

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT M. HOOPER and TENNESSEE VALLEY AUTHORITY,
WATTS BAR NUCLEAR PLANT, Spring City, Tenn.

*Docket No. 96-75; Submitted on the Record;
Issued July 10, 1998*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly found that appellant was at fault in the creation of an overpayment in the amount of \$61,367.50, thus precluding waiver of recovery of the overpayment.

On July 28, 1983 appellant, then a 28-year-old painter, sustained a contusion of the back and right shoulder and a low back strain in the performance of duty. Appellant returned to work on November 14, 1983 with certain work restrictions. Appellant was subsequently placed on the periodic compensation roll to receive compensation benefits for temporary total disability effective May 17, 1984.

By decision dated December 13, 1985, the Office adjusted appellant's compensation benefits on the grounds that the medical evidence established that he was no longer totally disabled for work.

In a form CA-1032 dated September 14, 1987, which covered the previous 15 months, appellant stated that from September 1985 through March 1987 he had worked at the Apex Office Supply company as an office trainee for \$100.00 per week and that from March 1987 through September 1987 he had worked at the A & W Office Supply company (A&W) in office sales at \$5.00 per hour.

In a form CA-1032 dated November 20, 1988, which covered the previous 15 months, appellant indicated that from August 1987 through November 1988 he was employed doing office work at A&W at \$5.00 per hour.

In a form CA-1032 dated November 2, 1989, which covered the previous 15 months, appellant indicated that from August 1988 through December 1989 he was employed doing office work at A&W for \$12.00 per hour.

By decision dated May 11, 1990, the Office advised appellant that it had determined that appellant's reemployment as an office worker at A&W with wages of \$480.00 per week effective on May 6, 1990 fairly and reasonably represented appellant wage-earning capacity and that his compensation benefits would be adjusted based upon the wages earned in his new position.

In a form CA-1032 dated May 18, 1991, which covered the previous 15 months, appellant stated that since March 1987 he had been employed as office manager at A&W office supply at the rate of \$586.00 per week.

In a form CA-1032 dated March 30, 1992, which covered the previous 15 months, appellant indicated that from January 1991 through December 1991 he had been employed as an office manager at A&W at the \$613.21 per week and that since January 1992 to the present he had been employed as an office manager at that company at the rate of \$620.00 per week.

By decision dated April 21, 1992, the Office adjusted appellant's compensation benefits on the grounds that he had been reemployed as a manager at A&W with wages of \$620.00 per week and that this employment was effective on March 1, 1987.

In a memorandum of an investigative interview conducted on March 20, 1992, Herbert E. Berl, an employing establishment special agent, related appellant's statement that the \$5.00 per hour pay rate which appellant had provided on his form CA-1032 filed on November 20, 1988 was not correct and appellant stated that perhaps he copied information from the prior year's form and was not paying attention. He related that appellant stated that he became a branch manager at A&W in January 1988 but still considered himself as an office worker when he completed the November 20, 1988 form.

In an investigative summary received by the Office on September 29, 1992, the employing establishment stated that appellant had understated his rate of pay and type of work activities during the periods covered by the disclosure statements, Forms CA-1032, submitted on September 14, 1987, November 20, 1988, November 2, 1989 and May 18, 1991. The employing establishment stated that in his September 14, 1987 form CA-1032, appellant reported that he worked at A&W in office sales for \$5.00 per hour but that the company records indicated that, including straight time, commissions and bonuses, appellant earned \$8.33 per hour. The employing establishment noted that in his November 20, 1988 form CA-1032, appellant reported he worked at A&W in office work for \$5.00 per hour but that company records indicate that appellant was promoted to branch manager in August 1988 and that he earned \$12.94 an hour including straight time, commissions and bonuses. In the November 2, 1989 form CA-1032 appellant reported he worked at A&W in office work for \$12.00 an hour but the company records indicated that he earned \$14.95 per hour including straight time, commissions and bonuses. In the May 18, 1991 form CA-1032, appellant reported that he worked at A&W as a manager for \$586.00 per week or (\$14.65 per hour) but that company records indicated that, including straight time, commissions and bonuses appellant earned \$16.69 per hour. The investigative report included a memorandum regarding an interview with Betty Foster, accounting manager at A&W, dated March 18, 1992.

By letter dated September 23, 1992, the employing establishment requested that the Office declare a forfeiture from the periods covered by the four Form CA-1032s dated September 14, 1987, November 20, 1988, November 2, 1989 and May 18, 1991.

