

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MELVIN E. GIBBS and DEPARTMENT OF DEFENSE,  
DEFENSE LOGISTICS AGENCY, BALTIMORE CONTRACT  
ADMINISTRATION MANAGEMENT AREA, Towson, MD

*Docket No. 01-2252; Oral Argument Held January 9, 2003;  
Issued March 6, 2003*

Appearances: *Melvin E. Gibbs, pro se; Jim Gordon, Esq.*, for  
the Director, Office of Workers' Compensation Programs.

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DECISION and ORDER

Before ALEC J. KOROMILAS, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant forfeited compensation for the period October 27, 1994 through March 30, 1996, because he failed to report his employment for that period; and (2) whether appellant was at fault in the creation of a \$41,565.85 overpayment in compensation.

On March 24, 1987 appellant, then a 43-year-old contract administrator, filed a claim for mental anguish. He stated that he was called into his superior's office on March 23, 1987 and had his integrity questioned without cause. Appellant stopped work on March 25, 1987, returned to work on March 31, 1987 and worked intermittently thereafter. In a subsequent statement, appellant indicated that he was assigned on March 17, 1987 to a corporation to administer a defense contract but was recalled by the employing establishment after four hours. The employing establishment indicated that appellant was being investigated for use of overtime on days he was in training as well as for his travel expenses. The employing establishment found that appellant was over reimbursed for overtime and travel expenses.

In a May 11, 1988 decision, the Office denied appellant's claim for compensation on the grounds that he had not met his burden of proof in establishing that his emotional condition was causally related to his employment. Appellant requested a hearing before an Office hearing representative. In an October 5, 1988 decision, an Office hearing representative found that the record needed further development on whether appellant's emotional reaction to the investigation of travel expenses constituted an injury sustained in the performance of duty. The Office's May 11, 1988 decision was set aside and remanded for further development. The Office subsequently accepted appellant's claim and began payment of temporary total disability compensation effective July 22, 1989. The Office instructed appellant to report any return to

employment and report any wages earned. The Office stated that if appellant was self-employed, he must report as his pay rate what it would cost to hire someone else to perform the same work.

The Office requested appellant to complete CA-1032 forms to report whether he had any employment for 15 months prior to the date of filing of the form. The CA-1032 form required appellant to report any employment, for which he received a salary, commission, wages, piecework or other payment. The Office indicated that if appellant performed work but was not paid, he was to report what it would have cost the employer to pay someone to perform the same type of work as appellant. He was also instructed to report earnings from self-employment. The Office stated that appellant was to report any enterprise in which he worked and from which he received revenue, even if it operated at a loss or if profits were reinvested. The Office again stated that appellant must show as the rate of pay what it would have cost to hire someone to perform the work he did. In CA-1032 forms dated November 7, 1989, July 20, 1990, November 2, 1992, October 22, 1993, October 27, 1994 and December 29, 1995, appellant indicated that he had not been employed during the periods covered by the reporting form.

In a January 6, 1995 letter, appellant noted that his physician had recommended permanent disability status. He requested information on when he might be put in a retirement status. Appellant stated that because of the severe trauma he experienced at work, he was unable to return to that work environment. He commented that the only alternative was for him to have his own small business. As he did not have sufficient money to start a small business, no business plan would be an option without having almost \$50,000.00 and continued payment for a three-year period. In an April 5, 1995 letter, appellant stated that he would need six months to a year to regain his work skills and that he would not be working in a paid capacity. He asked the Office to inform him if the activity would conflict with his benefits. In a November 22, 1995 letter, appellant stated that his one-year working experiment would end in the spring and had been a complete failure. In a December 29, 1995 letter, accompanying a CA-1032 form of that date, appellant indicated that his "experiment" began in February 1995 and would end on or about April 1996. He stated that he had received no compensation of any kind. Appellant related that his agreement obligated him to pay for his participation to the amount of \$35,000.00 plus costs. He stated that he would be approximately \$50,000.00 in debt at the conclusion of the experiment. He asked if money could be provided toward his training expense.

