

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHIRLEY DUNN and U.S. POSTAL SERVICE,
POST OFFICE, Dallas, Tex.

*Docket No. 97-1705; Submitted on the Record;
Issued July 12, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant forfeited her right to compensation for the period April 3, 1993 to July 12, 1994 when she knowingly failed to report earnings from self-employment; (2) whether the Office of Workers' Compensation Programs properly found that appellant was at fault in the creation of an overpayment of \$30,159.24, thus precluding waiver of recovery of the overpayment; and (3) whether the Office properly determined that \$600.00 should be withheld from appellant's continuing compensation checks to recover the overpayment.

The Office accepted appellant's claim for a low back strain. Appellant was temporarily totally disabled from March 20, 1993 through June 20, 1994, then worked part time at the employing establishment until July 1, 1994 and resumed part-time work on August 14, 1994. The Office paid appellant temporary total disability compensation for those periods of time from March 20, 1993 through August 14, 1994 when appellant was unable to work.

In investigations by the employing establishment recorded in memoranda dated November 29 and December 1, 1994 and January 20, 1995, the employing establishment found that appellant was self-employed in maintaining a crafts booth selling arts and crafts at an arts mall, "Nostalgia Crafts Mall," from approximately November 18, 1992 through January 1995. Business records from the mall showed that appellant had received sales of \$3,157.19 from November 30, 1992 through December 31, 1993 and sales of \$5,068.40 from January 1, 1994 through October 31, 1994. On five compensation claim forms, Forms CA-7 and CA-8 dated from April 27 to July 1, 1993 and on a Form 1032, dated July 11, 1994, appellant put "N/A" when asked if she was self-employed or did not respond.

The nature of appellant's involvement in the business was described by the employing establishment based on interviews and statements with her, dated November 22, 1994 and April 11, 1995, and statements dated April 11, 1995 by her grandson and two daughters who assisted with the business by making craft items. Appellant stated to the inspector that she

painted on the wood items and sometimes made clothes. She stated that she oversaw the operation of the crafts booth by paying rent, arranging for the crafts to be sold, delivering the crafts to the booth for sale, checking on the stock, purchasing equipment and supplies, painting some of the wooden crafts, and pricing some of the crafts. On forms appellant sent in to the Office in 1993 and 1994 seeking compensation, the Office had informed appellant that she must notify the Office when she returned to work or if she obtained other employment. On May 29, 1994 appellant signed a statement to certify that she understood the Office's instructions to notify the Office when she returned to work and understood that her failure to comply with conditions could result in termination or forfeiture of her benefits and liability for any overpayments.

In her August 2, 1995 Form 1032, appellant admitted that she had been involved in the craft booth business. She submitted copies of her federal tax returns for 1993 and 1994 on which she indicated that she was the proprietor of a business named Starts and Stripes Forever or Nostalgia Crafts which sold arts and crafts. In her 1993 return, she indicated that her gross receipts or sales were \$2,415.94, her gross income was \$262.25, her expenses were \$238.00 and she had a net loss of \$1,976.80. On her 1994 tax return, appellant indicated that she had gross receipts or sale of \$5,720.36, her gross income was \$1,846.42, her expenses were \$4,330.73 and she had a net loss of \$2,454.31.

In memoranda dated November 29, 1994 and January 20, 1995 from inspectors with the employing establishment, one of the inspectors stated that when he asked appellant why she did not report she was self-employed on the government forms, she stated that "I did [not] figure I was getting anything out of it." She told them that her daughter and grandson made most of the products, that the store was her social life and the booth was to benefit her daughter and grandson. She told him that she initially leased the booth in her name in November 1992 but had recently asked her daughter to take over the booth in January 1995. In statements dated November 22, 1994 and April 11, 1995, appellant stated that she did not fill out the forms on self-employment because she did not feel that she personally made any profit from the sales from the craft booth. She stated that she considered the craft booth more of a hobby than a business. In her April 11, 1995 statement, appellant stated:

"It was my belief that I had no income, even though the craft booth and checks were in my name. I did not consider it to be my money. The money was used to pay for rent, supplies and commissions. It was never my intention to commit fraud, as I never believed that I was self-employed. The only thing I [a]m guilty of is being a loving mother and grandmother. This was to be a fun thing to encourage my daughters and grandsons to be creative. We were only crafters with one booth. A business is when you have three or more booths."

In his April 11, 1995 statement, appellant's grandson stated, *inter alia*, that there had been more money spent than earned on the booth and no one made any money. He stated that appellant got part of the money towards the debt he owed her and then he used part of the money to purchase more wood. He also stated that he let appellant help him price items and give him ideas of what he should make so she would not feel useless. In her statement, appellant's daughter, Darla Ellis, stated that she and her sister made potpourris, refresher oils, pies, T-shirts

and used the booth to sell their goods. She stated that they had appellant lease one booth so appellant would feel like she was a part of the adventure and to save money and to help pay appellant back some of the money Ms. Ellis owed her. Ms. Ellis stated that her children needed clothes for school or dental work, that these expenses were paid for by booth money and appellant paid for a car Ms. Ellis bought with booth money. Ms. Ellis stated that the family let appellant use the booth as a tax write-off to help reduce the debt they owed her and that it was just a hobby.

