

**United States Department of Labor
Employees' Compensation Appeals Board**

K.S., Appellant

and

**U.S. POSTAL SERVICE, MAIN POST OFFICE,
Sacramento, CA, Employer**

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Docket No. 08-639

Issued: April 22, 2009

Appearances:

Paul Kalker, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

DAVID S. GERSON, Judge

MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 27, 2007 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated October 2 and December 20, 2007. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit issues of this case.

ISSUES

The issues are: (1) whether appellant forfeited her right to compensation effective July 26, 2007; (2) whether the Office properly determined that appellant forfeited her right to compensation benefits for the period March 24, 2002 through July 3, 2006; (3) whether the Office properly found that an overpayment in compensation in the amount of \$112,418.02, had been created because appellant did not report work activity; (4) whether the Office properly found that appellant was at fault in the creation of the overpayment and, therefore, the overpayment was not subject to waiver; and (5) whether the Office properly determined that the court-ordered restitution was not a global settlement.

FACTUAL HISTORY

On June 26, 1992 appellant, then a 25-year-old mail processor, sustained employment-related subluxations at T8 and L5 when she hurt her back lifting a tray of mail. After a brief

return to limited duty in July 1992, she was placed on the periodic rolls. On December 16, 1994 the accepted conditions were expanded to include somatoform pain disorder. By decision dated December 29, 1994, the Office terminated compensation benefits for the accepted orthopedic conditions. Appellant continued to receive wage-loss compensation based on her emotional condition. In 1995 she moved from California to Michigan.

Appellant submitted Office EN1032 forms which reported no employment activity. These included forms dated March 24, 2002, February 25, 2003, February 6 and December 24, 2004, December 19, 2005 and July 3, 2006. On an EN1032 form dated February 5, 2007, appellant noted that she had worked at Full Spectrum Auto Care with no actual earnings at a rate of \$5.25 an hour. She stated that during this period she worked intermittently for approximately three hours a day, two days a week performing office duties and that she stopped work in July 2006 because her back condition had worsened.

On July 26, 2007 the Office of the Inspector General (OIG) of the Department of Labor notified the Office that in April 2004 a criminal investigation was opened regarding whether appellant violated 18 U.S.C. § 1920, making false statements to obtain benefits under the Federal Employees' Compensation Act.¹ The OIG reported that through interviews and surveillance, it was determined that appellant was actively employed in a family-owned business, Full Spectrum Auto Care,² and that on July 26, 2007 she entered a guilty plea in the U.S. District Court for the Eastern District of Michigan and was subsequently sentenced to pay \$20,056.80 in restitution to the Office. Copies of an investigative memorandum, interviews with employees, former employees, and customers of the business, were attached.³ In an interview dated May 18, 2004, appellant stated that, while she took her husband's lunch at work each day and stayed several hours, she did not perform any work.

In a signed statement dated July 19, 2006, appellant acknowledged that she was not forthcoming in the May 2004 interview, stating that she was afraid she would lose her health benefits and that it was not her intention to falsify information related to the noncompensated activities conducted at her husband's business. She stated that, when the business began, she played a more active role but had decreased her activities and only occasionally conducted limited office activity. On July 19, 2006 appellant's husband acknowledged that appellant was at the business daily when it first opened, that she established the accounting system, prepared payroll, ran errands, and was a presence at the business in his absence but that, while she was not paid, he would have had to pay an employee or do the work himself had she not performed the activities. A U.S. District Court for the Eastern District of Michigan Judgment in a Criminal Case dated July 26, 2007 and signed July 30, 2007 advised that appellant entered a guilty plea to one count under 18 U.S.C. § 1920 of making a false statement to obtain federal employees' compensation and that the offense ended on May 18, 2004. Restitution of \$20,056.80 was ordered.

¹ 5 U.S.C. §§ 8101-8193.

² The business was incorporated in October 2002.

³ The reports covered periods from 2003 to July 2006. The interviewees attested that appellant performed clerical and bookkeeping activities and did not appear to be in pain or disabled.