In a February 28, 1996 letter, the Office asked appellant to furnish information on the business in which he had been involved, including the name and address of the business, the manager, the type of business, the duties he performed, what income he received from the business and the names and addresses of three clients and three suppliers, if any. Appellant did not respond to the Office's letter. In an April 15, 1996 letter, the Office warned appellant that his compensation would be suspended if he did not respond to its February 28, 1996 letter.

In a December 14, 1995 letter, the Office referred appellant to Dr. David Lockwood, a Board-certified psychiatrist, for an examination and second opinion. Appellant was advised that his compensation would be suspended if he did not submit to the examination. Appellant did not appear for the examination. In a March 14, 1996 letter, the Office gave appellant 14 days to give his written explanation for failing to appear for the examination and was again advised that his compensation would be suspended for failing to appear for the medical examination. Appellant

did not respond within the time allotted. In an April 12, 1996 decision, the Office suspended appellant's compensation effective March 31, 1996, for refusing to submit for an examination.<sup>1</sup>

The employing establishment submitted an April 17, 2001 report of an investigation into appellant's actions while he was receiving temporary total disability compensation. A senior criminal investigator indicated that appellant worked as an attorney in South Carolina, incorporating a law firm on February 15, 1995 and representing clients by March 15, 1995. He further indicated that appellant was a partner in a law firm incorporated on January 16, 1996. The investigator noted that appellant represented indigent criminal defendants whose legal fees were paid by the state Office of Indigent Defense. He reported that appellant billed \$5,040.00 for services preceding his December 29, 1996 CA-1032 form statement and was paid \$1,890.00 for a portion of those services on November 28, 1995. He noted that appellant also was billed for work performed through March 4, 1996. He indicated that statements from witnesses and former clients indicated that appellant was paid at least \$8,250.00 on behalf of other criminal defendants he represented. Several of the witnesses indicated that appellant requested that he be paid in cash. The investigator also reported that appellant was the attorney of record in several civil suits, including a significant civil suit against the city of Florence, South Carolina. The investigator submitted a copy of telephone book advertising and listings for appellant, presenting himself as an attorney in private practice. The investigator presented statements from witnesses who saw appellant practicing in the courtroom or indicating that appellant served as the attorney of record in several cases. The investigator noted that checks in payment of appellant's work were issued by the Office of Indigent Defense to appellant's law firms. The investigator interviewed one of appellant's partners who stated that, when the law firm was formed on January 18, 1996, appellant and he were to receive 30 percent of the proceeds, the other partner was to receive 10 percent of the proceeds and the corporation was to retain 30 percent of the proceeds.

In a June 14, 2001 decision, the Office found that appellant had understated his earnings from self-employment for the period covered by the CA-1032 form dated December 29, 1995 and for the period he actually worked thereafter through March 30, 1996. The Office found that appellant forfeited compensation for the period October 27 through March 30, 1996, in the amount of \$41,359.06 because he knowingly omitted his earnings.

In a separate letter of the same date, the Office made a preliminary determination that appellant was at fault in the creation of the overpayment because he should have been reasonably aware that he was not entitled to receive compensation for lost wages for total disability while earning income from employment. The Office stated that appellant knew his responsibility to report such earnings because he was on the periodic rolls and had completed a CA-1032 form, but he had omitted material information and concealed earnings. The Office advised that appellant had a right to submit information if he disagreed that an overpayment occurred, with the amount of the overpayment or believed that the overpayment occurred through no fault of his own and recovery should be waived.

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<sup>1</sup> In an April 19, 1996 letter, appellant indicated that he had called information and found that there was no listing for Dr. Lockwood in Silver Spring, Maryland. The Board notes that Dr. Lockwood has an office in Kensington, Maryland.

