

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALAN L. TRINDLE, SR. and DEPARTMENT OF THE NAVY,
MARINE CORPS LOGISTICS BASE, Barstow, CA

*Docket No. 00-2577; Submitted on the Record;
Issued April 9, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant forfeited his right to compensation from January 6, 1997 to September 11, 1999; (2) whether an overpayment of \$52,543.59 in compensation occurred as a result; and (3) whether appellant was at fault in the creation of the overpayment.

On November 21, 1996 appellant, then a 38-year-old hazardous waste handler, sustained a traumatic injury while in the performance of his duties when his truck came to a halt and a recycling bin that he was hauling shifted, striking the back of his seat. He stopped work that day and received continuation of pay through January 5, 1997.

The Office of Workers' Compensation Programs accepted appellant's claim for lumbar strain and temporary aggravation of degenerative disc disease. He received compensation for temporary total disability beginning January 5, 1997. Beginning May 17, 1997 the Office deducted court-ordered child support from appellant's compensation checks. Appellant returned to modified duty in June 1997 as a fire communications operator. On August 1, 1997 he worked in a temporary modified-duty position as a fire protection inspector. Appellant again stopped work in September 1997 and did not return. He received compensation for temporary total disability beginning September 28, 1997 with deductions for child support.

On March 12, 1997 appellant signed a Form CA-1032, certifying that he had no employment, self-employment or involvement in any business enterprise -- other than his federal employment as a hazardous waste handler -- during the prior 15 months. On June 12, 1998 appellant signed another Form CA-1032, certifying that he had no employment, self-employment or involvement in any business enterprise during the prior 15 months.

In a letter dated May 4, 1999, the Office advised appellant as follows:

"I am writing in reference to the compensation benefits you have been receiving from this Office.

“Section 10.125(a) of the Office’s regulations requires [appellant] to report earnings from any remunerative employment, whether full or part time. If timely response is not made, the right to compensation for wage loss is suspended until the report is received, at which time compensation will be restored retroactively. If [appellant] omits or understates earnings, compensation will be declared forfeit for the period involved. Moreover, criminal prosecution may result if deliberate falsehood is employed in providing answers.

“On March 30, 1999 Form CA-1032 and Form CA-0935/0936 were sent to you for completion. No reply has been received and your benefits have, therefore, been suspended as of May 4, 1999. If you complete and return the enclosed copy of Form CA-1032, your compensation benefits will be restored retroactively to the date they were suspended. Your appeal rights in this matter are attached.”

On May 7, 1999 appellant signed a Form CA-1032, certifying that he had no employment, self-employment or involvement in any business enterprise during the prior 15 months. By signing the form, appellant acknowledged the following:

“I know that anyone who fraudulently conceals or fails to report income or other information which would have an effect on benefits, or who makes a false statement or misrepresentation of a material fact in claiming a payment or benefit under the Federal Employees’ Compensation Act may be subject to criminal prosecution, from which a fine or imprisonment, or both, may result.

“I understand that I must immediately report to [the Office] any improvement in my medical condition, any employment, any change in the status of claimed dependents, any third-party settlement and any change in income from [f]ederally assisted disability or benefit programs.”

Having received a completed Form CA-1032, the Office restored appellant’s compensation payments, consistent with its letter of May 4, 1999.

The Office received an investigative package dated June 2, 1999 from the Naval Criminal Investigative Service (NCIS) at Camp Pendleton, California. The NCIS reported that during an interrogation on August 14, 1998 appellant had admitted to falsifying his CA-1032 forms, dated “March 6, [sic] 1997” and June 12, 1998 by denying receipt of outside income, self-employment and any association with a business enterprise. The NCIS reported that appellant had, in fact, earned \$23,380.00 in income generated from his environmental services business from March 1, 1996 to August 14, 1997. Appellant allegedly claimed that he needed the extra income for divorce-related expenses and child support payments. The NCIS produced copies of business documents showing appellant to be an owner and president of an environmental services business. The NCIS also produced copies of deposited checks made payable to appellant’s business, including checks dated February 17, May 20 and August 14, 1997.

The NCIS also reported that for about the last three months appellant was employed full time as a project manager for Consolidated Waste, an environmental cleanup company in Montclair, California.

