

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TIMOTHY R. COOPER and DEPARTMENT OF THE AIR FORCE,
BOLLING AIR FORCE BASE, Washington, DC

*Docket No. 97-1030; Submitted on the Record;
Issued October 6, 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 found that appellant forfeited his compensation for the period May 5, 1986 through July 10, 1990 and January 26, 1991 through April 26, 1992, because he knowingly failed to report his employment activities; (2) whether the Office properly found that appellant was at fault in the creation of a \$87,357.19 overpayment of compensation and therefore the overpayment was not subject to waiver; and (3) whether the Office properly found that appellant was at fault in the creation of a second overpayment of compensation, in the amount of \$2,401.50, and therefore the overpayment was not subject to waiver.

On August 28, 1978 appellant, then a 21-year-old mechanic, filed a notice of traumatic injury alleging that he sustained a back injury in the course of his federal employment duties. Appellant's claim was subsequently accepted by the Office for a ruptured lumbar disc and related surgical procedures.

Appellant was placed on the periodic rolls, effective September 1985. Subsequently, at the request of the Office, appellant completed several CA-1032 forms dated January 9 and September 9, 1986, August 5, 1987, September 4, 1988, September 21, 1989, July 10, 1990, and April 26, 1992, which included the period from May 5, 1986 through July 10, 1990 and from January 26, 1991 through April 26, 1992. Each of these forms contained a notice to appellant that a false or evasive answer to any question or the omission of an answer could be grounds for suspending compensation benefits, and could subject appellant to civil or criminal prosecution. Appellant indicated on each of these forms that he was not employed in any capacity and that he was not self-employed during the periods in question.

Through a July 20, 1992 investigative memorandum, the Office learned that appellant was sporadically self-employed performing light automotive repair work, between two and four hours a week, during the periods covered by CA-1032 forms dated August 5, 1987, September 4, 1988, September 21, 1989, July 1, 1990 and April 26, 1992. Appellant stated that he had

provided false information on the forms because he thought that if he indicated any work at all, the Office would immediately terminate his benefits and he did not consider the relatively small amount of work he performed as being of interest to the Office.

By decision dated October 29, 1992, the Office advised appellant of its finding that he had forfeited his right to compensation for the period January 1, 1987 to December 31, 1990 and from January 1 to May 30, 1992 because he “knowingly” failed to report his earnings from his self-employment in light automotive repair. On the same date the Office further advised appellant that as a result of this forfeiture, a preliminary determination had also been made that an overpayment of compensation occurred in his case in the amount of \$73,141.75, the amount of wage-loss compensation received during the periods in question.

By letter received November 25, 1992, appellant requested an oral hearing before an Office representative. The case file was returned to the District Office, however, for a determination on the issue of appellant’s loss of wage-earning capacity with respect to his entitlement to further compensation benefits.

In a decision dated March 19, 1993, the Office determined that appellant had had sporadic earnings as well as self-employment during the period from 1981 to March 1, 1992, earning an average weekly wage of \$78.59, and reduced appellant’s compensation accordingly.

In a decision dated March 25, 1993, the Office made a preliminary determination that as appellant’s compensation rate was reduced based on his actual earnings effective March 7, 1993, but should have been reduced effective May 31, 1992, an overpayment in the amount of \$2,401.50 had been created during that period. The Office further found that appellant was at fault in the creation of the overpayment because of his failure to timely notify the Office of his self-employment earnings.

On April 23, 1993 appellant requested a review of the written record on the issue of fault and possible waiver of recovery of the overpayments and submitted information regarding his household finances.

