U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEONARD B. LOTHLEN and U.S. POSTAL SERVICE,
POST OFFICE, Oakland, CA

Docket No. 98-2311; Submitted on the Record;
Issued November 29, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, 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 under 5 U.S.C. § 8106(b) for the periods February 25, 1982 through April 15, 1986 and July 15 through June 22, 1996 because he knowingly failed to report his employment and/or self-employment activities to the Office; (2) whether appellant was not without fault in the creation of the resulting overpayment of $305,889.75 and that therefore such overpayment was not subject to waiver; and (3) whether the Office properly required repayment of the overpayment by deducting $600.00 from appellant's continuing compensation payments every four weeks.

This is appellant's third appeal before the Board. The relevant facts and circumstances of this case are contained in the Board's January 31, 1986 and September 25, 1987 decisions respectively and are hereby incorporated by reference.[1]

On March 3, 1986 appellant signed a Form CA-8 on which he claimed compensation for the period February 25, 1982 to the present. In Item 9 of the form, it was requested that appellant provide information about any employment or self-employment for the period February 25, 1982 to March 3, 1986. On April 15, 1986 appellant signed a Form CA-1032 covering the 15-month period from January 16, 1985 through April 15, 1986. Appellant completed the form denying that he had any employment or self-employment during that period.

By letter dated July 10, 1986 (Form CA-1049), the Office advised appellant that he would be receiving compensation every four weeks provided that he complied with the instructions on the form. Appellant was advised on the first page of the letter that, if he were to return to work, he would need to notify the Office immediately. On the second page, additional instructions were given for reporting a return to his former job or "other employment." Appellant was advised that, should he return to any type of employment, he must report "at

[1] *Leonard B. Lothlen*, 37 ECAB 314 (1986); Docket No. 87-1063 (issued September 25, 1987).

once" such employment to the Office, and provide information about the employment, number of hours worked and pay received. Appellant was instructed that, if he became self-employed, he "must report as your pay rate what it would have cost you to have hired someone else to do the same work." On July 15, 1986 appellant signed the letter and returned a statement certifying that he had read the letter, that he understood the reporting requirements described in the letter, that he agreed to be bound by those conditions, and that he understood that willful failure to comply with the requirements could result in forfeiture of benefits and liability for the resulting overpayment.

Over the following years, appellant completed Office CA-1032 forms that included questions as to whether appellant had been engaged in any employment or self-employment activities during the period covered by the form. In addition to the Form CA-1032 completed and signed on April 15, 1986, appellant completed such forms on April 26 and August 8, 1988, December 21, 1990, August 10, 1992 and October 25, 1993. On each of the forms signed on those dates, appellant denied having any employment or self-employment during the 15-month period preceding the date he signed the form.

In March 1996 the Office received a March 8, 1996 investigative memorandum with exhibits, regarding an investigation of appellant performed by the Postal Inspection Service. The investigative report included copies of two residential loan applications that were signed by appellant and his wife and were dated October 16, 1990 and July or August 15, 1991.[2] On the applications appellant was identified as the "Borrower" and his wife as the "Co-Borrower." The application signed on October 16, 1990 identified appellant as being self-employed in the record industry as a recording artist and producer, with a base employment income of $10,833.00 per month gross from that employment. Separate telephone numbers were listed for appellant under "Home Phone" and "Business Phone." The "Base Employment Income" did not include the payments appellant received under the Federal Employees' Compensation Act, or the income from a gas and oil lease, which were listed separately under the category of "Other Income." Similar information was provided about appellant in the application signed on "July (August) 15, 1991." In the section applicable to appellant as borrower, "Self-Employed" was written in the block to identify name and address of employer. Appellant's position/title was noted as "Recording Artist, Writer, Producer," and the type of business was noted as the "Recording Industry." Appellant was described as being involved in such work for more than 14 years. Base employment income for appellant, separate from his payments under the Act and the oil and gas lease, was again noted as being $10,833.00 per month. At the end of each of the loan applications, appellant's signature appeared in the signature block next to the date, and immediately underneath was wording which stated, in pertinent part:

> "AGREEMENT: The undersigned applies for the loan indicated in this application to be secured by a first mortgage or deed of trust on the property described herein, and represents that the property will not be used for any illegal or restricted purposes, and that all statements made in this application are true and are made for the purpose of obtaining the loan."

[2] On the 1991 form it is not clear whether the numeral designating the month in the date next to the signatures is "7" or "8."

* * *

> "I/we fully understand that it is a federal crime punishable by fine or imprisonment, or both, to knowingly make any false statements concerning any of the above facts as applicable under the provisions of Title 18, United States Code, Section 1014."

The investigator provided a copy of a written summary of the loan request, which was on the letterhead of the Ready Mortgage Company. The summary noted that the borrower was requesting a loan in the amount of $450,000.00 to complete the construction of a single family residence located in the Oakland Hills, and that the borrower had applied for and received a forward permanent loan commitment from Financial Center Mortgage in the amount of $450,000.00. Regarding the borrower, the summary stated:

> "The borrowers are [appellant] and [his wife], husband and wife. They have excellent credit and $93,004.00 showing as income on their 1990 income tax statement. He is a recording producer/artist and his wife works at Penney's. [Appellant] has put a tremendous amount of cash into this project."

The investigator submitted documents showing that appellant subsequently filed a lawsuit against a contractor involved in the construction work on his house. The investigative report contained a copy of appellant's sworn responses to interrogatories put forth by the attorneys for Impossible Excavating and Engineering. Appellant's sworn answers were dated August 7, 1992. Questions posed to appellant, and appellant's answers, were as follows:

"QUESTION 2.6 -- State:

> The name, address and telephone number of your present employer or place of self-employment;
>
> The name, address, dates of employment or self-employment you have had from five years before the incident until today.

"ANSWER 2.6 -- Infinity Ministries; P.O. Box 19112; Oakland, CA 94619; (510) 654-6089; Infinity - 10 years; P.O. Box 94619; (Producer, Writer, Studio Engineer, & Artist).

