

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD J. CUMMINGS and U.S. POSTAL SERVICE,
POST OFFICE, Boston, MA

*Docket No. 98-1491; Submitted on the Record;
Issued May 18, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant forfeited compensation received January 4 through March 11, 1997, in the amount of \$5,478.00, because he knowingly failed to report his earnings from plowing snow; and (2) whether the Office properly found that appellant was at fault in the creation of an overpayment in the amount of \$5,478.00 and that, therefore, the overpayment was not subject to waiver.

On June 24, 1994 appellant, then a 50-year-old distribution clerk, felt a sharp pain in his back while bending over to pick up a walkie talkie. He filed a claim for benefits, which was accepted by the Office for temporary aggravation of a preexisting herniated lumbar disc at L4-5. Appellant has not returned to work with the employing establishment since that date.

Appellant subsequently filed two Form CA-8 claims for continuing compensation: one on February 12, 1997, on which he claimed compensation from January 4, 1997 through undetermined; and one on March 11, 1997, claiming compensation for the period February 21, 1997 through unknown.¹ Each of these forms states at part (9) that "this item should be completed if the claimant worked anywhere during the period claimed." Part (a) of this section requests information on salaried employment while part (b) requests information on

¹ In its November 26, 1997 decision finding forfeiture, the Office stated that appellant had submitted three CA-8 forms for the period in question. There are only two such forms in the record, however. This is sufficient to support the Office's finding, however, as the forms cover the entire period for which compensation was claimed, and the Office's November 26, 1997 worksheet and contemporaneous records indicate that appellant received \$5,478.00 in compensation during the period from January 4 through March 11, 1997.

self-employment and commission. Appellant left part (9) blank on both of the these forms. At the bottom of each CA-8 form, it states:

“Any person who knowingly makes any false statement, misrepresentation, concealment of fact or any other act of fraud to obtain compensation as provided by FECA [Federal Employees’ Compensation Act] or who knowingly accepts compensation to which that person is not entitled is subject to civil or administrative remedies as well as criminal prosecution and may, under appropriate criminal provisions, be punished by a fine or imprisonment or both.”

On November 26, 1997 the Office issued a preliminary determination that an overpayment had occurred in the amount of \$5,478.00 for the period January 4 through March 11, 1997 pursuant to section 8106 of the Act,² due to appellant’s failure to report his self-employment activities and outside earnings as a snow plower to the Office. The Office stated that it had been informed by the employing establishment that appellant had been reimbursed, through seven checks totaling \$500.00, for services as a snow plower during the periods in question. The checks indicated the following amounts and dates: \$75.00 on January 7, 1997; \$100.00 on January 13, 1997; \$50.00 on January 28, 1997; \$25.00 on February 20, 1997; \$150.00 on February 28, 1997; \$25.00 on March 12, 1997; and \$75.00 on March 13, 1997. The Office further found that appellant was not without fault in the creation of the overpayment, stating that he failed to report earnings as required and that section 8106(b) states that anyone who knowingly omits or understates any part of his earnings, forfeits his right to compensation. The Office informed appellant that if he disagreed with the decision he could, within 30 days, submit evidence or argument to the Office, or request a recoupment hearing with the Branch of Hearings and Review.

By decision dated November 26, 1997, the Office found that appellant had forfeited his entitlement to compensation for the period January 4 through March 11, 1997 on the grounds that he failed to report earnings as required under section 8106(b) of the Act. The Office stated that the CA-8 forms appellant had signed clearly advised him of the consequences of misrepresenting or concealing such information.

In response to the Office’s preliminary determination, appellant requested a waiver of recovery of overpayment for the period from January 4 through March 11, 1997, in which he was found to be at fault and indicated that he wished the Office to make a decision on his request based on the written record. He submitted a completed Form OWCP-20 outlining his total income and assets as well as his household expenses and debts. In addition, appellant submitted a typewritten statement in which he documented the periods in which he earned additional income by plowing snow and listed the amount of income he earned from such work. He also stated that he did not report the income, in the amount of \$535.00, because he did not consider the activity of snowplowing to be work or to constitute a “job situation.” Appellant further stated that, at the time he completed the CA-8 forms, he did not understand or consider the payments he received to be wages or earnings, or other forms of compensation and therefore did not knowingly omit or understate earnings. He asserted that he never intended to defraud the

² 5 U.S.C. § 8106.

