

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CAROL M. KURPIESKI and U.S. POSTAL SERVICE,  
POST OFFICE, Wheaton, IL

*Docket No. 99-1238; Submitted on the Record;  
Issued June 8, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant forfeited her right to compensation for the periods September 14, 1985 to October 10, 1986 and October 21, 1991 to August 21, 1993; (2) whether the Office properly found an overpayment of \$40,240.05 was created; (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.

In the present case, the Office accepted that appellant sustained a cervical myositis in the performance of duty on November 28, 1983. Appellant returned to work intermittently in a part-time position. By decision dated June 17, 1997, the Office determined that appellant had forfeited compensation during the following periods: (1) September 14, 1985 to October 10, 1986, based on the failure to report earnings on Forms CA-8 during this period; and (2) October 21, 1991 to August 21, 1993, based on the failure to report employment activity on EN-1032 forms dated January 10 and August 23, 1993.

In a decision dated July 18, 1997, the Office determined that an overpayment of \$40,240.05 was created due to the forfeiture of compensation.<sup>1</sup> The Office also finalized its determination that appellant was at fault in creating the overpayment. By decision dated December 7, 1998, an Office hearing representative affirmed the forfeiture and overpayment decisions.

The Board finds that appellant has forfeited compensation during the period October 21, 1991 to January 10, 1993; the case, however, requires further development with respect to the period September 14, 1985 to October 10, 1986.

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<sup>1</sup> The Office issued a preliminary determination on June 17, 1997 that an overpayment of \$40,204.05 had occurred because appellant failed to report employment and that appellant was at fault in creating the overpayment.

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.”<sup>2</sup>

In this case, the Office determined that appellant forfeited her compensation from September 14, 1985 to October 10, 1986 because she failed to report earnings on CA-8 forms (claim for compensation on account of disability) during this period. The form requires a claimant to identify the period compensation is claimed and “if you worked” during this period, to provide earnings information. The Office may forfeit compensation for the period claimed on a Form CA-8, if it can document that appellant did not report earnings during this period.<sup>3</sup>

The problem in this case, is that the Office purports to forfeit appellant's compensation for the entire period of September 14, 1985 to October 10, 1986, without documenting actual earnings during this entire period. An investigative memorandum from the employing establishment dated June 21, 1995 and the accompanying evidence, shows that appellant did have some earnings in private employment in 1985 and 1986. The Board notes, however, that the evidence of record shows only sporadic earnings for 1986. For example, the earnings record from a private employer, Ambience Inc., shows 12 hours of earnings for the period ending March 23, 1986 and does not report any additional hours work until the pay period ending September 28, 1996, when appellant was paid for 8 hours of work. The record also indicates that appellant received earnings from Sartin Enterprises, for the period ending February 1, 1986.

The June 21, 1995 investigative memorandum appears to identify specific CA-8 forms appellant filed and that have evidence supporting that she had earnings during the period compensation is claimed. The Office has instead attempted to forfeit compensation during the entire period of September 14, 1985 to October 10, 1986. This period includes CA-8 forms that claim compensation for periods that there does not appear to be any documented evidence of earnings.

The Office must identify the specific CA-8 forms for which appellant has claimed a period of compensation and had earnings that she did not report. Therefore, the case will be remanded to the Office for additional development on this issue.

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<sup>2</sup> 5 U.S.C. § 8106(b).

<sup>3</sup> See, eg., *Joseph M. Popp*, 48 ECAB 624 (1997).

With respect to the period October 21, 1991 to August 21, 1993, the Board again finds that the entire period of forfeiture has not been established.

On a Form EN-1032 dated January 10, 1993, appellant responded “no” to a question as to whether she had earnings from self employment. The Form En-1032 provides: “[E]arnings 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 received 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 indicates that the period covered is 15 months.

