

In October 2003 appellant's attorney advised the Solicitor of Labor (SOL) that a jury reached a verdict in the third-party case against CSX Transportation (CSX) for \$353,781.00.¹ The Department of Labor then applied the statutory formula in 5 U.S.C. § 8132 and the implementing regulations, to determine that appellant must reimburse the United States the amount of \$95,824.61.

Counsel asserted that no legal liability was created against any entity for lost wages and indicated that the court did not allow him to make any argument concerning lost wages. He argued that appellant is required to reimburse the United States only for past medical expenses awarded by the jury. Counsel claimed that the holding of the U.S. Supreme Court case, *U.S. v. Lorenzetti*, 467 U.S. 167 (1984), was distinguishable because appellant's case involved a jury verdict and the *Lorenzetti* case involved a settlement.

On June 29, 2005 counsel sent a partial payment of reimbursement and contested the calculation of the statement of recovery. He objected to the inclusion of lost wages in the recovery as a taking without just compensation. In a July 20, 2005 letter, the Solicitor of Labor explained that in the *Lorenzetti* case the U.S. Supreme Court held that the United States is entitled to be reimbursed for compensation under the Act out of any damage award or settlement made in satisfaction of a third-party liability for personal injury or death, regardless of the elements of damage for which recovery is made.

In an August 19, 2005 letter, counsel repeated his contention that the United States had no right of recovery in appellant's noneconomic damage award. He asserted that no legal liability was created in any person for lost wages in that the court prohibited appellant from making an argument to recover lost wages because he did not have a history of past earnings. Counsel asserted that the SOL could have intervened in the third-party lawsuit to protect its rights if it disagreed with his position. He enclosed checks in the amount of \$65,427.00 and \$283.70.

In an August 23, 2005 letter, the SOL advised counsel that under the statement of recovery an \$86,603.16 refund and a \$13,173.50 credit for future benefits had been sent to the Office. The SOL indicated that the first \$13,173.50 in compensation received subsequent to the recovery would be an overpayment and subject to recovery in accordance with Office overpayment procedures. The SOL noted that the recovery statement prepared for the Office reflected a refund for \$95,824.61 but did not result in an overpayment. Under 5 U.S.C. § 8132, the total amount to be refunded was reduced to reflect the United States contribution to attorney's fees and, to appellant's advantage, this method resulted in a lower total obligation.

In an August 8, 2007 letter, the Office advised counsel that the original amount owed to satisfy the United States' right of reimbursement was \$95,824.61. It indicated that three separate payments were received totaling \$86,603.16 and stated that a balance of \$9,221.45 was owed. The Office asserted that counsel disregarded the statutory formula and noted that the \$9,221.45 must be submitted to the Department of Labor to satisfy his and appellant's statutory obligation

¹ The SOL handles certain aspects of subrogation under the Act. See 20 C.F.R. § 10.705.

under 5 U.S.C. § 8132. It advised appellant that it would begin deducting \$148.50 from his compensation payments every 28 days until the balance of the right of reimbursement was paid.

In a February 5, 2008 decision, the Office determined that appellant had not established legal grounds for excluding his recovery for pain and suffering and future medical expenses from the amount subject to the United States right of reimbursement. It found that the United States was entitled to a refund of payments made to appellant based upon the total proceeds of his third-party suit, including the awards for pain and suffering and future medical expenses. The Office determined that the outstanding amount of the refund was \$9,221.45.

LEGAL PRECEDENT

Under 5 U.S.C. § 8132, a beneficiary under the Act who receives a recovery from a third party responsible for the beneficiary's injuries covered by the Act, after deducting the costs of the suit and a reasonable attorney's fee, is required to refund to the United States the amount of compensation paid by the United States and credit any surplus to future payments of compensation paid for the same injury. Moreover, no insurer, attorney, or other person shall pay or distribute to the beneficiary or his designee the proceeds of such suit or settlement without first satisfying or assuring satisfaction of the interest of the United States.² Under the Office's regulations, when a settlement or judgment is paid to, or for, one individual, the entire amount, except for the portion representing damage to real or personal property, is reported as the gross recovery.³

In *U.S. v. Lorenzetti*, 467 U.S. 167 (1984), the employee's third-party tort recovery did not include all elements of his damages. The U.S. Supreme Court stated:

“The answer to the question here is evident on the face of the statute.... Section 8132 imposes only two conditions precedent to an employee's obligation to refund ... the amount of compensation paid by the United States. The first is that the employee must have suffered an injury or death under circumstances creating a legal liability in a third party to pay damages. The second is that the employee or his beneficiaries must have received money or other property in satisfaction of that liability.”⁴

The Board has held that it is clear that the entire recovery from a third party, whether characterized as being for pain and suffering, medical expenses, loss of wage, or prospective loss of income, is subject to the duty to reimburse the United States for compensation payable for the same injury.⁵ The Board has rejected the argument that certain types of compensation such as vocational rehabilitation benefits need not be reimbursed to the United States under 5 U.S.C. § 8132 noting that this statutory provision makes clear that the Office is entitled to be refunded

² 5 U.S.C. § 8132.

