

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENNIS E. SURFACE and DEPARTMENT OF ENERGY,
BONNEVILLE POWER ADMINISTRATION, Vancouver, Wash.

*Docket No. 97-300; Submitted on the Record;
Issued January 7, 1999*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant had no loss of wage-earning capacity for the period March 25 through March 30, 1996; (2) whether the Office properly denied waiver of the overpayment that occurred for the period March 25 through March 30, 1996

On October 6, 1976 appellant, then a 27-year-old painter, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on October 5, 1976 he sprained his right ankle, broke his right jaw and nose and sustained back fractures when the vehicle he was traveling in overturned and rolled down a hill. The Office accepted the claim for contusion of right mandible and right ankle, compression fracture of T12 and fractured nose. Appellant reinjured his back on September 6, 1983. The Office accepted the claim for lumbosacral strain and spinal fusion on January 10, 1985. The Office approved appellant's claim for recurrence of disability for the period September 24, 1984 to July 15, 1988.

On December 27, 1984 appellant was referred for vocational rehabilitation and was reemployed as a painter on June 30, 1986.

On July 22, 1988 appellant filed another claim for a recurrence of disability. On September 2, 1988 the Office accepted appellant's claim for lumbosacral strain and spinal fusion and placed appellant on the disability rolls for temporary disability.

Appellant was again referred for vocational rehabilitation services. Appellant returned to work four hours per day as a painter (modified) on September 8, 1992 for a one-year period.

On November 11, 1992 appellant underwent a magnetic resonance imaging test of the lumbar and had not returned to work. Appellant was placed on the periodic roll for temporary disability effective February 7, 1993. Appellant was also advised that vocational rehabilitation services would continue.

Appellant returned to work on March 25, 1996 with the employing establishment at a yearly salary of \$42,619.20.

By letter dated April 9, 1996, the Office requested the employing establishment to provide information regarding appellant's wages for his date-of-injury position. In response, the employing establishment noted that appellant's current rate of pay for his position at the time of his injury was \$20.49 per hour. The employing establishment also noted that appellant earned \$15.16 per hour at the time of his injury.

On April 16, 1996 the Office made a preliminary determination that an overpayment to appellant had occurred in the amount of \$563.87 because he returned to work on March 25, 1996, but received compensation through March 30, 1996. The Office stated that it had made a preliminary finding that appellant was at fault in creating the overpayment because he knew or should have known that he was not entitled to receive compensation for wage loss after he had returned to work.

By decision dated September 23, 1996, the Office determined that appellant had no loss of wage-earning capacity based upon his position as painter (modified) with wages of \$21.21 per hour. The Office thus found that appellant was not entitled to any further wage-loss compensation as the wages he was earning were equal to the pay rate for his date-of-injury grade/step.

The Office issued a final determination on September 23, 1996 that appellant was at fault in the creation of the overpayment of \$563.87.

The Board finds that the Office properly determined appellant's wage-earning capacity for the period March 25 through March 30, 1996.

In its September 23, 1996 decision, the Office found that appellant had no loss of wage-earning capacity. In reaching this decision, Office based its loss of wage-earning capacity determination on appellant's actual earnings as an painter (modified). Under section 8115 of the Federal Employees' Compensation Act,¹ the Office shall use appellant's actual earnings to determine his wage-earning capacity if such earnings fairly and reasonably represent his wage-earning capacity. In this case, appellant had performed the position of painter (modified) since his reemployment on March 25, 1996. There is no evidence of record showing that appellant was unable to perform his duties during this period. His actual earnings for the period, therefore, fairly and reasonably represent his wage-earning capacity during this period.² The Board notes that the current pay for appellant's date-of-injury position was \$20.49 per hour and appellant was earning \$21.21. Thus, the Office properly found that there was no loss of wage-earning capacity.

The Board further finds that the Office properly denied waiver of the overpayment that occurred for the period March 25 through March 30, 1996.

¹ 5 U.S.C. § 8115.

² See *Albert L. Poe*, 37 ECAB 684, 689 (1986).

Section 8129(a)³ of the Act provides that when an overpayment of compensation occurs “because of an error of fact or law,” adjustment or recovery shall be made by decreasing later payments to which the individual is entitled. Section 8129(b)⁴ 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 the purpose of the Act or be against equity and good conscience.⁵ Therefore, adjustment or recovery must be made when an incorrect payment has been made to an individual who is found to be with fault.⁶

The implementing regulation⁷ provides that a claimant is with fault in the creation of an overpayment when he or she: (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) accepted a payment which the individual knew or should have been expected to know was incorrect. Any overpayment resulting from the Office’s negligence does not permit an employee to accept compensation to which he knew or should have known he was not entitled.⁸

The Office has the burden of proof in establishing that appellant was with fault in helping to create the overpayment.⁹ In determining whether a claimant is with fault, the Office will consider all pertinent circumstances including age, intelligence, education and physical and mental condition.¹⁰ Factors to be weighed are the individual’s understanding of reporting requirements and the obligation to return payments, which were not due, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported, and ability, efforts and opportunities to comply with reporting requirements.¹¹

Thus, an individual will be found to be with fault in the creation of an overpayment if the evidence shows either a lack of good faith or a failure to exercise a high degree of care in reporting changes in circumstances, which may affect entitlement to, or the amount of,

³ 5 U.S.C. § 8129(a)

⁴ 5 U.S.C. § 8129(b).

⁵ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

⁶ *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

⁷ 20 C.F.R. § 10.320(b).

⁸ *Russell E. Wageneck*, 46 ECAB 653 (1995).

⁹ *Danny L. Paul*, 46 ECAB 2822 (1994).

¹⁰ *Stephen A. Hund*, 47 ECAB ____ (Docket No. 94-559, issued March 7, 1996).

¹¹ *Henry P. Gilmore*, 46 ECAB 709 (1995).

benefits.¹² It is axiomatic that no waiver is possible if the claimant is with fault in helping to create the overpayment.¹³

In the instant case, the Office properly found that appellant was with fault as he accepted a compensation check that he knew or should have known was incorrect because it covered a period of employment. As appellant was with fault in the matter of this overpayment and as section 8129 of the Act precludes waiver in such cases, the Office properly determined that appellant was responsible for repaying the overpayment in the amount of \$563.87.

The decision of the Office of Workers' Compensation Programs dated September 23, 1996 is hereby affirmed.

Dated, Washington, D.C.
January 7, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹² *Id.*

¹³ *Linda E. Padilla*, 45 ECAB 768, 772 (1994).