

Appellant, a 28-year-old former casual clerk, has an accepted traumatic injury claim for acute stress disorder, which arose on June 11, 2004 when she was trapped in an elevator for more

than an hour. She received continuation of pay from June 12 to July 9, 2004, and the Office paid wage-loss compensation beginning July 10, 2004.<sup>1</sup>

On October 12, 2004 the Office informed appellant that she had been placed on the periodic compensation rolls effective October 3, 2004 and would receive regular compensation payments every 28 days in the amount of \$1,186.04. The letter was accompanied by an Office Form EN1049, which advised appellant of her rights and responsibilities as a benefits recipient. Appellant signed the Form EN1049 on October 25, 2004, certifying that she read and understood the various conditions and reporting requirements associated with her receipt of benefits.

The Office referred appellant for vocational rehabilitation in January 2005. During her initial meeting with the rehabilitation counselor, she reportedly told the counselor that she had no other source of income apart from her regular compensation checks of \$1,186.04. Over the next few months, appellant regularly met with the rehabilitation counselor but was unsuccessful in securing any form of employment.

On March 2, 2005 the Office requested that appellant submit an affidavit of earnings and employment, Form CA-1032. Appellant signed and returned the form indicating, among other things, that she had not worked during the preceding 15-month period.<sup>2</sup>

During a June 7, 2005 telephone conversation with her rehabilitation counselor, appellant advised that she had “engaged in training with Bath and Body Works [BBW] for a retail clerk position.” She indicated that she was “tentatively hired” for this position and was awaiting an opening in the schedule. The position was to provide 20 to 24 hours of work per week. Later that same month, appellant advised her rehabilitation counselor that she was being considered for employment as a nursing technician at St. Luke’s Hospital in New Bedford, MA. She also indicated that she had accepted employment as a substitute preschool teacher with North Star Learning Centers, Inc. in New Bedford, MA. Effective July 18, 2005, appellant was employed as a nurse intern at St. Luke’s Hospital. In July 2005, she began submitting pay stubs for earnings she received as a nurse intern and preschool teacher. The Office ended its vocational rehabilitation services on September 2, 2005.

A September 14, 2005 investigative memorandum from the employing establishment’s Office of the Inspector General revealed that, beginning September 18, 2004, appellant worked as a part-time sales associate for BBW. Appellant was paid an hourly rate of \$7.20. Records from BBW indicated that appellant was paid on a biweekly basis from September 25, 2004 to April 23, 2005 and June 4 to 18, 2005.<sup>3</sup>

On January 6, 2006 the Office issued a decision finding that appellant forfeited compensation for the period September 18, 2004 to August 6, 2005. The reason for the forfeiture was appellant’s failure to report earnings that she received from employment at BBW.

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<sup>1</sup> At the time of her injury, appellant held a temporary position, which subsequently expired on July 9, 2004.

<sup>2</sup> The report bears appellant’s signature, but it is undated. The Office received the signed Form CA-1032 on April 1, 2005.

<sup>3</sup> There was no record of income received for the two biweekly pay periods in May 2005.

The Office issued an amended decision on May 30, 2006, finding that appellant forfeited compensation for the period July 10, 2004 to March 2, 2005. The period of the forfeiture coincided with the 15-month time frame covered by the March 2, 2005 Form CA-1032, wherein appellant denied engaging in any employment activities.

In a separate letter, also dated May 30, 2006, the Office informed appellant of its preliminary determination that a \$9,996.51 overpayment existed because of her forfeiture of compensation for the period July 10, 2004 to March 2, 2005. The Office found that appellant was at fault in creating the overpayment due to her failure to report earnings as required on Form CA-1032. It issued a second preliminary overpayment finding on May 30, 2006. This one covered the period March 3 to August 6, 2005, during which appellant received \$6,650.22 in wage-loss compensation. Again, the Office found appellant at fault for failing to report earnings received from BBW during the covered period.

On June 24, 2006 appellant requested a review of the written record. She submitted copies of her 2004 and 2005 W-2 (wage and tax) statements for BBW. Appellant also provided a June 24, 2006 itemization of her BBW earnings from September 25, 2004 to June 17, 2006.