³ 20 C.F.R. § 10.712(a).

⁴ *U.S. v. Lorenzetti*, 467 U.S. 167, 173-74 (1984).

⁵ *Charles Howell*, 38 ECAB 421 (1987).

from a third-party recovery all “compensation” paid by the Office to an employee for his employment-related injury.⁶

ANALYSIS

The Office determined that appellant still owed the United States a refund of \$9,221.45 from a third-party recovery. The Board finds that the Office properly determined that the United States is entitled to a refund of payments made for under the Act for medical expenses and lost wages from an employee whose third-party recovery compensates him for past and future medical expenses and pain and suffering but not for lost wages.

Counsel argued that the United States right of reimbursement attaches only to the jury’s award for past medical bills and not for future medical expenses or pain and suffering. Pursuant to the terms of 5 U.S.C. § 8132, the regulations promulgated under the Act at 20 C.F.R. § 10.712, and the relevant case law, the United States’ statutory right of reimbursement attaches to the total amount of damages awarded by the jury, after deducting from the award the “costs of suit and a reasonable attorney’s fee.”⁷ Under the Act, these are the only amounts that can be excluded from appellant’s third-party recovery when calculating the right of reimbursement. Accordingly, he is required to reimburse the United States for all compensation subject to the strictures of 5 U.S.C. § 8132.

Appellant satisfies both conditions precedent established in the Act and addressed in the *Lorenzetti* case by the U.S. Supreme Court and by the Board where the beneficiaries have questioned the obligation to reimburse the United States.⁸ He sustained an injury which created a legal liability in CSX to pay damages. Appellant received a recovery from CSX in satisfaction of that liability. Therefore, he must refund to the United States the amount of compensation paid by the United States. The Office does not have discretionary authority under 5 U.S.C. § 8132 to waive or compromise the required reimbursement amount.

Counsel argued that appellant’s award for future medical expenses in the amount of \$90,000.00 should not be included in the gross recovery and that the Office should be responsible for future medical bills only to the extent they exceed that amount. Appellant’s argument is contrary to the relevant precedent which provides that the entire recovery is subject to the reimbursement provisions of 5 U.S.C. § 8132 regardless of whether the recovery included wage-loss and medical expenses.⁹

Counsel contends that appellant is not required to reimburse the United States for lost wages because CSX, the negligent third party, was not “legally liable” to compensate him for lost wages because he could not recover loss wages at trial. However, section 8132 of the Act does not refer to types of damages or require beneficiaries to reimburse the United States only

⁶ See *Joseph D. Hale, Jr.*, 40 ECAB 610, 613 (1989).

⁷ See 5 U.S.C. § 8132 and *supra* notes 2, 3, 5 and 6 and accompanying text.

⁸ See *supra* notes 4 through 6 accompanying text.

⁹ See *supra* notes 5 and 6 and accompanying text.

for those damages recovered by settlement or trial. Counsel also argued that *Lorenzetti* only applies to cases in which the parties reach a settlement. However, 5 U.S.C. § 8132 states that a beneficiary must reimburse the government if he receives money or other property “as the result of suit or settlement.”¹⁰ Counsel argued that appellant has a property interest in his cause of action that the United States cannot take and that the Office’s enforcement of the statutory right of reimbursement constitutes a taking of property in violation of the Fifth Amendment of the United States Constitution. However, the Board does not have jurisdiction to review constitutional issues.¹¹

The Board finds that the Office properly determined the amount of the refund due based on appellant’s third-party recovery. The Board has reviewed the Office’s calculations, based on this principle, regarding the amount due from the third-party recovery received by appellant. It properly calculated that appellant owed \$9,221.45 to the United States.

CONCLUSION

The Board finds that the United States is entitled to a refund of Act payments for medical expenses and lost wages from an employee whose third-party tort recovery compensates him for past and future medical expenses and pain and suffering but not for lost wages. The Board further finds that the Office properly determined that appellant owed \$9,221.45 to the United States.

¹⁰ 5 U.S.C. § 8132.

¹¹ See *Vittorio Pittelli*, 49 ECAB 181 (1997) (finding that as an administrative body the Board does not have jurisdiction to review a constitutional claim).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' February 5, 2008 decision is affirmed.

Issued: December 16, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board