In a June 23, 2001 overpayment recovery form, appellant stated that he had not received any income from self-employment or otherwise. He contended that the employing establishment lied in reporting that he was paid for representing clients. Appellant indicated that the law firm was paid but he was not. He claimed that he did not use any funds paid to the law firm for personal use. Appellant stated that he answered all requests by the Office accurately. He commented that he used his own funds to determine if he could return to work. Appellant reported that he had no assets, received \$700.00 a month in pension benefits and had total monthly expenses of \$2,650.00, including a monthly \$600.00 payment on a \$21,000.00 credit card debt.

In a July 25, 2001 decision, the Office found that appellant had received a \$41,359.06 overpayment in compensation because he had earnings from self-employment but failed to report his earnings on a CA-1032 form and failed to disclose his employment activities. The Office further found that the preliminary decision that appellant was at fault in the creation of the overpayment was correct because he failed to provide any evidence or arguments, which would support that the finding of forfeiture was incorrect and that he was not at fault in creating the overpayment.

The Board finds that the Office properly found that appellant forfeited compensation for the period covered by the CA-1032 form dated December 29, 1995.

Section 8106(b) of the Federal Employees' Compensation Act<sup>2</sup> provides that a partially disabled employee must report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times specified by the Secretary of Labor. The penalty for failing to make an affidavit or report when required or knowingly omitting or understating any part of an employee's earnings is forfeiture of his right to compensation during the period for which the affidavit or report was required.<sup>3</sup>

Appellant, however, can only be subjected to the forfeiture provision of 5 U.S.C. § 8106(b) if he "knowingly" failed to report employment or earnings. As forfeiture is a penalty, it is not enough merely to establish that there were unreported earnings from employment. The inquiry is where 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 had recognized that the definition of "knowingly" includes such concepts as "with knowledge," "consciously," "intelligently," "willfully" or "intentionally."<sup>4</sup>

The Office has the burden of proof of establishing that appellant did, either with knowledge, consciously, willfully or intentionally, fail to report earnings from self-employment.<sup>5</sup> To meet this burden of proof, the Office is required to closely examine appellant's activities and

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<sup>2</sup> 5 U.S.C. § 8106(b).

<sup>3</sup> *Terryl A. Geer*, 51 ECAB 168 (1999).

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

<sup>5</sup> *Anthony A. Nobile*, 44 ECAB 268 (1992).

statements in reporting employment or earnings.<sup>6</sup> The Office may meet this burden in several ways. The Office may meet this burden by appellant's own subsequent admission to the Office that he failed to report employment or earnings which he knew he should report. Similarly, the Office may meet this burden by establishing that appellant had pled guilty or was convicted of violating 18 U.S.C. § 1920 by falsely completing the affidavit section of the CA-1032 form.<sup>7</sup> Furthermore, the Office may meet this standard without an admission by appellant, if appellant failed to fully and truthfully complete the CA-1032 form and the circumstances of the case establish that appellant failed to fully and truthfully reveal the full extent of his employment activities and earnings. The Office may also meet this burden if it establishes through the totality of the factual circumstances that appellant's certification in a CA-1032 form, that he was not employed or self-employed, was false.

Appellant stated in a January 6, 1995 letter, that he was contemplating establishing a small business but indicated that he did not have sufficient funds. Appellant advised that he needed \$50,000.00 and continued payments for three years so that he could establish a business. In an April 5, 1995 letter, appellant indicated that he was getting into the legal system in reshaping his skills, which would take six months to a year. He stated that he would not be in a paid capacity for that period. In a November 22, 1995 letter, appellant stated that his work experiment had been a failure. In a supplement to the December 29, 1995 CA-1032 form, appellant stated that his agreement obligated him to pay \$35,000.00 for his participation and added that he would have \$50,000.00 in debt at the conclusion of his experiment. The Office asked appellant to respond to several specific questions about his business venture but appellant failed to respond. These letters by appellant and his failure to respond to the Office's letter requesting information show that appellant was aware that his attempt to return to work would affect his ability to receive temporary total disability compensation.

