

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LORENZO JOE KALLECO and DEPARTMENT OF THE INTERIOR,  
BUREAU OF INDIAN AFFAIRS, Crownpoint, NM

*Docket No. 97-1481; Submitted on the Record;  
Issued September 13, 1999*

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DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issues are whether the Office of Workers' Compensation Programs properly found an overpayment of \$70,042.54, and whether appellant was at fault in creating the overpayment, thereby precluding waiver of recovery.

Appellant's claim for traumatic injury, filed on September 11, 1987, was accepted by the Office for lacerations and fractures of his right fingers after a welding machine malfunctioned, forcing his hand into a fan's blades. Appellant, a temporary, 30-day employee, stopped work on September 8, 1987 and did not return.<sup>1</sup>

On August 3, 1995 the Office issued a determination of wage-earning capacity, finding that appellant had been reemployed as a laborer with various companies from January 1, 1988 through December 31, 1992 at an average wage of \$282.54 per week. The Office noted that the current rate of appellant's weekly wage on the date of injury was \$314.80 and adjusted his disability compensation accordingly.

On November 14, 1996 the Office made a preliminary determination that an overpayment of compensation in the amount of \$70,042.54 had occurred because appellant had earned wages while receiving disability compensation from January 1, 1988 through July 22, 1995.

The Office finalized its determination on December 18, 1996, finding that appellant had not responded within 30 days to its preliminary notice and was at fault in creating the

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<sup>1</sup> On April 18, 1997 the Office issued a schedule award for 53 percent permanent impairment of appellant's right upper extremity. The award ran from December 1, 1995 through January 31, 1999 for a total of 165.36 weeks. The Office applied the amount of the schedule award to recovery of the overpayment.

overpayment because he knew or should have been expected to know that the compensation checks he was receiving while earning wages were incorrect pursuant to section 10.320(b)(3).<sup>2</sup>

The Board finds that the Office correctly calculated the amount of the overpayment. The Office found that appellant earned wages while receiving total disability benefits from January 1, 1988 through July 22, 1995. The Office noted that appellant's date-of-injury wage was \$314.80 and found that he had a wage-earning capacity of \$236.10 per week during those seven and a half years. Thus, appellant should have received a total of \$24,422.24 during that time, but was paid a total of \$94,464.78 in benefits. Therefore, an overpayment of \$70,042.54 was created.

The Board further finds that appellant was at fault in creating the overpayment because he knew or should have been expected to know that he was not entitled to disability benefits while he was working and earning wages.

Section 8129(a)<sup>3</sup> 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)<sup>4</sup> provides that an overpayment of compensation may not be waived 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.<sup>5</sup>

The implementing regulation<sup>6</sup> 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.<sup>7</sup>

The Office has the burden of proof in establishing that appellant was with fault in helping to create the overpayment.<sup>8</sup> In determining whether a claimant is with fault, the Office will consider all pertinent circumstances including age, intelligence, education, and physical and mental condition.<sup>9</sup> Factors to be weighed are the individual's understanding of reporting

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<sup>2</sup> 20 C.F.R. § 10.320(b)(3).

<sup>3</sup> 5 U.S.C. § 8129(a).

<sup>4</sup> 5 U.S.C. § 8129(b).

<sup>5</sup> *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

<sup>6</sup> 20 C.F.R. § 10.320(b).

<sup>7</sup> *Russell E. Wageneck*, 46 ECAB 653, 660 (1995).

<sup>8</sup> *Danny L. Paul*, 46 ECAB 282, 285 (1994).

<sup>9</sup> *Stephen A. Hund*, 47 ECAB 432, 435 (1996).

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.<sup>10</sup>

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, benefits.<sup>11</sup> It is axiomatic that no waiver is possible if the claimant is with fault in helping to create the overpayment.<sup>12</sup>

In its letter to appellant accepting his claim on September 24, 1987, the Office stated the following:

“If you obtain or return to any employment, this office should be notified immediately. You are not permitted to receive temporary total disability payments while employed. If any compensation checks are received and you have returned to work, they should be returned to us immediately to prevent any overpayment.”

