U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEONARD M. DZICZKOWSKI and U.S. POSTAL SERVICE,
POST OFFICE, Cleveland, Ohio

Docket No. 97-1008; Submitted on the Record;
Issued February 16, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant forfeited compensation for the period February 28, 1994 through July 22, 1995 for knowingly failing to report income while receiving temporary total disability compensation; and (2) whether appellant was with fault in the creation of a $39,347.33 overpayment in compensation.

On March 28, 1993 appellant, then a 42-year-old maintenance mechanic, was working on the screen roof of a registry cage when, after removing the last bolt, the roof, weighing 240 pounds, fell and struck appellant in the head. Appellant stopped working that day and returned to light-duty work on May 18, 1993. He stopped work again on February 28, 1994 and underwent surgical fusion for a herniated C6-7 disc. He did not return to work thereafter. The Office accepted appellant's claim for avulsion of the scalp, right rotator cuff tear, hearing loss and a herniated C6-7 disc.

In an October 26, 1995 decision, the Office ordered that appellant forfeit compensation for the period February 28, 1994 through July 22, 1995 on the grounds that he knowingly omitted reporting his earnings from employment and self-employment. In a November 12, 1996 decision, an Office hearing representative affirmed the Office's October 26, 1995 decision.

The Board finds that the Office properly determined that appellant knowingly failed to report earnings from self-employment and, therefore, forfeited compensation for the period February 28, 1994 through July 22, 1995.

Section 8106(b) of the Federal Employees' Compensation Act[1] 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."[2]

The Office requested appellant to complete a report of employment, earnings and dependents on an Office form (CA-1032). He was instructed to report all self-employment or involvement in a business enterprise including operating a business. He was notified to include any self-employment including any odd jobs performed. The Office also informed him that he should include any activities such as keeping books and records or managing or overseeing a business of any kind, including a family business. In a July 22, 1995 response appellant indicated that he had not worked for an employer in the prior 15 months and had not been self-employed during the same period.[3]

In a September 20, 1995 investigative report, a postal inspector for the employing establishment indicated that on two occasions appellant advertised a boat and then a pickup truck for sale on the front yard of the house he rented and participated in a test drive of the truck with the inspector. He related that employees at a nearby government office reported that appellant distributed a flyer advertising a car wash and wax service at his home. He noted that appellant's landlord gave appellant a check for work performed by his family between July 19 and August 3, 1994 in cleaning another residence he owned. The inspector stated that, in an interview, appellant admitted helping to cut grass on another property with a brushhog, assisting in the

[1] 5 U.S.C. § 8106(b) (1974).

[2] While section 8106(b)(2) refers only to partially disabled employees, the Board has held that the test for determining partial disability is whether, for the period under consideration, the employee was in fact either totally disabled or merely partially disabled, and not whether he received compensation for that period for total or partial loss of wage-earning capacity. *Ronald H. Ripple*, 24 ECAB 254, 260 (1973). The Board explained that a totally disabled employee normally would not have any employment earnings and, therefore, a statutory provision about such earnings would be meaningless. 24 ECAB at 260.

[3] The Office indicated that appellant also submitted a March 28, 1995 CA-1032 form, in which he reported no income. That form is not part of the case record submitted on appeal. However, there was no objection or argument that the form was not submitted. The Board, therefore, accepts that this CA-1032 form exists and was merely not submitted with the record submitted on appeal.

house cleanup by moving some items and distributing flyers for his wife on behalf of the car wash operation.