By letter dated April 29, 1993, the Office advised appellant that it had made a preliminary determination that an overpayment of compensation had occurred in his case in the amount of \$61, 367.50 for the reason that appellant had understated his earnings on forms CA-1032 dated September 14, 1987, November 10, 1988, November 2, 1989 and May 18, 1991 and that appellant had therefore forfeited compensation for those periods. The Office stated that a preliminary finding had been made that appellant was at fault in the creation of the overpayment because he was aware or reasonably aware, that he understated his earnings while he was in receipt of compensation benefits.

By decision dated April 29, 1993, the Office declared a forfeiture of compensation benefits for the periods June 14, 1986 through November 2, 1989 and February 18, 1990 through May 18, 1991 for the reason that the evidence of record demonstrated that appellant had knowingly understated his earnings for that period.

By letter dated May 19, 1993, appellant requested reconsideration of the Office's April 29, 1993 decision.

The record shows that appellant pled guilty in federal court to two counts of knowingly providing false and fraudulent material statements and representations regarding his hourly wages at A&W in connection with his claim for compensation benefits from the Office in violation of 18 U.S.C. § 1001 and was sentenced on August 22, 1994. The record shows that appellant made restitution in the amount of \$35,000.00 at that time.

By decision dated June 29, 1995, the Office finalized its April 29, 1993 preliminary finding of overpayment finding appellant was at fault in the creation of an overpayment of compensation benefits in the amount of \$61,367.50 and noted that appellant had made restitution in the amount of \$35,000.00, leaving an amount owed of \$26,367.50.

The evidence of record establishes that appellant knowingly understated earnings from his nonfederal employment and therefore forfeited his right to compensation benefits.

The Board finds that appellant was with fault in the creation of the overpayment in the amount of \$61, 367.50.

Section 8129 of the Federal Employees' Compensation Act¹ provides that an overpayment of compensation shall be recovered by the Office unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat

¹ 20 C.F.R. § 8129(b).

the purpose of the Act or be against equity and good conscience.² Adjustment or recovery must therefore be made when an incorrect payment has been made to an individual who is with fault.³

The implementing regulation⁴ provides that a claimant is with fault in the creation of an overpayment when he: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; (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.

In this case, the Office applied the first standard in determining that appellant was at fault in creating the overpayment. The Office found that appellant made an incorrect statement as to a material fact which he knew or should have known was incorrect. In an investigative summary received by the Office on September 29, 1992, the employing establishment stated that appellant had understated his rate of pay and type of work activities during the periods covered by the disclosure statements forms CA-1032, submitted on September 14, 1987, November 20, 1988, November 2, 1989 and May 18, 1991. The employing establishment stated that in his September 14, 1987 form CA-1032, appellant reported that he worked at A&W in office sales for \$5.00 per hour but that the company records indicated that, including straight time, commissions and bonuses, appellant earned \$8.33 per hour. The employing establishment noted that in his November 20, 1988 form CA-1032, appellant reported he worked at A&W in office work for \$5.00 per hour but that company records indicate that appellant was promoted to branch manager in August 1988 and that he earned \$12.94 an hour including straight time, commissions and bonuses. In the November 2, 1989 form CA-1032 appellant reported he worked at A&W in office work for \$12.00 an hour but the company records indicated that he earned \$14.95 per hour including straight time, commissions and bonuses. In the May 18, 1991 form CA-1032, appellant reported that he work at A&W as a manager for \$586.00 per week or (\$14.65 per hour) but that company records indicated that, including straight time, commissions and bonuses appellant earned \$16.69 per hour. Thus, appellant made incorrect statements as to material facts, his hourly wages, which he knew or should have known were incorrect. The Board finds that because appellant made incorrect statements about material facts which he knew or should have known were incorrect, he is with fault in the matter of the overpayment resulting from his forfeiture.

In sum, pursuant to section 8106(b) appellant has forfeited his right to compensation for the periods June 14, 1986 through November 2, 1989 and February 18, 1990 through May 18, 1991, this forfeiture has resulted in an overpayment in the amount of \$61,367.50, and appellant is with fault in the creation of this overpayment of compensation. Accordingly, no waiver of recovery of the overpayment is possible under section 8129(b) of the Act.

² *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

³ *William G. Norton, Jr.*, 45 ECAB 630 (1994).

⁴ 20 C.F.R. § 10.320)b).

The decision of the Office of Workers' Compensation Programs dated June 29, 1995 is affirmed.

Dated, Washington, D.C.
July 10, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member