

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of STEPHEN J. WILDE and DEPARTMENT OF THE NAVY,  
MILITARY SEALIFT COMMAND PACIFIC, Virginia Beach, VA

*Docket No.03-814; Submitted on the Record;  
Issued June 10, 2004*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$9,827.69 for the period May 9, 1986 through April 29, 1995 because he earned wages while he was receiving compensation for temporary total disability; (2) whether appellant was at fault in the creation of this overpayment, such that waiver was not possible; and (3) whether the Office of Workers' Compensation Programs properly required repayment of the overpayment in a lump sum.

This is appellant's second appearance before the Board.<sup>1</sup> In the prior appeal, by decision dated February 4, 2000, the Board set aside a July 16, 1997 decision and remanded the case due to the Office's failure to issue a formal decision on the new determination of appellant's entitlement to compensation from May 9, 1986 through September 30, 1995, which, the Board found, denied appellant the right to seek review of the entitlement issue. The law and the facts of the case set forth in the prior decision are hereby incorporated by reference.<sup>2</sup>

In summary, the Office accepted that on January 14, 1984 appellant, then a 24-year-old second mate, sustained a right hand contusion, right medial collateral ligament strain and tear of

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<sup>1</sup> Appellant is also known as Stephen W. Jackson.

<sup>2</sup> Docket No. 98-230 (issued February 4, 2000). In this decision the Board determined that appellant received an overpayment in the amount of \$13,128.00. The Office determined that for the period May 9, 1986 through April 29, 1995 appellant received compensation in the amount of \$327,449.53, but he was only entitled to compensation totaling \$314,321.53, such that he received an overpayment of compensation in the amount of \$13,128.00. This specified period of the overpayment, May 9, 1986 through April 29, 1995, differs from the period cited elsewhere in the case record, which was from May 9, 1986 through September 30, 1995, and the amount of the overpayment, \$13,128.00, was calculated using the greater period. The overpayment was calculated by subtracting the total amount of compensation appellant was entitled to receive for the period May 9, 1986 through September 30, 1995 from the total amount that was paid for the period, according to this determination of wage-earning capacity. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7.d(4) (June 1996).

the anterior cruciate ligament of the right knee when he fell down a ladder on a ship. Appellant stopped work on January 17, 1984 and did not return. He underwent several surgeries to repair his injuries: an arthroscopy was performed on February 18, 1984, a meniscectomy was performed on March 27, 1984 and a torn right anterior cruciate ligament repair was performed on January 6, 1989.

Appellant received continuation of pay from the date of injury through March 1, 1984. He then received compensation for temporary total disability on the periodic rolls at 66 2/3 percent rate for no dependents with a weekly pay rate of \$649.63 gross. This resulted in a periodic gross payment of \$1,732.36 which, when health benefits and life insurance premiums were deducted, amounted to a net payment of \$1,714.40 each four weeks. Later a schedule award was granted for a 16 percent permanent impairment of the right leg for the period June 20, 1985 until May 8, 1986. On August 14, 1984 appellant was advised by Form EN1049-0484 that he must report any retirement income, disability income or compensation benefits and also "wages in kind" such as lodging and/or meals, because a recipient of wage-loss compensation benefits under the Federal Employees' Compensation Act<sup>3</sup> is not entitled to receive benefits under certain other agencies as well. Appellant signed the form denoting understanding on July 20, 1984.

The Office noted that appellant was entitled to receive compensation at the two-thirds rate from May 9, 1986 to October 15, 1994 and at the three-quarters rate from October 16, 1994 to September 30, 1995. Therefore, based upon his new wage-earning capacity appellant was entitled to receive compensation in the amount of \$314,321.53 (\$273,531.60 at 66 2/3 percent for the period May 9, 1986 to October 15, 1994, and \$40,789.93 at 75 percent for the period October 16, 1994 through September 30, 1995).