In her statement, appellant's other daughter, Rhonda Roppolo, stated that the booth was a family project and hobby. She stated that appellant loaned them the money to start the craft business and the booth was put in her name so that money they owed her would be paid back automatically. Ms. Roppolo stated that no profit had been made and it was a loss. She also stated that before her injury, appellant did most of the T-shirt purchasing and booth decorating but after she hurt herself, she only went if she were having a good day. Ms. Roppolo stated that appellant was not really self-employed but obtained the booth for her children and grandchildren and loaned them the money to get them to be more creative.

By notice dated October 5, 1995, the Office advised appellant of its preliminary finding that an overpayment of compensation had occurred in her case in the amount of \$30,159.21 because she failed to report income during the period April 3, 1993 through July 12, 1994 and therefore her compensation for that time period was forfeited. The Office found that appellant was with fault in the creation of the overpayment because she made incorrect statements to the Office which she knew or should have known were incorrect and she failed to furnish information on her earnings which you knew or should have known was material. The Office informed appellant that she had 30 days from the date of the notice to request a telephone conference, submit additional evidence or request a precoupment hearing.

By decision dated October 5, 1995, the Office stated that appellant's compensation was forfeited for the period April 3, 1993 through July 12, 1994 because she failed to report income from self-employment.

On November 5, 1995 appellant requested a recoupment hearing before an Office hearing representative which was held on November 21, 1996. At the hearing, appellant reiterated that she, her two daughters and grandson had been involved in a business at the booth in a craft mall as of November 1992. Appellant stated the lease of the booth was in her name so she could control the money since her daughter Darla did not handle money well. She stated that she sent the mall a check every month and also received a check from the mall for any purchases that were made at the booth which she deposited. Appellant stated that her mother (since deceased) made crocheted items for the booth, her daughters made potpourris and her grandson cut wood and painted it. Appellant stated she would go once a week or once every two weeks and other members of her family would occasionally go to the booth to check on it. Appellant further stated that the time she spent on the business including painting or going to the craft booth averaged five hours a month. She recorded the arts and crafts business on her 1993 return because a bookkeeper who was her friend told her she needed to file a return because she sustained a loss. Appellant testified that she did not consider herself self-employed as the

business was a “hobby,” “something [she] had always done.” Any money she received she transferred to her family.

Appellant stated that she did not report her earnings from the business on the July 12, 1994 Form 1032 because she did not think it was applicable since she did not make any money from the business. Appellant’s grandson and daughters testified corroborating that they contributed to the business by painting or preparing potpourris. Her grandson testified he did not have much to do with the money and that he was in it mostly for the fun of it. He stated that part of the purpose he was in the business was to pay for the equipment he purchased including saws, wood and tools. Appellant’s daughter, Darla, stated that she did not handle money well and let appellant take care of the money.

Appellant submitted an Overpayment Recovery Questionnaire, Form OWCP-20, dated December 5, 1996 showing that her income totaled \$2,414.23, her assets totaled \$55,713.00, her expenses totaled \$1,244.75 and she had other liabilities totaling \$1,634.75.

By decision dated January 21, 1997, the Office hearing representative, affirmed the Office’s October 5, 1995 decision and finalized the forfeiture.

The Board finds that the Office properly found that appellant forfeited her right to compensation for the period April 3, 1993 to July 12, 1994 because she knowingly failed to report earnings from employment during that period.

Section 8106(b) of the Federal Employees’ Compensation Act¹ states in pertinent part:

“The Secretary of Labor may require a partially disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times the Secretary specifies.... An employee who --

- (1) fails to make an affidavit or report when required; or
- (2) knowingly omits or understates any part of his earnings;
- (3) forfeits his right to compensation with respect to any period for which the affidavit or report was required. Compensation forfeited under this subsection, if already paid, shall be recovered ... under section 8129 of this title, unless recovery is waived under that section.”²

Appellant, however, can only be subjected to the forfeiture provision of section 8106(b) of the Act if she “knowingly” failed to report earnings from employment or self-employment. As forfeiture is a penalty, it is not enough merely to establish that there were unreported earnings.³ Being a penalty provision, the forfeiture provided for in section 8106(b) of the Act

¹ 5 U.S.C. § 8106(b).

² *Garry Don Young*, 45 ECAB 621, 627 (1994).

