



overpayment of compensation in the amount of \$4,531.43 during the period of forfeiture, January 29, 1995 to April 29, 1996; (3) whether the Office properly found that appellant was at fault in creating the \$4,531.43 overpayment and, therefore, the overpayment was not subject to waiver; and (4) whether the Office properly determined that appellant received overpayments for the periods August 24 to November 30, 1992 and January 8 to 28, 1995.

### **FACTUAL HISTORY**

On June 10, 1992 appellant, then a 40-year-old machine tool operator, filed a claim for an injury to his head and neck sustained in the performance of duty on June 5, 1992. The Office accepted his claim for a neck and shoulder strain. He stopped work on June 5, 1992 and returned to work on August 24, 1992 for four hours a day in a limited-duty position for the employing establishment. On January 8, 1995 appellant returned to full-time work in another limited-duty position as a time and leave clerk and, on July 11, 1995, the Office determined that this position represented his capacity to earn wages.<sup>2</sup> Appellant received Office compensation until November 6, 1999, when he elected to receive benefits from the Office of Personnel Management.<sup>3</sup>

Appellant completed a number of CA-1032 forms regarding his employment and receipt of benefits. The CA-1032 forms advised appellant that he must report all employment for which he received a salary, wages, income, sales commissions, piecework or any payment of any kind, including service in the military, that he must report self-employment (such as engaging in sales, providing services, and operating a store or business) and that he must report any such enterprise in which he worked. The forms requested that he report employment and earnings for the 15 months prior to the completion of any given form. His signature on the CA-1032 forms certified “all the statements made in response to questions on this form are true, complete and correct to the best of my knowledge and belief.” In a CA-1032 form signed on April 29, 1996, appellant detailed his limited-duty work as a time and leave clerk for the employing establishment during the prior 15 months, but he did not indicate that he had any other employment during this period. He also indicated “no” in response to a question of whether he had been “self-employed or involved in any business enterprise” in the past 15 months.

In investigative reports dated January 5 and 30, 2001, a special agent from the Major Procurement Fraud Unit for the Army’s Criminal Investigation Command, set forth findings of an investigation of appellant’s failure to report outside employment on his certification forms filed in connection with his receipt of benefits under the Federal Employees’ Compensation Act. The special agent reported that he had interviewed appellant on January 4, 2001, at which time appellant acknowledged that he was employed by Brigar Computer Services (BCS) as a floor maintenance worker from June 8, 1992 until March 1, 1996 and had failed to report such employment on his Forms CA-1032 regarding his employment and receipt of benefits.<sup>4</sup>

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<sup>2</sup> The limited-duty position resulted in a change in grade with a commensurate cut in pay. Appellant received compensation for loss of wage-earning capacity due to his June 5, 1992 injury.

<sup>3</sup> By award of compensation dated August 11, 2000, the Office granted appellant a schedule award for a four percent permanent impairment of his right arm.

<sup>4</sup> Appellant indicated that his duties included vacuuming, trash handling and dusting.

Appellant further testified that he worked at BCS for approximately nine hours per week throughout this period. He maintained that he did not understand that he was required to report any part-time employment and that he did not intend to submit a false statement when he failed to report his income from BCS.

The record contains copies of W-2 wage and tax statements for each of the years between 1992 and 1996 which show that appellant was employed by BCS and earned wages during these years.

In a decision dated May 25, 2001, the Office determined that appellant forfeited his compensation for the period January 29, 1995 to April 29, 1996. The Office found that he knowingly failed to report his employment and earnings with BCS during this period on an April 29, 1996 CA-1032 form which required him to do so.

In a letter dated May 25, 2001, the Office indicated it had made a preliminary determination that, due to the forfeiture, appellant received a \$4,531.43 overpayment of compensation for the period January 29, 1995 to April 29, 1996. It further determined that appellant was at fault in the creation of the overpayment and that, therefore, it was not subject to waiver.

In a letter dated May 25, 2001, the Office indicated that it had made a preliminary determination that appellant received an \$853.14 overpayment for the period August 24 to November 30, 1992. The Office indicated that overpayment occurred because he “worked and received earnings in private employment for the period August 24, 1992 through November 30, 1992, for which period you also received compensation.” The Office also made a preliminary determination that appellant was at fault in the creation of this overpayment because he had been advised to notify the Office if he returned to any employment and he failed to report all income from all sources.

