

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EUGENE H. TAYLOR and DEPARTMENT OF THE ARMY,
WILL ROGERS ARMY NATIONAL GUARD BASE, Oklahoma City, Okla.

*Docket No. 96-551; Submitted on the Record;
Issued August 14, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office properly adjusted appellant's compensation to reflect his wage-earning capacity in the position of social worker; (2) whether the Office of Workers' Compensation Programs properly found that appellant forfeited his compensation for the period from February 24, 1994 through May 24, 1995 because he knowingly failed to report his employment activities; and (3) whether the Office properly found that appellant was at fault in the creation of a \$19,131.28 overpayment of compensation and therefore the overpayment is not subject to waiver.

On December 12, 1990 appellant, then a 40-year-old fuel specialist, filed a claim alleging that he fell on concrete and injured his head, neck, back and legs. The Office accepted appellant's claim for a low back sprain and depression. Appellant received temporary total disability benefits until October 2, 1994 when he returned to work for the Oklahoma Department of Human Services as a social worker. By decision dated June 6, 1995, the Office reduced appellant's compensation based on his wage-earning capacity as a social worker at the weekly rate of \$390.80 effective February 27, 1995.¹

By letter dated June 23, 1995, appellant requested reconsideration of the June 6, 1995 decision and submitted medical evidence to support his claim. In a report dated May 15, 1995, Dr. Scott A. Mitchell, an osteopath, recommended that for a two-week period appellant work four hours a day or less with no more than five minutes of walking per hour. In a report dated June 12, 1995, Dr. S. Fulton Tompkins, a Board-certified orthopedic surgeon, opined that appellant should continue half-time work which should be nearly 100 percent sedentary as possible and that standing, walking and driving a motor vehicle should be minimized. Dr. Tompkins stated that following the bombing of the Murrah Federal Building in Oklahoma City on April 19, 1995, appellant sometimes worked up to 18 hours a day counseling victims and

¹ In making this calculation, the Office computed the difference between appellant's wages when injured and his current wage-earning capacity as a social worker.

relatives which considerably “flared up his symptoms.” Dr. Tompkins stated that appellant said that he had a temporary dorsal column stimulator placed in his spine in August 1994 and subsequently went through surgeries to adjust, replace and finally remove the unit.

In a report dated September 15, 1995, Dr. Tompkins stated that appellant had told him that he found a job with physical requirements which he felt were within his current limitations and which he could perform satisfactorily eight hours a day. He stated that he saw no reason for restricting appellant from performing that job. Dr. Tompkins stated that as a current comment to his June 12, 1995 report, he “underestimated [appellant’s] incentives to work and placed too much weight on the handicap [appellant had] and the difficulties he would encounter.”

By decision dated September 28, 1995, the Office denied appellant’s request. The Office noted that if the exacerbation of appellant’s condition was aggravated by his employment for the state of Oklahoma, then appellant should consider filing a state workers’ compensation claim. The Office also noted that appellant had secured a new job but did not identify that it paid less than appellant’s social worker position but “it had not been shown” that his earnings from that job would further reduce his compensation benefits. The Office found appellant’s pay rate of \$9.77 an hour as a full-time social worker for the Oklahoma Department of Human Service fairly and reasonably represented his wage-earning capacity.

By letter dated October 16, 1995, appellant requested reconsideration of the decision. Appellant stated that he told his rehabilitation counselor that he started working for the Department of Human Services in July 1994. He stated that when he was helping the families from the Murrah building bombing, he worked 12 hours a day the first two days and then 8 to 10 hours a day at most, mostly sitting and that was not his usual job. Appellant denied that he worked full time since October 2, 1994 because he underwent surgery from August through November 1994 for adjustment to the dorsal stimulator. To support his reconsideration request, appellant submitted reports from Dr. Mitchell dated from June 1994 to May 1995 documenting the surgeries he underwent and his progress. Appellant also submitted Form EN-1032 dated May 24, 1995 in which he stated that in the past 15 months he worked from August 1994 through May 1995 but only half days in May. Appellant stated he volunteered to work 120 hours for the Red Cross for three weeks from April 19 to May 8, 1995.

By decision dated November 9, 1995, the Office denied appellant’s request.

