U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS R. LIPPERT and DEPARTMENT OF THE NAVY, MARINE CORPS LOGISTICS BASE, Barstow, CA

Docket No. 98-27; Submitted on the Record;
Issued December 2, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant forfeited his right to compensation for the period October 24, 1994 through January 22, 1996 on the grounds that appellant knowingly failed to report his employment activities; (2) whether the Office properly found that appellant was at fault in the creation of an overpayment in the amount of $30,230.04; and (3) whether the Office properly required repayment of the overpayment by withholding $300.00 per month from appellant's continuing monthly compensation benefits.

On September 9, 1986 appellant, then a 29-year-old heavy mobile equipment mechanic, filed a traumatic injury claim alleging that on that date he injured his lower back while lifting parts from the floor to a table. Appellant stopped work on September 9, 1986. Appellant has not returned to work.

By letter dated March 9, 1987, the Office accepted appellant's claim for low back strain. Appellant received continuing compensation for total disability.

Appellant completed several Forms EN-1032 including one dated January 22, 1996. The form advised appellant that he must report all employment, for which he received a salary, wages, income, sales commission, piecework or any payment of any kind, including service in the military; that he must report self-employment (such as sales, service, operating a store, or business) and report any such enterprise in which he worked, even if the business lost money or if profits or income were reinvested or paid to others. The form also informed appellant that anyone who fraudulently conceals or fails to report income or other information which would have an effect on benefits, or who makes a false statement or misrepresentation of a material fact in claiming Office benefits might be subject to criminal prosecution. On the Form EN-1032 signed on January 22, 1996 appellant indicated that he did not work for any employer during the prior 15 months and that he was self-employed from November 1995 through the present. Appellant stated that he was helping his family look for land for a possible business venture. In

an accompanying statement, appellant provided his job duties which involved administrative work, that he worked approximately 10 hours per week and that he did not receive any money for his work. In another statement, appellant indicated that he was helping his family find land for a business venture and that he was not trying to defraud the federal government, rather he was trying to provide financially for his family.

In an April 25, 1996 letter, appellant advised the Office that he was moving to central New Mexico to start a family business. Appellant also advised the Office of his intention to work part time for the family business. Appellant stated that starting late April through mid-June he was going to work for the family business in Albuquerque approximately 20 to 40 hours per week at minimum wage.

In an undated letter received by the Office on May 13, 1996 appellant stated that as of May 9, 1996 he was working for the family business, B & D Manufacturing, in Albuquerque, New Mexico. Appellant stated that he was going to work approximately 40 hours per week at $5.00 per hour.

By letter dated May 14, 1996, the Office advised B & D Manufacturing to submit evidence regarding appellant's job title, position description, hours worked, dates of employment and weekly pay rate. The Office also advised B & D Manufacturing to explain why appellant left its employment if he did so.

An investigator from the Inspector General's Office submitted an investigative report dated June 10, 1996, revealing that appellant was employed by the family business earning $5.00 per hour for 20 hours per week from September through December 1995 and that appellant became a full time employee of the family business earning $5.00 per hour for 40 hours per week. The investigative report was accompanied by a February 15, 1996 memorandum from special agent, Connie Logan, regarding an interview of appellant. This memorandum indicated that appellant worked part time for B & D Manufacturing and that he received some money in cash and a corporate credit card to cover his business-related expenses such as, airline tickets back and forth to El Paso, Texas. In response to the question whether he was employed as a shop foreman for B & D Manufacturing and if he received wages in the amount of $1,200.00 to $1,600.00 per month as reported to his probation officer,[1] appellant stated that this was not entirely accurate in that some of the cash was reimbursement for business expenses. Appellant then stated that sometimes he was given $200.00 or $300.00 in cash. When asked to explain this, Ms. Logan indicated that appellant was unable to provide a clear explanation. Appellant stated that he sometimes worked approximately 40 hours per week and that some weeks he did not work as many hours. Appellant further stated that he did not really consider the cash he received from B & D Manufacturing as income because after he paid his bills there was nothing left. He stated that he considered income as money left over after paying his bills. He also stated that he worked from 5 to 40 hours per week at B & D Manufacturing, that he worked

[1] Appellant explained that he was on probation due to a guilty plea. Appellant stated that he was going fishing with some friends, one of whom he did not know very well and the police stopped the car finding marijuana. Appellant stated that the person he did not know very well told the authorities that the marijuana belonged to him and that he denied ownership of the drug. Appellant further stated that he plead guilty to avoid going to jail.

