

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LARRY GARRETT and DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION ADMINISTRATION, Islip, NY

*Docket No. 02-998; Submitted on the Record;  
Issued October 24, 2003*

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DECISION and ORDER

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

The issues are: (1) whether appellant forfeited his right to compensation from September 13, 1984 through July 7, 1986, from May 19, 1987 through July 21, 1989 and March 26, 1994; (2) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation in the amount of \$260,409.76 existed; (3) whether the Office properly found that appellant was at fault in the creation of the overpayment; and (4) whether the Office properly determined that \$1,000.00 should be withheld from appellant's continuing compensation checks to recover the overpayment.

The case is on appeal to the Board for the second time.<sup>1</sup> In the first appeal, the Board affirmed the Office's January 26, 1998 decision, finding that the Office properly denied appellant's request for a hearing.

Appellant completed Form EN1032 dated July 14, 1979, November 15, 1981, March 10, 1983, November 12, 1985, July 6, 1986, July 18, 1988, July 21, 1989, July 19, 1990, August 6, 1991, June 10, 1992, June 2, 1993, June 1, 1994, June 1, 1995, February 14 and May 6, 1996 and June 4, 1997.<sup>2</sup> Appellant indicated on each questionnaire, with the exception of the May 6, 1996 EN1032, that he had no wages and no earnings from self-employment during the covered period. On the May 6, 1996 EN1032 he indicated that he had intermittent self-employment or involvement in business enterprise consisting of the occasional sale of used shelves with gross receipts approximately in the amount of \$4,000.00. Appellant stated that he did not have records of these earnings. He said that the business had no name, but gave an address in Wyandanch,

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<sup>1</sup> Docket No. 98-1061 (issued May 3, 2000). The facts and history surrounding the prior appeal are set forth in the initial decision and are hereby incorporated by reference

<sup>2</sup> The forms commencing in 1985 indicated that they covered the 15-month period prior to the employee's completion of the date and signature. The forms also stated that a false or evasive answer to any questions or the omission of an answer, might be grounds for suspension of his compensation benefits and subject him to civil penalty; or if fraudulent, might result in criminal prosecution. Later EN1032 forms had similar language.

New York. Appellant did not respond to inquiries by the Office as to the nature of the business despite a warning that his right to compensation could be suspended if he did not respond.

The results of an investigation conducted by the Office of the Inspector General (OIG) between November 1995 and February 1997 allegedly established that appellant worked while in receipt of compensation benefits for more than 20 years prior to 1996 and that he was self-employed since at least the last 1970s. He was involved in two businesses. One was called "Larry's Discount Warehouse" and later renamed "All Island Ventures, Inc." and was located at 362 and 358 Long Island Avenue, Wyandanch, New York. Appellant's involvement in the store consisted of selling used shelving and other miscellaneous items. All Island Ventures, Inc. was incorporated in the name of appellant's son, Brian, in 1990. Appellant was listed as the owner of the business in numerous government applications and conducted various transactions in the store such as picking up merchandise from suppliers. For instance, in an interview with the government investigative group, the plant manager of Universal Electric Sign Company, Randy Lark, stated that he negotiated the purchase of shelving with appellant. Mr. Lark stated that, on September 23, 1995, he went to appellant's business on Long Island Avenue, Wyandanch, New York and met with appellant. He stated that at their meeting he gave appellant \$3,000.00 in cash, for which appellant gave him a receipt. Mr. Lark stated that, with some assistance from appellant and his helper, they loaded the shelves into Mr. Lark's van.

The owner of the space appellant rented for All Island Ventures, Inc. located at Long Island Avenue, Gerald O'Shea, stated that appellant rented the space since the early 1970s and he knew that he operated a business, selling shelving and other miscellaneous items, from that location the entire time he rented the space. The investigation determined that appellant bought shelving from various auctions as well as from closing businesses and during a search, the inspection agents found resale certificates which enabled appellant to purchase items to be resold without paying a tax for the period 1976 to 1982 and 1988. The investigation also determined that appellant had two employees, one who worked for him for approximately two years in the early nineties and the other worked part time for him the last five to six years.

