



## **FACTUAL HISTORY**

On June 3, 2002 appellant, then a 37-year-old mail clerk, sustained an injury to her right knee as she walked up a ramp and was hit by falling boxes in the performance of duty. The Office accepted her claim for tear of the right anterior cruciate ligament. Appellant stopped work on June 6, 2002 and was paid appropriate compensation and eventually placed on the periodic compensation rolls.<sup>1</sup>

In a January 27, 2004 report, Dr. David A. McGuire, a Board-certified orthopedic surgeon, noted that on November 18, 2004 appellant was placed on permanent light duty with limitations of no driving, stairs, squatting, kneeling or jumping, climbing or running. The restrictions also included no sitting longer than 30 minutes, no standing longer than 30 minutes, no walking longer than 30 minutes and no lifting over 10 pounds. Dr. McGuire opined that appellant had sustained permanent damage to her knee and advised that “it would be best [if] she retire.” He opined that appellant’s job duties had worsened her symptoms and were the cause of her current condition.

On July 27, 2005 the Office advised appellant that it would pay her wage-loss compensation from November 18, 2003 to July 9, 2005 and then every 28 days thereafter.<sup>2</sup> The Office noted the circumstances under which appellant could receive wage-loss compensation. Appellant was advised that to minimize the possibility of an overpayment, she must notify the Office if she returned to work. She was also advised that a partially disabled employee who returned to work was only entitled to compensation based upon the difference between the monthly pay and the employee’s wage-earning capacity.

The Office referred appellant to vocational rehabilitation. The vocational rehabilitation counselor determined that appellant’s medical restrictions would allow her to perform various clerical positions, including a general office clerk, receptionist and information clerk.

On October 20, 2005 the Office advised appellant’s congressional representative that appellant was entitled to benefits as long as she had continuing injury-related disability and or a work-related medical condition. The Office also indicated that appellant would not be entitled to continuing compensation benefits, if she were able to earn wages paid by her position at the time of her injury.

In a January 3, 2006 report, Dr. R. Matison White, Jr., a family practitioner, determined that appellant had severe degenerative arthritis of her right knee. He opined that appellant was in need of a total knee replacement and should be retired from her work. Dr. White noted that there was potential for further degenerative damage and loss of quality of life and basic functioning. He advised that appellant should avoid a total knee replacement “for as long as possible in order to have a normal, useful knee during her expected normal life expectancy.”

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<sup>1</sup> The record reflects that the Office also accepted appellant’s claim for a recurrence of disability related to a worsening of her right knee condition on January 21, 2003.

<sup>2</sup> The record reflects that appellant’s gross weekly pay rate when injured was \$637.89.

On March 13, 2006 the Office noted that appellant was employed. She accepted a full-time permanent position on March 13, 2006 with wages of \$10.50 per hour as a general office clerk performing duties and filling in as a relief receptionist.<sup>3</sup> On March 27, 2006 appellant received an offer to work as a temporary network assistant effective March 27, 2006. In an April 5, 2006 report, appellant's rehabilitation counselor advised that appellant was working in the payroll and accounting department. The counselor noted that appellant continued to work in the accounting department and enjoyed her work.

On April 12, 2006 appellant completed a Form CA-7 advising that she worked on March 10, 2006 for Hope Community Resources. A wage statement from her employer accompanied her form and indicated that she had received wages during the period February 27 to March 12, 2006.

In a May 25, 2006 report, Dr. T. Noah Laufer, a Board-certified family practitioner, noted that appellant had a history of severe degenerative osteoarthritis of the right knee and was a candidate for total knee replacement. Appellant related that, on May 19, 2006, she was asked to work in a different building and carried boxes up and down stairs. Dr. Laufer noted that appellant indicated that her supervisor acknowledged that this work was outside her restrictions and that she had been asked to do further work under these circumstances. He opined that appellant had worsening of her degenerative right knee osteoarthritis, which was an exacerbation of her condition at work. Dr. Laufer opined that her symptoms would continue to be bothersome and progress.

