

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEWEY LANGFORD and TENNESSE VALLEY AUTHORITY,
HARTSVILLE NUCLEAR PLANT, Chattanooga, TN

*Docket No. 98-374; Submitted on the Record;
Issued February 9, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant was at fault in creating an overpayment of \$48,309.51, thus precluding waiver of recovery of the overpayment.

On February 26, 1981 appellant, then a 29-year-old carpenter, sustained an injury to his back when he fell and a 12-foot piece of lumber fell on top of him. The Office initially accepted the claim for lumbosacral strain and subsequently accepted the condition of ruptured disc at L5-S1. On April 17, 1981 underwent a lumbar laminectomy to repair his ruptured disc. He returned to work on June 8, 1981 in a light-duty capacity. Due to a reduction-in-force, appellant was terminated from his employment effective October 9, 1981. Thereafter, appellant received compensation benefits for total disability until April 8, 1982, when the Office determined that the selected position of Cashier I represented appellant's wage-earning capacity. Consequently, the Office reduced appellant's compensation to reflect his loss of wage-earning capacity. Appellant continued to receive benefits for partial disability through April 28, 1996.¹

While appellant was receiving disability benefits, he was periodically required to submit Form CA-1032 in order to report employment and other information for the 15 months prior to the date of completion and signature. Question two on this form states:

“Self-employment. Earnings from self-employment (such as farming, sales, service, operating a store, business, etc.) must be reported. Report any such enterprise in which you worked and from which you received revenue, even if it

¹ In March 1996, as part of a pretrial diversion program to avoid prosecution for making false statements to the federal government, appellant agreed to relinquish his rights to any further wage-loss compensation. Appellant had previously advised the Office of his intention to relinquish his rights to further payments by letter dated December 27, 1995.

operated at a loss or if profits were reinvested. You must show as 'rate of pay' what it would have cost you to have hired someone to perform the work you did.

“(a) Were you self-employed during any time covered by this form? Answer Yes or No. _____”

On CA-1032 forms signed and dated March 11, 1991, August 16, 1993, February 12 and March 8, 1994, appellant answered “No” to the above question.

An April 8, 1996 investigative memorandum from the employing establishment’s Office of the Inspector General revealed that beginning in March 1991 and continuing through March 8, 1994, appellant was actively involved in a handy man business with his son and appellant received earnings as a result.

On October 30, 1996 the Office issued a decision advising appellant that because of his failure to report his earnings and employment activities on CA-1032 forms, he had forfeited his right to compensation for the periods of December 12, 1989 through March 11, 1991 and May 17, 1992 through March 8, 1994. Additionally, in a separate letter dated October 30, 1996, the Office informed appellant that it had made a preliminary determination that he received an overpayment of compensation in the amount of \$48,309.51 due to forfeiture. The Office also informed appellant that he was found to be at fault in creating the overpayment due to his failure to report earnings as required on CA-1032 forms.

By decision dated September 22, 1997, the Office finalized its preliminary determination that appellant received an overpayment of compensation in the amount of \$48,309.51 and that he was at fault in creating the overpayment.² The Office further advised appellant that the circumstances of his case did not warrant a waiver of recovery of the overpayment. Appellant, through his attorney, subsequently filed an appeal with the Board on November 7, 1997. The Board’s jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.³ As appellant filed his appeal with the Board on November 7, 1997, the Board lacks jurisdiction to review the Office’s October 30, 1996 forfeiture determination. Consequently, the only decision properly before the Board is the Office’s September 22, 1997 overpayment decision.

The Board finds that the Office properly determined that appellant was at fault in creating an overpayment of compensation for the periods of December 12, 1989 through March 11, 1991 and May 17, 1992 through March 8, 1994 and, therefore, the overpayment was not subject to waiver.

The record indicates that during the periods of December 12, 1989 through March 11, 1991 and May 17, 1992 through March 8, 1994 appellant received compensation benefits in the amount of \$48,309.51. Additionally, the record indicates that the CA-1032 forms submitted by

² Additionally, the Office acknowledged that appellant had already remitted \$5,206.00. This amount was offset against the preliminary overpayment calculation, leaving an overpayment balance of \$43,103.51.

³ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

appellant covering the above-noted periods do not include information regarding appellant's employment activities as a handy man and any income derived therefrom.

Section 8129 of the Federal Employees' Compensation Act⁴ provides that an overpayment must be recovered unless "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." However, an individual who is found to have been at fault in helping to create the overpayment is not eligible for a waiver of recovery of overpayment.⁵

With respect to determining fault, section 10.320(b) 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 the individual knew or should have known to be incorrect; or
- (2) Failed to furnish information which the individual knew or should have known to be material; or
- (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."⁶

The Office appears to have applied the standard under section 10.320(b)(2) in determining that appellant was at fault in creating the overpayment. In its October 30, 1996 decision declaring a forfeiture of compensation, the Office determined that appellant knowingly failed to report earnings he received as a self-employed handy man on Office CA-1032 forms. As previously noted, this finding is not subject to review by the Board. Nonetheless, the Board notes that the record supports such a finding. Under the circumstances, appellant's failure to report his earnings and employment activities similarly constitutes a failure to furnish information, which he knew or should have known to be material. Consequently, appellant was properly deemed to be at fault in creating the overpayment of compensation. Inasmuch as appellant was at fault in creating the overpayment pursuant to section 10.320(b)(2), recovery of the overpayment of compensation may not be waived.⁷

⁴ 5 U.S.C. § 8129(b).

⁵ *Bonnye Mathews*, 45 ECAB 657, 667 (1994).

⁶ 20 C.F.R. § 10.320(b).

⁷ *See Gary L. Allen*, 47 ECAB 409, 418 (1996).

The decision of the Office of Workers' Compensation Programs dated September 22, 1997 is hereby affirmed.

Dated, Washington, D.C.
February 9, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member