U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DANIEL J. BALADEZ and DEPARTMENT OF THE AIR FORCE, KELLY AIR FORCE BASE, San Antonio, TX

Docket No. 01-439; Submitted on the Record;
Issued June 4, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly found that appellant forfeited his right to compensation in the amount of $34,371.91 for the period July 9, 1990 through November 11, 1992 because he knowingly failed to report his employment activities.

Appellant injured his lower back while fitting some pipes on April 9, 1988. The Office accepted his claim for lumbar sprain and herniated disc at L5-S1. He returned to limited duty for four hours per day on October 2, 1991 and stopped working on December 3, 1993 due to continued lower back pain. Appellant has not returned to work since that time.[1]

Following his 1988 work injury, appellant completed CA-1032 information request forms dated October 9, 1991 and November 11, 1992. He indicated on the 1991 form that he was not employed in a capacity other than part time at his employing establishment and that he was not self-employed from May 9, 1990 through October 9, 1991. On the 1992 form, appellant indicated the same for the period from August 11, 1991 through November 11, 1992.

In a November 2, 1998 investigative memorandum, the Office determined that, as of May 4, 1990, appellant and his wife filed an Assumed Name Certificate for Lone Wolf Imports at San Antonio, Bexar County, Texas. The Office stated that on May 29, 1997, the comptroller of public accounts, State of Texas provided records relating to Lone Wolf Imports, and that

[1] This is the second time this case has been before the Board. By decision dated October 22, 1998, the Office advised appellant that it was reducing his compensation because the weight of the medical evidence showed that he was no longer totally disabled for work due to the effects of his April 5, 1988 employment injury and that the evidence of record showed that the position of telephone solicitor represented his wage-earning capacity. By decisions dated November 24, 1998 and February 18, 1999, the Office denied reconsideration. In a decision issued June 6, 2001, Docket No. 99-1641, the Board reversed the October 22, 1998 Office decision, finding that the Office did not meet its burden to reduce appellant's compensation effective October 22, 1998 based on his capacity to perform the duties of a telephone solicitor.

appellant and his wife were provided sales tax number 3-0114-29915-6 for their general partnership business, Lone Wolf Imports. The memorandum further stated that the Office of Special Investigations interviewed appellant at the employing establishment on May 15, 1998, at which time he provided a written statement. Appellant stated that he was not employed, but that he had started an arts and crafts business in approximately 1989 or 1990. He asserted that Lone Wolf Imports was a home-based hobby which required him to register with the City of San Antonio and the Texas Comptroller's Office-Sales Tax Division. Appellant claimed that, although he advertised his "hobby" in the newspaper, he received no responses and only his friends purchased goods from Lone Wolf Imports. He also asserted that he only sold approximately $30.00 to $40.00 of goods in his "hobby." Accompanying the memorandum was a list of exhibits which supported its contentions.

In a decision dated February 18, 1999,[2] the Office found that appellant had forfeited his right to compensation in the amount of $34,371.91 for the period July 9, 1990 through November 11, 1992. The Board stated that this forfeiture resulted when appellant knowingly failed to report on his CA-1032 yearly reporting forms that he was self-employed for the period July 9, 1990 through November 11, 1992.

On July 16, 1999 appellant requested an oral hearing, which was held on March 1, 2000. At the hearing, he argued that, although he admittedly established a business and advertised it in a local newspaper, he never received a response and received no income from the business. Appellant stated that, because of this failure to earn income, his accountant advised him that he was not actually "self-employed," and he believed that this venture was more like a hobby.

By decision dated August 21, 2000, an Office hearing representative affirmed the Office's February 18, 1999 decision.

The Board finds that the Office properly found that appellant forfeited his right to compensation for the period July 9, 1990 through November 11, 1992 in the amount of $34,371.91 because he knowingly failed to report his employment activities.

