

**United States Department of Labor  
Employees' Compensation Appeals Board**

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| A.C., Appellant                          | ) |                                  |
|  | ) |                                  |
| and                                      | ) | <b>Docket No. 09-177</b>         |
|  | ) | <b>Issued: September 9, 2009</b> |
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| <b>U.S. POSTAL SERVICE, NORTH TEXAS</b>  | ) |                                  |
| <b>DISTRIBUTION CENTER, Coppell, TX,</b> | ) |                                  |
| <b>Employer</b>                          | ) |                                  |
|  | ) |                                  |

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On October 23, 2008 appellant filed a timely appeal of a September 29, 2008 overpayment decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUES**

The issues are: (1) whether the Office properly determined that appellant received a \$12,193.92 overpayment of compensation; (2) whether the Office properly denied waiver of recovery of the overpayment; and (3) whether the Office abused its discretion in requiring repayment in a lump sum.

**FACTUAL HISTORY**

On February 5, 2008 appellant, then a 29-year-old part-time flexible mail processing clerk, filed a claim for an occupational disease claim alleging that she developed chronic costochondritis due to continuous pulling and lifting of heavy buckets of mail. The Office

accepted her claim for costochondritis. On March 6, 2008 appellant filed a Form CA-7 claim for disability beginning August 1, 2007 and continuing. On its portion of the claim form the employing establishment reported that her annual salary was \$39,938.00 and she had 1,256 leave-without-pay (LWOP) hours from August 1, 2007 to March 7, 2008. On March 19, 2008 the employing establishment corrected appellant's pay information. It advised that she was paid \$18.69 an hour and averaged 24.57 hours a week with \$587.08 night differential pay per year and \$536.63 Sunday premium pay per year. Appellant was on LWOP from August 4, 2007 to February 22, 2008 for a total of 703.57 LWOP hours. On April 18, 2008 the Office advised her that she was entitled to \$18,863.89 for lost wages from August 9, 2007 to April 12, 2008.

On March 6, April 2 and 21, 2008 appellant submitted time analysis forms for August 2, 2007 to March 7, 2008 claiming 1,256 hours of LWOP at 8 hours a day.<sup>1</sup> She claimed 24 hours of LWOP for March 24, 27 and 28, 2008 at 8 hours a day. For March 29 to April 11, 2008 appellant claimed 49.14 hours of LWOP at 4.91 hours a day. The employing establishment submitted corrected time analysis forms showing that appellant was entitled to 703.57 hours of LWOP from August 4, 2007 to February 22, 2008. Appellant received 40 hours of administrative leave for February 23 to March 23, 2008.

On April 21, 2008 the Office advised appellant of its preliminary determination that there was an overpayment of compensation in the amount of \$12,196.91 because she was paid at an incorrect pay rate. The employing establishment initially reported that her annual salary was \$39,938.00. Based on this information, the Office paid appellant at the weekly pay rate of \$768.04 for 1,256 hours. The employing establishment subsequently advised that she was a part-time flexible mail processing clerk and was paid \$18.69 per hour with \$587.08 night differential pay per year and \$536.63 Sunday premium pay per year. Appellant worked an average of 24.57 hours a week. Based on this information, the Office calculated that her correct weekly pay rate was \$480.82. The employing establishment advised that appellant had 703.57 hours of LWOP pay from August 4, 2007 to February 22, 2008. Appellant received \$18,863.89 in wage-loss compensation for August 9, 2007 through April 12, 2008 at a pay rate of \$768.04 per week but should have received \$6,666.98. The Office deducted \$6,666.98 from \$18,863.89 and calculated an overpayment of \$12,196.91. It made a preliminary determination that appellant was without fault in the creation of the overpayment because she was not aware nor could she reasonably have been aware that she had been paid at an incorrect pay rate. Appellant was advised to submit evidence or argument if she disagreed with the fact or amount of the overpayment or if she wished to request a waiver of recovery of the overpayment.

On May 18, 2008 appellant requested an oral hearing on the issues of fault and waiver. She did not contest the fact that an overpayment occurred but disagreed with the amount of the overpayment. On May 20, 2008 appellant submitted a completed overpayment recovery questionnaire. By decision dated July 21, 2008, an Office hearing representative remanded the case for recalculation of the amount of the overpayment. She noted a number of discrepancies in the information provided by the employing establishment regarding the total hours that appellant

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<sup>1</sup> A time analysis form from the employing establishment dated August 19, 2008 indicated that appellant used sick leave for August 1, 2007, was not scheduled to work on August 2, 2007 and used annual leave for August 3, 2007.

was on leave without pay. The hearing representative directed the Office to contact the employing establishment and request a time analysis for August 1, 2007 through April 12, 2008.

On August 8, 2008 the employing establishment submitted corrected copies of time analysis forms. The forms indicated that appellant had 703.57 hours of LWOP for August 4, 2007 to February 22, 2008.

