

**United States Department of Labor
Employees' Compensation Appeals Board**

JOHN LOMBARDO, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Toms River, NJ, Employer**

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**Docket No. 04-418
Issued: April 20, 2004**

Appearances:
John Lombardo, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On December 4, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated September 15, 2003 finding that he had received an overpayment in the amount of \$85,001.25 that was not subject to waiver. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment of this case.

ISSUES

The issues are: (1) whether an overpayment of \$85,001.25 occurred in appellant's case as he forfeited compensation benefits for the period March 20, 1991 to June 27, 1995; and (2) whether appellant was at fault in the creation of the overpayment such that the overpayment was not subject to waiver.

FACTUAL HISTORY

This case has previously been before the Board on appeal. In a July 1, 2002 decision,¹ the Board found that appellant had no permanent impairment of his right upper extremity

¹ Docket No. 01-814 (issued July 1, 2002).

entitling him to a schedule award, that he had a 30 percent loss of hearing in the right ear entitling him to a schedule award and that appellant had forfeited his compensation benefits for the period March 20, 1991 to June 27, 1995 as he knowingly failed to report earnings. The facts and the circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

Following the Board's July 1, 2002 decision, the Office informed appellant that he was entitled to additional compensation in the amount of \$974.08, the difference between the schedule award he had received for 26.2 percent loss of hearing in the amount of \$6,744.02 and the schedule award he was entitled to for 30 percent loss of hearing in the amount of \$7,718.10.

The Office issued a preliminary finding of overpayment on August 30, 2002 finding that, as appellant had forfeited the compensation he received for the period of March 20, 1991 to June 27, 1995, an overpayment was created in the amount of \$92,719.35. The Office reduced the amount of the overpayment by appellant's schedule award entitlement for 30 percent loss of hearing (\$7,718.10) to find an outstanding overpayment of \$85,001.25.

Appellant, through his attorney, requested an oral hearing. Appellant presented additional financial information and testified at his oral hearing on June 18, 2003. By decision dated September 15, 2003, the hearing representative finalized the Office's August 30, 2002 preliminary finding concluding that appellant had received an overpayment in the amount of \$85,001.25, that appellant was at fault in the creation of the overpayment and was therefore not entitled to waiver, and determining that the overpayment was due in full.²

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.³ If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability.⁴ Under section 8110 of the Act, an employee is entitled to compensation at the augmented rate of three fourths of his weekly pay if he has one or more dependents.⁵

² Appellant has not received compensation benefits from the Office since July 20, 1995.

³ 5 U.S.C. §§ 8101-8193, 8102(a).

⁴ *Id.* at § 8105(a). *See also Duane C. Rawlings*, 55 ECAB ____ (Docket No. 02-2172, issued March 8, 2004).

⁵ 5 U.S.C. § 8110.

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

“The Secretary of Labor may require a partially disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the time the Secretary specifies.... 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.”⁶ (Emphasis added.)

A claimant is subject to the forfeiture provision of 5 U.S.C. § 8106 if he “knowingly” failed to report employment or earnings. The Board has held that the total amount of wage-loss benefits received during the period of forfeiture is an overpayment.⁷

ANALYSIS -- ISSUE 1

The Board found in its previous decision that appellant was subject to the forfeiture provision as he knowingly failed to report earnings from employment for the period March 20, 1991 to June 27, 1995. The Board therefore found that the amount of compensation that appellant received during this period constituted an overpayment. The Office has alleged and appellant has not disputed that he received wage-loss compensation in the amount of \$92,719.35 during the period March 20, 1991 to June 27, 1995. However, in accordance with the Board’s July 1, 2002 decision, the Office also found that appellant was entitled to a schedule award for 30 percent loss of hearing in his right ear. The Office reduced appellant’s overpayment by the amount of the schedule award entitlement (\$7,718.10) for the period April 27 through July 31, 2000 to find an outstanding overpayment amount of \$85,001.25. Generally, the Office should not offset amounts owed to employees against amounts of overpayments, as this precludes the employee from obtaining waiver of the entire amount of the overpayment. However, under the circumstances of this case, because appellant was found to be at fault in creation of the overpayment and no waiver is possible, he was not harmed by these actions of the Office.⁸

LEGAL PRECEDENT -- ISSUE 2

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

⁶ 5 U.S.C. § 8106(b).

⁷ *Terryl A. Geer*, 51 ECAB 168, 173 (1999) (the Board held that the claimant received compensation in the amount of \$71,824.61 for the period October 26, 1985 through January 14, 1989, that he forfeited his compensation for this period and that therefore he received an overpayment in the amount of \$71,824.61).

⁸ *Finley W. Leclair*, Docket No. 02-2307 (issued March 25, 2003).

payments to which an individual is entitled.⁹ The only exception to this requirement is a situation which meets the test set forth 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.”¹⁰

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, which may affect entitlement to or the amount of benefits. 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).¹¹

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.¹²

ANALYSIS -- ISSUE 2

In this case, the Office applied the first standard in determining that appellant was at fault in creating the overpayment. Appellant is at fault under the first standard because he stated that he was not employed between March 20, 1991 and June 27, 1995. The Board, in a July 1, 2002 decision, found that the evidence revealed that he performed work in furtherance of his family businesses of Trim Plus and Eagle Millwork during that period. Since appellant is at fault in creating the overpayment it is not subject to waiver.

With respect to recovery of an overpayment, the Board’s jurisdiction is limited to reviewing those cases whether the Office seeks recovery from continuing compensation benefits under the Act. Where appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the Office’s recovery of an overpayment under the Debt Collection Act.¹³ As appellant is not receiving continuing compensation benefits, the Board does

⁹ 5 U.S.C. § 8129(a).

¹⁰ 5 U.S.C. § 8129(b).

¹¹ 20 C.F.R. § 10.433(a).

¹² *Id.* at § 10.433(b).

¹³ See *Lewis George*, 45 ECAB 144, 154 (1993).

not have jurisdiction with respect to the Office's decision regarding recovery of the overpayment.

CONCLUSION

The Board finds that appellant received an overpayment of compensation for the period of March 20, 1991 to June 27, 1995, that he was at fault in the creation of the overpayment, that the overpayment is, therefore, not subject to waiver and that the Board does not have jurisdiction over recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the September 15, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Issued: April 20, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member