"QUESTION 3.5

> Have you done business under a fictitious name during the past 10 years? If so, for each fictitious name state:
>
> the name;
>
> the dates each was used;
>
> the state and county of each fictitious name filing;

the address of the principle place of business.

"ANSWER 3.5 -- Yes; Immeasurable Publishing Company; 1987 to Present; Alameda County, P.O. Box 19112, Oakland, CA 94619

"QUESTION 8.1

Do you attribute any loss of income or earning capacity to the incident?

"ANSWER 8.1

Yes.

"QUESTION 8.2 -- State:

the nature of your work;

your job title at the time of the incident;

the date your employment began.

"ANSWER 8.2

Producer, Sound Engineer and song writer for Infinity Recording Group. Also I produce records for other recording artist.

See 8A

1982

"QUESTION 8.3 -- State the last date before the incident that you worked for compensation.

"ANSWER 8.3 -- August 20, 1991.

"QUESTION 8.4 -- State your monthly income at he time of the incident and how the amount was calculated.

"ANSWER 8.4 -- $12,000.00

"QUESTION 8.5 -- State the date you returned to work at each place of employment following the incident.

"ANSWER 8.5 -- October 1, 1992

"QUESTION 8.6 -- State the dates you did not work and for which you lost income.

"ANSWER 8.6 -- I have only been able to work off and on for the past eight months; while construction has been stopped or hindered by improper and undone drainage and excavation work, and later by financial difficulty caused by IMEX's wrongful lien, from September to present I have had to supervise hiring, construction, and litigation, and I have been too upset to work as I used to work.

"QUESTION 8.7 -- State the total income you have lost to date as a result of the incident and how the amount was calculated.

"ANSWER 8.7 -- Before this problem began I averaged $12,000.00 per month. I earned income from producing, writer's royalties, and concert appearances. I have lost over $50,000.00 in income because of this ordeal caused by IMEX. In my line of work concentration is necessary. I have lost my concentration; and due to my inability to work, I have lost contracts and canceled performances in Spain. Rome, and Europe, and I have not been able to produce another album which was due over five months ago. At present I average $7,000.00 a month. My income has dropped considerably.

"QUESTION 8.8 -- Will you lose income in the future as a result of the incident? If so, state:

the facts upon which you base this contention;

an estimate of the amount;

an estimate of how long you will be unable to work;

how the claim for future income is calculated

"ANSWER 8.8

Yes

It will take me at least six months to return fully back to work.

"I am scheduled to produce two albums and four music videos for Infinity for release within the next six months. I must write songs as well as produce the albums and music videos. I have lost so much time and am so upset I am not sure how much of this work I will actually complete.

Unknown.

N/A

"I will receive $25,000.00 for producing each album and a total of $40,000.00 for the music videos that are to be released along with the album."

The answers to the interrogatories were signed by appellant and by his attorney. Immediately above appellant's signature was the following attestation of verification:

"I have read the foregoing 'Answers to Interrogatories' and know the contents thereof. The same is true of my own knowledge except as to those matters which are stated therein on information and belief, and as to those matters I believe them to be true. I declare under penalty of perjury that the foregoing is true and correct.

"Executed on August 7, 1992 in Oakland, California."

The investigative report included a memorandum dated April 4, 1994 from Alfredo Nodal, a special agent in the Department of Labor's Office of the Inspector General (OIG). Agent Nodal wrote that on March 31, 1994 he went to Alameda County Superior Courthouse in Oakland, CA to attend the civil case trial of Impossible Excavating versus "Appellant." He wrote that he witnessed appellant testifying under oath during the trial. Agent Nodal wrote that, while on the witness stand, appellant stated to the attorney representing Impossible Excavating that he reported a monthly income of $7,000.00 on a mortgage loan application dated in July 1991, and that his monthly income was from royalties of the record albums he produced since 1989. Agent Nodal wrote that appellant stated that his current monthly income of royalties from record album productions was $12,000.00.

D.B. Davenport (Postal Inspector) and James B. Torres (Special Agent, DOLOIG) interviewed Charles Lothlen, appellant's brother, on April 13, 1995. Inspector Davenport wrote that Charles Lothlen stated that he and his brother had been involved with Infinity Ministries since 1968. Charles Lothlen identified Infinity Ministries as a nonprofit organization that travels to prisons and churches to give musical presentations of a primarily spiritual and religious nature. He stated that the performances are given by the gospel music group with which he and appellant are involved, which is called Infinity. He described Infinity as a gospel music performance group that uses up to 14 musicians in the performances. According to the memorandum of the interview, Charles Lothlen stated that the cost of putting on the performances at prisons is underwritten by church organizations; that Infinity Ministries gives one to four performances per month; that Infinity makes records and tapes for sale; that he and appellant are president and vice-president of Infinity Ministries, respectively; and that their gospel music group Infinity has performed backup vocals on various country and western records.

In the memorandum of the interview with Charles Lothlen, Inspector Davenport wrote that Charles Lothlen stated that he and appellant own a for-profit company called New Wine Records which records gospel music and distributes the recordings. Charles Lothlen was

reported as stating that appellant sings, plays guitar and writes the songs for New Wine Records, and that they had six or seven albums out through various record companies. Inspector Davenport wrote that Charles Lothlen stated that he and appellant also have a music publishing company called Immeasurable Publishing Company which handles the publication of their songs and of which appellant is president. According to the memorandum of the interview, Charles Lothlen stated that Immeasurable Publishing Company copyrights the songs and holds licenses for the recorded material. Inspector Davenport wrote that Charles Lothlen stated that Immeasurable Publishing Company currently had a gospel record in the number five position on the gospel record charts in Cincinnati, OH, and that New Wine Records made a lot of money.

Inspector Davenport wrote that the interview came to an end after Charles Lothlen returned from taking a telephone call and told the investigators "We don't make any money." In the memorandum of the interview, Inspector Davenport wrote that Charles Lothlen said at that point that appellant was on the telephone with his lawyer and had told him not to answer any questions. He requested that Inspector Davenport and Special Agent Torres leave.

