



was placed on the periodic rolls effective June 10, 2007. It also advised him that he could only receive compensation when his work injury prevented him from performing his regular work. On January 12, 2008 appellant returned to work for the employing establishment on a full-time basis as a vehicle operations assistant.

In a January 14, 2008 notice, the Office advised that appellant of its preliminary determination that he received a \$769.08 overpayment of compensation because he returned to work in a full-time capacity on January 12, 2008 but received compensation for total disability until January 19, 2008. It made a preliminary determination that appellant was at fault in the creation of the overpayment because he knew or should have reasonably known that he received compensation from January 12 to 19, 2008 to which he was not entitled. The Office noted that appellant was paid compensation for disability beginning on October 28, 2006 and received compensation on the periodic rolls beginning June 10, 2007. Regarding the calculation of the overpayment, it stated:

“Net total of \$2,603.51 compensation paid to [appellant] for the period December 23, 2007 to January 19, 2008 (Calculation A) less amount of net compensation actually due to the claimant of \$1,834.43 for the period December 23, 2007 to January 11, 2008 (Calculation B) = \$769.08 (amount of overpayment).”<sup>1</sup>

On January 23, 2008 appellant completed an overpayment questionnaire. He requested waiver of the \$769.08 overpayment. In a February 12, 2008 telephone conference with the Office, appellant further discussed his financial status.

In a March 5, 2008 decision, the Office determined that appellant received a \$769.08 overpayment of compensation for which he was at fault in creating. Therefore, waiver of recovery of the overpayment was precluded. The Office requested that appellant forward a check in the amount of \$769.08.<sup>2</sup>

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<sup>1</sup> The record contains documents which show that on January 19, 2008 a \$2,603.51 disability compensation check from the Office, covering the period December 23, 2007 to January 19, 2008, was directly deposited into appellant's bank account. The record also contains a calculation sheet showing that \$1,834.43 of the \$2,603.51 check covered the period December 23, 2007 to January 11, 2008 and that \$769.08 of the check covered the period January 12 to 19, 2008.

<sup>2</sup> As recovery from continuing compensation benefits under the Federal Employees' Compensation Act is not involved in this case, the Board has no jurisdiction over the amount the Office determined that appellant should repay each month. *Levon H. Knight*, 40 ECAB 658, 665 (1989).

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

Section 8102(a) of the Act<sup>3</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>4</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>5</sup>

Section 8116(a) of the Act provides that while an employee is receiving compensation or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.<sup>6</sup>

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

On January 12, 2008 appellant returned to work at the employing establishment on a full-time basis as a vehicle operations assistant. The evidence of record establishes that on January 19, 2008 a \$2,603.51 disability compensation check, covering the period December 23, 2007 to January 19, 2008, was directly deposited into his bank account. Appellant was not entitled to receive that portion of the \$2,603.51 compensation check which covered the period January 12 to 19, 2008 because he had returned to work on January 12, 2008. The record contains a calculation sheet showing that \$1,834.43 of the \$2,603.51 check covered the period December 23, 2007 to January 11, 2008 and that \$769.08 of the check covered the period January 12 to 19, 2008, *i.e.*, the period of the overpayment of compensation. The Board finds that, therefore, appellant received a \$769.08 overpayment of compensation.

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

Section 8129(a) of the 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.<sup>7</sup> 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 this

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> 5 U.S.C. § 8102(a).

<sup>5</sup> *Id.* at § 8129(a).

<sup>6</sup> *Id.* at § 8116(a).

<sup>7</sup> 5 U.S.C. § 8129(a).

subchapter or would be against equity and good conscience.”<sup>8</sup> No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment. It is the Office’s burden of proof to show that a claimant was at fault in the creation of an overpayment.<sup>9</sup>

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

“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....”<sup>10</sup>

Section 10.433(c) of the Office’s regulations provides:

“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>11</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 account which is something more than receipt, *i.e.*, 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>12</sup>

Even though the Office may have been negligent in making an incorrect payment, this does not excuse the employee from accepting payments he knew or should have known to be incorrect.<sup>13</sup> The Board has found the claimant to be at fault in cases where he is receiving

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<sup>8</sup> *Id.* at § 8129(b).

<sup>9</sup> See *Robert S. Luciano*, 47 ECAB 793 (1996).

<sup>10</sup> 20 C.F.R. § 10.433(a).

<sup>11</sup> *Id.* at § 10.433(c).

<sup>12</sup> *Tammy Craven*, 57 ECAB 689 (2006).

<sup>13</sup> *William E. McCarty*, 54 ECAB 525 (2003).

compensation checks through direct deposit which involve a series of payments over several months with clear knowledge that the payments were incorrect.<sup>14</sup> The Board has held; however, that it is not appropriate for the Office, to make a finding that a claimant has accepted an overpayment by direct deposit until such time as a reasonable person would have been aware that an overpayment had occurred. This awareness may 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>15</sup>

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

Since Office regulations define fault by what the employee knew or should have known at the time of acceptance. One of the consequences of electronic fund transfers is that a claimant will not be found at fault for accepting the first incorrect payment because the requisite knowledge is lacking at the time of deposit. On January 19, 2008 a \$2,603.51 compensation check was directly deposited into appellant's bank account. The Board finds that, at the time of deposit, appellant did not know that he received an incorrect amount of compensation.<sup>16</sup> Although appellant was advised after the deposit that the check covered the period December 23, 2007 to January 19, 2008, the Office did not present any evidence or argument showing that, at the time of the deposit, appellant knew or should have known that he was not entitled to receive a portion of the check. It is the Office's burden of proof to establish fault in the receipt of an overpayment and the Office has not met its burden of proof in this case.<sup>17</sup> Therefore, the Board finds that appellant is not at fault in the creation of the \$769.08 overpayment.

A finding of no fault does not mean, however, that appellant may keep the money, only that the Office must consider eligibility for waiver for this period. The case will be remanded for it to determine whether he is entitled to waiver for this period. After such development as it deems necessary, the Office should issue an appropriate decision regarding this overpayment matter.

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<sup>14</sup> See *Karen K. Dixon*, 56 ECAB 145 (2004).

<sup>15</sup> See *K.H.*, Docket No. 06-191, issued October 30, 2006.

<sup>16</sup> See *Karen K. Dixon*, *supra* note 14.

<sup>17</sup> See *supra* note 9 and accompanying text.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' March 5, 2008 decision is affirmed with respect to the fact and amount of the \$769.08 overpayment. The March 5, 2008 decision is reversed with respect to the matter of fault and set aside with respect to the matter of waiver. The case is remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: August 5, 2009  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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