

**United States Department of Labor  
Employees' Compensation Appeals Board**

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C.V., Appellant )

and )

U.S. POSTAL SERVICE, PROCESSING & )  
DISTRIBUTION CENTER, Dallas TX, Employer )

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**Docket No. 07-1557  
Issued: May 19, 2008**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On May 21, 2007 appellant filed a timely appeal of the Office of Workers' Compensation Programs' hearing representative's merit decision dated September 15, 2006 and Office decision dated December 18, 2006 that she had forfeited her compensation benefits and that an overpayment had been created. She also appealed a May 9, 2007 nonmerit decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit issues of this case.

**ISSUES**

The issues are: (1) whether the Office properly found that appellant forfeited her entitlement to compensation from July 13, 2004 to August 27, 2005 because she knowingly failed to report earnings from employment during this period; (2) whether appellant received an overpayment of compensation in the amount of \$18,031.15 during the period of the forfeiture; (3) whether the Office properly found appellant was at fault in the creation of the overpayment and, therefore, the overpayment was not subject to waiver; and (4) whether the Office properly refused to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

## **FACTUAL HISTORY**

This case has previously been before the Board. On July 12, 2000 appellant, then a 39-year-old clerk, sustained injury when a restbar collapsed while she was sitting on it. The Office accepted appellant's claim for lumbar strain and authorized appropriate compensation benefits. By decision dated July 20, 2001, the Office terminated appellant's wage-loss compensation benefits. Appellant sought reconsideration before the Office, which denied modification on September 25 and December 11, 2001 and March 13, 2002. In a decision dated May 6, 2003, the Board reversed the July 20, 2001 termination finding that the Office had not submitted sufficient medical evidence to meet its burden of proof to terminate appellant's compensation benefits.<sup>1</sup> The facts of the case are set forth in the Board's prior decision and are adopted herein by reference.

The Office entered appellant on the periodic rolls for a recurrence of total disability on July 23, 2003. She completed an EN1032 form on July 12, 2004 and stated that she was self-employed from January 1 to July 1, 2003 writing biblical study guides. Appellant stated that she did not receive any pay. The EN1032 form advised appellant that she must report all employment for which she received a salary, wages, income, sales commissions, piecework or any payment of any kind, that she must report self-employment and that she must report any such enterprise in which she worked. The forms requested that she report employment and earnings for the 15 months prior to the completion of any given form. The Office advised appellant on the EN1032 forms that she was obligated to immediately report any employment to the Office and that fraudulently concealing or failing to report income could subject her to criminal prosecution. On September 13, 2004 appellant returned to part-time work at the employing establishment six hours a day. The Office reduced her compensation benefits to reflect her actual earnings on September 28, 2004.

Appellant completed authorizations for earnings information from the Social Security Administration for the period January 1, 2000 through December 31, 2004. On July 6, 2005 the Office provided her with CA-1032 and EN1032 forms and requested that she complete these forms within 30 days. The Office provided appellant with a second request to complete an enclosed EN1032 form on August 26, 2005. The EN1032 form reiterated that she was to report all employment and earnings for the 15 months prior to the completion of the form. Appellant signed the Form EN1032 on August 27, 2005 and indicated that during the preceding 15-month period covered by the form she worked only for the employing establishment and was not self-employed or involved in any business enterprise. Following submission of the EN1032 form, she provided the Office with the following statement dated September 20, 2005:

“After being sent a CA1032 for the period January 1, 2002 to December 31, 2004, no extra income was earned during this period. However on May 9, 2005 my sibling Barbara McGregor, asked a favor of me. She wanted me to sign up for a directory phone book route that required an insured truck which she did not have. After reviewing this with Internal Revenue Service we were assured if a 1099 was filed to transfer the income, she would receive the earnings. This has been done.”

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<sup>1</sup> Docket No. 02-1373 (issued May 6, 2003).

Appellant telephoned the Office on September 27, 2005 to note that she allowed her sister to use her name and identification number to set up a truck delivery route. She stated that she did not receive any earnings from her sister's business.

