

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALLAN KUHLMAN and U.S. POSTAL SERVICE,
POST OFFICE, Tomball, TX

*Docket No. 98-2222; Submitted on the Record;
Issued December 21, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant forfeited his right to compensation from December 21, 1994 through September 11, 1996 because he knowingly failed to report his earnings, thereby creating an overpayment of compensation in the amount of \$36,821.10; (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment; and (3) whether the Office properly required appellant to repay the overpayment of compensation in a lump sum of \$18,411.00 in addition to paying \$525.00 per month thereafter.

On July 31, 1985 appellant, then a 50-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on July 15, 1985 he sustained a back injury while carrying a set of encyclopedias to the second floor. Appellant stopped work on July 18, 1985.¹

The Office accepted appellant's claim for a lumbar strain, herniated nucleus pulposus at L4-5 and authorized an L4-5 laminectomy.

By decision dated January 24, 1997, the Office terminated appellant's compensation on the grounds that he refused a suitable job offer from the employing establishment. Appellant has not appealed this decision.

By decision dated April 28, 1997, the Office found that appellant had forfeited compensation for the period December 21, 1994 through September 11, 1996 on the grounds that he knowingly failed to report his earnings and employment activities at SK Auto Brokers, which was operated by his son, Scott A. Kuhlman.

In a letter of the same date, the Office made a preliminary determination that an overpayment in compensation had occurred in the amount of \$36,821.10 during the period

¹ Appellant retired from the employing establishment on October 11, 1996.

December 21, 1994 through September 11, 1996 because appellant knowingly failed to report his employment activities at SK Auto Brokers on CA-1032 forms dated March 21 and September 11, 1996. The Office advised appellant that he was at fault in the creation of the overpayment because he made an incorrect statement as to a material fact which he knew or should have known to be incorrect and he failed to furnish information which he knew or should have known to be material. In addition, the Office advised appellant that he could request a telephone conference, a final decision based on the written evidence only, or a hearing within 30 days of the date of this letter if he disagreed that the overpayment occurred, if he disagreed with the amount of the overpayment, if he believed that the overpayment occurred through no fault of his own and if he believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof.

In a May 22, 1997 letter, appellant requested an oral hearing.

By decision dated April 21, 1998, the hearing representative finalized the Office's preliminary overpayment determination and finding of fault on the grounds that appellant knowingly failed to furnish information which he should have known to be material. The Office found that appellant was capable of repaying \$18,411.50 immediately and repaying the balance in monthly payments of \$525.00.

The Board finds that the Office properly found that appellant forfeited his right to compensation from December 21, 1994 through September 11, 1996 because he knowingly failed to report his earnings.

Section 8106(b) of the Federal Employees' Compensation Act² 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 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."³

² 5 U.S.C. § 8106(b).

³ *William G. Norton, Jr.*, 45 ECAB 630 (1994); *Garry Don Young*, 45 ECAB 621 (1994); *Gregg B. Manston*, 45 ECAB 344 (1994); *Lewis George*, 45 ECAB 144 (1993).

This section of the Act is further defined by regulation, which provides:

“Affidavit or report by employee of employment and earnings.”

* * *

“(c) Earnings from employment referred to in this section or elsewhere in this part means gross earnings or wages before any deductions and includes the value of subsistence, quarters, reimbursed expenses, or any other advantages received in kind as part of the wages or remuneration.”⁴

In analyzing whether an employee in receipt of compensation has earnings or wages the Board, in *Christine P. Burgess*,⁵ noted wages are defined as:

“Every form of remuneration payable for a given period to an individual for personal services, including salaries, commissions, vacation pay, dismissal wages, bonuses and reasonable value of board, rent, housing, lodging, payments in kind, tips and any other similar advantage received from the individual’s employer or directly with respect to work for him.”⁶

In *Burgess*, the Board found that the record established the employee received reimbursed expenses and “other advantages” as part of wages or remuneration in the form of free travel, lodging, food and transportation costs as a result of performing the duties of an escort for a travel service. Based on these reimbursed expenses and payments in kind, the Board found that appellant had “earnings” as defined under section 8106(c), which he was required to report to the Office.

