

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WARREN P. TILGHMAN and DEPARTMENT OF AGRICULTURE,
OFFICE OF OPERATIONS, Washington, DC

*Docket No. 00-1269; Oral Argument Held February 5, 2002;
Issued May 16, 2002*

Appearances: *Warren P. Tilghman, pro se; James C. Gordon, Jr., Esq.*
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant forfeited his compensation for the periods January 8, 1984 through March 8, 1985; June 1, 1985 through October 18, 1989; and May 20, 1991 through March 6, 1994, because he knowingly failed to report his employment activities and income; and (2) whether the Office properly found that appellant was at fault in the consequential creation of a \$302,851.41 overpayment of compensation and, therefore, the overpayment was not subject to waiver.

The Office accepted that, on May 25, 1982, appellant, then a 44-year-old special projects officer, sustained back strain and aggravation of degenerative disc disease when he slipped and fell while walking down a hallway. Appropriate compensation benefits were granted and appellant did not return to work. After periods of intermittent disability following the injury appellant was placed on the periodic rolls for receipt of compensation effective October 6, 1983. On December 28, 1983 a CA-1049 form was issued to appellant notifying him of his placement on the periodic rolls and advising him of his entitlement to ongoing disability payments and indicating:

“If you return to your former job or employer or obtain any other employment, submit the following information to the Office at once: (1) Name and address of employer; (2) Date you returned to work; (3) Type of work you are performing; (4) Your weekly pay rate; and (5) Number of hours worked per week. Your rate of pay should include not only cash but also ‘wages in kind,’ such as board and lodging. If you are self-employed (such as farming, operating a store or business, etc.) your rate of pay should be what it would have cost you to hire someone else to do the same work....”

On March 8, 1985, September 1, 1986, August 25, 1987, July 17, 1988, October 19, 1989, May 19, 1991, April 25, 1992, June 16, 1993 and March 6, 1994 appellant completed Forms CA-1032 indicating no employment or employment activities for the 15 months preceding the date of signature of each form. The form completed by appellant on March 8, 1985 covered the period from January 8, 1984 through March 8, 1985; the forms completed on September 1, 1986, August 25, 1987, July 17, 1988 and October 18, 1989, covered the period from June 1, 1985 through October 18, 1989 and the forms completed on April 25, 1992, June 16, 1993 and March 6, 1994 covered the period from May 20, 1991 through March 6, 1994. Appellant answered no with regard to his having any self-employment at any time covered by the forms and answered "yes" that he was unemployed during the periods.

A February 15, 1996 investigative memorandum, however, determined that appellant received the following outside income apart from his compensation benefits for the identified years: 1984 -- \$4,435.00; 1985 -- \$12,993.52; 1986 -- \$21,437.48; 1987 -- \$20,400.00; 1988 -- \$19,700.00; 1989 -- \$11,248.30; 1990 -- \$7,428.07; 1991 -- \$15,461.66; 1992 -- \$7,440.91; 1993 -- \$7,139.65.

The investigative memorandum noted that since 1984 appellant had been employed as a government contractor and had filed articles of incorporation for Tilghman Enterprise, Ltd. and Tilghman & Tilghman on January 31, 1984. Appellant acknowledged his involvement with these businesses during the process of filing for a divorce from his third wife. He also had four employees, including a daughter, working for him. Evidence was found that during the period appellant was receiving compensation for temporary total disability he was awarded 11 contracts upon which he had bid. Appellant bid on contracts from the National Guard Bureau and the Defense Logistics Agency, Wilkshire Associates, Southwinds, Viewtech, Associates Control Research & Analysis, Multi-Group Industries and Farmers' Home Administration to perform equal employment opportunity investigations.

Further investigation of appellant revealed that deposits of earnings for Tilghman Enterprises Ltd. for the periods were as follows: 1984 -- \$4,435.00; 1985 -- \$12,993.52; 1986 -- \$21,438.32; 1987 -- \$7,535.50; 1988 -- \$22,479.22; 1989 -- \$7,532.46; 1990 -- \$5,153.32; 1991 -- \$14,220.56; 1992 -- \$7,494.64; 1993 -- \$2,300.00.

Appellant was interviewed by an investigative agent on April 20, 1994 and he made admissions, which were inconsistent with the agent's findings in the investigations. He further claimed that he reported all of his income to the Office.

Appellant argued that the Form CA-1032 he completed on March 6, 1994 reported no income and that the form was true and accurate. However, the record indicates that the form covered the preceding 15 months, which included most of the months in 1993 and which dated back to his June 16, 1993 CA-1032 forms, during which time in 1993 it was discovered that he actually earned \$7,139.65 from his various contracts and businesses. Appellant was indicted on February 29, 1996 for fraud against the government for violations of 18 U.S.C. § 1341 (mail fraud), 18 U.S.C. § 1920 (false statements to obtain compensation under the Federal Employees' Compensation Act) and 18 U.S.C. § 1001 (false statements to the government). However, on May 23, 1996 the District Court for the District of Columbia found appellant not guilty of all

charges except for two counts of making a false statement to the Department of Labor in order to receive benefits under the Act.

