

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PHILIP E. WOLF and DEPARTMENT OF THE ARMY,
INSTALLATION SUPPLY SERVICES DIVISION, Fort Lewis, WA

*Docket No. 03-515; Submitted on the Record;
Issued April 28, 2003*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant forfeited his compensation from July 29, 1998 to October 29, 1999 because he knowingly failed to report his employment activities; (2) whether appellant received an overpayment of compensation in the amount of \$17,257.11 during the period of the forfeiture; and (3) whether the Office properly found that appellant was at fault in the creation of the overpayment and that, therefore, the overpayment was not subject to waiver.

On August 8, 1989 appellant, then a 41-year-old woodworker, filed a claim for a traumatic injury occurring on August 7, 1989 in the performance of duty. The Office accepted appellant's claim for lumbosacral strain, lumbar subluxation and a herniated disc at L5-S1.

Appellant stopped work on August 8, 1989 and returned to limited-duty employment on September 19, 1990 for four hours a day. He stopped work again from November 4, 1990 until October 7, 1991, when he returned to light work for four hours a day. In a letter dated January 28, 1991, the Office informed appellant that it was placing him on the periodic rolls effective October 30, 1990 and that he should notify the Office immediately if he returned to work in order to avoid an overpayment of compensation.¹

By letter dated November 9, 1999, the employing establishment informed the Office as follows:

“[Appellant] is working on the side doing construction/labor type work and has been bragging about it in bars and to others. One of the people he contracted to do work for came and reported this info[r]mation to our civilian personnel office. She brought with her the contract he had written up along with photo[graphs] she took of him doing the work. [Appellant] requested she pay him cash. She refused

¹ The Office did not issue a formal loss of wage-earning capacity determination.

and paid him by check. She included a [copy] of her bank statement backing this up. After he saw her taking pictures he stopped work. She is taking him to small claims court to redeem half of the money she paid him.”

The record contains photographs of appellant working with a dump truck and a September 15, 1999 proposal to perform work submitted by appellant to Mr. Kenneth O. Miller. The record also contains a list of receipts for materials and a notice of small claim in which appellant was directed to appear in court on November 9, 1999.

In a report of interview dated October 13, 2000, an investigator with the Department of Labor’s Office of the Inspector General (OIG) stated that appellant, in the interview, related that his wife contracted with Mr. Miller to perform excavation work for Mr. Miller. The investigator further stated:

“[Appellant’s wife] did a lot of the work at issue. [He] also worked on the project. [Appellant] ran the backhoe to prep[are] for installation of the power pole and did some of the grading of the driveway. [Appellant] only hauled in a couple of loads of rock; either his wife or others could have delivered the rest. He ‘guesstimates’ he worked on the Miller job a total of about 20 hours over a six-month period.”

The investigator indicated that Mr. Miller sued appellant over a work and payment dispute and that a November 9, 1999 trial resulted in a judgment against him for \$257.97. The investigator related:

“[Appellant] did not report the work and earnings in question on the Ltr. [letter] [EN]1032 dated October 29, 1999 because of the uncertainty of the outcome of [the] impending law suit; he did [not] know how much, if any, money they would realize after any possible judgments. [Appellant] did not report the work and earnings to the [Office] after the suit was resolved and he knew how much they were ultimately paid because it was [not] time for his usual and customary method of reporting.... [Appellant] is not denying he performed labor during the period cover[ed] by the questionnaire dated October 29, 1999; however, he does deny he intentionally violated the law by not reporting it on that document.”

In a report of interview dated May 25, 2000, an OIG investigator related that Mr. Miller stated:

“[Appellant] does construction work utilizing his dump truck, backhoe and cat [bulldozer].... Mr. Miller believes [appellant] gets a week or two of construction work each month.... [Appellant] has said he does [not] want to be paid by check and always requests cash because he does [not] want any record of what he [has] been paid. He does [not] want any checks to show up in his back records; although he has never said why.”

The investigator stated that Mr. Miller related:

“Last year, [Mr.] Miller planned to move his daughter Adrienne Watts’ mobile home onto the property [Mr.] Miller owns.... One day when they were in the bar together, [Mr.] Miller told [appellant] about the planned move. They discussed it and [appellant] told [him] he [would] give him a good deal on the work that needed to be done. On May 24, 1999 [appellant] gave [Mr.] Miller a preliminary bid of \$3,030.00....”

The investigator stated that Mr. Miller related:

“[Appellant] worked on [Mr.] Miller’s contract for about two or three weeks before he pulled out. He used his backhoe, bulldozer and dump truck for the work on [Mr.] Miller’s property. During the time he worked there, [appellant] did [not] work every day and when he was there, [he] usually worked just three or four hours at a time. On one occasion, [appellant] took the backhoe away for use on another job and it was gone about two weeks before [he] brought it back.”

The investigator further related that Mr. Miller indicated that appellant objected to being photographed at work.

A November 6, 2000 OIG investigative report disclosed that appellant “engaged in commercial excavation and construction work which he neglected to report to [the Office]” and failed “to report the work activity on the EN1032 he submitted covering the relevant period.”

By decision dated October 25, 2001, the Office found that appellant forfeited his right to compensation for the period July 29, 1998 to October 29, 1999 because he knowingly failed to report earnings from his self-employment. On October 25, 2001 the Office also notified appellant of its preliminary determination that he had received an overpayment of compensation in the amount of \$17,257.11 because he forfeited his entitlement to compensation for the period July 29, 1998 to October 29, 1999. The Office further notified appellant of its preliminary determination that he was at fault in the creation of the overpayment.

On November 13, 2001 appellant requested a prerecoupment hearing and submitted a completed overpayment recovery questionnaire and supporting financial documentation.