However, investigative reports submitted to the record by the employing establishment's investigative service and social security records demonstrated that appellant had extensive earnings from employment as an actor, broadcast consultant, talent agent and a waiter from May 1986 through April 29, 1995, during which time he was also in receipt of compensation for temporary total disability. Beginning in 1986 appellant worked in multiple jobs and had significant earnings. In 1986 he worked in PSI marketing where he earned \$73.00 gross, at the Columbia School of Broadcasting where he earned \$576.92 gross, and at the Star of Chicago where he earned \$982.96 gross. In 1987 appellant worked as a movie extra where he earned \$382.22 gross, and as an actor where he earned \$2,935.91 gross. In 1988 appellant worked as an actor where he earned \$1,652.58 gross, as a lunch server where he earned \$3,402.58 gross, and as a play actor where he earned \$1,000.00 gross. In 1989 appellant worked as a Greenpeace activist where he earned \$345.10 gross. In 1990 appellant worked as a day player (actor) where he earned \$455.40 gross. In 1991 appellant worked doing voice-overs where he earned \$110.00 gross. In 1994 appellant worked as an extra where he earned \$307.45, and as a weekly player where he earned \$2,200.00. In 1995 appellant worked as an actor where he earned \$1,895.00 gross, and as a weekly player where he earned \$1,570.80 gross. Therefore, appellant earned a

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

total of \$17,889.93 gross while he was in receipt of wage-loss compensation benefits on the periodic rolls.<sup>4</sup>

The period May 9, 1986 to September 30, 1995 consists of 3,432 days. According to the record appellant had actual earnings of \$17,889.93 during that period, which is averaged by dividing \$17,889.93 by 3,432 and multiplying by 7 to equal \$36.48 per week in actual wages.<sup>5</sup> The procedure manual requires that the Office use appellant's averaged earnings for the period, and compare it to his employing establishment salary on the date he ceased his actual earnings (April 29, 1995) which was \$1,200.34 per week.

On June 12, 1996 the Office made a preliminary determination that an overpayment of \$13,128.00 had occurred for the period May 9, 1986 through September 30, 1995 because appellant had actual earnings of \$17,889.93 during that period but also received compensation for temporary total disability. The Office calculated the amount of appellant's overpayment by determining that appellant's actual earnings for this period represented a wage-earning capacity of 4 percent, or \$32.62 per week.<sup>6</sup> Appellant was entitled to \$314,321.53 but he actually received \$327,449.53, which was \$13,128.00 more than that to which he was entitled on the basis of his actual earnings. Therefore, the excess amount of money received for the period becomes the overpayment amount.

However, the Office issued no formal wage-earning capacity decision showing the new determination of appellant's entitlement for the period May 9, 1986 through September 30, 1995, but instead calculated the overpayment by subtracting the total amount of compensation appellant was entitled to receive according to this determination of wage-earning capacity<sup>7</sup> from the total amount of compensation he did receive. Because the Office did not issue appellant a formal decision on the new determination of his entitlement to compensation for the period May 9, 1986 through September 30, 1995, it denied him the right to seek review of the entitlement issue. The Board set aside the Office's July 16, 1997 decision affirming the fact and amount of the overpayment and remanded the case for issuance of a proper decision on the entitlement issue. The Board did not determine whether the residuals appellant received from second and 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

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<sup>4</sup> The Office originally calculated that the amount of the overpayment was \$13,128.00 but that it was later reduced to \$9,266.69 as per Board direction. Section 2.814.7(d) of the Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(d) (June 1996) states that, where the Office learns of actual earnings that span a lengthy period of time (*e.g.*, several months or more), the compensation entitlement should be determined by averaging the earnings for the entire period, determining the average pay rate, and applying the *Shadrick* formula (comparing the average pay rate for the entire period to the pay rate of the date-of-injury job in effect at the end of the period of actual earnings).

<sup>5</sup> The Office actually calculated this to be \$36.70 per week due to use of a slightly larger amount of actual wages for the period, \$17,996.81. This difference arises because two extra payments of \$31.89 and \$75.00 were added.