An exhibit submitted with the investigative report was a copy of a December 1993 statement filed with the State of California regarding the nonprofit status of the corporation Infinity Ministries. In the statement appellant was listed as an officer of the corporation. A copy of the Articles of Incorporation of Infinity Ministries was also submitted, which was filed with the State of California in December 1990. In the Articles of Incorporation, Infinity Ministries was described as a nonprofit religious corporation, with appellant listed among the directors.

The investigative report described and included photocopies of the front and/or back covers of four recordings (record albums or compact discs) which the investigators found, and which listed appellant as having input as a performer, song writer, and/or producer. All of the recordings were by the musical group called Infinity. A recording entitled "Infinity," released by Luminar Records in 1981, listed appellant as the writer or co-writer of all 10 songs. Appellant was also listed on the record as providing vocals, lead/rhythm guitars, and as a member of "Infinity Personnel." On the record entitled "Show Me The Way," released by WFL Records, appellant was listed as the co-producer and as performing vocals and lead/rhythm guitars. On another recording by the musical group Infinity, released by Message Records in 1985, appellant was listed as the co-producer, the songwriter of 5 of the 10 songs, and as performing vocals and lead, acoustic and rhythm guitars. A compact disk entitled "New Direction" was released in 1994 by New Wine Records. Appellant was listed as one of the executive producers of the recording, and as part of the personnel of Infinity. The recording also lists the publisher as Immeasurable Publishing Company.

By decision dated July 24, 1996, the Office found that the evidence established that appellant had actual earnings of $3,000.00 per week as a recording artist/writer/producer/sound engineer effective January 1, 1982, that those actual earnings fairly and reasonably represented his wage-earning capacity, and that he therefore had no further loss of wage-earning capacity effective January 1, 1982 and continuing. As of June 23, 1996, the Office terminated appellant's wage-loss monetary compensation benefits.

Thereafter, appellant reelected to receive benefits from the Office of Personnel Management (OPM).

By preliminary determination dated July 25, 1996, the Office further found that appellant had been advised by the Office of the need to report any and all employment or self-employment earnings and activities on various CA-1032 forms he had been sent over the years, and that he knowingly failed to do so. The Office found that appellant therefore had forfeited his entitlement to monetary compensation for the period January 1, 1982 through June 22, 1996. The Office made a preliminary finding of a resulting overpayment of compensation in the amount of $313,135.29. A preliminary determination was made that appellant was with fault in the creation of the overpayment, on the basis that he had failed to furnish information he knew to be material.

Appellant disagreed with the July 24 and 25, 1996 decisions and requested an oral hearing.

Pastor McCurdy testified that he met appellant in 1971 when they were both involved in ministering to prisoners. Pastor McCurdy described appellant's involvement in prison ministry as being part of a group called Infinity that would arrange through prison chaplains to sing at prisons. He testified that appellant did not receive any pay for the prison ministry or for playing his guitar at church.

Charles Lothlen testified that he started the company Infinity in 1981 to minister to prisoners through music and preaching. He testified that his brother, appellant, was a member of Infinity. He stated that appellant went on all the prison visits, and that appellant played a musical instrument and sang in the musical performances. Charles Lothlen testified that Infinity was not paid for the performances in the prisons, but that it received donations from churches to fund the prison work. He stated that the prison work was also funded by proceeds from concerts that the musical group Infinity gave at locations other than prisons. Charles Lothlen provided a list which he stated showed the gross income for Infinity for each year beginning in 1980. He stated that the highest earnings for Infinity were $14,000.00 earned in 1988, the year the group performed at the Great American theme park. Charles Lothlen stated that the money earned by Infinity was used for the expenses of traveling to the prisons, for renting sound systems for the performances, and for accommodations on some of the trips. Charles Lothlen testified that appellant was never paid a salary or anything else for his time and efforts with Infinity. He testified that appellant had been an officer of Infinity since its inception. He stated that both he and appellant received telephone calls from prison chaplains, organized the trips to the prisons, and performed music at the prisons. Charles Lothlen testified that calls from the chaplains would come in less than once a month.

Charles Lothlen testified that he started his musical group in 1967, but did not register Infinity as a business until 1981. He stated that the group had made about seven recordings, but had not made any money from those recordings. Charles Lothlen testified that the group Infinity released recordings in 1974, 1977, 1981, 1983, 1989 and 1995. He testified that the recordings were made both for commercial use and to give away to prisoners. He stated that they also made a recording in 1969 but that the recording in 1969 was never released. He stated that he and appellant had been giving musical performances since 1967, and that most of the record companies with which Infinity had been affiliated had ended up applying for bankruptcy and going out of business, so that Infinity did not make money even on the albums that sold.

Charles Lothlen testified that the company New Wine Records had not generated any earnings, and that the earnings for Immeasurable Publishing Company totaled $325.00. He testified that appellant had never been paid a salary from either of those companies. He denied that he told the Postal Inspector and the OIG agent that New Wine Records makes a lot of money. Charles Lothlen stated that Immeasurable Publishing Company is a gospel music publishing company and has been in existence since 1985. He testified that appellant was president of that company, that the activities appellant performed for that company were to write songs, obtain federal copyright numbers for the songs, and register the songs with SESAC (a record company affiliate). He explained that SESAC was supposed to track the playing of the songs on the radio and pay appellant his portion of the royalties generated from the use of the songs. Charles Lothlen testified that he and appellant started New Wine Records in 1985 to produce their own records on their own recording label. He stated that they started the company because the record companies with which they had previously made recordings went bankrupt, stole money from them, and did not give them royalties as they never knew how much they were making. Charles Lothlen testified that appellant was president of New Wine Records, writes songs for New Wine Records, and is a producer for New Wine Records. He described the functions of a producer and stated that they have made one record on their label so far, which was an album by their own musical group, and that appellant had been the producer for that record. Charles Lothlen testified that they raised money through Infinity in 1993 to make the recording, and that they finished the recording in 1994. Charles Lothlen testified that appellant did not receive a fee for producing the album, but acknowledged that if neither he nor appellant had acted as producer, they would have had to pay somebody to do that work. Charles Lothlen testified that he and appellant had also produced albums by Infinity made prior to the founding of New Wine Records. He testified that producing takes a lot of time and requires hours in the studio, but that appellant had not worked as a sound engineer on the recordings.