On June 16, 2006 the Office made a preliminary finding that an overpayment of \$2,617.55 arose because appellant received wage-loss compensation for total disability while simultaneously receiving wages from her employer. The Office determined that she was at fault in creating of the overpayment because she accepted a payment that she knew or reasonably should have known to be incorrect. Appellant was informed of her right to challenge the overpayment or request a waiver of the overpayment. If she wished a waiver of the overpayment, she was specifically directed to submit financial information by completing an overpayment recovery questionnaire. In an accompanying June 14, 2006 memorandum, the Office noted that appellant was hired as a full-time employee effective March 10, 2006; however, her periodic rolls compensation did not stop until April 16, 2006. As a result, appellant received an overpayment from March 10 to April 15, 2006. The Office found that the compensation payments that appellant received for the period February 19 to March 18, 2006 was \$1,979.00. For the period March 19 to April 15, 2006 she received \$2,048.00. The Office added the payments, to equal \$4,027.00 and subtracted the amount appellant should have received from February 19 to March 9, 2006, \$1,409.45, a total overpayment of \$2,617.55. The Office found that she was at fault as she was aware or reasonably should have been aware that there was no entitlement to receive wage-loss benefits after returning to full-time work. Appellant did not respond to the preliminary finding.

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<sup>3</sup> On May 18, 2006 appellant's vocational rehabilitation file was closed. The vocational rehabilitation counselor documented that appellant had obtained a full-time permanent job offer effective March 13, 2006 with wages of \$10.50 per hour as a general office clerk in the accounting department.

In a February 27, 2007 letter, appellant's congressional representative asked that the Office increase appellant's benefits. It was noted that appellant's position "ended in the middle of January 2007."

On March 14, 2007 the Office advised that appellant was employed as an accounting assistant at the community resource center where she earned wages of \$420.00 per week since April 2006. The Office found that this fairly and reasonably represented her wage-earning capacity. The Office determined that appellant performed the job until January 2007, had demonstrated the ability to perform the job for two months or more and the position was suitable to her partially disabled condition. The Office retroactively reduced appellant's compensation effective March 10, 2006.<sup>4</sup> The Office determined that appellant's gross weekly pay rate on the date of injury was \$637.89<sup>5</sup> and the current pay rate for the job as \$685.73. The Office noted that appellant earned \$420.00 per week and that the percentage of the new wage-earning capacity was equal to 61 percent, or a loss of wage-earning capacity of \$248.78 per week. The Office concluded that appellant's new compensation rate was equivalent to \$186.59 per week and reduced her compensation accordingly.

On March 27, 2007 appellant contended that the employing establishment could find a job to fit her disability. She wished to locate to a warmer climate and wanted back pay from January to the present.

By letter dated March 29, 2007, the Office informed appellant that her disability had extended beyond a year, and there was no requirement that the employing establishment provide her with a position in Alaska or another state. The Office noted that employers were encouraged to accommodate work limitations where feasible; however, they were under no obligation to find suitable light duty. Appellant was also advised that, if she was requesting temporary total disability from the date she was laid off, she had the burden to modify the loss of wage-earning capacity determination.

The Office subsequently received a January 27, 2004 report from Dr. McGuire, who opined that appellant had permanent damage to her knee and advised that "it would be best [if] she retire." He opined that appellant's "job duties have worsened her symptoms and are the causes of her current condition based on her medical record." In chart notes dated April 9, 2007, Dr. McGuire advised that appellant had severe degenerative joint disease, which he suspected might warrant a total knee replacement.

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<sup>4</sup> On June 22, 2006 the Office determined that appellant was recently employed as a temporary network assistant with wages of \$420.00 per week, effective March 10, 2006, which fairly and reasonably represented her wage-earning capacity. The Office determined that appellant had demonstrated the ability to perform the job for two months or more, and the position was suitable to her partially disabled condition, and reduced her compensation effective that date. On March 14, 2007 the Office rescinded this decision as it was issued in error due to the fact that the Office was unaware that appellant had changed duties to an accounting assistant.