By decision dated October 2, 2007, the Office found that appellant forfeited her right to further compensation because she was convicted of a violation relating to fraud in the application for or receipt of benefits under the Act. It terminated compensation effective July 26, 2007. In a second October 2, 2007 decision, the Office found that appellant forfeited her right to compensation for the period March 24, 2002 to July 3, 2006 because she did not report work activity as required under the Act.

On October 2, 2007 the Office also made a preliminary determination that appellant received an overpayment in compensation in the amount of \$112,418.02 because she knowingly failed to report work activity for the period March 24, 2002 to July 3, 2006. It noted that she had received compensation totaling \$132,474.82 for this period and credited the restitution amount of \$20,056.80, yielding the \$112,418.02 overpayment. Appellant was found at fault in creating the overpayment because she should have been aware that her work activity should have been reported. The actions she could take were explained to her, and she was given 30 days to respond. Computer print-outs and an overpayment worksheet contained in the record show that appellant received wage-loss compensation totaling \$132,474.82 for the period March 24, 2002 to July 3, 2006.

Appellant did not timely respond to the preliminary overpayment finding, and by decision dated December 10, 2007, the Office finalized the preliminary determination that appellant was at fault in creating the \$112,418.02 overpayment because she made an incorrect statement to a material fact.

LEGAL PRECEDENT -- ISSUE 1

Section 8148 of the Act provides that any individual convicted of a violation of 18 U.S.C. § 1920, or any other federal or state criminal statute relating to fraud in the application for or receipt of any benefit under the Act, shall forfeit, as of the date of such conviction, any entitlement to any benefit such individual would otherwise be entitled to under the Act for any injury occurring on or before the date of such conviction. Such forfeiture shall be in addition to any action the Secretary may take under section 8106 or 8129 of the Act.⁴

ANALYSIS -- ISSUE 1

The U.S. District Court for the Eastern District of Michigan found appellant guilty of violating 18 U.S.C. § 1920. Specifically, the court found her guilty of making a false statement to obtain federal employee's compensation. Under section 8148 of the Act, appellant thus forfeited any entitlement to benefits she would otherwise be entitled to under the Act for any injury occurring on or before the date of such conviction.⁵ The Board therefore finds that appellant forfeited the right to compensation effective July 26, 2007, the date of her conviction.

LEGAL PRECEDENT -- ISSUE 2

Section 8106(b) provides that the Secretary of Labor may require a partially disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise,

⁴ 5 U.S.C. § 8148(a); *see F.C.*, 59 ECAB ____ (Docket No. 07-1541, issued November 16, 2007).

⁵ *Id.*

in the manner and at the times the Secretary specifies. It provides that an employee who fails to make an affidavit or report when required or knowingly omits or understates any part of his or her earnings forfeits his or her right to compensation with respect to any period for which the affidavit or report was required.⁶

Section 10.5(g) of the Office's regulations defines earnings from employment or self-employment as follows:

“(1) Gross earnings or wages before any deduction and includes the value of subsistence, quarters, reimbursed expenses and any other goods or services received in kind as remuneration; or

“(2) A reasonable estimate of the cost to have someone else perform the duties of an individual who accepts no remuneration. Neither lack of profits, nor the characterization of the duties as a hobby, removes an unremunerated individual's responsibility to report the estimated cost to have someone else perform his or her duties.”⁷

In order to establish that a compensationner should forfeit the compensation received for the periods covered by completed Office EN1032 forms, the evidence must establish that he or she knowingly omitted or understated his or her employment and earnings.⁸ As forfeiture is a penalty, it is not enough merely to establish that there were underreported earnings from employment. The inquiry is whether appellant knowingly omitted or understated his earnings from employment for the periods covered by the EN1032 forms. The term knowingly is not defined within the Act or its implementing federal regulations. In common usage, the Board has adopted the definition of “knowingly” as “with knowledge; consciously; intelligently; willfully; intentionally.”⁹ The language on Office EN1032 forms is clear and unambiguous in requiring a claimant to report earnings for the previous 15 months from any employer, self-employment or a business enterprise in which he or she worked. The forms further emphasize that severe penalties may be applied for failure to report all work activities thoroughly and completely.