Department of Labor or receive compensation to which he was not entitled. Appellant also claimed that recovery of the forfeiture/overpayment would be a financial hardship and indicated that he had filed a claim for bankruptcy.

By decision dated May 5, 1998, the Office finalized its preliminary determination that appellant was at fault in creating the \$5,478.00 overpayment of compensation January 4 through March 11, 1997, in which he was found to be at fault, and which occurred because he was self-employed during a period in which he was claiming compensation from the Office. The Office further found that, as appellant was at fault in creating the overpayment of compensation, recovery of the overpayment could not be waived. The Office also ordered appellant to repay the overpayment, and any applicable interest, by making payments in the amount of \$35.00 per week, until such time as repayment of the overpayment was completed.

The Board finds that the Office properly determined that appellant forfeited his right to compensation in the amount of \$5,478.00 for the period January 4 through March 11, 1997, because he knowingly failed to report employment and/or earnings from such employment.

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.”³

This section of the Act is further defined by regulation⁴ which provides:

“Affidavit or report by employee of employment and earnings.

“(c) 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 the wages or remuneration....”

³ 5 U.S.C. § 8106(b).

⁴ 20 C.F.R. § 10.125(c).

In analyzing whether appellant had earnings or wages the Board notes that wages have been defined 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, payment in kind, tips and any other similar advantage received from the individual’s employer or directly with respect to work for him.”⁵

As appellant did receive monetary remuneration in the amount of \$500.00 from those persons for whom he performed snow plowing during the time period in question, appellant did indeed have “earnings” pursuant to 20 C.F.R. § 10.125 and 5 U.S.C. § 8106(c) and was required to report these earnings to the Office.

Appellant, however, can only be subjected to the forfeiture provision of 5 U.S.C. § 8106 if he “knowingly” failed to report employment or earnings. It is not enough merely to establish that there was unreported employment or earnings. The Board has recognized that forfeiture is a penalty, and, as a penalty provision, it must be narrowly construed.⁶ The term “knowingly” is not defined within the Act or its regulations. In common usage “knowingly” is defined as: “with knowledge; consciously; intelligently; willfully; intentionally.”⁷

The Office has the burden of proof in establishing that appellant, either with knowledge, consciously, willfully or intentionally, failed to report employment or earnings.⁸ To meet this burden of proof, the Office is required to closely examine appellant’s activities and statements in reporting employment or earnings.⁹ The Office may meet this burden in several ways. The Office may meet this burden by appellant’s own admission to the Office that he failed to report employment or earnings which he knew he should report. Likewise, the Office may meet this burden by establishing that appellant has pled guilty to violating applicable federal statutes by falsely completing the affidavits in a Form CA-1032.¹⁰ Furthermore, the Office may meet this standard without an admission by appellant, if appellant failed to fully and truthfully complete the relevant forms and the circumstances of the case establish that appellant, upon further inquiry by the Office as to employment activities and earnings, continued to fail to fully and truthfully reveal the full extent of her employment activities and earnings. The Office may also meet this burden if it establishes through the totality of the factual circumstances of record that appellant was employed or self-employed; that the employment activities engaged in or earnings resulting from the employment or self-employment were not *de minimis*;¹¹ and that appellant’s

⁵ See *Christine P. Burgess*, 43 ECAB 449, 457 (1992).

⁶ *Id.*

⁷ *BLACK’S LAW DICTIONARY* (5th ed. 1979); see *Charles Walker*, 44 ECAB 641 (1993).

⁸ *Anthony A. Nobile*, 44 ECAB 268 (1992).

