



## **FACTUAL HISTORY**

On January 8, 2010 appellant, then a 57-year-old secretary, sustained injury to her right knee when she slipped on a wet floor in a hallway at work. She stopped work that day and received treatment at the employer's health unit. The Office accepted appellant's claim for right knee medial meniscus tear and old bucket handle tear.

Appellant came under the treatment of Dr. Syed A. Zahir, a Board-certified orthopedic surgeon. He advised that she could return to work as of January 13, 2010. Following a course of conservative care, Dr. Zahir recommended that she proceed to arthroscopic surgery.<sup>2</sup> Appellant stopped work on March 2, 2010 and underwent synovectomy of the medial, lateral and superior compartments, trimming of the anterior horn of the medial meniscus and chondroplasty of the medial femoral condyle. Dr. Zahir anticipated her return to work as of March 22, 2010 but she was released to modified work with restrictions as of March 10, 2010.

On March 2, 2010 appellant filed a claim for wage-loss compensation for the period of March 2 through 12, 2010.<sup>3</sup> On March 9, 2010 the Office issued payment in the amount of \$1,195.96 in wage-loss compensation for the claimed period.<sup>4</sup>

The record contains an April 9, 2010 overpayment memorandum. It noted that appellant returned to work on March 10, 2010 and that the waiting period days were not deducted from her check. The record listed payment of \$1,195.96 from March 2 through 9, 2010. In explanation of the pay rates and calculations, the claims examiner stated: "March 5 through 9, 2009 (waiting period taken) \$425.00." In describing how the amount of overpayment was calculated, the memorandum stated: "\$1,195.96 minus \$425.23; \$770.73 minus \$335.50 (claimant returned); remaining overpayment \$435.23." Handwritten corrections were made of \$345.50 as the amount returned by appellant resulting in an outstanding balance of \$425.23.

On April 9, 2010 the Office notified appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$425.23. Appellant received compensation from March 2 through 12, 2010 but was only entitled to compensation from March 5 through 9, 2010 based on her return to work as of March 10, 2010. As she was disabled less than 14 days following the continuation of pay (COP) period, she was not entitled to wage-loss compensation for the first three days of disability. March 2, 3 and 4, 2010 were considered waiting days and not payable. Therefore, appellant should have received compensation from March 5 through 9, 2010. Payment from March 2 through 12, 2010 was made in the amount of \$1,195.96, but she should have only received \$425.23. The Office found

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<sup>2</sup> A January 15, 2010 right knee magnetic resonance imaging (MRI) scan revealed a tear of the posterior horn of the medial meniscus, a partial thickness tear and chondromalacia at the lateral compartment.

<sup>3</sup> The employing establishment advised that appellant used 3.5 hours of leave without pay (LWOP) on March 2, 2010 and 8 hours of LWOP from March 3 to 12, 2010 or a total of 67.5 hours.

<sup>4</sup> On March 10, 2010 the Office notified appellant that, since she had returned to work that day, she was not entitled to wage-loss compensation after her return to full-time work. It asked her to remit \$345.50 in order to avoid an overpayment from March 10 to 12, 2010. On March 15, 2010 appellant sent a check in that amount to the Office.

that appellant was without fault in the creation of the overpayment and notified her of her right to request a precoupment hearing or waiver of the overpayment.

On April 15, 2010 appellant contested the overpayment, noting that it arose through no fault of her own. She requested waiver.

In a May 11, 2010 letter, the Office noted that appellant did not complete part one of the overpayment action request form. It advised that if she sought waiver of the overpayment, she should return a completed form within 10 days together with supporting financial documentation. There was no response.

In a June 1, 2010 decision, the Office finalized the overpayment in the amount of \$425.23. Although appellant was found without fault in the creation of overpayment, it denied waiver as she did not timely complete the overpayment action request form or submit any financial information establishing a basis for waiver.

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

When an injured employee receives payment in excess of the amounts provided for under the Act, an overpayment is created and the Office must determine the questions of fact, amount, fault and recovery.<sup>5</sup>

Section 8117 of the Act provides that an employee is not entitled to compensation for the first three days of temporary disability except: (1) when the disability exceeds 14 days; (2) when the disability is followed by permanent disability; or (3) as provided by section 8103 and 8104 of this title.<sup>6</sup> Section 8103 of the Act refers to the payment of medical expenses, while section 8104 refers to vocational rehabilitation expenses.<sup>7</sup>

In order to determine the three-day waiting period under section 8117, it must first be determined under section 8118(a) of the Act whether the entitlement to COP had ceased as of those dates.<sup>8</sup> Under the Office's implementing federal regulations, the 45-day period of COP starts with the first day or shift following the date or shift of injury.<sup>9</sup> When the employee's job-related disability continues after entitlement to continuation of pay ceases, the employee is entitled to receive disability compensation for wage loss subject to the provisions of section 8117.<sup>10</sup>

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<sup>5</sup> See 20 C.F.R. §§ 10.431, 10.433-437; *see also* Docket No. 09-176 (issued September 23, 2009).