The employing establishment provided the Office with an Investigative Memorandum dated October 11, 2005 which found that appellant failed to report earnings on her Form EN1032. The postal inspectors stated that appellant had earnings from Directory Distributing Association (DDA) during May 2005 in the amount of \$748.93 and submitted pay records from the company in support of this finding. David Schmitt, the manager of DDA, stated that appellant was a contract employee who delivered four routes from May 24 through 30, 2005. He stated that company policy required employees to deliver the routes themselves and not have other people help them. Mr. Schmitt provided a record of the routes delivered by appellant and the number of miles she claimed. When interviewed by the inspectors on September 23, 2005, appellant stated that she did not have employment outside the employing establishment during the period covered by the EN1032 form. She stated that she helped deliver some telephone books with her sister in August 2005 for Product Development Corporation (PDC) and that she gave the money that she earned from this enterprise to her sister. Appellant stated that she "drove mostly" while delivering the telephone books and that her sister and nephew delivered the books. She acknowledged that she completed the application, attended training and signed the work agreement with PDC. However, appellant did not list this employment on the Form EN1032 as her sister received all the money. She delivered 13 routes between August 24 and September 10, 2005 for PDC earning \$1,396.20. Appellant did not provide PDC with her social security number, but instead utilized that of Cynthia Perry.

On December 20, 2005 the Office terminated appellant's compensation and medical benefits effective December 25, 2005. Appellant requested a review of the written record. By decision dated April 18, 2006, an Office hearing representative affirmed the December 20, 2005 termination decision. The Board reviewed this decision on January 16, 2007<sup>2</sup> and found that the Office properly terminated appellant's compensation benefits effective December 25, 2005.<sup>3</sup> The Board also found that appellant had not established any continuing employment-related residuals or disability and that she had not established a consequential emotional condition due to her July 12, 2000 employment injury. The facts of the case, as set out in this decision, are incorporated herein by reference.

By decision dated April 6, 2006, the Office determined that appellant knowingly omitted information regarding earnings on her August 2005 EN1032 form. The Office found that appellant was employed by both DDA and PDC and delivered telephone books during the period covered by the August 27, 2005 Form EN1032. The Office noted that appellant described her work for these companies as "mostly driving the truck." The Office found that, although appellant provided her earnings from this employment to her sister, she did in fact work and had earnings resulting from her efforts. The Office concluded that she had knowingly omitted information about her outside earnings on the August 2005 EN1032 form based on her

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<sup>2</sup> Docket No. 06-1259 (issued January 16, 2007).

<sup>3</sup> As the Office issued this decision on April 18, 2006, more than one year before appellant's appeal to the Board on May 21, 2007, the Board will not consider this issue on appeal. 20 C.F.R. § 501.3(d)(2).

misrepresentations in the September 2005 telephone call and letter to the Office. The Office found that appellant forfeited her compensation benefits during the period of the Form EN1032 from July 13, 2004 through August 27, 2005 and that the benefits paid during this period must be considered an overpayment.<sup>4</sup>

In a preliminary finding of April 6, 2006, the Office also determined that appellant had received an overpayment of compensation in the amount of \$18,031.15 for the period July 13, 2004 to August 27, 2005 as she knowingly omitted information about her outside employment and earnings on the August 27, 2005 Form EN1032 thus forfeiting her compensation benefits for the period covered by this form. The Office found that appellant was at fault in the creation of the overpayment and that the overpayment was not subject to waiver. The Office allowed 30 days for appellant to request a precoupment hearing. In the accompanying memorandum, the Office calculated that appellant received compensation in the amount of \$2,293.27 from July 13 to August 7, 2004. The Office determined that she received \$15,257.88 in compensation benefits from August 8, 2004 to August 6, 2005. The Office calculated that appellant had received \$480.00 in compensation for the period August 7 to 27, 2005. Adding these sums, the Office found a total overpayment of \$18,031.15 for the period July 13, 2004 to August 27, 2005.

Appellant requested a precoupment hearing on April 8, 2006, which was held on July 31, 2006. She stated:

“My sister didn’t have an insured truck and in order to do this route you would have to have an insured truck and the name of the insurance on that truck.... [S]o I went and signed up for her and let her use my truck and her and her sons did the route. I had nothing to do with it as far as actually doing the work but it was in my name and I knew I was on workman’s compensation....”

Appellant noted that the paycheck came in her name, but that she would cash the check and transferred the money to her sister. She contended that the Internal Revenue Service (IRS) allowed this income to be considered as that of her sister once appellant completed a form which indicated that she had hired her sister. Appellant submitted a statement from her sister, Ms. McGregor, noting that she received the income from delivering the telephone books and reported this to the IRS. She also submitted a letter from the IRS stating that she had been instructed to request that DDA submit a corrected Form 1099 stating that she did not earn the money and another Form 1099 stating that Ms. McGregor had earned the money. Appellant also submitted an overpayment recovery questionnaire.