In an undercover operation on February 5 and 7, 1996, an investigative agent initiated and completed a purchase of shelving from appellant for \$180.00, for which he received a receipt. On February 5, 1996 the undercover agent observed appellant loading shelves into the van of a customer, John Sunden.

The investigators established that appellant had \$250,000.00 in receipts for shelving and other miscellaneous items between 1976 and 1994. A computer spreadsheet from the OIG documents receipts in appellant's possession from various companies from the years 1976, 1977, 1982, 1983, 1985 and from 1987 through 1994. The record contains a purchase order dated October 19, 1995, to Larry's Discount Warehouse from Sungold Enterprise for 30 shelf units in the amount of \$540.00. The OIG found notebooks and message pads with customer's names and telephone numbers for the years 1991 through 1996, price lists for shelving dated 1979 and 1988 and handwritten receipts dated September 1995 and February 1996. Further, OIG agents interviewed 19 customers who "indicated in substance" that they bought shelving from appellant through 1996. An auctioneer indicated that he sold appellant used store fixtures for over 20 years.

The OIG seized appellant's income tax returns from 1990 through 1992. The 1990 tax return covering the period June 1990 through September 1990 showed that appellant had gross business sales of \$7,645.00. The 1991 tax return covering the period October 1990 through September 1991 indicated gross business sales of \$52,212 and the 1992 tax return covering the period October 1991 to September 1992 indicated gross business sales of \$56,195.00.

The other business in which appellant was involved was a variety store, "Larry's Discount Warehouse" located at 1567A Straight Path, Wyandanch, New York, which appellant's family had operated since the early seventies. The OIG investigation determined that appellant had worked in the store in a limited capacity, in addition to his employment in the shelving business. A representative of Price Rite stated that appellant has consistently purchased dozens of boxes of tissue products for Larry's Discount. Appellant completed and filed numerous governmental applications on behalf of Larry's discount for licenses for Lotto, beer/wine and food stamps and he had held himself out as the owner and operator of Larry's Discount on these filings. On November 21, 1995 the investigative agents observed appellant conducting a Lotto transaction for a customer.

Appellant's 1994 and 1995 tax returns do not show that he had any wages although they do show that as part of his being a corporate member with Larry's Discount Warehouse, Inc. he had nonpassive income of \$3,518.00 in 1994 and he had nonpassive income of \$10,142.00 in 1995.

The OIG interviewed appellant in front of his shelving business on February 21, 1996 and stated that he admitted that he had continuously operated the shelving business since the late 1970s, although he had "officially" closed it three years earlier. Appellant stated that he incorporated the business under his sons' names, Brian and Jeffery and that he was the primary operator of the business, while his family operated the discount store on Straight Path.

In an affidavit dated February 21, 1996, appellant stated that, in the late 1970s, he rented 1567A Straight Path in Wyandanch, New York and bought it in 1980. He stated that he bought clothing and his wife and a friend sold clothing. Appellant stated that a few years later he and his wife converted it into a variety store. He stated that he did minimal work there such as open and close the store and help around the store. Appellant stated that he began renting 358 Long Island Avenue in the late 1970s. He stated that, in the beginning, he sold fish and miscellaneous items "to make ends meet" and he sold clothing and general merchandise. Appellant stated that he began selling shelving and used office furniture in the late 1970s. He continued to operate the business until the present, but three years earlier he officially closed the business. Appellant stated that he still rented the space and went to the store four to five times a week and sold "things" a few times a month. He stated that he understood he was required to report his employment to the Office, but he did not report it because he wanted to remain active.

The OIG noted that appellant had continuously received compensation benefits since June 1973. On November 15, 1996 he was indicted by the U.S. District Court, Eastern District of New York on 15 counts of mail fraud and false statements to the Office, but on December 19, 1996 was found not guilty on all counts by a jury.