³ *Barbara Hughes*, 48 ECAB _____ (Docket No. 94-2533, issued March 13, 1997); *Charles Walker*, 44 ECAB

must be narrowly construed.⁴ The term “knowingly” is not defined in the act or its regulations. In common legal usage, “knowingly” is defined as: “with knowledge; consciously; intelligently; willfully; intentionally.”⁵

The Office has the burden of proof in establishing that appellant, either with knowledge, consciously, willfully or intentionally, failed to report employment or earnings.⁶ To meet this burden of proof, the Office is required to closely examine appellant’s activities and statements in reporting employment or earnings.⁷ The Office may meet this burden in several ways: by employee’s own admission to the Office that they failed to report employment or earnings which she knew she should report; by establishing that appellant has pled guilty to violating applicable federal statutes by falsely completing the affidavits in the Form CA-1032;⁸ or by showing that, upon further inquiry by the Office as to employment activities, the employee continued not to fully and truthfully reveal the full the nature of the employment activities.⁹

In the present case, the evidence establishes that appellant failed to report her earnings from her craft business for the period April 3, 1993 through July 12, 1994. Appellant began the business in November 1992. The nature of her involvement consisted of her having the lease in her name, paying rent to the mall, providing funding to her children for supplies, painting some of the wooden objects, checking the crafts booth once or twice a week, shopping for some of the supplies for the booth, making clothes, delivering items for sale, checking up on stock and putting price tags on the craft items. On her forms CA-7, CA-8 and 1032 dated from March 20, 1993 through May 25, 1994, when asked is she was self-employed, appellant indicated either “N/A” or did not respond. The Board therefore finds that appellant knowingly failed to report her earnings from the craft booth business for the period April 3, 1993 through July 12, 1994.¹⁰

The Board further finds that appellant received an overpayment of compensation in the amount of \$30,159.21. The Office correctly determined the amount of the overpayment based on that amount of compensation appellant received during the period April 3, 1993 through July 12, 1994 as obtained from the Employment Standards Administration computer printout dated October 3, 1995. Further, appellant does not dispute the amount of the overpayment. The calculation of \$30,159.21 is proper, and for the reasons stated above, appellant was not entitled to this compensation due to her forfeiture of entitlement to compensation for this period.

641 (1993).

⁴ *Barbara Hughes, supra note 3; Anthony A. Nobile, 44 ECAB 268, 271-72 (1992).*

⁵ BLACK’S LAW DICTIONARY (5th ed. 1979).

⁶ *Barbara Hughes, supra note 3; Barbara L. Kanter, 46 ECAB 165, 169 (1994).*

⁷ *Barbara Hughes, supra note 3; see Royal E. Smith, 44 ECAB 417, 419 (1993).*

⁸ *Barbara Hughes, supra note 3; Barbara L. Kanter, supra note 6 at 169-70 (1994).*

⁹ *Id.*

¹⁰ *See James H. Hopkins, 48 ECAB _____ (Docket No. 94-2331, issued January 7, 1997).*

The Board finds that the Office properly determined that appellant was at fault in the creation of the overpayment of compensation and that, therefore, the overpayment was not subject to waiver.

Section 8129(b) of the Act¹¹ provides that an overpayment of compensation shall be recovered by the Office 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 and be against equity and good conscience.¹² Adjustment or recovery must therefore be made when an incorrect payment has been made to an individual who is with fault.¹³

The implementing regulation¹⁴ provides that a claimant is with fault in the creation of an overpayment when he: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; (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.

The Office also correctly determined that appellant was at fault in the creation of the overpayment, as she failed to furnish information which she knew or should have known to be material. Although appellant repeatedly stated at the hearing and in her statements dated November 22, 1994 and April 11, 1995 that she did not believe the crafts booth was a business, that she regarded it as a hobby and she made no money from it, the Office informed her on July 7, 1994 that regardless of whether she made money from a business, she must report the income. Moreover, the fact that appellant reported her income from the craft business on her 1993 and 1994 tax returns belies her statement that she did not regard it as a business. Therefore, appellant is with fault in the creation of the overpayment and the overpayment of compensation cannot be waived.

Section 10.321(a) of the regulations relating to recovery of overpayment states:

“Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to the probable extent of the future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors so as to minimize any resulting hardship upon such individual.”¹⁵

¹¹ 5 U.S.C. § 8129(b).

¹² *Philip G. Arcadipane*, 48 ECAB _____ (Docket No. 95-1024, issued June 6, 1997); *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

¹³ *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

¹⁴ 20 C.F.R. § 10.320(b).

¹⁵ 20 C.F.R. § 10.321(a); see *Kattie L. Summers*, 48 ECAB _____ (Docket No. 93-2381, issued July 21, 1995).

In its January 27, 1997 decision, the Office determined that appellant had over \$2,400.00 per month income with over \$1,600.00 per month expenses. The Office found that repayment of \$600.00 per month would leave appellant with \$200.00 remaining for emergencies. The December 5, 1996 Overpayment Recovery Questionnaire appellant completed shows that appellant had assets of \$55,713.00, a monthly income of \$2,414.23 and monthly liabilities of \$1,634.75. Since the evidence establishes that appellant's income of approximately \$2,400.00 exceeded her monthly expenses of approximately \$1,600.00 by \$800.00 and appellant had assets of over \$55,000.00, the Office's monthly deduction of \$600.00 to recover the overpayment is proper.

The decision of the Office of Workers' Compensation Programs dated January 27, 1997 is hereby affirmed.

Dated, Washington, D.C.
July 12, 1999

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member