In another letter dated May 25, 2001, the Office indicated that it had made a preliminary determination that appellant received a \$140.20 overpayment for the period January 8 to 28, 1995. The Office indicated that the overpayment occurred because he “worked and received earnings in private employment for the period January 8, 1995 through January 28, 1995, for which period you also received compensation.” The Office also made a preliminary determination that appellant was at fault in the creation of this overpayment because he had been advised to notify the Office if he returned to any employment and he failed to report all income from all sources.<sup>5</sup>

Appellant requested an oral hearing regarding his case and, by decision dated November 8, 2002, the Office hearing representative found that the Office had properly determined that appellant forfeited his compensation for the period January 29, 1995 to April 29, 1996. The Office hearing representative finalized the Office’s preliminary

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<sup>5</sup> The record contains calculations for the three periods of overpayment. With respect to the \$4,531.43 overpayment of compensation for the period January 29, 1995 to April 29, 1996, the Office determined that appellant received \$3,323.96 in Office compensation for the period January 29 to December 31, 1995 and \$1,207.46 in Office compensation for the period January 1 to April 29, 1996.

determinations that appellant received an \$853.14 overpayment for the period August 24 to November 30, 1992; a \$140.20 overpayment for the period January 8 to 28, 1995; and a \$4,531.43 overpayment of compensation for the period January 29, 1995 to April 29, 1996.<sup>6</sup> He further determined that appellant was at fault in the creation of these overpayments and that, therefore, they were not subject to waiver.<sup>7</sup> The Office hearing representative found that the overpayment amounts were “due and payable.”<sup>8</sup>

### LEGAL PRECEDENT -- ISSUE 1

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 times 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. 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, unless recovery is waived under that section.”<sup>9</sup>

The Board has held that it is not enough merely to establish that there were unreported earnings or employment. Appellant can be subjected to the forfeiture provision of section 8106(b) only if he “knowingly” failed to report employment or earnings.<sup>10</sup> The term

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<sup>6</sup> The Office hearing representative inadvertently indicated that the total of the amounts for the three overpayment periods was \$15,658.35. The actual total of the three overpayment amounts would be \$5,524.76.

<sup>7</sup> The Office hearing representative did not provide any notable additional explanation of how the various overpayment amounts were created.

<sup>8</sup> Appellant did not receive Office compensation after November 6, 1999, when he elected to receive benefits from the Office of Personnel Management. As recovery from continuing compensation benefits under the Act is not involved in this case, the Board has no jurisdiction over the method of recovery of the overpayment. *Levon H. Knight*, 40 ECAB 658, 665 (1989).

<sup>9</sup> 5 U.S.C. § 8106(b). *See also* 20 C.F.R. § 10.529. While section 8106(b)(2) refers only to partially disabled employees, the Board has held that the test for determining partial disability is whether, for the period under consideration, the employee was in fact either totally disabled or merely partially disabled, and not whether he received compensation for that period for total or partial loss of wage-earning capacity. *Ronald H. Ripple*, 24 ECAB 254, 260 (1973). The Board explained that a totally disabled employee normally would not have any employment earnings and therefore a statutory provision about such earnings would be meaningless. *Id.* at 260.

<sup>10</sup> *Barbara L. Kanter*, 46 ECAB 165, 169 (1994).

“knowingly” as defined in the Office’s implementing regulation, means “with knowledge, consciously, willfully or intentionally.”<sup>11</sup>

### **ANALYSIS -- ISSUE 1**

In the present case, the record establishes that appellant omitted earnings on an April 29, 1996 CA-1032 form covering the period January 29, 1995 to April 29, 1996. In this form, the Office notified appellant of his responsibility to complete the forms and provide relevant information concerning his employment status and earnings during the periods covered by the forms. The record reveals, however, that appellant had employment and earnings during the periods covered by these forms in that he was employed and had earnings from this employment. Appellant acknowledged, as indicated in the January 2001 investigative reports, that he was employed by BCS as a floor maintenance worker from June 8, 1992 until March 1, 1996. The W-2 wage and tax statements for each of the years between 1992 and 1996 support appellant’s admission that he was employed by BCS during this period and had earnings.

