U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DANIEL A. MASHE and U.S. POSTAL SERVICE,
POST OFFICE, Stamford, Conn.

Docket No. 97-2115; Submitted on the Record;
Issued June 11, 1999

DECISION and ORDER

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

The issues are: (1) whether appellant forfeited his right to monetary compensation from September 10, 1990 through June 27, 1992, thereby creating an overpayment of compensation; and if so, (2) whether he was at fault in the creation of such an overpayment.

On December 28, 1976 appellant, then a 58-year-old letter carrier, sustained an injury when he fell while in the performance of duty. His claim was accepted by the Office of Workers' Compensation Programs for acceleration and aggravation of preexisting aseptic necrosis of the right hip. Appellant did not return to work and he received appropriate compensation benefits.

In a decision dated March 21, 1995, the Office found that appellant forfeited his right to monetary compensation for the period September 10, 1990 through June 27, 1992 on the grounds that he concealed his employment at a liquor store and did not report such employment as required by 5 U.S.C. § 8106(b). The Office noted that the forfeiture provision of 5 U.S.C. § 8106(b) applies to those who knowingly omit or understate earnings. The Office found appellant knowingly failed to report his employment on Office Form CA-1032, which requires claimants to report any employment performed in furtherance of a business. Appellant was found to be working on a regular basis.

On March 21, 1995 the Office also issued a preliminary determination that an overpayment occurred as a result of the forfeiture and that appellant was at fault in the creation of the overpayment because he failed to furnish information as to a material fact and because he accepted payments for temporary total disability which he knew or should have known were incorrect.

On March 24, 1995 appellant requested reconsideration of the Office's March 21, 1995 decision contending that he did not conceal his employment and had answered the CA-1032 forms honestly.

In a decision dated June 20, 1995, the Office denied modification of the March 21, 1995 decision.

On June 23, 1995 appellant requested reconsideration of the Office's June 20, 1995 decision. He contended that he performed no work, that he was not employed and had no duties to perform. Appellant submitted a statement from the attorney representing the liquor store to support his request for reconsideration. It does not appear that the Office issued a final decision on appellant's June 23, 1995 request.

In a decision dated April 18, 1997, the Office finalized its March 21, 1995 preliminary determination that an overpayment occurred in appellant's case as a result of the forfeiture and that he was at fault in the creation of the overpayment.

The Office Form CA-1032 advised appellant to report all employment, other than self-employment, for which he received salary, wages, sales commissions, piecework or other payment. "If you performed work for which you were not paid," the form states, "you must show as 'rate of pay' what it would have cost the employer or organization to hire someone to perform the work you performed." Under the self-employment heading, the Form CA-1032 advises that earnings from self-employment must be reported. "Report any such enterprise in which you worked," the form states, "and from which you received revenue, even if it is 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."

On September 9, 1991 appellant completed and signed a Form CA-1032 indicating that he was not employed by an employer and was not self-employed during the prior 12 months. On January 29, 1993 appellant completed and signed a Form CA-1032 indicating that he was not employed by an employer and was not self-employed during the prior 15 months.

A postal inspector's investigative memorandum dated March 25, 1992, reported that appellant had performed work in a liquor store in Stamford, Connecticut. Appellant was observed on numerous occasions from December 23, 1991 to March 11, 1992 working behind the counter, waiting on customers, working the register and at times minding the store by himself. The postal inspector attached sworn statements from postal employees who also observed appellant working at the liquor store during this period. On one such occasion, a postal employee made a purchase while appellant waited on her and she heard appellant's wife ask how long he was working that night. The liquor store had no employment records for appellant, and the store owner acknowledged that appellant was not an employee but did serve a security function since the death of her husband. It was better to have two people behind the counter, she explained, because the neighborhood was bad and she felt safer when her son was not in the store alone. Her son, who operated the store, stated that when he left the store for periods of time to help out at other family businesses, appellant would be in the store alone waiting on customers, selling lotto tickets and answering the telephone. Appellant had helped out in this manner, he stated, since early in 1991.

Appellant was interviewed and explained that he was "hanging out" at the store to pass the time. He stated that his affiliation began with the liquor store's owner many years ago and that he began going to the store on a daily basis, usually six days a week, following the death of

the store owner, about nine months to a year before the February 27, 1992 interview. Appellant would remain at the store an average of four hours a day, six days a week. He stated that he sat behind the counter but, when needed, sold lotto tickets, worked the cash register when selling liquor and cigarettes and answered the telephone. He performed these duties when the owner's son left the store. Appellant agreed that he served a security function and told of a time he caught a guy putting a bottle of gin in his pants. He also told of how he prevented shoplifting while acting as a bagger. According to the postal inspector's memorandum, appellant agreed that he incorrectly answered the employment section of the CA-1032 forms.

In subsequent letters, appellant stated that he was not employed and was not remunerated, that his presence in the store was unsolicited and that he did not believe the owner would hire someone if he stopped going. He stated that he passed the time at the store, where he could talk to people and stimulate his mind. "If a clerk goes to the restroom," he stated, "I do assist customers" but added that his assistance amounted to "nothing material." He stated that he could hardly walk, much less run after suspected thieves and that there was no way he could be considered serving a security role. An attorney for the owner of the liquor store stated that appellant was not compensated and was not on the payroll, that appellant was not employed and had no "duties" to perform. "Therefore," he stated, "my clients have no knowledge as to what they would pay an individual for doing nothing."

