

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES M. EDGAR and DEPARTMENT OF COMMERCE,
OFFICE OF THE INSPECTOR GENERAL, New York, NY

*Docket No. 01-27; Submitted on the Record;
Issued May 24, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$142,295.99 for the period from August 22, 1983 to May 30, 1992; (2) whether the Office properly found that appellant was at fault in the creation of the overpayment; and (3) whether the Office properly required repayment of the entire amount.

This case has previously been before the Board on appeal. In a decision dated October 31, 1988, the Board found that appellant had established that his disability beginning August 1983 and his surgery for a ruptured disc in April 1984 were causally related to his May 2, 1981 employment injury.¹ The Board reversed an Office July 6, 1987 decision and remanded the case for payment of appropriate compensation. By decision dated December 11, 1990, the Board found that the Office failed to meet its burden of proof to terminate appellant's compensation benefits effective January 22, 1986.² The Board reversed the Office's December 14, 1989 decision. The facts and circumstances of the case as set forth in the Board's prior decision are adopted herein by reference.

Following the Board's decisions, the Office provided appellant with compensation in the amount of \$56,284.20 for the period August 22, 1983 to January 21, 1986; in the amount of \$110,929.08 for the period January 22, 1986 to June 15, 1989; and \$98,879.18 for the period June 16, 1989 to February 8, 1992. The Office based this compensation on two-thirds of appellant's weekly pay rate of \$893.60 per week as reported on his claim for compensation. Beginning February 9, 1992 the Office entered appellant on the periodic rolls with monthly compensation of \$3,004.00.

¹ 40 ECAB 957 (1988).

² Docket No. 90-740.

The employing establishment notified the Office on April 8, 1992 that appellant was receiving compensation at twice his weekly salary. The employing establishment provided records establishing that on May 2, 1981 appellant's date of injury, his annual salary was \$23,236.00 and that his biweekly compensation was \$893.60. Appellant returned to work on June 27, 1981 and resigned from the employing establishment on August 1, 1981.

The Office determined that appellant was paid compensation at the wrong pay rate received total compensation from August 22, 1983 to May 30, 1992 in the amount of \$278,381.46. The Office concluded that appellant was actually due compensation in the amount of \$136,085.47, therefore, he had received an overpayment in the amount of \$142,295.99. The Office reduced appellant's continuing compensation benefits to reflect his weekly salary as of the date of injury. By letter dated July 3, 1992, appellant queried the reduction in compensation alleging that the payable amount should be that amount of compensation paid him for his last investigators job.

The Office issued a preliminary finding of overpayment on July 22, 1992 finding that appellant had received an overpayment in the amount of \$142,295.99 for the period of August 22, 1983 to May 30, 1992 as he was incorrectly paid based on a weekly salary of \$893.60 rather than his earnings as of his date of injury of \$446.80. The Office found that appellant was without fault in the creation of the overpayment.

In response to this preliminary finding, appellant's attorney alleged that appellant had received an underpayment of compensation as he was not paid based on the salary he was earning in the private sector at the time of his recurrence of disability and that appellant was entitled to be compensated at the augmented three-quarters rate as he was paying child support.

In an undated note, the Office stated appellant's compensation should reflect the augmented three-quarters rate effective January 22, 1986 when a certified copy of his divorce decree was received by the Office. The Office took no further action in this case until October 14, 1999. On that date the Office issued a preliminary finding of overpayment in the amount of \$142,295.99 and found that appellant was at fault in the creation of the overpayment. The Office found that appellant was "aware or should reasonably have been aware that the amount of compensation you were receiving far exceeded your normal salary."³

In response to the 1999 preliminary notice of overpayment, appellant requested a copy of his case file. By decision dated February 23, 2000, the Office finalized the overpayment determination based on its determination that he received compensation at the incorrect pay rate for the period August 22, 1983 to May 30, 1992.

The Board finds that the Office improperly determined that appellant received an overpayment in the amount of \$142,295.99 for the period August 22, 1983 to May 30, 1992.

³ The record indicates that appellant was indicted for fraud. However, there is no evidence in the record that the Office pursued a forfeiture action against appellant nor attempted to terminate his compensation benefits based on 5 U.S.C. § 8191.

Following the initial preliminary finding of overpayment, appellant contended that he was entitled to compensation at the augmented rate as he paid child support during the period in question. The Office acknowledged that appellant would be entitled to compensation at the augmented rate and that recomputation of his entitlement to compensation at the augmented rate should be effective as of January 22, 1986. There is no evidence in the record that the Office recalculated the amount of compensation due appellant or the period for which he had dependants based on the payment of child support. The preliminary notices of overpayment and the Office's final decision do not clearly indicate how the amount of overpayment was determined, especially with regard to the evidence of record pertaining to his eligibility to compensation at the augmented rate as of January 22, 1986, or regarding the issue of concurrent employment at the time of his recurrence of disability. For this reason, the case will be remanded to the Office for a *de novo* determination of the amount of the overpayment. As the Office's determination on the amount of overpayment is set aside, the case is not in posture with regard to the issues of fault or recovery of the overpayment.

The February 23, 2000 decision of the Office of Workers' Compensation Programs is hereby set aside and remanded for further development consistent with this opinion of the Board.

Dated, Washington, DC
May 24, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member