[2] It is not clear from the record exactly when the Office issued its original decision finding that a forfeiture had occurred, as a copy of this decision is not contained in the record. The hearing representative stated in his decision that the Office decision from which appellant was appealing was dated February 18, 1999, although he stated in a footnote that "it appears that the original decision was issued with inappropriate appeal rights." The February 18, 1999 decision, to which the hearing representative refers, however, appears to be a copy of the Office decision denying appellant's request for reconsideration of its October 22, 1998 decision reducing compensation. However, this decision was attached to an undated Office memorandum which provides an analysis indicating the reasons underlying the Office decision finding that a forfeiture had occurred from July 7, 1990 through November 11, 1992 in the amount of $34,371.91. It is likely that the decision was issued at approximately the same time as the reconsideration decision, as the Office investigative memorandum was issued in November 1998 and appellant's appeal was dated July 1999. In any case, any error is harmless, as the undated Office memorandum and the August 21, 2000 decision by the Office representative properly found that a forfeiture had occurred.

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 times 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. 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."[3]

The record establishes that the Office specifically notified appellant in the Office Form EN1032, which he completed and signed on October 9, 1991, that if he obtained employment, including self-employment (such as sales, service, operating a store or business) he was required to report any such enterprise in which he worked "even if operated at a loss," and he was required to report this employment, including the value of housing, meals, equipment and reimbursed expenses in a business. The form required appellant to provide information regarding the dates of employment, type of work performed, number of hours worked per week, rate of pay and name of firm or business; he was required to submit certain information to the Office "at once" and was warned that his willful failure to comply with the conditions of his receipt of compensation could result in the termination or forfeiture of benefits and liability for any overpayment. The Form EN1032 advised 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 Office benefits might be subject to criminal prosecution. Appellant was therefore notified, as early as October 9, 1991, that he was required to report whether he was engaged in self-employment. The Form EN1032 appellant signed on October 9, 1991 covered the 15-month period preceding the date he signed the form, *i.e.*, July 9, 1990 to October 9, 1991. In this form appellant responded "no" to the questions concerning employment, self-employment and earnings and responded "yes" to a question regarding whether he was unemployed for the 15 months prior to October 9, 1991. Moreover, he affirmatively represented to the Office that he was unemployed and remained unable to earn wages. Appellant subsequently completed and signed a second Form EN1032 on November 11, 1992 covering the 15-month period prior to November 11, 1992.

In these forms, the Office notified appellant of his responsibility to complete the forms and provide relevant information concerning his employment status and earnings during the periods covered by the forms. The record reveals, however, that appellant was actively engaged

[3] 5 U.S.C. § 8106(b). 20 C.F.R. § 10.125(c) concerning affidavits or reports by employees of employment and earnings, provides in part: "Earnings from employment referred to in this section or elsewhere in this part means gross earnings or wages before any deductions and includes the value of subsistence, quarters, reimbursed expenses, or any other advantages received in kind as a part of wages or remuneration."

in self-employment during these periods. The Office's investigation revealed that appellant filed an Assumed Name Certificate with Bexar County, Texas, for a business called Lone Wolf Imports at San Antonio, and that according to the comptroller of public accounts, State of Texas, he and his wife were provided sales tax number 3-0114-29915-6 for their general partnership business. Appellant admitted in his interview with the Office investigator and at the hearing that he had started an arts and crafts business, Lone Wolf Imports, in approximately 1989 or 1990, which he claimed was a home-based hobby which required him to register with the City of San Antonio and the Texas Comptroller's Office-Sales Tax Division. Appellant asserted that he failed to attract any customers by advertising his "hobby" in the local newspaper, and garnered his only sales of Lone Wolf goods from friends. He asserted that he only sold approximately $30.00 to $40.00 of goods in his "hobby"; nevertheless, the totality of the instant record demonstrates that appellant engaged in self-employment by starting and operating Lone Wolf Imports. Therefore, appellant was engaged in self-employment pursuant to 5 U.S.C. § 8106(b) and the implementing regulations, which he was required to report to the Office. Appellant, however, can only be subjected to the forfeiture provision of section 8106(b) if he "knowingly" failed to report employment or earnings.[4]

