

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GLORI F. FINCH and U.S. POSTAL SERVICE,
POST OFFICE, Toledo, OH

*Docket No. 97-1235; Submitted on the Record;
Issued September 7, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant forfeited her right to compensation in the amount of \$8,872.66 covering the period September 26, 1994 through March 11, 1995, because she knowingly failed to report employment and/or earnings; and (2) whether 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.

On February 28, 1994 appellant, then a 38-year-old mail handler, sustained a lumbosacral strain in the performance of duty. Appellant received continuation of pay for time lost due to scheduled medical appointments. On October 13, 1994 appellant filed a notice of recurrence of disability alleging that she suffered a recurrence on September 26, 1994. Appellant was subsequently paid compensation benefits for temporary total disability beginning September 26, 1994.

On a CA-7 form received October 6, 1994, appellant indicated that she did not engage in salaried employment, or commissioned and self-employment for the period September 26, 1994 through October 24, 1994 for which she requested compensation.

On CA-8 forms dated November 5 and 19, December 7 and 19, 1994, January 2, 12 and 29, February 13 and 27 and March 16, 1995 appellant claimed compensation benefits for lost wages for the periods October 25, 1994 through March 11, 1995. Appellant indicated on these forms that she did not engage in salaried employment nor received income from commissioned and self-employment during these periods. She placed her signature under the warning that any person who knowingly made any false statement, misrepresentation, concealment of fact or any act of fraud to obtain compensation under the Federal Employees' Compensation Act would be subject to criminal prosecution.

Appellant was subsequently indicted for submitting false statements claiming that she was not self-employed and had no income pursuant to 18 U.S.C. § 1920 in order to obtain compensation benefits, and for also receiving \$8,872.66 in fraudulently obtained compensation benefits through the mail pursuant to 18 U.S.C. § 1341.

On March 24, 1995 the employing establishment submitted evidence indicating that appellant engaged in self-employment activities during the period in which she received compensation benefits.

The employing establishment submitted a March 16, 1995 memorandum from its human resources specialist indicating that appellant was told on November 22, 1994 to answer "NA" on those portions of her Form CA-8's which required answers. The human resources specialist indicated that appellant subsequently entered "NA" on the portions of her November 19, 1994 Form CA-8 which were left blank.

The employing establishment also submitted a December 2, 1994 memorandum which indicated that a postal inspector called appellant's home telephone number and spoke to a person identifying herself as Glori. The postal inspector stated that he inquired about costumes for a dance recital and that Glori stated that work was two years backed up from making mascots. The postal inspectors further wrote that Glori stated that she had to turn down other future mascot work, but that prior mascot projects had been successful. Glori stated that another person would contact the caller about dresses for the dance recital.

The employing establishment also submitted a telephone transcript between appellant and a postal inspector dated January 26, 1995. The postal inspector posed as a prospective mascot buyer and appellant supplied information regarding prior mascot projects. Appellant also described the type of mascots the postal inspector could purchase and the method of construction. She suggested prices for her product and indicated that she and her family did all the work on the mascot costumes. Appellant stated that she was currently working on a bear costume and on superhero costumes for another company. She requested information in order to generate an estimate and requested an address so that she could send photographs of her prior work. Appellant indicated that the product could be ready by September or December. She further stated that she received an advance for her work from another company. Finally, the postal inspector and appellant arranged a meeting to view samples of her products.

On February 21, 1995 the postal inspector, still posing as a prospective mascot buyer, met with appellant and her husband at a restaurant. Appellant suggested that the postal inspector purchase a soft-headed costume. She then demonstrated examples of her previous work. Appellant indicated that she also made bags to store the costumes. She promised to send further pictures and an example of the fur that would be used on the costume requested by the postal inspector. Appellant also discussed how to maintain the costumes. She indicated that she did all the construction on her mascot costumes herself. Appellant further stated that she did not draw her mascots, but relied on pictures from her customers. She stated, however, that she created a drawing for one customer. Appellant indicated that she had shipped out a costume the previous Monday. She further stated that alterations could be added to mascots. Appellant then showed the postal inspector an actual mascot costume she was taking back to maintain. She carried the costume from her customer's car to her own. Appellant indicated that the construction of the

costume would take about 100 hours of her labor. She discussed the price of the costume and the amount of maintenance required. Appellant stated that she would send a contract for the work which the postal inspector could sign and return. She also discussed the construction of the costume and indicated that she worked continuously on her costumes. Appellant indicated that she had people working for her making costumes. She indicated that her shop was in her basement and that she had several sewing machines. Appellant indicated that her work could be completed in 18 months. She stated that she required payment up front. The postal inspector summarized this meeting in a subsequent memorandum.

