

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KIMBERLY A. WHITFIELD and U.S. POSTAL SERVICE,
POST OFFICE, Greensboro, NC

*Docket No. 02-163; Submitted on the Record;
Issued March 13, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant forfeited her compensation benefits for the period from June 1, 1997 to September 1, 1998 in the amount of \$16,064.46 on the grounds that she knowingly failed to report her earnings; and (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment.

On February 6, 1997 appellant, then a 30-year-old data conversion operator, alleged that on February 2, 1997 she injured her right shoulder and neck in the performance of duty. The Office accepted her claim for cervical strain, right shoulder strain and surgery on April 14, 1997. The employing establishment removed appellant from employment on May 15, 1997. The Office entered her on the periodic rolls on June 9, 1997. Appellant signed Office reporting EN1032 forms, on June 16, 1997, September 1, 1998, September 20, 1999 and September 1, 2000 indicating that after her termination by the employing establishment she had no earnings due to employment, self-employment or charitable work.

The Office received an investigative memorandum from the employing establishment dated December 6, 2000, which included appellant's application for employment with the School District of Hillsborough County, on July 23, 1997. The school indicated that she worked as a bus driver from July 28, 1997 to March 6, 1998 earning a total of \$8,775.57. The investigator stated that appellant initially denied working for the school system.

Appellant returned to work on March 19, 2001 earning \$400.00 a week. By decision dated May 30, 2001, the Office found that this position represented her wage-earning capacity and that she had no loss of earnings.¹

¹ Appellant did not request review of this decision in her appeal letter to the Board.

By decision dated July 11, 2001, the Office found that appellant had forfeited her compensation benefits for the period of June 1, 1997 through September 1, 1998 as she had unreported earnings as a school bus driver during that period. The Office issued a preliminary finding of overpayment in the amount of \$16,064.46 on July 11, 2001 noting that appellant failed to report her earnings during the 15-month period covered by the September 1, 1998 Form EN1032. The Office finalized this finding by decision dated September 6, 2001.

The Board finds that the Office properly determined that appellant forfeited her compensation benefits for the period June 1, 1997 to September 1, 1998 in the amount of \$16,064.46 on the grounds that she knowingly failed to report earnings.

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 the time 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.”² (Emphasis added.)

Appellant, however, can only be subjected to the forfeiture provision of 5 U.S.C. § 8106 if she “knowingly” failed to report employment or earnings. It is not enough to merely establish that there were unreported earnings. The Board has recognized that forfeiture is a penalty and, as a penalty provision, it must be narrowly construed.³ The term “knowingly” is not defined within the Act or its regulations. The Board has adopted the common usage definition of “knowingly:” “with knowledge; consciously; intelligently; willfully; intentionally.”⁴

The Board finds that on the EN1032 form she signed on September 1, 1998, covering the period from June 1, 1997 to September 1, 1998, appellant consciously omitted relevant information concerning her earnings with the Hillsborough County School District as a bus driver which generated earnings in appellant's name. She responded “No” to questions concerning self-employment and failed to report any further employment following the end of her employment with the employing establishment in May 1997. Even though appellant may have performed work or had earnings on an irregular basis during this period, she knew that she was required to report any earnings produced from her work activities.⁵ Nevertheless, in response to the Office's inquires, she signed the EN1032 form certifying that all statements

² 5 U.S.C. § 8106(b).

³ *Anthony A. Nobile*, 44 ECAB 268, 271-72 (1992).

⁴ *Christine P. Burgess*, 43 ECAB 449, 458 (1992).

⁵ *Charles Walker*, 44 ECAB 641, 645 (1993).

provided in response to the questions on the form were true, complete and correct to the best of her knowledge and belief. The clear weight of the evidence of record establishes that appellant knowingly failed to report her earnings from employment.

The investigative memorandum from the employing establishment included appellant's application for employment with the Hillsborough County School District on July 23, 1997. On this application appellant stated that she had never been injured on the job. Records from the school district indicate that on July 28, 1997 she began to earn \$8.25 an hour as a bus driver, that she worked or received wages until March 6, 1998 and that she earned a total of \$8,775.57 for 1,066.7 hours of work. Appellant tendered her resignation on February 10, 1998 effective February 17, 1998 due to personal conflicts. In her interview with an employing establishment inspector, she initially denied any employment other than the employing establishment in 1997 and 1998. In response to queries regarding her employment as a bus driver, appellant stated that she trained in this position, but did not actually receive employment. When confronted with the above-mentioned evidence, she stated that she resigned to pursue vocational rehabilitation through the Office.

Appellant submitted statements to the Office and alleged that she did not realize that she could not perform "part-time temporary work." She further stated that she reported her income as a bus driver on her tax returns and that she did not list it on the report in question because she was not yet certified and was still in training. The Board finds that the evidence establishes that appellant was aware that she was working as a bus driver and that she had received compensation for her services by September 1, 1998, the date that she signed the EN1032 in question, as at that point in time she had received wages for more than six months totaling over \$8,000.00.

These factual circumstances of record, together with appellant's certification to the Office on Form EN1032, that she had no employment or earnings, provides persuasive evidence that she "knowingly" misrepresented and omitted her earnings.⁶ The Office, therefore, properly found appellant forfeited her compensation for the periods covered by the September 1, 1998 EN1032, in the amount of \$16,064.46.

The Board further finds that the Office properly determined that appellant was at fault in the creation of the overpayment in the amount of \$16,064.46.

The period of forfeiture is determined by the date appellant completed the Office Form EN1032, which requires that information, be provided concerning activities during the previous 15 months. If the form is improperly completed resulting in a finding of forfeiture, the Board has found that the period of forfeiture is the entire 15-month period covered by the form in question.⁷ During the period of June 1, 1997 to September 1, 1998, appellant was paid compensation for wage loss in the amount of \$16,064.46. The Office determined that appellant received compensation at the rate of \$244.02 a week from June 1, 1997 to February 28, 1998 and at the rate of \$247.75 from March 1 to September 1, 1998 for a total of \$16,064.46.

⁶ *Mamie L. Morgan*, 41 ECAB 661 (1990).

⁷ *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

Section 8129(a) of the Act⁸ provides that, where an overpayment of compensation has been made “because of an error or fact of law,” adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “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 Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is at fault, section 10.433(a) of the Office’s regulations¹⁰ provides in relevant part:

“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 only to the overpaid individual.)”

In this case, the Office applied the second standard in determining that appellant was at fault in creating the overpayment. The Board finds that appellant failed to furnish information to the Office which she knew was material, when she knowingly failed to report her earnings as a school bus driver on the September 1, 1998 EN1032. Pursuant to section 8106(b), appellant has forfeited her right to compensation during this period. This forfeiture has resulted in an overpayment of compensation in the amount of \$16,064.46 and appellant is not without fault in the creation of this overpayment. Accordingly, no waiver of collection of the overpayment is possible under section 8129(b) of the Act.

On appeal, appellant alleged that she was entitled to reimbursement for schooling and supplies and requested that if the Board affirmed the Office’s decision, the reimbursement amount be deducted from her overpayment amount. With respect to recovery of an overpayment, the Board’s jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act. When appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the Office’s recovery of an overpayment under the Debt Collection Act.¹¹

⁸ 5 U.S.C. §§ 8101-8193, 8129(a).

⁹ 5 U.S.C. § 8129(b).

¹⁰ 20 C.F.R. § 10.433(a).

¹¹ See *Lewis George*, 45 ECAB 144, 154 (1993).

The September 6 and July 11, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
March 13, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member