Ellen Rodin testified that she is an attorney who represented appellant in his civil lawsuit against the IMEX (Impossible Excavating) company regarding improper construction and excavation work. She stated that she helped appellant prepare his answers to the interrogatories received from the opposing side. She testified that in preparing the response to the interrogatories, she and appellant had interpreted the word "earnings" to mean any kind of income appellant would have expected to receive but for the difficulty that led to the litigation. Ms. Rodin testified that appellant did not tell her at that time that he was currently receiving royalties from songs he had written. She stated that her experience with appellant was that at the time she knew him he was actually not receiving very much income at all, but that "he expected that he would be able to earn this amount of income or that he had at one time had the opportunity to earn that kind of income." Ms. Rodin indicated that she met appellant and became involved in his litigation with IMEX in approximately December 1991 or January 1992. She testified that when she first met appellant, as far as she could tell, he did not have the kind of income which he represented to her he had been earning or was able to earn prior to the problems with IMEX. Ms. Rodin stated that appellant told her that because the construction on the house was not completed, he was not able to use a sound studio that he had hoped to build. She stated: "I mean, frankly, my understanding about these interrogatories was that this is the amount of money he expected to be able to make based on contracts or contacts that he had."

Ms. Rodin noted that during the four and a half to five years she represented appellant, she received only two small payments for her services, both during the first half of 1992. When questioned about the interrogatory response stating that appellant was currently making $7,000.00 per month, Ms. Rodin responded: "I saw that here and I asked myself how had I let him get away with that if I wasn't being paid." She testified that she did not verify that appellant was making $7,000.00 per month. In response to a question from Mr. Hellesto as to whether she was sometimes a little bit lax in the answers to interrogatories, Ms. Rodin stated: "Well, I wouldn't say I was lax, that's -- but I note that [appellant] filled these out, and after all, I mean, it's his information and all I was doing was making sure that he understood the question and answered it fully in a way."

Appellant testified that the only sources of income he had since 1982 were his workers' compensation payments and royalties from writing songs. He testified that the only years in which he received royalty income were 1990 and 1991. With regard to his song writing, he stated that he signed a royalty agreement with SESAC Music in 1989. He stated that he had a contract with a different music company in the 1970s but that the contract expired in the early 1970s. Appellant testified that the royalties he received from SESAC were from the songs he had written and registered with SESAC. Appellant stated that he would get a check every four months as long as one of his songs was being played on the radio. Appellant testified that during the year 1990 he received a total of approximately $20,000.00 to $24,000.00 in royalties, and that the royalties he received during 1991 totaled approximately $12,000.00. Appellant testified that he received a small amount of royalties in 1994 and 1995, and that the agreement he had signed with SESAC stated that he would be paid a percentage of the amount paid to SESAC for the use of his songs.

Appellant testified that he has not worked at any jobs or received any wages since he stopped work due to his injury. With regard to his answers to the interrogatories posed by the opposing side in his civil suit, appellant testified that he took the word "earnings" to mean what he could have made if his house and studio had been built. He stated that he had intended to have his own recording studio which he could have leased out to other producers and recording groups. Regarding the interrogatory answer that he produced records for other recording artists, appellant stated that he had not actually done that but it was his plan to do so. He testified that what he meant to say in the interrogatory answer was that he planned to record other artists when his house and studio were built. Appellant testified that the interrogatory answer that he was earning $12,000.00 a month at the time of the incident with IMEX was a mistake. Appellant stated that he really meant that he thought he could have earned $12,000.00 a month if the studio had been built and in operation. Appellant stated that it was a mistake and he did not mean to say in his response to the interrogatories that he was averaging $12,000.00 per month in income from producing, writing songs and concert appearances before the problem began. He maintained that he had again been referring to what he thought he would have been able to make had the studio been built.

Appellant testified that at the time of the problem with IMEX, his musical group had a booking agency that was interested in booking Infinity into prisons all over Europe, but that the bookings never materialized. Appellant testified that he had never produced any music videos, and that the same person who was going to book the group for performances in Europe had

expressed an interest in paying for Infinity to do a music video, but that the video never materialized.

Appellant acknowledged that he had been involved in producing recordings, song writing, and recording music during the period he was receiving workers' compensation benefits, and he described what was involved in performing those activities. Appellant testified that some live performances in which he was involved with the musical group Infinity did generate revenue, but that he did not receive any money from those performances and all of the money went back into the prison ministry. Appellant further denied working as a sound engineer, stated that although he had assisted the sound engineer who worked on the Infinity recordings, he did not have the qualifications to be a sound engineer or belong to the society of sound engineers. Appellant testified that he applied through a company called MJA Financial for the mortgage he obtained from Ready Mortgage, that he was told by a representative of MJA Financial that it would qualify him for a loan, and that all he had to do was give the company a fee of $500.00. Appellant testified that he and his wife signed a blank loan application form and that the representative from MJA Financial filled in the application. Appellant initially indicated that he could not remember whether the blank loan application he signed was the one in 1990, 1991 or both, but he later testified that he never signed a completed loan application. Appellant testified that he gave the loan broker information about himself, told the broker about his business, and gave the MJA Financial representative truthful information about his finances, but reiterated that he never completed the loan applications himself, only signing blank applications. Appellant claimed that he left it to MJA Financial to qualify him, that he never saw what information MJA Financial provided to Ready Mortgage, and that he never provided the mortgage company with a copy of his 1990 income tax return nor reported that his income for 1990 was $93,000.00. Appellant claimed that he did not know what was in the loan file that MJA Financial gave to Ready Mortgage. He denied testifying at the trial on March 31, 1994 that he presently had income of $12,000.00 per month.

Appellant testified that he did not report his songwriting royalties to the Office because he did not consider songwriting to be a job, and he did not consider his royalties to be income. He claimed that he wrote songs for pleasure and not for a living, and that the questions on the Form CA-1032 did not state anything about royalty income from songwriting, such that he did not feel he had to report such activities.

