

On appeal appellant's counsel contends the evidence of record was insufficient to support that appellant knowingly failed to report self-employment earnings.

FACTUAL HISTORY

On September 9, 2002 appellant, then a 37-year-old clerk/mail processor, filed a traumatic injury claim alleging that on August 30, 2002 she injured her back while lifting heavy tubs of mail. The Office accepted the claim for exacerbation of cervicobrachial syndrome. By letter dated January 23, 2003, 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 appellant provide information covering the 15-month period preceding the date of the request. The reports contained a clear warning advising 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 February 5 and October 28, 2004, August 30, 2005 and May 11, 2006. In response to the question as to whether she worked for any employer during the previous 15 months, in each instance appellant answered, "No." In response to the question as to whether appellant was self-employed or involved in any business enterprise in 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 an investigative memorandum dated September 28, 2008, the employing establishment's Office of the Inspector General informed the Office that appellant assisted her husband in the operation of the GettyMart in New Holland, PA for the period September 20, 2004 to September 30, 2005. Undercover Agent Michael Brennan observed appellant working in the store alone on numerous occasions from June 8 to August 16, 2005 operating the cash register, refilling cigarette stock, waiting on customers, accounting for lottery tickets, washing pots and pans and receiving deliveries. The investigation report noted that appellant acknowledged assisting her husband in the operation of the business. She admitted to stocking the shelves, operating the cash register, selling and accounting for lottery tickets, delivering bank deposits and washing kitchen items.

The record contains a copy of a September 20, 2004 retail gasoline station lease agreement between appellant and her husband, who are identified as lessees and Getty Petroleum Marketing, Inc., identified as the company. The lease provided that the premises located in New Holland, PA, would be leased to appellant and her husband for a one-year term, September 20, 2004 to September 30, 2005.

The record contains a payment history, which was prepared by the investigator, bearing a run date of September 28, 2007 reflecting the net amount paid, check date and period covered for the period January 3, 2003 to August 4, 2007.

On February 5, 2008 the Office received a September 19, 2007 memorandum of interview. On September 19, 2007 the special agent interviewed appellant at her residence.

Both appellant and her husband admitted that she performed work at the GettyMart from approximately October 2004 to September 2005. Appellant admitted to filling and selling cigarettes, accounting for lottery tickets, washing dishes, bagging customer items, using the cash register, making coffee and occasionally driving and depositing store receipts to the bank.

By decision dated December 5, 2007, the Office found that compensation should be forfeited for all periods covered by EN1032 forms completed by appellant between February 6, 2004 and May 11, 2006. Accordingly, it determined that she forfeited the amount of \$70,760.48 for the period February 6, 2004 to May 11, 2006.

The record contains a payment history, bearing a run date of December 5, 2007, reflecting that appellant was paid compensation in the total amount of \$70,760.48 for the period February 6, 2004 to May 11, 2006.

On December 11, 2007 the Office issued a preliminary finding of overpayment in the amount of \$70,760.48 due to appellant's failure to notify the Office that she and her husband leased and operated a GettyMart station and that she performed work at the station. Finding that appellant was at fault in the creation of the overpayment by knowingly misrepresenting her employment status during the periods covered by EN1032 forms signed by her from February 6, 2004 to May 11, 2006, the Office concluded that she had forfeited her right to compensation for those periods. It informed appellant that she had 30 days to request a preresoupment hearing on the issues of fault and a possible waiver.

On January 2, 2008 appellant's counsel requested a preresoupment hearing before an Office hearing representative. She also requested an oral hearing before an Office hearing representative on the December 5, 2007 forfeiture decision. No completed overpayment questionnaire was submitted.

A hearing was held on April 9, 2008, at which appellant was represented by counsel and testified. Appellant stated that her husband started the business and he put her name on the corporation. She visited him at the store everyday and helped out at the cash register when he was either in the restroom or in the back stocking items and that she occasionally helped him with stocking cigarettes. Appellant denied receiving any money from her husband for the work she performed.

