

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA L. COGGINS and U.S. POSTAL SERVICE,
POST OFFICE, Anniston, AL

*Docket No. 98-172; Submitted on the Record;
Issued January 24, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant forfeited her right to compensation in the amount of \$8,595.07 for the period December 30, 1995 to April 30, 1996 because she knowingly failed to report earnings from employment during this period; and (2) whether the Office properly determined that appellant was at fault in creating an overpayment of \$8,595.07, thus precluding waiver of recovery of the overpayment.

On October 14, 1995 appellant, then a 42-year-old distribution clerk, sustained injuries to her head and right hip as a result of a fall that occurred while in the performance of duty. Appellant stopped working on October 16, 1995. The Office accepted the claim for contusions to both the right hip and head. Appellant received continuation of pay through December 29, 1995 and thereafter she received appropriate wage-loss compensation. Appellant returned to work in a limited-duty capacity on July 22, 1996. Shortly thereafter, she filed a claim for recurrence of disability on August 16, 1996. However, appellant continued to work in a part-time, limited-duty capacity until she was granted a disability retirement by the Office of Personnel Management effective September 28, 1996.

The employing establishment investigated appellant's activities while on disability compensation and determined that appellant continued to perform some of the duties of her position as union president. Additionally, the employing establishment submitted evidence indicating that appellant, in her capacity as union president, was entitled to a monthly "salary" of \$100.00. The employing establishment also obtained banking records from the union documenting certain funds that were dispersed to appellant during the period of December 1995 to May 1996. The record indicates that appellant resigned from her position as union president effective April 14, 1996. When interviewed by a postal inspector on August 14, 1996, appellant reportedly explained that the payments she received from the union every month were reimbursements for miscellaneous expenses she incurred for telephone calls and mileage.

Appellant submitted Forms CA-7 and CA-8 in connection with her claim for disability compensation.¹ Both Form CA-7 and CA-8 advise the signer that any person who knowingly makes “any false statement, misrepresentation, concealment of fact or any other act of fraud” in order to obtain compensation under the Federal Employees’ Compensation Act is subject to various civil, administrative and criminal penalties. Form CA-7 inquires under item 6 whether the injured employee received “any pay” during the period of compensation claimed. Form CA-8 solicits similar information under item 9. Specifically, Form CA-8 requires that the injured employee provide certain information if he or she “worked anywhere” during the period of compensation claimed.² On the Forms CA-7 and CA-8 signed and submitted by appellant, she either responded no and/or not applicable or she did not respond at all to the questions regarding employment and earnings.

On April 22, 1997 the Office issued two decisions, the first of which denied appellant’s August 16, 1996 claim for compensation due to a recurrence of disability. Additionally, the Office issued an April 22, 1997 decision advising appellant that because of her failure to report her earnings and employment activities during the period of December 30, 1995 to April 30, 1996, she had forfeited her right to compensation for that period. Lastly, in a separate letter, the Office informed appellant that it had made a preliminary determination that she received an overpayment of compensation in the amount of \$8,595.07. The Office explained that the overpayment occurred because appellant failed to report her earnings and activities with the union during the period of December 30, 1995 to April 30, 1996. Additionally, the Office informed appellant that she was found to be at fault in creating the overpayment.

By decision dated June 25, 1997, the Office finalized its preliminary determination that appellant received an overpayment of compensation in the amount of \$8,595.07, and that she was at fault in creating the overpayment.³ Appellant, through her attorney, subsequently filed an appeal with the Board on September 22, 1997.⁴

The Board finds that the Office properly determined that appellant forfeited her right to compensation for the periods of February 3 to March 1, 1996 and March 9 to April 19, 1996. Additionally, the Board finds that the Office improperly determined that appellant forfeited her right to compensation for the periods of December 30, 1995 to February 2, 1996, March 2 to 8, 1996, and April 20 to 30, 1996.

¹ Form CA-7 is titled “claim for compensation on account of traumatic injury or occupational disease” and Form CA-8 is titled “claim for continuing compensation on account of disability.”