As forfeiture is a penalty, it is not enough merely to establish that there were unreported earnings from employment. The relevant inquiry on this appeal, therefore, is whether appellant "knowingly" failed to report his employment activities and earnings. The term "knowingly" is not defined within the Act or its implementing regulations. In common usage, the Board has recognized that the definition of "knowingly" includes such concepts as "with knowledge, consciously, willfully or intentionally."[5]

The factual evidence developed in this case indicates that appellant was knowingly engaged in self-employment from July 9, 1990 through November 11, 1992. Appellant admitted that he started his own business in both his May 1998 interview with the Office investigator and his hearing testimony. There is also a question in this case regarding appellant's earnings from his self-employment. Pursuant to 20 C.F.R. § 10.5(g)(2), "earnings" from employment or self-employment are defined as:

> "(2) A reasonable estimate of the cost to have someone else perform the duties of an individual who accepts no remuneration. Neither lack of profits, nor the characterization of the duties as a hobby, removes an unremunerated individual's responsibility to report the estimated cost to have someone else perform his or her duties."

Thus, although appellant stated that the business was merely a "hobby" he started to develop an interest outside of and apart from the employing establishment, he had a responsibility under 20 C.F.R § 10.5(g)(2) to report the estimated cost to have someone else perform his duties. In addition, appellant admitted that he placed ads in the local newspaper in an attempt to attract customers, an action which was clearly in furtherance of a business purpose. Thus, with regard to the Form CA-1032 appellant signed on October 15, 1990 and November 20,

[4] *Charles Walker*, 44 ECAB 641 (1993); *Christine P. Burgess*, 43 ECAB 449 (1992).

[5] 20 C.F.R. § 10.5(n).

1991, the evidence of record establishes that appellant "knowingly and willingly" falsified, concealed, or covered up a material fact and made false, fictitious and fraudulent statements, and representations. The Board therefore finds that, regarding the CA-1032 forms he signed on October 9, 1991 and November 11, 1992, appellant consciously and knowingly omitted relevant information concerning his employment activities with Lone Wolf Imports. Appellant responded "no" to the questions concerning employment or self-employment and answered "yes" to the question inquiring whether he was unemployed for all periods during the previous 15 months. 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.[6] Despite his protestations that he had minimal earnings from his "hobby," appellant had a responsibility to report on the CA-1032 forms that he was engaged in self-employment. Nevertheless, in response to the Office's inquiries, appellant signed the CA-1032 forms certifying that all statements provided in response to the questions on the form were true, complete and correct to the best of his knowledge and belief.[7] The Office's investigation, however, revealed that appellant was actively engaged in employment through his operation of Lone Wolf Imports during the periods in question. Therefore, appellant knowingly engaged in "self-employment" pursuant to 5 U.S.C. § 8106(b) and the implementing regulations,[8] which he was required to report to the Office.[9]

Under these circumstances, therefore, the Board concludes that appellant "knowingly" omitted his earnings under section 8106(b)(2) of the Act by failing to report his employment activities and earnings on the applicable EN1032 forms for the period July 9, 1990 to November 11, 1992. Accordingly, the Board finds that the clear weight of the evidence in this case is sufficient to establish that appellant knowingly failed to report he was engaged in self-employment for the period July 9, 1990 to November 11, 1992, in violation of 5 U.S.C. § 8106(b), and the Board therefore affirms the Office's determination that appellant forfeited the total amount of compensation he received for that period.[10]

[6] *See Walker, supra* note 4*; see Mamie L. Morgan*, 41 ECAB 661 (1990).

[7] The form indicated that commission employment and self-employment should be reported regardless of whether income resulted from such efforts. Appellant did not provide any indication on these forms that he "worked for anyone" during the period of compensation claimed on the forms.

[8] *See* 20 C.F.R. § 10.525-28.

[9] *See William C. Austin*, 39 ECAB 357 (1988).

[10] *Joseph M. Popp*, 47 ECAB 624 (1997); *Wayne P. Hammer*, 44 ECAB 286 (1992).

The decision of the Office of Workers' Compensation Programs dated August 21, 2000 is hereby affirmed.

Dated, Washington, DC
June 4, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member