

while delivering mail on June 27, 1975. The Office accepted his claim for torn meniscus of the right knee and placed appellant on the periodic rolls.

As a benefit recipient, the Office periodically required appellant to submit updated information (Form EN1032) regarding his employment, volunteer work, dependents, other federal benefits or payments received and any third-party settlements. The reports required that appellant provide information covering the 15-month period preceding the date of the request. The reports contained a clear warning advising him that a false or evasive answer to any question or the omission of an answer, may be grounds for forfeiting his compensation benefits. The record contains EN1032 forms, signed by appellant on March 31, 1998, August 2, 1999, March 14, 2000, March 31, 2001 and August 10, 2002. In response to the question as to whether he worked for any employer during the previous 15 months, in each instance appellant answered, "No." In response to the question as to whether appellant was self-employed or involved in any business enterprise in the previous 15 months, he responded, "No." Appellant answered "Yes" when asked to state whether he was unemployed for all periods during the previous 15 months.

In an investigative memorandum dated July 24, 2002, the Office of the Inspector General informed the Office that appellant had participated in an educational supply business, Educate-Um, for 14 years, 5 years at the current location at 215 West Main Street, Farmington, NM. Undercover agent and a postal inspector observed appellant working in the store alone on numerous occasions from September 9, 1998 to August 16, 2001, waiting on customers, selling merchandise, talking on the telephone, accepting deliveries and opening and closing the store. In a taped conversation, which took place on May 10, 2001, appellant told the postal inspector that he and his wife had formed an "S" corporation in order to obtain tax benefits. He stated that he advertised via television, newspapers and radio. On August 16, 2001 appellant informed the inspectors that, though his wife owned the business, he was the president of the company and that he normally worked a 40-hour week, doing paperwork in the morning in his back office and waiting on customers in the afternoon. He stated that he had customers from all over New Mexico and that he was trying to get more internet orders through his company web site. Appellant told the inspector that he had applied to the Government Services Administration to become a supplier. He indicated that he was in charge of pricing and paying bills and that he conducted an inventory once a year. Appellant provided the inspector with an Educate-Um business card on which he had written his name.

The record contains a copy of a September 1, 1994 lease agreement between appellant, who was identified as "tenant" and Myron C. Taylor and Revis W. Taylor, identified as "landlord[s]." The lease provided that the premises located at 215 West Main Street, Farmington, NM, would be leased to appellant for a one-year term, which would be automatically renewed at the end of the lease term unless terminated by written notice 30 days prior to the end of the term. The record also contains correspondence between appellant and the landlords reflecting that he made rental payments and dealt with management issues, on behalf of Educate-Um. In a letter dated May 20, 1997, Myron Taylor informed appellant and his wife that he had transferred his interest in the rental property to his sons. In a letter dated May 15, 2000, which was accompanied by a rental payment, appellant advised the landlord that the business would remain open as long as his health permitted. In a September 11, 2001 letter, he provided the landlord with a notice of intent to vacate the property. Appellant informed the landlord that he had performed many functions in order to mitigate any damage to the property,

including ladder climbing. In a June 6, 2003 statement, Sabrina Taylor indicated that appellant routinely contacted her concerning rental payments and problems concerning the rental property.

In a September 9, 1998 criminal damage property report, investigator Daryl T. Noon stated that he responded to a report of vandalism at the Educate-Um location on August 16, 1998. He indicated that appellant, who he identified as “the responsible party,” stated that “this is the third time in one week his business has been vandalized.”

On September 15, 1998 Michael Masko, injury compensation research assistant, stated that he purchased a “Beanie Baby” from appellant, who was alone in the Educate-Um location. Appellant reportedly informed Mr. Masko that he had been in business at the existing location for five years.

On August 27, 2002 the inspectors interviewed appellant at his residence. Appellant denied that he worked at Educate-Um, stating that his wife ran the business. When confronted with the fact that he had been observed working inside the store and selling merchandise, he claimed that these actions did not constitute “working.”

The record contains a report dated August 23, 2002 from the New Mexico Regulation Commission, reflecting that the corporate status of Educate-Um had been revoked. The report indicates that appellant was president and director of the corporation effective June 1, 1996.

In a statement dated August 27, 2002, Ramona Clevenger, mail carrier, indicated that she had been delivering mail to Educate-Um at the Farmington, NM location for approximately 10 years. She stated that, on most occasions, appellant was in the store, ringing sales, waiting on customers and answering the telephones. Ms. Clevenger reported that she had purchased merchandise from appellant. She stated that most of the mail she delivered was addressed to both appellant and Educate-Um.