As noted above, appellant can be subjected to the forfeiture provision of section 8106(b) only if he “knowingly” failed to report employment or earnings. The present case does not involve any question as to the definition of “earnings” that must be reported. There is no question that appellant was paid a regular wage for his work as a floor maintenance worker for BCS. The April 29, 1996 CA-1032 signed by appellant used such terms as “business,” “enterprise,” and “service” to explain the obligation for reporting all forms of employment, self-employment and earnings. It advised appellant that he must report all employment for which he received a salary, wages, income, sales commissions, piecework or any payment of any kind. The explicit language of the CA-1032 form clearly advised appellant that the nature of his work as a floor maintenance worker, for which he received wages, would require him to report such employment activities on the form. Appellant’s signing of a strongly-worded certification clause on the CA-1032 form further shows that he was aware of the materiality of his failure to report his employment.<sup>12</sup>

Under these circumstances, the Board concludes that appellant “knowingly” omitted his earnings under section 8106(b)(2) of the Act by failing to report his employment activities and earnings on the April 29, 1996 CA-1032 form covering the period January 29, 1995 to April 29, 1996.<sup>13</sup> Accordingly, the Board finds that the Office properly determined that appellant forfeited his right to compensation for the period January 29, 1995 to April 29, 1996.

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<sup>11</sup> 20 C.F.R. § 10.5(n).

<sup>12</sup> Moreover, the fact that appellant reported his BCS earnings for tax purposes shows that he knew he should have also reported the earnings to the Office.

<sup>13</sup> See generally *Lewis George*, 45 ECAB 144 (1993).

## **LEGAL PRECEDENT -- ISSUE 2**

Section 10.529 of the implementing regulation provides as follows:

“(a) If an employee knowingly omits or understates any earnings or work activity in making a report, he or she shall forfeit the right to compensation with respect to any period for which the report was required. A false or evasive statement, omission, concealment or misrepresentation with respect to employment activity or earnings in a report may also subject an employee to criminal prosecution.

“(b) Where the right to compensation is forfeited, [the Office] shall recover any compensation already paid for the period of forfeiture pursuant to 5 U.S.C. [§] 8129 [recovery of overpayments] and other relevant statutes.”<sup>14</sup>

## **ANALYSIS -- ISSUE 2**

As noted above, Office regulations provide that the Office may declare an overpayment of compensation for the period of a given forfeiture of compensation. If a claimant has any earnings during a period covered by a report which he knowingly failed to report and for which a forfeiture is determined to exist, he is not entitled to any compensation for any portion of the period covered by the report, even though he may not have had earnings during a portion of that period.<sup>15</sup> The record contains calculations which show that the Office paid appellant compensation during the period January 29, 1995 to April 29, 1996 in the amount of \$4,531.43.<sup>16</sup> As it has already been determined that appellant forfeited his compensation for this entire period, there exists an overpayment in the amount of \$4,531.43.

## **LEGAL PRECEDENT -- ISSUE 3**

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.<sup>17</sup> 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 this subchapter or would be against equity and good conscience.”<sup>18</sup> No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.

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<sup>14</sup> 20 C.F.R. § 10.529.

<sup>15</sup> *Louis P. McKenna, Jr.*, 46 ECAB 328, 337 (1994).

<sup>16</sup> The Office determined that appellant received \$3,323.96 in Office compensation for the period January 29 to December 31, 1995 and \$1,207.46 in Office compensation for the period January 1 to April 29, 1996.

<sup>17</sup> 5 U.S.C. § 8129(a).

<sup>18</sup> 5 U.S.C. § 8129(b).

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

“An individual is with fault in the creation of an overpayment who:

- (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....”<sup>19</sup>

Section 10.433(c) of the Office’s regulations provides:

“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.”<sup>20</sup>

### **ANALYSIS -- ISSUE 3**

In this case, the Office applied the second standard in determining appellant was at fault in the creation of the overpayment. The evidence of record establishes that appellant failed to report on a CA-1032 form covering the period January 29, 1995 to April 29, 1996 that he was employed at BCS during this period. The record reveals that appellant worked for BCS as a floor maintenance worker from June 8, 1992 until March 1, 1996. The CA-1032 form instructed appellant that the information was material and should be fully reported to the Office. The explicit language of the form, which included the requirement that he report all employment for which he received a salary, wages or income, put appellant on notice that he was required to report his work as a floor maintenance worker. The strong language of the certification clause signed by appellant advised him of the materiality of providing this information. Appellant therefore failed to furnish information he knew or should have known to be material to the Office and the Office properly determined that he is not without fault in creating the \$4,531.43 overpayment. Consequently, it also properly determined that the \$4,531.43 overpayment was not subject to waiver.

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<sup>19</sup> 20 C.F.R. § 10.433(a).

<sup>20</sup> 20 C.F.R. § 10.433(c).

