



June 18, 2004. By letter dated November 18, 2004, he was placed on the periodic rolls, effective October 18, 2004. The letter stated: “To avoid an overpayment of compensation: NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK.” (Emphasis in the original.)

By letter dated July 28, 2005, the Office issued a preliminary determination that appellant had received an overpayment in compensation in the amount of \$8,836.81 for the period May 31 through August 6, 2005 because he continued to receive disability compensation payments after his return to work. The Office found him to be at fault in the creation of the overpayment because he accepted payments by direct deposit that he knew or should have known were incorrect. A computer-generated overpayment worksheet contained in the record provides that during this period appellant received compensation totaling \$8,836.81. On August 22, 2005 appellant requested a hearing.

At the hearing, held on October 25, 2006, appellant testified that he had informed the Office that he had returned to work and therefore the overpayment was created by negligence on the Office’s part. He also acknowledged that he had received three incorrect payments through direct deposit. On November 12, 2006 appellant submitted an overpayment questionnaire. By decision dated December 15, 2006, an Office hearing representative finalized the determination that appellant was at fault in the creation of an overpayment in compensation in the amount of \$8,836.81 because he was aware that he was not entitled to receive compensation payments after his return to work. Appellant was advised that recovery would be at the rate of \$400.00 per month.

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

Section 8102(a) of the Federal Employees’ Compensation Act<sup>1</sup> provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.<sup>2</sup> 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>3</sup>

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

The Board finds that appellant received an overpayment in compensation in the amount of \$8,836.81. The record supports that he continued to receive compensation from the date of his return to work on May 31 to August 6, 2005. For this period appellant received

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> 5 U.S.C. § 8102(a).

<sup>3</sup> 5 U.S.C. § 8129(a).

compensation in the amount of \$8,836.81. As he was not entitled to compensation after his return to work, the Office properly found that an overpayment in compensation in the amount of \$8,836.81 had been created.<sup>4</sup>

### **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>5</sup>

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

“[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 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>6</sup>

In determining fault under section 10.433(a)(3), where the claimant receives compensation through direct deposit, the payment goes directly from the U.S. Treasury to the claimant’s account. The Office may not deposit compensation into a claimant’s account without authorization. The claimant must first complete a form authorizing the electronic transfer of payment to a named financial institution to be deposited to a designated account. It is only with the claimant’s intent that these payments are deposited to his or her account which is something more than receipt; it is acceptance. When control of the funds passes to the claimant upon deposit, the acceptance necessary under section 10.433(a)(3) is established.<sup>7</sup>

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<sup>4</sup> 5 U.S.C. §§ 8101, 8110.

<sup>5</sup> 5 U.S.C. § 8129; *see Linda E. Padilla*, 45 ECAB 768 (1994).

<sup>6</sup> 20 C.F.R. § 10.433 (2006); *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

<sup>7</sup> *Tammy Craven*, 57 ECAB \_\_\_\_ (Docket No. 05-249, issued July 24, 2006).

## ANALYSIS -- ISSUE 2

In finding appellant at fault in the creation of the \$8,836.81 overpayment, the Office stated that he knew or should have known that the payments he received by direct deposit for the period May 31 through August 6, 2005 were not proper because he had returned to work.

Even though the Office may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments he or she knew or should have known to be incorrect.<sup>8</sup> The Board has found the claimant to be at fault in cases where he or she is receiving compensation checks through direct deposit which involve a series of payments over several months with clear knowledge that the payments were incorrect.<sup>9</sup> It is not appropriate, however, to make a finding that a claimant has accepted an overpayment via direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from the Office or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.<sup>10</sup>

In this case, appellant continued to receive augmented compensation by direct deposit from the time he returned to work on May 31 to August 6, 2005. Since Office regulations define fault by what the claimant knew or should have known at the time of acceptance, one of the consequences of electronic fund transfers is that in many cases the claimant will not be at fault for accepting the first incorrect payment because the requisite knowledge is lacking at the time of deposit, and the Board so finds in this case as there is no evidence of record to show the period covered by the direct deposit.<sup>11</sup> A finding of no fault does not mean, however, that the claimant may keep the money, only that the Office must consider eligibility for waiver for this period, and the case must be remanded for the Office to determine whether he is entitled to waiver for this period.<sup>12</sup>

By his own admission at the hearing, appellant acknowledged that he was not entitled to receive compensation after his return to work. Thus, after his receipt of the first direct deposit for which fault may not be imputed to him under the reasonableness standard delineated above, for the subsequent direct deposits appellant knew or should have know that the compensation paid by direct deposits issued by the Office after the first direct deposit subsequent to his return to work on May 31, 2005 were in error and the Board finds that he was at fault under the third standard outlined above for any period after the first direct deposit after his return to work. Recovery of the overpayment in compensation may not be waived for this time period, and the decision dated December 15, 2006 is affirmed in this respect. The record in this case, however,

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<sup>8</sup> *William E. McCarty*, 54 ECAB 525 (2003).

<sup>9</sup> *See Karen K. Dixon*, 56 ECAB \_\_\_\_ (Docket No. 03-2265, issued November 9, 2004).

<sup>10</sup> *See K.H.*, Docket No. 06-191 (issued October 30, 2006).

<sup>11</sup> *See Karen K. Dixon*, *supra* note 9.

<sup>12</sup> Appellant acknowledged that he was aware that he received direct deposits to which he was not entitled on July 8 and August 5, 2005.

does not show when appellant's individual direct deposits were made. As appellant was not at fault for the first direct deposit after his May 31, 2005 return to work, the case must be remanded to the Office to determine the exact period appellant would not be at fault and would thus be entitled to waiver.

Lastly, with respect to recovery of the overpayment in compensation, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act.<sup>13</sup> As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act.<sup>14</sup>

### **CONCLUSION**

The Board finds that the Office properly determined that an overpayment in compensation in the amount of \$8,836.81 had been created and that appellant was at fault for the overpayment period commencing subsequent to the first direct deposit after his return to work but was not at fault for the first direct deposit of compensation. The case is remanded for a determination of whether he would be entitled to waiver for this brief period.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 15, 2006 be affirmed in part, set aside in part, and the case remanded for further proceedings consistent with this opinion of the Board.

Issued: August 14, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>13</sup> *Cheryl Thomas*, 55 ECAB 610 (2004).

<sup>14</sup> *Id.*