At the hearing appellant submitted a "Trial Memorandum" dated April 17, 1997 prepared by his attorney. The memorandum argued that royalties were not earnings within the meaning of the Act, and that royalties need not be reported to the Office as they were comparable to income from investments. The memorandum argued that even if the royalties should have been reported, appellant did not knowingly fail to report them as earnings because he believed the income to be as a result of creative or artistic endeavors and not earnings from labor. The memorandum also argued that appellant received royalties only in the years 1990 and 1991, such that if forfeiture applied, it should only apply to those two years.

Appellant submitted a breakdown of revenue generated by Infinity, Infinity Ministries, New Wine Records, and Immeasurable Publishing Company for the years 1980 to 1996, and a

copy of "SESAC-Writer Affiliation Agreement" agreement he signed with SESAC in the summer of 1989.

Following the hearing appellant submitted an explanation of his reasons for disagreeing with the findings and conclusions of the Office regarding wage-earning capacity and forfeiture issues, an Overpayment Recovery Questionnaire signed and dated May 1, 1997,[3] income tax returns for the years 1992 through 1996,[4] a SSA earnings report,[5] and a February 26, 1996 letter from the Internal Revenue Service (IRS) stating that appellant was no longer a subject of an investigation by the Criminal Investigation Division for his 1991 through 1994 federal tax liabilities. Appellant claimed that his attorney informed him that "it was alright [sic] to write songs, [as] all royalties received from songwriting were not considered working income and did not have to be reported." Appellant claimed that writing songs was "a gift from God" and should not be considered a crime.

The employing establishment submitted a May 27, 1997 investigative interview memorandum of an interview that Postal Inspector D.B. Davenport conducted with Bill Ready, President of Ready Mortgage Company, regarding a $450,000.00 loan made to appellant and his wife in 1991. Mr. Ready recalled the 1991 loan to appellant, stated that he had approved the loan and was well informed of the particulars. He stated that a $450,000.00 loan at an interest rate of between 12 and 14 percent would involve a monthly loan payment of between $4,500.00 and $5,500.00, that the borrower would have had to have substantial monthly income to finance a loan with a monthly payment of that size, and that the borrower would have been required to provide documents verifying his income and assets. Mr. Ready stated that Ready Mortgage reviewed appellant's 1990 income tax return which showed $93,004.00 in income, that appellant listed his occupation as record producer/artist, and that appellant's wife was listed as a J.C. Penney employee with earnings of $1,232.00 per month. The memorandum indicated that Inspector Davenport asked Mr. Ready if the loan to appellant was based on what appellant anticipated his income would be in the future or if the loan was granted on what appellant stated was his actual income at that time, and Mr. Ready replied that the basis for granting the loan was not the future income appellant thought he might earn. Inspector Davenport asked Mr. Ready if it was common for borrowers to sign blank loan applications and for the loan provider to fill out the income amounts later, and Mr. Ready stated that the cardinal rule of lending is for the borrower to fully complete the application personally and then to sign it. He noted that Mr. Ready further advised that it was common for borrowers, if they later had problems with lenders, to claim that they did not personally complete the loan application. Mr. Ready further advised that his company never loans money to a potential borrower without having a "sit-down

[3] Appellant listed in excess of $94,702.00 in debt as "Other Liabilities" that he owed to eight different creditors.(R1615)

[4] These showed varying amounts of reported, noninvestment, nonbusiness income/loss, nonrental, nonroyalty income; with $13,761.00 in wages reported for 1991, $9,439.00 in wages reported for 1992 with deductions of $35,292.00, $9,421.00 income in wages and $5,532.00 in capital gains distributions reported for 1993, $10,626.00 in wages for 1994, $13,748.00 in wages from 1995 and $15,058.00 in wages for 1996.

[5] The Board notes that the only five years for which appellant reported earnings for social security purposes and paid taxes for social security for the entire period 1950 to 1996 were the years 1969 to 1973.

discussion" with the borrower, that such a discussion was held with appellant, and that all of his assets and sources of income were discussed and verified prior to the granting of the loan.

A copy of the memorandum was provided to appellant, and by June 16, 1997 response appellant's attorney argued that the information provided in the investigative interview memorandum was hearsay. Appellant reiterated that he and his wife had signed a bank loan application which was completed by an MJA financial officer and was forwarded to Ready Mortgage.

By decision dated March 31, 1998, but issued on April 1, 1998, the hearing representative found that the Office had erroneously determined that appellant had no further loss of wage-earning capacity effective January 1, 1982.

The hearing representative noted that the Office based its decision that appellant had no further loss of wage-earning capacity on the finding that he had actual earnings of approximately $3,000.00 per week from his self-employment activities in the music business dating back to January 1, 1982, and that the evidence of record supported that appellant was engaged in self-employment activities as a recording artist, song writer, musician and record producer on and after January 1, 1982, but that appellant had also been engaged in such activities at the time of his injury in 1977, and that his involvement in such activities predated his employment injury. The hearing representative found that the Office improperly relied on such earnings, as in *Irwin E. Goldman*,[6] the Board had explained that earnings received from dissimilar private employment held at the time of injury must be excluded by the Office when determining an injured employee's pay rate for compensation purposes, and subsequent earnings from that same employment cannot be considered in determining the employee's wage-earning capacity. The hearing representative further noted that this was true even where the employee has increased earnings from the private sector employment following the work injury, citing *James Jones, Jr.*[7]

The hearing representative noted that appellant's federal job as a letter sorting machine operator was not similar to his concurrent activities in the music business, that his earnings from his music endeavors subsequent to his work injury could not be considered in determining his wage-earning capacity, and that therefore the Office had not met its burden of proof to establish appellant's wage-earning capacity and reduce/terminate his monetary compensation benefits, such that the Office's July 24, 1996 decision had to be reversed.