ANALYSIS -- ISSUE 2

The record establishes that, in a May 18, 2004 interview, appellant stated that she was not working, and that on July 19, 2006 she provided a sworn statement that she had been performing work activities at Full Spectrum Auto Care since its inception and admitted that she lied in the May 2004 interview. The record also contains numerous EN1032 forms in which she stated that she had no work activity. For purposes of this appeal, it is sufficient that the District Court found appellant guilty of making a false statement on May 18, 2004 to obtain federal employees' compensation ending on May 18, 2004. This satisfies the requirements of section 8106(b) of the

⁶ 5 U.S.C. § 8106(b); *see F.C., supra* note 4.

⁷ 20 C.F.R. § 10.5(g).

⁸ *Robert R. Holmes*, 49 ECAB 161 (1997).

⁹ *Christine C. Burgess*, 43 ECAB 449 (1992).

Act and establishes that she knowingly omitted work activities up to that date.¹⁰ The Board therefore finds that appellant forfeited her right to compensation for the period March 24, 2002 to May 18, 2004, the period covered by the plea agreement.

The Board also finds that appellant forfeited her right to compensation for the period May 19, 2004 to July 3, 2006. While she did not plead guilty to falsifying forms after May 18, 2004, she did not report work activities on Office EN1032 forms submitted after that date. The language on the forms is clear and unambiguous in requiring that appellant report all earnings, including such activities as keeping books and records, or managing and/or overseeing a business of any kind, including a family business, and specifically notes that unpaid duties must also be reported and an appropriate rate of pay shown for the activity. Office regulations define earnings as a reasonable estimate of the cost to have someone else perform the duties of an individual who accepts no remuneration.¹¹ The record supports that appellant continued to perform bookkeeping and other business activities at Full Spectrum Auto Care after May 18, 2004. In her July 19, 2006 statement, she acknowledged that she continued to perform office work at that time, and her husband and other interviewees also advised that she performed work duties during this period. Appellant's signature on the EN1032 forms certified "all the statements made in response to questions on this form are true, complete and correct to the best of my knowledge and belief." The Board finds that her failure to fully report her work activities is found to be a knowing omission by appellant.¹² Accordingly, appellant forfeited her right to compensation for the period May 19, 2004 to July 3, 2006.

LEGAL PRECEDENT -- ISSUE 3

Section 8102(a) of the Act provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.¹³ A claimant, however, is not entitled to receive temporary total disability and actual earnings for the same period.¹⁴ The Office procedures provide that an overpayment in compensation is created when a claimant returns to work and continues to receive compensation.¹⁵

ANALYSIS -- ISSUE 3

As discussed above, appellant forfeited her right to compensation for the period March 24, 2002 to July 3, 2006 because she knowingly failed to report employment activity. An overpayment in compensation was therefore created. In calculating the amount of the

¹⁰ The plea agreement does not explain why this date was selected, although it is the date that appellant made a false statement to the OIG.

¹¹ 20 C.F.R. § 10.5(g).

¹² *Albert A. Garcia*, 54 ECAB 206 (2002).

¹³ 5 U.S.C. § 8102(a).

¹⁴ *Donna M. Rowan*, 54 ECAB 698 (2003).

