

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANTHONY V. KNOX and TENNESSEE VALLEY AUTHORITY,
HARTSVILLE NUCLEAR PLANT, Hartsville, Tenn.

*Docket No. 96-725; Submitted on the Record;
Issued May 26, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant forfeited compensation from April 17, 1986 through April 30, 1992; and (2) whether the Office properly found that appellant was not without fault in the matter of the overpayment of compensation.

In the present case, the Office accepted that appellant, a boilermaker, sustained a low back injury in the performance of duty on August 31, 1979. Appellant was placed on the periodic rolls for payment of temporary total disability benefits in July 1980. Appellant has not returned to work at the employing establishment since that time. In an April 14, 1993 report, the manager of General Investigation, Office of the Inspector General, for the employing establishment stated that during the period April 17, 1986 to April 30, 1992 appellant knowingly made false statements concerning his self-employment activities on annual disclosure statements (OWCP Forms EN-1032) by failing to report that he was actively involved in the operation and management of his own and his family's rental properties and that he was actively involved in the operation of his own farm.

On November 29, 1994 the Office advised appellant that a preliminary determination had been made that an overpayment of compensation had occurred in his case in the amount of \$175,218.69 because appellant failed to report his self-employment income on EN-1032 forms during the period April 17, 1986 to April 30, 1992 and therefore compensation received during this period had been forfeited. The Office also advised appellant that a preliminary finding had been made that he was at fault in this matter because, in completing and signing the EN-1032 forms, he should have known or been reasonably aware that he was to report his self-employment income. Appellant thereafter requested a precoupment hearing before an Office hearing representative.

By decision dated October 17, 1995 and finalized October 20, 1995, the Office hearing representative affirmed the Office's finding that appellant had forfeited all compensation paid

from April 17, 1986 through April 30, 1992 and had therefore received an overpayment of compensation in the amount of \$175,218.69 which was not subject to waiver. The hearing representative also found that, pursuant to Office procedure, the debt principal would be compromised to \$150,246.98 to reduce the repayment period to 236.55 months.

The Board finds that the Office properly determined that appellant forfeited all compensation received during the period April 17, 1986 to April 30, 1992.

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. The employee shall include in the affidavit or report the value of housing, board, lodging, and other advantages which are part of his earnings in employment or self-employment and which can be estimated in money. 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.”¹

This section of the Act is further defined by regulation² which, in addition to reiterating that a knowing omission or understatement of any earnings or remuneration shall result in forfeiture, provides a definition of earnings. Regarding “earnings” arising from self-employment, this regulation provides: “In general, earnings from self-employment means a reasonable estimate of the rate of pay it would cost the employee to have someone else perform the work or duties the employee is performing.” Therefore section 8106(b) of the Act, when read together with its implementing regulation, requires that a self-employed individual, even if he has no monetary earnings, report an estimate of the advantages he has accrued by the performance of his self-employment activities, by providing a reasonable estimate of the rate of pay it would cost to have someone else perform the work he was performing. This requirement recognizes that an individual who works for himself may in fact accrue advantages, which would not be typical earnings in a standard employment setting, but which nevertheless may accrue to his benefit and thus constitute earnings. Section 8106(b) of the Act clearly envisions that all “earnings,” whether cash or in kind, from employment or self-employment activities, shall be reported to the Office.

In the present case, the Office was first required to establish that appellant failed to make an affidavit or report when required. In determining whether the Office properly determined the period of forfeiture, the record must therefore establish that appellant signed EN-1032 affidavits

¹ 5 U.S.C. § 8106(b).

² 20 C.F.R. § 10.125(c).

or other reports for the time period in question and that such affidavits or reports did omit or understate earnings or remuneration.

