



## **FACTUAL HISTORY**

On June 30, 2003 appellant, then a 49-year-old structural worker, experienced pain in his low back and right shoulder when carrying closing plates from a pier to his work site. The Office accepted the claim for permanent aggravation of lumbosacral spondylosis and paid appropriate compensation benefits. Appellant retired from the employing establishment on March 6, 2004 and elected benefits under the Federal Employees' Compensation Act. Beginning September 4, 2005, he was paid compensation for total disability on the periodic rolls.

By letter dated August 30, 2005, the Office advised appellant of the circumstances under which he could receive compensation. It informed him that, to avoid an overpayment, he must return any periodic rolls checks issued which included payment of compensation after he returned to work.

Appellant returned to work in the private sector as a microfiche machine operator on March 3, 2009. Subsequently, he submitted evidence showing his earnings in his new job. The employing establishment submitted evidence regarding appellant's rate of pay on the date of injury and on March 3, 2009.

In a letter dated April 6, 2009, the Office informally reduced appellant's compensation benefits effective March 3, 2009 based on his earnings as a microfiche machine operator for a private employer with weekly wages of \$320.00 (\$8.00 per hour for 40 hours per week). It noted that he received a 28-day compensation check for the period February 15 through March 14, 2009 which partially covered the period following his return to work on March 3, 2009. The Office advised that, in order to avoid an overpayment, appellant should return the check and another check, which covered the appropriate period, would be issued. It also enclosed its worksheet which found that appellant's new compensation rate each four weeks effective March 3, 2009 would be \$1,620.34. Appellant did not respond.

In a letter dated April 14, 2009, the Office advised appellant that it made a preliminary determination that he received a \$336.64 overpayment of compensation because he returned to full-time work on March 3, 2009 in the private sector but continued to receive compensation for total disability until March 14, 2009. It found that he was at fault in the creation of the overpayment as he knew or should have reasonably known that he was not entitled to compensation for total disability after his return to work on March 3, 2009. For the period March 3 to 14, 2009, the Office found that appellant received \$1,071.14. It calculated this amount by dividing the \$2,499.34 net compensation payment appellant received from February 15 to March 14, 2009 by 28 days to find that appellant received \$89.26 a day. The \$89.26 a day in compensation was multiplied by 12 days in the overpayment period from March 3 to 14, 2009. The Office then subtracted \$734.50, appellant's entitlement to compensation less his actual earnings for the period March 3 to 14, 2009, to find the \$336.64 overpayment amount. The \$734.50 was calculated under the *Shadrick* formula and represented

appellant's entitlement to compensation after his return to work on March 3, 2009.<sup>2</sup> Appellant was informed of his right to challenge the fact or amount of the overpayment or request a waiver. If he wished a waiver of the overpayment, he was directed to submit financial information by completing an overpayment recovery questionnaire. The overpayment recovery questionnaire in part directed appellant to list his monthly income including any income from a spouse or any dependent relative living in the household with him. The Office attached copies of its worksheets which explained how the overpayment was calculated.

On April 18, 2009 appellant requested that the Office make a decision on his overpayment based on the written evidence. He disagreed that the overpayment had occurred through any fault of his and requested waiver. Appellant completed an overpayment recovery questionnaire. He advised that he currently had \$32.57 in his checking account and \$100.00 in his savings account and his monthly income was \$4,916.48. Appellant listed monthly expenses of \$4,410.48, which included \$1,685.00 for mortgage and property tax, \$400.00 for food, \$300.00 for clothing and \$980.00 for utilities. He paid monthly installments of \$65.00, \$291.00, \$155.00 and \$534.00 to individual creditors. Appellant believed that the money in his workers' compensation check was his and that he did not get a financial breakdown on what his new rate of compensation would be until a week later. He stated that he needed the money to help pay bills.

By decision dated May 11, 2009, the Office finalized the overpayment of compensation in the amount of \$336.64. Appellant returned to work in the private sector on March 3, 2009 and had earnings but continued to receive compensation for total disability until March 14, 2009. The Office found that appellant was at fault in the matter of the overpayment as he accepted payments he knew or reasonably should have known he was not entitled as he had returned to work in the private sector. It reviewed the financial evidence provided and directed recovery by deducting \$50.00 every four weeks from his continuing compensation payments.