<sup>6</sup> The Board notes that this amount differs from its calculation of \$36.48 per week.

<sup>7</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) (June 1996).

capacity.<sup>8</sup> The record is not specific as to the amount of these royalty payments, which apparently will continue over time.

Following the Board's directive, by preliminary determination dated July 21, 2000, the Office recalculated the amount of the overpayment from \$13,128.00 to \$9,827.69.<sup>9</sup>

Appellant was found to be with fault in the creation of the overpayment. On August 18, 2000 appellant disagreed with the proposed actions.

Appellant requested a preresoupment hearing before an Office hearing representative which was held on April 6, 2001. By decision dated August 9, 2001, the hearing representative noted that the Office paid wage-loss compensation on a weekly pay rate of \$649.63, but it subsequently determined that the correct pay rate was \$815.61 per week, which included penalty pay. On March 6, 1992 the Office paid appellant \$50,356.26, representing compensation owed from March 2, 1984 through February 28, 1992, based on the correct weekly pay rate of \$815.61, less compensation already paid. Appellant's gross compensation was \$2,185.00 every 28 days which increased to \$2,742.00 every 28 days. Thereafter the hearing representative noted that the Office determined that the position of paralegal represented appellant's wage-earning capacity, it applied the *Shadrick*<sup>10</sup> formula, and determined that appellant had a 40 percent wage-earning capacity and it reduced his compensation benefits effective October 14, 1995 to reflect this change. The Office calculated appellant's compensation entitlement for loss of wage-earning capacity based on his actual earnings of \$52.61 per week from May 9, 1986 through September 30, 1995, used the *Shadrick* formula, and determined that appellant was entitled to \$314,321.53 from May 9, 1986 through September 30, 1995 but was actually paid \$327,449.53 during this period which resulted in an overpayment of \$13,128.00. The Office finalized the determination and directed repayment but the Board set the decision aside and remanded the case for a formal decision on appellant's entitlement for the period. Appellant calculated his earnings for the period as \$17,889.92 but the Office calculated it as \$17,996.81, adding \$31.89 in 1988 for two days of training, and \$75.00 for payment of CENEX Services, to reach its total earnings for the period. The Office determined that appellant was entitled to \$317,621.84, which, when subtracted from the amount received, \$327,449.53, equaled \$9,827.69.

By decision dated August 9, 2001, the case was remanded by the hearing representative to the Office for recalculation of the overpayment as it had been originally calculated using the incorrect dates.<sup>11</sup> The hearing representative found that the overpayment should have been

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<sup>8</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 nor otherwise engaged in work he would have had to pay someone else to perform, income derived from the business could not be considered actual earnings for purposes of determining wage-earning capacity).

<sup>9</sup> The Office noted that appellant's earnings totaled \$17,996.81 for the period May 9, 1986 to September 30, 1995, which was 3,432 days. The Office determined that this averaged \$36.70 per week, obtained by dividing the \$17,996.81 by 3,432 days times 7 equaled \$36.70 per week.

<sup>10</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953).

<sup>11</sup> That was using the April 29, 1995 ending date instead of the September 30, 1995 ending date as supported by the case record.

calculated for the period May 9, 1986 through April 29, 1995, and not through September 30, 1995, which was a difference of 153 days.<sup>12</sup> She also found that the average weekly earnings needed to be recalculated based on 3,278 calendar days from May 9, 1986 through April 29, 1995, and that the amount of compensation paid appellant must likewise be recalculated from May 9, 1986 through April 29, 1995.

Upon return of the case record, on November 14, 2001 the Office recalculated the amount of the overpayment for the proper period which resulted in a preliminary determination that appellant had received an overpayment in the amount of \$9,266.69.<sup>13</sup> The Office also made a preliminary determination that appellant was at fault in the creation of the overpayment because he should have known that he could not receive compensation for temporary total disability while earning wages. Appellant disagreed with this preliminary determination and requested a hearing before an Office hearing representative. He also provided a listing of his business and legal ventures,<sup>14</sup> and a December 12, 2001 Form CA-1032.