² Item 9 on Form CA-8 requests information about salaried employment and commission and self-employment, including name and address of business or employer, dates and hours worked, pay rate, total amount earned or income derived, and type of work or activity performed. With respect to commission and self-employment, Form CA-8 instructs the employee to “show all activities, whether or not income resulted from [such] efforts.”

³ The Office also noted that appellant did not submit any evidence in response to either the April 22, 1997 forfeiture decision or the preliminary determination regarding overpayment.

⁴ On appeal appellant’s counsel has not challenged the Office’s April 22, 1997 decision denying her August 16, 1996 claim for recurrence of disability. Accordingly, the Board will not exercise jurisdiction over this particular decision.

Section 8106(b) of the Act provides 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.”⁵

In the present case, the Office determined that appellant forfeited her right to compensation for the period December 30, 1995 through April 30, 1996 because she knowingly failed to report earnings from employment during this period. The record reveals that the union local issued appellant five monthly checks covering the period of December 1995 through April 1996, totaling \$461.75.⁶ Appellant did not dispute receiving these funds, but merely contended that the monies received were reimbursements for miscellaneous expenses, such as telephone calls and mileage, that she incurred while carrying out her duties as union president. The Office rejected appellant’s characterization of these funds as reimbursements in light of the fact that the checks she negotiated included the notations “salary” or “monthly salary,” along with the corresponding month and year, *i.e.*, “Monthly Salary Feb[ruary] 1996.” Additionally, the record includes a copy of the union’s constitution and by-laws which indicates under Article 6, Section 1, I that “The President will be paid \$100.00 per month in *salary*.”⁷ Moreover, reimbursement for mileage is addressed under a separate provision in Article 6, Section 1. Lastly, appellant reportedly acknowledged that the union withheld social security taxes from her monthly checks, thus further undermining her contention that the funds received were

⁵ 5 U.S.C. § 8106(b).

⁶ The evidence of payment consists of photocopies of three checks that were negotiated by appellant for the months of December 1995, January and February 1996. Additionally, the record includes two check stubs from the union’s checking account register covering the months of March and April 1996.

⁷ The record indicates that on April 21, 1996 the union was scheduled to address proposed amendments to its constitution. One such amendment involved Article 6, Section 1, whereby the president’s monthly salary would be increased to \$130.00. Additionally, the proposed amendment included the following language: “This salary is to be payed [sic] for the president’s travels and food to do union business in the small outlying offices as well as all normal expenses for union business in all offices in our area.” While this information arguably supports appellant’s contention that the designated monthly “salary” was intended to cover the president’s miscellaneous expenses, it also suggests that there was a concern within the union that under the current by-laws such payments could reasonably be construed as income.

reimbursements for miscellaneous expenses incurred.⁸ Consequently, the Office properly concluded appellant received earnings arising from her activities with the union.

Appellant, however, can only be subjected to the forfeiture provision of section 8106 of the Act if she “knowingly” omitted or understated earnings. It is not enough to merely establish that there were unreported earnings. The Board recognizes that forfeiture is a penalty,⁹ and, as a penalty provision, it must be narrowly construed.¹⁰ The term “knowingly” is not defined within the Act or its regulations. In common usage, “knowingly” is defined as: “[w]ith knowledge; consciously; intelligently; willfully; intentionally.”¹¹

The Office indicated that appellant failed to report her earnings and employment activities on Forms CA-8 covering the period December 30, 1995 to April 30, 1996. A failure to complete item 9 on Form CA-8 is sufficient to establish that appellant “knowingly” omitted reporting earnings.¹² In the instant case, however, the record does not include a Form CA-8 covering the period December 30, 1995 to January 19, 1996. Appellant filed a Form CA-7 on January 16, 1996 in which she checked the “no” box in item 6 in response to the question of whether she received “any pay” during the period of claimed compensation, *i.e.*, December 30, 1995.¹³ The Board has previously held that the language of Form CA-7 is not specific enough to reasonably put an injured employee on notice that he or she had to report all earnings, no matter the source, for the period of claimed compensation.¹⁴ Because the January 16, 1996 Form CA-7 is insufficient to reasonably put appellant on notice of her reporting responsibilities, it is not sufficient to meet the Office’s burden of proof to establish that she forfeited her right to compensation for the period of compensation claimed. Thus, the Office improperly concluded that appellant forfeited her compensation for the period December 30, 1995 to January 19, 1996.