By letter dated March 1, 1995, appellant wrote to the prospective customer, played by the postal inspector, offering her services and indicating the price of her costume. Appellant enclosed photographs of other costumes she had made. She also provided a sample contract.

The employing establishment also provided a memorandum of an interview with appellant completed on March 9 and 10, 1995. Appellant indicated that she was currently employed with both the employing establishment and "Glori and Me." She stated, however, that she did nothing for "Glori and Me" and that she was not actively involved with the operation of that business. Appellant stated "Glori and Me" was also a maintenance business which cleaned veterinary offices. She stated that she owned this business, but that she had not actively worked in it since February 1994. Appellant stated that she also owns a mascot business, but that she does not meet with clients and tells her husband how to perform maintenance of the mascots. She also stated that she takes checks to the bank and answers business calls. Appellant stated that the last time she met with a client was in 1988. She, however, further stated that she met with mascot customers in 1993 and again just two weeks earlier. She indicated that she helped her daughter wipe down veterinary counters the prior summer. Appellant indicated that her husband and daughter earned \$291.20 every two weeks cleaning veterinary offices which is deposited in the "Glori and Me" account. She indicated that she had been backed up with mascot orders prior to her employment with the employing establishment. Appellant stated that her husband and daughter now handle 75 percent of the work for "Glori and Me." She stated that she delivered a mascot in August 1994 and that shortly thereafter she did maintenance work on other mascots. Appellant stated that she assisted her husband in picking up the costumes. The cost of the maintenance ranged from \$30.00 to \$150.00 and the costumes were shipped out in December 1994. She stated that she contacted another customer about replacing an emblem on a mascot and that she accepted a check in December 1994 for a mascot which was completed and delivered on February 20, 1995. The check was deposited in the "Glori and Me" account. Appellant stated that she also met with a woman around February 21, 1995 concerning a possible mascot contract. She stated that she entered into a separate \$4,500.00 contract in December 1994 for a dog mascot due June 1995. Appellant admitted to being involved in a mascot making business, including laying out patterns, taking checks to the bank, shopping for fur samples, picking up mascots for maintenance, and meeting with customers. She stated that she physically picked up a mascot and placed it in her car for maintenance at a previous meeting. Appellant stated that she handled the money for the veterinary cleaning services.

In a deposition dated March 10, 1995, appellant stated that when she began working at the employing establishment, her family assumed 75 percent of her duties at her business "Glori and Me." She indicated that she completed a costume in 1993, but kept it in storage until

delivered in August 1994. Appellant stated that after that she assisted in the maintenance of other costumes which cost between \$30.00 and \$150.00. She indicated all money was paid to the "Glori and Me" account. Appellant stated that she made a verbal contract with a company in December 1994 for two costumes which were shipped in February 1995. She indicated that she worked on this project in a limited capacity. Appellant stated that she picked up a costume for maintenance in February 1995 and physically placed the mascot in her own vehicle. She stated that she also met with a prospective customer at that time and stated that she could likely deliver the product in 18 months. Appellant stated that she agreed to make another mascot for \$4,500.00 in December 1994 and that a check for that amount was deposited in the "Glori and Me" account. She stated that she shopped for fabric and conferred with clients over the phone. She also stated that she sent sample fabrics and a sample contract to another prospective customer. Appellant stated that she also performed limited work with "Glori and Me" wiping counters in veterinary clinics. She stated that she deposited checks for this service in the "Glori and Me" account.

The record also contains financial records from appellant and her business "Glori and Me." These records include a November 18, 1994 contract for "Glori and Me" to produce a mascot costing \$4,300.00. An invoice dated December 1, 1994 for \$4,500.00 from the Wood County Hospital. A contract and invoices from the Home Quarters Warehouse, Inc. dated December 10 and 19, 1994 with "Glori and Me" for mascots totaling \$7,000.00. A checking account application dated February 24, 1989 indicating appellant was a joint account holder in a "Glori and Me" account. Appellant's 1994 federal tax return indicating that appellant and her husband received \$4,052.00 in that year in net business income. The record also contained canceled business checks from "Glori and Me" signed by appellant. Many of the checks were made out to fabric companies. In addition, there were invoices from Perrysburg Animal Care, Inc. showing that "Glori and Me" received payments from March 1994 through March 1995. Finally, the record contained invoices from costume suppliers indicating that "Glori and Me" made purchases on December 29, 1994, January 10, February 2 and 3, 1995.

By decision dated January 31, 1996, the Office ordered that entitlement to compensation for lost wages for the period September 26, 1994 through March 11, 1995 totaling \$8,872.66 be forfeited pursuant to 5 U.S.C. § 8106(b) because appellant knowingly omitted activity and earnings from self-employment on the Form CA-7 and Forms CA-8 she completed.