On November 19, 1996 the Office suspended appellant's compensation benefits, effective December 7, 1996, pending receipt of a report of his earnings. By decision dated March 2, 1998, the Office adjusted appellant's compensation to reflect his wage-earning capacity of a purchasing agent, based on the fair market value of his self-employment in the amount of \$567.00 a week, as of December 7, 1996.

In a preliminary overpayment determination dated October 17, 2001, the Office found that appellant forfeited his right to compensation for the periods September 13, 1984 through July 7, 1986, May 19, 1987 through July 21, 1989 and March 26, 1994, because he knowingly failed to report his services to his family owned business. In making its finding, the Office reviewed the EN1032s appellant completed in 1979, 1981 and 1983 and from November 12, 1985 through July 21, 1989 and from June 1, 1994 through September 7, 2000.

The Office found that in the EN1032s in 1979, 1981, 1983, the language was sufficiently ambiguous that it might not have been clear whether appellant should have reported that he was self-employed if he did not receive any earnings for his employment.<sup>3</sup> The Office found, though, that by 1985 the forms had changed and the language in them was clear that appellant should report that he was self-employed even if he did not receive earnings for that employment.

In the November 12, 1985 EN-1032, Question No. 1 stated:

Employment other than Self-Employment. Under this heading, you must report all employment, other than self-employment, for which you received salary, wages, sales commissions, piecework or other payment: If you performed work in furtherance of a relative's or spouse's business, you must show as "rate of pay" what it would have cost the employer or organization to hire someone to perform the work you performed. The value of housing, meals, food allowance, clothing, equipment, reimbursed expenses in a business, corporation, partnership or sole proprietorship or other things of value must be included in the rate of pay. Report overtime pay separately (that is, pay received for work in excess of forty hours a week.)

Question No. 2 on the form stated

"Self-Employment (such as farming, sales, service, operating a store, business, etc., must be reported. Report any such enterprise, in which you worked and from which you received revenue, even if operated at a loss or if profits were reinvested. You must show as "rate of pay" what it would have cost you to have hired someone to perform the work you performed."

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<sup>3</sup> For instance, the EN1032 forms for 1979, 1981 and 1983 stated that appellant must report all employment during the past 12 months, the rate of pay which it defined and if he was self-employed he should report as pay what it would have cost him to have hired someone to do the same work. The form instructed the employee not to report as pay any other income from a business which he fully or partially owned, nor profits or income from investments or real estate and not to report overtime pay.

The subsequent EN1032s had the same language. The June 1, 1995 EN1032 and subsequent EN1032s requested additional details about the self-employment.

The Office concluded that an overpayment was created in the amount of \$260,409.76 and that appellant was at fault in creating the overpayment. The Office informed appellant that he should provide information regarding his income and expenses to determine how the overpayment would be collected.

By letter dated November 13, 2001, an attorney responding on appellant's behalf, Syd Askoff, stated that if the federal criminal court acquitted appellant of all charges, he could not possibly owe "anybody anything." He stated that the government was "very unfair" in "trying to do administratively" what it could not do in a court of law. Mr. Askoff stated that upon his acquittal, appellant's "full pension" should have been restored.

By letter dated November 23, 2001, the Office stated that appellant's benefits did not constitute a pension and that he had been paid benefits on the mistaken belief that he was totally disabled and incapable of working and earning income. The Office stated that, if appellant disagreed with the October 17, 2001 "decision," he could exercise his appeal rights which accompanied the decision and the action was completely independent of the legal prosecution of appellant.

By letter dated December 6, 2001, appellant contended that the Office's preliminary determination violated due process and that, since he was found not guilty in a federal district court, he should not be penalized under the Federal Employees' Compensation Act.

