

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ADORA L. WATKINS and U.S. POSTAL SERVICE,
POST OFFICE, Capitol Heights, Md.

*Docket No. 98-1397; Oral Argument Held March 17, 1999;
Issued May 7, 1999*

Appearances: *Appellant, pro se; Catherine P. Carter, Esq.,
for the Director, Office of Workers' Compensation Programs.*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant forfeited her right to compensation for the period October 31, 1994 through January 31, 1996 because she knowingly failed to report her earnings to the Office; and (2) whether the Office properly found that appellant that appellant was not "without fault" in the creation of the resulting overpayment of \$32,260.57 such that this overpayment is not subject to waiver.

The Office accepted that on July 19, 1988 appellant, then a 33-year-old letter sorting machine operator, sustained a sprain of the left thumb. She worked light duty intermittently until October 4, 1989 when she stopped work entirely. Appellant began receiving wage-loss compensation on the periodic rolls beginning October 22, 1992. On March 26, 1993 the Office accepted that appellant sustained a broken right ankle during a motor vehicle accident on December 3, 1992 as a consequential injury. In September 1994 appellant underwent a second surgery for her left thumb and remained in receipt of wage-loss compensation benefits.

On November 21, 1995 appellant was sent a Form CA-1032 requesting information regarding her employment during the previous 15 months. The form instructed appellant to report all employment, including self-employment or involvement in business enterprises, which included but was not limited to:

"Farming; sales work; operating a business, including a store or a restaurant; and providing services in exchange for money, goods or other services. The kinds of services which you must report include such activities as carpentry, mechanical work, painting, contracting, child care, odd jobs, etc. Report activities such as keeping books and records, or managing and/or overseeing a business of any

kind, including a family business. Even if your activities were part-time or intermittent, you must report them.

* * *

“Report any work or ownership interest in any business enterprise, even if the business lost money or if profits on income were reinvested or paid to others. If you performed any duties in any business enterprise for which you were not paid, you must show as rate of pay what it would have cost the employer or organization to hire someone to perform the work or duties you did, even if your work was for yourself or a family member or relative.”

The Office advised that severe penalties may be applied for failure to report all work activities.

By letter dated January 17, 1996, the Office again requested that appellant complete the Form CA-1032.

The record contains a Form CA-1032 signed by the appellant on December 15, 1995 in which she indicated that she was unemployed for all periods during the previous 15 months. Appellant indicated that she did not work for an employer, that she was not self-employed, and that she was not involved in any business enterprise. Another Form CA-1032 signed on January 31, 1996 was completed with similar indications.

However, the Office received a Postal Investigation report dated May 16, 1996 which indicated that appellant “was and continues to be actively involved in the business operations of A.T.L.C. Recovery, Inc. (ATLC),” a towing and repossessing business located in Mt. Rainier, Maryland. The investigator noted that a certified copy of the Articles of Incorporation for ATLC indicated that ATLC was a District of Columbia corporation for the purpose of repossessing, storing and towing automobiles, and listed as directors appellant, her husband, her mother-in-law and her brother-in-law. A District of Columbia application for certificate of occupancy dated June 8, 1994 filed by ATLC listed appellant as president, and was signed and dated by appellant. A Mt. Rainier, Maryland Business License application for the period August 1994 through July 1995 listed appellant as president, and was signed by appellant on the second page. Bank records pursuant to a warrant were seized and revealed during the period January 1993 through December 1995 appellant was the primary signatory on the account’s checks. During that period appellant effected 136 transactions in which, through checks written to herself as payee, she received approximately \$110,500.00 in ATLC funds. Appellant stated that she went to the bank with her husband, wrote checks on the ATLC account to herself, and gave the money to her husband for his payroll cash payments. During an interview appellant admitted that she helped her husband by driving the tow truck sometimes, but stated that he, and not she, hooked up the cars. Appellant stated that she used the tow truck to go to the employing establishment, which she did practically every day. However, appellant was advised that she had been seen with a car in tow. In response appellant stated that she has helped her husband drive the cars over, depending upon his activities, maybe one or two times.

