U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH W. CROVO and U.S. POSTAL SERVICE,
POST OFFICE, Brooklyn, NY

Docket No. 98-594; Submitted on the Record;
Issued January 18, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant forfeited his right to compensation benefits for the period May 8, 1992 through May 7, 1993; and (2) whether the Office properly found that appellant was at fault in the creation of the overpayment of $25,125.46 and that, therefore, the overpayment was not subject to waiver.

The Office accepted appellant's claim for a lumbosacral strain and a herniated lumbar disc and paid appellant compensation benefits from December 6, 1989 through March 21, 1994 when appellant returned to light-duty work.

On the employment status report, Form CA-1032, which the Office sent appellant, appellant was informed that a false or evasive answer to any questions, or the omission of an answer, may be grounds for forfeiture of his compensation benefits and subject him to civil liability, or, if fraudulent, may result in criminal prosecution. On the Form CA-1032 signed by appellant on May 7, 1993, which covered the 15 preceding months, appellant stated that he had been unemployed since his December 5, 1989 employment injury. He indicated that the questions of whether he had been employed or self-employed during the time period covered on the form were not applicable.

In an investigative memorandum dated October 13, 1994, the employing establishment described seven incidents on Sundays from January 10 through May 4, 1992 where appellant was observed exiting the Silver Fox Tavern and, in all but two of the incidents, locking the door by either placing locks on the door or securing the bar on the security gate. Videotapes were made of most of these incidents. The employing establishment also obtained a sworn statement from the owner of the Silver Fox Tavern, Alfred Triosi, dated October 7, 1994 stating that he employed appellant from approximately November 1992 until November 1993 as a "porter/cleaner," that appellant worked on Sunday mornings and was paid $25.00 per Sunday and that after finishing his duties, appellant would secure the tavern by locking the doors and

placing the security gate. The employing establishment stated that in an interview with two postal inspectors on October 7, 1994, Mr. Triosi stated that he paid appellant $25.00 "off the books" for each shift worked. Mr. Triosi stated that appellant would clean the place and then secure the tavern.

In a memorandum of an interview the postal inspector had with appellant on October 7, 1994, appellant stated that prior to his December 5, 1989 employment injury, he worked intermittently at the Silver Fox Tavern but denied working there since the injury. He stated that the Silver Fox Tavern was his "hangout," that when the tavern closed he would remain there, watch cable television and make himself breakfast. Appellant stated that he would then close the tavern for the owner. He also stated that he would tend the bar occasionally if the owner had to leave on personal business. Appellant stated that he was never paid for any services rendered at the tavern. He stated that when he did tend the bar and he was given a tip, he placed the tip in the tip jar for other bartenders at the establishment.

In a supplemental investigative memorandum dated November 17, 1994, the employing establishment stated that appellant had been arrested and charged with making false statements in violation of 18 U.S.C. § 1001 and that he appeared before a United States Magistrate Judge and was released upon his own recognizance. By letter dated May 24, 1996, the postal inspector informed the Office that on May 10, 1996 appellant appeared at the United States Pre-Trial Services Agency in the eastern District of New York and entered into a Pre-Trial Diversion Agreement. He stated that appellant agreed to be placed under the supervision of the Pre-Trial Services Agency for a period of eight months.

By decision dated August 6, 1996, the Office found that the compensation appellant had been paid from May 8, 1992 through May 7, 1993 in the amount of $25,125.46 was forfeit because appellant failed to report earnings and was aware that he was not entitled to compensation during that time period. The Office based its decision on the employing establishment's investigation showing that during the relevant time period, in a sworn statement by the owner of the Silver Fox Tavern, appellant was paid "off the books" $25.00 per shift to close the tavern and clean-up and that the investigation led to the arrest and indictment of appellant who entered into a pre-trial diversion agreement.

Appellant requested an oral argument before an Office hearing representative, which was held on June 25, 1997.

