

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of GLENN E. WESAW and DEPARTMENT OF THE INTERIOR,  
BUREAU OF INDIAN AFFAIRS, Fort Washakie, Wyo.

*Docket No. 97-2093; Submitted on the Record;  
Issued May 6, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether appellant received an overpayment in the amount of \$13,162.80 and, if so, whether he was without fault in the matter of this overpayment.

The Board finds that appellant received an overpayment in the amount of \$13,162.80.

On August 29, 1991 the Office of Workers' Compensation Programs accepted that on August 16, 1991 appellant sustained a pulmonary contusion, open comminuted fractures of the right tibia and right fibula, fractures of left ribs numbers 10, 11 and 12 and osteomyelitis and delayed union of the right tibia, as a result of a logging accident, which occurred in the course of his federal employment duties. The Office further accepted the periods of hospitalization and surgical procedures necessitated by appellant's injuries. Appellant began receiving total disability compensation October 1, 1991 and on July 7, 1992 the Office informed appellant that he would be placed on the automatic payment rolls. The Office fully explained the terms under which appellant was entitled to receive compensation, and specifically instructed appellant that in order to avoid an overpayment of compensation, he should notify the Office immediately when he returned to work and that he should return to the Office any compensation check received after he returned to work. On July 13, 1992 appellant signed and returned a form provided by the Office indicating that he understood the terms of his compensation benefits.

Appellant returned to work on June 14, 1993. Appellant noted his return to work on a form CA-3, which was received by the Office on July 13, 1993. The Office, however, did not take the necessary action to stop compensation upon receipt of the notification by appellant that he had returned to work, and appellant continued to receive and cash checks for compensation during the period he was receiving regular pay checks from the employing establishment. Therefore, appellant received an overpayment of compensation.<sup>1</sup>

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<sup>1</sup> Charles E. Watkins, Jr., 33 ECAB 1451 (1982).

The Board further finds that appellant was not without fault in the matter of the overpayment of compensation.

Section 8129(a) of the Federal Employees' Compensation Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "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 the Act or would be against equity and good conscience."<sup>2</sup> No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.

In determining whether an individual is not "without fault" or, alternatively, "with fault," section 10.320 of Title 20 of the Code of Federal Regulations states 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>3</sup>

In this case, the Office applied the third standard in finding appellant to be at fault in creating the overpayment.

The evidence of record establishes that appellant knew or reasonably should have known that he was not entitled to regular paychecks and compensation simultaneously and that he failed to take any action to resolve the error when he received compensation checks during periods for which he had already received paychecks. In its July 7, 1992 letter, the Office outlined the terms under which appellant could receive compensation. As appellant received this letter, and signed a statement indicating that he understood the terms discussed therein, appellant should have known that he was not entitled to receive regular pay and compensation for periods after June 14, 1993, when he returned to work. Appellant's assertion that the Office was partially to blame in creating the overpayment, because appellant submitted a Form CA-3 indicating that he had returned to work on June 14, 1993, is without merit. The Board has held that although the Office may have been negligent in issuing a claimant a compensation check, to which he was not entitled, this does not excuse the claimant from accepting such check, to which he knew or

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<sup>2</sup> 5 U.S.C. § 8129.

<sup>3</sup> 20 C.F.R. § 10.320(b).

should have been expected to know he was not entitled.<sup>4</sup> Despite the fact that appellant knew or should have known that he was receiving compensation in error, he never notified the Office of his receipt of dual payments.

For these reasons, the Board finds that, under the circumstances of this case, the Office properly found that appellant reasonably knew or should have known that the compensation he received for periods after June 14, 1993 was in error. Therefore, appellant is at fault in the creation of the overpayment and it is not subject to waiver.

The decision of the Office of Workers' Compensation Programs dated April 7, 1997 is affirmed.<sup>5</sup>

Dated, Washington, D.C.  
May 6, 1999

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>4</sup> See *Lee B. Bass*, 40 ECAB 334 (1988); *Robert W. O'Brien*, 36 ECAB 541 (1985).

<sup>5</sup> The record also contains a second decision by the Office issued on April 7, 1997, in which the Office granted appellant a schedule award for a 12 percent permanent impairment of his right leg. The Office noted, however, that pursuant to appellant's agreement during a February 28, 1997 conference call, the entire amount of the schedule award, \$5,244.48, was used to offset appellant's overpayment, thus leaving a balance due of \$7,918.32. There is no indication in the record that appellant disputes the amount of the schedule award.