In an April 21, 2006 investigative report, a postal inspector recounted reports and cited evidence that appellant had been engaged in business at Educate-Um since 1988. He reiterated that appellant was a corporate officer and worked in the store 40 hours per week, waiting on customers, selling merchandise, talking on the telephone, accepting deliveries, opening and closing the store and paying bills. The inspector stated that appellant had offered to sell the business to Inspector Jack Scholl for \$95,000.00 on May 10, 2001.

In a September 29, 2006 memorandum of forfeiture, the Office found that compensation should be forfeited for all periods covered by EN1032 forms completed by appellant between March 31, 1998 and August 10, 2002 and that he was at fault for any overpayment thereby created. Accordingly, it determined that appellant forfeited the amount of \$23,053.23 for the period December 31, 1996 to March 30, 1998 and the amount of \$85,327.42 for the period March 31, 1998 to August 10, 2002.

The record contains a payment history, bearing a run date of August 7, 2002, reflecting that appellant was paid compensation in the total amount of \$87,902.54 for the period January 1, 1998 to August 10, 2002.

On October 6, 2006 the Office issued a proposal to reduce appellant's compensation based on his ability to earn the wages of a retail sales clerk. In response to the Office's proposed reduction, appellant stated that, from time to time, he had helped with paperwork, with customers and with pricing, but that he had never received any money and had not worked 40 hours per week. He did not deny that he had sold items to customers, but claimed that inventory was depleted. By decision dated December 8, 2006, the Office reduced appellant's compensation benefits, based on his ability to earn the wages of a retail sales clerk.

On December 8, 2006 the Office issued a preliminary finding of overpayment in the amount of \$108,380.65 due to appellant's failure to notify the Office of earnings from his Educate-Um business from December 31, 1996 to August 10, 2002. Finding that appellant was at fault in the creation of the overpayment by knowingly misrepresenting his employment status during the periods covered by EN1032 forms signed by him from March 31, 1998 to August 10, 2002, the Office concluded that he had forfeited his right to compensation for the period December 31, 1996 to August 10, 2002. It provided a calculation of the overpayment, based on compensation received by appellant from December 31, 1996 to March 30, 1998 in the amount of \$23,053.23 and from March 31, 1998 to August 10, 2002 in the amount of \$85,327.42, for a total overpayment amount of \$108,380.65. The Office informed appellant that he had 30 days to request a preresoupment hearing on the issues of fault and a possible waiver.

On October 13, 2006 appellant submitted an overpayment recovery questionnaire in which he denied having received an overpayment. He contended that the documents provided to him did not require him to report a business owned by his wife.

By decision dated February 5, 2008, an Office hearing representative finalized the overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$108,380.65, due to his falsification of EN1032 forms from March 31, 1998 to August 10, 2002 and that he was at fault in the creation of the overpayment and, therefore, was not entitled to a waiver of recovery. The Office directed recovery in the full amount within 30 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of the Federal Employees' Compensation Act provides that an employee who "fails to make an affidavit or report when required or 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."¹

The Office has the burden of proof to establish that appellant did, either with knowledge, consciously, willfully or intentionally, fail to report earnings from self-employment. To meet this burden of proof, it is required to closely examine appellant's activities and statements in reporting employment earnings.²

¹ 5 U.S.C. § 8106(b)(1) and (2).

² See *Michael D. Mathews*, 51 ECAB 247 (1999).

The Office may meet this burden by appellant's own subsequent admission to the Office that he failed to report employment or earnings, which he knew he should report. It may meet this standard without an admission by appellant, if he failed to fully and truthfully complete the EN1032 forms and the circumstances of the case establish that he failed to fully and truthfully reveal the full extent of his employment activities and earnings. The Office may also meet this burden if it establishes through the totality of the factual circumstances that appellant's certification in the EN1032 forms that he was not employed or self-employed, was false.³

