

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of STEPHEN W. JACKSON, a.k.a. STEPHEN J. WILDE and DEPARTMENT OF  
THE NAVY, MILITARY SEALIFT COMMAND, PACIFIC, Oakland, CA

*Docket No. 98-230; Submitted on the Record;  
Issued February 4, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issue is whether appellant received an overpayment in the amount of \$13,128.00.

On January 14, 1984 appellant, a second mate, sustained an injury in the performance of duty when he fell down a ladder. The Office of Workers' Compensation Programs accepted his claim for right hand contusion, right medial collateral ligament strain and torn right anterior cruciate ligament. The Office approved arthroscopy and a meniscectomy. In addition to a schedule award for permanent impairment to his right leg, appellant received compensation for temporary total disability on the periodic rolls. Beginning October 14, 1995 the Office reduced his regular compensation payments to reflect a capacity to earn wages in the constructed position of paralegal.

An investigative memorandum, dated October 20, 1995, from the Office of the Inspector General found that appellant had significantly underreported his income as an actor.

On June 12, 1996 the Office made a preliminary determination that an overpayment of \$13,128.00 occurred from May 9, 1986 through September 30, 1995 because appellant had actual earnings but received compensation for temporary total disability. The Office calculated the amount of the overpayment by reasoning that appellant's actual earnings over this period represented a wage-earning capacity of 4 percent or \$32.62 per week. The Office issued no formal wage-earning capacity decision showing the new determination of appellant's entitlement from May 9, 1986 through September 30, 1995. Instead, the Office calculated the overpayment by subtracting the total amount of compensation appellant was entitled to receive according to this determination of wage-earning capacity<sup>1</sup> from the total amount of compensation he did receive. The Office found that appellant was with fault in the creation of the overpayment

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<sup>1</sup> The Office determined appellant's wage-earning capacity using the method described at Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7.d(4) (June 1996).

because he accepted payments that he knew or should have been expected to know were incorrect.

Appellant requested a preresoupment hearing, which was held on April 9, 1997. He testified that he reported the wages he received for his work when a movie was shot but did not report residuals from second or third runs of the movie. He explained:

“[R]esiduals are a part of what you make, maybe, if you do a film. And I don’t think I’ve reported any of those because I didn’t work for those. That’s sort of like an equity investment in to the film, or these were movies of the week. So there’s no -- you don’t necessarily get them back. If it’s a good film, and they run it again on television, you would get another check. And after that, if they run it again, you would get a much less -- one time you get a similar check, after that you get a small check. If they sell it to Madagascar, you get a tiny check, a European video, or whatever. You have a little tiny part. So every once in a while, you’ll get a check in the mail.”

In a decision dated July 16, 1997, an Office hearing representative finalized the preliminary overpayment determination. She found that an overpayment of \$13,128.00 occurred from May 9, 1986 through September 30, 1995 because appellant was entitled to receive compensation for partial disability but received compensation for total disability. The hearing representative further found that appellant was with fault in the creation of the overpayment because he failed to furnish information he knew or should have known to be material to his entitlement to compensation benefits.

The Board finds that the Office improperly determined that appellant received an overpayment of \$13,128.00.

The Office based its overpayment decision on a new determination of appellant’s entitlement from May 9, 1986 through September 30, 1995. The Office found that appellant had a wage-earning capacity of 4 percent, or \$32.62 per week, during the period in question, but it issued no formal wage-earning capacity decision showing this new determination of entitlement. The Office’s procedure manual addresses this situation, as follows:

“Regardless of whether the claimant is ‘with fault’ or ‘without fault,’ a new determination on entitlement which results in an overpayment (*e.g.*, an amended schedule award, the correction of an incorrect pay rate, the forfeiture of compensation) entitles the claimant to request a reconsideration, a hearing and/or review by the Employees’ Compensation Appeals Board on the entitlement issue. Therefore, a formal decision on the claimant’s *entitlement* to benefits, with full appeal rights, should be issued along with the preliminary overpayment decision. The [preliminary overpayment decision] is not the proper vehicle for issuing the entitlement decision which resulted in the overpayment.<sup>2</sup>

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<sup>2</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.4(a) (July 1997) (original emphasis).

By failing to issue a formal decision on the new determination of appellant's entitlement to compensation from May 9, 1986 through September 30, 1995, the Office has denied appellant the right to seek review of the entitlement issue. Without a formal decision on wage-earning capacity and full review rights, the Office's finding of an overpayment is not in conformance of the procedure manual. For this reason the Board will set aside the Office's July 16, 1997 overpayment decision.

Because of the procedural irregularities attending the Office's overpayment decision, the Board need not determine whether the residuals appellant received from second or third runs of his movies were material to his entitlement, whether they constituted reportable earnings or whether they fairly and reasonably represented his wage-earning capacity.<sup>3</sup>

The July 16, 1997 decision of the Office of Workers' Compensation Programs is set aside.

Dated, Washington, D.C.  
February 4, 2000

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

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<sup>3</sup> See generally *Vernon Booth*, 7 ECAB 209 (1954) (where the claimant was neither performing the duties of a bartender nor actively managing his tavern business nor otherwise engaged in work he would have to pay someone else to perform, income derived from the business could not be considered actual earnings for purposes of determining wage-earning capacity).