However, the hearing representative found, notwithstanding the lack of reliable documentation regarding the specific amount of actual earnings, that the evidence of record did establish that appellant was involved in self-employment as a recording artist, song writer, musician and record producer during the period 1982 through 1996. The hearing representative found that appellant demonstrated such self-employment on the loan applications he completed in 1990 and 1991, and in his sworn responses to interrogatories dated August 7, 1992 involving his civil lawsuit, which he completed with the assistance of counsel, that the employing

[6] 23 ECAB 6 (1971); *petition for recon.*, 23 ECAB 46 (1971).

[7] 39 ECAB 678 (1988).

establishment investigators found four different record albums or compact discs released commercially between 1981 and 1994 on which appellant was listed as having involvement as a performer, song writer, and/or producer which demonstrated employment during that period, that appellant's brother and partner in his musical ventures, when interviewed by investigators, revealed that their musical group had made six or seven albums through various record companies to which appellant had contributed his time and effort as recording artist, song writer, musician and record producer, and that this musical involvement was verified by testimony at the hearing when both appellant and his brother confirmed these activities but claimed that they received little or no profits from the sale of musical recordings made by Infinity during this period.[8] The hearing representative further found that testimony at the hearing verified that over the years during which appellant received workers' compensation benefits for temporary total disability, appellant had performed regularly as a singer and musician in the performances given by Infinity, that he was actively involved in the running of Infinity Ministries, and that he wrote and published songs. The hearing representative further found that appellant participated in concerts with Infinity that raised money, and specifically, that he participated in a performance at the Great America theme park in 1988 for which Infinity was paid a fee, and that appellant's recordings were played on the radio, for which he received royalties. The hearing representative found that appellant's argument that he did not need to report his self-employment activities because he was not actually self-employed, but was rather engaging in creative, artistic and/or religious endeavors, was unpersuasive. She found that appellant knowingly omitted his earnings under 5 U.S.C. § 8106(b)(2), as on the CA-1032 forms that he signed, he had been advised that the forms indicated that self-employment activities must be reported, even if appellant was not paid wages for those activities or if the enterprise had no profits or all the profits were reinvested back into the business, and that if he performed work for which he was not paid, he must show as "rate of pay" what it would have cost the employer or organization to hire someone to perform the work he performed. The hearing representative also found that appellant was advised on the Form CA-8 on which he claimed compensation for the period February 25, 1982 through March 3, 1986, regarding self-employment, to "show all activities, whether or not income resulted from your efforts." The hearing representative found that appellant's representation on the loan applications that he was self-employed as a recording artist, musician, songwriter and/or record producer was convincing evidence that he considered himself to be self-employed during that period. Further, this was found to be consistent with his answers regarding self-employment on the sworn interrogatories. The hearing representative found that appellant considered himself to be self-employed during the period in question, and the fact that appellant was engaged in a business where he used his creative and artistic talents and was able to express his religious beliefs was irrelevant to the issue of whether his activities constituted self-employment, and did not create an exception to the reporting requirements under the Act.

The hearing representative found that appellant forfeited his monetary compensation entitlement for the required reporting periods where he omitted mention of such employment and for the periods of claimed temporary total disability when he had self-employment, and that he was also subject to the forfeiture provision for periods he worked because he was on notice from the CA-1032 and CA-8 forms that he was to file a report whenever he worked, citing *Lorand A.*

[8] Although the hearing representative noted that Charles Lothlen, appellant's brother, acknowledged that recordings made by Infinity had produced revenue through sales.

Hegedus,[9] which stated that if an employee was employed or self-employed during a period not covered by a CA-8 or CA-1032, he can still be subject to the forfeiture provision for the period he worked if he was on notice that he was to file a report whenever he worked. The hearing representative further found, however, that the total amount of the forfeiture had to be modified somewhat, as the periods January 1 through February 24, 1982 and April 16 through July 14, 1986 were not subject to forfeiture as these periods were not covered by a CA-1032 or a CA-8, and because they preceded appellant's July 15, 1986 acknowledgment that he was aware of his obligation to immediately report any employment or self-employment. The periods of forfeiture of compensation were found to be February 25, 1982 through April 15, 1996 and July 15 through June 22, 1996. The amount of the forfeiture was noted to be $305,889.75, appellant was found to be at fault in the creation of the overpayment for his failure to furnish information that he knew or should have known was material, and that, with due regard to the "probable extent of future payments, the rate of compensation," appellant's circumstances, and any other relevant factors, and minimizing any resulting hardship upon appellant, that proper adjustment would be made by collecting 25 percent of his OPM payment benefits. The hearing representative noted that appellant had not yet elected to receive benefits under the Act, but calculated that if he did, besides paying OPM back for all benefits paid, and absent a more complete and documented accounting of appellant's current financial circumstances, a deduction in the amount of $600.00 from each of appellant's potential gross four-week payment of $2,181.00, amounting to $650.00 per month, would not be unreasonable.

Also by separate memorandum dated March 31, 1998 the hearing representative issued a waiver of charges/compromise of principle noting that the application of charges would increase the period of indebtedness by more than 35 percent, and that the debt with charges would have to be repaid within 1,975.84 months or 164.653 years. This calculation was based upon appellant's current benefits at that time, $209.00 per month, which were being paid by OPM. The hearing representative discounted administrative costs, penalties, and interest, and ordered compromised $255,743.31 of the outstanding debt, leaving a remaining debt of $50,146.44.

By letter dated May 14, 1998, the Office advised appellant of his entitlement to compensation under the Act beginning March 1, 1998. A memorandum to file noted that the April 1, 1998 hearing representative decision reversed the WEC determination, which terminated appellant's monetary compensation effective June 24, 1996, such that an election of benefits going back to the date of entitlement should be made.[10]

By letter to appellant dated May 18, 1998, the Office demanded repayment of his indebtedness to the government in the amount of $305,889.75. It advised that it was then requesting OPM to make appropriate deductions from any money owed appellant.

On May 20, 1998 appellant elected to receive benefits under the FECA. He omitted, however, the effective date of this election.

[9] 37 ECAB 162 (1985).

[10] The Board notes that this date would be the date of the reversed WEC determination, June 24, 1996.