about 2 weeks in November and December 1995 and 3 weeks in January 1996, that his job title was shop foreman, that he did not consider the time he spent looking for land for the family business to be work. Appellant explained his job duties and stated that he was unable to do any heavy lifting or strenuous manual labor. Additionally, appellant stated that he did not read the January Form EN-1032 before signing it, that he had read the form in the past, but was unsure about it's contents and that sometimes in the past, his wife filled out the form and he signed it. Appellant then stated that he was aware of a criminal warning on the form. Appellant signed an affidavit of the same date indicating that he worked part time and full time for his family and described his job duties.

Ms. Logan's memorandum was also accompanied by a February 20, 1996 investigative statement revealing that appellant stated that he was no longer working for the family business. A May 7, 1996 investigative report revealed that Ann Hills, appellant's mother, stated during an interview that appellant's employment with B & D Manufacturing was off and on. Ms. Hills further stated that appellant was only working because her husband was sick and that appellant was paid $5.00 per hour and that he had been working for about three days after just moving from El Paso, Texas. Ms. Hills also stated that there were timesheets for appellant. An investigative report of the same date provided that appellant had a meeting with his parents on May 8, 1996 and that he would work full time at B & D Manufacturing 40 hours per week at $5.00 per hour. Letters from Ms. Hills indicated that appellant worked from September through December 1995 and beginning May 8, 1996 as an office worker. Accompanying receipts indicated that appellant received cash from B & D Manufacturing for hours worked during the period September through December 1995 and on May 1996 and a tax withholding document regarding his May 8, 1996 employment. A May 13, 1996 investigative statement revealed that appellant answered the telephone on May 7, 1996 at B & D Manufacturing. Appellant stated that he was not working there, but only answering the telephone because his step-father was out of town.

By decision dated September 24, 1996, the Office found that appellant had forfeited his right to compensation benefits because he had knowingly stated his under earnings. In an accompanying memorandum, the Office found that appellant knowingly understated his earnings from employment in his family business for the period October 23, 1994 through January 22, 1996, the 15-month period covered by the form.

In a letter dated September 24, 1996, the Office made a preliminary determination that an overpayment had occurred in the amount of $30,230.04 because appellant failed to report his earnings during the period September 1995 through December 1995 on the Form EN-1032 as required by the Federal Employees' Compensation Act. The Office advised appellant that he was at fault in the creation of the overpayment because he failed to furnish information, which he knew or should have known to be material. In addition, the Office advised appellant that he could request a telephone conference, a final decision based on the written evidence only, or a hearing within 30 days of the date of this letter if he disagreed that the overpayment occurred, if he disagreed with the amount of the overpayment, if he believed that the overpayment occurred through no fault of his own and if he believed that recovery of the overpayment should be waived. The Office then advised appellant to complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and to submit financial documents in support thereof.

On October 9, 1996 appellant requested that the Office make a decision based on a review of the written record. Appellant submitted an October 10, 1996 letter, indicating that he was not at fault in the creation of the overpayment. Appellant stated that he did not knowingly or willingly accept money from his family's business as an employee. Appellant also stated that repayment of the overpayment would cause severe financial hardship to himself and his family. Appellant submitted a completed questionnaire indicating that his monthly take home pay was approximately $1,000.00. Appellant also indicated that his assets included $7.00 in a checking account, a 1981 Jeep Wagoneer that was owned by his wife and was neither running nor registered and a 1977 Ford pick-up. Appellant also listed the following monthly expenses: (1) food, $450.00; (2) clothing, $65.00; (3) rent or mortgage, $560.00; (4) gas and electric, $120.00; (5) water, $50.00; (6) telephone, approximately $150.00; (7) home maintenance, $70.00; (8) auto loan, $300.00; (9) gas and oil, $100.00; (10) car maintenance, $20.00; (11) insurance, $63.00; (12) nonreimbursable medical expenses, $156.00; (12) commuting expenses for a second vehicle, $140.00; (13) cable, $39.00; (14) cellular telephone, $50.00; (15) personal loan, $43.00; and (16) personal loan, $47.00.