In this case, the Office found that appellant forfeited his right to compensation for the period December 21, 1994 through September 11, 1996 on the basis that he knowingly failed to report his employment on CA-1032 forms dated March 21 and September 11, 1996. The Office has established, as required by section 8106(b), that appellant had “earnings” or other forms of remuneration from his activities at SK Auto Brokers. The record clearly establishes that appellant engaged in work activities at SK Auto Brokers and had “earnings.” Specifically, the July 26, 1996 and April 2, 1997 investigative reports from the employing establishment revealed that appellant bought automobiles under the name of SK Auto Brokers from an auction house that sold damaged vehicles to licensed automobile dealers, wholesalers and brokers, and from individuals. The April 2, 1997 report and a March 10, 1998 letter from the employing establishment’s inspector indicated that appellant used money from his own personal account to purchase these automobiles and that the sales proceeds were made payable to SK Auto Brokers, which were endorsed payable to appellant. The reports also indicated that appellant deposited money from the sale of the automobiles into his personal account.

⁴ 20 C.F.R. § 10.125(c).

⁵ 43 ECAB 449 (1992).

⁶ *Id.* at 457, citing BLACK’S LAW DICTIONARY, (Special Deluxe, 5th ed. 1979).

In a March 18, 1998 narrative statement, appellant indicated that he was only advising his son and loaned money to him. In a July 19, 1996 interview, appellant stated in response to questions regarding his March 21, 1996 Form CA-1032, that he did not have any outside employment or additional income. Appellant also stated that he had not worked as an agent or representative for any business organization in the past 15 months and that he had not worked as a volunteer. However, at his February 5, 1998 hearing, appellant testified that he signed as an agent on a buyer's sheet because he provided and controlled the money for his son's business. Appellant also testified that he helped his son buy and sell vehicles.

Inasmuch as the record demonstrates a financial benefit and active participation by appellant in SK Auto Brokers, the Board finds that the Office had a basis for invoking the penalty provision of section 8106(b)(2).

The Board further finds that the Office properly determined that appellant was at fault in the creation of the overpayment.

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.⁷ The only exception to this requirement is a situation which meets the test set forth as follows in section 8129(b): "[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 the Act or would be against equity and good conscience."⁸ Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.⁹ In evaluation of whether appellant is without fault, the Office will consider whether appellant's receipt of the overpayment occurred because he relied on misinformation given by an official source within the Office or another government agency which appellant had reason to believe was connected with administration of benefits as to the interpretation of the Act or applicable regulations.¹⁰

In determining whether an individual is at fault, section 10.320(b) 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
- (2) Failed to furnish information which the individual knew or should have known to be material; or

⁷ 5 U.S.C. § 8129.

⁸ 5 U.S.C. § 8129(b).

⁹ *Harold W. Steele*, 38 ECAB 245 (1986).

¹⁰ 20 C.F.R. § 10.320(c)(1).

(3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”¹¹

In this case, the Office’s hearing representative applied the second standard -- appellant failed to furnish information which he knew or should have known to be material. The Board finds that the Office was correct in finding that appellant failed to furnish information which he knew or should have known to be material. As noted above, the record establishes that appellant was involved in employment activities and that he had a financial benefit from SK Auto Brokers. Appellant signed CA-1032 forms beginning January 15, 1990 instructing him to report all employment or self-employment activities conducted while also receiving compensation for temporary total disability. Yet, he failed to report his employment activities on the March 21 and September 11, 1996 CA-1032 forms. Therefore, appellant was at fault in the creation of the overpayment, as he reasonably should have been aware that he was obligated to report his employment activities for the period December 21, 1994 through September 11, 1996 as he was also receiving total temporary disability compensation at that time. For this reason, the Board finds that appellant was with fault in the matter of overpayment of compensation under the second criterion above, thereby precluding waiver of recovery.¹²

With respect to recovery of the overpayment, the Board notes its jurisdiction on appeal is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act.¹³ As appellant is no longer receiving wage-loss compensation benefits, the Board does not have jurisdiction with respect to the Office’s recovery of the overpayment under the Debt Recovery Act.¹⁴

¹¹ 20 C.F.R. § 10.320(b).

¹² 20 C.F.R. §§ 10.322(a), 10.323.

¹³ *Lewis George*, 45 ECAB 144 (1993).

¹⁴ *Levon H. Knight*, 40 ECAB 658 (1989).

The April 21, 1998 decision of the Office of Workers' Compensation Programs' hearing representative is hereby affirmed.

Dated, Washington, DC
December 21, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Valerie D. Evans-Harrell
Alternate Member