In a decision dated June 15, 1994, the Office hearing representative finalized the Office’s preliminary determinations that appellant had forfeited his right to compensation for the periods covered by the Forms CA-1032 dated August 5, 1987, September 4, 1988, September 21, 1989, July 10, 1990 and April 26, 1992, but found that the proper periods covered by these forms, each of which covers the 15 months prior to the date the form is signed, ran from May 5, 1986 through July 10, 1990 and from January 26, 1991 through April 26, 1992. The Office hearing representative specifically found that the investigative memorandum contained in the record established, by appellant’s own admission, that during these time periods appellant was self-employed performing light automotive repair. The hearing representative further found that the record contained a statement from a Barbara Houtwed, a payroll clerk at Lawson Realty, which indicated that appellant began working on April 24, 1989, 40 hours weekly, as a groundsman. The Office hearing representative determined that appellant had received an overpayment of compensation the amount of \$64,882.79 for the period May 5, 1986, and had received an overpayment in the amount of \$22,474.40 for the period January 26, 1991 through April 26, 1992, for an overpayment based on forfeiture of compensation of \$87,357.19. The hearing

representative additionally found that appellant received a second overpayment in the amount of \$2,401.50 based on his actual earnings from 1981 to 1992 and that appellant was also at fault in the creation of this overpayment, and, therefore, waiver of recovery was not an option. After reviewing appellant's financial information, the hearing representative determined that appellant's overpayment could be repaid by withholding \$600.00 a month from appellant's continuing compensation.

Following appellant's request for reconsideration of the Office hearing representative's decision, the Office issued a merit decision dated October 27, 1995, in which it found the evidence submitted by appellant was insufficient to warrant modification of its prior decision.

By letter dated April 9, 1996, appellant requested reconsideration of the Office's October 27, 1995 decision. Appellant specifically asserted that information obtained by the Office that appellant was employed by Lawson Realty Corporation in 1989 is incorrect. In support of his request, appellant submitted an affidavit from Debbie Daniels, payroll supervisor, and John Dale Terry, senior vice president of Lawson Realty Corporation, which stated:

"That based upon the payroll records of Lawson Realty Corporation which I have reviewed, I find no record of the employment of [appellant] (Social Security Number 217-66-0244). The records do show the employment of Timmy S. Cooper (Social Security Number 230-13-8309) during 1989 and 1990."

In a decision dated April 12, 1996, the Office denied appellant's request for reconsideration on the grounds that the newly submitted evidence was insufficient to warrant review of the decision issued October 27, 1995 denying modification of the decision issued June 15, 1994. The Office specifically determined that the affidavit lacks probative value because it appears to state that appellant never worked at Lawson Realty Corporation, when the record contains records from the Social Security Administration that he was employed there in 1981, and because it directly contradicts an earlier, more contemporaneous statement from Lawson Realty Corporation, dated April 12, 1990, in which payroll clerk Barbara Houtwed stated that appellant worked as a groundsman for the corporation beginning on April 24, 1989.

By letter dated October 21, 1996, appellant again requested reconsideration of the Office's prior decision. In support of his request, appellant submitted additional medical evidence as well as an affidavit from Julius and Agnes Orosz, his in-laws. In their affidavit, Mr. and Mrs. Orosz stated that in 1989 appellant lived with them in their home and was not employed by Lawson Realty Corporation during that time.

In a decision dated October 29, 1996, the Office found that the newly submitted evidence was immaterial and repetitious in nature and therefore was insufficient to warrant review of its prior decision.

The Board initially finds that in its April 12, 1996 decision, although the Office concluded that the newly submitted evidence was insufficient to warrant review of the decision issued October 27, 1995 pursuant to 20 C.F.R. § 10.138(b)(1), the Office in fact exercised its

discretionary authority under 5 U.S.C. § 8128 to reopen appellant's claim for further merit review by weighing the probative value of the newly submitted evidence.¹

In its April 12, 1996 decision, the Office found that the newly submitted evidence, the statements from Debbie Daniels, payroll supervisor, and John Dale Terry, senior vice president of Lawson Realty Corporation, was immaterial to overcome the decision issued June 15, 1994, finding an overpayment occurred for the period May 5, 1996 through July 10, 1990, and for January 26, 1991 through April 26, 1992 and of insufficient probative value to overcome contemporaneous statements regarding the issue of whether appellant was employed by Lawson Realty during 1989. By exercising its discretionary authority, reviewing the probative value of the additional factual evidence, the Office in fact conducted a review of the merits of appellant's claim.