By decision dated November 8, 2006, the Office hearing representative affirmed the May 30, 2006 decision regarding forfeiture for the period July 10, 2004 to March 2, 2005. The hearing representative also finalized the Office's overpayments in the amount of \$9,996.51 and \$6,650.22 and that appellant was at fault in creating the overpayments. Because she was at fault, appellant was not entitled to a waiver of recovery of the overpayment.

### **LEGAL PRECEDENT**

Pursuant to the Federal Employees' Compensation Act, a partially disabled employee may be required to report her earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times specified by the Office.<sup>4</sup> An employee who fails to make an affidavit or report when required or knowingly omits or understates any part of her earnings; forfeits the right to compensation with respect to any period for which the affidavit or report was required.<sup>5</sup> Forfeiture results in an overpayment of compensation for the period of the forfeiture and is subject to recovery under 5 U.S.C. § 8129.<sup>6</sup> An individual who is found at fault in either accepting or creating an overpayment is not eligible for a waiver of recovery of overpayment.<sup>7</sup> A benefits recipient will be found at fault if the individual failed to provide information which she knew or should have known to be material.<sup>8</sup>

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<sup>4</sup> 5 U.S.C. § 8106(b) (2000).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*; 20 C.F.R. § 10.529(b) (2007).

<sup>7</sup> 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433(a), 10.434.

<sup>8</sup> 20 C.F.R. § 10.433(a)(2).

## ANALYSIS

On August 2, 2004 the Office accepted appellant's claim and advised her of certain responsibilities with respect to returning to work. The acceptance letter included the following pertinent information: "You are expected to return to work (including light duty or part-time work, if available) as soon as you are able. Once you return to work, *or obtain new employment*, notify this office immediately." (Emphasis in the original.) The Office further advised appellant that, if she received a compensation check which included payment for a period she had worked, she should "return it ... immediately to prevent an overpayment of compensation."

The Office subsequently placed appellant on the periodic compensation rolls. The October 12, 2004 letter advising appellant of this action included a Form EN1049, which explained, among other things, her responsibility for reporting information regarding employment. Appellant was instructed to advise the Office if she returned to her former job. If she obtained other work, either with her original employing agency or with another employer, she was to submit "at once," the name and address of her employer, the date she returned to work, the type of work she was performing, the number of hours worked per week and the weekly pay rate.

An EN1049 form also provided appellant with information regarding overpayments. To minimize the possibility of an overpayment of compensation, appellant was instructed to "NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU GO BACK TO WORK." (Emphasis in the original.) The Office explained that each payment showed the period for which payment was being made. If appellant worked for any portion of the designated period, she was instructed to return the payment, even if she had already advised the Office that she was working. Appellant signed a Form EN1049 on October 24, 2005, certifying that she read and understood its content and acknowledging that her "willful failure ... to comply with these conditions [could] result in termination or forfeiture of benefits and liability for resulting overpayments."

The March 2, 2005 Form CA-1032 also advised appellant of her reporting obligations and the consequences of providing false, misleading or incomplete information. The first page of the information package included a warning that false or evasive answers to any questions, or the omission of an answer, may be grounds for forfeiting compensation benefits. The instructions for completing the affidavit explained that the statement covered the 15 months prior to the date the form was completed and signed. It also advised that, by signing the form, appellant would be certifying that she had supplied all information requested for that period of time.

The Board finds that appellant forfeited her compensation for the period July 10, 2004 to March 2, 2005 as she failed to report her earnings from BBW on the March 2, 2005 CA-1032 form that she submitted. Appellant worked for BBW as a part-time sales associate beginning September 18, 2004. Employment records indicate that BBW paid her on a biweekly basis beginning September 25, 2004. These payments continued uninterrupted through the pay period ending April 23, 2005. However, appellant did not report this information on her CA-1032, which clearly advised her to report "ALL employment for which [she] received a salary, wages, income, sales commissions, piecework, or payment of any kind." She stated on the Form

CA-1032 that she had not worked for any employer and was not self-employed or involved in any business enterprise during the preceding 15-month period. Appellant also indicated that she had been unemployed for all periods during the past 15 months.