A hearing was scheduled for July 31, 2002, but appellant indicated that he could not attend, and a review of the written record was conducted instead. In a letter submitted prior to the scheduled hearing, appellant made the same argument he had made at the previous hearing, namely that he had reported his earnings periodically on the Forms CA-1032 provided by the Office. Appellant argued that the Forms CA-1032 did not indicate that it was illegal for him to receive earnings, such that he felt he was without fault in the creation of the overpayment.

By decision dated November 5, 2002, the hearing representative found that appellant had been advised, when he was first placed on the periodic rolls, and with each subsequent CA-1032 form completed, of the amount of compensation to which he was entitled, of his responsibility in advising the Office should he ever have earnings and of his obligation to return any checks received while in receipt of such earnings. The hearing representative cited to the Office's implementing regulations regarding fault in the creation of overpayments, and found appellant at fault for receiving and keeping checks which he knew or should have known to be incorrect, as he should have known that he could not receive compensation for temporary total disability and earnings concurrently. As the hearing representative found appellant at fault in the creation of the overpayment, waiver could not be considered. The hearing representative finalized the preliminary determination finding that appellant received an overpayment in the amount of \$9,266.69, for which he was at fault, such that waiver could not be considered. The hearing representative further found that, since appellant had not submitted any of the requested financial information so that an overpayment schedule could be arranged, the entire overpayment was due and payable at that time. He further found that, if appellant did not submit a check in the total

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<sup>12</sup> Subtracting 153 from 3,432 leaves 3,279 days. \$17,996.81 divided by 3,279 equals 5.4885056 which, when multiplied by 7 equals \$38.42 dollars per week.

<sup>13</sup> The Office took the overpayment of \$9827.69 obtained by subtracting the amount earned for the period, May 9, 1986 through April 29, 1995, from the amount of compensation paid for the period, and then changes the DMCS record to result in \$561.00 being subtracted from the overpayment amount; \$9,827.69 minus \$561.00 equals \$9,266.69 overpayment. It is not clear what the \$561.00 represents.

<sup>14</sup> Appellant was now working as an attorney in North Carolina.

amount of the overpayment within 30 days, the Office should begin deducting \$500.00 from appellant's ongoing compensation payments until the debt was resolved.<sup>15</sup>

The Board finds that this case must be set aside with respect to the amount of overpayment found.

The Board finds that this case requires clarification as to the Office's calculations, particularly where the \$561.00, by which appellant's overpayment was reduced, came from and what it represents.

Appellant had earnings as an actor, a talent coordinator, a broadcast consultant and a waiter for the period May 1986 through April 29, 1995. Beginning in 1986 appellant worked in PSI marketing where he earned \$73.00 gross, at the Columbia School of Broadcasting where he earned \$576.92 gross, and at the Star of Chicago where he earned \$982.96 gross. In 1987 appellant worked as a movie extra where he earned \$382.22 gross, and as an actor where he earned \$2,935.91 gross. In 1988 appellant worked as an actor where he earned \$1,652.58 gross, as a lunch server where he earned \$3,402.58 gross, and as a play actor where he earned \$1,000.00 gross. In 1989 appellant worked as a Greenpeace activist where he earned \$345.10 gross. In 1990 appellant worked as a day player (actor) where he earned \$455.40 gross. In 1991 appellant worked doing voice-overs where he earned \$110.00 gross. In 1994 appellant worked as an extra where he earned \$307.45, and as a weekly player where he earned \$2,200.00. In 1995 appellant worked as an actor where he earned \$1,895.00 gross, and as a weekly player where he earned \$1,570.80 gross, for a total of \$17,889.93 gross (\$14,834.45 net) earned while he was in receipt of wage-loss compensation benefits. Thereafter \$31.89 for 1988 and \$75.00 for payment of CENEX Services, were added to the amount of income, which resulted in the amount earned during the period as being \$17,996.81 rather than \$17,889.92. Dividing \$17,996.81 by 3,278 equals \$38.43 per week. Therefore, the total amount received for the period of May 9, 1986 through April 29, 1995 equaled \$327,449.53 minus the amount owed, \$317,621.84, which equaled \$9,827.69. Then the \$561.00 was subtracted for reasons not entirely clear, which resulted in an overpayment amount of \$9,266.69.

