

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT WAYNE VAUGHN and TENNESSEE VALLEY AUTHORITY,
WATTS BAR NUCLEAR PLANT, Chattanooga, TN

*Docket No. 00-1588; Submitted on the Record;
Issued December 12, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant forfeited his right to compensation from 1989 through 1991; (2) whether the Office properly found an overpayment of \$87,236.57; (3) whether the Office properly found appellant to be at fault in creating the overpayment; and (4) whether the Office properly determined the rate of recovery of the overpayment based on a compromised principal of \$74,934.63 and by deducting \$500.00 every four weeks from appellant's compensation.

The Office accepted that appellant sustained a lumbosacral strain (twice) and contusion, herniated nucleus pulposus at L4-5 and indirect left inguinal hernia in the performance of duty on March 23, 1983. Appellant never returned to work and received compensation for total wage loss beginning May 8, 1983. Effective December 7, 1997, appellant's compensation benefits were reduced on the basis of a constructed position of cashier.

By decision dated November 9, 1998, the Office determined that appellant had forfeited compensation from May 2, 1988 through October 8, 1991, based on his failure to report income from owning and operating a bait shop. The Office determined that an overpayment of \$87,236.57 was created due to the forfeiture of compensation and that appellant was at fault in creating the overpayment.¹

In a decision dated January 22, 1999, the Office reduced the amount of overpayment appellant had forfeited from May 2, 1988 through October 8, 1991 to \$74,934.63.

¹ The Office had previously issued a November 13, 1997 forfeiture decision and a preliminary overpayment decision on November 17, 1997. By decision dated August 5, 1998, the Office's Branch of Hearing and Review vacated the November 13, 1997 forfeiture decision as it did not contain appropriate appeal rights. The Office was further directed to reissue the preliminary determination of overpayment.

In a decision also dated January 22, 1999, the Office determined that an overpayment of \$1,728.38 was created from June 7 through July 4, 1987 because appellant received and negotiated two checks for the same period. The Office found that appellant was at fault in the creation of this overpayment.

By decision dated January 17, 2000, an Office hearing representative affirmed the November 8, 1998 decisions relating to forfeiture and overpayment and the January 22, 1999 decision relating to the compromised overpayment amount. The hearing representative set aside the January 22, 1999 decision regarding the overpayment of \$1,728.38 on the grounds that further development was needed to determine exactly what happened.

The Board finds that appellant has forfeited compensation from May 2, 1988 through October 8, 1991.

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

“The Secretary of Labor may require a disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at times the Secretary specifies. An employee who --

(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 ... under section 8129 of this title, unless recovery is waived under that section.”²

In this case, the Office determined that appellant failed to report self-employment activities and earnings to the Office on forms covering May 2, 1988 to October 8, 1991. The form requires a claimant to identify the period for which compensation is claimed and specifically states that employment should be reported whether or not income or revenue resulted from his or her efforts. With respect to self-employment, the form provides: “Earnings from self-employment (such as farming, sales, service, operating a store, business, etc.) must be reported. Report any such enterprise in which you worked, and from which you receive revenue, even if it operated at a loss or if profits were reinvested. You must show as “rate of pay” what it would have cost you to have hired someone to perform the work you did.” The form further advises that a false statement misrepresentation or concealment of fact is punishable by fine or imprisonment. The Office may forfeit compensation for the period claimed on a this form reporting, if it can document that appellant did not report earnings during this period.³

The evidence of record establishes that appellant was owner/operator of a bait camp from 1989 to 1991. In an investigative memorandum dated October 19, 1993, appellant admitted to

² 5 U.S.C. § 8106(b).

³ See, eg., *Joseph M. Popp*, 48 ECAB 624 (1997).

the Office of the Inspector General (OIG) that, during May 1998 through October 1991, he operated a bait shop and intentionally did not report it to the Office. The memorandum further stated that, during June 1992 and while appellant was being investigated, he reported that he worked as a supervisor at Daniel's Live Bait for "maybe" 20 hours a week from 1989 to 1991. He reported his rate of pay as nothing and his actual earnings as "loss." From May 2, 1988 to October 8, 1991, appellant signed three forms dated August 2, 1989, September 10, 1990 and October 8, 1991, but did not report his self-employment activities on any of them.

The Office may forfeit a claimant's compensation if he or she "knowingly" omitted earnings. The Board has adopted the common usage definition of "knowingly" as "with knowledge; consciously; intelligently; willfully; intentionally."⁴ The language on the form is clear and unambiguous in requiring a claimant to report revenue from a business enterprise in which he worked.

Appellant stated that the business enterprise did not make a profit, but the form explicitly states that revenue must be reported even if the business operated at a loss. His signature on the three forms certifies that "all the statements made in response to questions on this form are true, complete and correct to the best of my knowledge and belief." The failure to report earnings under the factual circumstances of this case and in view of the unambiguous language of the form must be considered a knowing omission by appellant. Accordingly, he forfeits his right to compensation from May 2, 1988 through October 8, 1991.

The Board further finds that an overpayment of compensation was created from May 2, 1988 through October 8, 1991 which amounted to \$87,236.57.

Because the record establishes that appellant forfeited his compensation from May 2, 1988 through October 8, 1991, an overpayment of compensation was created. The record contains evidence that appellant received \$87,236.37 during this period. Therefore, the Office properly determined that appellant received a \$87,236.37 overpayment.

The Board further finds that appellant was at fault in creating the overpayment of compensation, which was therefore, not subject to waiver.

Section 8129(a) of the Federal Employees' Compensation Act⁵ 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 payments to which an individual is entitled.⁶ 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 this subchapter or would be against equity and good conscience."⁷

⁴ *Christine C. Burgess*, 43 ECAB 449 (1992).

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 5 U.S.C. § 8129(a).

⁷ 5 U.S.C. § 8129(b).

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

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

“An individual is with fault in the creation of an overpayment who--

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect....”⁸

In this case, the Office applied the second standard in determining that appellant was at fault in creating the overpayment. Appellant failed to furnish information that he knew was material; specifically, his self-employment venture on the reporting forms he signed and returned to the Office. The forms clearly specify the necessity and importance of reporting employment information to the Office. Moreover, the investigative memorandum of October 19, 1993 noted that appellant intentionally failed to report his involvement in the bait camp during the period in question. Appellant, therefore, is not entitled to waiver of the overpayment for the period May 2, 1988 through October 8, 1991.

The Board further finds that the Office properly required repayment of the overpayment by deducting \$500.00 from appellant’s compensation every four weeks.

Section 10.441(a) provides in pertinent part:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, [the Office] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.”⁹

In this case, the Office reduced the debt principal of \$87,236.57 in the compromised amount of \$12,301.94 to reduce the repayment period pursuant to established procedures. The new amount of overpayment owed by appellant was \$74,934.63. The Office further stated that repayment of the overpayment would be derived by deducting \$500.00 from appellant’s

⁸ 20 C.F.R. § 10.433(a).

⁹ 20 C.F.R. § 10.441(a); *see Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

compensation payments every four weeks with an interest rate of five percent. The record supports that, in requiring repayment of the new overpayment amount by deducting \$500.00 from appellant's compensation payments every four weeks, the Office took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on appellant.

The January 17, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
December 12, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member