



## **FACTUAL HISTORY**

On November 20, 1986 appellant, then a 41-year-old flat sorter machine operator, injured both knees and her back in the performance of duty. The Office accepted sprains of the lumbosacral spine and both knees. On May 12, 1987 it placed appellant on the periodic rolls for temporary total disability.

As a benefit recipient, the Office periodically required appellant to submit updated information (Form EN1032) regarding her employment, volunteer work, dependents, other federal benefits or payments received and any third-party settlements. The reports required that she provide information covering the 15-month period preceding the date of the request. The reports contained advised her that a false or evasive answer to any question or the omission of an answer may be grounds for forfeiting her compensation benefits. The record contains EN1032 forms, signed by appellant on January 23, 1998, January 22, 1999, January 25, 2000, February 12, 2001, January 24, 2002 and February 3, 2003. In response to whether she worked for any employer during the previous 15 months, in each instance she answered, "No." As to whether appellant was self-employed or involved in any business enterprise during the previous 15 months, she responded, "No." She answered "Yes" when asked to state whether she was unemployed for all periods during the previous 15 months.

In a December 5, 2007 investigative memorandum, the employing establishment informed the Office that appellant was vice president and secretary of Little Tykes Learning Center, Inc. The investigation revealed that both appellant and Little Tykes Learning Center were listed as defendants in a breach of contract case filed by General Electric Capitol Corporation and that appellant was listed in the bankruptcy filing of Little Tykes Learning Center. The record contains annual corporate reports dated March 22, 1997, April 8, 1998, March 12, 1999, April 20, 2000 and April 12, 2001 which listed appellant as vice president and secretary and the articles of dissolution for the corporation dated January 1, 2002. The investigator submitted copies of checks and correspondence signed by appellant on behalf of Little Tykes Learning Center and records from the civil lawsuit against appellant and Little Tykes Learning Center by General Electric Capitol Corporation.

In a January 2, 2008 decision, the Office found that appellant's compensation should be forfeited for all periods covered by EN1032 forms completed by her between March 22, 1997 and January 1, 2002. It determined that appellant forfeited compensation in the amount of \$126,390.60 for the period.

The record contains a December 28, 2007 payment history reflecting that she was paid compensation in the amount of \$126,390.60 from March 22, 1997 to January 1, 2002.

On January 2, 2008 the Office issued a preliminary overpayment determination in the amount of \$126,390.60 due to appellant's failure to notify it of her self-employment with Little Tykes Learning Center. It found that she was at fault in the creation of the overpayment by knowingly misrepresenting her employment status during the periods covered by EN1032 forms. The Office concluded that she had forfeited her right to compensation. It informed her that she had 30 days to request a prerecoupment hearing on the issues of fault and a possible waiver.

On January 28, 2008 appellant requested a prerecoupment hearing before an Office hearing representative and submitted an overpayment recovery questionnaire. She denied having received an overpayment. Appellant also requested an oral hearing before an Office hearing representative on the January 2, 2008 forfeiture decision. She contended that she did not have to report this employment as she received no salary.

A telephonic hearing was held on May 13, 2008, at which appellant was represented by counsel. She testified that her parents lent her daughter the money to open the day care center, but had her open the business in her name to protect their money. Appellant testified that she spent time at her daughter's business and that she used her charge cards and money to help her daughter out. She stated that at no time was she paid or worked at the business; however, appellant acknowledged that she wrote checks for the business and showed her daughter how to do payroll and accounting. Appellant testified that she occasionally went on trips and picked up one child and her grandchildren to bring them to the day care center.

By decision dated July 11, 2008, an Office hearing representative affirmed the January 2, 2008 forfeiture decision. She also finalized the overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$126,390.60 due to her falsification of EN1032 forms from March 22, 1997 to January 1, 2002. As appellant was at fault in the creation of the overpayment, she was not entitled to a waiver of recovery. The hearing representative found the overpayment was due in full as appellant failed to provide any supporting documentation and failed to include her ongoing compensation payments under her reported monthly income.