In the present case, appellant submitted EN-1032 forms covering the period April 17, 1986 to April 30, 1992 indicating he was not employed and had no earnings during this period. Appellant submitted EN-1032 forms dated March 3, 1987, June 9, 1988, May 8, 1989, May 10, 1990, May 30, 1991 and April 30, 1992. In a letter to the Office dated May 1, 1992, appellant advised that he was not self-employed but had worked around his farm to show his daughter how to work equipment so that she could make some money for college costs. Appellant stated that during the past 15 months he probably performed about 50 hours of work on the farm, for which he could have hired someone at minimum wage. Appellant also stated that he performed some “emergency” work on rental property that his mother and his wife owned for approximately 40 hours. Appellant stated that he had not received pay for any of this work and that after reading the EN-1032 form he understood he was to report this work activity. The record therefore establishes that appellant signed affidavits or reports during the time period in question indicating that he had no earnings or self-employment.

The record also establishes that appellant was in fact self-employed and therefore was required to report “earnings” from his self-employment. In the present case, appellant owned investment properties and performed maintenance activities for his properties and other rental properties owned by his family. Appellant was required to report his “earnings” from his self-employment activities.

The record establishes that as of 1992, appellant and his wife owned seven properties, based on records of the Reha County, Dayton, Tennessee, Property Assessor. On August 10, 1987 appellant filed a loan application for money to perform repairs on his home and a rental property. In a 1987 Internal Revenue Service (IRS) form, appellant indicated that he had earned \$2,525.00 from rental income on a mobile home and had actively participated in the operation of the rental property. On a loan application dated October 18, 1990, for payoff of a previous loan for purchase of a tractor, appellant reported annual rental income of \$12,659.96 and net worth of \$186,050.00.

Furthermore, the record establishes that 16 current or former tenants who rented property from appellant or his family during the period 1987 to 1992 made statements regarding appellant’s involvement in the maintenance and management of his and his family’s rental property. Six tenants stated that they contacted appellant directly for maintenance work, and three others stated that they contacted appellant’s mother and appellant responded to the maintenance calls. Five tenants stated that they saw appellant perform the following activities from the fall of 1987 to August 1992: operating a backhoe while digging a fuel line to a rental mobile home; installing siding on a house; installing a gas heater in a mobile home; working on a septic tank; repairing two broken windows and helping build a roof; repairing a faulty bathroom sink; and repairing the roof of a house. A housing inspector for the Dayton Housing Authority reported in 1992 that during the last six and one half years’ time he had been inspecting homes for appellant and his wife, he had coordinated his inspection efforts equally between the two. In a 1987 IRS schedule E, completed on February 5, 1988, appellant is listed as the owner of rental property described as a mobile home. This schedule E also indicates by a

check mark, yes, that appellant did actively participate in the operation of the rental property. In an affidavit dated December 3, 1992, Michael King stated that he had rented a house from appellant in the fall of 1987 until May 1988. Mr. King stated that he verbally entered into the rental agreement with appellant. He stated that he was unable to move into the house for approximately one month because the house was undergoing remodeling. During the month wait, he went by the house three or four times and always observed appellant alone at the house during the remodeling. Mr. King related that he moved into the house and, if he had any difficulty, he would call appellant's mother and appellant would arrive to check out the problem. He also related that appellant would inspect the house and left one or two notes regarding the neatness of the house. Mr. King stated that appellant personally evicted him in May 1988. Finally, Mr. King related that he had observed appellant working on a septic tank on a trailer home near the house he was renting during the fall of 1987. In an affidavit dated December 3, 1992, Edwin Bagget stated that he had rented a home from appellant from May 1988 until July 1989. Mr. Bagget stated that he had first met appellant to inspect the property and reach a verbal agreement concerning the rent. He stated that when he moved into the house there was no heat and appellant stated he would install a gas heater. Mr. Bagget stated that he observed appellant install a gas heater in his home. Mr. Bagget stated that occasionally he would observe appellant and his brother operating a bulldozer and backhoe on a vacant lot across the street from the house he was renting. He also observed appellant operating a backhoe while installing a fuel line for one of his rental trailers. Further, Mr. Bagget stated that he observed appellant installing outside siding on the house he was renting.