Inasmuch as the Board finds that the Office's April 12, 1996 decision constitutes a decision on the merits, and that appellant in a letter received January 29, 1997, appealed to the Board within one year of the merit decision dated April 12, 1996, the Board will consider the merits of appellant's claim.

The Board further finds that the Office properly determined that appellant forfeited his right to compensation in the amount of \$87,357.19, covering the period May 5, 1986 through July 10, 1990, and January 26, 1991 through April 26, 1992, because he knowingly failed to report employment and/or earnings.

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

"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."²

The record reflects that the Office regularly issued appellant Forms CA-1032, and that each form contained a notice informing appellant of the possible consequences of falsifying his responses to questions regarding employment, and other issues, contained on the form. However, by CA-1032 forms completed August 5, 1987, September 4, 1988, September 21,

¹ See *Nelson T. Thompson*, 43 ECAB 919 (1992); *David F. Garner*, 43 ECAB 459 (1992).

² 5 U.S.C. § 8106(b). 20 C.F.R. § 10.125(c) concerning affidavits or reports by employees of employment and earnings, provides in part, "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 a part of wages or remuneration."

1989, July 10, 1990 and April 26, 1992, appellant certified by his signature that he was neither employed nor had self-employment during the 15-month periods covered by the forms. Moreover, he affirmatively represented to the Office that he was unemployed and remained unable to earn wages.

Investigation revealed, however, that appellant was sporadically self-employed in light automotive repair work for between two to four hours per week during the periods in question, and that appellant did receive monetary compensation in exchange for his services. Therefore, appellant did have “earnings” pursuant to 5 U.S.C. § 8106(b) and the implementing regulations and was required to report these earnings to the Office. Appellant, however, can only be subjected to the forfeiture provision of section 8106(b) if he “knowingly” failed to report employment or earnings.³

As forfeiture is a penalty, it is not enough merely to establish that there were unreported earnings from employment. The relevant inquiry on this appeal, therefore, 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 has recognized that the definition of “knowingly” includes such concepts as “with knowledge,” “consciously,” “intelligently,” “willfully” or “intentionally.”⁴

The factual evidence developed in this case indicates that appellant admitted to investigators, in an interview dated April 17, 1992, that he provided false information on the Forms CA-1032 in question because he thought that if he indicated any work at all, the Office would immediately terminate all benefits. He explained that at the time, he was attempting to obtain approval for back surgery and did not want to jeopardize his receipt of benefits. He stated that he did not consider the relatively small amount of work he performed, approximately two to four hours a week of light automotive repair, as being of interest to the Office, whom he thought to be interested only in claimants operating or involved in big business.

Thus, with regard to the Forms CA-1032 appellant signed on August 5, 1987, September 4, 1988, September 21, 1989, July 10, 1990 and April 26, 1992, the evidence of record establishes that appellant “knowingly and willingly” falsified, concealed or covered up a material fact and made false, fictitious and fraudulent statements and representations. While appellant received, in return for his services, only \$5.00 per hour or \$10.00 to 15.00 per job, appellant did have “earnings” pursuant to 5 U.S.C. § 8106(b) and the implementing regulations and was required to report these earnings to the Office. The Board therefore finds that, regarding the CA-1032 forms in question, appellant consciously and knowingly omitted relevant information concerning his self-employment activities performing light automotive repair work which generated earnings for the employee. Appellant responded “no” to the questions concerning employment or self-employment and answered “yes” to the question inquiring whether he was unemployed for all periods during the previous 15 months. Even though appellant may have performed work or had earnings on an irregular basis during this period, he

³ *Charles Walker*, 44 ECAB 641 (1993); *Christine P. Burgess*, 43 ECAB 449 (1992).

⁴ *Id.*; see also *BLACK'S LAW DICTIONARY* (6th ed. 1990).

knew that he was required to report any earnings produced from his work activities.⁵ Nevertheless, in response to the Office's inquiries, appellant signed the CA-1032 forms certifying that all statements provided in response to the questions on the form were true, complete and correct to the best of his knowledge and belief.