By decision dated December 18, 2001, the Office finalized the preliminary overpayment determination. The Office stated that in the form letter CA-2201 dated October 17, 2001, it informed appellant that he could submit additional evidence if he wished to object to the findings in the preliminary determination. The Office noted that appellant contested the Office's decision in his December 6, 2001 letter, but did not submit additional information. The Office, therefore, determined that \$1,000.00 would be withheld from appellant's continuing compensation payments effective December 29, 2001.

The Board finds that appellant forfeited his right to compensation for the time periods September 13, 1984 through July 7, 1986 and from May 19, 1987 through July 21, 1989, but the date "March 26, 1994" requires clarification from the Office as it does not indicate a specific time period.

Section 8106(b) of the 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.<sup>4</sup>

In order to establish that appellant should forfeit the compensation he received for the periods he completed EN1032 forms, the evidence must establish that he knowingly omitted or

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<sup>4</sup> 5 U.S.C. § 8106(b).

understated his employment and earnings.<sup>5</sup> As forfeiture is a penalty, it is not enough merely to establish that there were underreported earnings from employment. The inquiry is whether appellant knowingly omitted or understated his earnings from employment for the periods covered by the EN1032 forms. Appellant can be subjected to the forfeiture provision of 5 U.S.C. § 8106(b) only if he “knowingly” failed to report employment or earnings.<sup>6</sup> The term “knowingly” is not defined in 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,” “intelligently,” “willfully” or “intentionally.”<sup>7</sup>

The Board has held that the Office may not base application of the forfeiture provision strictly on conclusions drawn in an investigation, but rather the evidence of record must establish that the claimant had unreported earnings.<sup>8</sup> Moreover, appellant’s own admission of working during the period of forfeiture is probative on a finding that he knowingly failed to report his earnings during the relevant time period.<sup>9</sup>

On all the EN1032 forms from November 12, 1985 (*i.e.*, including the 12 month period prior to that date) through June 4, 1997, with the exception of the May 6, 1996 EN1032, appellant indicated that he was not employed or self-employed. The instructions in the EN1032, in 1985 and in the forms thereafter, explain in great detail what is meant by employment other than self-employment and what is meant by self-employment. Thus, in those forms, appellant knew that he should have reported any place where he worked from which he earned revenue even if he operated at a loss if profits were reinvested.

As stated above, the conclusions of the OIG investigation is not determinative of appellant’s having unreported earnings. Thus, the OIG’s conducting an undercover operation to establish that appellant sold shelves at All Island Ventures, Inc. and having OIG agents observe him sell a lotto ticket or a third party stating that appellant purchased dozens of tissue products for the store do not automatically establish that he had earnings from his businesses.<sup>10</sup> Further, although the OIG found many receipts in appellant’s possession from 1976 and 1994, the computer spreadsheet it compiled did not include the years 1984 and 1986. By listing the purchaser and the cost, the computer spreadsheet did not show that a particular purchase was actually made by appellant. Thus, the data is of limited probative value. There must be independent, objective evidence that corroborates the findings of the OIG investigation.

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<sup>5</sup> *Albert A. Garcia*, 54 ECAB \_\_ (Docket No. 00-2150, issued December 4, 2002); *Robert R. Holmes*, 49 ECAB 161 (1997).

<sup>6</sup> *Robert Ringo*, 53 ECAB \_\_ (Docket No. 99-2281, issued December 11, 2001); *Barbara L. Kanter*, 46 ECAB 165 (1994).

<sup>7</sup> BLACK’S LAW DICTIONARY (5<sup>th</sup> ed. 1979); *see Linda L. Coggins*, 51 ECAB \_\_ (Docket No. 98-172, issued January 24, 2000); *Glenn Robertson*, 48 ECAB 344, 349 (1997).

<sup>8</sup> *Louis P. McKenna, Jr.*, 46 ECAB 328, 338 (1994).

<sup>9</sup> *See Garry Don Young*, 45 ECAB 621, 627 (1994).

<sup>10</sup> *Louis P. McKenna, Jr.*, *supra* note 8.