During an interview held on September 9 and 11, 1992 with an inspector from the Office of the Inspector General, appellant stated that he had rental property in Graysville, Tennessee, which was registered in his and his wife's name but that this rental property was actually owned by his son, Anthony V. Knox, Jr., his wife and his mother. Appellant stated that he had received no income from the rental property and was not actively involved in the operation or upkeep of the property. Appellant stated that on May 1, 1992 he had written the Office to report that he had completed approximately 40 hours of emergency repair work on rental property owned by his wife and mother because his brother, Mike Knox, had been convicted in Federal Court for violating Office guidelines. Appellant stated that his mother collected the rent from all the rental property tenants and that his wife took care of the rental property, including contracts, problems, mowing the yards and inspections. Appellant requested that his mother not be interviewed as she "gets things confused" and was in bad health. Appellant also stated that he would evict any of his rental property tenants if they made statements to the investigator against him.

The Board has held that there is a distinction between income received from investment, and earnings received by performing work. The former is not considered to be evidence of a claimant's ability to work and earn wages but a return on investment while the latter is considered to be wages if the source of income can be established to be the product of the claimant's work.³ In the case of *Gregg B. Manston*,⁴ the Board found that, while passive land investment can be considered an investment, activity such as property management can be

³ *Burnett Terry*, 46 ECAB 457 (1995).

⁴ 45 ECAB 344 (1994).

considered employment from which appellant might derive earnings as the product of his work. The Board has explained in other cases that management activities are considered employment activities if someone would be hired to perform such activities, if the claimant was not performing such.⁵ The distinction to be made is between passive business investment profit and active work resulting in earnings. Before the Office can declare a forfeiture of compensation, it must establish that appellant has received earnings from his own employment, not from passive investment in business ventures. The evidence of record in this case establishes that appellant was an investor in real estate transactions and owned multiple rental properties but that he was also an active manager of his own and his family's properties from which he derived earnings. The witness statements of records establish that appellant did engage in self-employment activities from 1987 to 1992 which he was required to, but did not report to the Office.

Appellant, however, can only be subjected to the forfeiture provision of 5 U.S.C. § 8106(b) if he "knowingly" failed to report 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.⁶ The term "knowingly" is not defined within the Act or its regulations. The Board has adopted the common usage definition of "knowingly": "with knowledge; consciously; intelligently; willfully; and intentionally."⁷

The Office has the burden of proof in establishing that appellant, either with knowledge, consciously, willfully or intentionally failed to report earnings.⁸ To meet this burden of proof, the Office is required to closely examine appellant's activities and statements in reporting earnings. The Office may meet this burden in several ways. The Office may meet this burden by appellant's own admission to the Office that he failed to report earnings which he knew he should report. Similarly, the Office may meet this burden by establishing that appellant has pled guilty to violating applicable federal statutes by falsely completing the affidavits in the Form EN-1032. Additionally, the Office may meet this standard without an admission by appellant, if appellant failed to fully and truthfully complete the Form EN-1032 and the circumstances of the case establish that appellant, upon further inquiry by the Office as to earnings, continued to fail to fully and truthfully reveal the full extent of his earnings. The Office may also meet this burden if it establishes through the totality of the factual circumstances of record that appellant was employed or self-employed; that the employment activities engaged in resulted in earnings which were not *de minimus*; and that appellant's certification on a Form EN-1032 that he was not employed or self-employed was therefore false.⁹

When completing an Office Form EN-1032, a claimant certifies that he was not employed, was not self-employed and did not have earnings during the previous 15 months. If a claimant fails to report earnings during the period covered by the form, he is not entitled to

⁵ *Id.*

⁶ *Anthony A. Nobile*, 44 ECAB 268 (1992).

⁷ *Christine P. Burgess*, 43 EAB 449 (1992).

⁸ *Barbara L. Kanter*, 46 ECAB 165 (1994).

