

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of SUSIE H. VAUGHN and TENNESSEE VALLEY AUTHORITY,  
NATIONAL FERTILIZER DEVELOPMENT CENTER, Muscle Shoals, Ala.

*Docket No. 96-2394; Submitted on the Record;  
Issued November 17, 1998*

---

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant forfeited her compensation for the period March 21, 1987 through June 21, 1988 because she knowingly failed to report her employment activities; and (2) whether the Office properly found that appellant was at fault in the creation of a \$13,101.32 overpayment of compensation and therefore the overpayment was not subject to waiver.

This is appellant's second appeal before the Board. In the prior appeal,<sup>1</sup> the Board found that the Office properly terminated appellant's compensation benefits on the basis that disability due to her accepted July 26, 1986 injury had ceased as of February 9, 1992.

Appellant completed forms in connection with her claims for disability compensation including claims for compensation on account of traumatic injury and several claims for continuing compensation on account of disability (Form CA-8). These forms advise the claimant that any person who knowingly makes a false statement, misrepresentation, concealment of fact or any other act of fraud to obtain compensation under the Federal Employees' Compensation Act<sup>2</sup> would be subject to various civil, administrative and criminal penalties. The Form CA-8 required that any person completing the form to complete block number nine if he or she had been self-employed during the period of compensation claimed on the form. This portion of the form requested information about salaried employment, commissioned employment or self-employment held during the period of compensation claimed on the form, including dates and hours worked, pay rate, total amount earned and type of work performed. The form indicated that commissioned employment and self-employment should be reported regardless of whether income resulted from such efforts.

---

<sup>1</sup> Docket No. 93-573 (issued March 11, 1994).

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

In Forms CA-8 signed by appellant on July 9, 16 and 28, August 28, September 12 and 28, October 2, 11 and 28, and November 12, 1987 and August 8, 1988, claiming compensation for the periods December 4, 1986 to July 9, 1987, July 10 to 15, 1987, July 16 to 31, 1987, September 1 to 15, 1987, September 16 to 30, 1987, October 1 to 15, 1987, October 16 to 31, 1987, November 1 to 15, 1987 and June 7, 1988 to August 8, 1988, respectively, appellant did not provide any responses in block number nine, the portion of the forms for reporting employment, both self-employment and salaried, during periods of claimed compensation.

In a Form CA-1032 completed by appellant on June 21, 1988, appellant replied “no” to the question as to whether she was employed by an employer during the time period covered by this form. Appellant also replied “no” to the question of whether she was self-employed during this time period.

The next Form CA-1032 completed by appellant on February 7, 1989 indicated that she had invested in a business called Simon Enterprises. Appellant again replied “no” to the question whether she was employed by an employer during the time period covered by this form.” Appellant also replied “no” to the question of whether she was self-employed during this time period even though she noted her investment in a business.

As a result of an employing establishment investigation, the employing establishment determined that appellant had failed to report her self-employment activities on the annual disclosure statement (Form CA-1032) and the claim for continuing compensation on account of disability (Form CA-8). During the investigation, appellant admitted owning and operating Simon Enterprises (an accounting business) and Fashion Showcase (a dress shop) in 1988 as well as forming and operating Charlie’s Designs, a partnership with her sister-in-law to sell cut and dried floral arrangements during 1987 and early 1988. Appellant applied for and was granted a license to operate Simon Enterprises, an accounting business. Appellant also rented the premises and arranged for electrical service, telephone service and printing of signs and business cards. After appellant hired Ms. Bailey as secretary and Mr. Nichols as an accountant after Mr. Vaughn left. Appellant also applied for and was granted a license to operate Fashion Showcase. Appellant controlled the finances of the business and directed her employee, Ms. Bailey, as to what clothes to purchase. Both businesses were destroyed in a fire on June 2, 1988 and appellant filed a claim with Nationwide Insurance Company to retrieve her loss. As to Charley’s Design, appellant started this business with her sister-in-law. Appellant occasionally worked in the store when her sister-in-law was not present and had the authority to write business checks, but did not write any checks. In June 1987 her brother and sister-in-law had her name removed from the bank account and they assumed total control and operation of the business.