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

Section 8106(b) of the Federal Employees' Compensation Act provides that an employee who fails to make an affidavit or report when required or 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.<sup>1</sup>

The Office has the burden of proof to establish that appellant did, either with knowledge, consciously, willfully or intentionally, fail to report earnings from self-employment. To meet this burden of proof, it is required to closely examine appellant's activities and statements in reporting employment earnings.<sup>2</sup>

The Office may meet this burden by appellant's own subsequent admission that she failed to report employment or earnings, which she knew she should report. It may meet this standard without an admission by appellant, if she failed to fully and truthfully complete the EN1032 forms and the circumstances of the case establish that she failed to fully and truthfully reveal the full extent of her employment activities and earnings. The Office may also meet this burden if it

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<sup>1</sup> 5 U.S.C. § 8106(b)(1) and (2)

<sup>2</sup> See *Michael D. Mathews*, 51 ECAB 247 (1999).

establishes through the totality of the factual circumstances that appellant's certification in the EN1032 forms that she was not employed or self-employed, was false.<sup>3</sup>

### ANALYSIS -- ISSUE 1

The record contains EN1032 forms signed by appellant on January 23, 1998, January 22, 1999, January 25, 2000, February 12, 2001, January 24, 2002 and February 3, 2003. She informed the Office that she was unemployed, not engaged in any self-employment activities and earned no income for the respective 15-month period covered by each form.<sup>4</sup> The record, however, contains clear evidence to the contrary and reflects that appellant failed to report her employment activities with her daughter's day care facility. Although she alleged that she did not believe that EN1032 forms required her to report her activity with her daughter's business, she acknowledged performing activities such as transporting children, going on field trips, writing checks, accounting and payroll work and teaching her daughter how to perform accounting. The Board has held that, if work was performed in furtherance of a relative's business, the employee must show as the rate of pay what it would have cost the employer or organization to hire someone to perform the work performed. 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 to do the work. Appellant took an active role in the operation of the day care business and was obligated to report as earnings the amount that would have been paid to a person to do the work.<sup>5</sup>

The Office regulations define knowingly as with knowledge, consciously, willfully or intentionally.<sup>6</sup> Absent an admission by appellant, a knowing omission or understatement of income can be established where circumstances indicate that she did not fully and truthfully complete EN1032 forms and thus failed to reveal the full extent of her employment activities and earnings.<sup>7</sup>

The evidence establishes that appellant assisted her daughter in the operations of Little Tykes Learning Center, which was a business enterprise, for the period March 22, 1997 to January 1, 2002. She served as vice president and secretary of the corporation and is listed on annual corporate reports dated March 22, 1997, April 8, 1998, March 12, 1999, April 20, 2000 and April 12, 2001 and the January 1, 2002 articles of dissolution. In addition appellant signed her name on both checks and correspondence for Little Tykes Learning Center. The Board finds that her work and management activities are consistent with self-employment in furtherance of

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<sup>3</sup> See *Donald L. Overstreet*, 54 ECAB 678 (2003). See also *Terry A. Geer*, 51 ECAB 168 (1999).

<sup>4</sup> The Board notes that the respective 15-month periods referenced are as follows: October 23, 1996 to January 23, 1998; October 22, 1997 to January 22, 1999; October 25, 1998 to January 25, 2000; November 12, 1999 to February 12, 2001; October 24, 2000 to January 24, 2002 and November 3, 2001 to February 3, 2003.

<sup>5</sup> *J.S.*, 58 ECAB \_\_\_\_ (Docket No. 06-2113, issued May 10, 2007); *Anthony A. Nobile*, 44 ECAB 268 (1992).

<sup>6</sup> 20 C.F.R. § 10.5(n).

<sup>7</sup> See *Donald L. Overstreet*, *supra* note 3.

her daughter's business. The record contains persuasive evidence that she knowingly misrepresented her employment activities on the EN1032 forms.<sup>8</sup>

Appellant expressed her belief that she was not required to report her assistance in her daughter's business as she earned no wages. However, she was clearly informed by the Office that she had an affirmative obligation to report any work or ownership interest in any business enterprise and that her failure to do so would result in forfeiture of compensation. Therefore, the Board finds appellant's claim of ignorance to be without merit.

Office regulations provide that, if an employee knowingly omits or understates 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.<sup>9</sup> Appellant misrepresented her employment status and, therefore, forfeited her right to all compensation during the periods in question. The Board finds that the Office met its burden of proof to establish that she knowingly misrepresented her employment status to it in the EN1032 forms dated January 23, 1998, January 22, 1999, January 25, 2000, February 12, 2001, January 24, 2002 and February 3, 2003. Therefore, appellant is required to forfeit the amount of compensation received during the 15-month period preceding the signing of these reports.