⁹ *Id.*

compensation for any portion of the period covered by the form, even if he had no earnings during a portion of the period.¹⁰ Appellant completed EN-1032 forms certifying that he was not employed or self-employed and had no earnings on March 3, 1987, June 9, 1988, May 8, 1989, May 10, 1990, May 30, 1991 and April 30, 1992. These forms therefore represented certification by appellant that he had not worked in employment or self-employment and had no earnings from January 3, 1986 through April 30, 1992.

In the present case, appellant completed EN-1032 forms during the time period in question wherein he indicated that he was not employed or self-employed. During the investigative interview conducted in September 1992, appellant continued to deny that he engaged in any work activities involving his or his family's rental properties and farms. The Board finds that the evidence of record does establish that appellant failed to fully and truthfully complete the EN-1032 forms during the time period in question and that the circumstances of the case establish that appellant, upon further inquiry by the Office as to employment activities and earnings, continued to fail to fully and truthfully reveal the full extent of his activities and earnings. The Board also finds that the totality of the factual circumstances of record, as previously outlined, establish that appellant was self-employed as he performed maintenance activities on his many rental properties which he would have otherwise had to hire someone else to perform. The Board also finds from the witness statements of record that the employment activities appellant engaged in were not *de minimus*; therefore, appellant's estimated financial advantage, *i.e.*, earnings, were not *de minimus*. Consequently, the Board finds that the Office met its burden of proof to establish that appellant knowingly failed to report his earnings.¹¹

The Board also finds that the Office properly found that appellant was at fault in the creation of an overpayment in the amount of \$175,218.69 and that therefore the overpayment was not subject to waiver.

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."¹² Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.¹³

¹⁰ *Mamie L. Morgan*, 41 ECAB 661 (1990).

¹¹ While the record also indicates that appellant owned a farm, the record does not establish that appellant engaged in farm work which he did not report to the Office.

¹² 5 U.S.C. § 8129.

¹³ See *Harold W. Steele*, 38 ECAB 245 (1986) (no waiver is possible if the claimant is not without fault in helping to create the overpayment).

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.”¹⁴

In its preliminary decision dated November 29, 1994, the Office found appellant was at fault in the matter of the overpayment under the first and second criteria above; that is, on the grounds that appellant failed to report or to accurately report total earnings on each of the EN-1032 forms in question. On October 17, 1995 the Office finalized this finding. As the previous discussion of “knowingly” illustrates, the record establishes that appellant knew of his obligation to report his employment and earnings and that the information provided to the Office was incorrect. The making of incorrect statements regarding material facts which appellant knew or should have known to be incorrect renders appellant “at fault” in the creation of the overpayment under section 10.320(b)(1). For this reason, the Board finds that appellant was with fault in the matter of overpayment of compensation, precluding waiver of recovery.

With respect to the recovery of the overpayment, the Board finds that the Office did not abuse its discretion by compromising the principal due to \$150,246.98 and requiring repayment at the rate of \$1,000.00 per month.

Section 10.321(a) of the Office’s regulations¹⁵ provides that whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to 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 resulting hardship upon such individual.

In the present case, the Office determined that appellant’s current monthly income was approximately \$3,020.00 and his current allowable monthly expense was \$1,700.00. Subtracting his current allowable expense from his monthly income, the Office determined that appellant had a monthly surplus of approximately \$1,320.00 and the Office held that appellant was capable of paying back the overpayment at the rate of \$1,000.00 per month. The Board has previously held

¹⁴ 20 C.F.R. § 10.320(b).

¹⁵ 20 C.F.R. § 10.321(a).

that where the Office gave due regard to the relevant factors set forth in 20 C.F.R. § 10.321(a), the Office did not abuse its discretion in setting the rate of recovery.¹⁶

The decision of the Office of Workers' Compensation Programs dated October 17, 1995 and finalized on October 20, 1995 is hereby affirmed.

Dated, Washington, D.C.
May 26, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹⁶ See *Carroll R. Davis*, 46 ECAB 361 (1994).