellant worked for them as a plumber's apprentice from January 3, 2002 through August 12, 2004 at which time she was fired for being undependable. He noted that the reason she was fired had nothing to do with her physical condition and that she was perfectly capable of doing the job.

A report from the Social Security Administration noted that appellant's wages for American Plumbing and Heating in 2001 were \$16,648.26 and \$7,702.75 in 2002.

In a decision dated February 14, 2005, the Office found that appellant had been earning wages as a plumber's apprentice with American Plumbing and Heating effective February 10, 2001 and that, as she had this position for more than two months, the position fairly and reasonably represented her wage-earning capacity and was considered suitable to her partially disabled position. The Office noted that this position paid appellant \$326.92 per week,¹ which was greater than the current pay rate of appellant's job and step when injured, \$225.00. The Office found that, as appellant's wages met or exceeded the current wages of the job she held when injured, she had been reemployed with no loss of wage-earning capacity, her entitlement to compensation benefits ended the date she was reemployed and her compensation was terminated. She remained entitled to medical benefits.

By letter dated March 14, 2005, appellant requested reconsideration. In a decision dated April 27, 2005, the Office denied modification.

By letter dated July 14, 2005, the Office informed appellant that it had made a preliminary determination that she had received an overpayment in the amount of \$35,613.00. The Office noted that she worked as a plumber's apprentice full time commencing February 10, 2001 until she was fired on August 12, 2004. The Office noted that appellant continued to accept compensation for wage loss from this Office even though she should have known that she was not entitled to these payments due to the fact that she was earning wages as a plumber's apprentice. Appellant did not file a timely response.

¹ The Office based this figure on appellant's statement that she earned \$17,000.00 per year while working at American Plumbing and Heating. The Office divided \$17,000.00 by 52 (weeks per year) to determine that appellant had earnings in this position of \$326.92 per week.

By decision dated August 23, 2005, the Office finalized its finding that appellant had received an overpayment in the amount of \$35,613.00 and that, as appellant was at fault in the creation of the overpayment, she was not entitled to waiver.

LEGAL PRECEDENT -- ISSUE 1

It is well established that once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.² After it has determined that an employee has a disability causally related to his or her federal employment, the Office may not reduce compensation without establishing that the disability ceased or that it is no longer related to the employment.

Section 8115(a) provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by her actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity.³ 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 a measure.⁴

The formula for determining loss of wage-earning capacity, developed in the *Shadrick* decision,⁵ has been codified at 20 C.F.R. § 10.403. The Office calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant's actual wages as a plumbers' apprentice fairly and reasonably represent her wage-earning capacity. On February 10, 2001 she returned to work as a plumber's apprentice. Appellant continued to work in this position until she was fired on August 12, 2004. Her employer, American Plumbing and Heating, indicated that she was fired for being undependable and that it had nothing to do with her physical condition as she was perfectly capable of handling the job. Appellant indicated that, for her first year of employment, she earned approximately \$17,000.00. The fact that she continued to earn wages in this position through April 12, 2004 supports her capacity to earn such wages.⁷ Further, there is no evidence

² See *Lawrence D. Price*, 47 ECAB 120 (1995); *Charles E. Minniss*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

³ 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

⁴ *Stanley B. Plotkin*, 51 ECAB 700 (2000).

⁵ *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁶ 20 C.F.R. § 10.403(c).

⁷ The Office's procedure manual provides that, after a claimant has been working for 60 days, the Office will determine whether her actual earnings fairly and reasonably represent her wage-earning capacity. Federal (FECA) Procedure Manual, Part 2 -- *Claims, Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (May 1997).

that the position was seasonal, temporary or make-shift work designed for appellant's particular needs.⁸

As appellant's actual earnings in her position as a plumber's apprentice fairly and reasonably represent her wage-earning capacity, the Board must determine whether the Office properly calculated her wage-earning capacity based on her actual earnings. Her earnings in the plumber's apprentice position of \$326.92 per week exceeded the current weekly wages of her date-of-injury position, which the Office identified as \$225.00 per week. Therefore, appellant had no loss of wage-earning capacity under the *Shadrick* formula.⁹

LEGAL PRECEDENT -- ISSUE 2

Section 8116(a) of the Act provides that an employee who is receiving compensation for an employment injury may not receive wages for the same time period.¹⁰

ANALYSIS -- ISSUE 2

The Board finds that the Office properly determined that appellant received an overpayment in the amount of \$35,613.00. The records shows that she received an overpayment during that period because she continued to receive checks from the Office for temporary total disability compensation after returning to full-time work as a plumber's apprentice with American Plumbing and Heating effective February 10, 2001. Appellant was not entitled to wage-loss compensation after that date as her wages exceeded the current pay of her prior job. The Office properly found that she received an overpayment of compensation in the amount of \$35,613.00.¹¹

LEGAL PRECEDENT -- ISSUE 3

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. 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 with respect to creating an overpayment: (1) Made an incorrect statement as to a material fact which he or she knew or should have know 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 to be incorrect (this provision applies only to the overpaid individual).¹²

⁸ *Elbert Hicks*, 49 ECAB 283 (1998).

⁹ *Albert C. Shadrick*, *supra* note 5.

¹⁰ 5 U.S.C. § 8116(a).

¹¹ The record reveals that the compensation checks ranged from approximately \$548.00 to \$614.00 every 28 days.

¹² 20 C.F.R. § 10.433(a).

ANALYSIS -- ISSUE 3

The Office found that appellant was at fault in the creation of the overpayment based on the third criterion above, that she accepted payments which she knew or should have known to be incorrect. In order for the Office to establish that she was at fault in creating the overpayment, the Office must show that, at the time she received the compensation checks in question, she knew or should have known that the payment was incorrect.¹³ The Office informed appellant that she must return checks received after she returned to work in order to avoid an overpayment of compensation. Although she notified the Office that she had returned to work, the Office's error in not terminating compensation immediately upon receiving this notice does not excuse appellant's acceptance of payment for total disability during a period when she was working full time.¹⁴ As appellant was at fault in the matter of the overpayment, the overpayment of compensation cannot be waived.

CONCLUSION

The Board finds that the Office properly determined that appellant's actual earnings as a plumber's apprentice fairly and reasonably represented her wage-earning capacity, that appellant received an overpayment in the amount of \$35,613.00 and that appellant was at fault in creating the overpayment and thus not entitled to waiver.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 23, April 27 and February 14, 2005 are affirmed.

Issued: July 25, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

¹³ See *Diana L. Booth*, 52 ECAB 370 (2001); *Robin O. Porter*, 40 ECAB 421 (1989).

¹⁴ *Lynden F. Moser*, 37 ECAB 725, 728 (1986).