¹⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (September 1994).

overpayment, the Office properly determined that appellant received wage-loss compensation totaling \$132,474.82 for the period in question, and deducted the court-ordered restitution amount of \$20,056.80, yielding the \$112,418.02 overpayment. As appellant was not entitled to receive compensation benefits during a period that she knowingly failed to report employment activity, the Office permissibly determined that an overpayment in compensation in the amount of \$112,418.02 had been created for the period March 24, 2002 to July 3, 2006.¹⁶

LEGAL PRECEDENT -- ISSUE 4

Section 8129 of the Act provides that an overpayment in 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.”¹⁷

Section 10.433(a) of the Office regulations provides that the Office:

“[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from [the Office] are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual).”¹⁸

To determine if an individual was at fault with respect to the creation of an overpayment, the Office examines the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.¹⁹

ANALYSIS -- ISSUE 4

In this case, the Office found appellant at fault in creating the overpayment in compensation because she knowingly failed to report employment activities. Appellant had an

¹⁶ *F.C.*, *supra* note 4.

¹⁷ 5 U.S.C. § 8129; *see Linda E. Padilla*, 45 ECAB 768 (1994).

¹⁸ 20 C.F.R. § 10.433; *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

¹⁹ 20 C.F.R. § 10.433(b); *Duane C. Rawlings*, 55 ECAB 366 (2004).

obligation to show good faith and to exercise a high degree of care in reporting events that could affect the amount of her compensation.²⁰ Beginning on March 24, 2002 she submitted a number of Office EN1032 forms in which she indicated that she had no earnings and was not performing work activities. Appellant knew that she was performing work activities during the periods covered by the Office's EN1032 forms. The forms properly advised her that a false or evasive answer to any question could be grounds for forfeiting compensation benefits and advised that severe penalties could be applied for failure to report all work activities thoroughly and completely. When appellant signed her name to the forms, she certified that she understood that she must immediately report to the Office any employment or work activities. She failed to inform the Office of her business activities, information that she knew or should have known was material to the calculation of her wage-loss compensation. The Board finds that the fact that appellant did not report her earnings is probative evidence that she was aware of the consequences of reporting and that she knew or should have known that she was not entitled to receive wage-loss compensation while she was performing work activities and was thus at fault in the creation of the overpayment in compensation.²¹ Because appellant is at fault in the creation of the overpayment, she is not entitled to waiver.

LEGAL PRECEDENT -- ISSUE 5

The Office procedures regarding court-ordered restitution in fraud cases and the Office's administrative debt collection process, note that, when a debtor is convicted of filing a false claim that resulted in an overpayment/debt due the government, the court often orders the defendant to make restitution to the United States as a condition of probation. The restitution amount may or may not be the full amount of the debt owed to the Office. If the court order states that the restitution amount will be in full satisfaction of the debt owed the United States (a "Global Settlement"), the court order takes precedence over the Office's administrative debt collection process. In such cases, if the restitution amount is less than the outstanding debt principal balance, the principal balance must be reduced to the restitution amount set by the court. If the court order does not represent a global settlement, the Office should continue to pursue collection of the full debt amount, taking credit for any restitution amounts received.²²

ANALYSIS -- ISSUE 5

On appeal, appellant's attorney argued that the court-ordered restitution of \$20,056.80 constituted a global settlement. The court order that was imposed on July 26, 2006, however, did not indicate that the recovery from appellant in restitution was meant to be in full satisfaction of the debt owed to the United States such that it would constitute a global settlement. Thus, the Office was not precluded from pursuing collection of the overpayment in compensation, with credit to be given to the restitution amount received.²³

²⁰ *Sinclair L. Taylor*, *supra* note 18.

²¹ *F.C.*, *supra* note 4.

²² Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300 (September 1994); *Martin James Sullivan*, 50 ECAB 158 (1998).

²³ *Danny E. Haley*, 56 ECAB 393 (2005).

CONCLUSION

The Board finds that appellant was not entitled to wage-loss compensation after July 26, 2007 and that she forfeited her right to compensation for the period March 24, 2002 to July 3, 2006. The Board also finds that appellant was at fault in the creation of an overpayment in the amount of \$112,418.02, and that the court-ordered restitution does not constitute a global settlement.²⁴

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 20 and October 2, 2007 be affirmed.

Issued: April 22, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

²⁴ Lastly, the Board notes that its jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act. Where, as here, a claimant 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 Collection Act. *Albert Pineiro*, 51 ECAB 310 (2000).