



sustained that date when he slipped and fell. He stopped work on the date of the injury and received continuation of pay from November 19, 2004 to January 3, 2005.

On December 23, 2004 appellant filed a claim for compensation for wage loss beginning January 3, 2005 on Office (Form CA-7), indicating that he was in a leave-without-pay status beginning January 3, 2005. In January 10 and 19, 2005 letters, the employing establishment advised appellant and the Office that he had requested sick leave for the period from January 3 to 17, 2005 and that he was therefore not entitled to compensation for that period.

In a January 24, 2005 letter, the Office advised appellant that it had accepted that he sustained a lumbosacral strain/sprain, a left leg strain/sprain and a contusion of the buttocks in his November 18, 2004 injury. In a January 26, 2005 letter, the Office advised appellant that it could not pay compensation since he was already in a paid status and that if he chose leave without pay, he should complete another Form CA-7. In a February 8, 2005 letter, appellant requested that the employing establishment change his status from leave to leave without pay, retroactive to January 3, 2005. On June 14 and July 9, 2005 the Office issued appellant payments for compensation for temporary total disability for the periods January 18 to June 11 and June 12 to July 11, 2005. On August 17, 2005 the employing establishment advised the Office that appellant received sick leave from January 3 to February 4, February 21 to 28 and March 21 and 22, 2005 and used annual leave from March 1 to 18 and March 22 to April 1, 2005. He was in a leave-without-pay status from February 7 to 18 and again beginning April 4, 2005.

On September 1, 2005 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$6,065.62. It arose because he received both compensation and sick leave from January 18 to April 1, 2005, except for February 7 to 18, 2005. The Office found appellant at fault in the creation of the overpayment for knowingly receiving compensation and leave for the same period. The amount of the overpayment was the total amount of compensation appellant received from January 18 to February 6 and February 19 to April 4, 2005. In an October 13, 2005 letter, appellant's attorney contended that he was without fault in the matter of the overpayment. He noted that appellant had requested leave without pay, was not aware of the source of his income for months and could not have known the employing establishment was taking his leave, which he did not request.

By decision dated October 27, 2005, the Office found that appellant received an overpayment of compensation in the amount of \$6,065.62 that arose because he received both compensation and sick leave from January 18 to April 1, 2005, except for February 7 to 18, 2005. It found he was at fault in the matter of the overpayment for the reason that he was aware that he was receiving leave and compensation.

### **LEGAL PRECEDENT**

Section 8129(a) of the Federal Employees' Compensation Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when 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>1</sup> No waiver of an overpayment is possible if the claimant is not “without fault” in helping to create the overpayment.

In determining whether an individual is not “without fault” or, alternatively, “with fault,” section 10.320 of Title 20 of the Code of Federal Regulations states in pertinent part:

“An individual is with fault in the creation of an overpayment who --

- (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
- (2) Failed to furnish information which the individual knew or should have known to be material; or
- (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”<sup>2</sup>

### ANALYSIS

The Board finds that appellant received an overpayment of compensation in the amount of \$6,065.62. An employee cannot receive paid leave and compensation for the same period.<sup>3</sup> That is what occurred in this case. Appellant received both wage-loss compensation for temporary total disability and paid leave for the periods January 18 to February 6 and February 19 to April 4, 2005. The entire amount of compensation paid during this period, \$6,065.62, is an overpayment of compensation.

The Board also finds that appellant was at fault in the creation of the overpayment. He was advised by the employing establishment and the Office in January 2005 that he could not receive paid leave and compensation during the same period. Nonetheless, he accepted the Office’s compensation payments, knowing that he had already received paid leave from the employing establishment. Although the record does not contain a request for paid leave, the fact remains that he received such pay from the employing establishment. He knew or should have known that the Office’s payment of compensation for the same period was incorrect. Even though the Office erred by paying compensation for periods when appellant had already received paid leave, this does not excuse appellant’s fault in accepting compensation payments he knew or should have known were incorrect.<sup>4</sup>

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<sup>1</sup> 5 U.S.C. § 8129.

<sup>2</sup> 20 C.F.R. § 10.320(b).

<sup>3</sup> See *Lee B. Bass*, 40 ECAB 334 (1988); 5 U.S.C. §§ 8116, 8118.

<sup>4</sup> *Lynden F. Moser*, 37 ECAB 725 (1986).

**CONCLUSION**

Appellant was at fault in the matter of an overpayment of compensation in the amount of \$6,065.62.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 27, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 9, 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