On August 28, 2008 the Office advised appellant of its preliminary determination that there was an overpayment of compensation in the amount of \$12,193.92 because she was paid at an incorrect pay rate. The employing establishment initially reported that her annual salary was \$39,938.00. Based on this information, the Office paid appellant at the weekly pay rate of \$768.04 for 1,256 hours. The employing establishment subsequently advised the Office that she was paid \$18.69 per hour with \$587.08 night differential pay per year and \$536.63 Sunday premium pay per year and she worked an average of 24.57 hours a week. The Office calculated that appellant's correct weekly pay rate was \$480.82. It found that she received \$18,863.89 in wage-loss compensation for August 9, 2007 through April 12, 2008 at a pay rate of \$768.04 per week but should have received \$6,666.98.<sup>2</sup> The Office deducted \$6,669.97<sup>3</sup> from \$18,863.89 and calculated an overpayment of \$12,193.92. It made a preliminary determination that appellant was without fault in the creation of the overpayment because she was not aware nor could she reasonably have been aware that she had been paid at an incorrect pay rate. Appellant was advised to submit evidence or argument if she disagreed with the fact or amount of the overpayment or if she wished to request a waiver of recovery of the overpayment.

By decision dated September 29, 2008, the Office finalized the determination that appellant received an overpayment of \$12,193.92 because the Office paid her at an incorrect pay rate. It found that she was without fault in the creation of the overpayment. The Office found that the circumstances in appellant's case did not warrant waiver of recovery of the overpayment. It stated that the reasons for the decision were explained in an enclosed memorandum. However, no memorandum was enclosed with the decision. The Office requested that appellant repay the overpayment in one lump sum of \$12,193.92.<sup>4</sup>

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

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 duty.<sup>5</sup> When an overpayment has been made to an individual

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<sup>2</sup> In an August 19, 2008 time analysis form, the employing establishment indicated that appellant was on LWOP status beginning August 9, 2007.

<sup>3</sup> There is no explanation as to why the Office changed the amount of compensation which appellant should have been paid from \$6,666.98 to \$6, 669.97.

<sup>4</sup> Subsequent to the September 29, 2008 decision, additional evidence was associated with the file. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

<sup>5</sup> 5 U.S.C. §§ 8101-8193, 8102(a).

because of error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the employee is entitled.<sup>6</sup>

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

The Board finds that this case is not in posture for a decision. The record requires clarification as to whether appellant's LWOP status began August 4 or 9, 2007. On March 19, 2008 the employing establishment indicated that she was in LWOP status beginning August 4, 2007. In an August 19, 2008 time analysis form, the employing establishment indicated that the LWOP period began August 9, 2007. The record also requires clarification as to the actual amount that appellant received for lost wages for August 4, 2007 to April 12, 2008.<sup>7</sup> On April 21, 2008 the Office advised that appellant received \$18,863.89 in compensation between August 9, 2007 and April 12, 2008. There are no printouts of record showing dates and amounts of checks sent to appellant. On remand the Office should document the amount paid to appellant for lost wages for the period August 4, 2007 to April 12, 2008. Additionally, the record is unclear as to the number of LWOP hours appellant is entitled to be paid for August 4, 2007 to April 12, 2008.<sup>8</sup> On March 19, 2008 the employing establishment advised that appellant had 703.57 hours of LWOP from August 4, 2007 to February 22, 2008. The record does not show appellant's LWOP hours from March 24 to April 12, 2008, although the Office stated that she was paid for lost wages through April 12, 2008 and the July 21, 2008 hearing representative directed the Office to obtain a time analysis through April 12, 2008.<sup>9</sup> There is also a question as to the amount that appellant should have received for August 4, 2007 to April 12, 2008. On April 21, 2008 the Office stated that appellant should have received \$6,666.98 for the period August 9, 2007 through April 12, 2008. In its August 28, 2008 preliminary overpayment determination, it first stated that appellant should have been paid \$6,666.98 for August 9, 2007 to April 12, 2008. However, the Office deducted a different amount, \$6,669.97, from the \$18,863.89 paid from August 9, 2007 to April 12, 2008, calculating an overpayment of \$12,193.92. In summary, it should determine whether the period of appellant's LWOP began on August 4 or August 9, 2007. The Office should document the amount that appellant received for lost wages, the number of hours of LWOP to which she was entitled and the amount of compensation to which she was entitled for lost wages. After such further development as it deems necessary, it should issue an appropriate decision.

### **CONCLUSION**

The Board finds that this case must be remanded for recalculation of the amount of the overpayment. In light of the Board's resolution of the first issue, the second and third issues are rendered moot.

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<sup>6</sup> *Id.* at § 8129(a).

<sup>7</sup> On March 19, 2008 the employing establishment stated that appellant was on LWOP beginning August 4, 2007. However, on April 18, 2008 the Office indicated that her LWOP began on August 9, 2007.

<sup>8</sup> As noted, appellant was not in LWOP status from August 1 to 3, 2007.

<sup>9</sup> As noted, appellant received administrative leave for February 23 to March 23, 2008.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 29, 2008 is set aside and the case is remanded for further action consistent with this decision.

Issued: September 9, 2009  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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