#### **LEGAL PRECEDENT -- ISSUE 4**

The Office has the burden of proof to establish the fact and amount of an alleged overpayment of compensation.<sup>21</sup>

It is a well-settled principle of workers' compensation law that, if the medical evidence establishes that the residuals of an employment-related impairment are such that, from a medical standpoint, they prevent the employee from continuing in the employment, he is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.<sup>22</sup> The general test of loss of wage-earning capacity is whether a claimant's work-related impairment prevents him from engaging in the kind of work being performed when injured.<sup>23</sup>

#### **ANALYSIS -- ISSUE 4**

In the present case, the Office failed to establish that appellant received overpayments for the periods August 24 to November 30, 1992 and January 8 to 28, 1995. The Office determined that he received an \$853.14 overpayment for the period August 24 to November 30, 1992 and a \$140.20 overpayment for the period January 8 to 28, 1995, but it did not adequately explain the basis for this determination. It indicated that the overpayments were created because appellant "worked and received earnings in private employment" for the periods August 24 to November 30, 1992 and January 8 to 28, 1995, but it did not explain how appellant's receipt of these earnings would prevent him from receiving wage-loss compensation from the Office during these periods.

Appellant sustained an employment injury on June 10, 1992 and on January 8, 1995 he returned to full-time work in a limited-duty position as a time and leave clerk for the employing establishment. On July 11, 1995 the Office formally determined that this position represented his capacity to earn wages and it paid him compensation for loss of wage-earning capacity due to his June 5, 1992 injury.<sup>24</sup> The Office did not clearly advance a reason for why it felt that appellant was not entitled to Office compensation for the periods August 24 to November 30, 1992 and January 8 to 28, 1995, but it implied that appellant's private employment showed that his receipt of compensation for loss of wage-earning capacity was improper. As noted above, when the evidence reveals that a medical condition shows that an employment-related injury prevents an employee from continuing in a given position, he is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity. The record does not contain any indication that the Office conducted any modification of appellant's wage-earning capacity

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<sup>21</sup> See *Fernando Chavez*, 51 ECAB 579, 581-82 (2000) (finding that the Office did not establish the fact and amount of the alleged overpayment because it did not show appellant could not receive Office and Veterans Administration compensation at the same time).

<sup>22</sup> *Bobby W. Hornbuckle*, 38 ECAB 626, 630 (1987).

<sup>23</sup> *Ellis Loveless, Jr.*, 40 ECAB 368, 373 (1988).

<sup>24</sup> The limited-duty position resulted in a change in grade with a commensurate cut in pay.

determination<sup>25</sup> and the record does not otherwise clearly indicate that such a modification is warranted.<sup>26</sup>

For these reasons, the Office has not met its burden of proof to establish that appellant received overpayments for the periods August 24 to November 30, 1992 and January 8 to 28, 1995.<sup>27</sup>

### CONCLUSION

The Board finds that the Office properly determined that appellant forfeited his compensation for the period January 29, 1995 to April 29, 1996 because he knowingly failed to report earnings from employment during these periods. The Board further finds that appellant received an overpayment of compensation in the amount of \$4,531.43 during the period of forfeiture and that the Office properly found that he was at fault in creating the overpayment and, therefore, the overpayment was not subject to waiver. The Board also finds that the Office improperly determined that appellant received overpayments for the periods August 24 to November 30, 1992 and January 8 to 28, 1995, that he was at fault in the creation of the overpayments, and that the overpayments were not subject to waiver.

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<sup>25</sup> Once a loss of wage-earning capacity is determined, a modification of such a determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous. *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984). The burden of proof is on the party attempting to show the award should be modified. *Jack E. Rohrbaugh*, 38 ECAB 186, 190 (1986).

<sup>26</sup> For example, there is no medical evidence of record showing that appellant's medical condition had improved such that he would no longer be entitled to the same amount of compensation for loss of wage-earning capacity. The mere fact that appellant worked as a floor maintenance worker would not establish such a change in his medical condition.

<sup>27</sup> Given this finding, the Office's determination that appellant was at fault in the creation of the overpayments and covering the periods August 24 to November 30, 1992 and January 8 to 28, 1995 must be reversed and the overpayments were not subject to waiver.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 8, 2002 is affirmed with respect to the finding appellant forfeited his compensation for the period January 29, 1995 to April 29, 1996 and that he received an overpayment of compensation in the amount of \$4,531.43 that was not subject to waiver. The decision is reversed with respect to the finding that appellant received overpayments for the periods August 24 to November 30, 1992 and January 8 to 28, 1995, that he was at fault in the creation of the overpayments, and that the overpayments were not subject to waiver.

Issued: February 3, 2005  
Washington, DC

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
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