

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

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**RHONDA L. THRASHER, Appellant**

**and**

**U.S. POSTAL SERVICE, PORT ORCHARD  
POST OFFICE, Port Orchard, WA, Employer**

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**Docket No. 05-207  
Issued: September 14, 2005**

*Appearances:*  
*Rhonda L. Thrasher, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On October 27, 2004 appellant filed a timely appeal of a July 28, 2004 decision of the Office of Workers' Compensation Programs, which found that she received an overpayment of compensation based upon an incorrect pay rate for the period April 11, 1999 to July 14, 2001. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment issue.

**ISSUES**

The issues are: (1) whether the Office properly determined that appellant received an overpayment of \$15,569.10, from April 11, 1999 to July 14, 2001; and (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment.

**FACTUAL HISTORY**

On February 6, 1999 appellant, a 31-year-old rural carrier, filed a traumatic injury claim, alleging that she injured her lower back while lifting a parcel out of her truck. On the back of the form, the employing establishment noted that her annual salary was \$24,327.00. Appellant

stopped work on February 7, 1999, returned to full-duty work on March 27, 1999 and stopped again on April 9, 1999. The Office accepted the claim for a lumbar strain and she filed a claim for compensation (Form CA-7) beginning April 11, 1999. The employing establishment reported that, as of February 6, 1999, appellant earned \$11.70 per hour. The form indicated that appellant worked as assigned and her wages for the prior year were \$8,414.11. On a form dated July 16, 1999 the employing establishment noted that she worked part time.<sup>1</sup>

As of October 8, 1999 the Office paid appellant compensation for wage loss for the period April 11 to August 29, 1999 in the amount of \$7,070.14, based upon a pay rate of \$468.00 per week. The pay rate represented 40 hours per week at \$11.70 per hour. Appellant continued to receive compensation based on a weekly pay rate of \$468.00 until July 14, 2001.<sup>2</sup>

In a letter dated March 30, 2000, the Office informed appellant that she was being placed on the periodic rolls for temporary total disability effective October 24, 1999. It informed her that the weekly pay rate of \$428.00 was used to compute her compensation and that effective March 26, 2000 she would be receiving \$1,442.00 every 28 days.

On August 13, 2001 the Office received information from the employing establishment regarding appellant's wages for her date of injury. The employing establishment noted that appellant was a part-time employee at the time of her injury and that her gross pay was \$8,232.36 for 703.62 hours worked.

In a September 20, 2001 memorandum to file, the Office calculated appellant's current pay rate based upon her earnings of \$8,232.36; the number of hours worked of 703.62 and the number of days worked in the prior year of 1992. The Office then calculated appellant's correct weekly pay rate as \$270.00.

In a letter dated October 30, 2001, the Office advised appellant that a preliminary determination had been made with respect to an overpayment of compensation in the amount of \$15,569.10. The Office stated that an incorrect pay rate had been used to calculate her wage-loss compensation; that she had been paid at the rate of full-time employee when she was working part time. With respect to fault, the Office stated that appellant was at fault because she should have realized the compensation she received was greater than the wages she had earned.

On November 14, 2001 appellant requested a telephone conference and possible waiver. She alleged that in August 1999 she spoke to Marcus Tapia, a claims examiner, regarding the incorrect calculation of her compensation and was told "that its just the way it worked out after all the calculations."

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<sup>1</sup> On September 20, 2001 the Office issued a loss of wage-earning capacity decision which found that appellant had no loss of wage-earning capacity based upon her reemployment as a temporary rural carrier associate effective July 14, 2001.

<sup>2</sup> In a decision dated February 3, 2000, an Office hearing representative set aside a November 1, 1999 Office decision terminating her compensation benefits and remanded the case for further development. The hearing representative instructed the Office to reinstate compensation benefits retroactively to the date of termination.

On May 2 and 8, 2002 and April 1, 2004 the Office received an overpayment recovery questionnaire form completed by appellant requesting waiver of the overpayment and supporting financial documentation. Regarding the issue of fault, appellant stated that the overpayment was not her fault as she relied upon Mr. Tapia, who assured her that the payment was correct.

In a June 4, 2004 memorandum of conference, the Office noted that appellant was a part-time employee at the time of injury. Her work hours varied week to week and she worked one to six days a week. Appellant related that, once she received her second or third compensation check, she spoke with Mr. Tapia regarding being overpaid. She stated Mr. Tapia reassured her that she was receiving the correct amount. The Office detailed appellant's income and expenses and noted that she currently was working 24 hours per week at an hourly rate of \$15.22.

By decision dated July 28, 2004, the Office finalized the overpayment determination and found that appellant received a \$15,569.10 overpayment of compensation from April 11, 1999 to July 14, 2001 due to an incorrect pay rate. The Office indicated that appellant should have reasonably known that she was paid at an incorrect rate as the "compensation payments were greater than that which you were due." The Office noted that appellant had been paid \$42,348.07 during this period, based upon a weekly pay rate of \$468.00. Since appellant had not been a full-time employee, she should have been paid \$26,778.97, based upon a weekly pay rate of \$270.00. The Office noted that appellant had been paid wage-loss compensation based on a weekly pay rate of \$468.00 for a full-time employee. Since appellant was a part-time employee she was only entitled to compensation based on a weekly pay rate of \$270.00. With respect to repayment, the Office directed a repayment schedule of \$200.00 per month.

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

Under 5 U.S.C. § 8101(4), "'monthly' pay means the monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater...."