By notice dated November 20, 1995, the Office advised appellant of its preliminary finding that an overpayment of compensation occurred in his case in the amount of \$19,131.28 because he failed to report all his earnings for the period from February 24, 1994 through May 24, 1995 and therefore his compensation for that time period was forfeit. The Office found that appellant was with fault in the creation of the overpayment because he knowingly failed to report all of his employment as required by Federal Employees’ Compensation Act. The Office informed appellant that he had 30 days from the date of the notice to submit additional evidence or request a pre-recoupment hearing.

By decision dated November 20, 1995, the Office finalized the forfeiture, stating that appellant’s compensation from February 24, 1994 to May 24, 1995 was forfeited based on his failure to report his earnings for that time period. The Office found that appellant knowingly

omitted the starting date of his employment because on Form EN-1032 dated May 22, 1994 he stated that his employment with Department of Human Services as a social worker began in August 1994 while a Department of Human Services employee informed the Office on November 9, 1995 that appellant commenced working on July 5, 1994 and worked through June 14, 1995. Further, appellant informed the rehabilitation counselor in August and September 1994 that he was looking for work and did not correct the Office when he received the November 3, 1994 notice of wage reduction effective October 3, 1994 indicating that his employment began on that date.

The Board finds that the Office has met its burden of proof in establishing that the position of social worker reasonably represents appellant's wage-earning capacity.

Under section 8115(a) of Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent his wage-earning capacity or if the employee has not actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.²

Once an employee's loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, of the original determination was, in fact, erroneous.³ The burden of proof is on the party attempting to show modification of the award, in this case, appellant.⁴

The Office found that appellant's actual wages as a social worker fairly and reasonably represented his wage-earning capacity and therefore relied on those wages in determining appellant's compensation. Appellant did not show that there was a material change in the nature and extent of his injury-related condition or that he was unable to perform the job of social worker. The documents from Dr. Mitchell dated from June 1994 to May 1995 document the surgeries appellant underwent and his progress but do not address appellant's restrictions or the nature of the work he could perform. In his September 15, 1995 report, Dr. Tompkins stated there was no reason for appellant to be restricted from working eight hours in his current job and that, in his June 12, 1995 report in which he restricted appellant to working half days, he underestimated appellant's incentives to work and placed too much weight on the handicap appellant had and the difficulties he would encounter. The Office therefore properly adjusted appellant's compensation to reflect his wage-earning capacity as a social worker.

² See *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *petition for recon. denied*, (Docket No. 92-118, issued February 11, 1993); see also 5 U.S.C. § 8115 (a).

³ *Don J. Mazurek*, 46 ECAB 447, 451, 452 (1995); *Sue A. Sedgwick*, 45 ECAB 211, 215-16 (1993)

⁴ *Sue A. Sedgwick*, *supra* note 3 at 216.

The Board further finds that the Office properly found that appellant forfeited his right to compensation for the period from February 24, 1994 through May 24, 1995 because he knowingly failed to report his employment activities.

Section 8106(b) of the Act⁵ states 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.... 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 ... under section 8129 of this title, unless recovery is waived under that section.”⁶

Appellant, however, can only be subjected to the forfeiture provision of section 8106(b) of the Act if he “knowingly” failed to report earnings from employment or self-employment. As forfeiture is a penalty, it is not enough merely to establish that there were unreported earnings.⁷ Being a penalty provision, the forfeiture provided for in section 8106(b) of the Act must be narrowly construed.⁸ The term “knowingly” is not defined in the act or its regulations. In common legal usage, “knowingly” is defined as: “with knowledge; consciously; intelligently; willfully; intentionally.”⁹

The Office has the burden of proof in establishing that appellant, either with knowledge, consciously, willfully or intentionally, failed to report employment or earnings.¹⁰ To meet this burden of proof, the Office is required to closely examine appellant’s activities and statements in reporting employment or earnings.¹¹ The Office may meet this burden in several ways: by employee’s own admission to the Office that they failed to report employment or earnings which he knew he should report; by establishing that appellant has pled guilty to violating applicable federal statutes by falsely completing the affidavits in the Form CA-1032;¹² or by showing that,

⁵ 5 U.S.C. § 8106(b)(1974).

⁶ *Garry Don Young*, 45 ECAB 621, 627 (1994).

