U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT POWROZNIK and U.S. POSTAL SERVICE,
POST OFFICE, Miami, FL

Docket No. 98-2618; Oral Argument Held July 3, 2001;
Issued August 31, 2001

Appearances: *Michael M. Raulston, Esq.*, for appellant; *Miriam D. Ozur, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant forfeited his right to compensation in the amount of $56,450.31 for the periods of March 9, 1982 to April 29, 1983; June 3, 1987 to February 1, 1989; and February 17, 1990 to November 2, 1992 because he knowingly failed to report earnings during those periods; and (2) whether the Office properly determined that appellant was at fault in creating the overpayment in the amount of $56,450.31 thus precluding waiver of recovery of the overpayment.

Appellant, a 26-year-old city carrier, filed a notice of traumatic injury on September 11, 1979 alleging that he injured his back in the performance of duty. The Office accepted his claim for lumbosacral sprain. Appellant filed notices of recurrence of disability on November 28, 1979 and November 5, 1980 which the Office accepted. He received compensation from January 23 to February 19, 1982.

Appellant filed a claim on March 10, 1982 alleging an emotional condition due to employment factors. The Office accepted anxiety and depression as causally related to appellant's employment. The Office entered appellant on the periodic rolls and on October 26, 1983 reduced his compensation based on his capacity to work four hours a day. The employing establishment terminated appellant effective July 23, 1984.

On May 1, 1996 appellant plead guilty to making a false statement to the Office on February 10, 1992. The U.S. District Court sentenced appellant to three years of probation and restitution to the employing establishment in the amount of $5,877.85. By decision dated May 31, 1996, the Office terminated appellant's compensation benefits based on this plea.

By decision dated March 10, 1997, the Office found that appellant had forfeited his compensation benefits for the periods of March 9, 1982 to April 29, 1983; June 3, 1987 to February 1, 1989; and February 17, 1990 to November 9, 1992 in the amount of $56,450.31 as he failed to report earnings from employment and self-employment during these periods.

The Office issued a preliminary determination on March 10, 1997 that an overpayment of compensation in the amount of $56,450.31 had occurred as appellant had forfeited his entitlement to compensation for the above-mentioned periods. The Office found that appellant had knowingly engaged in work activities that were not reported to the Office.

Appellant requested an oral hearing and by decision dated June 3, 1998, the hearing representative found that appellant was at fault in the creation of the overpayment for the periods in questions as he failed to report earnings to the Office, that therefore the overpayment was not subject to waiver and that as appellant had failed to submit documentation to support his financial statement, the entire amount of the overpayment should be collected.

The Board finds that the Office properly found that appellant forfeited his right to compensation in the amount of $56,450.31 for the periods of March 9, 1982 to April 29, 1983; June 3, 1987 to February 1, 1989; and February 17, 1990 to November 9, 1992 because he knowingly failed to report earnings during those periods.

Section 8106(b) of the Federal Employees' Compensation Act provides in pertinent part:

> "The Secretary of Labor may require a partially disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the time 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 or report was required."[1] (Emphasis added.)

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 to merely establish that there were unreported earnings. The Board has recognized that forfeiture is a penalty, and, as a penalty provision, it must be narrowly construed.[2] The term "knowingly" is not defined within the Act or its regulations. The Board has adopted the common usage definition of "knowingly:" "with knowledge; consciously; intelligently; willfully; intentionally."[3]

[1] 5 U.S.C. § 8106(b).

[2] *Anthony A. Nobile*, 44 ECAB 268, 271-72 (1992).

[3] *Christine P. Burgess*, 43 ECAB 449, 458 (1992).

In this case, appellant completed a claim for compensation (Form CA-8) on September 15, 1982 requesting compensation benefits from July 13 to September 17, 1982. He also completed a Form CA-8 on April 28, 1983 and requested compensation from March 9, 1982 to April 29, 1983. These forms requested that appellant provided information regarding his employer, time worked and amount earning and job duties performed if he worked during the period for which compensation was claimed. He did not complete this section on either Form CA-8.