In a memorandum dated February 23, 1989, appellant contended that the companies were merely investments and that she had no work duties to perform.

By notice dated December 24, 1992, the Office advised appellant of its preliminary finding that she had forfeited her right to compensation for the period March 21, 1987 through June 21, 1988 because she “knowingly” failed to report earnings from her work activities with her businesses which included Simon Enterprises, Fashion Showcase, Charlie’s Designs and a house cleaning job. The Office advised appellant that as a result of this forfeiture, a preliminary

determination had also been made that an overpayment of compensation occurred in her case in the amount of \$13,101.32, the amount of wage-loss compensation received from March 21, 1987 through June 21, 1988.

On January 20, 1993 appellant requested an oral hearing before an Office representative. At the hearing, held on February 21, 1996, appellant, represented by counsel, submitted evidence and testified that she did not actively participate in any of the businesses. With respect to why she did not report her participation in the various business ventures, appellant stated that she did not think she should report her activity as she did not make any money and that she also experienced personal problems at the time. Mr. Dewey J. Nichols, an accountant employed by appellant in her Simon Enterprises business, testified that appellant took business receipts to the bank, but did not work at getting new clients or making appointments. Mr. Nichols testified that appellant did settle a dispute between him and a client. Mr. Nichols testified that appellant told him that she did not “really work here.” He also testified that appellant did not really participate in the running of the Simon Enterprises business and she did not come in on a daily basis. Mr. Nichols testified that he was paid by appellant.

In a decision dated April 24, 1996, the Office hearing representative finalized the Office’s preliminary determinations that appellant had forfeited her right to compensation for the period March 21, 1987 through June 21, 1988, and that this resulted in an overpayment in the amount of \$13,101.32.

The Board finds that the Office properly found that appellant forfeited her compensation for the period March 21, 1987 to June 21, 1988 because she knowingly failed to report her self-employment from the businesses she owned during this period.

Section 8106(b) of the Act<sup>3</sup> states 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.”

This section of the Act is further defined by regulation which provides:

“Affidavit or report by employee of employment and earnings.

---

<sup>3</sup> 5 U.S.C. § 8106(b).

“(c) Earnings from employment referred to in this section or elsewhere in this part means gross earnings or wages before any deductions and includes the value of subsistence, quarters, reimbursed expenses, or any other advantages received in kind as part of the wages or remuneration...”<sup>4</sup>

In analyzing whether appellant had earnings or wages the Board notes that wages have been defined as:

“Every form of remuneration payable for a given period to an individual for personal services, including salaries, commissions, vacation pay, dismissal wages, bonuses and reasonable value of board, rent, housing, lodging, payments in kind, tips, and any other similar advantage received from the individual’s employer or directly with respect to work for him.”<sup>5</sup>

Appellant, however, can only be subjected to the forfeiture provision of 5 U.S.C. § 8106 if she “knowingly” failed to report employment 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.<sup>6</sup> The term “knowingly” is not defined with the Act or its regulations. The Board has adopted the common usage definition of “knowingly”: “with knowledge; consciously; intelligently; willfully; and intentionally.”<sup>7</sup>

The Office has the burden of proof in establishing that appellant, either with knowledge, consciously, willfully or intentionally failed to report employment or earnings.<sup>8</sup> To meet this burden of proof, the Office is required to closely examine appellant’s activities and statements in reporting employment or earnings. The Office may meet this burden in several ways. The Office may meet this burden by appellant’s own admission to the Office that he failed to report employment or earnings which he knew he should report. The Office may meet this burden by establishing that appellant pled guilty to violating applicable federal statutes by falsely completing the affidavits in the Form CA-1032. Additionally, the Office may meet this standard without an admission by appellant, if appellant failed to fully and truthfully complete the Form CA-1032 and the circumstances of the case establish that appellant, upon further inquiry by the Office as to employment activities and earnings, continued to fail to fully and truthfully reveal the full extent of his employment activities and earnings. The Office may also meet this burden if it establishes that the totality of the factual circumstances of record that appellant was employed or self-employed; that the employment activities engaged in or earnings resulted from

---

<sup>4</sup> 20 C.F.R. § 10.125(b).