The 15-month period covered by the March 2, 2005 CA-1032 encompassed all wage-loss compensation that appellant received beginning July 10, 2004 to March 2, 2005, for a total of \$9,996.51. Appellant's failure to report her earnings from BBW on a Form CA-1032 constitutes a knowing omission of her earnings and employment activities, thus warranting forfeiture of all wage-loss compensation received during the 15-month period covered by the March 2, 2005 form.<sup>9</sup> While there is no evidence of BBW earnings from July 10 to September 17, 2004, appellant's compensation for this 2-month period is nonetheless forfeited because the period falls within the 15-month time frame of the March 2, 2005 Form CA-1032.<sup>10</sup>

Appellant's failure to report her earnings and employment activities on Form CA-1032 similarly constitutes a failure to provide information which she knew or should have known to be material.<sup>11</sup> Consequently, the Office properly found appellant at fault in creating the overpayment of compensation for the period July 10, 2004 to March 2, 2005. Because appellant was at fault, she is not eligible for a waiver of recovery of the \$9,996.51 overpayment.<sup>12</sup>

While the Office's findings with respect to the period July 10, 2004 to March 2, 2005 is affirmed, the question of whether there was a similar forfeiture and overpayment for the period of March 3 to August 6, 2005 is not in posture for decision. The record includes a May 26, 2006 worksheet indicating that the Office paid appellant wage-loss compensation of \$6,650.22 for the period March 3 to August 6, 2005. However, the record does not include a specific breakdown of when these payments were disbursed and the amounts of each disbursement. This information is necessary in order to properly match appellant's wage-loss compensation with the earnings she received and failed to report. Without the benefit of a Form CA-1032, the Office must be more exact in its analysis of the individual periods for payments disbursed and the corresponding unreported earnings.

The Board notes that there is no evidence of earnings from BBW for May 2005, yet the Office found that appellant forfeited all compensation received from March 3 to August 6, 2005.<sup>13</sup> Moreover, the July 7, 2005 earnings statement submitted by BBW only reported earnings through the pay period ending June 18, 2005. When the Office issued its preliminary determination on

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<sup>9</sup> *Cheryl Thomas*, 55 ECAB 610, 616 (2004). It is also noteworthy that almost five months passed before appellant even hinted to her rehabilitation counselor about the possibility of employment with BBW. Although securing employment was the primary reason for their relationship, appellant never disclosed her months-long tenure with BBW to her rehabilitation counselor. The only mention of BBW appears in the rehabilitation counselor's June 28, 2005 report, when appellant reportedly advised her earlier that month that she was "tentatively hired" to work at BBW.

<sup>10</sup> 20 C.F.R. § 10.529(a).

<sup>11</sup> 20 C.F.R. § 10.433(a)(2).

<sup>12</sup> See *Gary L. Allen*, 47 ECAB 409, 418 (1996).

<sup>13</sup> Appellant advised her rehabilitation counselor that she was going on vacation in May 2005.

May 30, 2006, there was no evidence of any post-June 18, 2005 unreported earnings from BBW. Despite the lack of evidence, it was found that appellant forfeited an additional seven weeks of compensation through August 6, 2005. In affirming this finding, the hearing representative noted that there was evidence that appellant “continued to work at least through June 17, 2006.” The Office’s analysis regarding the March 3 to August 6, 2005 period is incomplete or supported by the evidence of record. Accordingly, the Office’s finding of forfeiture and overpayment for the period of March 3 to August 6, 2005 is set aside.

### **CONCLUSION**

The Board finds that appellant forfeited her right to compensation for the period July 10, 2004 to March 2, 2005. During this time frame, appellant received a \$9,996.51 overpayment, for which she was at fault in creating. Because appellant was at fault, she is not entitled to waiver of recovery of the \$9,996.51 overpayment. The Board further finds that the question of whether there was a forfeiture of compensation and resulting overpayment for the period of March 3 to August 6, 2005 is not in posture for decision.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the November 8, 2006 decision of the Office of Workers’ Compensation Programs is affirmed in part and set aside in part. The case is remanded to the Office for further action consistent with this decision.

Issued: October 17, 2007  
Washington, DC

David S. Gerson, Judge  
Employees’ Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees’ Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees’ Compensation Appeals Board