At the hearing, held on July 10, 2002, appellant’s representative maintained that appellant had a job as a farmer and “submitted information about his farm earnings on prior [EN]1032s.” The representative argued that appellant’s “construction work was part of his farm work” and, therefore, the unreported information was not relevant because it could not be used in a wage-earning capacity determination.

By decision dated September 23, 2002, the hearing representative affirmed the Office’s October 25, 2001 forfeiture decision and finalized the finding that appellant was at fault in the creation of an overpayment in the amount of \$17,257.11 for the period July 29, 1998 to

October 29, 1999.² The hearing representative found that, as appellant was not entitled to receive further compensation, the entire amount of the overpayment should be refunded.

The Board finds that the Office properly determined that appellant forfeited compensation from July 29, 1998 to October 29, 1999 because he knowingly failed to report earnings from his employment activities.

Section 8106(b) of the Federal Employees' Compensation Act provides that an employee who "fails to make an affidavit or report when required or 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."³

The Board has held that it is not enough merely to establish that there were unreported earnings or unemployment. Appellant can be subjected to the forfeiture provisions of 5 U.S.C. § 8106(b) only if he "knowingly" failed to report employment or earnings.⁴ The term "knowingly" as defined in the Office implementing regulation, means "with knowledge, consciously, willfully or intentionally."⁵

On October 29, 1999 appellant signed an affidavit on a Form EN1032 covering the previous 15-month period. On the form he answered "no" to the question, "[w]ere you self-employed or involved in any business enterprise in the past 15 months?" He further listed only his part-time work for the employing establishment in response to the question, "[d]id you work for any employer during the past 15 months?" In signing the form, appellant certified that, except for his part-time employment with the employing establishment, he had not worked or had other self-employment during the covered period. The form advised him that he must report all employment. The form specifically warned appellant that anyone "who fraudulently conceals or fails to report income or other information which would have an effect on benefits or who makes a false statement or misrepresentation of a material fact" in claiming compensation benefits under the Federal Employees' Compensation Act might be subject to criminal prosecution.

In a report of interview dated October 13, 2000, appellant acknowledged to the OIG investigator that he had performed work for the Millers during the period in question. Appellant stated that he did not report his earnings on the October 29, 1999 Form EN1032 because he was waiting to determine what the exact earnings would be after resolution of the lawsuit. However, the reporting requirements of the Form EN1032 are clear and unambiguous. The issue is not whether appellant made a profit from his employment activities but whether he worked for an employer, was self-employed or involved in a business enterprise. The Form EN1032 signed by appellant clearly stated that all employment activities had to be reported regardless of profit.

² The hearing representative issued a prior decision dated August 28, 2002 which contained a typographical error regarding the amount of overpayment.

³ 5 U.S.C. § 8106(b).

⁴ *Barbara L. Kanter*, 46 ECAB 165 (1994).

⁵ 20 C.F.R. § 10.5(n).

Appellant argued at the hearing that his earnings were not reportable because he was performing farm work which would not be included in a wage-earning capacity determination. However, the OIG investigator concluded in his November 6, 2000 report that appellant had not reported work activity of “commercial excavation and construction” on his Form EN1032. The issue of whether such work could be included in a wage-earning capacity determination is not relevant to the reporting requirements of the Form EN1032, which necessitates disclosure of all self-employment and earnings.

The factual circumstances of record, including appellant’s request for cash payments and his signing of strongly-worded certification clauses on the EN1032 form, provide persuasive evidence that he “knowingly” understated his earnings and employment activities. His failure to report his earnings and employment must be considered to have been made with knowledge of the reporting requirements. The Office, therefore, properly found that appellant forfeited his compensation from July 29, 1998 to October 29, 1999.

The Board finds that appellant received an overpayment of compensation in the amount of \$17,257.11 during the period of the forfeiture.

The record indicates that the Office paid appellant compensation from July 29, 1998 to October 29, 1999 in the amount of \$17,257.11. Based on appellant’s forfeiture of his right to compensation during this period, he received an overpayment of compensation for this period in the amount of \$17,257.11.

The Board further finds that the Office properly determined that appellant was at fault in creating an overpayment of compensation and that, therefore, the overpayment was not subject to waiver.

Section 8129(b) of the Federal Employees’ Compensation Act⁶ provides that “[a]djustment 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.” Section 10.433 of the Office’s implementing regulation⁷ provides that in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. 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....”

⁶ 5 U.S.C. § 8129(b).

⁷ 20 C.F.R. § 10.433.

In this case, the Office found that appellant was at fault under all three standards in creating the overpayment. The record establishes that appellant had earnings from construction and excavation work during the period of the forfeiture and knowingly failed to furnish this material information to the Office. On October 29, 1999 appellant signed a certification clause on an EN1032 form which advised him that he might be subject to civil, administrative or criminal penalties if he knowingly made a false statement or misrepresentation or concealed a fact to obtain compensation. Thus, by signing the form, appellant is deemed to have acknowledged his duty to fill out the form properly, including the duty to report any employment or self-employment activities or income. The evidence of record shows that appellant was aware or should have been aware of the materiality of the information that he had employment and earnings in connection with his work for the Millers. As he failed to provide information to the Office regarding his employment during the period covered by the form, he is at fault in creating the overpayment and is not entitled to waiver of recovery of the amount of \$17,257.11.

Regarding the repayment of the overpayment of compensation, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Federal Employees' Compensation Act. Where, as in this case, a claimant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to recovery of the overpayment under the Debt Collection Act.⁸

The decision of the Office of Workers' Compensation Programs dated September 23, 2002 is affirmed.

Dated, Washington, DC
April 28, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁸ See *Robert S. Luciano*, 47 ECAB 793 (1996).