By letter dated June 1, 1998 the Office advised appellant that it could not process his election form without the effective date of the election included, and without his indication as to whether or not he received a lump-sum annuity from OPM.

By letter dated June 30, 1998 and postmarked by Federal Express "Priority Overnight Deliver by 1 July 1998" appellant requested reconsideration of the April 1, 1998 decision.[11]

On July 20, 1998 appellant elected FECA benefits effective March 1, 1998.

By memorandum dated August 13, 1998, the Office again noted that the application of charges increased the period of appellant's indebtedness by more than 35 percent, and that compromise of accrued charges and principle had to be considered. The Office recommended that all accrued interest charges be compromised and that the principle be compromised to $144,885.72. This calculation was based upon appellant's receipt of the Act benefits in the amount of $2,362.75 per month.

The Board finds that the Office properly found that appellant forfeited his right to compensation under 5 U.S.C. § 8106(b) for the periods February 25, 1982 through April 15, 1986 and July 15 through June 22, 1996 because he knowingly failed to report his employment and/or self-employment activities to the Office.

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 § 8129 of this title, unless recovery is waived under that section."[12]

On the Form CA-8 he signed on March 3, 1986 claiming compensation for temporary total disability for the period February 25, 1982 through that date, appellant failed to provide the information requested in Item 9 about any employment or self-employment during that period. On a Form CA-1032 dated April 15, 1986 appellant certified that he did not receive salary or wages or other payment from employment for the 15 months prior to the date of his signature. On July 10, 1986 the Office advised appellant by Form CA-1049 of his compensation

[11] Although appellant's appeal request was initially postmarked July 1, 1998 it was not received by the Board until July 21, 1998 because it was improperly addressed to the Board's pre-1996 address, and was returned to appellant on July 20, 1998. The Board took jurisdiction and docketed the appeal on July 21, 1998.

[12] 5 U.S.C. § 8106(b).

entitlement, provided that he complied with the instructions on the form. Appellant was advised on the first page of the letter that if he were to return to work, he would need to notify the Office immediately. On the second page, additional instructions were given for reporting a return to his former job or "other employment," and appellant was advised that should he return to any type of employment, he must report "at once" such employment to the Office, and provide information about the employment, number of hours worked, and pay received. Appellant was instructed that if he became self-employed, he "must report as your pay rate what it would have cost you to have hired someone else to do the same work." On July 15, 1986 appellant signed the letter and returned a statement certifying that he had read the letter, that he understood the reporting requirements described in the letter, that he agreed to be bound by those conditions, and that he understood that willful failure to comply with the requirements could result in forfeiture of benefits and liability for the resulting overpayment.

Over the following years, appellant completed Office CA-1032 forms that included questions as to whether appellant had been engaged in any employment or self-employment activities during the period covered by the form. Appellant completed such forms on April 26 and August 8, 1988, December 21, 1990, August 10, 1992 and October 25, 1993 denying on each that he had any employment or self-employment during the 15-month period preceding the date he signed the form.

However, in sworn answers to interrogatories dated August 7, 1992, which were additionally reviewed by appellant's attorney, regarding a civil lawsuit between appellant and an excavation company, appellant admitted that he had been self-employed with Infinity for 10 years as a producer, writer, studio engineer and performing artist. He also indicated that he was presently self-employed by Infinity Ministries. Appellant further indicated that he had done business as Immeasurable Publishing Company since 1987 to the present, that he had worked as a producer, sound engineer and song writer for Infinity Recording Group since 1982, that he had a monthly income on August 20, 1991 of $12,000.00, and that he lost income between August 20, 1991 and October 1, 1992 in an amount exceeding $50,000.00. Appellant further swore that before the 1991 excavating company problem began, he was averaging $12,000.00 per month, but that at the present time in 1992 he was only averaging $7,500.00 per month.

The Board finds that this sworn admission to being self-employed in several enterprises dating from 1982 to 1992 constitutes persuasive evidence that appellant knew that he had been self-employed during that period, and that therefore he knowingly omitted his earnings from self-employment from the CA-8 completed on March 3, 1986 and from the subsequently completed affidavits on CA-1032 forms completed on April 15, 1986, April 26 and August 8, 1988, December 21, 1990, August 10, 1992 and October 25, 1993, and that therefore the provisions of 5 U.S.C. § 8106(b)(2) apply to the periods covered by the affidavits.[13]

Further, the Board notes that on July 10, 1986 the Office advised appellant by Form CA-1049 of his requirement for compliance by reporting all employment and self-employment, that if he were to return to work, he would need to notify the Office immediately, that should he return to any type of employment, he must report "at once" such employment to the Office, and

[13] *See Iris E. Ramsey*, 43 ECAB 1075 (1992).

provide information about the employment, number of hours worked, and pay received, and that if he became self-employed, he "must report as your pay rate what it would have cost you to have hired someone else to do the same work." On July 15, 1986 appellant signed the letter and returned a statement certifying that he had read the letter, that he understood the reporting requirements described in the letter, that he agreed to be bound by those conditions, and that he understood that willful failure to comply with the requirements could result in forfeiture of benefits and liability for the resulting overpayment. Therefore, after July 10, 1986 the Board finds that appellant was clearly informed of his responsibility to report all employment and/or self-employment activities, whether or not the period during which the activities occurred was covered by a Form CA-8 or a Form CA-1032.[14] Therefore, the Board finds that appellant also forfeited his right to compensation during the periods not covered by any Form CA-8 or CA-1032.

The Board further finds, as evidence that appellant knowingly withheld and failed to report relevant information to the Office about his self-employment activities, that on loan applications signed on October 16, 1990 and July 15, 1991 he described himself as being self-employed in the record industry as a recording artist, writer and producer with a base monthly income of $10,833.00, and that he had been so employed for more than 14 years. The Board notes that this monthly income was stated as separate from payments received under the FECA or income from gas and oil leases, which was stated in the category of "Other Income." The Board notes that appellant indicated by signature that he understood that it was a federal crime punishable by fine or imprisonment or both, to knowingly make any false statements concerning any of the above noted facts as applicable under Title 18 U.S.C. § 1014. Therefore, the Board finds that appellant again attested to the fact of his self-employment for a period of more than 14 years, such that he knowingly omitted reporting relevant self-employment information to the Office as required, and consequently forfeits his right to all compensation received for the period in question.