In a letter dated October 24, 1996, the Office advised appellant to explain whether his wife was employed and if so, to submit her wages. The Office advised appellant to clarify the number of weeks he worked based on earnings statements he submitted and the book value of his 1981 Jeep Wagoneer. The Office further advised appellant to submit an itemized copy of his monthly telephone bill showing the base rate and all taxes. The Office then advised appellant to clarify what was included in the $140.00 expense for a second vehicle. In a November 30, 1996 response letter, appellant stated that the wages he earned were bi-monthly and that he worked approximately 20 hours of overtime per pay period. Appellant further stated that the book value of his 1981 Jeep Wagoneer was approximately $800.00 noting that this vehicle was neither running nor registered for the past two years. Appellant clarified that the $140.00 represented a commuting expense for his 1977 Ford pick-up truck, which included gas, oil and maintenance. Appellant's response was accompanied by duplicate check receipts, telephone bills, store receipts, medical receipts and bills, earning statements, utility bills, a car insurance bill, a rent receipt, bank statements and tax bills.

In a decision dated December 3, 1996, the Office finalized its preliminary overpayment decision and finding of fault. In an accompanying memorandum, the Office determined that $300.00 would be withheld from appellant's continuing compensation payments. In so doing, the Office determined that appellant's monthly income was $2,534.36 and his total monthly expenses equaled $1,961.01.[2] The Office subtracted appellant's monthly expenses from his monthly income resulting in a remainder of $573.35.

[2] Regarding appellant's monthly workers' compensation, the Office found that appellant received compensation in the amount of $1,199.74 each month from the Office and multiplied this amount by 13, thus totaling $15,596.62. The Office then divided this amount by 12 months, thus totaling $1,299.72. Regarding appellant's monthly wages, the Office determined that appellant received an average of $1,234.64 each month by adding $602.28 and $632.36. The Office then added $1,299.72 and $1,234.64 to calculate monthly income in the amount of $2,534.36.

The Board finds that the Office properly found that appellant forfeited his right to compensation for the period October 24, 1994 through January 22, 1996 on the grounds that appellant knowingly failed to report his employment activities

Section 8106(b) of the Act[3] 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-
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> (1) fails to make an affidavit or report when required; or
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> (2) knowingly omits or understates any part of his earnings;
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> 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."[4]

In this case, the record establishes that appellant was engaged in employment activities and received wages for these activities during the 15-month period October 24, 1994 through January 22, 1996, prior to signing a January 22, 1996 Form EN-1032. In the January 22, 1996 Form EN-1032, appellant indicated that he had not worked for any employer during the previous 15-month period. However, a June 10, 1996 investigative report from the Inspector General's Office revealed that appellant worked part time for his family business, B & D Manufacturing, during the period September through December 1995 for $5.00 per hour, 20 hours per week. Letters from appellant's mother, Ms. Hills, indicated that appellant worked for the family business and was paid for his work. In addition, receipts from B & D Manufacturing revealed that appellant was paid for his work during the period September through December 1995. Inasmuch as appellant did not report his employment with B & D Manufacturing during the 15-month period prior to signing a January 22, 1996 Form EN-1032, the Board finds that appellant failed to report his earnings in the manner and at the time specified by the Office.[5]

To establish that appellant should forfeit the compensation he received during the claimed period that he omitted his earnings pursuant to section 8106(b), the Office must establish that he "knowingly" failed to report employment or earnings. It is not enough to merely establish that there were unreported earnings. The Office procedure manual recognizes that forfeiture is a

[3] 5 U.S.C. § 8106(b) (1974).

[4] *William G. Norton, Jr.*, 45 ECAB 630 (1994); *Garry Don Young*, 45 ECAB 621 (1994); *Gregg B. Manston*, 45 ECAB 344 (1994); *Lewis George*, 45 ECAB 144 (1993).