<sup>6</sup> 5 U.S.C. § 8117.

<sup>7</sup> *Id.* at §§ 8103, 8104.

<sup>8</sup> See *Paula Read*, Docket No. 97-2550 (issued October 27, 1999).

<sup>9</sup> 20 C.F.R. § 10.215(b).

<sup>10</sup> *Id.* at § 10.401(a). Disability is defined under the Act to mean the incapacity because of an employment injury to earn the wages the employee was receiving at the time of injury. See *G.T.*, 59 ECAB 447 (2008).

Where the employer has continued the pay of the employee, it may be stopped when the employee returns to work with no loss of pay.<sup>11</sup> When the employee returns to work without using all 45 days of COP and sustains a recurrence of disability within 45 days of the return to duty, he or she may elect to use the remaining days of COP.<sup>12</sup> But if the recurrence of disability begins more than 45 days after the employee first returned to duty, the employer may not pay COP; the employee is to claim compensation for wage loss.<sup>13</sup>

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

The Board finds that the fact of overpayment is established in this case. Appellant sustained injury to her right knee on January 8, 2010. She stopped work and received COP from January 9 to 13, 2010, when she returned to regular full-time work with no loss of pay.<sup>14</sup> Appellant sustained employment-related disability again as of March 2, 2010 when she stopped work prior to surgery on March 3, 2010. As her disability commenced more than 45 days after she returned to work on January 13, 2010, she was not entitled to additional COP and she filed a claim for 67.5 hours of wage loss. Under section 8117, the first three days of disability were subject to the statutory waiting period as appellant did not meet any of the exceptions provided. The Office made payment from March 2 to 12, 2010 but, under section 8117, appellant was not entitled to wage loss for March 2, 3 and 4, 2010.<sup>15</sup> These were the first three days of LWOP from work. Appellant's disability from surgery did not exceed 14 days, was not followed by permanent disability or arise under section 8103 or 8104. The evidence of record establishes that the Office properly applied the three-day waiting period for temporary disability under section 8117.

The case is not in posture for decision, however, as to the amount of overpayment. Appellant received wage-loss compensation from March 2 through 12, 2010 in the total amount of \$1,195.96; but she was entitled only to compensation from March 5 through 9, 2010. The memorandum accompanying the overpayment determination did not adequately set forth factual findings or statement of reasons for the amount of overpayment. As noted in *O.R.*,<sup>16</sup> a final decision of the Office shall contain findings of fact and a statement of reasons: "With respect to overpayment decisions, the Office must provide clear reasoning showing how the amount of

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<sup>11</sup> *Id.* at §10.222(a)(4).

<sup>12</sup> *Id.* at §10.207(c).

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Continuation of Pay and Initial Payments*, Chapter 2.807.13 (March 2004). See 20 C.F.R. § 10.207. The Board has addressed the distinction between COP from wage-loss compensation for disability. COP for the purposes of section 8118(a) is the employee's pay, while compensation is the money allowance to an employee paid for wage loss from the Employees' Compensation Fund. See *Kathy P. Roberts*, 45 ECAB 548, 553 (1994).

<sup>14</sup> Appellant used a total of 4.25 hours of COP on January 14 and 19, 2010 related to visits to her physician.

<sup>15</sup> The question of an overpayment from March 10, 2010 when appellant returned to work through March 12, 2010 is presently not before the Board in this appeal.

<sup>16</sup> 59 ECAB 432 (2008).

overpayment was calculated.”<sup>17</sup> The overpayment memorandum and final decision of record do not adequately address the Office’s calculations. There was no explanation of appellant’s pay rate and the worksheet contains several handwritten corrections pertaining to the final overpayment amount that were not addressed in the final decision. It is not readily apparent how the Office determined an overpayment of \$345.50, as was reimbursed by appellant for March 10, 11 and 12, 2010, while the three days of March 2, 3 and 4, 2010 were found to total \$425.23.<sup>18</sup>

The case will be remanded to the Office for further development regarding the amount of overpayment. The Office should fully explain its calculations and provide such documentation to support the conclusion reached. As the case is not in posture as to amount, it is premature to address appellant’s eligibility for waiver and recovery. After such further development, the Office should issue an appropriate decision.

### **CONCLUSION**

The Board finds that the Office properly determined that appellant received an overpayment of compensation as she received wage-loss compensation that was subject to the three-day waiting period of section 8117.

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<sup>17</sup> See also *James Tackett*, 54 ECAB 611 (2003).

<sup>18</sup> See *supra* note 4.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 1, 2010 decision of the Office of Workers' Compensation Programs be affirmed as to fact of overpayment. The case is remanded for further action in conformance with this decision as to the issues of amount and waiver.

Issued: March 21, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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