Although there remains some question as to whether appellant was in fact employed by Lawson Realty in 1989, as appellant has admitted that he was self-employed as an auto mechanic during this same period, the Board finds that the clear weight of the evidence in this case is sufficient to establish that appellant knowingly failed to report earnings for the period May 5, 1986 through July 10, 1990 and January 26, 1991 through April 26, 1992, in violation of 5 U.S.C. § 8106(b) and the Board therefore affirms the Office's determination that appellant forfeited the total amount of compensation he received for that period.⁶

The Board finds that the Office properly determined that appellant was at fault in the creation of the overpayment resulting from the forfeiture and that, therefore, the overpayment was not subject to waiver.

Section 8129 of the Act provides that an overpayment of compensation shall be recovered by the Office unless "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."⁷ Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.⁸

Section 10.320 of the implementing federal regulations provides the following:

"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 who:

- (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

⁵ See *Charles Walker*, *supra* note 3; see *Mamie L. Morgan*, 41 ECAB 661 (1990).

⁶ *Wayne P. Hammer*, 44 ECAB 286 (1992).

⁷ 5 U.S.C. § 8129(a)-(b).

⁸ *Wayne P. Hammer*, *supra* note 6.

(3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”⁹

The Board finds that appellant was at fault in the matter of the overpayment under the second criteria above, as the evidence of record establishes that appellant failed to report or to accurately report total earnings on each of the CA-1032 forms in question. The evidence also establishes that appellant should have known that this information was material. Each Form CA-1032 informed appellant that he must report all earnings from employment and self-employment or face serious penalties. Notwithstanding this notification, appellant failed to report certain earnings information on each of the CA-1032 forms in question. For this reason, the Board finds that appellant was with fault in the matter of overpayment of compensation under the second criterion above, thereby precluding waiver of recovery.

The Board further finds that appellant received a second overpayment, based on his actual earnings from April 26, 1992 to March 6, 1993.

In a decision dated March 19, 1993, the Office determined that based on appellant’s sporadic earnings from employment with various employers and self-employment, from 1981 to March 1, 1992, appellant had an adjusted wage-earning capacity, based on actual earnings of \$78.59 per week and reduced appellant’s compensation effective March 7, 1993. As the record now establishes that appellant’s compensation should have been reduced retroactive to April 26, 1992, and as appellant, through his failure to report his earnings for the period in question, received full compensation benefits, rather than reduced benefits, from April 26, 1992 to March 6, 1993, appellant was at fault in the creation of the resulting overpayment and this second overpayment is also not subject to waiver.¹⁰

The Board also finds that that the Office properly required repayment by withholding \$600.00 from appellant’s monthly continuing compensation.

The Office’s implementing regulations provide:

“Whenever an overpayment has been made to an individual who is entitled to further 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.”¹¹

⁹ 20 C.F.R. § 10.320.

¹⁰ The Office found that appellant had been overpaid \$2,401.50, for the period May 31 to March 6, 1992. The Board notes, however, that appellant’s compensation actually should have been reduced retroactive to April 26, 1992, which would result in a greater overpayment than that found by the Office.

¹¹ 20 C.F.R. § 10.321(a); see *Roger Seay*, 39 ECAB 441 (1988).

The Office properly reviewed the financial information provided by appellant on his overpayment recovery questionnaire, noting that appellant and his wife received a total of \$1,652.00 from workers' compensation benefits, social security benefits and occasional work. The Office further determined from the information provided by appellant, that appellant had total monthly expenses of \$896.00, and that, therefore, appellant had a surplus income of \$765.00 a month. Therefore, the Board finds that the Office did not abuse its discretion in deciding to withhold \$600.00 per month from appellant's continuing compensation in order to facilitate recovery of the overpayment with minimal hardship.

The decision of the Office of Workers' Compensation Programs dated October 29, 1996 is affirmed. The decision of the Office dated April 12, 1996 is modified to reflect that a merit review of the claim was conducted and that the evidence submitted was found insufficient to warrant modification of the prior decision.

Dated, Washington, D.C.
October 6, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member