[5] *Roger Seay*, 39 ECAB 441, 445 (1988).

penalty,[6] and as a penalty provision, it must be narrowly construed.[7] The term "knowingly" is not defined within the Act or its regulations. In common usage, the Board has defined "knowingly" as: "[w]ith knowledge; consciously; intelligently; willfully; intentionally."[8]

The record establishes that appellant engaged in employment activities and received earnings for these activities. The record further establishes that appellant understated his employment activities and earnings on the Form EN-1032 signed by him on January 22, 1996. The Form EN-1032 signed by appellant on January 22, 1996 used such terms as "business," "enterprise," and "service" to explain the obligation for reporting all forms of employment, self-employment and earnings. The language of the Form EN-1032 clearly advised appellant that the nature of his involvement in the family business would require him to report such employment activity on the form. Further, the Form EN-1032 advised appellant that he may be subject to criminal prosecution if he fraudulently concealed or failed to report income or made a false statement or material misrepresentation of a material fact in claiming compensation under the Act. Appellant alleged that he did not knowingly omit any employment or earnings on the January 22, 1996 Form EN-1032 because he did not read the form before signing it and that, although he had read it in the past, he was not sure about its contents. Appellant also alleged that sometimes in the past, his wife filled out the form and he signed it. Further, appellant alleged that he was unaware of a criminal warning on the form. The Board concludes that the totality of the factual circumstances establish that appellant "knowingly" understated his earnings under section 8106(b)(2) of the Act by failing to fully report his employment activity and earnings from B & D Manufacturing on his January 22, 1996 Form EN-1032.[9] Accordingly, the Board finds that the Office properly determined that appellant forfeited his right to compensation for this period.

The Board also finds that, based on appellant's forfeiture of compensation for the period October 24, 1994 through January 22, 1996, he is with fault in the creation of an overpayment in the amount of $30,230.04.

Section 8129(a) of the Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.[10] The only exception to this requirement is a situation, which meets the test set forth as follows in section 8129(b): "[a]djustment 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

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[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.10(c) (July 1993).

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

[8] BLACK'S LAW DICTIONARY 872 (6th ed. 1990); *see Charles Walker*, 44 ECAB 641 (1993); *Anthony A. Nobile*, 44 ECAB 268, 271-72 (1992); *Christine P. Burgess*, *supra* note 7.

[9] *See generally Lewis George*, 45 ECAB 144 (1993).

[10] 5 U.S.C. § 8129.

would be against equity and good conscience."[11] Thus, the Office may not waive the overpayment of compensation in this case, unless appellant was without fault.[12]

In determining whether an individual is at fault, section 10.320(b) of the regulations 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."[13]

In this case, the Office applied the second standard -- appellant failed to furnish information, which he knew or should have known to be material -- in finding appellant to be at fault in the creation of the overpayment.

The Board finds that the Office properly determined that appellant knew or should have known that he was required to fully report his employment activities and earnings with B & D Manufacturing since the January 22, 1996 Form EN-1032, which he completed and signed, clearly advised him that the nature of his involvement in the family business would require him to report such employment activity on the form. The Board notes that Office regulations provide that an individual's understanding of the reporting requirements, efforts, opportunities, or ability to comply with reporting requirements will be considered by the Office in determining whether an individual is with fault in creating the overpayment.[14] As the previous discussion of "knowingly" illustrates, while appellant claimed he did not know about the reporting requirements, the evidence does not substantiate his lack of knowledge, as he did report partially that he was employed in a family business. The failure of appellant to fully disclose his employment activities for the period October 24, 1994 through January 22, 1996, renders him "with fault" in the creation of the overpayment under section 10.320(b)(1). Inasmuch as appellant is "with fault" in the creation of the overpayment, recovery of the overpayment cannot be waived.

Finally, the Board finds that the Office properly required repayment of the overpayment by withholding $300.00 per month from appellant's continuing monthly compensation benefits.

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[11] 5 U.S.C. § 8129(b).

[12] *Harold W. Steele*, 38 ECAB 245 (1986).

[13] 20 C.F.R. § 10.320(b).

[14] 20 C.F.R. § 10.320(c).

Section 10.321(a) of the regulations provides:

> "Whenever an overpayment of compensation has been made to an individual who is entitled to future payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to 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 resulting hardship upon such individual."[15]

The Office determined that appellant's monthly expenses totaled $2,194.00. The Office determined this amount by deducting appellant's monthly cable television and cellular telephone expenses in the amount of $39.00 and $50.00 respectively on the grounds that they do not constitute ordinary and necessary expenses. Appellant also submitted nonemployment-related medical bills in the amount of $82.10, $293.63, $30.00, $332.75 and $165.00. However, the evidence reflects the Office considered these expenses in determining the amount of overpayment recovery. The Board finds that the Office properly considered appellant's financial circumstances to minimize any resulting hardship.

The December 3 and September 24, 1996 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
December 2, 1999

George E. Rivers
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[15] 20 C.F.R. § 10.321(a).