



## **FACTUAL HISTORY**

The Office accepted that on March 14, 1995 appellant, then a 46-year-old supervisor of customer service, sustained a right knee sprain when he twisted his right knee while twisting to lift a large mail pouch out of a container. It later accepted that he sustained right knee osteoarthritis due to the March 14, 1995 injury. Appellant was paid appropriate compensation for periods of disability.<sup>1</sup> He received schedule awards for a 75 percent permanent impairment of his right leg.<sup>2</sup>

On January 29, 2004 the Office requested that appellant complete a Form EN1032 which required him to report employment activities and earnings from employment during the 15-month period preceding the date of the completion of the form.

On February 12, 2004 appellant responded “no” in response to questions on the Form EN1032 regarding whether he had self-employment or employment other than self-employment during the 15 months prior to his completion of the form. The form requested that he report employment other than self-employment for which he received salary, wages, sales commissions, piecework or other payment. Appellant was to report all self-employment or involvement in business enterprises including, but not limited to, farming, sales work, operating a business (including a store or restaurant), and providing services in exchange for money, goods or other services. He was required to report activities such as keeping books and records or managing and/or overseeing a business of any kind, including a family business and even part-time or intermittent activities were to be reported. Appellant was to report work or any ownership interest in any business enterprise even if he was not paid, the work was for a family member or relative, the business lost money, or income was reinvested or paid to others.<sup>3</sup>

An investigation was conducted by the Office of the Inspector General (OIG) of the employing establishment regarding appellant’s employment activities and earnings. In an April 18, 2008 report, Special Agent Mathew Smith documented that appellant was the proprietor and president of a real estate development business, P.K.S. Enterprises, Inc., that he created on September 27, 2002.<sup>4</sup> The report shows that appellant engaged in employment activities and had earnings during the 15-month period covered by the Form EN1032 he signed on February 12, 2004, *i.e.*, the period November 12, 2002 to February 12, 2004. The investigation was documented through surveillance, witness interviews and other investigative techniques that appellant engaged in a real estate development business. Special Agent Smith

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<sup>1</sup> In March 1998, the Office adjusted appellant’s compensation based on his ability to earn actual wages as an administrative supervisor.

<sup>2</sup> The Office authorized several right knee surgeries, including a total knee replacement in January 1999. Appellant last worked for the employing establishment on November 29, 1999.

<sup>3</sup> The Form EN1032 appellant signed asked him to certify that the information he provided was correct. He was advised that he might be subject to criminal prosecution if he made a false statement or misrepresentation of a material fact in claiming a payment of benefits under the Federal Employees’ Compensation Act or fraudulently concealed or failed to report income or other information which could have an effect on benefits.

<sup>4</sup> On a 2003 yearly business report required by North Carolina, P. K. S. Enterprises was described as a “Real Estate Development” company.

documented numerous real estate development deals that appellant oversaw since 1999 which resulted in aggregate profits of several hundred thousand dollars.<sup>5</sup> For example, on February 5, 2003 appellant purchased a property known as “Lot 6, Heritage Wood Subdivision” for \$25,000.00. On September 12, 2003 he sold the property for \$34,000.00 resulting in an apparent \$9,000.00 profit.<sup>6</sup>

Special Agent Smith detailed an interview that he conducted with appellant on March 11, 2008. Appellant initially denied having any other source of income while in receipt of compensation for his work-related injury, but when questioned again, he acknowledged that he had been involved in the buying and selling of real estate in the mountains of North Carolina until the real estate market crashed. When questioned about running a real estate development business, appellant initially denied the existence of any such business, but upon further questioning, he confirmed that he was the president of P.K.S. Enterprises, Inc. Appellant initially asserted to Special Agent Smith that P.K.S. Enterprises was not a business and was only established to assist with tax relief for buying and selling real estate. However, he later indicated after answering additional questions about P.K.S. Enterprises, “You probably could say it was a business.” Appellant told Special Agent Smith that as the proprietor and president of P.K.S. Enterprises, he would purchase plots of land, hire someone to clear the land, contract a house to be built and then sell the property. He admitted that he did not report these activities to the Office.<sup>7</sup>