By decision dated June 24, 2008, an Office hearing representative affirmed the December 5, 2007 forfeiture decision. She also finalized the overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$70,760.48, due to her falsification of EN1032 forms from February 6, 2004 to May 11, 2006 and that she was at fault in the creation of the overpayment and, therefore, was not entitled to a waiver of recovery. The Office hearing representative directed that \$700.00 be deducted from appellant's continuing compensation.

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 her earnings, forfeits her right to compensation with respect to any period for which the affidavit or report was required.¹

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 her activities and statements in reporting employment earnings.²

The Office may meet this burden by appellant's own subsequent admission to the Office that she failed to report employment or earnings, which she knew she should report. It may meet this standard without an admission by her, 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 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.³

ANALYSIS -- ISSUE 1

The record contains EN1032 forms signed by appellant on February 5 and October 28, 2004, August 30, 2005 and May 11, 2006, stating that she was unemployed, had not engaged in any self-employment activities and earned no income for the respective 15-month periods prior to the signing of the documents.⁴ The record, however, establishes the contrary. The forms signed on October 28, 2004, August 30, 2005 and May 11, 2006 reflect that appellant failed to report her employment activities during those periods of time. Appellant alleged that she did not believe that EN1032 forms required her to report her activity with her husband's business. However, she acknowledged that she helped him out at the business and that her name was on the lease form for the business. 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. Appellant took an active role in the operation of the gas station and was obligated to report as earnings the amount that would have been paid to a person doing the work.⁵

The Office regulations define knowingly as with knowledge, consciously, willfully or intentionally.⁶ 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

¹ 5 U.S.C. § 8106(b)(1) and (2).

² See *Michael D. Mathews*, 51 ECAB 247 (1999).

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

⁴ The Board notes that the respective 15-month periods referenced are as follows: November 4, 2002 to February 5, 2004; July 8, 2003 to October 8, 2004; May 30, 2004 to August 30, 2005; and February 11, 2005 to May 11, 2006.

⁵ *J.S.*, 58 ECAB ____ (Docket No. 06-2113, issued May 10, 2007); *Anthony A. Nobile*, 44 ECAB 268 (1992).

⁶ 20 C.F.R. § 10.5(n).

complete EN1032 forms and thus failed to reveal the full extent of her employment activities and earnings.⁷

The evidence establishes that appellant and her husband operated GettyMart, an ongoing business enterprise for the period September 20, 2004 to September 30, 2005, when they entered into a lease agreement with Getty Petroleum Marketing, Inc. Appellant went to the store everyday where she worked stocking the shelves, operating the cash register, selling and accounting for lottery tickets, delivering bank deposits and washing kitchen items. Her name was on the lease form for the business. The Board finds that appellant's work and name on the lease form are consistent with self-employment in furtherance of her family business and that her actions constitute persuasive evidence that she knowingly misrepresented her employment status on the EN1032 forms.

Appellant expressed her belief that she was not required to report her assistance with her husband'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.⁸ 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 the Office in the EN1032 forms dated October 8, 2004, August 30, 2005 and May 11, 2006. Therefore, appellant is required to forfeit the amount of compensation received during the 15-month period preceding the reports in which she knowingly misrepresented her employment status. As she correctly identified in a February 5, 2004 EN1032 form that she was not working, the period of forfeiture is February 6, 2004 to May 11, 2006.

On appeal appellant's counsel contends that there was insufficient knowledge in this case to support forfeiture of benefits and alleges the facts are similar to *Anthony A. Nobile*.⁹ She contends that, as in *Nobile*, appellant did believe that she only had to report any income she earned and that she had no knowledge that she had to report her activities at the gas station. In *Nobile*, the employee stated that he believed that employment meant that he received wages for any work he performed. As he was not paid for sales work he performed to help his mother out with her liquor store, he did not believe that he had to report this income. A majority of the Board found that, based on the circumstances, the Office improperly found he had forfeited his compensation for failure to report his work activities at the liquor store owned by his parents. In *Nobile*, the employee contended that he did not know he was required to report employment

⁷ See *Donald L. Overstreet*, *supra* note 3.

⁸ 5 U.S.C. § 8106(b)(1) and (2).

