

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LOUIS F. BERTONCINI and U.S. POSTAL SERVICE,  
POST OFFICE, Taunton, R.I.

*Docket No. 97-2165; Submitted on the Record;  
Issued July 12, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether appellant received an overpayment of compensation in the amount of \$16,414.98 and, if so, whether he was without fault in the matter of this overpayment.

The Office of Workers' Compensation Programs accepted that appellant sustained a temporary aggravation of the degenerative disc disease of his cervical spine and paid him compensation for his intermittent absences from work from March 24 to June 13, 1987. Appellant returned to his regular, full-time work on June 16, 1987 and worked until March 13, 1989, when he filed a claim for a recurrence of disability which the Office accepted. The Office paid appellant compensation for temporary total disability from March 13 until September 27, 1989, when he returned to part-time light duty. The Office then reduced his compensation to that for partial disability. On May 3, 1990 appellant again stopped work and the Office resumed payment of compensation for temporary total disability. The Office continued to pay such compensation until appellant returned to light-duty work on June 30, 1994.

On July 14, 1994 the Office issued a preliminary determination that appellant had received an overpayment of compensation in the amount of \$22,906.25, which occurred because he had earned that amount during the period October 1991 to February 1994, a period during which he received compensation for temporary total disability. The Office preliminarily found that appellant was at fault in the matter of this overpayment because he accepted payments he should have known were incorrect. Appellant requested a hearing, which was held before an Office hearing representative on February 6, 1995. By decision dated May 13, 1997, an Office hearing representative found that the amount of the overpayment had been incorrectly determined and that the proper amount was \$16,414.98. This Office hearing representative found that appellant was at fault, in that he accepted payments he knew or should have known were incorrect. Noting that appellant's monthly expenses exceeded his income, the Office hearing representative declared the overpayment due and payable.

The Board finds that the amount of the overpayment must be recalculated.

The Office hearing representative was correct in finding that the amount of the overpayment must be calculated by determining appellant's loss of wage-earning capacity during the period he worked and subtracting the amount due for loss of wage-earning capacity from the amount appellant was paid for total disability during that period. Two errors, however, were made in the calculation of the amount of the overpayment.

First, the rate of pay used to calculate appellant's compensation after May 3, 1990 was incorrect. As appellant's disability increased on May 4, 1990 from partial to total, he had a recurrence of disability within the meaning of the Federal Employees' Compensation Act on that date.<sup>1</sup> Section 8101(4) of the Act,<sup>2</sup> under which the Office determines rate of pay for the purpose of calculating compensation, states in pertinent part: "'monthly pay' means the monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater." As noted above, appellant resumed regular full-time employment with the employing establishment from June 1987 to March 1989 and is, therefore, eligible for a recurrent pay rate for his subsequent recurrence of disability on May 3, 1990. The record indicates that appellant's rate of pay on March 13, 1989, the pay rate the Office used, was \$29,385.00 per year. His rate of pay on May 4, 1990 was \$30,775.00. The Office should have used the higher pay rate in calculating the amount of compensation to which appellant was entitled for his loss of wage-earning capacity.<sup>3</sup>

The second error is that the Office, in computing appellant's loss of wage-earning capacity, used appellant's gross earnings rather than his net earnings for his work as a real estate agent. The Board has pointed out: "A self-employed claimant has expenses associated with conducting business which must be paid from the receipts of the business. It, therefore, would be inequitable to calculate a loss of wage-earning capacity on the basis of a claimant's gross earnings from self-employment as that would not allow for the costs of conducting the business."<sup>4</sup> The Office should obtain from appellant an account of his expenses incurred in operating his real estate business during the periods November 1990 through February 1991 and October 1991 through October 1993, and subtract the direct expenses of operating his business from his gross earnings. The Office should then recalculate, using the correct pay rate and appellant's net earnings, his entitlement to compensation for loss of wage-earning capacity and the amount of his overpayment.

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

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<sup>1</sup> *Thomas Donaghue*, 39 ECAB 336 (1988).

<sup>2</sup> 5 U.S.C. § 8101(4).

<sup>3</sup> *Johnny A. Muro*, 17 ECAB 537 (1966).

<sup>4</sup> *Thomas F. Jordan*, 47 ECAB 382 (1996).

Section 8129(a) of the 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>5</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>6</sup>

On Office forms CA-1032 and in letters, appellant informed the Office that he was working as a real estate agent and of the amounts he earned in commissions. The Office nonetheless continued to pay appellant compensation for total disability. Although the Office may have been negligent in continuing to issue appellant checks for total disability after having been informed that he was working and had earnings, this does not excuse appellant’s acceptance of such checks if he knew or should have known that the payments were incorrect.<sup>7</sup>

The Board finds that appellant knew or should have known that the checks he received for total disability while he had earnings were incorrect. A July 11, 1990 letter from the Office advised appellant that if he worked during any portion of a period covered by its compensation check, he must return the check to the Office or an overpayment of compensation may result. Appellant’s undated letter received by the Office on May 4, 1992 inquired how his earnings would affect his compensation rate. Appellant knew or should have known that the payments for total disability that were made during periods he worked and had earnings were incorrect.

The decision of the Office of Workers’ Compensation Programs dated May 13, 1997 is affirmed with regard to the finding of fault. With regard to the amount of the overpayment, the

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<sup>5</sup> 5 U.S.C. § 8129.

<sup>6</sup> 20 C.F.R. § 10.320(b).

<sup>7</sup> *Robert W. O’Brien*, 36 ECAB 541 (1985).

May 13, 1997 decision is set aside and the case remanded to the Office for recalculation consistent with this decision of the Board.

Dated, Washington, D.C.  
July 12, 1999

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member