

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RANDOLPH DAWES and DEPARTMENT OF THE AIR FORCE,
McCLELLAN AIR FORCE BASE, Sacramento, Calif.

*Docket No. 96-704; Submitted on the Record;
Issued March 4, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant received a \$2,819.93 overpayment in compensation; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant was not "without fault" in the creation of the overpayment.

On January 6, 1993 appellant, then a 49-year-old air conditioning mechanic, fell from a 20-foot ladder, hitting his head on a concrete floor. Medical reports indicated that appellant sustained skull fractures in two locations, cerebral concussion, subdural hematoma and fracture of the left upper posterior rib. The Office accepted appellant's claim for skull fracture, rib fracture, subdural hematoma and post-concussion syndrome. Appellant received continuation of pay for the period January 7 through February 20, 1993. The Office began payment of temporary total disability compensation effective February 21, 1993.

In a March 10, 1993 letter, the Office described how appellant's compensation would be paid. The Office stated that appellant was expected to return to work when he was no longer totally disabled because of his accepted employment-related injury. The Office specifically warned appellant to notify it immediately when he returned to work and return any compensation checks received after he returned to work.

On July 1, 1993 appellant returned to work, four hours a day, three days a week. Effective August 8, 1993 appellant began working eight hours a day, three days a week. On September 5, 1993 appellant started to work eight hours a day, two days a week. In a November 19, 1993 letter, the Office indicated that it was adjusting appellant's compensation to reflect his actual earnings of 16 hours a week. The Office again informed appellant to inform it if he returned to work. The Office stated that the period of payment was indicated on each compensation check. It warned appellant that if a check included compensation for a period after he returned to work there would be an overpayment of compensation. The Office instructed appellant to either return the compensation check or estimate the amount of the overpayment and hold this amount aside until he received instructions from the Office.

On January 3, 1994 appellant stopped working to undergo therapy and rehabilitation for his employment injuries. The Office began payment of temporary total disability compensation, again instructing appellant to report any return to work. The Office indicated that appellant would be paid compensation until July 3, 1994 or until he returned to work, whichever came first. Appellant returned to work on light duty, eight hours a day, three days a week, on July 6, 1994. In an October 13, 1994 decision, the Office found that appellant had a 40 percent loss of wage-earning capacity based on his actual earnings, effective July 5, 1994. The Office paid appellant compensation retroactive to July 5, 1994. The Office warned appellant that payment of compensation would be terminated without notice whenever it was notified that appellant had earnings equal to or higher than the wages being paid for the job he held when injured.

In a January 24, 1995 letter, Dr. Lawrence D. Wilcox, a psychologist, indicated that appellant had returned to full-time work, 40 hours a week, on October 31, 1994. He stated, however, that appellant was not able to retain his efficiency on a full-time basis. He therefore indicated that he was returning appellant to a work schedule of eight hours a day, three days a week. Appellant began the reduced work schedule effective February 5, 1995.

In an October 25, 1995 letter, the Office informed appellant that it had made a preliminary determination that appellant had received an overpayment of \$2,819.93 in compensation. The Office indicated that the overpayment had occurred because appellant had returned to full-time work from October 31, 1994 through February 5, 1995 without wage loss yet he had received compensation during this period for this period based on the finding that he was working eight hours a day, three days a week. The Office made a preliminary finding that appellant was at fault in the creation of the overpayment because he should have been reasonably aware upon his return to full-time employment that he was no longer entitled to compensation. The Office informed appellant that he had the right to submit any evidence or arguments if he disagreed that the overpayment occurred, disagreed with the amount of the overpayment, believed that the overpayment occurred through no fault of his own or believed that recovery of the overpayment should be waived. The Office also informed appellant that he had a right to a precoupment hearing before an Office hearing representative. The Office indicated that when a claimant is found to be without fault in the occurrence of the overpayment, the Federal Employees' Compensation Act states that recovery of the overpayment may not be made if it could be shown that such recovery would defeat the purpose of the Act or would be against equity and good conscience.