The earliest Form CA-8 of record is dated January 22, 1996. Appellant responded “no” under item 9 regarding salaried employment. Under item 6, the period of compensation claimed is noted as January 20 to February 2, 1996. However, the record indicates that the employing establishment provided this latter information. Appellant noted a beginning date of November 3, 1995 and she did not provide an end date. There is no indication in the record that appellant was aware that the employing establishment changed the information she originally submitted in her

⁸ Although appellant was entitled to receive \$100.00 per month, the record indicates that the union paid her \$92.35 per month.

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Case*, Chapter 2.812.10(c) (July 1993).

¹⁰ See *Christine P. Burgess*, 43 ECAB 449, 458 (1992).

¹¹ *BLACK’S LAW DICTIONARY* (5th ed. 1979); see *Anthony A. Nobile*, 44 ECAB 268, 271-73 (1992).

¹² See *James H. Hopkins*, 48 ECAB ____ (Docket No. 94-2351, issued January 7, 1997).

¹³ With respect to the period of time for which compensation was claimed, the Form CA-7, submitted by appellant included a beginning date of December 30, 1995, but did not include an end date.

¹⁴ *Carlos M. Giangrancio*, 47 ECAB 205, 210 (1995).

January 22, 1996 Form CA-8. Consequently, it is inappropriate to conclude from this document that appellant knowingly omitted earnings for the period of January 20 to February 2, 1996. Therefore, appellant cannot be found to have forfeited her compensation for the period in question.

The next Form CA-8 is signed by appellant, but undated. The period of compensation claimed is noted as February 3 to 16, 1996. Appellant noted “n/a” under item 9 with respect to salaried employment. In another Form CA-8 dated February 29, 1996, which covered the period of February 17 to March 1, 1996, appellant provided no response under item 9. Based on these two documents, the Office properly concluded that appellant knowingly failed to report earnings during the period in question, and therefore, she forfeited her compensation for the period of February 3 to March 1, 1996.¹⁵

The Office also found that appellant forfeited compensation for the period of March 2 to 8, 1996. However, the record does not include a completed Form CA-8 covering this time period and the Office has not otherwise identified any evidence to establish that appellant knowingly omitted earnings for the period in question. Consequently, the Office improperly concluded that appellant forfeited her compensation for the period of March 2 to 8, 1996.

With respect to the period of March 9 through April 19, 1996, the record includes three CA-8 forms submitted by appellant. On two of the forms, both dated March 27, 1996, appellant responded “no” at item 9 with respect to salaried employment. On the third Form CA-8 dated April 27, 1996, appellant did not provide any information under item 9. In light of the broad, inclusive language on Form CA-8, this evidence is sufficient to establish that appellant knowingly failed to report earnings, and therefore, she forfeited her compensation for the period of March 9 through April 19, 1996.¹⁶

Finally, based on Forms CA-8 dated May 13 and 24, 1996, the Office determined that appellant knowingly failed to report earnings and employment activities, and therefore, she forfeited her compensation for the period of April 20 to 30, 1996.¹⁷ On both forms appellant provided no response under item 9. The lack of a response is reasonable in light of the fact that appellant resigned from her position as union president effective April 14, 1996. Although the union paid appellant her full salary for April 1996, these earnings pertained to the services she provided prior to her resignation in mid-April 1996. Inasmuch as appellant did not have any earnings and employment activities during the period in question, the Office erred in concluding that appellant forfeited her right to compensation for the period of April 20 to 30, 1996.

