

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANDY WADOWIAK and U.S. POSTAL SERVICE,
POST OFFICE, Van Nuys, CA

*Docket No. 01-622; Submitted on the Record;
Issued July 23, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$12,241.72 during the period September 24, 1993 through September 28, 1994; and (2) whether the Office properly found that appellant was at fault in the creation of the overpayment because he failed to report his earnings while receiving compensation.

This case has previously been before the Board on appeal. By decision dated September 22, 1993, the Office terminated appellant's compensation on the grounds that he no longer had any disability caused by his July 6, 1992 employment injury. The Board reversed the Office's determination in a decision dated August 21, 1995.¹ In an August 19, 1997 decision, the Office again terminated appellant's compensation on the grounds that he no longer had any residuals or disability due to his July 6, 1992 employment injury. By decision dated January 20, 2000, the Board affirmed the Office's decision to terminate appellant's compensation benefits. The Board also affirmed the Office's September 17, 1997 decision finding that appellant forfeited his right to monetary compensation for the period September 29, 1994 through May 5, 1997. The Board further affirmed the Office's November 10, 1997 decision finding that appellant was at fault in the creation of an overpayment in the amount of \$24,308.77, for the period September 29, 1994 through May 5, 1997. The facts of the case are set out in the Board's decision.² In a decision dated June 6, 2000, the Office amended the amount of the overpayment to reflect \$32,915.95, the amount appellant received in compensation. Further, the Office ordered appellant to repay the overpayment in the amount of \$1,000.00 a month.³

¹ Docket No. 94-403 (issued August 21, 1995).

² Docket No. 98-499 (issued January 20, 2000).

³ Appellant's appeal of the Office's June 6, 2000 decision regarding the overpayment in the amount of \$32,915.95 is currently pending before the Board.

Prior to the Office's June 6, 2000 decision, the Office made a preliminary finding in a May 3, 2000 notice that an overpayment had been created in the amount of \$12,241.72 for the period September 24, 1993 through September 28, 1994. The Office advised appellant that he was not without fault in the creation of the overpayment because he failed to report his earnings on a December 29, 1995 claim for continuing compensation on account of disability (Form CA-8), which covered the period September 24, 1993 through December 9, 1995, while receiving compensation during this period. In addition, the Office advised appellant that he could request a telephone conference, a final decision based on the written evidence only, or a hearing within 30 days of the date of this letter if he disagreed that the overpayment occurred, if he disagreed with the amount of the overpayment, if he believed that the overpayment occurred through no fault of his own and if he believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof.

By decision dated September 18, 2000, the Office finalized its preliminary overpayment determination and finding of fault.

The Board finds that the Office properly determined that appellant received an overpayment in the amount of \$12,241.72 during the period September 24, 1993 through September 28, 1994.

The Office received an investigative memorandum dated July 16, 1997 from the employing establishment indicating that appellant received earnings while working for Balas Inc. from April 5 through May 1, 1994, B.T. Lakeside Roofing for one day on May 19, 1994, InterAmer Realty from March 8, 1995 through September 17, 1996 and Orbit restaurant from December 1996 through May 1997. The Office determined that appellant received \$12,241.72 in compensation for temporary total disability during the period in question. Thus, the Office properly found that an overpayment existed in the amount of \$12,241.72.

The Board further finds that the Office properly determined that appellant was with fault in the creation of the overpayment because he failed to report his earnings while receiving 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.⁴ The only exception to this requirement is a situation which meets the test set forth as follows in section 8129(b): "[a]djustment 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."⁵ Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.⁶ In evaluation of whether appellant is without fault, the Office will consider

⁴ 5 U.S.C. § 8129.

⁵ 5 U.S.C. § 8129(b).

⁶ *Harold W. Steele*, 38 ECAB 245 (1986).

whether appellant's receipt of the overpayment occurred because he relied on misinformation given by an official source within the Office or another government agency which appellant had reason to believe was connected with administration of benefits as to the interpretation of the Federal Employees' Compensation Act or applicable regulations.⁷

In determining whether an individual is at fault, section 10.433(a) of the Code of Federal Regulations provides in relevant part:

"An individual is with fault in the creation of an overpayment who:

- (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 furnish information he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have been expected to know was incorrect."⁸

In this case, the Office applied the first standard in determining that appellant was at fault in the creation of the overpayment. Appellant filled out and signed a Form CA-8, on December 29, 1995 covering the period September 24, 1993 through December 9, 1995 in which he wrote "N/A" in response to the question concerning salaried employment and self-employment activities whether or not he derived income from his efforts. In the signature block of this form, it indicates that any knowing false statements, misrepresentations, concealment of fact or any other act of fraud are subject to felony criminal prosecution. Thus, the form clearly provides severe consequences for failing to properly execute the document; and by signing the form, appellant is deemed to have acknowledged his duty to fill the form out properly, including the duty to report any salaried employment activities or income. Appellant met the first standard for determining fault by writing "N/A" on the Form CA-8. As he made an incorrect statement as to material facts, which he knew or should have known to be incorrect, he is at fault in the creation of the overpayment and, therefore, is not entitled to waiver of the overpayment.

On appeal, appellant contends that he relied on telephone assistance from Office employees in filling out his forms. Appellant stated they told him that since he was a temporary employee he had to use their assistance. He further stated that everything he included on his forms was based on the employees' recommendations. The fact that the Office may have erred in making the overpayment does not by itself relieve the individual who received the overpayment from liability for repayment if the individual was also at fault in accepting the overpayment.⁹ However, the Office may find that the individual was not at fault if failure to report an event affecting compensation benefits, or acceptance of an incorrect payment, occurred because: (1) The individual relied on misinformation given in writing by the Office (or by

⁷ 20 C.F.R. § 10.435(b)(1) (January 1999).

⁸ 20 C.F.R. § 10.433(a) (January 1999).

⁹ *Id.*

another government agency, which he or she had reason to believe was connected with the administration of benefits) at the interpretation of a pertinent provision of the Federal Employees' Compensation Act or its regulations; or (2) the Office erred in calculating cost-of-living increases, schedule award length and/or percentage of impairment, or loss of wage-earning capacity.¹⁰

Although appellant indicated that he talked to someone at the Office about the matter, there is no evidence that appellant relied on misinformation given in writing. Thus, the Board will affirm the Office's finding of fault.

With respect to recovery of an overpayment, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act. Where appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the Office's recovery of an overpayment under the Debt Collection Act.¹¹

The September 18, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
July 23, 2002

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁰ *Id.* § 10.435.

¹¹ *See Lewis George*, 45 ECAB 144, 154 (1993).