When appellant's husband was interviewed he claimed that appellant was listed as president of ATLC because he thought they would enjoy better job opportunities by having a female in that position. He claimed that appellant did not actively work at ATLC but that when Patsy Ahmay, their secretary, was not at work, appellant would provide administrative support such as answering telephones, typing and filing paperwork, completing and submitting corporate documents and processing payroll. He further stated that appellant and Ms. Ahmay have used the computer to log in billing invoices and that the invoice and condition report completed for each car towed is done by Ms. Ahmay, appellant or himself. In addition, Mr. Porter said that when appellant is needed, she is capable of driving the one tow truck with automatic transmission.

Ms. Ahmay, ATLC's secretary was interviewed, and stated that she began work at ATLC in September 1994. She stated that her interview started with Mr. Porter but that he quickly referred her to appellant who performed the interview. Ms. Ahmay stated that when appellant was at ATLC she would pick up the company's mail at the post office, use the tow truck to run errands, and take the tow truck to Mr. Porter for business use. Ms. Ahmay also stated that for the past six months appellant had been transferring business records into the computer in the back office.

Thomas Proctor, a friend of Mr. Porter and appellant, stated that he had known both of them since the 1980s, knows that they both own the business, and that typically either one or the other is at ATLC because they have cars stored there and want to prevent theft. He also stated that one or the other would spend the night there.

The landlord for the premises upon which ATLC was situated stated that appellant had signed both leases as president of the company, and had signed every rent check tendered to him by ATLC for rent. The landlord also stated that appellant had signed a promissory note for the debt of approximately \$3,600.00 owed for lease termination at one location.

By decision dated July 24, 1996, the Office determined that appellant must forfeit all compensation paid from October 31, 1994 through January 31, 1996 due to her failure to report her self-employment during that period on Forms CA-1032. The Office found that records demonstrated that appellant had received \$32,260.57 in compensation during the period October 1, 1994 through January 31, 1996, and it issued an overpayment decision finding an overpayment in that amount, for which it found appellant was at fault in the creation.

In response appellant requested a hearing on the overpayment.

Prior to the hearing the Postal Inspector submitted a supplemental investigative memorandum and additional evidence, including a video tape of the Mt. Rainier Town Council. The video demonstrated that appellant had appeared before the council to discuss a business license, and stated that she sold vehicles. She stated that she had spoken with inspectors, that she and her husband repossessed vehicles, and that she frequently used the word "I" in discussing the activities of the business. Appellant described the business and her concerns with regard to regulations, she frequently referred to "my staff," and she discussed her previous experiences with obtaining a county license. Appellant argued that her business should be allowed to continue to operate, speaking for 25 minutes before the Council.

The investigator also indicated that notes of a telephone call on April 8, 1993 between an insurance representative and appellant revealed that appellant stated that she did all paperwork and “some repos” at the towing company.

At the hearing on November 20, 1997 appellant and her union representative testified. The union representative argued that ATLC’s 1995 corporate tax form demonstrated that Mr. Porter owned 100 percent of the corporation stock, and that appellant’s involvement in the business was of little consequence. He compared appellant’s case to the case of *Jack Snipes*,¹ and argued that it was improper to base a forfeiture solely on the Postal Inspector’s report.

Appellant argued that she stayed at the business address to spend time with her husband and because of difficulties with stairs and the bathroom after her 1992 accident. She argued that she rode with her husband during the day also in order to spend time with him. Appellant stated that her name was on the disbursements rather than “cash” at the bank’s insistence, and that 95 percent of the cash withdrawn was for payroll. She stated that her name was on the checks, and the checks were written to her because she did all the banking, but she denied any formal bookkeeping activities. Appellant stated that she appeared on behalf of ATLC at the town council meeting in support of her husband and not as the owner of the business.

The hearing representative evaluated all of the evidence of record and testimony presented, and, by decision dated February 28, 1998 determined that the Office had properly determined that appellant should forfeit all compensation paid from October 31, 1994 through January 31, 1996 on the grounds that she knowingly withheld information on employment while in receipt of compensation.

The Board finds that the Office properly determined that appellant forfeited her right to compensation for the period October 31, 1994 through January 31, 1996 because she knowingly failed to report her earnings to the Office.

Section 8106(b) of the Federal Employees’ Compensation Act provides that the Office may require a partially disabled employee to report his or her earnings from employment or self-employment, by affidavit or otherwise, in the manner and at such times as the Office specifies. An employee who: (1) fails to make an affidavit or report when required; or (2) knowingly omits or understates any part of his or her earnings; forfeits his or her 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 by a deduction from the compensation payable to the employee or otherwise recovered under § 8129 of this title, unless recovery is waived under that section.”²

In the instant case, the preponderance of the evidence supports that appellant engaged in self-employment during the 15-month period prior to January 31, 1996 when she completed a

¹ Docket No. 91-1820 (issued May 22, 1992). In this case, Mr. Snipes owned livestock, some of which was sold to repay a loan. The Board determined that his involvement in raising and selling livestock was not sufficient to establish that he was employed.