By letter decision dated June 4, 1996, the Office advised appellant that it had been informed that on May 23, 1996 he had been convicted of defrauding the Federal Employees' Compensation Act program by making false statements in order to receive compensation for temporary total disability in violation of Title 18 U.S.C. § 1920. The Office explained that appellant falsely presented/omitted his earnings in an effort to obtain benefits under fraudulent pretenses and noted that 5 U.S.C. § 8148(a) expressly provided that any individual who is convicted of fraud related to the application for or receipt of benefits under the Act forfeits their right to any entitlement under the Act for any injury occurring on or before the date of such conviction. The Office advised appellant that it was terminating his right to benefits effective May 23, 1996 and that any checks received after that date must be returned to the Office. It additionally advised that the Office would pay for authorized medical treatment received prior to the date of this decision, but that further medical treatment after the date of this decision would not be paid.

By decision dated June 28, 1996, the Office found that appellant had forfeited his compensation entitlement for the periods December 8, 1983 through February 17, 1990 and from May 20, 1991 through May 25, 1996 because he received earnings from self-employment and other employment while he was receiving compensation for temporary total disability from the Office.

On June 28, 1996 the Office also made a preliminary determination that an overpayment of compensation had occurred in appellant's case in the amount of \$422,686.53 because he forfeited his right to compensation for the periods December 8, 1983 through February 17, 1990 and May 20, 1991 through May 25, 1996 by failing to report, his employment and earnings in accordance with 5 U.S.C. § 8106.

By letter dated July 25, 1999, appellant through his representative, requested a hearing on the fact and amount of forfeiture, the fact and amount of the overpayment, the issue of fault and the denial of waiver of the overpayment.

On November 10, 1999 the hearing representative finalized the Office's finding of an overpayment and found that the overpayment in the amount of \$302,851.41 occurred because appellant failed to report earnings from employment activities during times when he was receiving compensation for temporary total disability and, therefore, his compensation benefits were subject to forfeiture. He further found that appellant was at fault in the creation of the overpayment¹ in the amount of \$302,851.41 as he knowingly failed to report earnings from employment activities, such that waiver could not be granted,² and he noted that, in determining appellant's monthly income and expenses, appellant had refused to provide his spouse's current

¹ He found that appellant "clearly possessed the age, intelligence/comprehension and educational background to comply with the filing requirements of the Office."

² The hearing representative determined that the periods of overpayment included January 8, 1984 through March 8, 1985; June 1, 1985 through October 18, 1989; and May 20, 1991 through March 6, 1994. He did not address the period of March 19, 1990 through May 19, 1991 as appellant had not requested a hearing on that period.

income, which in 1996 was approximately \$4,075.00 per month. The hearing representative found that no reasonable payment plan for restitution could be developed as vital information was not provided and, therefore, found that the entire sum was due and payable.

On July 21, 2000 appellant's debt was compromised to a new balance of \$161,341.52 to be repaid within 545.13 months.

The Board finds that appellant failed to report his earnings from self-employment and other income during the periods December 8, 1983 through February 17, 1990 and May 20, 1991 through May 25, 1996, which resulted in a forfeiture of compensation under 5 U.S.C. § 8106(b)(2).

Section 8106(b) of the Act³ states 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 times the Secretary specifies.... An employee who--

- (1) fails to make an affidavit or report when required; or
- (2) knowingly⁴ omits or understates any part of his earnings;

forfeits his right to compensation with respect to any period for which the affidavit or report was required. Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee or otherwise recovered under section 8129 of this title, unless recovery is waived under that section.”⁵

The record reveals that on March 8, 1985, September 1, 1986, August 25, 1987, July 17, 1988, October 19, 1989, May 19, 1991, April 25, 1992, June 16, 1993 and March 6, 1994, appellant completed CA-1032 forms indicating that he had no employment, employment activity or earnings for the 15 months preceding the date of signature of each form.

However, investigation of appellant's employment activities, income and corporation deposits for the time periods covered by the CA-1032 forms revealed that appellant had unreported earnings for the identified years as follows: for 1984 appellant had earnings of \$4,435.00; for 1985 he had earnings of \$12,993.52; for 1986 he had earnings of \$21,437.48; for

³ 5 U.S.C. § 8106(b).

⁴ The Board has held that “knowingly” under this section is defined as “with knowledge; consciously; intelligently; willfully; and intentionally.” See *Christine P. Burgess*, 43 ECAB 449 (1992).