In a July 17, 2008 decision, the Office determined that appellant forfeited his right to compensation for the period November 12, 2002 to February 12, 2004 because he knowingly failed to report his employment activities. It indicated that the evidence supported that he was employed during the period in question and omitted earnings and business activities during the 15-month period covered by the Form EN1032 he signed on February 12, 2004 “with knowledge” that failure to report earnings or business activities might have an effect on his benefits. The Office found that appellant willfully and knowingly omitted earnings and work activities on the Form EN1032 covering the period November 12, 2002 to February 12, 2004 and concluded that, under section 8106(b) of the Act, he forfeited compensation for this period in the amount of \$52,084.76.

In a July 17, 2008 letter, the Office advised appellant that it had made a preliminary determination that he received a \$52,084.76 overpayment of compensation because he forfeited that amount of compensation for the period November 11, 2002 to February 12, 2004 when he knowingly falsified a Form EN1032 completed on February 12, 2004 (covering the prior 15-month period) and did not report employment activities and earnings from his real estate development business, P.K.S. Enterprises. It also made a preliminary determination that appellant was at fault in the creation of this overpayment, because he denied receiving earnings or engaging in business activities during the period covered by the Form EN1032 completed on

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<sup>5</sup> It appears that appellant was involved in real estate development activities prior to founding P.K.S. Enterprises.

<sup>6</sup> The record contains copies of numerous supporting documents, including copies of deeds signed by appellant.

<sup>7</sup> Special Agent Smith also obtained a voice recording in which appellant indicated that he and some friends built most of a house in 2005.

February 12, 2004 and signed the form “with knowledge” that failure to report income or other business activities may have an effect on his benefits. The Office provided appellant an opportunity to submit evidence if he contested the proposed overpayment determination. It asked him to complete and return a financial information questionnaire.

Appellant requested a review of the written record by an Office hearing representative. In an August 13, 2008 letter, appellant’s attorney asserted that appellant’s real estate activities between November 12, 2002 and February 12, 2004 only constituted a passive business investment. In a December 17, 2008 decision, the Office hearing representative affirmed the Office’s July 17, 2008 decision finding that appellant forfeited his right to compensation for the period November 12, 2002 to February 12, 2004.

In a January 7, 2009 decision, the Office determined that appellant received a \$52,084.76 overpayment of compensation. It found that appellant was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment. The Office required repayment of the overpayment by deducting \$650.00 from appellant’s compensation payments every 28 days.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8106(b) of the Act<sup>8</sup> 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 --

- (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.”<sup>9</sup>

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<sup>8</sup> 5 U.S.C. § 8106(b).

<sup>9</sup> 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.

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.<sup>10</sup>

It is not enough merely to establish that there was unreported employment or earnings. Appellant can only be subjected to the forfeiture provision of 5 U.S.C. § 8106(b) if he or she knowingly failed to report employment or earnings.<sup>11</sup> The term knowingly as defined in the Office's implementing regulations, means with knowledge, consciously, willfully or intentionally.<sup>12</sup> To meet this burden, the Office is required to examine closely appellant's activities and statements. It may meet this burden without an admission by the claimant if the circumstances of the case establish that he failed to reveal fully and truthfully the full extent of his employment activities and earnings.<sup>13</sup>

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.”<sup>14</sup>

### **ANALYSIS -- ISSUE 1**

In the present case, the record establishes that appellant omitted earnings on a Form EN1032 he signed on February 12, 2004 and which covered the period November 12, 2002 to February 12, 2004. In this form, the Office notified appellant of his responsibility to complete the form and provide relevant information concerning his employment status and earnings during the period covered by the form. The record reveals, however, that appellant had employment and earnings during the period covered by this form in that he was self-employed and running his own real estate development business and had earnings from this employment.

