

The issues are: (1) whether appellant forfeited his right to compensation from February 11, 1992 to March 18, 1993, from December 4, 1993 to March 4, 1995 and from March 17, 1995 to March 11, 1997; (2) whether appellant was at fault in creating the resulting overpayment, thereby, precluding waiver; and (3) whether the Office properly determined that repayment was due and payable in full.

FACTUAL HISTORY

On August 9, 1976 appellant, then a 27-year-old millwright, sustained an injury in the performance of duty: "There was an air hose on walk board. I stepped off one walk board to another. Air hose was wet and my foot just slipped off of it. I felt my knee twist at that time." The Office accepted his claim for left knee strain, *pes anserine* bursitis, degenerative joint disease, torn medial meniscus and a temporary aggravation of right leg and foot strain. Appellant received compensation on the periodic rolls.

On August 17, 1992 the Office noted the following in its statement of accepted facts: "From 1980 through 1991, [appellant] owned and operated [SCF, a concrete finishing business], performing numerous activities associated with the business. These activities included supervising the labor crews, work on projects and receiving deliveries of concrete."

Appellant signed EN1032 disclosure forms on March 18, 1993, March 4, 1995, June 17, 1996 and March 11, 1997. On each form he represented that he did not work for any employer and was not self-employed during the prior 15 months.

On January 20, 2000 the employer's Office of the Inspector General (OIG) reported its finding that appellant knowingly made false statements on the EN1032 disclosure forms by failing to report his employment or self-employment at SCF. Appellant was the owner and sole stockholder of SCF, and the OIG attached numerous exhibits showing him actively engaged in the business during the periods in question. His son stated the following:

"My dad hired me as a laborer in 1989. Some of my responsibilities included cleaning the job site, collecting materials from the trucks and helping other employees. Although my dad put me as the owner of [SCF], I never really owned the business. I didn't do the books. I didn't hire or fire employees. I didn't set up jobs. I didn't even do payroll. All I did was sign checks. The only reason I signed the checks was because my dad told me to.

"Even though I was the owner on paper, my dad still functioned as the owner. In fact, I did the same things I did as a laborer, except for signing checks. I still received the same pay from my dad. When I was supposed to be the owner, Keith Robinson continued to bid on jobs, set up jobs and act as foreman.

"Keith and my dad continued to tell me what to do even though I was supposed to be the owner. So, as far as I'm concerned the business was not transferred to me in 1991 or ever. My dad was always asking me to sign papers. I often did not know what I was signing. In approximately 1993, I left the business and moved to Port Orchard, Washington, to live with my mom."

* * *

"My dad handled all the financial records. I never learned the day-to-day business operations, although, I signed a lot of papers that I didn't know what they were. My dad never told me what I was signing. Approximately January 1998, my dad called me and told me that someone would either call me or

write a letter asking questions about his work activities. He then tried to tell me what he wanted me to say. He said that I want you to tell them I haven't been working, I gave you the business and Keith is working for you. He more or less wanted me to lie. I told him that I was not going to lie and he got mad and wanted to talk to my brother...."

Statements from golf course and greens superintendents, several business owners and a number of individuals establish that appellant directly engaged in business activities from 1994 to 1997. The OIG reported that appellant generally endorsed checks deposited in several SCF accounts; provided an estimate to an undercover special agent; dealt directly with customers, one of whom stated that appellant was on the job site approximately 75 to 80 percent of the time; subcontracted and dealt directly with other business owners; and contracted and handled transactions for individual customers.

In a decision dated January 24, 2002, the Office found that appellant forfeited \$122,489.11 in compensation for the periods covered by the EN1032 disclosure forms because he failed to report employment income as required under 5 U.S.C. § 8106(b). The Office found that the evidence established that he acted as a manager and foreman/supervisor for his own concrete business through 1997. The Office found that he performed all the duties of a foreman until he hired Mr. Robinson in 1994 and that from 1994 through 1997 he continued to participate actively in the running and operation of his business. The Office noted that appellant's signature on an April 27, 1991 Form EN1049 showed that he understood his obligation to report employment activity. The Office concluded that he knowingly reported no earnings or employment activity on the disclosure forms in question.

On January 24, 2002 the Office also issued a preliminary determination that appellant was at fault in the creation of a \$122,489.11 overpayment of compensation because he knowingly failed to report his self-employment income on the EN1032 disclosure forms. Appellant requested a prerecoupment hearing and submitted a February 21, 2002 overpayment recovery questionnaire. Following a hearing on March 25, 2004, appellant submitted an updated overpayment recovery questionnaire dated April 23, 2004.

In a decision dated July 23, 2004, the hearing representative affirmed the Office's January 24, 2002 forfeiture decision and finalized the January 24, 2002 preliminary determination that appellant was at fault in creating the resulting overpayment. The hearing representative found the overpayment was "due and payable in full." The hearing representative did not find appellant's testimony to be credible regarding his very limited role in the business. The hearing representative found that appellant provided consulting services, showed up at work sites to oversee jobs, took part in monetary transactions, was available to oversee transactions or represent the company at various times or during various transactions with the customer or client, answered telephone calls on behalf of the company, received payment for work completed on the part of the company, signed or deposited checks or funds on behalf of the company and in some capacity acted as liaison for the company. Appellant completed additional overpayment recovery questionnaires on September 22 and December 11, 2004.