The Board finds that the Office improperly determined that appellant forfeited his right to compensation for the period September 10, 1990 through June 27, 1992.

To determine whether an overpayment of compensation occurred in this case, as found by the Office in its April 18, 1997 decision, the Board must review whether appellant forfeited his right to monetary compensation from September 10, 1990 through June 27, 1992 pursuant to 5 U.S.C. § 8106(b).[1]

Section 8106(b) of the Federal Employees' Compensation Act provides 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. The employee shall include in the affidavit or report the value of housing, board, lodging, and other advantages which are part of his earnings in employment or self-employment and which can be estimated in money. An employee who --
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> (1) fails to make an affidavit or report when required; or
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> (2) knowingly omits or understates any part of his earnings;
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> forfeits his right to compensation with respect to any period for which the affidavit or report was required."[2]

[1] *See Samuel J. Rosso*, 28 ECAB 43, 46 (1976).

[2] 5 U.S.C. § 8106(b).

This section of the Act is further defined by regulation which provides:

"Affidavit or report by employee of employment and earnings."

* * *

> "(c) Earnings from employment referred to in this section or elsewhere in this part means gross earnings or wages before any deductions and includes the value of subsistence, quarters, reimbursed expenses, or any other advantages received in kind as part of the wages or remuneration."[3]

In analyzing whether an employee in receipt of compensation has earnings or wages the Board, in *Christine P. Burgess*,[4] noted wages are defined as:

> "Every form of remuneration payable for a given period to an individual for personal services, including salaries, commissions, vacation pay, dismissal wages, bonuses and reasonable value of board, rent, housing, lodging, payments in kind, tips and any other similar advantage received from the individual's employer or directly with respect to work for him."[5]

In *Burgess*, the Board found that the record established the employee received reimbursed expenses and "other advantages" as part of wages or remuneration in the form of free travel, lodging, food and transportation costs as a result of performing the duties of an escort for a travel service. Based on these reimbursed expenses and payments in kind, the Board found that appellant had "earnings" as defined under section 8106(c) which she was required to report to the Office. Similarly in *Barbara L. Kanter*,[6] the Board found that the employee received monetary remuneration from the sales of dogs from her self-employment as a dog breeder. The Board noted that appellant's self-employment activities were not so *de minimus* that her earnings did not have to be reported to the Office as required under the Act. In *James M. Steck*,[7] the Board found that appellant had earnings from his self-employment as a youth minister in that he received free housing, living expenses and utilities as remuneration for his work.

In the present case, the Office found appellant forfeited his right to compensation for the period from September 10, 1990 through June 27, 1992 on the basis that he knowingly failed to report his employment on Office CA-1032 forms. The Office has not established, as required by section 8106(b), that appellant had "earnings" or other forms of remuneration from his activities at the liquor store. The evidence in this case does not establish that appellant received any wages, tips, or other similar advantage from the liquor store owners with respect to his activities,

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[3] 20 C.F.R. § 10.125(c).

[4] 43 ECAB 449 (1992).

[5] *Id.* at 457, citing BLACK'S LAW DICTIONARY, (Special Deluxe, 5th ed. 1979).

[6] 46 ECAB 165 (1994).

[7] 49 ECAB ___ (Docket No. 95-2406, issued October 22, 1997).

i.e., in the form of any discount on merchandise or receipt of liquor or other commodity in exchange for his services.[8] The evidence clearly establishes that appellant engaged in work activities at the liquor store, for which he was not paid, and appellant's failure to show as "rate of pay" what it would have cost the employer to hire someone to perform the work he performed may make him liable to criminal prosecution or lead to a reduction of his monetary benefits to reflect a wage-earning capacity.[9] With no evidence of the receipt of earnings or other remuneration from his efforts, however, the record provides no basis for invoking the penalty provision of section 8106(b)(2). This case is distinguishable from those instances where forfeiture has been invoked based on a claimant's self-employment in a family-owned business or where a personal financial interest is otherwise established as accruing to the benefit of the employee, members of his or her family, or other associates.[10] The record does not demonstrate any financial interest by appellant in the liquor store or that any benefit inured to him based on his activities.

As the record on appeal fails to establish that appellant had any earnings or other form of remuneration from his employment activities at the liquor store, the Board finds that the Office did not properly invoke the penalty provision under section 8106(b)(2). For this reason, the overpayment of compensation based on the application of the forfeiture provision in this case must be set aside.

[8] *Compare Cecil S. Ortagus*, 38 ECAB 141 (1986) (setting aside a period of forfeiture as there was no evidence that there were earnings); *Jack Langley*, 34 ECAB 1077 (1983) (noting the Office's application of the forfeiture provision of the Act is not proper where an employee has no outside earnings).

[9] The Board notes that by decision dated February 1, 1994, the Office reduced appellant's monetary compensation effective June 2, 1992 to reflect his capacity to earn wages as a liquor store clerk.

[10] *Compare Robert C. Gilliam*, 49 ECAB ___ (Docket No. 97-2588, issued September 17, 1998) (the employee owned and operated motor home rental companies); *Gary L. Allen*, 47 ECAB 409 (1996) (the employee had earnings from a lawn mowing service); *Gary Don Young*, 45 ECAB 344 (1994) (the employee received earnings under his wife's social security number); *Anthony Nobile*, 44 ECAB 268 (1992) (the employee operated a family liquor store).

The April 18, 1997 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, D.C.
June 11, 1999

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member