At the hearing, appellant's representative testified as to appellant's character, stating that appellant liked to help people, both individuals and commercial enterprises, in his neighborhood by doing small tasks and never asked for or accepted money for doing them. The legal representative stated that appellant did not work at the Silver Fox Tavern and appellant denied that he ever worked there for money. He stated that appellant hung out at the tavern, had "the run of the place," and had the key to open and close it. The legal representative stated that appellant cleaned "up things around the place" and would serve beers when the owner or bartender went out but never accepted any kind of pay. He stated that appellant benefited by having access to the kitchen facilities, the large screen television and the watch cable, which he did not have access to in his one room apartment where he lived. The legal representative stated that Mr. Triosi owed appellant money. He also stated that Mr. Triosi was "scared into making

statements" to the postal inspectors about appellant's employment status because they told him they would bring in the Internal Revenue Service and the state liquor authority because he had illegal poker machines in the building.

The legal representative stated that Mr. Triosi put $20.00 on the bar but appellant did not regard the $20.00 Mr. Triosi presented as payment for his service, that Mr. Triosi refused to accept it back and that appellant would restock the mixture supplies. He stated that the money "would never be in [appellant's] pocket." The legal representative stated that there was never any signed or verbal agreement that appellant would get paid and appellant thought Mr. Triosi was leaving the money, not in repayment of the loan, but to show his appreciation for cleaning up the place. He also stated that as a bartender appellant did not accept the tips that were offered him but placed them in a jar for other bartenders.

Appellant affirmed that everything his legal representative said was accurate. Appellant testified that he loaned Mr. Triosi over $1,000.00, some of which was paid back. He stated that he left the money on the bar that Mr. Triosi placed there. Appellant stated that Mr. Triosi gave him $20.00 about four or five times approximately in a one-year period. Appellant indicated that when Mr. Triosi returned some of the money appellant had loaned him, he indicated that it was to repay the loan.

In an undated statement, appellant stated that he told the postal inspectors during his interview with them, that he would go into the bar occasionally as Mr. Triosi might run to the back for change or groceries. He stated that on Sunday morning, after the bar was closed he might watch old movies on the cable channel or play songs on the juke box. Appellant stated that he would also cook in the kitchen, make coffee and read the Sunday advance. He stated that he would clean up after himself and would at times clean "other things" such as the sink, or pick up a beer bottle or cigarette butt if he saw them. Appellant stated that Mr. Triosi did him a favor by allowing him to use his facility to have "the run of the place" and it gave him a change "just to get out." He stated that Mr. Triosi would offer him $30.00 which he "repeatedly informed" him he did not want but he used the money to buy "drinks and many times pizza for the customers." Appellant also stated that, unknown to Mr. Triosi, he would purchase juices, fruits and other supplies that he knew Mr. Triosi could use. He stated that he did not consider himself an employee and did not interpret any money given to him as payment or reimbursement of any kind.

By decision dated September 5, 1997, the Office hearing representative affirmed the Office's August 6, 1996 decision. The hearing representative found that, pursuant to the Debt Collection Act of 1982,[1] appellant's debt would be compromised by $6,982.82 since payment of the full debt would have increased the period of indebtedness more than 35 percent. He, therefore, concluded that there was a total balance of $18,142.64 and appellant should pay $100.00 a month to recover the forfeited amount.

[1] Pub. L. 97-365.

The Board finds that the Office properly determined that appellant forfeited compensation from the period of May 8, 1992 through May 7, 1993 based on his failure to report earnings.

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

The Office, however, 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 to establish that there were unreported earnings from employment. The term knowingly is not defined within the Federal Employees' Compensation Act or its implementing regulations. In common usage, the Board had recognized that the definition of "knowingly" includes such concepts as "with knowledge," "consciously," "willfully," or "intentionally."[7]

In the present case, appellant was informed by the CA-1032 that he was to report any employment for which he received salary, wages, sales commissions, piecework or other payment. In his sworn statement dated October 7, 1994, the owner of the Silver Fox Tavern, Mr. Triosi, stated that he employed appellant as a porter and cleaner approximately from November 1992 until November 1993, that appellant worked Sunday mornings and would secure the tavern when he left by locking the doors and placing the security gate in position and that he paid appellant $25.00 for each shift. The Board has defined wages as:

> "Every form of remuneration payable for a given period to an individual for personal services, including salaries, commissions, vacation pay, dismissal wages, bonuses and reasonable value of board, rent, housing, lodging payments in kind, tips and any other similar advantage received from the individual's employer or directly with respect to work for him."[3]

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[2] 5 U.S.C. § 8106(b).