ANALYSIS -- ISSUE 1

The record contains EN1032 forms signed by appellant on March 31, 1998, August 2, 1999, March 14, 2000, March 31, 2001 and August 10, 2002, stating that he was unemployed, had not engaged in any self-employment activities and earned no income for the respective 15-month periods prior to the signing of the documents.⁴ The record, however, contains clear evidence to the contrary and reflects that he failed to report his employment activity during those periods of time. Although appellant alleged that he did believe that EN1032 forms required him to report his wife's business activity, he did not deny that he helped out with paperwork and pricing or that he sold items to customers. The Board has held that, if work was performed in furtherance of a relative's business, the employee must show as the rate of pay what it would have cost the employer or organization to hire someone to perform the work performed. The Board has held that the test of what constitutes reportable earnings is not whether appellant received a salary but what it would have cost to have someone else do the work. Appellant took an active role in the operation of the store and was obligated to report as earnings the amount that would have been paid to a person doing the work.⁵

The Office regulations define "knowingly" as "with knowledge, consciously, willfully or intentionally."⁶ Absent an admission by appellant, a knowing omission or understatement of income can be established where circumstances indicate that he did not fully and truthfully complete EN1032 forms and thus failed to reveal the full extent of his employment activities and earnings.⁷

The evidence establishes that appellant and his wife operated Educate-Um, an ongoing business enterprise since 1994 at least, when he entered into a lease agreement on behalf of the business. He served as president and director of the corporation. Appellant leased the premises in which the business operated and was responsible for paying the rent, as well as other bills associated with the operation of the business. He placed advertisements for the business in the newspapers and on television. Appellant worked regularly in the store, where he priced and sold

³ See *Donald L. Overstreet*, 54 ECAB 678 (2003). See also *Terryl A. Geer*, 51 ECAB 168 (1999).

⁴ The Board notes that the respective 15-month periods referenced are as follows: December 31, 1996 to March 31, 1998; May 2, 1998 to August 2, 1999; December 14, 1998 to March 14, 2000; December 31, 1999 to March 31, 2001; and May 10, 2001 to August 10, 2002.

⁵ *Anthony A. Nobile*, 44 ECAB 268 (1992).

⁶ 20 C.F.R. § 10.5(n) (2006).

⁷ See *Donald L. Overstreet*, *supra* note 3.

merchandise to customers, answered telephones, received deliveries and mail and conducted inventories. He handed out business cards, bearing the name of the business, as well as his own name. Appellant made an offer to sell the business to an undercover agent for \$95,000.00. The Board finds that appellant's work and management activities are consistent with self-employment in furtherance of his family business and that his actions constitute persuasive evidence that he knowingly misrepresented his employment status on the EN1032 forms.

Appellant expressed his belief that his wife's business was not a forbidden activity that he was required to report. However, he was clearly informed by the Office that he had an affirmative obligation to report any work or ownership interest in any business enterprise and that his failure to do so would result in forfeiture of compensation. Therefore, the Board finds appellant's claim of ignorance to be without merit.

Office regulations provide that, if an employee knowingly omits or understates 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.⁸ Appellant misrepresented his employment status and, therefore, forfeited his right to all compensation during the periods in question. The Board finds that the Office met its burden of proof to establish that appellant knowingly misrepresented his employment status to the Office in the EN1032 forms dated March 31, 1998, August 2, 1999, March 14, 2000, March 31, 2001 and August 10, 2002. Therefore, appellant is required to forfeit the amount of compensation received during the 15-month period preceding the signing of the aforementioned reports.

The Board finds that the evidence of record is insufficient to determine the amount of compensation that should be forfeited. It appears from the record that the Office made its determination based solely on inaccurate information provided on EN1032 forms. The Office found that appellant had forfeited compensation in the total amount of \$108,380.65, representing compensation received from December 31, 1996 to August 10, 2002. However, the Board notes that the EN1032 forms signed by appellant do not cover that entire period. The respective 15-month period referenced above, during which compensation received is forfeited, are as follows: December 31, 1996 to March 31, 1998; May 2, 1998 to August 2, 1999; December 14, 1998 to March 14, 2000; December 31, 1999 to March 31, 2001; and May 10, 2001 to August 10, 2002. The periods from March 31 to May 2, 1998 and from March 31 to May 10, 2001, fall outside the 15-month period preceding the signing of any form. Therefore, the Office's February 5, 2008 decision is reversed as it applies to these periods. The record does not provide a breakdown of compensation received by appellant from March 31, 1998 to August 10, 2002. Additionally, the record does not contain documentation of the amount of compensation received from December 31, 1996 to March 31, 1998. As the Board is unable to determine the exact amount of compensation received by appellant during these periods, the case must be remanded to the Office for recalculation and an appropriate decision.

⁸ 5 U.S.C. § 8106(b)(1) and (2).