The record establishes that appellant worked for Travel Time Bureau, Inc. as a full-time travel agent from July to December 1982. The Board finds that on the CA-8 forms he signed on April 28, 1983 and September 15, 1982, covering the period from March 9, 1982 to April 29, 1983, appellant consciously omitted relevant information concerning his employment activities with Travel Time Bureau, Inc. which generated earnings in appellant's name. 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.[4] The clear weight of the evidence of record establishes that appellant knowingly failed to report his earnings from employment. Accordingly, the Board finds that appellant thereby forfeited his right to compensation received for that period.

Appellant completed EN1032 forms beginning on December 18, 1984. He certified that he had no employment nor self-employment on February 1, 1985, February 1, 1989, February 26, 1991, February 10 and November 9, 1992. On April 26, 1986, June 2 and December 12, 1987 and February 15, 1988 appellant reported no self-employment, but indicated that he worked for a radio station intermittently during the periods in question. On February 16, 1990 appellant completed a Form EN1032 and indicated that he was self-employed from June to December 31, 1989 at Southern Casual Furniture. Appellant completed a Form EN1032 on May 28, 1993 and indicated that he was self-employed at East Coast Futons from November 1, 1992 to May 28, 1993 and that he was self-employed at Southern Casual Furniture from November 1, 1987 to October 31, 1992.

The EN1032 forms clearly indicate that if work was performed in furtherance of a relative's business, the employee must show as the rate of pay what it would have cost the employer or organization to hire someone to perform the work performed. The Board has held that the test of what constitutes reportable earnings is not whether appellant received a salary but what it would have cost to have someone else do the work.[5]

The investigative report prepared by the employing establishment establishes that appellant performed work for his wife's companies, Southern Casual Furniture and East Coast Futons. He admitted that he made telephone calls, completed paperwork, set up furniture displays and occasionally made deliveries. Appellant also later completed a Form EN1032 admitting that he was self-employed at East Coast Futons from November 1, 1992 to May 28, 1993 and that he was self-employed at Southern Casual Furniture from November 1, 1987 to October 31, 1992. These factual circumstances of record, together with appellant's certification

[4] *Charles Walker*, 44 ECAB 641, 645 (1993).

[5] *See Anthony Derenzo*, 40 ECAB 504 (1988); *see also Monroe E. Hartzog*, 40 ECAB 322 (1988).

to the Office on Form EN1032 dated February 1, 1985, February 1, 1989, February 26, 1991, February 10 and November 9, 1992, April 26, 1986, June 2 and December 12, 1987 and February 15, 1988 that he had no self-employment or earnings, provides persuasive evidence that appellant "knowingly" misrepresented and omitted his earnings and employment activities.[6] The Office, therefore, properly found that appellant forfeited his compensation for the periods covered by these EN1032 forms in the amount of $56,450.31. The Office properly excluded from the forfeiture calculations the period and compensation received during the 15-month period covered by the February 16, 1990 Form EN1032 on which appellant reported his self-employment activities.

The Board further finds that appellant was at fault in the creation of the $56,450.31 overpayment.

Section 8129(a) of the Act[7] provides that, where an overpayment of compensation has been made "because of an error or fact of law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows 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."[8] 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 10.320(b) of the Office's regulations[9] provides in relevant part:

"An individual is with fault in the creation of an overpayment who:

> (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
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> (2) Failed to furnish information which the individual knew or should have known to be material; or
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> (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."

In this case, the Office applied the first standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was at fault in creating the overpayment of compensation, the Office must establish that appellant made an

[6] *Mamie L. Morgan*, 41 ECAB 661 (1990).

[7] 5 U.S.C. §§ 8101-8193, 8129(a).

[8] 5 U.S.C. § 8129(b).

[9] 20 C.F.R. § 10.320(b).

incorrect statement as to a material fact which appellant knew or should have known to be incorrect. As noted previously, the evidence establishes that appellant knew of his obligation to report his earnings from self-employment and employment to the Office and failed to do so. For this reason, the Board finds that the Office met its burden of proof to establish fault in the creation of the overpayment.

With respect to recovery of an overpayment, the Board's jurisdiction is limited to reviewing those 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.[10]

The June 3, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
August 31, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

[10] *See Lewis George*, 45 ECAB 144, 154 (1993).