U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES KELLEY and U.S. POSTAL SERVICE,
POST OFFICE, Birmingham, Ala.

Docket No. 96-1770; Submitted on the Record;
Issued August 13, 1998

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined appellant's wage-earning capacity based on his actual earnings as a modified city letter carrier; (2) whether the Office properly found that appellant forfeited his compensation for the period May 1, 1988 to November 11, 1991 because he knowingly failed to report his employment activities; (3) whether the Office abused its discretion by refusing to reopen appellant's claim for consideration of the merits on February 1, 1996; and (4) whether the Office properly found that appellant was at fault in the creation of a $70,685.54 overpayment of compensation and therefore overpayment was not subject to waiver.

Appellant filed a claim on April 28, 1986 alleging he injured his left shoulder in the performance of duty. The Office accepted appellant's claim for acrominal separation, left shoulder and resulting fasciitis left shoulder and entered appellant on the periodic rolls. By decision dated December 8, 1995, the Office found that appellant had actual earnings as a modified city letter carrier and that he had no loss of wage-earning capacity. In a decision dated December 8, 1995, the Office found that appellant misrepresented his work on 1032 forms which covered the period May 1, 1988 through November 11, 1991. The Office made a preliminary finding on December 8, 1995 that appellant had received an overpayment of compensation in the amount of $70,685.54 as he forfeited his compensation for the period May 1, 1988 through November 11, 1991 since he misrepresented his work activities on 1032 forms covering the forfeiture period. Appellant requested reconsideration of the December 8, 1995 decision on January 2, 1996 and by decision dated February 1, 1996, the Office denied appellant's request for reconsideration. By decision dated April 3, 1996, the Office finalized its determination that appellant received an overpayment in the amount of $70,685.54 and that this overpayment was not subject to waiver.

The Board has reviewed the record on appeal and finds that the Office properly determined appellant's loss of wage-earning capacity.

Section 8115 of the Federal Employees' Compensation Act,[1] titled "Determination of wage-earning capacity," states in pertinent part:

> "In determining compensation for partial disability … the wage-earning capacity of an employee is determined by his actual earnings if his earnings fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to --
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> (1) the nature of his injury;
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> (2) the degree of physical impairment;
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> (3) his usual employment;
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> (4) his age;
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> (5) his qualifications for other employment;
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> (6) the availability of suitable employment; and
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> (7) other factors or circumstances which may affect his wage-earning capacity in his disabled condition."

Generally, wages actually earned are the best measure of a wage-earning capacity, and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[2]

In the present case, appellant worked as a modified city letter carrier from September 5 through December 8, 1995. Appellant's performance of this position for 90 days is persuasive evidence that it represents his wage-earning capacity. There is no evidence that this position is seasonal, temporary, less than full-time or make-shift work designed for appellant's particular needs.[3]

Appellant's actual wages as a modified city letter carrier fairly and reasonably represent his wage-earning capacity on and after September 5, 1995. The wages equaled the current pay rate for the position he held when injured and therefore, the Office properly terminated his compensation effective December 8, 1995.

The Board further finds that the Office properly found that appellant forfeited his compensation for the period May 1, 1988 to November 11, 1991 because he knowingly failed to report his employment activities.

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[1] 5 U.S.C. § 8115.

[2] *Elbert Hicks,* 49 ECAB ___ (Docket No. 95-1448, issued January 20, 1998).

[3] *Monique L. Love,* 48 ECAB ___ (Docket No. 95-188, issued February 28, 1997).

Appellant completed a 1032 form on July 14, 1988 indicating that he was neither employed nor self-employed during the 15-month period covered by the form. This form indicated that appellant should report earnings from self-employment as well as any enterprise in which he worked and from which he received revenue, even if it operated at a loss. Appellant completed similar forms on August 1, 1989, October 3, 1990 and November 11, 1991.

The employing establishment submitted an investigative memorandum alleging that appellant owned and operated a restaurant known as "Cal's Kitchen and Bake Shop." The inspector interviewed Mr. Steven L. Davis, the owner of the building leased by appellant. Mr. Davis stated that appellant rented the premises for two years and that appellant initially worked in the restaurant six or seven days a week. A copy of the lease for Cal's Kitchen and Bake Shop signed by appellant dated September 19, 1988 was included in the report.

The chief health inspector, Thomas F. Childers, stated appellant cooked barbecue contrary to regulations. He further stated that appellant cooked for the restaurant as well as waiting on tables. Mr. Childers stated in May and June 1990 he placed orders with Cal's Kitchen and Bake Shop, that appellant took the orders and delivered the meals. The county tax assessor, Charles Allen, stated that the records indicated that appellant operated the business and was the sole employee. Appellant filed a tax return in 1988 as a partner in Cal's Kitchen and Bake Shop.

The inspector interviewed customers and suppliers of Cal's Kitchen and Bake Shop who stated that appellant provided service, did most of the cooking including large pans of ribs on an outside grill made appointments for goods and services as well as cleaning the restaurant and that appellant performed such duties almost daily between 1988 and 1990.