As no person is entitled to both wages and compensation for loss of wages at the same time,<sup>16</sup> appellant received an overpayment of compensation which was calculated to be \$9,827.69, but was reduced by \$561.00 without a clear explanation. This aspect of the case requires further clarification.

The Board further finds that appellant was at fault in the creation of the overpayment, such that waiver could not be considered.

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<sup>15</sup> Neither the July 31, 2002 hearing transcript nor the November 5, 2002 decision appears in the present case file; however, their contents are derived from copies in the docket file and from the substance of the decision itself.

<sup>16</sup> See *Robert B. Hutchins*, 52 ECAB 344 (2001) (receipt of dual benefits is prohibited by statute and by regulations.) See generally 20 C.F.R. § 10.412 (a)-(d) (1993).

Section 8129(a) of the Act<sup>17</sup> 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. 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 the Act or would be against equity and good conscience.”<sup>18</sup> No waiver of an overpayment is possible if the claimant is not “without fault” in helping to create the overpayment.

Section 10.433 of Title 20 of the Code of Federal Regulations provides:

“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.)”<sup>19</sup>

In this case, the Office properly applied the third standard and determined that appellant accepted payments which he knew of should have known to be incorrect. With his original letter advising him that he would be receiving wage-loss compensation benefits, he was also advised that he was not entitled to dual benefits and that he not only had to notify the Office of his extra income but to return each check that was incorrect, which he did not do.

The Board further finds that the Office properly required repayment of the overpayment in a lump sum, or, in the alternative, at \$500.00 per compensation payment.

No waiver or recovery of an overpayment is possible if the claimant is with fault in helping to create the overpayment.<sup>20</sup> In this case, appellant was found to be with fault in helping to create the overpayment as he did not return the checks he knew or should have known to be incorrect. Therefore, adjustment or recovery must be made.<sup>21</sup> Even if an overpayment resulted from negligence by the Office, this does not excuse the employee from accepting payment that he knew or should have known he was not entitled to.<sup>22</sup> Section 10.438(a) of the Office’s

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<sup>17</sup> 5 U.S.C. § 8129(a).

<sup>18</sup> 5 U.S.C. § 8129.

<sup>19</sup> 20 C.F.R. § 10.433(a).

<sup>20</sup> *Sinclair L. Taylor*, 52 ECAB 227 (2001).

<sup>21</sup> *Bernard L. Smiley*, 50 ECAB 301 (1999).

<sup>22</sup> *Diana L. Booth*, 52 ECAB 370 (2001).

implementing regulation<sup>23</sup> states that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine a repayment schedule. Section 10.441 states that when an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to the Office the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made the Office shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship.<sup>24</sup>

In this case, appellant did not provide the requested financial information, such that the Office was unable to determine the rate of recovery of the overpayment with the least hardship to appellant. Under these circumstances, the Office has the discretion regarding whether to recover the entire amount of the overpayment in a lump sum, or by withholding 100 percent of appellant's continuing compensation, or by withholding some amount less than that.<sup>25</sup> Therefore, the Office did not abuse its discretion by withholding \$500.00 every 30 days from appellant's continuing compensation benefits.

Accordingly, the decision of the Office of Workers' Compensation Programs dated November 5, 2002 is hereby set aside with regard to the amount of the overpayment, but is affirmed with respect to the finding of fault and the repayment.

Dated, Washington, DC  
June 10, 2004

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

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<sup>23</sup> 20 C.F.R. § 10.438(a).

<sup>24</sup> See 20 C.F.R. § 10.441.

<sup>25</sup> See, e.g., *Nina D. Newborn*, 47 ECAB 132 (1995).