⁵ While section 8106(b)(2) refers only to partially disabled employees, the Board has held that the test for determining partial disability is whether, for the period under consideration, the employee was in fact either totally disabled or merely partially disabled and not whether he received compensation for that period for total or partial loss of wage-earning capacity. *Ronald H. Ripple*, 24 ECAB 254, 260 (1973). The Board explained that a totally disabled employee normally would not have any employment earnings and, therefore, a statutory provision about such earnings would be meaningless. 24 ECAB at 260.

1987 he had earnings of \$20,400.00; for 1988 he had earnings of \$19,700.00; for 1989 he had earnings of \$11,248.30; for 1990 he had earnings of \$7,428.07; for 1991 he had earnings of \$15,461.66; for 1992 he had earnings of \$7,440.91; and for 1993 he had earnings of \$7,139.65.

As the record documents that appellant had significant unreported income each year from 1984 through 1993 and as he completed CA-1032 forms on March 8, 1985, September 1, 1986, August 25, 1987, July 17, 1988, October 19, 1989, May 19, 1991, April 25, 1992, June 16, 1993 and March 6, 1994 indicating that he had no employment, employment activity or outside income for the 15 months preceding the date of signature of each form, he knowingly omitted and understated his earnings on the required CA-1032 forms.

Appellant had been advised by a December 28, 1983 letter, Form CA-1049 and multiple times thereafter that “If you return to your former job or employer or obtain any other employment, [you must] submit the following information to the Office at once: (1) Name and address of employer; (2) Date you returned to work; (3) Type of work you are performing; (4) Your weekly pay rate; and (5) Number of hours worked per week. Your rate of pay should include not only cash but also ‘wages in kind,’ such as board and lodging. If you are self-employed (such as farming, operating a store or business, etc.) your rate of pay should be what it would have cost you to hire someone else to do the same work....” The record, therefore, supports that appellant knowingly omitted reporting his employment activities and earnings for the periods covered by the CA-1032 forms. Consequently, he forfeited his right to compensation under 5 U.S.C. § 8106(b)(2) with respect to any period for which the affidavit or report was required.

Appellant contends that he did not receive any profit in his employment activities and lost money in his business. However, even if his expenses exceeded the earnings generated from his employment activities, appellant was still required to report these to the Office.⁶ The Office Form CA-1032 does not instruct the employee to report earnings from self-employment based on profit or loss. Rather, the form requires the employee to report what it would have cost to have someone else do the same work and to report earnings even if operated at a loss.⁷

The Board further finds that this forfeiture created an overpayment, which was compromised to the amount of \$161,341.52 and that he was at fault in the creation of the overpayment, such that the overpayment cannot be waived.

Section 8129(a) of the Act⁸ provides that where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled. Section 10.441(b) of Title 20 of the Federal Code of Regulations provides that where there are no further payments due and an overpayment has been made to an individual by reason of an error of fact or law, such individual, as soon as the mistake is discovered or his attention is

⁶ See *Sherwood T. Rodrigues*, 37 ECAB 617 (1986).

⁷ See *Gary L. Allen*, 47 ECAB 409 (1996).

⁸ 5 U.S.C. §§ 8101-8193.

called to same, shall refund to the Office any amount so paid or, upon failure to make such refund, the Office may proceed to recover the same. Section 8129(b) describes the only exception to the Office's right to adjust later payments or to recover overpaid compensation:

“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.”⁹

Thus, before the Office may recover an overpayment of compensation, it must determine whether the individual is without fault. Section 10.433(a) of the implementing federal regulations provides the following:

“(a) [The Office] may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from [the Office] are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment--

- (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.¹⁰

“(b) Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.”

By letter dated July 19, 1999, the Office informed appellant that it had made a preliminary determination that he was at fault in the creation of the overpayment based on the second standard above: failure to furnish information that the individual knew or should have known to be material. Appellant was advised by the December 28, 1983 letter and subsequent CA-1032 forms of his obligation to report the name and address of any employer; the date he returned to work; the type of work he was performing; his weekly pay rate; and the number of

⁹ *Id.* at § 8129(b).

¹⁰ 20 C.F.R. § 10.433(a).

hours he worked per week and to report his rate of pay including not only cash but also ‘wages in kind,’ such as board and lodging and, regarding self-employment to report the rate of pay based on what it would have cost him to hire someone else to do the same work. The Board finds that appellant knew or should have known that he was required to report all earnings from employment, self-employment and income for the periods covered by the required reporting forms. As appellant knowingly omitted answers on the Forms CA-1032 and as he failed to provide the material information as requested, the Board finds that he is at fault in the creation of the overpayment and is not entitled to waiver of the overpayment.

Because appellant is not entitled to any further continuing compensation benefits, the recovery of the overpayment is not within the jurisdiction of the Board.¹¹

Accordingly, the November 10, 1999 decision of the Office of Workers’ Compensation Programs is hereby affirmed.

Dated, Washington, DC
May 16, 2002

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹¹ See *Sherry A. Hunt*, 49 ECAB 467 (1998).