Robert J. Muehlberger, a forensic document analyst, reviewed several checks and orders from Cal's Kitchen and Bake Shop and concluded that appellant had written them. These documents were dated May 26, 1990 through November 4, 1988. Appellant also completed a change of address form for the restaurant on November 29, 1990.

In a letter dated April 11, 1991, appellant stated that he was neither the owner nor the operator of any business. In a statement to the investigator, appellant stated that his wife owned the restaurant and that he had nothing to do with the business.

In an interview on February 13, 1995, appellant denied working at the restaurant and stated that he cooked for himself, occasionally took orders if he was already on the telephone and that he occasionally shopped for the restaurant if he was also shopping for himself. Appellant stated that he only cleaned a table if he had personally dirtied it.

Section 8106(b) of the Act 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 time 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."[4] (Emphasis added.)

Appellant, however, can only be subjected to the forfeiture provision of 5 U.S.C. § 8106 if he "knowingly" failed to report employment or earnings. It is not enough to merely establish that there were unreported earnings. The Board has recognized that forfeiture is a penalty, and, as a penalty provision, it must be narrowly construed.[5] The term "knowingly" is not defined within the Act or its regulations. The Board has adopted the common usage definition of "knowingly:" "with knowledge; consciously; intelligently; willfully; intentionally."[6]

The Board finds that on the 1032 forms he signed on August 1, 1989, October 3, 1990 and November 11, 1991, covering the period from May 1, 1988 to November 11, 1991, appellant consciously omitted relevant information concerning his employment activities with Cal's Kitchen and Bake Shop. The 1032 forms clearly indicate 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 do the work.[7]

The investigative memorandum included documents such as checks and order tickets completed by appellant from 1988 through 1990. There were also interviews with witnesses stating that they saw appellant perform physical labor. These factual circumstances of record, together with appellant's certification to the Office on Forms 1032 that he had no employment or earnings, provides persuasive evidence that appellant "knowingly" misrepresented and omitted his earnings and employment activities.[8] The Office, therefore, properly found appellant forfeited his compensation for the periods covered by the August 1, 1989, October 3, 1990 and November 11, 1992 in the amount of $70,685.54.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for consideration of the merits on February 1, 1996.

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[4] 5 U.S.C. § 8106(b).

[5] *Anthony A. Nobile*, 44 ECAB 268 (1992).

[6] *Christine P. Burgess*, 43 ECAB 449, 458 (1992).

[7] *See Anthony Derenzo*, 40 ECAB 504 (1988); *see also Monroe E. Hartzog*, 40 ECAB 322 (1988).

[8] *Mamie L. Morgan*, 41 ECAB 661 (1990).

Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[9] Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[10]

Appellant filed a request for reconsideration of the Office's December 8, 1995 decision on January 2, 1996. Appellant restated that he did not work or have earnings. This evidence was already in the record at the time of the Office's December 8, 1995 decision. Material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.[11] As appellant did not comply with the requirements of section 10.138(b)(2) the Office properly denied his request for merit review in its February 1, 1996 decision.

The Board further finds that the Office properly found that appellant was at fault in the creation of a $70,685.54 overpayment of compensation and therefore overpayment was not subject to waiver.

Section 8129(a) of the Act[12] provides that, where an overpayment of compensation has been made "because of an error or fact of law," adjustment shall be made by decreasing later payments to which an individual is entitled. 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 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] Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

[9] 20 C.F.R. § 10.138(b)(1).

[10] 20 C.F.R. § 10.138(b)(2).

[11] *See Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta Z. DeGuzman*, 35 ECAB 309 (1983); *Katherine A. Williamson*, 33 ECAB 1696, 1705 (1982).

[12] 5 U.S.C. §§ 8101-8193, 8129(a).

[13] 5 U.S.C. § 8129(b).

In determining whether an individual is with fault, section 10.320(b) of the Office's regulations[14] provides 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 the individual knew or should have known to be incorrect; or
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> (2) Failed to furnish information which the individual knew or should have known to be material; or
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> (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."

In this case, the Office applied the first and second standards in determining that appellant was at fault in creating the overpayment.

The evidence of record shows that appellant indicated on 1032 forms that questions relating to employment, particularly self-employment, did not apply in his case. However, the evidence of record shows that appellant's statement was incorrect because he did not report his participation in a family business which was a material fact specifically noted on the 1032 form. He therefore knew or should have known from a reading of the 1032 forms that participating in a family business was a material fact that should be reported. Appellant therefore failed to report a material fact, and presented information on employment which he knew or should have known to be incorrect. Appellant therefore was at fault in the creation of the overpayment. He is not entitled to waiver of the overpayment.

[14] 20 C.F.R. § 10.320(b).

The decisions of the Office of Workers' Compensation Programs dated April 3, February 1, 1996 and December 8, 1995 are hereby affirmed.

Dated, Washington, D.C.
August 13, 1998

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member