On September 7, 1999 Consolidated Waste confirmed that appellant was employed at the company since April 26, 1999 as an Emergency Response Project Manager, working 40-plus hours a week and earning an annual salary of \$38,400.00.¹

In a decision dated October 20, 1999, the Office found that appellant had forfeited his entitlement to compensation because he knowingly failed to report earnings on CA-1032 forms and admitted during an investigative interview that he knowingly did this in an effort to meet divorce-related expenses and child support. For the period after the last Form CA-1032, signed May 7, 1999, the Office noted that appellant had earnings during the entire period through September 11, 1999. The Office explained that this period was included in the forfeiture because appellant actually worked and did not report earnings.

Also on October 20, 1999 the Office made a preliminary determination that an overpayment of \$52,543.59 in compensation occurred in appellant's case because of the following: "You were working and receiving total disability compensation at the same time." The Office found that appellant was at fault in the matter for the following reasons:

"You knew or reasonably should have known that you could not receive compensation for total disability while at the same time working and earning wages. As you knowingly omitted earnings information on CA-1032 forms, you have forfeited your entitled [sic] to all monetary compensation under section 8106(b) of the Act."

In a memorandum dated October 20, 1999, the Office found that appellant was at fault in the matter of the overpayment because he "accepted payments, which he knew or should have been expected to know, were incorrect as he returned to private employment work." The Office recommended that appellant be found with fault in the creation of the overpayment, as he knew or should have known that he was ineligible to receive compensation payments after he returned to work, "yet he accepted payments for compensation anyway." Further, the Office found, appellant knowingly withheld earnings information in an effort to perpetuate the incorrect payments.

Appellant advised the Office that he refused to sign any request for a telephone conference, hearing or decision based on the written evidence.

In a decision dated January 20, 2000, the Office finalized its preliminary determination. The Office found that an overpayment of \$52,543.59 occurred in appellant's case because of the following: "You were working and receiving total disability compensation at the same time." The Office found that appellant was at fault in the matter of the overpayment for the following reasons:

"You knew or reasonably should have known that you could not receive compensation for total disability while at the same time working and earning

¹ In a decision dated October 15, 1999, the Office found that appellant's position at Consolidated Waste fairly and reasonably represented his wage-earning capacity. As his actual wages in this position exceeded the current wage of the job he held when he was injured, the Office reduced his compensation to zero.

wages. As you knowingly omitted earnings information on CA-1032 forms, you have forfeited your entitlement to all monetary compensation.”

The Board finds that appellant forfeited his right to compensation from January 6, 1997 to September 11, 1999.

Section 8106(b) of the Act provides in pertinent part:

“An employee who --

- (1) fails to make an affidavit or report when required; or
- (2) knowingly omits or understates any part of his earnings;

forfeits his right to compensation with respect to any period for which the affidavit or report was required. Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee or otherwise recovered under [section] 8129 of this title [Recovery of Overpayments], unless recovery is waived under that section.”²

The CA-1032 forms that appellant signed on March 12, 1997, June 12, 1998 and May 7, 1999 completely encompass the period from January 6, 1997, when appellant first began receiving compensation for his November 21, 1996 employment injury, to May 7, 1999. He represented on these forms that he had no employment, self-employment or involvement in any business enterprise during this time. The record shows otherwise. The investigative package received from the NCIS well documents appellant’s self-employment or involvement in an environmental services enterprise that received revenues during the periods covered by the first two CA-1032 forms. Information received from Consolidated Waste establishes that appellant was employed and received a salary during the period covered by the last CA-1032 form, signed May 7, 1999.

As appellant had earnings during each of these periods, the question for determination is whether he knowingly omitted or understated any part of his earnings.

The NCIS investigation documents that appellant knowingly omitted or understated his earnings on the first two forms. During an interrogation on August 14, 1998 appellant admitted to falsifying the CA-1032 forms, dated March 6, [sic] 1997 and June 12, 1998 by denying receipt of outside income, self-employment and any association with a business enterprise. He does not contest this statement against interest. The Board, therefore, finds that appellant knowingly omitted or understated his earnings for the period January 6, 1997 to June 12, 1998, in violation of 5 U.S.C. § 8106(b) and thereby forfeited the total amount of compensation he received for that period.

For the overlapping period from February 7, 1998 to May 7, 1999, when appellant signed the last Form CA-1032, the record shows that appellant was working full time for Consolidated

² 5 U.S.C. § 8106(b).

Waste as an Emergency Response Project Manager, earning an annual salary of \$38,400.00. He knew he was employed, knew he was earning a salary, but he denied any such employment on his Form CA-1032, dated May 7, 1999. There is no medical evidence in the record to suggest that appellant was mentally incapacitated when he signed this form or that he was otherwise incompetent to handle his affairs. Under the circumstances, the Board finds that appellant knowingly omitted or understated his earnings for the period February 7, 1998 to May 7, 1999, in violation of 5 U.S.C. § 8106(b) and, thereby, forfeited the total amount of compensation he received for that period.