An investigation was conducted by the OIG of the employing establishment regarding appellant's employment activities and earnings. In an April 18, 2008 report, Special Agent

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<sup>10</sup> *Anthony V. Knox*, 50 ECAB 402 (1999).

<sup>11</sup> *Barbara L. Kanter*, 46 ECAB 165 (1994).

<sup>12</sup> 20 C.F.R. § 10.5(n).

<sup>13</sup> *Terry A. Geer*, 51 ECAB 168 (1999).

<sup>14</sup> 20 C.F.R. § 10.5(g); *see Monroe E. Hartzog*, 40 ECAB 322, 329 (1988).

Smith documented that appellant was the proprietor and president of a real estate development business, P.K.S. Enterprises, Inc., that he created on September 27, 2002. The report shows that appellant engaged in employment activities and had earnings during the 15-month period covered by the Form EN1032 he signed on February 12, 2004, *i.e.*, the period November 12, 2002 to February 12, 2004. For example, on February 5, 2003 appellant purchased a property known as “Lot 6, Heritage Wood Subdivision” for \$25,000.00. On September 12, 2003 he sold the property for \$34,000.00 resulting in an apparent \$9,000.00 profit. Special Agent Smith of the OIG detailed an interview that he conducted with appellant on March 11, 2008. Appellant initially asserted to Special Agent Smith that P.K.S. Enterprises was not a business and was only established to assist with tax relief for buying and selling real estate. However, he later indicated after answering additional questions about P.K.S. Enterprises, “You probably could say it was a business.” Appellant told Special Agent Smith that as the proprietor and president of P.K.S. Enterprises, he would purchase plots of land, hire someone to clear the land, contract a house to be built and then sell the property. He admitted that he did not report these activities to the Office.

The present case does not involve any question as to the definition of “earnings” that must be reported. Appellant’s attorney asserted that appellant’s real estate activities between November 12, 2002 and February 12, 2004 only constituted a passive business investment.<sup>15</sup> However, appellant’s real estate activities, including his running his own real estate business, were too extensive to be considered merely a passive business investment. There is no question that appellant had earnings as the proprietor and owner of a real estate development business during the period in question.

The Board further finds that appellant knowingly failed to report earnings and employment activities during the relevant period. The Form EN032 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. The explicit language of the Form CA-1032 clearly advised appellant that the nature of his work running a real estate development business would require him to report such employment activities on the form. Appellant’s signing of a strongly-worded certification clause on the Form EN1032 further shows that he was aware of materiality of his failure to report his employment. Moreover, the fact that appellant initially attempted to conceal the full extent of his employment activities and earnings from Special Agent Smith suggest that he knew that he was required to report such activities and earnings.<sup>16</sup>

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 on the applicable Form EN1032 for the period.<sup>17</sup> Accordingly, the Board finds that the Office properly determined that appellant forfeited his right to compensation for the period November 12, 2002 to February 12, 2004. Appellant received \$52,084.76 in compensation for

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<sup>15</sup> See *supra* note 10.

<sup>16</sup> See *supra* note 13.

<sup>17</sup> See generally *Lewis George*, 45 ECAB 144 (1993).

the period November 12, 2002 to February 12, 2004 and therefore he forfeited compensation in this amount.<sup>18</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Section 10.529 of the Office's implementing regulations provide as follows:

“(a) If an employee knowingly omits or understates any earnings or work activity in making a report, he or she shall forfeit the right to compensation with respect to any period for which the report was required. A false or evasive statement, omission, concealment or misrepresentation with respect to employment activity or earnings in a report may also subject an employee to criminal prosecution.