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.''[15] The evidence of record establishes, from sworn interrogatory answers, formal loan applications subject to Title 18 U.S.C. § 1014, and from statements given to investigators, that appellant knew he had income from self-employment, knew of his obligation to report such income, and therefore "knowingly'' omitted mention of his earnings from self-employment from February 25, 1982 through June 22, 1996, save two periods preceding appellant's receipt of Form 1049.

As the Board concludes that appellant knowingly'' omitted his earnings under 5 U.S.C. § 8106(b)(2) by failing to report his self-employment activities as required, the Board finds that appellant has forfeited his right to compensation benefits based on his receipt of temporary total disability for the period 1982 through 1996.

[14] *See Lorand A. Hegedus*, 37 ECAB 162 (1985); *Charles A. Grifffin*, 22 ECAB 94 (1970).

[15] *See Christine P. Burgess*, 43 ECAB 449 (1992).

Although appellant argues that he was told that royalties were not to be reported as income as they were the result of passive or prior investment, the above information supports that appellant performed actual activities during the period in question which resulted in the receipt of royalties, including but not limited to song writing, performing, and producing recordings during the period in question. In *Christine P. Burgess*,[16] the Board noted that 20 C.F.R. § 10.125(c) (1998) provided that a claimant must report all "gross earnings or wages," and construed this term as including every form of remuneration payable for a given period to an individual for personal services, including salaries, commissions, vacation pay, dismissal wages, bonuses and the reasonable value of board, rent, housing, lodging, payments in kind, tips, and any other similar advantage received with respect to work accomplished for himself or for another. Therefore, appellant was required to report any song writing, singing, performing, and/or producing activities during the period in question which resulted in any benefit as noted above, including the receipt of royalties.

Appellant also argues that he did not "know" such activities had to be reported as they were a gift from God and not work, but the Board finds that appellant's admission in interrogatories and on loan applications that he considered himself to be self-employed at these activities disproves appellant's contentions. Appellant further argues that he merely signed blank loan applications, in violation of Title 18 U.S.C. § 1014, and/or that he was guessing on these applications and interrogatories as to what he might possibly be making in the future. The Board does not find these contentions credible.

The Board also finds that appellant was with fault in the matter of the resulting overpayment of compensation.

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."[17] Thus, an overpayment cannot be waived by the Office unless appellant was without fault.[18]

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

[16] *Id.*

[17] 5 U.S.C. § 8129.

[18] *See, e.g., Harold W. Steele*, 38 ECAB 245 (1986) (no waiver is possible if the claimant is not without fault in helping to create the overpayment).

(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."[19]

In its preliminary decision dated July 25, 1996, the Office found that appellant was with fault in the matter of the overpayment because he made incorrect statements when he was aware that when he signed the CA-1032 forms that he was to report any earnings, and the hearing representative additionally found that appellant was with fault in the matter of the overpayment because the forfeiture and resulting overpayment were a direct consequence of appellant's failure to furnish information and failure to report his employment during the period 1982 to 1996.

The factual evidence in this case establishes that appellant was self-employed during the 14-year period covered by the CA-1032 forms, and that he made incorrect statements on these forms regarding his self-employment status. The factual evidence also supports that appellant failed to provide information which he knew or should have known was material to his continuing receipt of monetary compensation benefits under the Act, as he attested on the Form CA-1049 that he understood his responsibility to provide such information. Appellant thus both made incorrect statements on required reporting forms and failed to furnish information that he knew or should have known was material, and for these reason he is with fault in the matter of the overpayment, recovery of which is not subject to waiver.

However, the Board notes that, following a detailed review of the complete case record, it is evident that the March 31, 1998 hearing representative's decision, issued April 1, 1998, also included an attached waiver of charges/compromise of principal in which the Office, within its discretion as to fact and amount, reduced the total amount of the $305,889.75 overpayment by $255,743.31, resulting in a final repayment amount due of $50,146.44. Since it is totally within the Office's discretion whether to compromise the overpayment principal due, and how much of the debt to waive, the final amount of the overpayment due after the compromise of the remaining principal is not within the Board's jurisdiction. Further, since the amount of the compromise is discretionary with the Office, the amount of the original overpayment before the compromise and the subtraction of the required lump-sum payment is technically moot.[20]

Further, the Board notes that at the time of issuance on the hearing representative's decision appellant was not in receipt of compensation benefits under the Act, but was receiving

[19] 20 C.F.R. § 10.320.

[20] In explanation, whether the actual amount of the total overpayment is $305,889.75, or $400,000.00, or $200,000.00 is not important, because the Office chose to waive a portion of that debt, the amount of which is totally within the Office's discretion and not subject to Board review, resulting in a final debt owed of $50,146.44. If the debt had been $100,146.44, the Office could have chosen to waive $50,000.00 to arrive at the $50,146.44 remainder due, and if the debt had been $200,146.44, the Office could have chosen to waive $150,000.00 to arrive at the same remainder due, and neither waiver amount would be subject to review by the Board; *see* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.0300.5 (September 1994).

benefits from OPM. Although the hearing representative reversed the July 24, 1996 Office WEC decision, which effectively reinstated appellant's compensation entitlement, this entitlement ran only from July 24, 1996 until he elected to receive OPM benefits at some point after his Act benefits were terminated. With respect to recovery of an overpayment, the Board's jurisdiction is limited to cases where the Office seeks recovery from continuing compensation benefits under the Act. Where appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the Office's recovery of an overpayment under the Debt Collection Act.[21] As appellant did not reelect the Act benefits until May 20, 1998, more than a month after the most recent merit decision in the case record, the issue of recovery of the overpayment is not now before the Board on this appeal.

[21] *See Lewis George*, 45 ECAB 144 (1993).

Accordingly, the decision of the Office of Workers' Compensation Programs dated April 1, 1998 is hereby affirmed.

Dated, Washington, DC
November 29, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member