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

Section 8102(a) of the Act<sup>3</sup> provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty. A claimant, however, is not entitled to receive temporary total disability and actual earnings for the same period.<sup>4</sup> Office procedures

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<sup>2</sup> The formula for determining loss of wage-earning capacity based on actual earnings, developed in *Albert C. Shadrick*, 5 ECAB 376 (1953), has been codified at 20 C.F.R. § 10.403 of the Office's regulations. The Office calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job. *See J.C.*, 58 ECAB 700 (2007). Under the *Shadrick* formula, the Office determined that appellant's salary on June 30, 2003, the date he was injured, was \$801.89 per week, that the current adjusted pay rate for his job was \$1,011.00 per week and that he was currently capable of earning \$320.00 per week as a microfiche machine operator in the private sector. It, then determined that appellant had 32 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of \$256.60 per week. The Office concluded that appellant's new gross weekly compensation rate was \$467.50 with cost-of-living adjustment and that his net compensation, after reduction for life and health insurance, for each four-week period would be \$1,620.34.

<sup>3</sup> 5 U.S.C. §§ 8101-8193, 8102(a).

<sup>4</sup> *Id.* at § 8116(a).

provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.<sup>5</sup>

Under sections 8110(a)(1) and 8101(17) of the Act, an employee is entitled to compensation at the augmented rate of 3/4 of his weekly pay if he has one or more dependents.<sup>6</sup>

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

The record establishes that appellant received an overpayment of compensation in the amount of \$336.64 for the period March 3 to 14, 2009 because he had actual earnings from employment during a period for which he received total disability compensation. When an employee has earnings from employment, he is not entitled to receive temporary total disability benefits and actual earnings for the same time period.<sup>7</sup> Under these circumstances, the Office offsets actual earnings pursuant to the *Shadrick* formula. If a reduction of benefits based upon actual earnings is not accompanied by a determination that the earnings fairly and reasonably represent the employee's wage-earning capacity, an informal reduction of benefits utilizing the *Shadrick* formula is proper rather than a formal loss of wage-earning capacity determination. The Office had not found that appellant's actual earnings as a microfiche machine operator fairly and reasonably represented his wage-earning capacity at the time it issued its overpayment decision. Therefore, it properly provided an informal determination of the amount owed based on his actual earnings using the *Shadrick* formula.<sup>8</sup>

In determining the amount of the overpayment, the Office found that appellant earned \$8.00 an hour for a 40-hour week (\$320.00 per week) when he returned to work in the private sector on March 3, 2009. Using the *Shadrick* formula, it found that he was entitled to compensation during the period March 3 to 14, 2009 period based on his actual earnings in the amount of \$734.50. The Office subtracted the amount of compensation owed, \$734.50, from the amount of compensation received, \$1,071.14, to find an overpayment of \$336.64. Appellant has not submitted any evidence to show that he did not receive this overpayment of compensation or that the amount of the overpayment was erroneously calculated. The Board finds that he received an overpayment of compensation in the amount of \$336.64 for the period March 3 to 14, 2009.

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

Section 8129(b) of the Act<sup>9</sup> provides that adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault

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<sup>5</sup> *Danny E. Haley*, 56 ECAB 393, 400 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (September 1994).

<sup>6</sup> 5 U.S.C. §§ 8110(a)(1) and 8101(17); 20 C.F.R. § 10.405.

<sup>7</sup> *L.S.*, 59 ECAB \_\_\_\_ (Docket No. 07-1961, issued February 14, 2008); *Daniel Renard*, 51 ECAB 466 (2000); 20 C.F.R. § 10.403(c).

<sup>8</sup> 5 U.S.C. § 8106(a); *see id.*

<sup>9</sup> *Id.* at § 8129(b).

and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.

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 received 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; (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>10</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>11</sup>

Section 10.430(a) of the Office's regulations advises that the Office includes on each periodic check a clear indication of the period for which payment is being made. A form is sent to the recipient with each supplemental check which states the period for which payment is being made. Section 10.430(b) notes that, by these means, the Office puts the recipient on notice that a payment was made and the amount of the payment.<sup>12</sup>

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

The Office found that appellant was at fault in creating the overpayment because he accepted a payment he knew or should have known to be incorrect. As noted, appellant was not entitled to wage-loss compensation from March 3 through 14, 2009 for total disability when he also worked and received a salary. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives are proper.<sup>13</sup> The recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits.<sup>14</sup>

The Office notified appellant in an August 30, 2005 letter, when he was placed on the periodic compensation rolls, that he was to immediately inform the Office upon his return to work to avoid an overpayment in compensation and that, if he worked during any period covered

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<sup>10</sup> 20 C.F.R. § 10.433(a).