“(b) Where the right to compensation is forfeited, [the Office] shall recover any compensation already paid for the period of forfeiture pursuant to 5 U.S.C. [§] 8129 [recovery of overpayments] and other relevant statutes.”<sup>19</sup>

If a claimant has any earnings during a period covered by a Form EN1032 which he knowingly fails to report, he is not entitled to any compensation for any portion of the period covered by the report, even though he may not have had earnings during a portion of that period.<sup>20</sup>

### **ANALYSIS -- ISSUE 2**

As noted, Office regulations provide that the Office may declare an overpayment of compensation for the period of a given forfeiture of compensation. The Office paid appellant compensation in the amount of \$53,084.76 for the period November 12, 2002 to February 12, 2004. It properly found that appellant forfeited his entitlement to compensation during this time because he failed to report earnings and employment activities from employment on a Form EN1032. Therefore, there exists an overpayment of compensation in the amount of \$53,084.76.

### **LEGAL PRECEDENT -- ISSUE 3**

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.<sup>21</sup> 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

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<sup>18</sup> On appeal, appellant asserted that the Office hearing representative only found a forfeiture of \$8,000.00 in compensation, but the December 17, 2008 decision reveals that a \$52,084.76 forfeiture of compensation was found.

<sup>19</sup> 20 C.F.R. § 10.529. *See also Harold F. Franklin*, 57 ECAB 387 (2006).

<sup>20</sup> *Robert Ringo*, 53 ECAB 258 (2001).

<sup>21</sup> 5 U.S.C. § 8129(a).

who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”<sup>22</sup> No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.<sup>23</sup>

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.433(a) of Title 20 of the Code of Federal Regulations provide 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 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....”<sup>24</sup>

Section 10.433(c) of the Office’s regulations provides:

“Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on 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.”<sup>25</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that appellant was at fault under the third standard described above as he accepted payments of compensation covering the period November 12, 2002 to February 12, 2004 which he knew or should have known to be incorrect. Appellant had signed a Form EN1032 which directed him to return any and all checks to which he was not entitled. He knowingly failed to report employment activities and earnings on a Form EN1032 covering the period November 12, 2002 to February 12, 2004. The form advised him of the materiality of the duty to report employment activities and earnings from employment and informed him that failure to properly report these activities or earnings could affect his compensation. However, appellant accepted incorrect compensation payments for the period November 12, 2002 to February 12, 2004. Therefore, appellant is at fault in the creation of the \$52,084.76 overpayment, such that it is not subject to waiver.<sup>26</sup>

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<sup>22</sup> 5 U.S.C. § 8129(b).

<sup>23</sup> *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

<sup>24</sup> 20 C.F.R. § 10.433(a).

<sup>25</sup> *Id.* at § 10.433(c).

<sup>26</sup> *See Bob R. Gilley*, 51 ECAB 377 (2000); *Albert Pineiro*, 51 ECAB 310 (2000).

**LEGAL PRECEDENT -- ISSUE 4**

Section 10.441(a) of Title 20 of the Code of Federal Regulations provides in pertinent part:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, [the Office] shall decrease later payments of compensation, taking into account 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 hardship.”<sup>27</sup>

**ANALYSIS -- ISSUE 4**

The record supports that, in requiring repayment of the overpayment by deducting \$650.00 from appellant’s compensation payments every 28 days, the Office took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on appellant.<sup>28</sup> Therefore, the Office properly required repayment of the overpayment by deducting \$650.00 from appellant’s compensation payments every 28 days.

**CONCLUSION**

The Board finds that the Office properly found that appellant forfeited his right to compensation for the period November 12, 2002 to February 12, 2004 because he knowingly failed to report his employment activities. The Board further finds that the Office properly determined that appellant received a \$52,084.76 overpayment of compensation and that he was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment. The Board finds that the Office properly required repayment of the overpayment by deducting \$650.00 from appellant’s compensation payments every 28 days.

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<sup>27</sup> 20 C.F.R. § 10.441(a); *see Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

<sup>28</sup> Appellant did not complete and return a financial information questionnaire as directed by the Office and he was receiving a gross amount of Office compensation per month of more than \$3,700.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' January 7, 2009 and December 17, 2008 decisions are affirmed.

Issued: December 3, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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