

performance of duty. He did not initially stop work. On August 20, 2004 the Office accepted the claim for neck strain and thoracic strain. The Office later accepted brachial plexus lesions, bilateral neuritis and radiculitis. The Office advised appellant to return any wage-loss compensation received after he returned to work to avoid an overpayment of compensation.

Appellant underwent a right brachial plexus decompression of the upper, middle, lower trunks and selected trigger point denervation on January 4, 2006. He was placed on the periodic rolls in receipt of compensation for total disability commencing January 4, 2006.

On March 6, 2006 appellant was released to light-duty work for eight hours a day with restrictions. On March 14, 2006 the employing establishment confirmed that appellant returned to work on March 6, 2006. The employing establishment also notified the Office that appellant's compensation records indicated that his payment was certified through the end of the pay cycle. The employing establishment indicated that this would place appellant in an overpayment status for 13 days.

By letter dated March 10, 2006, the Office advised appellant of his entitlement to compensation benefits and his responsibility to return to work. The Office advised appellant that his first payment of compensation would cover the period January 21 through March 18, 2006 and that he would receive a gross amount of \$5,317.06. Thereafter, he would receive a payment of \$2,611.89 for the period March 19 through April 15, 2006. The Office advised appellant that compensation benefits for total disability were only payable while he could not perform work because of his injury. Appellant was advised to inform the Office if he returned to work and return any payment to the Office, which specifically advised appellant that, "to minimize the possibility of an overpayment, notify this Office immediately when you go back to work. Each payment shows the period for which the payment is made. If you have worked for any portion of this period, return the payment to this office, even if you have already advised the [Office] that you are working." (Emphasis omitted.) The Officer certified a supplemental roll net compensation payment of \$4,782.24 (\$5,317.06 was the gross amount before deductions) on March 10, 2006 for the period January 21 through March 18, 2006.

By letter dated March 14, 2006, the employing establishment advised appellant that it had received medical documentation indicating that appellant could work eight hours daily with restrictions. The employing establishment informed appellant that, since he had returned to work, his compensation payments would be terminated, and any compensation payments to which he was not entitled would result in an overpayment. Appellant was advised that action would be taken to collect the monies.

The Office completed an overpayment worksheet and determined that appellant received an overpayment of compensation in the amount of \$1,212.66 for the period March 6 to 18, 2006, as he returned to full-time light duty on March 6, 2006. The Office subtracted the health and life insurance deductions taken by both the Office and the employing establishment during this period and found that appellant had received a total overpayment of \$1,090.68.

On March 22, 2006 the Office noted that appellant called to inquire into the status of his compensation payments. He was advised with regard to the amount of the payment and the breakdown of the payment, minus the deductions for health and life insurance.

On March 30, 2006 the Office notified appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$1,090.68 because he returned to full-time light-duty work on March 6, 2006 but received compensation for temporary total disability until March 18, 2006. The Office found that he was at fault in the creation of the overpayment because he had been informed on March 10, 2006 that he should return any compensation checks received after he returned to work. The Office advised appellant that he had 30 days in which to submit evidence or argument if he disagreed with the preliminary determination. No response was received from appellant regarding the Office's preliminary determination.

By decision dated May 18, 2006, the Office finalized its determination that appellant received an overpayment of compensation in the amount of \$1,090.68. It found that appellant returned to full-time light duty on March 6, 2006; however, compensation payments for total disability continued through March 18, 2006. The Office found that there was no evidence to alter the initial fault finding. It determined that appellant accepted payments he knew or should have known were incorrect, because he continued to receive full compensation payments despite having returned to full-time light duty. The Office finalized its determination that he was at fault in the creation of the overpayment and therefore not entitled to consideration of waiver.¹

LEGAL PRECEDENT -- ISSUE 1

Office regulations, at 20 C.F.R. § 10.500(a), provide as follows:

“Benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury....”