<sup>5</sup> *Royal E. Smith*, 43 ECAB 965, 986 (1992).

<sup>6</sup> *Anthony A. Nobile*, 44 ECAB 268 (1992).

<sup>7</sup> *Christine P. Burgess*, 43 ECAB 449, 458 (1992).

<sup>8</sup> *Robert S. Luciano*, 47 ECAB \_\_\_\_ (Docket No. 95-1588, issued September 10, 1996); *Barbara L. Kanter*, 46 ECAB 165 (1994).

the employment or self-employment were not *de minimis*; and that appellant's certification on a Form CA-1032 that he was not employed or self-employed was therefore false.<sup>9</sup>

In the present case, appellant completed a Form CA-1032 covering the period of March 21, 1987 through June 21, 1988, wherein she indicated that she was not employed or self-employed. The evidence of record establishes that during this period appellant took receipts to the bank, settled a dispute between an employee and a client, was being responsible for hiring and firing staff, bought goods and performed clerical work. Appellant was responsible for deciding the clothes to purchase for Fashion Showcase and worked in the Charlie's Designs store when her sister-in-law was not at the shop. Appellant also submitted insurance forms to reimburse her for losses incurred in the fire that destroyed Simon Enterprises and Fashion Showcase. The Board finds that appellant's work activities constituted employment for which she would have to pay someone else to perform had she not performed such activity. The investigative report and witness statements establish that appellant was active in the management of these business enterprises and that her activities were not of a *de minimus* nature nor those of a passive investor. For this reason, the Office properly found that appellant knowingly failed to report her work activities and earnings on the CA-1032 form she signed on June 21, 1988.

The Board further finds that the Office properly determined that appellant was at fault in creating an overpayment of compensation for the period March 21, 1987 through June 21, 1988 and that, therefore, the overpayment for that period is not subject to waiver.

The Act<sup>10</sup> provides that "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 this subchapter or would be against equity and good conscience." If an employee is not "without fault" the overpayment is not subject to waiver even though the overpayment was paid "because of an error of fact or law" by the administrating agency.<sup>11</sup>

In determining whether an individual is with fault, the Office will consider all pertinent circumstances including age, intelligence, education, and physical and mental condition. An individual is with fault in the creation of an overpayment if he:

"(1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or

"(2) failed to furnish information which the individual knew or should have known to be material; or

---

<sup>9</sup> *Id.*

<sup>10</sup> 5 U.S.C. § 8129(b).

<sup>11</sup> *Fergus Tait*, 30 ECAB 929 (1979).

“(3) with respect to overpayment the individual accepted a payment which the individual knew or should have been expected to know was incorrect.”<sup>12</sup>

The Office applied the second standard in finding that appellant was at fault. As pointed out previously, appellant was fully informed of her obligation to report all employment activities and earnings. The evidence shows that appellant was actively involved in her businesses even though she stated that she lost money and was merely a passive investor. Appellant’s active involvement in her businesses is a fact that she knew or should have known was material to her receipt of compensation. Her failure to report the fact is sufficient grounds for the Office’s finding that appellant was not “without fault” in the matter of the overpayment. For this reason the recovery of the overpayment may not be waived.

The decision of the Office of Workers’ Compensation Programs dated April 24, 1996 is affirmed.

Dated, Washington, D.C.  
November 17, 1998

George E. Rivers  
Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

---

<sup>12</sup> 20 C.F.R. § 10.320(b).