In addition, the Office issued a preliminary determination that an overpayment had occurred in the amount of \$8,872.66 as a result of the forfeiture. The Office advised appellant that she was found to be at fault in the creation of the overpayment.

By decision dated February 23, 1996, the Office also denied appellant's claim because the evidence of file demonstrated that the work-related injury of February 28, 1994 had resolved.¹

On February 28, 1996 appellant requested a hearing on the issue of fault and waiver of the overpayment. Appellant canceled her hearing request on August 20, 1996.

¹ Appellant limited her appeal to the Board to the overpayment decision of the Office.

On August 14, 1996 appellant was found guilty by a federal court of one count of mail fraud and nine counts of filing a false statement to obtain federal employee's compensation.

By decision dated December 16, 1996, the Office found that an overpayment in the amount of \$8,872.66 occurred because appellant was self-employed while in receipt of compensation. The Office further found that appellant was at fault in the creation of the overpayment because she knowingly omitted self-employment from her claims for compensation.

The Board finds that the Office properly determined that appellant forfeited her right to compensation in the amount of \$8,872.66, covering the period September 26, 1994 through March 11, 1995, because she knowingly failed to report employment and/or earnings.

Section 8106(b) of the 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

Moreover, as forfeiture is a penalty, it is not enough merely to establish that there were unreported earnings from employment. The relevant inquiry is whether appellant “knowingly” failed to report her 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.”³

The evidence of record demonstrates that appellant indicated on her Form CA-7 and on subsequently filed Forms CA-8 that she was not employed or self-employed with earnings for the period of September 26, 1994 through March 11, 1995. She placed her signature under warning that any person who knowingly made any false statement, misrepresentation, concealment of fact or any act of fraud to obtain compensation under the Act would be subject to criminal prosecution. Appellant, therefore, knew from her reading of the Form CA-7 and the CA-8 forms that self-employment and earnings were material facts that should be reported.

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 part of wages or remuneration.”

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

Although appellant signed these forms indicating that she was not self-employed and had no earnings, the record clearly established that appellant engaged in self-employment activities during the periods covered by the forms. In this regard, appellant solicited business from postal inspectors posing as customers of “Glori and Me” on December 2, 1994, January 26 and February 21, 1995. Moreover, appellant admitted in a March 9 and 10, 1995 interview with a postal inspector that she owned “Glori and Me,” but that her participation was limited to 75 percent of the work of the enterprise. Appellant admitted to soliciting business for “Glori and Me” in 1993 and 1994. She stated that she helped in wiping down veterinary counters for “Glori and Me” in 1994. Appellant stated that she delivered a mascot in August 1994 and did maintenance work on mascot costumes through December 1994. She further stated that she accepted a check in December 1994 for a mascot and completed the product on February 20, 1995. Appellant also indicated that she entered into a contract in December 1994 for another mascot which was to be completed by June 1995. Appellant admitted that she was involved in the mascot making business, including laying out patterns, taking checks to the bank, shopping for fur samples, picking up mascots for maintenance, and meeting with customers. She also indicated that she handled the money for the “Glori and Me” veterinary services. Appellant repeated these statements in a deposition dated March 10, 1995. These periods of self-employment were further documented by appellant’s financial records, which included a 1994 federal tax return indicating that appellant and her husband received \$4,052.00 that year in net business income and, checks and invoices indicating that purchases of supplies and the selling of goods and services by “Glori and Me.”

Accordingly, 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 of September 26, 1994 through March 11, 1995 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 she received for that period.⁴

The Board further 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(b) of the Act provides, “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 the Act or would be against equity and good conscience.”⁵ Accordingly, no waiver of 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:

“Any individual is with fault in the creation of an overpayment who:

⁴ *Wayne P. Hammer*, 44 ECAB 286 (1992).

⁵ 5 U.S.C. § 8129(b).

- (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
- (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

The Board finds that appellant was at fault in the matter of the overpayment under the second criteria above, that is, on the grounds that appellant knowingly failed to reveal material information. As established above, appellant failed to report her self-employment earnings from “Glori and Me” for the period September 26, 1994 through March 11, 1995 on the Form CA-7 and Forms CA-8 she completed. Given the fact that appellant was told on these forms that her self-employment was a material fact that should be reported and that she was found guilty by a federal court of one count of mail fraud and nine counts of filing a false statement related to these forms, it is clear that appellant knowingly failed to furnish material information. The Board, therefore, finds that appellant was at fault in the creation of the overpayment and is not entitled to waiver of the overpayment.

⁶ 20 C.F.R. § 10.320(b).

The decisions of the Office of Workers' Compensation Programs dated December 16 and January 31, 1996 affirmed.

Dated, Washington, D.C.
September 7, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member