ANALYSIS -- ISSUE 1

The record establishes that appellant returned to limited-duty work full time on March 6, 2006. However, he received compensation for temporary total disability from March 6 to 18, 2006. On March 10, 2006 the Office issued a compensation check for the period January 21 to March 18, 2006. In calculating the overpayment, the Office determined that, from March 6 to 18, 2006, appellant received gross compensation in the amount of \$1,212.66. After crediting amounts for appellant for health and life insurance premiums, the Office calculated that appellant received net compensation from March 6 to 18, 2006 of \$1,090.68. As he had returned to work from March 6 to 18, 2006, and had no entitlement to compensation for that period, the Office properly calculated that he received a \$1,090.68 overpayment. Appellant has not

¹ The Office advised appellant to either forward a check for the entire amount of the overpayment or to contact the Office to make arrangements for repayment.

submitted any evidence showing that he did not receive an overpayment of compensation or contesting the existence and amount of the overpayment. Thus, the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,090.68.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Federal Employees' Compensation Act² provides that "[a]djustment 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 this subchapter or would be against equity and good conscience." Section 10.433 of the Office's implementing regulations³ provides that, in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

“(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.”

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was at fault in creating the overpayment of compensation, the Office must establish that, at the time appellant received the compensation checks in question, he knew or should have known that the payment was incorrect.⁴

In this case, appellant returned to work on March 6, 2006 and, as noted above, received an overpayment of compensation for the period March 6 to 18, 2006. On March 10, 2006 the date the Office issued the payment in question, it notified appellant of his entitlement to compensation and his responsibility to return to work. The Office advised appellant that “to minimize the possibility of an overpayment,” he should notify the Office immediately when he returned to work and that, if he “worked for any portion of this period, return the payment to this office, even if you have already advised the [Office] that you are working.” Appellant was specifically advised that his compensation check covered the period January 21 to March 18, 2006. As appellant had already returned to work on March 6, 2006, he knew or

² 5 U.S.C. § 8129(b).

³ 20 C.F.R. § 10.433.

⁴ See *Robin O. Porter*, 40 ECAB 421 (1989).

reasonably should have known that he was accepting an incorrect payment.⁵ Additionally, appellant was informed that his compensation payments for total disability were only payable while he could not perform the duties of his regular job because of his injury at work and that he should return any payments received once he returned to work.

The Board finds that the evidence establishes that appellant accepted a payment which he knew or should have known was incorrect. Therefore, appellant is at fault in creating the overpayment such that waiver of the overpayment is not possible.

On appeal, appellant argues that he was without fault in creating the overpayment. He also alleged that his injury compensation representative informed the Office of his return to work. However, the Board has held that the fact that the Office may have been negligent in issuing a check for temporary total disability after being informed by a claimant of a return to work, does not excuse the claimant's acceptance of such checks which he knew or should have been expected to know to be incorrect.⁶

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$1,090.68.

The Board further finds that the Office properly determined that appellant was at fault in the creation of the overpayment and therefore not entitled to waiver.

⁵ This case is distinguished from those cases where appellant was not apprised of the specific period of compensation. *See for example, Michael R. Nixon*, 40 ECAB 398 (1988). *See also Marlene R. Pavlo*, 38 ECAB 716 (1987) (where the Board found that appellant was without fault where the record contained no evidence indicating that appellant was apprised by the Office, as of the time she received the compensation check, of the specific period the check covered so as to put her on notice that she was being paid incorrectly for a period of time during which she worked); *John DeLuca*, 36 ECAB 337 (1984) (where the Board found, in determining that appellant was not at fault, that there was no indication in the record that appellant was apprised by the Office of the specific period that the check in issue covered so that appellant would have had notice that an incorrect payment was received during a period of time in which he worked).

⁶ *Robert W. O'Brien*, 36 ECAB 541 (1985).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 18, 2006 is affirmed.

Issued: November 1, 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