By decision dated September 15, 2006, the hearing representative found that appellant had forfeited her entitlement to compensation from July 13, 2004 to August 27, 2005. He noted that appellant delivered the telephone books herself and was paid for this work. The hearing representative also found that appellant “attempted to conceal her nonfederal employment by the use of an assumed social security number.” He concluded that appellant knowingly failed to report nonfederal earnings on the EN1032. The hearing representative reviewed appellant’s

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<sup>4</sup> Appellant’s previously Form EN1032 was dated July 12, 2004. Therefore, the August 27, 2005 EN1032 does not include the entire 15-month period, instead reaching back only to July 12, 2004.

financial information and determined that recovery of the overpayment would be made by monthly payments of \$250.00.

In a letter dated October 26, 2006, appellant stated, “On October 25, 2006 it was discovered that [DDA] in the amount of \$603.00 and [PDC] in the amount of \$1,396.20 was not part of my 2004 or 2005 income so I did not withhold this information from my 1032.” She submitted a May 5, 2006 1099 form indicating that she received nonemployee commissions in the amount of \$603.00.

By decision dated December 18, 2006, the Office reviewed the case on the merits and found that the 1099 form did not establish that appellant did not have earnings during the period covered by the August 27, 2005 EN1032.

Appellant requested reconsideration on April 24, 2007 and denied delivering telephone books on May 24 through 30 and August 24 through September 10, 2005. She admitted that she made a mistake in writing her sister’s social security number on her job application and, that at the time, she was only receiving compensation for two hours a day and not working at the employing establishment. Appellant stated that she was submitting a back-up withholding warning from the IRS, a W-9 request for tax payer and a letter. The record contains partially legible forms from the IRS indicating that she had listed her name and her sister’s identification number on an account.

By decision dated May 9, 2007, the Office denied further reconsideration of the merits, finding that she failed to submit relevant new evidence or advance legal contentions not previously considered.

### **LEGAL PRECEDENT -- ISSUE 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 time 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; forfeits his right to compensation with respect to any period for which the affidavit or report was required.”<sup>5</sup> (Emphasis added.)

A claimant, however, can only be subjected to the forfeiture provision of 5 U.S.C. § 8106 if she “knowingly” failed to report employment or earnings. It is not enough to merely establish that there were unreported earnings. The Board has recognized that forfeiture is a penalty, and, as a penalty provision, it must be narrowly construed.<sup>6</sup> The term “knowingly” is defined in the regulations as “with knowledge, consciously, willfully or intentionally.”<sup>7</sup>

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<sup>5</sup> 5 U.S.C. § 8106(b).

<sup>6</sup> See *Anthony A. Nobile*, 44 ECAB 268, 271-72 (1992).

<sup>7</sup> 20 C.F.R. § 10.5(n).

### **ANALYSIS -- ISSUE 1**

The Office determined that appellant forfeited her entitlement to compensation for the period July 13, 2004 to August 27, 2005. She signed a Form EN1032 on August 27, 2005 covering this period. On this form, appellant indicated that she was not employed or self-employed except at the employing establishment. The investigative memorandum submitted by the employing establishment establishes that she sought and obtained employment with two companies to deliver telephone books. Appellant worked for DDA delivering four routes from May 24 to 30, 2005. She was required by company policy to deliver the route herself and had earnings for delivering four routes. Appellant also worked for PDC between August 24 and September 10, 2005 utilizing another social security number. In the interview with the postal inspectors, she stated that she “mostly drove” while delivering the telephone books and that she gave her earnings to her sister.

Appellant can be subject to the forfeiture provision of section 8106(b) only if she “knowingly” failed to report earnings or employment. The Office has the burden of proof to establish that a claimant did, either with knowledge, consciously, willfully or intentionally, fail to report earnings from employment.<sup>8</sup> In this case, appellant completed the August 27, 2005 EN1032 form which advised her that she must report both all employment and all earnings from employment or self-employment. The EN1032 form clearly advised that she could be subject to criminal prosecution for false or evasive answers or omissions. The evidence of record documents appellant’s failure to report her work in May and August 2005, her use of another social security number, her statement to investigators that she “mostly drove” while delivering books, together with her signing of the certification clauses on the EN1032 forms, provide persuasive evidence that she “knowingly” understated her earnings and self-employment.<sup>9</sup> The Office, therefore, properly found that appellant forfeited her compensation for the period July 13, 2004 to August 27, 2005.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 10.529 of the Office’s implementing regulation provides as follows:

“(a) If an employee knowingly omits or understates any earnings or work activity in making a report, he or she shall forfeit the right to compensation with respect to any period for which the report was required. A false or evasive statement, omission, concealment or misrepresentation with respect to employment activity or earnings in a report may also subject an employee to criminal prosecution.

“(b) Where the right to compensation is forfeited, [the Office] shall recover any compensation already paid for the period of the forfeiture pursuant to 5 U.S.C. [§] 8129 [recovery of overpayments] and other relevant statutes.”<sup>10</sup>

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<sup>8</sup> 20 C.F.R. § 10.5(n).