<sup>5</sup> The decision actually contained a typographical error, stating that weekly pay rate when injured was \$685.73. However, the calculation is actually based on a weekly pay rate, when injured, of \$637.89, an amount that is supported by evidence of record.

By letter dated April 18, 2007, the Office advised appellant's congressional representative that appellant received a cost-of-living increase. The Office indicated that appellant was entitled to \$818.00 less premiums for health benefits and life insurance, for a net payment of \$710.82. The Office also noted that Dr. McGuire's January 27, 2004 report, was prior to appellant's return to work, and did not establish a worsening of her condition. The Office also noted that the April 9, 2007 report did not explain how appellant's condition had changed since she had returned to work as a network assistant, or how these changes would prevent her from performing her duties as a network assistant.

In a decision dated May 2, 2007, the Office finalized its preliminary findings on the fact and amount of the overpayment. The Office found that appellant was at fault because she accepted a payment which she knew or reasonably should have known was incorrect. The Office noted that no response was received from appellant to the June 16, 2006 preliminary finding, that appellant had not completed an overpayment questionnaire or provided any other financial information. The Office determined that the amount of \$100.00 would be withheld from her continuing compensation every 28 days until the overpayment was recovered.

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

Under section 8115(a) of the Act,<sup>6</sup> wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. 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 measure.<sup>7</sup> The formula for determining loss of wage-earning capacity based on actual earnings, developed in the Board's decision in *Albert C. Shadrick*,<sup>8</sup> has been codified by regulation at 20 C.F.R. § 10.403. Office procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days.<sup>9</sup> The amount of any compensation paid is based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>10</sup>

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

The Office accepted appellant's claim for tear of the right anterior cruciate ligament and paid appropriate compensation.

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<sup>6</sup> 5 U.S.C. §§ 8101-8193, 8115(a).

<sup>7</sup> *Hayden C. Ross*, 55 ECAB 455 (2004).

<sup>8</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

<sup>10</sup> See *Sharon C. Clement*, 55 ECAB 552 (2004).

The record reflects that appellant returned to work full time, as an accounting assistant beginning in April 2006. She was able to perform various clerical positions in accordance with Dr. McGuire's January 27, 2004 restrictions. Appellant initially began working as a general clerk on March 13, 2006, and later received an offer as a temporary network assistant effective, March 27, 2006. She accepted an assistant accounting position in April 2006 and continued to perform this position until January 2007. Accordingly, the Board finds that the position of an accounting assistant that appellant held commencing April 2006 was an appropriate limited-duty job which the Office properly determined represented her wage-earning capacity. Appellant began her modified position on March 27, 2006 and subsequently worked in the position for over 60 days. Her case was closed by the rehabilitation counselor on May 18, 2006. Appellant's performance of this position in excess of 60 days is persuasive evidence that the position represents her wage-earning capacity.<sup>11</sup>

As there was no evidence that appellant's actual earnings as an accounting assistant did not properly represent her wage-earning capacity, the Office properly accepted these earnings as the best measure of her wage-earning capacity. The record reflects that, on March 14, 2007, appellant's compensation was reduced to reflect her actual earnings as an accounting assistant, effective March 13, 2006, the date she returned to work.<sup>12</sup>

There is no evidence that the position was seasonal, temporary or make-shift work designed for appellant's particular needs.<sup>13</sup> The record reflects that appellant was making \$420.00 per week and that her gross weekly pay rate on the date of injury was \$637.89 and her current pay rate was \$685.73. The Office noted that the percentage of the new wage-earning capacity was equal to 61 percent, or a loss of wage-earning capacity of \$248.78 per week. The Office accordingly reduced appellant's compensation rate to \$186.59 per week. Therefore, the Office properly determined appellant's loss of wage-earning capacity under the *Shadrick* formula as of April 2006, as the Office found in its March 14, 2007 decision.<sup>14</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

The Federal Employees' Compensation Act 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>15</sup> When an overpayment has been made to an individual

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<sup>11</sup> Office procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

<sup>12</sup> While the Office used March 10, it appears that appellant actually began receiving wages on March 13, 2006.