Moreover, appellant's acquittal on December 19, 1996 by the Eastern District Court of New York on 15 counts of mail fraud and false statements is not dispositive on appellant's liability for his overpayment under the Act.<sup>11</sup> The levels of proof are different in the court system. Moreover, it is not clear from the record the nature of the charges that were made against appellant, the time period in which they were made and the reasons for the acquittal.

The purchase order dated October 19, 1995, showed that appellant's company, Larry Discount Warehouse, sold 30 shelf units for \$540.00 to Sungold Enterprise. This constitutes independent, objective evidence that appellant sold shelving at the store in 1995. The 1994 and 1995 tax returns show that appellant had nonpassive income from Larry's Discount Warehouse, Inc. Assuming appellant was referring to the family variety store in those tax returns, the exact nature of appellant's duties at the store are unclear as he stated in his affidavit that he did "minimal work" such as opening and closing the store and helping "around the store." However, his own admission in the affidavit dated February 21, 1996, that he operated All Island Ventures, Inc. at 358 Long Island Avenue since the late 1970s, selling shelving and used office furniture and continued to do so despite "officially closing the store" in 1993, established that he had earnings during the relevant time periods he claimed he was not employed or self-employed, *i.e.*, from September 13, 1984 through July 7, 1986 and from May 19, 1987 through July 21, 1989. The Office, therefore, properly determined that appellant forfeited his compensation during those time periods.

The Board finds that appellant was at fault in the creation of an overpayment from September 13, 1984 through July 7, 1996 and from May 19, 1987 through July 21, 1989.

Section 8129(b) of the Act<sup>12</sup> 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 regulations<sup>13</sup> 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."

The Board finds that appellant failed to furnish information to the Office, which he knew was material, when he knowingly failed to report his earnings from All Island Ventures, Inc. for

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<sup>11</sup> See *William McMahan*, 47 ECAB 526, 533 (1996).

<sup>12</sup> 5 U.S.C. § 8129(b).

<sup>13</sup> 20 C.F.R. § 10.433.

the periods September 13, 1984 through July 7, 1986 and from May 19, 1987 through July 21, 1989 on the EN1032 forms dated November 12, 1985, July 6, 1986, July 18, 1988 and July 21, 1989. Pursuant to section 8106(b), appellant has forfeited his right to compensation for those time periods. This forfeiture has resulted in an overpayment of compensation and appellant is at fault in the creation of this overpayment. Accordingly, no waiver of collection of the overpayment is possible under section 8129(b) of the Act.

The Board finds, however, that it is unclear what the Office meant, when it stated appellant also forfeited his compensation on “March 26, 1994,” without specifying a time period. The Office’s lack of clarity regarding this date precludes the Board from reviewing the Office’s finding. Section 20 C.F.R. § 10.126 provides in part, that a final decision of the Office “shall contain findings and a statement of reasons.”<sup>14</sup>

The case must, therefore, be remanded to clarify its finding in this regard. The Office failed to meet its burden of proof as to compensation forfeited on March 26, 1994.

Section 20 C.F.R. § 10.441 provides that, if an overpayment of compensation has been made to an individual entitled to further payments and no refund is made, the Office shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.

Since appellant did not submit any financial data, there is no sufficient information for the Board to perform an analysis of the reasonableness of the monthly recovery rate of \$1,000.00. Appellant has, therefore, not shown that the Office abused its discretion in withholding \$1,000.00 from his monthly compensation payments. However, the Office must deduct the amount of the March 26, 1994 deduction of the \$260,490.76 as it did not satisfy its burden of proof.

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<sup>14</sup> See *Robert L. Johnson*, 51 ECAB 480-81 (2000).



The December 18, 2001 decision of the Office of Workers' Compensation Programs is affirmed regarding the Office's findings that appellant forfeited his right to compensation for the periods September 13, 1984 through July 7, 1986 and from May 19, 1987 through July 21, 1989 and that appellant was at fault in the creation of an overpayment during these time periods.

Dated, Washington, DC  
October 24, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member