

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CORINNE RUSCICA and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS HOSPITAL, Palo Alto, CA

*Docket No. 99-1398; Submitted on the Record;
Issued January 17, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation in the amount of \$919.54 from July 29 to October 31, 1996; and (2) whether the Office properly determined that appellant was at fault with respect to the overpayment so that it was not subject to waiver.

On August 9, 1996 appellant, then a 54-year-old secretary, filed a notice of occupational disease and claim for compensation (Form CA-2). She alleged that on July 26, 1996 she sustained a back strain and pulled muscles. Appellant stopped work on July 29, 1996. The claim was accepted for back strain. Appellant received compensation for the period July 29 to October 31, 1996.

In a computer generated computation log dated September 7, 1996, the payment history reflected that the Office used a pay rate of \$501.48 for a 20-hour week. The log reflects that appellant was paid \$752.22 for the period July 29 to August 23, 1996.

On November 15, 1996 appellant filed a claim for compensation for traumatic injury or occupational disease (Form CA-7). Her compensation was certified by her supervisor as \$26,077.00 per year for part-time work of 20 hours per week.¹

In a computer generated computation log dated December 17, 1996, the payment history reflected that the Office used a pay rate of \$501.48 for 40 weeks. The log reflects that appellant was paid \$789.83 for the period September 3 to October 31, 1996.

In a March 11, 1997 report of telephone call, appellant informed the Office that she made an annual salary of \$26,077.00 and worked 20 hours per week. An annotation was made that

¹ Based upon this certification, \$26,077.00 divided by 52 weeks would equate to \$501.48 per week or \$25.07 per hour.

appellant's correct salary was \$12.49 per hour times 20 hours a week times 52 weeks to equal an annual salary of \$12,989.60.

In a computer generated computation log dated March 19, 1997, the payment history reflected that the Office used a pay rate of \$249.80 for a 40-hour week. The log reflects that appellant was paid \$622.51 for 142 hours from July 29 to October 31, 1996.

In an April 22, 1997 memorandum to the file, the Office indicated that appellant was paid for the period July 29 to October 31, 1996 at the incorrect pay rate of \$501.48. The Office noted that compensation was due for the period at the pay rate of \$249.80 and that an overpayment had resulted for this period. The Office noted that appellant was paid from July 29 to October 31, 1996 at the pay rate of \$501.48 for 124 intermittent hours. The Office also noted that the total due for the above period was \$622.91 and that an overpayment of \$919.54 had resulted.²

By letter dated April 22, 1997, the Office advised appellant that it had made a preliminary determination that an overpayment had occurred in the amount of \$919.54 and that appellant was at fault in the creation of the overpayment because she knew or reasonably should have known the payments were incorrect. The Office also advised appellant that she had the right to a precoupment hearing wherein she could submit any additional evidence or arguments if she disagreed that the overpayment occurred, if she disagreed with the amount of the overpayment, if she believed that the overpayment occurred through no fault of her own and if she believed that recovery of the overpayment should be waived. The Office also enclosed an overpayment recovery questionnaire, which she returned on May 21, 1997 along with wage-benefit statements.

In a letter dated May 20, 1997, appellant explained that she did not mislead the claims examiner in any way. She noted that she made \$26,077.00 per year. Appellant noted that this equated to \$510.49 every two weeks, which amounted to \$12.49 per hour.³ Additionally, appellant indicated that it was so confusing to her and she had never filed a "workers' claim" before and "she just took it for granted that the checks were correct." She also stated that, now that she received the letter and reviewed her checks, she should have been paid for 58 hours instead of 40 hours. She multiplied 58 hours times \$12.49, which equated to \$733.59. Appellant then multiplied \$733.59 times .75, which was equal to \$550.19. Appellant then stated that the check she received was in the amount of \$752.22. She subtracted \$550.19 from this figure and came up with an overpayment of \$202.03. Appellant also indicated that she did not feel she should have to pay the money back as she did not defraud or willfully mislead anybody. She also stated that she had used all of the money to pay her bills. Appellant requested a waiver of the overpayment and a hearing.

In a computer generated computation log dated November 10, 1998, the payment history reflected that appellant received payments of \$752.22 covering the period July 29 to August 23, 1996 and \$789.83 covering the period September 3 to October 31, 1996.

² It is unclear how the Office came up with these numbers.

³ An earnings and leave statement also confirmed that she received \$249.80 for 20 hours or \$12.49 per hour.