⁷ *Barbara Hughes*, 47 ECAB _____ (Docket No. 94-2533, issued March 13, 1997); *Charles Walker*, 44 ECAB 641 (1993).

⁸ *Barbara Hughes*, *supra* note 7; *Anthony A. Nobile*, 44 ECAB 268, 271-72 (1992).

⁹ Black’s Law Dictionary (5th ed. 1979).

¹⁰ *Barbara Hughes*, *supra* note 7; *Barbara L. Kanter*, 46 ECAB 165, 169 (1994).

¹¹ *Barbara Hughes*, *supra* note 7; *see Royal E. Smith*, 44 ECAB 417, 419 (1993).

upon further inquiry by the Office as to employment activities, the employee continued not to fail to fully and truthfully reveal the full the nature of the employment activities.¹³

In the present case, the evidence of record establishes that appellant failed to report his earnings as a social worker for Department of Human Services from July through October 3, 1994. In a notation of a telephone call dated November 9, 1995, the Office stated that a Department of Human Services employee informed the Office that appellant started working for the employing establishment from July 5, 1994 through June 14, 1995. In appellant's October 16, 1995 request for reconsideration, appellant stated that he reported to his rehabilitation counselor that he started to work for Department of Human Services in July 1994 and he in fact started working on that date. In contrast to this evidence, the August and September 1994 notes of the rehabilitation counselor indicate that in August and September 1994 appellant informed him he was looking for work and being interviewed. On December 16, 1994 appellant told the counselor he commenced working in September 1994. Appellant did not correct the Office when he received the Office's November 3, 1994 notice of wage reduction informing him that he began employment on October 2, 1994. The Board therefore finds that appellant knowingly understated his earnings for the period from July to October 3, 1994 and that he forfeited his right to compensation for the period from February 24, 1994 through May 24, 1995.

The Board further finds that appellant received an overpayment of compensation in the amount of \$19,131.28. The Office correctly determined the amount of the overpayment, \$19,131.28, as the total amount of compensation appellant received during the period from February 24, 1994 through May 24, 1995. The Office made its calculation based on the figures from its employment standards administration computer printout dated November 14, 1995. The calculation of \$19,131.28 is proper and, for the reasons stated above, appellant was not entitled to this compensation due to his forfeiture of entitlement to compensation for this period.

The Board further finds that the Office properly determined that appellant was at fault in the creation of the overpayment of compensation and that, therefore, the overpayment was not subject to waiver.

Section 8129(b) of the Act¹⁴ 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 of be against equity

¹² *Barbara Hughes, supra* note 7; *Barbara L. Kanter, supra* note 10 at 169-70 (1994).

¹³ *Id.*

¹⁴ 5 U.S.C. § 8129(b).

and good conscience.¹⁵ Adjustment or recovery must therefore be made when an incorrect payment has been made to an individual who is with fault.¹⁶

The implementing regulation¹⁷ provides that a claimant is with fault in the creation of an overpayment when he: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; (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.

The Office also correctly determined that appellant was with fault in the creation of this overpayment, as he knowingly made incorrect statements as to material facts and failed to furnish information he knew or should have know to be material. As noted above, evidence of record establishes that appellant commenced working for Department of Human Services in July 1994. Appellant had several opportunities in the following two months to inform the Office that he had started working but on Form EN-1032 dated May 24, 1995 he stated that his employment with Department of Human Services began in August 1994 and in August and September 1994 he told the rehabilitation counselor he was looking for work and interviewing, thereby representing that he was not working. Further, appellant did not object to the Office's finding in its November 3, 1994 notice of wage reduction that he commenced working on October 2, 1994. As appellant is with fault in its creation, the overpayment of compensation cannot be waived.¹⁸

¹⁵ *Philip G. Arcadipane*, 48 ECAB _____ (Docket No. 95-1024, issued June 6, 1997); *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

¹⁶ *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

¹⁷ 20 C.F.R. § 10.320(b).

¹⁸ See *Barbara L. Kanter*, *supra* note 10 at 171 (1994).

Accordingly, the decisions of the Office of Workers' Compensation Programs dated November 20, November 9, September 28 and June 6, 1995 are hereby affirmed.

Dated, Washington, D.C.
August 14, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member