The letter warned appellant that misrepresentation or concealment of facts or a false or evasive answer to any of its questions might be grounds for suspension of benefits and subject appellant to civil liability or result in criminal prosecution.

In a letter dated December 2, 1987, the Office informed appellant that if he returned to his former job or obtained other employment, he must “at once” submit information to the Office regarding the name and address of his employer, the date of his return, the rate of pay, and the type and hours of work he was doing. On December 7, 1987 appellant signed and returned a copy of this letter to the Office, indicating by his signature that he understood the conditions under which he would receive disability compensation and the items that he must report to the Office. Appellant also indicated that he understood that willful failure on his part to comply with the conditions could result in termination or forfeiture of benefits and liability for resulting overpayments.

Subsequently, the Office provided appellant with several CA-1032 reporting forms which he completed and signed on the following dates, August 29, 1988, April 5 and July 13, 1989, July 2, 1990, June 25, 1991, November 16, 1992, June 23, 1994 and January 28, 1997, stating his wages and the dates and the companies for whom he had worked. Each time appellant signed these forms he attested to his understanding that he “must immediately report” to the Office any employment.

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<sup>10</sup> *Henry P. Gilmore*, 46 ECAB 709, 719 (1995).

<sup>11</sup> *Ruth Moreno Rios*, 48 ECAB \_\_\_\_ (Docket No. 94-1977, issued July 14, 1997).

<sup>12</sup> *Linda E. Padilla*, 45 ECAB 768, 772 (1994).

In response to the Office's inquiries about reported employment, appellant explained that he had worked for Pro-Quip "off and on only when they have work," and that his employment was only temporary "to get caught up" on his bills. However, the itemized statement of earnings reports present a record of wages far beyond temporary, sporadic employment.

Based on a comparison of the information reported on the CA-1032 forms and the actual wages shown on the itemized statement of earnings reports, the Board finds that appellant under-reported his actual employment and earnings and provided incomplete answers to the questions on the Form CA-1032 reports. By failing to report his various jobs to the Office "at once" as instructed, appellant was able to conceal his actual earnings from the Office for several years and thus receive both disability benefits and wages.

Appellant admitted that he had "work on the side," but argued that he had completed all the forms as required and thought it was okay to keep the compensation checks because the Office did not question his work or reduce the amount of his benefits. Appellant complained that his disability compensation was insufficient to meet his living expenses and that he was forced to seek "temporary work" to supplement his benefits.

However, the record establishes that appellant was fully aware of the prohibition against receiving disability benefits and earning wages at the same time. The Office's instruction was straightforward -- appellant was to return any compensation checks if he obtained employment, and this he completely failed to do.<sup>13</sup>

Even if the Office was not diligent in monitoring appellant's claim, and there is no evidence of Office inaction here, such a situation does not excuse appellant from failing to return the compensation checks or advising the Office when he began working.<sup>14</sup> Inasmuch as appellant was at fault in creating the overpayment because he accepted compensation payments that he knew were incorrect, the Board need not address his arguments regarding waiver of recovery of the overpayment.<sup>15</sup>

Contrary to appellant's assertion that the Office ignored his marriage in 1993, the Board finds that the Office properly calculated the amount of the overpayment by increasing appellant's augmented rate of compensation to three-quarters on October 7, 1993, based on his marriage certificate.

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<sup>13</sup> 20 C.F.R. § 10.320(b); see *John L. Wolf*, 48 ECAB \_\_\_\_ (Docket No. 95-1932, issued October 23, 1996) (finding that appellant was at fault in creating the overpayment because he knew that he could not receive both retirement benefits and disability compensation at the same time).

<sup>14</sup> See *George A. Hirsch*, 47 ECAB 520 (1996) (finding that appellant's claim of mental incompetence in handling his financial affairs was unsupported by the factual and medical record).

<sup>15</sup> *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994); see *Harold W. Steele*, 38 ECAB 245, (1986) (no waiver is possible if the claimant is at fault in helping to create the overpayment).

The December 18, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.  
September 13, 1999

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member