The June 21, 1995 investigative memorandum and the accompanying evidence clearly establish that appellant had employment activity during the period covered by the January 10, 1993 EN-1032 form. In October 1991, appellant’s husband became involved in a business enterprise as an Amway distributor. The record indicates that appellant became involved in the business enterprise at least as of early 1992; the investigative memorandum notes that a witness reported attending a presentation given by appellant and her spouse in early 1992. There is also evidence that appellant was selling Amway products as of July 1992 and was receiving revenue pursuant to those sales.

The Board finds that appellant should have reported the revenue from the Amway business enterprise on the January 10, 1993 Form EN-1032. Appellant worked in business enterprise and failed to report earnings as required by the Form EN-1032.

The Office may forfeit her compensation for the period covered by the EN-1032 forms if appellant “knowingly” omitted earnings. The Board has adopted the common usage definition of “knowingly” as “with knowledge; consciously; intelligently; willfully; intentionally.”<sup>4</sup> The language on the Form EN-1032 is clear and unambiguous in requiring a claimant to report revenue from a business enterprise in which she 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. Her signature on the Form EN-1032 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, she forfeits her right to compensation for a 15-month period covered by the January 10, 1993 Form EN-1032.

With respect to the August 23, 1993 Form EN-1032, however, the Board cannot find that earnings were unreported. Appellant wrote on the form, in response to the self-employment inquiry, “see attached statement and request for ruling.” This refers to a letter dated August 25, 1993 from appellant’s representative. In this letter the representative acknowledges that appellant was involved in an Amway business and argues that any income earned was passive as opposed to earned income. The representative also requests a ruling from the Office on the issue. Whether the arguments presented are valid is not the issue; the letter serves as notice to the Office of earnings in a business enterprise. The Office cannot invoke the penalty provision

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<sup>4</sup> *Christine C. Burgess*, 43 ECAB 449 (1992).

of section 8106 based on the August 23, 1993 Form EN-1032, since there has not been an omission or understatement of earnings.

The Board further finds that an overpayment of compensation was created during the 15-month period ending on January 10, 1993; the case remains not in posture with respect to the actual amount of the overpayment.

Since the record does establish that appellant forfeited her compensation for 15 months prior to January 10, 1993, an overpayment of compensation is created. As noted above, the evidence of record does not support forfeiture of compensation for the entire period of September 14, 1985 to October 10, 1986. The case will be remanded for further development as to the actual amount of the overpayment.

The Board further finds that the Office properly found appellant was at fault in creating the overpayment during the 15-month period ending January 10, 1993.

Section 8129(b) of the Federal Employees' Compensation Act<sup>5</sup> provides: "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."<sup>6</sup> No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.<sup>7</sup>

On the issue of fault, 20 C.F.R. § 10.320(b) provides in pertinent 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 (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."

In the present case, appellant failed to furnish information that she knew was material; specifically, the earnings from her business enterprise. Appellant is, therefore, properly found to be at fault in creating the overpayment and is not entitled to waiver of the overpayment for the 15-month period ending January 10, 1993.

With respect to the period September 14, 1985 to October 10, 1986, the Board will not address the issue of fault since the specific period(s) of the overpayment have not been established. The rate of repayment issue will also not be addressed because the total amount of the overpayment has not been finalized. On remand, the Office should make findings as to forfeiture and the periods of overpayment from September 14, 1985 to October 10, 1986 based on specific CA-8 forms that were filed. After such further development as it deems necessary, the Office should issue an appropriate decision as to forfeiture, overpayment and rate of repayment.

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<sup>5</sup> 5 U.S.C. §§ 8101-8193.

<sup>6</sup> 5 U.S.C. § 8129(b).

<sup>7</sup> *Gregg B. Manston*, 45 ECAB 344 (1994).

The decision of the Office of Workers' Compensation Programs dated December 7, 1998 is affirmed with respect to forfeiture of compensation for the 15-month period ending January 10, 1993 and the finding of fault in the resulting overpayment for this period. The decision is reversed with respect to January 11 to August 22, 1993 and remanded for further development as to the period September 14, 1985 to October 10, 1986.

Dated, Washington, DC  
June 8, 2001

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Michael E. Groom  
Alternate Member