[3] *Daniel A. Mashe*, 50 ECAB ___ (Docket No. 97-2115, issued June 11, 1999); *Christine P. Burgess*, 43 ECAB 449 (1992).

Although appellant testified that he did not consider himself an employee of the Silver Fox Tavern and did not interpret any money given him as payment or reimbursement, he stated that he occasionally cleaned up the bar area and worked behind the bar when Mr. Triosi had to leave the bar. He also stated that Mr. Triosi offered him money, at one time stating it was $30.00 and another time, $20.00, that he told Mr. Triosi he did not want the money and unknown to Mr. Triosi, he used the money to purchase juices, fruits and other supplies that he knew Mr. Triosi could use. Appellant also stated that he occasionally used the money to purchase pizza for the bar patrons. Appellant's representative stated that the money Mr. Triosi gave to appellant "would never be in [appellant]'s pocket." He indicated that appellant knew the money Mr. Triosi left for him was not in repayment of the money Mr. Triosi owed appellant. Mr. Triosi's sworn statement dated October 7, 1994 establishes that appellant received wages during the relevant time period as Mr. Triosi stated that the $25.00 he gave appellant per shift on Sunday was for his work of cleaning the store and securing the building upon closing. The fact that appellant used the money he received from Mr. Triosi to purchase supplies for the bar or food for customers does not negate that the money constituted wages within the meaning of the Federal Employees' Compensation Act. Since, according to Mr. Triosi's October 7, 1997 sworn statement, appellant received wages for cleaning the tavern and securing it when it closed, the Office has shown that appellant knowingly omitted to report his earnings.[4]

The Board further finds that appellant was at fault in the creation of the overpayment.

Section 8129(b) of the Federal Employees' Compensation 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 10.32(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

[4] *See Charles Walker*, 44 ECAB 641 (1993); *compare Daniel A. Mashe, supra* note 3 (the Board found that appellant, who regularly hung out in a bar where he worked the cash register and helped maintain security, did not forfeit his right to compensation because there was no evidence that the bar owner employed appellant or compensated him for his services).

[5] 5 U.S.C. § 8129(b).

(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 applied the first and second standards in determining that appellant was at fault in creating the overpayment.

The evidence of record demonstrates that appellant indicated on the CA-1032 forms that questions relating to employment did not apply in his case and he stated that he had not worked since the December 5, 1989 employment injury. The evidence of record shows, however, that appellant's statement was incorrect because he did not report his employment and his earnings at the Silver Fox Tavern as described in Mr. Triosi's October 9, 1994 sworn statement which was a material fact specifically noted on the CA-1032 form. Appellant, therefore, knew or should have known from a reading of the CA-1032 form that his work and earnings at the Silver Fox Tavern was a material fact that should have been reported. Appellant, therefore, failed to report a material fact and presented information on employment which he knew or should have known to be incorrect. Appellant, therefore, was at fault in the creation of the overpayment and is not entitled to waiver of the overpayment.

As appellant is at fault in the creation of the overpayment from May 8, 1992 through May 7, 1993, recovery of the overpayment is not subject to waiver.[7]

[6] 20 C.F.R. § 10.32(b).

[7] Regarding recovery of the overpayment, the record establishes that the Office terminated payment of compensation to appellant on March 21, 1994, and consequently, recovery of the forfeiture will be made under the Debt Collection Act. Since the Board's jurisdiction to review the collection of an overpayment is limited to cases of adjustment wherein the Office decreases later payment to which an individual is entitled, *see* 5 U.S.C. § 8129; *Levon H. Knight*, 40 ECAB 658 (1989), the Board lacks jurisdiction in this case because recovery cannot be made by adjusting later payments, but must be recovered by other means.

The decision of the Office of Workers' Compensation Programs dated September 5, 1997 is hereby affirmed.

Dated, Washington, D.C.
January 18, 2000

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member