In a November 26, 1994 letter, appellant stated that he did nothing to contribute to the overpayment. He vigorously noted that he did not receive monthly compensation checks from June 27 through September 19, 1994 which placed him under great stress. He commented that when he returned to work full time, he kept getting compensation checks. He indicated that he went to the payroll department of the employing establishment twice and to an employing establishment official twice to get the situation rectified but to no avail. He stated that when he returned to work three days a week, the compensation was as it should be so he forgot about the period he received checks even though he had returned to work full time. He noted that he had memory problems since his employment injury and had to consult his checkbook where it appeared that he had been overpaid. He indicated that he had spent the money over time and

would have to sell his trailer to repay the overpayment. In a December 18, 1995 telephone conference, a senior Office claims examiner reviewed the case with appellant, explaining the basis on which a finding of fault in the creation would be made. The claims examiner noted that appellant believed his compensation was incorrect because he was making more in salary and therefore should be receiving more in compensation.

In a December 18, 1995 decision, the Office found that appellant had received a \$2,819.93 overpayment in compensation because he returned to full-time work for the period October 31, 1994 through February 4, 1995 but continued to receive compensation based on his loss of wage-earning capacity. The Office further found that appellant was at fault in the creation of the overpayment because he should have reasonably been aware that upon his return to full-time employment he was no longer entitled to compensation benefits.

The Board finds that the Office properly determined that appellant had received an overpayment in compensation.

Appellant was entitled to compensation only when he had a loss of wage-earning capacity, as reflected by his restrictions of working only 24 hours a week. However, from October 31, 1994 to February 4, 1995 appellant worked 40 hours a week. He therefore did not have a loss of wage-earning capacity during that period and therefore was not entitled to compensation. As a result, he received an overpayment of compensation during this period.

Appellant contended that the calculation of his compensation was incorrect because his pay had increased since his injury. Under section 8101(4) of the Act¹ the rate of pay to use in calculating compensation is based on the greatest of either appellant's monthly pay at the date of injury, the date disability began or the date compensable disability recurred if it recurred more than six months after appellant's return to work. Appellant's pay rate at the time of the January 6, 1993 employment injury was \$16.55 an hour or \$662.00 a week, based on a 40-hour work week. He returned to work on July 1, 1993 and stopped work again on January 3, 1994 which would be a recurrence of disability more than six months after his return to work. Appellant's pay rate after he returned to work was \$17.16 an hour at that time. However, he was only working 3 days a week so his pay for a 24-hour work week was \$411.84. In September, 1993 he began working only 2 hours a week so his weekly pay rate at the time of the recurrence of disability would have been \$274.56. The provisions of section 8101(4) are based not on hourly pay but on the monthly pay received for actual hours worked. Therefore the highest pay to be used under section 8101(4) is appellant's pay at the date of injury as it would be greater than appellant's monthly pay as of January 3, 1994 when the recurrence of disability occurred. The Office therefore did not err in calculating the amount of appellant's compensation after January 3, 1994.

The Board further finds that the Office properly determined that appellant was not without fault in the creation of the overpayment.

¹ 5 U.S.C. § 8101(4).

Section 8129(a) of the Federal Employees' Compensation Act provides, "Adjustment of 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 of recovery would defeat the purpose of the Act or would be against equity and good conscience."² Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault section 10.320(b) of the Office's regulations provide 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 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."³

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment.

In several letters to appellant, the Office had constantly informed appellant that if he returned to work, he should return any compensation check received which covered any period after the return to work or set aside funds to reimburse the Office for the amount received after the effective date of his return to work. In the October 13, 1994 wage-earning capacity decision, the Office specifically warned appellant that his compensation could be terminated without notice if it received notice that he was receiving wages equal to or higher than the wages being paid for the job he held when injured. Appellant therefore was on notice that any return to full-time work would mean that compensation should cease. In his November 26, 1995 letter, appellant indicated that he made several efforts to correct the error of continuing to receive compensation after his return to full-time work through his employing establishment. He noted that he had eventually spent the money he had received in the compensation checks. Appellant therefore acknowledged that he knew he was not entitled to the compensation checks but still deposited the checks in his bank account. He therefore knew he had received a payment of compensation to which he was not entitled and, as a result, was not "without fault" in the creation of the overpayment. Although appellant claimed that the employing establishment was incompetent in not correcting appellant's compensation after he returned to work full time, he is

² 5 U.S.C. § 8129(b).

³ 20 C.F.R. § 10.320(b).

still at fault in the creation of the overpayment. The overpayment therefore must still be recovered even though it resulted from negligence or error by employees of the government.⁴

The decision of the Office of Workers' Compensation Programs, dated December 18, 1995, is hereby affirmed.

Dated, Washington, D.C.
March 4, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁴ *Fergus Tait*, 30 ECAB 929 (1979)