On July 13, 2006, in Docket No. 05-1531, the Board set aside the Office's July 23, 2004 decision as improperly issued. The Office sent the decision to the wrong address. The Board

found that appellant was entitled to a merit decision on the issue of forfeiture. The Board remanded the case to the Office for an appropriate final decision and noted that the improperly issued decision left the record with no final decision on the issues of fact of overpayment, amount of overpayment, fault or rate of recovery.

On August 16, 2006 the Office reissued its July 23, 2004 decision and sent it to appellant's last known address. This appeal follows.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of the Federal Employees' Compensation Act provides:

"An employee who --

(1) fails to make an affidavit or report when required; or

(2) knowingly omits or understates any part of his earnings;

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 by a deduction from the compensation payable to the employee or otherwise recovered under [section] 8129 of this title, unless recovery is waived under that section."¹

As forfeiture is a penalty, it is not enough to establish that the claimant failed to report earnings from employment or self-employment. The Office must show that the claimant knowingly omitted or understated any part of his earnings. "Knowingly" means "with knowledge, consciously, willfully or intentionally."² The Office thus has the burden of proof to establish that appellant did, either with knowledge, consciously, willfully or intentionally, omit or understate any part of his earnings. To meet this burden, the Office is required to examine closely appellant's activities and statements. The Office may meet this burden without an admission by the claimant if the circumstances of the case establish that he failed to reveal fully and truthfully the full extent of his employment activities and earnings.³

"Earnings from employment or self-employment" means gross earnings or wages before any deductions and includes the value of subsistence, quarters, reimbursed expenses and any other goods or services received in kind as remuneration. It also means a reasonable estimate of the cost to have someone else perform the duties of an individual who accepts no remuneration. Neither lack of profits, nor the characterization of the duties as a hobby, removes an

¹ 5 U.S.C. § 8106(b).

² 20 C.F.R. § 10.5(n) (1999).

³ *Terryl A. Geer*, 51 ECAB 168 (1999).

unremunerated individual's responsibility to report the estimated cost to have someone else perform his duties.⁴

The test of what constitutes reportable earnings is not whether the claimant received a salary but what it would have cost to have someone else to do the work. Where a claimant takes an active role in the operation of a business, the claimant is obligated to report as "earnings" the amount that would have been paid to a person doing such work.⁵

ANALYSIS -- ISSUE 1

The evidence collected by the OIG belies appellant's assertion that his only involvement in the concrete finishing business was as an investor.⁶ The evidence establishes that he actively engaged in business activities during the periods covered by the EN1032 disclosure forms. Appellant dealt directly with customers, provided estimates, contracted for jobs, hired employees, started his crew, visited job sites, provided invoices, received payments and endorsed checks. His son, who worked for SCF from 1989 to approximately 1993, confirmed that appellant handled all the financial records and functioned as the owner.

Each disclosure form asked appellant to report any work he performed, and if he performed any duties in any business enterprise for which he was not paid, the forms required him to show as "rate of pay" what it would have cost the employer or organization to hire someone to perform those duties. Appellant omitted this information. Notwithstanding bold print warning that "severe penalties may be applied for failure to report all work activities thoroughly and completely," he denied performing any work or having any involvement in any business enterprise. This representation proved to be false. The Office hearing representative, who had an opportunity to observe appellant's demeanor at a hearing, found his testimony regarding his very limited role in the business not to be credible, a finding the Board is not compelled to overturn.⁷

The Board finds that appellant knowingly omitted or understated his involvement in the concrete finishing business. The nature and extent of his involvement, together with the specificity of the disclosure forms, make it difficult to come to any other conclusion. It is the statement from his son that removes any doubt about appellant's intent. Appellant asked his son

⁴ 20 C.F.R. § 10.5(g) (1999).

⁵ *Anthony A. Nobile*, 44 ECAB 268, 271 (1992) (the claimant worked at a liquor store owned by his family but contended that he received no salary for his work).

⁶ Income on profits from business are not generally held to be the fruits of wage-earning capacity but of the investment, the management and the business acumen of the owner, and the return on the investment of an employee's capital, even though augmented by his personal attention in looking after the business in which it is invested, cannot be considered as if it were wages. Where, however, the source of income can be differentiated, *i.e.*, as representing either profit and return on capital, or the product of the employee's work, any portion of the income directly traceable to such work may be considered as if it were "wages." *Vernon Booth*, 7 ECAB 209 (1954). It is for the Office to decide, not the claimant, whether business involvement or work activities demonstrate a wage-earning capacity that might affect compensation payments. The claimant is always responsible for full disclosure.