The Office 1032 forms advised appellant that he was to report any work performed in self-employment enterprises. The record clearly establishes that appellant was engaged in extensive self-employment activities during the period in question and had earnings that he knowingly failed to report to the Office. The investigation report documents that appellant worked as an attorney in private practice and had earnings from his self-employment activities in representing private clients and indigent criminal defendants. Appellant has not disputed that he was engaged in self-employment activities. Rather, he asserts that his activities did not result in reportable earnings as he incorporated his legal practice and did not have a profit from these activities. In defining earnings under the applicable federal regulations, the Office has noted:

“Earnings from employment or self-employment means:

“(1) Gross earnings or wages before any deduction and includes the value of subsistence, quarters, reimbursed expenses and any other goods or services received in kind as remuneration; or

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<sup>6</sup> *Royal E. Smith*, 44 ECAB 417 (1993).

<sup>7</sup> *Irish E. Ramsey*, 43 ECAB 1075 (1992).

“(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.*”<sup>8</sup> (Emphasis added.)

The record reflects that appellant was actively engaged in private practice as an attorney, a business enterprise. The 1032 forms specifically requested that appellant report revenues received from employment activities, even if operated at a loss or if profits were reinvested. It is well established that the lack of profits from a business enterprise does not remove the employee’s obligation to report the employment activity or the rate of pay of what it would cost to have someone else perform the duties of an individual who accepts no remuneration.<sup>9</sup> Appellant was obligated to report his earnings to the Office as required and his contention that his business operated at a loss is without merit. Under these circumstances, the Board finds that appellant knowingly omitted reporting his earnings to the Office. Appellant was appropriately advised of the reporting requirement and his failure to fully disclose his earnings forfeit his right to compensation for the period of the 1032 form filed on December 29, 1995.

On appeal, the Director of the Office moved to remand the case on the grounds that the Office erred when determining the extent of the period of forfeiture and thus the amount of the overpayment. The Director noted that, as the CA-1032 form only covered the period October 27, 1994 through December 29, 1995, this should be the period forfeited. The Director requested that this aspect of the case be remanded in order that the Office may recalculate the amount of the overpayment. This motion to remand in part will be granted.

The Board further finds that appellant was at fault in the creation of the overpayment and, therefore, recovery of the overpayment may not be waived.

Section 8129(a) of the Act provides, “Adjustment of 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 of recovery would defeat the purpose of [the Act] or would be against equity and good conscience.”<sup>10</sup> Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

Section 10.433(a) of the Office’s implementing regulation<sup>11</sup> provides as follows:

“[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 payment he or she receives from [the Office] are proper.

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<sup>8</sup> 20 C.F.R. § 10.5(g).

<sup>9</sup> See *Frank E. Rodgers, Jr.*, Docket No. 97-1139, issued June 10, 1999; *William C. Austin*, 39 ECAB 357 (1988).

<sup>10</sup> 5 U.S.C. § 8129(b).

<sup>11</sup> 20 C.F.R. § 10.433(a).

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. (This provision applies to the overpaid individual.)”<sup>12</sup>

The Office found that appellant was at fault in the creation of the overpayment because he failed to provide information about his employment, which he knew or should have known was material. The CA-1032 forms specifically indicated that appellant had to report any employment activity or earnings, including self-employment, even if the business ran at a loss. Appellant, therefore, was reasonably aware that information that he was self-employed as a lawyer was material information that should be furnished to the Office. Appellant’s failure to furnish this information created the forfeiture of compensation and the resulting overpayment of compensation. Appellant, therefore, was at fault in the creation of the overpayment. Recovery of the overpayment is not subject to waiver.

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<sup>12</sup> *Id.*

The decisions of the Office of Workers' Compensation Programs dated July 25 and June 14, 2001 are hereby affirmed, in part finding that appellant forfeited compensation for the period October 27, 1994 through December 29, 1995 and was at fault in the creation of the resulting overpayment. The case is remanded in accordance with the Director's motion to remand in part to recalculate the amount of the overpayment.

Dated, Washington, DC  
March 6, 2003

Alec J. Koromilas  
Chairman

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member