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

Section 10.529 of the Office's implementing regulations provides 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 the forfeiture pursuant to 5 U.S.C. [§] 8129 [recovery of overpayments] and other relevant statutes.”<sup>10</sup>

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

If a claimant has any earnings during a period covered by a Form CA-1032 which he or she knowingly fails to report, he or she is not entitled to any compensation for any portion of the period covered by the report, even though he or she may not have had earnings during a portion

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<sup>8</sup> Earnings from employment or self-employment means either gross earnings or wages before deductions or a reasonable estimate of the cost to have someone else perform the duties of an individual who accepts no remuneration. See 20 C.F.R. § 10.5(g).

<sup>9</sup> 5 U.S.C. § 8106(b)(1) and (2).

<sup>10</sup> 20 C.F.R. § 10.529

of that period.<sup>11</sup> The Board has determined that appellant forfeited compensation because she misrepresented her employment activities on EN1032 forms returned to the Office which paid appellant compensation in the amount of \$126,390.60 from March 22, 1997 to January 1, 2002. As appellant forfeited compensation for this period because she omitted earnings and employment activities on EN1032 forms covering this period, she received an overpayment of compensation in the amount of \$126,390.60.

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

Section 8129(b) of the Act<sup>12</sup> provides: 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 the Act or would be against equity and good conscience.<sup>13</sup>

The Office may 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 received 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 with respect to 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).<sup>14</sup>

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>15</sup>

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

The Office found that appellant was at fault in the creation of the overpayment because she failed to provide information as to a material fact which she knew or should have known to be incorrect. The record establishes that appellant was engaged in employment activities and knowingly omitted this material information to the Office.

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<sup>11</sup> *F.H.*, 60 ECAB \_\_\_ (Docket No. 07-1379, issued November 24, 2008); *Louis P. McKenna, Jr.*, 46 ECAB 328 (1994).

<sup>12</sup> 5 U.S.C. § 8129(b).

<sup>13</sup> *J.K.*, 60 ECAB \_\_\_ (Docket No. 08-1761, issued January 8, 2009).

<sup>14</sup> 20 C.F.R. § 10.433(a).

<sup>15</sup> *Id.* at § 10.433(b).

Appellant signed a certification clause on CA-1032 forms dated January 23, 1998, January 22, 1999, January 25, 2000, February 12, 2001, January 24, 2002 and February 3, 2003. In response to the question as to whether she worked for any employer during the previous 15 months, in each instance she answered, "No." In response to the question as to whether she was self-employed or involved in any business enterprise in the previous 15 months, she responded, "No." Appellant answered "Yes" when asked to state whether she was unemployed for all periods during the previous 15 months. The certification clause advised her that she might be subject to civil, administrative or criminal penalties if she knowingly made a false statement or misrepresentation or concealed a fact to obtain compensation. By signing the forms, appellant acknowledged her duty to fill out the form properly, including the duty to report any employment or self-employment activities. The evidence of record establishes that even though she provided various services to the operation of her daughter's day care center, she failed to report such activities to the Office as required. Appellant was aware or should have been aware of the materiality of the information that she was engaged in work activities which she did not list on the relevant forms. As she failed to provide material information to the Office regarding her employment during the periods covered by the forms, the Board finds that she is at fault in creating the overpayment based on her forfeiture of compensation for these periods and, therefore, is not entitled to waiver.

#### **LEGAL PRECEDENT -- ISSUE 4**

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act. Section 10.441(a) of the regulations provides:

"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 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>16</sup>

#### **ANALYSIS -- ISSUE 4**

The record reflects that appellant continues to receive wage-loss compensation under the Act. As noted, she failed to timely submit supporting documentation or properly represent all her income on the overpayment questionnaire form as she omitted her compensation payments on the form. In cases where the appropriate financial documentation or overpayment questionnaire as required by 20 C.F.R. § 10.441 is not submitted, the Office is unable to consider her financial circumstances. The Board finds that the Office did not abuse its discretion in following its regulations and finding that the overpayment was due in full.

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<sup>16</sup> *Id.* at § 10.441.

**CONCLUSION**

The Board finds that the Office properly applied the penalty provision of 5 U.S.C. § 8106(b)(2) as appellant knowingly omitted as earnings what it would have cost her daughter to hire someone to perform the duties she performed. Appellant concealed her work activities and forfeited her right to compensation for the periods covered by the EN1032 disclosure forms. The Board finds that she was at fault in the creation of the resulting overpayment, thereby, precluding waiver of the recovery. Appellant failed to provide information that she knew or should have known was material. The Board further finds that the Office acted within its discretion in concluding the overpayment was due in full as she failed to provide supporting documentation and failed to include her compensation payments as income on the overpayment recovery form.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 11, 2008 is affirmed.

Issued: November 17, 2009  
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