² 5 U.S.C. § 8106(b).

Form CA-1032 statement of earnings and employment. Appellant declared that she was not employed in any manner, including self employment. The preponderance of the evidence of record demonstrates, however, that she was engaged in the operation of a towing and repossessing business. The documents accompanying the Postal Inspector's report demonstrate that appellant was involved in multiple and regular business transactions on behalf of ATLC, including obtaining cash to meet the payroll and signing leases, invoices, business licenses, and ATLC checks for operating expenses. The Postal Inspector's interviews support that appellant was working performing a variety of business activities ranging from clerical assistance and support to driving a tow truck with a car in tow. Appellant has attempted to explain and dismiss her involvement by claiming that she was only acting in a supportive role as an aide to her husband. However, the witness statements, when considered in conjunction with the documentary evidence strongly suggest otherwise, as she was actively handling multiple corporate aspects of ATLC, such as securing the payroll, obtaining licenses and lease agreements, paying corporate bills, invoices and obligations, and speaking as the primary representative on behalf of ATLC pursuing business issues under discussion. Further, although appellant claims that she was only using the tow truck as transportation to her medical appointments, surveillance evidence documents that she was driving the truck with a car in tow, which argues against the medical appointment scenario. Therefore, the Board finds appellant's explanations unconvincing, and finds that she performed more than sufficient activities on behalf of ATLC, for her to be considered as having worked in her self-employed capacity during the time she was receiving wage-loss compensation for the reporting period October 31, 1994 through January 31, 1996. The Board further finds that, as president and part owner of ATLC and as the person responsible for obtaining and signing legal documents and for discussing legal ramifications affecting her business, she knew that her activity on behalf of ATLC was employment which had to be reported to the Office in the Form CA-1032. As appellant failed to report any employment or self-employment during the 15-month period covered by the signed forms returned to the office dated December 15, 1995 and January 31, 1996, she knowingly failed to declare and report her employment activities, such that the compensation she received during that 15-month period, from October 31, 1994 through January 31, 1996 must be declared forfeit.

The Board also finds that appellant was with fault in the matter of the resulting \$32,260.57 overpayment of compensation, such that the debt must be repaid.

Section 8129 of the Act 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 or would be against equity and

good conscience.”³ Thus, an overpayment cannot be waived by the Office unless appellant was without fault.⁴

Section 10.320 of the implementing federal regulations provides the following:

“In determining whether an individual is with fault, the Office will consider all pertinent circumstances including age, intelligence, education and physical and mental condition. 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.”⁵

In its preliminary determination dated July 24, 1996, the Office found that appellant was with fault in the matter of the overpayment because she was aware, or should have been expected to know, when she signed the Form CA-1032 questionnaires on December 15, 1995 and January 31, 1996 that she was to report any employment, self-employment or earnings. By decision dated February 28, 1998, the hearing representative found that appellant was with fault in the matter of the overpayment because the forfeiture and resulting overpayment were a direct consequence of appellant’s failure to report her employment on the December 15, 1995 and January 31, 1996 affidavits.

The preponderance of the evidence in this case establishes that appellant was employed/self-employed during the 15-month period covered by the Forms CA-1032 she signed on December 15, 1995 and January 31, 1996, and that she should have reported this activity on this form. Appellant knew or should have known that this information was material because the questionnaire itself clearly stated that the information provided therein would be used to determine her qualification for continued benefits or to determine whether an adjustment in benefits would be warranted, and it warned appellant that a false answer to any question could be grounds for suspension of compensation benefits. Appellant thus failed to furnish information that she knew or should have known was material, and for this reason she is with fault in the matter of the overpayment, recovery of which is not subject to waiver.

³ 5 U.S.C. § 8129.

⁴ *See, e.g., Harold W. Steele*, 38 ECAB 245 (1986) (no waiver is possible if the claimant is not without fault in helping to create the overpayment).

⁵ 20 C.F.R. § 10.320.

The February 28, 1998 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
May 7, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member