⁹ 44 ECAB 268 (1992).

activities because he did not get paid. In the case at hand, the evidence establishes that appellant along with her husband had an ownership interest in the gas station and was actively involved in work activities to further the business. *Nobile* can be distinguished from the case at hand as the Office regulations applicable to this case provide that forfeiture may be found if an employee knowingly omits any earnings or work activities in a report.

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 the forfeiture pursuant to 5 U.S.C. [§] 8129 [recovery of overpayments] and other relevant statutes.”¹⁰

ANALYSIS -- ISSUE 2

If a claimant has any earnings during a period covered by a Form CA-1032 (or Form CA-8), 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 of that period.¹¹ The Board has determined that appellant forfeited compensation for various periods identified herein because she omitted and understated her employment activities on EN1032 forms covering these periods. The Office paid her compensation in the amount of \$70,760.48 from February 6, 2004 to May 11, 2006. As appellant forfeited compensation for this period because she omitted earnings and employment on EN1032 forms covering this period, she received an overpayment of compensation in the amount of \$70,760.48.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(b) of the Act¹² 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.¹³

¹⁰ 20 C.F.R. § 10.529.

¹¹ *F.H.*, 60 ECAB ____ (Docket No. 07-1379, issued November 24, 2008); *Louis P. McKenna, Jr.*, 46 ECAB 328 (1994).

¹² 5 U.S.C. § 8129(b).

¹³ *J.K.*, 60 ECAB ____ (Docket No. 08-1761, issued January 8, 2009).

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; (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).¹⁴

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.¹⁵

ANALYSIS -- ISSUE 3

The Office found that appellant was at fault in the creation of the overpayment because she knowingly failed to furnish information regarding her activities with her husband's business. The Board finds that the record establishes that she was engaged in employment activity during the alleged periods and knowingly failed to furnish this material information to the Office.

Appellant signed a certification clause on EN1032 forms dated February 5 and October 28, 2004, August 30, 2005 and May 11, 2006. 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, appellant responded, "No." She answered "Yes" when asked to state whether she was unemployed for all periods during the previous 15 months. The certification clause advised appellant 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. Thus, by signing the form, she is deemed to have acknowledged her duty to fill out the form properly, including the duty to report any employment or self-employment activities. The evidence of record, therefore, shows that appellant was aware or should have been aware of the need to report that she was engaged in work activities. As she failed to provide information to the Office regarding her employment activities 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 of the recovery of the overpayment.

¹⁴ 20 C.F.R. § 10.433(a).

¹⁵ *Id.* at § 10.433(b).

LEGAL PRECEDENT -- ISSUE 4

Section 10.441 of the Office's regulations provide that whenever 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 her attention is called to the same.¹⁶ 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 hardship.¹⁷

ANALYSIS -- ISSUE 4

The Office ordered recovery in the amount of \$700.00 per month. Appellant did not provide any information regarding her current financial circumstances. It is her responsibility to provide information about income, expenses and assets.¹⁸ There is no evidence that recovery of the overpayment from appellant's continuing compensation would cause her undue financial hardship. Thus, the Board finds that the Office properly imposed repayment from continuing compensation at the rate of \$700.00 every 28 days pursuant to its recovery procedures.¹⁹

CONCLUSION

The Board finds that appellant forfeited her entitlement to compensation for the period February 6, 2004 to May 11, 2006. Regarding the second issue, the Board finds that she received an overpayment of compensation in the amount of \$70,760.48, for the period February 6, 2004 to May 11, 2006, based on her forfeiture of compensation benefits. Regarding the third issue, the Board finds that appellant was at fault in the creation of the overpayment, such that it was not subject to waiver of the recovery of the overpayment. Lastly, the Board finds that the Office did not abuse its discretion in setting the rate of recovery at \$700.00 every 28 days from continuing compensation.

¹⁶ *Id.* at § 10.441.

¹⁷ *Id.* at § 10.438(a). *See Ralph P. Beachum*, 55 ECAB 442 (2004).

¹⁸ 20 C.F.R. § 10.438(a). *See R.W., (A.T.)*, 59 ECAB ___ (Docket No. 07-1845, issued December 7, 2007).

¹⁹ *See* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300.8 (May 2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 24, 2008 is affirmed.

Issued: September 30, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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