U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TERRY A. PETERSON and DEPARTMENT OF TRANSPORTATION, ALASKA RAILROAD, Anchorage, Alas.

Docket No. 96-1489; Submitted on the Record;
Issued May 24, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant forfeited his right to compensation for the period May 7, 1983 to March 11, 1989 because he knowingly failed to report his employment activities; (2) whether the Office properly determined that appellant received a $72,991.73 overpayment of compensation for the period May 7, 1983 to March 11, 1989; (3) whether the Office properly determined that appellant was at fault in creating the overpayment of compensation and that, therefore, the overpayment was not subject to waiver; and (4) whether the Office properly required repayment of the overpayment by deducting $294.00 from appellant's compensation payments every four weeks.

The Board finds that the Office properly found that appellant forfeited his right to compensation for the period May 7, 1983 to March 11, 1989 because he knowingly failed to report his employment activities.

This is the third appeal in the present case. In the first appeal, the Board issued a decision and order[1] on February 28, 1992 in which it affirmed the Office's February 27, 1991 decision on the grounds that the Office properly adjusted appellant's compensation effective March 12, 1989 based on his wage-earning capacity as a sales clerk. The Board set aside the Office's February 27, 1991 decision with respect to whether appellant had forfeited his right to compensation for a prior period and created an overpayment of compensation; the Board remanded the case to the Office for further development of this matter. On remand, the Office obtained a copy of the August 30, 1988 investigative report of the Department of Labor's Office of Inspector General. By decision dated December 8, 1992, the Office found that appellant forfeited his right to compensation for the period May 7, 1983 through March 11, 1989 and that he was at fault in the creation of a $191,017.76 overpayment of compensation.

[1] Docket No. 91-995 (issued February 28, 1992), *petition for recon. denied* (issued June 2, 1992).

On June 30, 1993 the Director of the Office filed a motion to remand in which he acknowledged that the Office did not fully comply with the Board's instructions for further development contained in its February 28, 1992 decision.[2] By order dated August 10, 1993, the Board granted the Director's motion, set aside the Office's December 8, 1992 decision and remanded the case to the Office for further development. By decision dated February 29, 1996, the Office found that appellant forfeited his right to compensation for the period May 7, 1983 through March 11, 1989, that appellant was at fault in the creation of the resulting $72,991.73 overpayment of compensation such that it was subject to recovery and that the overpayment should be recovered by deducting $294.00 every four weeks from appellant's continuing compensation.[3] The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

Section 8106(b) of the Federal Employees' Compensation Act[4] 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 times the Secretary specifies.... An employee who --
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> (1) fails to make an affidavit or report when required; or
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> (2) knowingly omits or understates any part of his earnings;
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> 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."[5]

[2] The Director filed his motion after appellant filed a second appeal with the Board.

[3] In its February 14, 1994 preliminary determination, the Office indicated that appellant was at fault in the creation of a $191,017.76 overpayment, but the Office reduced the amount of the overpayment to $72,991.73 in its February 29, 1996 decision because it had determined that appellant would be unable to pay back the full amount at the current rate of recovery. In another decision dated February 29, 1996, the Office adjusted appellant's compensation based on his wage-earning capacity as a retail sales clerk. On April 4, 1996 appellant requested a hearing before an Office hearing representative and, by decision dated May 24, 1996, the Office denied appellant's hearing request as untimely. These matters are not currently before the Board.

[4] 5 U.S.C. § 8106(b).

[5] Appellant alleged that section 8106(b)(2) did not apply to him because he received compensation for temporary total disability. While section 8106(b)(2) refers only to partially disabled employees, the Board has held that the test for determining partial disability is whether, for the period under consideration, the employee was in fact either totally disabled or merely partially disabled, and not whether he received compensation for that period for total or partial loss of wage-earning capacity. *Ronald H. Ripple*, 24 ECAB 254, 260 (1973). The Board explained that a totally disabled employee normally would not have any employment earnings and therefore a statutory provision about such earnings would be meaningless. *Id.* at 260.

In the present case, the record establishes that appellant was engaged in employment or self-employment during the period of forfeiture in that he worked as a store manager or clerk during this period at the "Smoke Shoppe and Book Nook." Appellant completed several Forms EN-1032 in which the Office notified him of his responsibility to complete the forms and provide relevant information concerning his employment status and earnings during the periods covered by the forms.[6] In response to questions on these forms regarding earnings from employment or self-employment, appellant answered "N/A" or "No." The record reveals, however, that appellant had employment and earnings during the periods covered by these forms in that he was employed as a store manager or clerk and had earnings from this employment. An investigation memorandum of the Department of Labor's Office of Inspector General and numerous exhibits associated with this memorandum document the extensive nature of this employment. 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 perform the work.[7] The type of work appellant performed, store manager or clerk, is the type of work for which someone else could have been hired and paid wages. This finding is confirmed by the fact that appellant hired another person on a part-time basis to perform duties similar to those that he performed at the shop. Moreover, although it is unclear whether appellant received a salary, tax records reveal that the business created income and the record contains testimony that appellant applied earnings from the business to a loan he had received from his father to start the business.

