U.S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of ELLEN L. MURPHY and U.S. POSTAL SERVICE,
POST OFFICE, Boston, Mass.

*Docket No. 96-969; Submitted on the Record;*
*Issued January 23, 1998*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant forfeited her right to compensation from July 30, 1988 through October 6, 1992.

The Board has duly reviewed the record in this case and finds that the evidence is sufficient to support that appellant forfeited her right to compensation.

Section 8106(b) of the Federal Employees' Compensation Act provides in pertinent part:

> "An employee who ... 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."[1]

Section 10.125(c) of the Federal Code of Regulations provides that, in general, earnings from self-employment means a reasonable estimate of the rate of pay it would cost the employee to have someone else perform the work or duties the employee is performing.[2]

During the period in question, the Office required appellant to complete a number of affidavits or reports requesting information that would be used to determine her entitlement to continuing benefits. These forms advised appellant of the following:

> "Earnings from self-employment (such as farming, sales, service, operating a store, business, etc.) must be reported. Report any such enterprise in which you worked, and from which you received revenue, even if operated at a loss or if

[1] 5 U.S.C. § 8106(b).

[2] 20 C.F.R. § 10.125(b).

profits were re-invested. You must show as 'rate of pay' what it would have cost you to have hired someone to perform the work you did."

Appellant completed the forms and certified that she had no employment or self-employment during the periods covered. The Office paid her compensation for temporary total disability. According to an investigation by the Office of the Inspector General, however, appellant was employed between April 10, 1988 and June 30, 1992 as the President of Constable Services, Inc./Process Servers, Inc., in Weymouth and Quincy, Massachusetts. The evidence revealed that appellant, doing business as Constable Services, Inc., held contracts with and received payment from the City of Quincy for the years 1989 to 1991, and that a subcontractor worked for her as a process server at Constable Services/Process Servers, Inc., from June 1988 to the summer of 1992.

A review of the testimony given at the September 14, 1995 hearing shows that, before her employment injury, appellant was actively involved in the daily operations of the company she had created. As a constable, she obtained a group of warrants from the treasurer/collector's office, copied them, did a mass mailing, did a follow-up mailing, called those who did not respond to arrange payment and obtain information, collected the payment, deposited the money in the bank and wrote checks to the city for the appropriate amount. In the beginning, she physically served all of the warrants herself but later hired a subcontractor to do the outside work. Two friends helped appellant on an informal, part-time basis with the understanding that they would eventually become partners and run a similar operation in their own localities. Appellant's sister also helped out.

After her employment injury, appellant alleged she was unable to continue and handed the business over to her sister, who in turn received all the revenues and profits therefrom. The two friends increased their hours and did all of the paperwork they could handle to help out appellant's sister. They hardly saw appellant after her employment injury. They occasionally asked for her advice and she gave it, but she was not involved in the daily operation of the company. Appellant did, however, renew mailboxes for the business mail. And if something had to be picked up at city hall, something that had to be picked up by a constable, appellant would have to do that. If she had to sign a contract with the city to keep the business going, she would do that as well. Once or maybe twice a week appellant would hand to the subcontractor the warrants that her sister and friends had prepared the night before and she sometimes paid the subcontractor herself. Once a month or once every two months appellant might speak with the treasurer/collector about a particular account or pick up documentation that the company needed to complete. Appellant earned no income from her business after the employment injury; she simply needed her sister to keep the business a going concern until she recovered. When her sister died of a heart attack several years later, appellant's business closed.

Appellant testified that she did not believe that she had to report her activities because she had turned the business over to her sister, because she received no earnings, and because she did not consider what she did to be "work."

The Board has carefully evaluated the nature of the activities in question and other relevant factors and finds that the evidence is sufficient to support that appellant knowingly omitted or understated earnings.

The test of what constitutes reportable earnings is not simply whether appellant received a salary but what it would have cost to have someone else do the work.[3] The record shows that, although appellant performed fewer duties than she performed prior to her employment injury, she nonetheless took an active and indeed a necessary role in the operation of the business.[4] By her own testimony, she had to perform certain activities in her capacity as a constable. These activities were critical to operating the business as an ongoing concern and are to be distinguished from such indirect activities as passive investment.[5] Because appellant's activities were critical to the operation of the business, the Board finds that appellant was obligated to report them to the Office, together with a reasonable estimate of what it would have cost to have someone else do the same work.[6]

Appellant's testimony indicated that she knowingly failed to report her activities but that she had reasons for not reporting. These reasons, however, do not justify or excuse her nondisclosure. The Office required appellant to complete a number of forms requesting information that would be used to determine her entitlement to continuing benefits and advised her to report any enterprise in which she worked. Although appellant was less involved in the daily operation of her business, she did work in some capacity, and the forms she completed made clear her obligation to report such activity so that the Office could properly determine the extent of her entitlement to continuing compensation. Appellant gave the Office no indication that she did anything for her business, which the record shows to be contrary to fact. In view of the notices sent by the Office and appellant's testimony concerning her business activities, limited as they were, the Board finds that the evidence is sufficient to establish that appellant knowingly failed to report her activities together with a reasonable estimate of the rate of pay it would have cost her to have someone else perform the work or duties she was performing.

Because the record supports the Office's finding that appellant had reportable earnings and that she knowingly failed to report such earnings, the Board finds that the Office has met its burden of proof to establish that appellant forfeited her right to compensation.

The November 6, 1995 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
January 23, 1998

[3] *Anthony A. Nobile*, 44 ECAB 268, 271 (1992).

[4] *See id.* (finding that the employee "took an active role" in the operation of the store and was obligated to report as earnings the amount that would have been paid to a person doing such work).

[5] *See Vernon Booth*, 7 ECAB 209 (1954) (in which the Board found that going to the bank once a week, making an occasional inspection of the books and spending an hour "just observing" could hardly be considered as constituting the type of work that would generally be available in the open labor market).

[6] *Monroe E. Hartzog*, 40 ECAB 322 (1988) (finding that the employee took a more active part in the business than he described at the hearing and was therefore obligated to report as earnings what it would have cost to have someone else do the same work).

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member