The record shows that appellant earned a salary working for Consolidated Waste during the final period at issue, from May 7 to September 11, 1999. No Form CA-1032, covers this period, so there can be no charge that appellant omitted or understated his earnings on any such report. Forfeiture, however, may be declared for failing to make an affidavit or report when required.³ When appellant signed his last Form CA-1032, on May 7, 1999 he acknowledged that he must immediately report to the Office any employment. Notwithstanding this contemporaneous notification, appellant failed to report to the Office his employment with Consolidated Waste, which began April 26, 1999. The Board, therefore, finds that appellant failed to make an affidavit or report when required, in violation of 5 U.S.C. § 8106(b) and thereby forfeited the total amount of compensation he received from April 26 to September 11, 1999.

The Board also finds that an overpayment of \$52,543.59 in compensation occurred as a result of the forfeiture.

On October 18, 1999 the Office generated a computer printout of all compensation payments made from January 6, 1997 to September 11, 1999. The list shows the date and number of each compensation check, the net and gross compensation paid and each uncanceled check for court-ordered child support. The printout documents the payment of \$52,543.59 in gross compensation from January 6, 1997 to September 11, 1999. Appellant forfeited his right to this compensation, creating the overpayment found in this case.

The Board also finds that appellant was at fault in the creation of the overpayment.

Section 8129 of the Act 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 would be against equity and good conscience.”⁴

Thus, the Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she received from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits.

³ *Lorand A. Hegedus*, 37 ECAB 162 (1985).

⁴ *Id.* at § 8129.

A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or (2) Failed to provide information which he or she knew or should have known to be material; or (3) Accepted a payment which he or she knew or should have known to be incorrect (this provision applies only to the overpaid individual).⁵

The Office found that appellant was at fault in creating the overpayment under the second and third criteria above. The Office found that appellant knew or reasonably should have known that he could not receive compensation for total disability while at the same time working and earning wages. The Office also found that appellant knowingly omitted earnings information on CA-1032 forms and thereby forfeited his right to all monetary compensation.

Appellant is at fault because he failed to provide information that he knew or should have known to be material. On each of the CA-1032 forms, the Office advised as follows:

“The information requested in this letter is required in connection with your benefits under the Act, 5 U.S.C. 8101 *et seq.* This information will be used to decide whether you are entitled to continue receiving these benefits, or whether your benefits should be adjusted.”

Appellant, therefore, knew or should have known that his self-employment or involvement in an environmental services enterprise was material to his entitlement to benefits. Appellant’s failure to provide this material information on his CA-1032 forms, establishes fault in the creation of the overpayment that occurred through May 7, 1999, the date of his last Form CA-1032.

Appellant is likewise at fault in the creation of the overpayment that occurred after May 7, 1999. As the Board noted earlier, when appellant signed the last Form CA-1032, on May 7, 1999, he acknowledged that he must immediately report to the Office any employment. This acknowledgement, together with notification that such information would be used to decide whether appellant was entitled to continue to receive benefits or whether his benefits should be adjusted, shows that he knew or should have known that any employment was material. Appellant’s failure to provide information about his employment with Consolidated Waste establishes fault in the creation of the overpayment that occurred after May 7, 1999.

Whether or not the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.⁶ Under the circumstances of this case, the Office properly found that appellant was at fault in the creation of the overpayment.⁷

⁵ 20 C.F.R. § 10.433(a).

⁶ *Id.* at § 10.433(b).

⁷ The fact that the Office may have erred in making the overpayment does not by itself relieve the individual who received the overpayment from liability for repayment if the individual was also at fault in accepting the overpayment. *Id.* at § 10.433(a).

The Board's jurisdiction to review the collection of an overpayment is limited to cases of adjustment, where the Office decreases later payments of compensation to which the individual is entitled.⁸ In this case, appellant is no longer entitled to compensation for wage loss because his actual wages at Consolidated Waste demonstrated no loss of wage-earning capacity.⁹ As the Office is not seeking recovery from continuing payments of compensation, the Board lacks jurisdiction to review the collection of the overpayment.

The January 20, 2000 and October 20, 1999 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
April 9, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

⁸ 5 U.S.C. § 8129; *Levon H. Knight*, 40 ECAB 658 (1989).

⁹ *See supra* note 1.