⁹ See *Royal E. Smith*, 44 ECAB 417 (1993).

¹⁰ *Iris E. Ramsey*, 43 ECAB 1075 (1992).

certification in the relevant form that he was not employed or self-employed was therefore false.¹²

In the present case, the evidence of record indicates that with regard to the periods of employment for which appellant is responsible; *i.e.*, those covered by the Forms CA-8 he signed on February 12 and March 11, 1997, he failed to report his earnings as a self-employed snow plower, despite the fact that the evidence of record indicated that he was actively engaged in such employment during the periods in question. Therefore, although appellant has stated that he did not consider the activity of snowplowing to be work or to constitute a “job situation,” and that he did not understand or consider the payments he received to be wages or earnings, the evidence of record establishes that he 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 further finds that appellant’s self-employment snowplowing activities, which produced earnings of \$500.00 over a period of two months, were not so *de minimis* that he did not know that he was required to report such activities to the Office. The Board therefore finds that, regarding the CA-8 forms he signed on February 12 and March 11, 1997, appellant consciously and knowingly omitted relevant information concerning his employment activities as a self-employed snow plower. Even though appellant may have performed work or had earnings on an irregular basis during this period, he knew that he was required to report any earnings produced from his work activities.¹³ Nevertheless, appellant signed the CA-8 forms which clearly advised him of the consequences of misrepresenting or concealing such information.

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 covering the period January 4 through March 11, 1997, in violation of 5 U.S.C. § 8106(b). The Board therefore concludes that the Office has met its burden of proof to establish that appellant knowingly failed to report employment or earnings,¹⁴ and therefore affirms the Office’s determination that appellant forfeited the total amount of compensation he received for that period.¹⁵

The Board further finds that the Office properly found that appellant was at fault in the creation of an overpayment in the amount of \$5,478.00 and that therefore the overpayment was not subject to waiver.

Section 8129(a) of the Act provides that where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later

¹¹ The law does not care for, or take notice of, very small or trifling matters. The law does not concern itself about trifles. *BLACK’S LAW DICTIONARY*, (Special Deluxe, 5th ed. 1979); *see Vernon Booth*, 7 ECAB 209 (1954); *see also Fred A. Cooper*, 44 ECAB 498 (1993).

¹² *See Barbara L. Kanter*, 46 ECAB 165 (1994).

¹³ *See Charles Walker*, *supra* note 7; *see Mamie L. Morgan*, 41 ECAB 661 (1990).

¹⁴ *Id.*

¹⁵ *Wayne P. Hammer*, 44 ECAB 286 (1992).

payments to which an individual is entitled.¹⁶ The only exception to this requirement is a situation which meets the tests as set forth in section 8129(b):

“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. No waiver of an overpayment is possible if the claimant is not without fault in helping to create the overpayment.”¹⁷

In determining whether an individual is without fault, what constitutes fault depends on whether the facts show that the incorrect payment resulted from: (a) an incorrect statement made by the payee which the payee knew or should have known to be incorrect; (b) failure of the payee to furnish information which the payee knew or should have known to be material; or (c) acceptance of a payment which the payee either knew or should have been expected to know was incorrect.¹⁸

In the present case, it is apparent that appellant was found at fault in the creation of the overpayment under the second standard set forth above. Appellant is at fault under the second standard because he knowingly failed to furnish material information to the Office, *i.e.*, that he had earnings from his self-employment plowing snow. He knew or should have known of the material nature of the information regarding his employment activities and earnings because the CA-8 forms which he completed advised him of the requirement to accurately report his employment activities and earnings and informed him of the consequences of failing to do so. As appellant was at fault in the creation of the overpayment, the overpayment may not be waived.

¹⁶ 5 U.S.C. § 8129(a).

¹⁷ *Norman F. Bligh*, 41 ECAB 230 (1989).

¹⁸ *Id.*

The decisions of the Office of Workers' Compensation Programs dated May 5, 1998 and November 26, 1997 are hereby affirmed.

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

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member