<sup>9</sup> *Harold F. Franklin*, 57 ECAB 387 (2006).

<sup>10</sup> 20 C.F.R. § 10.529.

## **ANALYSIS -- ISSUE 2**

As noted, Office regulations provide that it may declare an overpayment of compensation for the period of a given forfeiture of compensation. If a claimant has any earnings during a period covered by a Form EN1032 which she knowingly fails to report, she is not entitled to any compensation for any portion of the period covered by the report, even though she may not have had earnings during a portion of that period.<sup>11</sup> The Office paid appellant compensation in the amount of \$18,031.15 from July 13, 2004 to August 27, 2005. The Office properly found that appellant forfeited her entitlement to compensation during this period, because she failed to report earnings from employment on her EN1032 form. Therefore, an overpayment of compensation in the amount of \$18,031.15 was created.

## **LEGAL PRECEDENT -- ISSUE 3**

Section 8129(b) of the Act<sup>12</sup> provides: Adjustment or recovery by the United States may not be made when 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.”

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).<sup>13</sup>

Whether or not the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding 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.<sup>14</sup>

## **ANALYSIS -- ISSUE 3**

The Office properly determined that appellant was at fault in the creation of the overpayment because she failed to provide information which she knew or should have known to be material on the EN1032 form dated August 27, 2005. The record establishes that she had

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<sup>11</sup> *Louis P. McKenna, Jr.*, 46 ECAB 328 (1994).

<sup>12</sup> 5 U.S.C. § 8129(b).

<sup>13</sup> 20 C.F.R. § 10.433(a).

<sup>14</sup> *Id.* § 10.433(b).

unreported self-employment and earnings during this period and knowingly failed to furnish this material information to the Office. Appellant signed a certification clause EN1032 form which advised her that she might be subject to civil, administrative or criminal penalties if she knowingly made a false statement or misrepresentation or concealed a fact to obtain compensation. By signing the form, she is deemed to have acknowledged her duty to fill out the form properly, including the requirement to report any employment activities and income. Appellant failed to furnish information which she knew or should have known to be material to the Office. As she is not without fault in creating the overpayment, it is not subject to waiver.

The Board notes that it does not have jurisdiction to review the Office's finding that the overpayment would be recovered in payments of \$250.00 a month. The Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act.<sup>15</sup>

#### **LEGAL PRECEDENT -- ISSUE 4**

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>16</sup> the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.<sup>17</sup> When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.<sup>18</sup>

#### **ANALYSIS -- ISSUE 4**

Appellant requested reconsideration on April 24, 2007 and submitted a back-up withholding warning from the IRS indicating that appellant's name was on a form with her sister's taxpayer identification number. This form is not relevant to the issue of whether appellant had earnings from self-employment during the period covered by the Form EN1032. Appellant was employed by DDA in May 2005 and PDC in August 2005 to deliver telephone books and received earnings from the companies for the delivery of telephone books. She contended that she transferred this money to her sister and that her sister reported this as income. However, appellant's contribution to her sister's income does not diminish the fact that the income was derived from her earnings from self-employment which she failed to report on the EN1032.

Appellant also submitted a statement dated April 24, 2007 denying that she worked at the employing establishment six hours a day in May and August 2005. This statement is not

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<sup>15</sup> *Judith A. Cariddo*, 55 ECAB 348, 353 (2004).

<sup>16</sup> 5 U.S.C. §§ 8101-8193, § 8128(a).

<sup>17</sup> 20 C.F.R. § 10.606(b)(2).

<sup>18</sup> 20 C.F.R. § 10.608(b).



relevant. The forfeiture statutes and regulations do not require that an employee be actively working at the employing establishment before other self-employment must be reported. Even if the hearing representative misstated that appellant was working at the employing establishment on the same dates as she was employed by DDA and PDC, it has no bearing on the issue of whether she had unreported earnings from employment during the period covered by the August 27, 2005 EN1032 form.

Appellant failed to submit relevant new evidence or argument establishing that she was not employed and had no earnings in the private sector during the period covered by the August 27, 2005 EN1032 form. The Office properly declined to reopen her claim for reconsideration of the merits.

### **CONCLUSION**

The Board finds that appellant forfeited her entitlement to compensation for the period July 13, 2004 to August 27, 2005, that she received an overpayment in the amount of \$18,031.15 for this period, for which she was at fault, and that therefore the overpayment was not subject to waiver. The Board further finds that the Office properly declined to reopen appellant's claim for consideration of the merits.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated May 9, 2007, December 18 and September 15, 2006 are affirmed.

Issued: May 19, 2008  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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