⁷ *Anthony J. DeWilliams*, 48 ECAB 410, 411 (1997).

to make certain representations to investigators, representations that the son knew to be untrue: that appellant had not been working, that appellant had given the business to the son and that Mr. Robinson was working for the son. He took conscious, willful and intentional steps to conceal his involvement and work activities because he knew that disclosure could affect how much compensation he received from the Office for disability due to his employment injury.

The Board finds that the Office has met its burden of proof. In violation of 5 U.S.C. § 8106(b)(2), appellant knowingly omitted a reasonable estimate of the cost to have someone else perform the duties he performed. He thereby forfeited his right to compensation with respect to the periods for which the EN1032 disclosure forms were required. The Board will affirm the Office's August 16, 2006 decision finding that appellant forfeited his right to compensation from February 11, 1992 to March 18, 1993, from December 4, 1993 to March 4, 1995 and from March 17, 1995 to March 11, 1997.

LEGAL PRECEDENT -- ISSUE 2

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she received from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. 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).⁸

Whether an individual is at fault in creating an overpayment depends on the circumstances of the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.⁹

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault, under the second standard, for failing to provide information on the EN1032 disclosure forms. Appellant knew or should have known that this information was material. Each of the disclosure forms made clear that the Office would use the information requested to decide whether he was entitled to continue receiving benefits under the Act or whether his benefits should be adjusted. Warnings that severe penalties could be applied for failure to report all work activities thoroughly and completely underscored the importance of this information and appellant's responsibility to disclose it. The Board will therefore affirm the Office's August 16, 2006 decision finding that appellant was at fault in creating the overpayment that arose from his forfeiture of compensation. Appellant's fault in the

⁸ 20 C.F.R. § 10.433(a) (1999).

⁹ *Id.* at § 10.433(b).

matter precludes any consideration of waiver. The law requires the Office to recover the overpayment.

LEGAL PRECEDENT -- ISSUE 3

When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.¹⁰ 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 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.¹¹

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information will be used to determine the repayment schedule, if necessary.¹²

ANALYSIS -- ISSUE 3

The Board finds that this case is not in posture for determination on the issue of recovery. In its August 16, 2006 decision finalizing the overpayment, the Office noted that appellant provided no evidence with his April 23, 2004 overpayment recovery questionnaire to document his financial status. The Office stated that after the submission of this questionnaire “no additional evidence or argument was received for review or consideration.”

The record shows, however, that appellant submitted overpayment recovery questionnaires on September 22 and December 11, 2004. With these questionnaires, he submitted documents to support his current financial status. Although this evidence was not before the Office when it issued its July 23, 2004 decision, this evidence was before the Office when it issued its August 16, 2006 decision finalizing the overpayment. The Office did not consider the financial documentation appellant submitted, nor did the Office, in 2006, ask appellant for a current overpayment recovery questionnaire so that it could take into account relevant factors so as to minimize (but not necessarily eliminate)¹³ any hardship when it decreased his compensation to recover the overpayment.¹⁴

¹⁰ 5 U.S.C. § 8129(a).

¹¹ 20 C.F.R. § 10.441(a).

¹² *Id.* at § 10.438(a).

¹³ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Preliminary and Final Decisions*, Chapter 6.200.4.d(1)(b) (May 2004).

¹⁴ In judging whether repayment of the uncompromised portion of the debt would cause hardship, the Office should assess the debtor’s income and assets, and the debtor should be required to submit a current financial report (OWCP-20) if one has not been provided within the previous six months. *Id.* at *Debt Liquidation*, Chapter 6.300.6.a.

The Board will remand the case for further development on the issue of recovery. Pending further development of appellant's current financial status and the Office's consideration of relevant factors so as to minimize any hardship in setting the rate of recovery, the Office should suspend its collection of the overpayment. After further development, the Office shall issue a final decision on an appropriate rate of recovery from continuing compensation.¹⁵

CONCLUSION

The Board finds that the Office properly applied the penalty provision of 5 U.S.C. § 8106(b)(2). Appellant knowingly omitted as "earnings" what it would have cost his concrete finishing business to hire someone to perform the duties he performed. He concealed his work activities and forfeited his right to compensation for the periods covered by the EN1032 disclosure forms. The Board finds that appellant was at fault in the creation of the resulting overpayment, thereby, precluding waiver. He failed to provide information that he knew or should have known was material. The Board also finds that further development is warranted on the issue of recovery. The Office must assess appellant's current financial status and consider relevant factors so as to minimize any hardship.

¹⁵ The issues of forfeiture, fact of overpayment and fault are decided. There is no need for the Office to issue another decision on those issues. The Office should, however, clearly explain how it calculated the amount of the overpayment. *Vincent E. Washington*, 42 ECAB 636, 640 (1991). The Office indicated that appellant received compensation of \$29,404.50 from February 11, 1992 to March 18, 1993, \$34,939.32 from December 4, 1993 to March 4, 1995 and \$58,145.29 from March 17, 1995 to March 11, 1997. The Office should document these payments or explain how it arrived at these amounts.

ORDER

IT IS HEREBY ORDERED THAT the August 16, 2006 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further action consistent with this opinion.

Issued: May 10, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board