Appellant also failed to report earnings for the periods not covered by Forms EN-1032, August 8, 1984 to November 19, 1985 and February 22 to March 11, 1989. The Board has held that claimants are required to report earnings to the Office independent of a Form EN-1032 or similar form if the Office has informed them of their duty to report such earnings.[8] In the present case, the Office sent appellant a Form CA-1049 dated July 27, 1983 which required him to immediately notify the Office when he returned to work. Moreover, prior to the periods August 8, 1984 to November 19, 1985 and February 22 to March 11, 1989, appellant had already completed several Forms EN-1032 which advised him that the type of work he performed, *i.e.*, operating a store, was the type of work which he was required to report to the Office. Therefore, although the Office apparently did not send appellant Forms EN-1032 for the periods August 8, 1984 to November 19, 1985 and February 22 to March 11, 1989, appellant nevertheless had a duty to report his earnings for these periods.

Appellant, however, can only be subjected to the forfeiture provision of section 8106 of the Act if he "knowingly" omitted or understated earnings. It is not enough to merely establish that there were unreported earnings. The Office procedure manual recognizes that forfeiture is

[6] Appellant completed Forms CA-1032 dated August 7, 1984, February 20, 1987, March 15 and July 22, 1988, and February 21, 1989 which covered the periods May 7, 1983 to August 7, 1984 and November 20, 1985 to February 21, 1989.

[7] *See Monroe E. Hartzog*, 40 ECAB 322, 329 (1988).

[8] *See Lorand A. Hegedus*, 37 ECAB 162, 170-72 (1985); *Charles A. Griffin, 22* ECAB 94, 97-98 (1970).

penalty,[9] and, as a penalty provision, it must be narrowly construed.[10] The term "knowingly" is not defined within the Act or its regulations. In common usage "knowingly" is defined as: "[w]ith knowledge; consciously; intelligently; willfully; intentionally."[11]

The Forms EN-1032 signed by appellant used such terms as "business," "enterprise," and "service" to explain the obligation for reporting all forms of employment, self-employment and earnings. In particular, the forms indicated that "operating a store" would constitute a form of self-employment. The explicit language of the Forms EN-1032 clearly advised appellant that the nature of his work as a manager or clerk at the Smoke Shoppe and Book Nook would require him to report such employment activities on the forms. Appellant's signing of strongly-worded certification clauses on the Forms EN-1032 further shows that he was aware of materiality of his failure to report his employment.

Appellant has alleged that he was not required to report his work at the Smoke Shoppe and Book Nook because he was only engaging in such activities in order to preserve his investment in the shop. In *Vernon Booth*,[12] the Board found that a return on an investment could be differentiated from the earning of wages and hence would be exempt from reporting requirements. The Board indicated that the claimant in *Booth* maintained his investment in a bar by going to the bank once a week, making occasional inspections of the book and spending an hour "just observing" when felt up to doing so. It noted that such activities did not constitute a type of work that would generally be available in the open labor market and did not constitute the earning of wages which would require reporting to the Office. The situation in the present case is more akin to the situation in the case of *Monroe E. Hartzog*[13] than to that in *Booth.* In *Hartzog*, the claimant's work in the family business of selling mobile homes involved serving as an officer, submitting credit applications, signing security liens, ordering mobile homes from manufacturers, and showing mobile homes to customers. The Board in *Hartzog* found that the evidence demonstrated that the claimant "was actively involved in helping to operate" a business, and that the Office properly found he forfeited his compensation for failure to report his earnings from self-employment.

In the present case, appellant's wide-ranging participation in managing the Smoke Shoppe and Book Nook shows that he "was actively involved in helping to operate" a business rather than merely reaping the fruits of an investment. Given the nature of these activities and the wording of the forms and letters requiring the reporting of earnings, the Board finds that appellant "knew" that he was required to report his earnings and employment activity for the period May 7, 1983 to March 11, 1989. In mid to late 1983, appellant secured the documents necessary to purchase the shop from its prior owner and incorporate it as a business. From an

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.10c (July 1993).

[10] *See Christine P. Burgess*, 43 ECAB 449, 458 (1992).

[11] BLACK'S LAW DICTIONARY (5th ed. 1979); *see Anthony A. Nobile*, 44 ECAB 268, 271-73 (1992).

[12] 7 ECAB 209 (1954).