The Board finds that the Office properly determined that appellant knowingly failed to report earnings from employment during the periods of February 3 to March 1, 1996 and March 9 to April 19, 1996. As such, appellant forfeited her right to compensation for those periods in accordance with section 8106(b) of the Act. However, the Office improperly

¹⁵ *James H. Hopkins, supra* note 12.

¹⁶ *Id.*

¹⁷ The period of compensation claimed on the two forms covers the timeframe of April 20 to May 10, 1996.

determined that appellant forfeited her right to compensation for the periods of December 30, 1995 to February 2, 1996, March 2 to 8, 1996, and April 20 to 30, 1996. Accordingly, the case will be remanded to the Office to determine the amount of compensation appellant received during the periods of February 3 to March 1, 1996 and March 9 to April 19, 1996, which is subject to forfeiture.

The Board further finds that the Office properly determined that appellant was at fault in creating an overpayment of compensation for the periods of February 3 to March 1, 1996 and March 9 to April 19, 1996, and, therefore, the overpayment for those periods was not subject to waiver. With respect to the issue of whether appellant received an overpayment during the period of December 30, 1995 to February 2, 1996, the Board finds that the case is not in posture for a decision.

Section 8129 of the Act¹⁸ provides that an overpayment must be recovered 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.” However, an individual who is found to have been at fault in helping to create the overpayment is not eligible for a waiver of recovery of overpayment.¹⁹

With respect to determining fault, section 10.320(b) of Title 20 of the Code of Federal 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
- (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.”²⁰

The Office appears to have applied the standard under section 10.320(b)(2) in determining that appellant was at fault in creating the overpayment. Under the circumstances, appellant’s failure to report her earnings and employment activities during the periods of February 3 to March 1, 1996 and March 9 to April 19, 1996, not only justifies forfeiture of compensation received, but also constitutes a failure to furnish information which she knew or should have known to be material. Consequently, appellant was properly deemed to be at fault in creating the overpayment of compensation. Inasmuch as appellant was at fault in creating the

¹⁸ 5 U.S.C. § 8129(b).

¹⁹ *Bonnye Mathews*, 45 ECAB 657, 667 (1994).

²⁰ 20 C.F.R. § 10.320(b).

overpayment pursuant to section 10.320(b)(2) recovery of the overpayment of compensation may not be waived.²¹

As previously indicated, the case will be remanded to the Office for calculation of the amount of compensation received by appellant during the periods of February 3 to March 1, 1996 and March 9 to April 19, 1996, which is subject to forfeiture. Once calculated, this figure would also represent the amount of overpayment appellant received during the period in question. However, the question remains as to whether appellant received an overpayment during the period of December 30, 1995 to February 2, 1996 as a result of earnings she received in connection with her duties as union president during December 1995 and January 1996. On remand the Office should address this issue as well.

²¹ See *James H. Hopkins, supra* note 12.

The decision of the Office of Workers' Compensation Programs dated April 22, 1997 is: affirmed with respect to the finding that appellant forfeited compensation received during the periods of February 3 to March 1, 1996 and March 9 to April 19, 1996; set aside and remanded to the Office for calculation of the amount of compensation received during the periods of February 3 to March 1, 1996 and March 9 to April 19, 1996; and reversed with respect to the finding that appellant forfeited compensation received for the periods of December 30, 1995 to February 2, 1996, March 2 to 8, 1996, and April 20 to 30, 1996. Additionally, the decision of the Office dated June 25, 1997 is: affirmed with respect to the finding that appellant was at fault in creating an overpayment of compensation for the periods of February 3 to March 1, 1996 and March 9 to April 19, 1996 and, therefore, not entitled to waiver of recovery of the overpayment; set aside and remanded to the Office for calculation of the amount of the overpayment received for the periods of February 3 to March 1, 1996 and March 9 to April 19, 1996; set aside and remanded to the Office for further proceedings regarding whether appellant received an overpayment of compensation during the period of December 30, 1995 to February 2, 1996; and reversed with respect to the finding that appellant received an overpayment of compensation for the periods of March 2 to 8, 1996 and April 20 to 30, 1996.

Dated, Washington, D.C.
January 24, 2000

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member