The Office informed appellant on December 17, 1998 that a prerecoupment hearing was scheduled for January 25, 1999.

By decision dated February 10, 1999, the Office found that appellant had abandoned her request for a hearing because she failed to appear at the hearing and did not provide good cause for her failure to appear within 10 days after the scheduled hearing. The Office also found that the preliminary finding of the Office dated April 22, 1997 was made final and the overpayment was due and payable in full. The Office mailed this notice to appellant's address of record.

The Board finds that appellant received an overpayment of compensation.

In the instant case, appellant acknowledged that, upon reviewing her records, it appeared that she received an overpayment of compensation. The record indicates that appellant received compensation at an incorrect rate for at least a portion of the period in question and that such payment at an incorrect rate resulted in an overpayment of compensation.

The Board further finds, however, that the case is not in posture for a decision, with respect to the amount of the overpayment.

In the instant case, appellant initially received compensation from the Office for the period July 29 to August 23, 1996 based on a rate of \$501.48 for a 20-hour week or \$25.07 per hour. Appellant also stated that she should have received this amount. However, earnings statements submitted by appellant indicated that she worked 20 hours per week and earned \$249.80 or about \$12.49 per hour. The Office changed appellant's payments from September 3, to October 31, 1996 at the rate of \$501.48 for a 40-hour week or about \$12.53 per hour. Appellant should have received compensation payments based upon her 20-hour week or about \$12.49 per hour, based upon appellant's earnings statement. The result of this is that, in using an incorrect pay rate, particularly from July 29 to August 23, 1996, the Office overpaid appellant but that she received little or no overpayment for the period September 3 to October 31, 1996. Consequently the Office must recalculate the amount of the overpayment.

The Board further finds that the Office improperly found that appellant was at fault with regard to the overpayment.

Section 8129 of the Federal Employees' Compensation Act, provides that adjustment or recovery may not be made by the Office when "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience."⁴ Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.⁵

⁴ 5 U.S.C. § 8129.

⁵ See, e.g., *Harold W. Steele*, 38 ECAB 245 (1986) (no waiver is possible if the claimant is not without fault in helping to create the overpayment).

Section 10.433 of the implementing federal regulations⁶ provides that 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.)

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.⁷

The Office found that appellant was at fault based on the third standard -- acceptance of a payment, which she knew or should have known, was incorrect. For a finding of fault based on the third standard, the evidence must establish that at the time appellant received the compensation check or checks constituting the overpayment she knew or should have known that such check was incorrect.⁸ However, the evidence in the record fails to establish that appellant accepted any compensation which she knew or should have known was incorrect.

In this case, appellant indicated in her letter dated May 20, 1997, that she was confused and that she "had never had a workers' compensation claim before." The record reflects that appellant received two compensation checks that totaled \$1,542.05. This was equivalent to a pay rate of \$12.43 per hour, which was close to what appellant thought to be her regular salary. In any event, this amount cannot be considered so great that appellant should have known that she received an incorrect payment.⁹ Appellant did not receive the checks in a consistent manner or have previous consistent checks to compare the amounts. Under these circumstances, it cannot be found that appellant reasonably should have known, at the time she received her compensation payments, that such payments were incorrect.

⁶ 20 C.F.R. § 10.433 (1999).

⁷ 20 C.F.R. § 10.433 (1999)

⁸ See *Monty R. Bullock*, 40 ECAB 500 (1989); *Willis J. Brooks*, 40 ECAB 431 (1989); *Marlene R. Pavlo*, 38 ECAB 716, 718 (1987).

⁹ See *Claude T. Green*, 42 ECAB 274 (1990).

On remand, the Office should recalculate the amount of the overpayment based on appellant's actual salary and her part-time employment of 20 hours per week. The Office should then follow its established regulations and procedures in apprising appellant of the overpayment. Following such preliminary notice and after such further development as the Office may find necessary, it should issue a *de novo* decision on the matter.¹⁰

The February 10, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed with respect to the fact of overpayment, set aside with respect to the amount of overpayment and reversed with respect to the issue of fault. The case is remanded for further proceedings in accordance with this decision of the Board.

Dated, Washington, DC
January 17, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

¹⁰ In view of the Board's disposition on appeal, it is not necessary to address the issue of whether the Office properly found that appellant abandoned her request for a prerecoumment hearing since, after the Office recalculates the amount of the overpayment and issues a preliminary overpayment determination, appellant will have another opportunity to request a prerecoumment hearing should she so desire.