<sup>13</sup> *Elbert Hicks*, 49 ECAB 283 (1998).

<sup>14</sup> *Supra* note 8.

<sup>15</sup> 5 U.S.C. § 8102(a).

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 the individual is entitled.<sup>16</sup>

A claimant is not entitled to receive total disability compensation and actual earnings for the same period. Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.<sup>17</sup>

### **ANALYSIS -- ISSUE 2**

The record indicates that on June 16, 2006, the Office found that an overpayment had occurred. The Office explained that the overpayment had occurred because appellant received compensation for total disability while she was employed as a full-time employee beginning March 10, 2006. The Office found that her periodic rolls compensation did not stop until April 16, 2006. The Office further found that this error created an overpayment of compensation to appellant. Appellant should not have received compensation for the period March 10 to April 15, 2006, as she was working and receiving wages. The Office determined that she received \$1,979.00, plus \$2,048.00 or a total of \$4,027.00 for the aforementioned time frame. The Office determined that appellant was entitled to receive compensation from February 19 to March 9, 2006 in the amount of \$1,409.45. The Office subtracted this amount from the \$4,027.00 to determine an overpayment in the amount of \$2,617.55. The Board will affirm the Office's May 2, 2007 decision on the issue of fact and amount of overpayment.

### **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 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>18</sup>

Whether or not the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.<sup>19</sup>

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<sup>16</sup> *Id.* at § 8129(a).

<sup>17</sup> *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

<sup>18</sup> 20 C.F.R. § 10.433(a).

<sup>19</sup> 20 C.F.R. § 10.433(b).

### 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 appellant 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.<sup>20</sup>

The record contains no evidence that appellant was apprised by the Office, as of the time she accepted the compensation checks, 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 he worked.<sup>21</sup> If such evidence existed which established that appellant had notice that she was accepting an incorrect payment, this would establish fault. However, there is no evidence in the record that any letter or other information which accompanied the check which would have reasonably put appellant on notice that she had received an incorrect payment. As noted above, in determining whether an individual is without fault, the Office must consider an individual's understanding of the obligation to return payments which were not due. If there is no evidence which indicates that an individual knew or should have known at the time the incorrect payment was accepted that the payment was not due, the Office cannot meet its burden of proof in finding that such individual was at fault in accepting an incorrect payment. There is no other evidence of record which put appellant on notice that the compensation check was for a period of time to which she was not entitled to compensation. Appellant's congressional representative received a notice on October 20, 2005 that appellant would not be entitled to continuing compensation benefits, if she were able to earn wages paid by her position at the time of her injury. However, there is no evidence that the letter was sent to appellant or that she was aware of it prior to receipt and acceptance of the check in question. As there is no evidence which indicates that appellant know or should have known that she was not due the incorrect payment at the time she accepted the payment, the Office has not met its burden. For this reason, the Office has not met its burden of proof in establishing that she was at fault.

Thus, the May 2, 2007 decision is reversed as to the finding of fault for the overpayment of compensation and the case is remanded to the Office for a determination on the issue of whether appellant is entitled to waiver of the overpayment.<sup>22</sup>

### CONCLUSION

The Board finds that the Office properly determined appellant's wage-earning capacity. The Board also finds that the Office properly determined that appellant received an overpayment in the amount of \$2,617.55. However, the Office did not meet its burden of proof in establishing that appellant was at fault in creating the overpayment in the amount of \$2,617.55. Thus, the May 2, 2007 decision is reversed as to the finding of fault for the overpayment of and the case is

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<sup>20</sup> *Robin O. Porter*, 40 ECAB 421 (1989).

<sup>21</sup> *Id.*

<sup>22</sup> The issue regarding recovery of the overpayment is not in posture.



remanded to the Office for a determination on the issue of whether appellant is entitled to waiver of the overpayment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 2, 2007 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part and the case remanded for further action consistent with this decision. The March 14, 2007 decision is affirmed.

Issued: April 21, 2008  
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