<sup>11</sup> *Id.* at § 10.433(b).

<sup>12</sup> *Id.* at § 10.430.

<sup>13</sup> *See Danny E. Haley*, 56 ECAB 393 (2005).

<sup>14</sup> *See Sinclair L. Taylor*, 52 ECAB 227 (2001).

by a compensation payment, he had to return the payment to the Office. Under these circumstances, appellant should have known that he could not receive wage-loss compensation during any period that he worked.<sup>15</sup> While he notified the Office of his return to work, he did not return the compensation he received by check for the period February 15 through March 14, 2009, which covered the period following his return to work.<sup>16</sup>

Furthermore, the Office includes on each periodic check a clear indication of the period for which payment is being made. By doing this, it puts the recipient on notice that a payment was made and the amount of the payment.<sup>17</sup> This is evidence that appellant should have been aware that, when he accepted the compensation for the period in question, he was not entitled to receive wage-loss compensation for total disability for a period when he worked.

The Board finds that appellant knew or should have known after he returned to work that he was not entitled to concurrently receive a salary and wage-loss compensation. Appellant had an obligation to return payments that he knew or should have known to be incorrect. Appellant was at fault in the creation of the overpayment and is not entitled to waiver of the overpayment in compensation.<sup>18</sup>

### **LEGAL PRECEDENT -- ISSUE 3**

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information will be used to determine the repayment schedule, if necessary.<sup>19</sup>

When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to the Office the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, the Office shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.<sup>20</sup>

### **ANALYSIS -- ISSUE 3**

With respect to the recovery of an overpayment, the Board notes that its jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation

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<sup>15</sup> See *Neill D. Dewald*, 57 ECAB 451 (2006).

<sup>16</sup> The fact that the Office may have been negligent in making payment to a claimant does not relieve the employee of fault in accepting an incorrect payment. See *Ricky Greenwood*, 57 ECAB 462 (2006).

<sup>17</sup> *J.R.*, 60 ECAB \_\_\_\_ (Docket No. 08-1107, issued June 15, 2009). 20 C.F.R. § 10.430.

<sup>18</sup> *Supra* note 10.

<sup>19</sup> 20 C.F.R. § 10.438.

<sup>20</sup> *Id.* at § 10.441(a).

benefits under the Act.<sup>21</sup> Regarding the recovery of the \$336.64 overpayment from appellant's continuing compensation, the Office found it reasonable to deduct \$50.00 from his periodic continuing compensation payments to recover the debt.

Appellant reported in the overpayment recovery questionnaire that he had a monthly income of \$4,916.48 and monthly expenses of \$4,410.48. The Office determined that he received \$3,150.00 from his monthly compensation payments and actual earnings in the private sector, which was less than the total amount of income indicated. It noted that appellant did not report income from his spouse and that he failed to provide any supporting financial evidence to support his reported monthly income and expenses. The Office found that his actual monthly expenses did not exceed the actual monthly income. Based on the evidence of record, it took into consideration relevant factors so as to minimize any hardship and properly directed recovery of the overpayment by deducting \$50.00 from continuing compensation payments every four weeks.

Appellant argues on appeal that he included his wife's income in the reported monthly income of \$4,916.48. The Board notes that it is his responsibility to submit supporting financial evidence.<sup>22</sup> In any event, appellant's reported income exceeded his monthly expenses by about \$500.00. He also asserts that he was owed additional compensation from the Office and was justified in cashing his compensation check. However, appellant did not submit any evidence to establish that he was owed additional compensation the overpayment was created. Additionally, he was advised to return any compensation checks received after he returned to work. The compensation check in question contained the period covered by the check to put appellant on notice that the check was payment for a period in which he worked and earned a salary.

### CONCLUSION

The Board finds that the Office properly determined that appellant received a \$336.64 overpayment of compensation from March 3 through 14, 2009, that he was at fault in creating the overpayment and that the Office properly directed recovery of the overpayment at the rate of \$50.00 every four weeks from appellant's continuing compensation payments.

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<sup>21</sup> *Terry A. Keister*, 56 ECAB 559 (2005); *see also Cheryl Thomas*, 55 ECAB 610 (2004).

<sup>22</sup> *See* 20 C.F.R. § 10.438(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 11, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 22, 2010  
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