[13] *Supra* note 7; *see also Anthony Derenzo*, 40 ECAB 504 (1989).

early date, appellant worked an extensive number of hours at the store as the sole employee on duty; he generally worked more than 30 hours per week. Appellant hired another employee to cover the few hours per week that he did not work and handled the supervision and payment of this employee. Appellant performed numerous duties regarding the purchase and maintenance of the store's inventory in books and tobacco products. He arranged the display of products, advised customers regarding their potential purchases, and wrung up sales on a register. Appellant also handled the accounting books, signed all checks for the business, and made deposits of sales revenue at the bank. As previously noted, these are the types of activities for which someone else could have been hired and paid wages.

Appellant alleged that his attorney advised him that he did not need to report his work at the Smoke Shoppe and Book Nook because it would be considered an investment as long as he did not have too active a role in its operation. While appellant asserted that he never intended to play an extensive role in the business, the evidence of record shows that he did engage in a wide variety of activities which could reasonably be characterized as operating the store. Appellant alleged that he attempted to contact the Office in order to determine whether he needed to report his activities but that the Office failed to respond to his telephone calls. The record shows, however, that appellant was in contact with the Office, either by telephone or letter, on numerous occasions during the period in question. Appellant did not adequately explain why he did not make further attempts to secure an opinion on this matter from the Office. Appellant also argued that his August 22, 1983 acquittal under 18 U.S.C. § 1001, a criminal provision concerning the making of false statements in the receipt of compensation benefits, showed that he did not knowingly fail to report earnings. However, the court's determination under the criminal statute 18 U.S.C. § 1001 would not be binding on the Office's administration of the forfeiture provisions of an entirely different legislative framework, *i.e.*, 5 U.S.C. §§ 8101-8193.

Under these circumstances, the Board concludes that appellant "knowingly" omitted his earnings under section 8106(b)(2) of the Act by failing to report his employment activities and earnings for the period May 7, 1983 to March 11, 1989.[14] Accordingly, the Board finds that the Office properly determined that appellant forfeited his right to compensation for this period.

The Board further finds that appellant received a $72,991.73 overpayment of compensation for the period May 7, 1983 to March 11, 1989.

As described above, the record reveals that appellant forfeited $72,991.73 in compensation due to his failure to report earnings and employment during the period May 7, 1983 to March 11, 1989. Although appellant was actually paid $191,017.76 in compensation during this period, the Office reduced the amount of the overpayment to $72,991.73 because it had determined that appellant would be unable to pay back the full amount of the overpayment at the current rate of recovery. Therefore, the Office properly determined that appellant received a $72,991.73 overpayment.

[14] *See generally Lewis George*, 45 ECAB 144 (1993).

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

Section 8129(a) of the Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.[15] The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "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 this subchapter or would be against equity and good conscience."[16] No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.

In determining whether an individual is not "without fault" or alternatively, "with fault," section 10.320(b) of Title 20 of the Code of Federal Regulations provides in relevant part:

"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
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> (2) Failed to furnish information which the individual knew or should have known to be material; or
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> (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."[17]

In this case, the Office applied the first and second standard in determining that appellant was at fault in creating the overpayment.

With respect to whether an individual is without fault, section 10.320(c) of the Office's regulations provides in relevant part:

> "Whether an individual is 'without fault' depends on all the circumstances surrounding the overpayment in the particular case. The Office will consider the individual's understanding of any reporting requirements, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported, efforts to comply with reporting requirements, opportunities to comply with reporting requirements, understanding of the obligation to return payments which were not due, and ability to comply with any reporting

[15] 5 U.S.C. § 8129(a).

[16] 5 U.S.C. § 8129(b).

[17] 20 C.F.R. § 10.320(b).

requirements (*e.g.*, age, comprehension, memory, physical and mental condition)."[18]

For the reasons explained in the discussion of his forfeiture of compensation, appellant knowingly failed to report earnings and knowingly made incorrect statements on various forms regarding his earnings for the period May 7, 1983 to March 11, 1989. Therefore, appellant made incorrect statements as to material facts which he knew or should have known to be incorrect and failed to furnish information which he knew or should have known to be material.

The Board further finds that the Office properly required repayment of the overpayment by deducting $294.00 from appellant's compensation payments every four weeks.

Section 10.321 of Title 20 of the Code of Federal Regulations provides in pertinent part:

"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."[19]

The record supports that, in requiring repayment of the overpayment by deducting $294.00 from appellant's compensation payments every four weeks, the Office took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.321 and found that this method of recovery would minimize any resulting hardship on appellant. Therefore, the Office properly required repayment of the overpayment by deducting $294.00 from appellant's compensation payments every four weeks.

[18] 20 C.F.R. § 10.320(c).

[19] 20 C.F.R. § 10.321(a); *see Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

The decision of the Office of Workers' Compensation Programs dated February 29, 1996 is affirmed.

Dated, Washington, D.C.
May 24, 1999

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member