Legal Opinion L-2005-03
February 14, 2005

U.S. Railroad Retirement Board
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TO : Wayne Scharnak
Chief, Compensation and Employee Services
Assessment and Training, Office of Programs

FROM : Steven A. Bartholow
General Counsel

SUBJECT : Crediting Pay for Time Lost Awarded by Jury Verdict

This is in reply to your inquiry of January 19, 2005, requesting my opinion regarding your proposed allocation of pay for time lost pursuant to the damages awarded by verdict of the jury in a personal injury action. For the reasons set forth below, in my opinion the entire amount of damages for past lost compensation should be allocated equally among months following the date of injury and through the date of entry of judgment. I do not agree that you may allocate compensation to months after entry of judgment.

The railroad employee was injured September 12, 2001, and brought a suit for damages against his railroad employer. After trial the state Court on October 28, 2004 entered a judgment on the jury's verdict. The jury verdict found "the total amount of damages suffered by the plaintiff and caused in whole or in part from negligence of the defendant" to be $130,835 for "past loss, including lost earnings" and $760,872 for "future loss, including lost earnings, medical expenses, pension loss, ability to provide household services". Section 3 of the Federal Employers Liability Act, under which the suit apparently was brought, provides that "the damages [awarded to an employee under the Act] shall be diminished by the jury in proportion to the amount of negligence attributable to such employee* * *." See 45 U.S.C. § 53. Pursuant to this provision, the jury explicitly found 20 percent of the above damages to result from the plaintiff railroad employee's own negligence. Accordingly, the latter finding reduces the total damages recoverable by the plaintiff employee to 80 percent of the total, or $104,668 for "past loss" and $608,697 for "future loss". I note that the employee has not yet filed an application for an annuity under the Railroad Retirement Act, and the employer has not yet filed a return of compensation reflecting the verdict and judgment.

As you know, section 1(h)(1) of the Railroad Retirement Act (RRA) defines compensation for benefit entitlement purposes under that Act in part as:

> * * * any form of money remuneration paid to an individual for services rendered as an employee to one or more [railroad] employers * * * including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost. A payment made by an employer to an individual through the employer's payroll shall be presumed, in the absence of evidence to the contrary, to be compensation for service rendered by such individual as an employee of the employer in the period with respect to which the payment is made. * * *

Section 1(h)(2) of the RRA further provides that:

> An employee shall be deemed to be paid "for time lost" the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury * * *. If a payment is made by an employer with respect to a personal injury and includes pay for time lost, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost, in which event only such part of the payment as is not so apportioned shall be deemed to be paid for time lost.

The Railroad Unemployment Insurance Act at section 1(i)(1) provides essentially the same definition with respect to compensation creditable for benefit entitlement purposes under that Act as well. In addition, regulations of the Board (20 CFR 211.3(a)(1)) further define pay for time lost:

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(a) A payment made to an employee for a period during which the employee was absent from the active service of the employer is considered to be pay for time lost and is, therefore, creditable compensation. Pay for time lost as an employee includes
(1) Pay received for a certain period of time due to personal injury * * *

The regulations of the Board allow parties to agree that the employer file a return of compensation allocating pay to the months in which the time was actually lost. A reasonable relationship to the employee's normal monthly pay is ordinarily no less than 10 times the employee's daily pay rate. See 20 CFR 211.3(b). Section 210.5(d) of the regulations (20 CFR 210.5(d)) provides in part that for purposes of annuity calculation and entitlement under the Act, "Any month or any part of a month during which an employee performed no active service but received pay for time lost as an employee is counted as a month of service."

The evidence in the current case is that although a total judgment of $713,365 is payable to the employee in October 2004 based on factors including pay for time lost, no compensation was allocated to specific months. The employee's record of compensation in the Board's records shows a total of 34 months for which no compensation has been reported during the period following the September 2001 date of injury and through the date of entry of judgment in October 2004. Given that under the Railroad Retirement Tax Act, the total amount subject to tier II tax for 2004 is $65,100, you propose to limit the total compensation creditable under the jury award to a total of $65,100. In view of section 211.3(b) of the regulations, you then propose to allocate this $65,100 as pay for time lost at the rate of $1,568 each month, which yields a total of 42 months. In my opinion, this is not consistent with the express language of section 1(h)(2) of the Act, which requires that "the total payment shall be deemed to be paid for time lost". In my opinion, in the absence of allocation to other factors, section 1(h)(2) requires that the entire $104,668 of damages, including past lost compensation, must be allocated equally among the 34 months following the date of injury and through the date of entry of judgment. See Legal Opinions L-92-18 (advising former Director of Research and Employment Accounts that compensation may be credited under a jury award which includes damages for lost time) and L-94-47 at note 3, (advising Chief Financial Officer that where no period of absence is specified, the lost time is presumed from first day of absence through date of payment.)

In this case, the judgment also provides $608,697 for factors including loss of future earnings following the date of the verdict. Though the jury awarded the greater proportion of damages to the future period, specific future months lost are not identified. After allocating compensation to the 34 month period through date of judgment, you proposed to allocate an additional 8 months of compensation to the period November 2004 through June 2005 in order to reach the total 42 months derived from your allocation calculation above based upon the 2004 tier II benefit tax base.

It is well settled that additional service months may be credited after entry of judgment or conclusion of a settlement agreement to the extent that the employee retains an employment relation with the railroad employer, and that the judgment or settlement agreement clearly intends that the employment relation is to continue into the future. See regulations of the Board at 20 CFR 204.6, and Legal Opinion L-86-16 (advising the former Director of Compensation and Certification regarding authority to allocate pay for time lost for future months). Though future earnings are explicitly included in the verdict in the subject case, in my opinion the second criteria is not met because it cannot be shown that the parties intended to credit compensation to an identifiable period beyond the date of judgment. Under the circumstances of this case, in my opinion none of the $608,697 in damages awarded for factors including loss of future earnings may be credited as compensation to months beyond the date of the October 2004 judgment and verdict.

I trust that the foregoing will be of assistance to you.