At the August 29, 1996 hearing, appellant stated that the sale of the boat and car was done by his landlord who owned the vehicles in question and parked them on the property he rented to appellant. He indicated that the test drive of the pickup truck mainly involved driving the truck to the owner's business where the postal inspector indicated that he was interested in the price of the vehicle. Appellant stated that one of his four sons earned money by cutting brush on the site of a drive-in movie theater with the brushhog. He indicated that he drove the brushhog to the site because his son did not have a driver's license. Appellant then instructed his son how to operate the brushhog. He stated that the car wash and the house cleanup were activities carried out by his wife and sons as a way to earn money. He indicated that his only participation in the car wash was to occasionally hand out flyers give some instruction to his sons and rinsed off an occasional tire. Appellant testified that in the house cleaning project, he only drove his wife and sons to the house and back, gave some cleaning advice and filed a sheet of paper on the hours worked by his wife and sons to submit to the landlord. He acknowledged that he received checks for work performed but stated that he deposited the checks and then disbursed the money to his wife and sons.

The Office hearing representative found that the sale of the boat and pickup truck and the mowing of property were not activities by appellant that constituted self-employment. However, he stated that appellant, in distributing flyers, had participated in the car wash business of his family. The hearing representative specifically found from his own observation of appellant's testimony that the testimony was less than credible. He concluded that appellant had more extensive involvement in the car wash and house cleaning projects than he admitted at the hearing. He, therefore, found that appellant had knowingly failed to report income from self-employment.

The Office, to establish that appellant should forfeit the compensation he received during the period, must establish that he knowingly failed to report employment or earnings. As forfeiture is a penalty, it is not enough merely to establish that there were unreported earnings from employment. The inquiry is whether appellant knowingly failed to report his employment activities and earnings. The term knowingly is not defined within the Act or its implementing regulations. In common usage, the Board had recognized that the definition of "knowingly" includes such concepts as "with knowledge," "consciously," "intelligently," "willfully," or "intentionally."[4] In this case, the record contains a copy of the work sheet that appellant testified he prepared for submission for payment for the house cleanup project. The work sheet contained five columns, one for each of the sons and one, in which appellant's name was listed and his wife's name written above appellant's name. That column showed 64 hours of work performed in this column, including 10 hours or more of work on 3 occasions while the columns for each son did not exceed 48 hours for the period and showed that only one son worked more than 10 hours on 1 occasion. The Board concurs with the finding of the hearing representative that appellant had added his wife's name to the sheet to conceal the amount of work he had performed in the house cleanup particularly on those days when he credited his wife with 10

[4] *Charles Walker*, 44 ECAB 641 1993); *Christine P. Burgess*, 43 ECAB 449 (1992).

hours or more of work when it was more likely that he and his wife combined performed those hours of work. Also, appellant, in preparing the work sheet listing hours of work performed, was performing the activities of keeping books and records, which the Office in the CA-1032 form instructed appellant to perform. In giving advice and occasionally helping in the family house cleaning and car wash, appellant was participating in the managing or overseeing of a family business. He was informed of the requirement to report these activities in the CA-1032 form. However, appellant did not report the activities and, at the hearing, understated his involvement in the activities. These actions show that he was aware of what he was required to report yet consciously failed to report these activities. He, therefore, knowingly omitted to report family business activities. In this circumstance, the Office properly found that appellant should forfeit compensation for the period covered by the CA-1032 form, in which he failed to accurately report his activities.

The Board further finds that appellant was at fault in the creation of the overpayment. Section 8129(a) of the Act provides, "Adjustment of 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 of recovery would defeat the purpose of the Act or would be against equity and good conscience."[5] Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault section 10.320(b) of the Office's regulations provide 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."[6]

In this case, the Office hearing representative applied the second standard in determining that appellant was at fault in creating the overpayment.

Appellant was advised to fully report any self-employment, including participation in any family business operation. However, despite the instructions on the CA-1032 form, appellant failed to report actions, which he knew or should have known were material because the Office requested the information. Appellant, therefore, was at fault in the creation of the overpayment in compensation.

[5] 5 U.S.C. § 8129(b).

[6] 20 C.F.R. § 10.320(b).

The decision of the Office of Workers' Compensation Programs, dated November 12, 1996, is hereby affirmed.

Dated, Washington, D.C.
February 16, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member