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 forfeiture pursuant to 5 U.S.C. [§] 8129 [recovery of overpayments] and other relevant statutes.”⁹

ANALYSIS -- ISSUE 2

If a claimant has any earnings during a period covered by a Form CA-1032 (or Form CA-8), which he or she knowingly fails to report, he or she is not entitled to any compensation for any portion of the period covered by the report, even though he or she may not have had earnings during a portion of that period.¹⁰ The Board has determined that appellant forfeited compensation for various periods identified herein because he misrepresented his employment activities on EN1032 forms covering these periods. The Board finds that there exists an overpayment of compensation as a result of the forfeiture. However, for reasons stated above, the amount of overpayment cannot be determined at this time and the Board's February 5, 2008 overpayment decision is reversed as it applies to the periods outside the periods of forfeiture, namely, the periods from March 31 to May 2, 1998 and from March 31 to May 10, 2001. The case will be remanded for recalculation of the overpayment amount, which should correspond to the compensation received during the periods of forfeiture.¹¹

LEGAL PRECEDENT -- ISSUE 3

Section 8129(b) of the Act¹² provides that “[a]djustment 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 this subchapter or would be against equity and good conscience.” Section 10.433 of the Office's implementing regulation¹³

⁹ 20 C.F.R. § 10.529.

¹⁰ *Louis P. McKenna, Jr.*, 46 ECAB 328 (1994).

¹¹ The Board concludes that periods of forfeiture were from December 31, 1996 to March 31, 1998; May 2, 1998 to August 2, 1999; December 14, 1998 to March 14, 2000; December 31, 1999 to March 31, 2001; and May 10, 2001 to August 10, 2002. The amount of compensation received by appellant during these periods constitutes an overpayment.

¹² 5 U.S.C. § 8129(b).

¹³ 20 C.F.R. § 10.433.

provides that in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

“(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.”

ANALYSIS -- ISSUE 3

The Office found that appellant was at fault in the creation of the overpayment because he knowingly accepted compensation to which he was not entitled. The record establishes that appellant was engaged in employment activity during the alleged periods and knowingly failed to furnish this material information to the Office.

Appellant signed a certification clause on CA-1032 forms dated March 31, 1998, August 2, 1999, March 14, 2000, March 31, 2001 and August 10, 2002. In response to the question as to whether he worked for any employer during the previous 15 months, in each instance he answered, “No.” In response to the question as to whether he was self-employed or involved in any business enterprise in the previous 15 months, appellant responded, “No.” He answered “Yes” when asked to state whether he was unemployed for all periods during the previous 15 months. The certification clause advised appellant that he might be subject to civil, administrative or criminal penalties if he knowingly made a false statement or misrepresentation or concealed a fact to obtain compensation. Thus, by signing the form, he is deemed to have acknowledged his duty to fill out the form properly, including the duty to report any employment or self-employment activities. The evidence of record, therefore, shows that appellant was aware or should have been aware of the materiality of the information that he was engaged in work activities which he had not listed on the relevant forms. As he failed to provide information to the Office regarding his employment during the periods covered by the forms, the Board finds that he is at fault in creating the overpayment based on his forfeiture of compensation for these periods and, therefore, is not entitled to waiver.¹⁴

CONCLUSION

The Board finds that appellant forfeited his entitlement to compensation for the periods December 31, 1996 to March 31, 1998; May 2, 1998 to August 2, 1999; December 14, 1998 to March 14, 2000; December 31, 1999 to March 31, 2001; and May 10, 2001 to August 10, 2002, because he knowingly failed to report employment activities. The Board also finds that appellant

¹⁴ The Board does not have jurisdiction to review the Office’s finding that appellant should repay the amount of the overpayment in full. The Board’s jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act. *See* 20 C.F.R. § 10.441(a); *L.C.*, 59 ECAB ____ (Docket No. 08-209, issued June 16, 2008), n. 24, *citing Ronald E. Ogden*, 56 ECAB 278 (2005).

received an overpayment of compensation during the periods of the forfeiture and that he was at fault in the creation of the overpayment and, thus, not entitled to waiver. The Board further finds that the case is not in posture for a decision as to the amount of compensation to be forfeited or the amount of overpayment and the case must be remanded for recalculation of the forfeiture and overpayment amounts as delineated above.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 5, 2008 is affirmed in part, reversed in part and remanded for action in accordance with the provisions of this decision and for an appropriate order.

Issued: January 21, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board