Section 8114(d) of the Federal Employees' Compensation Act provides:

"Average annual earnings are determined as follows:

"(1) If the employee worked in the employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay--

(A) was fixed, the average annual earnings are the annual rate of pay; or

(B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for particular employment, or the average thereof if the daily wage has fluctuated, by 300 if he was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5½-day week and 260 if employed on the basis of a 5-day week."

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“(3) If either of the foregoing methods of determining the average annual earnings cannot be applied reasonably and fairly, the average annual earnings are a sum that reasonably represents the annual earning capacity of the injured employee in the employment in which he was working at the time of the injury having regard to the previous earnings of the employee in [f]ederal employment and of other employees of the United States in the same or most similar employment in the same or neighboring location, other previous employment of the employee, or other relevant factors. However, the average annual earnings may not be less than 150 times the average daily wage the employee earned in the employment during the days employed within 1 year immediately preceding his injury.”<sup>3</sup>

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

The Board finds that the Office properly determined that the overpayment in this case was based on the payment of compensation benefits at an incorrect pay rate. Appellant was paid compensation from April 11, 1999 to July 14, 2001 based on a pay rate for compensation purposes of \$468.00, which represented wages at \$11.70 per hour for a full-time employee. Evidence from the employing establishment, however, noted that she was not a full-time employee and did not work 40 hours per week but instead was a part-time employee at the time of her injury. Therefore, the fact of overpayment has been established in this case.

The evidence does not indicate that appellant had a fixed annual salary on February 6, 1999 nor can her pay rate be determined under section 8114(d)(1)(B), as she was a part-time employee with a variable work schedule.<sup>4</sup> The proper method is to apply section 8114(d)(3), which is to determine a pay rate that reasonably represents the annual earning capacity of the injured employee.

In determining appellant’s weekly pay rate, the Office found that appellant received \$8,232.36 in compensation for 703.62 hours worked for the prior year. The Office calculated appellant’s current pay rate based upon her earnings of \$8,232.36; the number of hours worked of 703.62 and the number of days worked in the prior year, which was 92 and determined her correct weekly pay rate as \$270.00. The Office found that she had received an overpayment in the amount \$15,569.10 from April 11, 1999 to July 14, 2001 due to the receipt of compensation paid at an incorrect pay rate. The Board finds that this was proper.

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

Section 8129(b) of the Federal Employees’ Compensation Act provides: “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

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<sup>3</sup> 5 U.S.C. § 8114(d).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4(c)(2) (December 1995) states that the pay rate of part-time flexible employees whose earnings fluctuate from week to week would be computed under section 8114(d)(1)(B); this section, however, is limited to employees working at least five days per week.

[the Act] or would be against equity and good conscience.”<sup>5</sup> No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.<sup>6</sup>

On the issue of fault, 20 C.F.R. § 10.320(b) provides in pertinent part: “An individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”<sup>7</sup>

### ANALYSIS -- ISSUE 2

In this case, the Office applied the third standard -- acceptance of a payment which the recipient either knew or should have known was incorrect -- in finding appellant at fault in creating the overpayment. The Board finds that this determination is proper. On October 8, 1999 the Office paid appellant compensation for wage loss for the period April 11 to August 29, 1999 in the amount of \$7,070.14. On March 30, 2000 the Office sent correspondence to appellant clearly indicating that her wage-loss compensation was calculated based upon a weekly pay rate of \$468.00. Thus, she knew or should have known that the amount she received was incorrect.<sup>8</sup> The compensation she received on October 8, 1999 was almost equal to the salary she had earned in 1998. Moreover, the Office informed appellant on March 30, 2000 that it was basing her wage-loss compensation on a weekly pay rate of \$468.00. She acknowledges that she contacted Mr. Tapia in August 1999 and informed him of her concern that she was being overpaid. The record shows that she did not receive compensation until October 8, 1999 and there is no evidence supporting appellant’s contention. As the evidence supports the Office’s finding that she was at fault in the creation of the overpayment that occurred in this case, section 8129 of the Federal Employees’ Compensation Act does not preclude recovery by the Office.<sup>9</sup>

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<sup>5</sup> 5 U.S.C. § 8129.

<sup>6</sup> *Gregg B. Manston*, 45 ECAB 344 (1994).

<sup>7</sup> 20 C.F.R. § 10.320(b).

<sup>8</sup> *Duane C. Rawlings*, 55 ECAB \_\_\_\_ (Docket No. 02-2172, issued March 8, 2004). (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 that may affect entitlement to or the amount of benefits received).

<sup>9</sup> In the present case, the Office is not seeking recovery from continuing compensation benefits. The Board notes that it does not have jurisdiction under the Debt Collection Act, 5 U.S.C. § 5511 *et seq.*, to consider the matter of recovery of an overpayment against the assets of the salary of an employee. See *Beverly E. Labbe*, 50 ECAB 440, 443 (1999); *Levon H. Knight*, 40 ECAB 658 (1989). The Board’s jurisdiction is limited to instances in which recovery is sought against continuing compensation benefits under the Federal Employees’ Compensation Act. *Id.* Therefore the Board does not have jurisdiction over the method of recovery of the overpayment in the present case.

**CONCLUSION**

The Office properly determined that an overpayment of \$15,569.10 was created and that appellant was at fault in the creation of the overpayment based on an incorrect pay rate, thereby, precluding waiver of the overpayment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 28, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 14, 2005  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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