

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PHILLIP A. ZAMPINO and U.S. POSTAL SERVICE,
POST OFFICE, Canton, OH

*Docket No. 02-1145; Submitted on the Record;
Issued January 28, 2004*

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant forfeited his right to compensation for the following periods: July 7, 1979 through July 2, 1980, April 5, 1982 through April 4, 1983 and June 7, 1984 through May 11, 1990; (2) whether the Office properly determined that an overpayment occurred in the amount of \$143,570.31; and (3) whether the Office properly determined that appellant was at fault in the creation of the overpayment.

On April 26, 1972 appellant, then a 24-year-old letter carrier, filed a notice of traumatic injury alleging that on that date he hurt his back while adjusting his grip on a heavy mailbag in the performance of duty. The Office accepted the claim for aggravation of spondylolisthesis. Appellant worked light duty for four years following his work injury and he was placed on permanent total disability status effective April 26, 1976 by his treating physician, Dr. John M. Thomas, a Board-certified general surgeon. Appellant subsequently retired on March 4, 1977. He has been receiving wage-loss compensation on the periodic rolls since April 26, 1976.

Pursuant to a (Form CA-1032) letter dated January 15, 1978, the Office requested that appellant report financial information pertinent to computation of his compensation, including any personal earnings he received during the past year or any earnings he received as a result of self-employment. On January 15, 1978 appellant signed a CA-1032 form wherein he disclosed self-employment income at Zampino's Drum Shop in Canton, Ohio. The owner of the shop was listed as appellant's wife, Diane Zampino. In a CA-1032 form signed on July 6, 1979, appellant stated that his wife had attempted to increase music sales to compensate for his inability to work, but that she was only breaking even with the business. He indicated that the maximum amount of time he put into the store was 20 hours per week when he was feeling "decent." On CA-1032 forms signed by appellant on July 2, 1980, October 15, 1981, April 4, 1983 and June 4, 1984, he did not report any self-employment income. In a CA-1032 form signed by appellant on June 8, 1985, he stated under "[e]mployment [h]istory" that he had been self-employed since his work injury. He reported that he worked 15 to 20 hours per week supervising and "telling everyone what to do." Appellant noted, however, that his rate of pay was zero.

In a December 3, 1985 letter, the Office wrote appellant to obtain certain information regarding his self-employment and family business. In response, he prepared a three-page document, reporting for the first time that he had received income from playing music and teaching drum lessons at the store from 1981 to 1985. The Office subsequently obtained Social Security Administration (SSA) records confirming that appellant earned income from self-employment from 1977 through 1980.

In CA-1032 forms signed on October 20, 1986, October 7, 1987 and October 20, 1989 appellant advised that he performed supervisory work at the shop for 10 to 18 hours per week, depending upon how he felt. He reported a zero rate of pay from the shop but listed \$300.00 in income from music lessons at Kent State University. In a signed May 11, 1990 CA-1032 form, appellant reported actual earnings of \$605.00 related to his teaching efforts. He noted that the money received from teaching went back into the store to pay operating expenses.

By letter dated August 6, 1991, the employing establishment forwarded a copy of an investigative memorandum dated August 6, 1991 and signed by A.E. Douillette, alleging that appellant had failed to report earnings for private teaching lessons and self-employment income that he received from Zampino's Drum Shop. There were 58 exhibits attached to the memorandum. Among the exhibits were undated notices, Yellow Page advertisements and envelopes used in the drum shop business where appellant's name or picture was listed on the letterhead or the top of the page. The advertisement noted appellant's 37 years of experience and the envelope contained a personal message from appellant.

Several exhibits indicated that appellant's name was included as the owner of Zampino's Drum Shop with the Ohio Bureau of Employment Services and workers' compensation payroll reports. Only appellant's wife was listed as an owner on the Schedule C (Form 1040) filed with the Internal Revenue Service for tax years 1985 to 1990. Appellant did not file a Schedule C for his teaching lessons prior to 1990.

On February 20, 1992 the Office issued a notice of preliminary determination that an overpayment in the amount of \$221,528.53 had been created for the period of January 15, 1977 through May 30, 1999. On March 15, 1992 appellant responded to the Office decisions, arguing that he had never been evasive with respect to his finances and denying that he had knowingly understated his earnings. In a decision dated March 28, 1992, the Office determined that appellant forfeited his right to compensation because he knowingly omitted or understated earnings that he received during the period from January 15, 1977 through May 30, 1990.¹ On April 15, 1992 appellant requested a hearing and submitted extensive documentation.

The record reflects that, on March 10, 1994, appellant pled guilty in U.S. District Court to providing false information to the Office and received a sentence of a \$50.00 fine and one year of probation.² The court decision stated that "both parties agree that restitution is due and owing

¹ In a separate decision dated March 28, 1992 decision, the Office reduced appellant's compensation to reflect his capacity to earn compensation based on the constructed position of retail sales clerk consistent with his work in Zampino's Drum Shop.

² Appellant admitted being guilty of fraud to the extent that, while he had received money from teaching, he stated on a CA-1032 form dated September 15, 200 that he had never received any money from teaching.

the Department of Labor, but specifically defers the determination of a dollar amount to the administrative action currently pending before the Department of Labor, Hearings and Review Board in the Office of Workers' Compensation Programs." It was further stated that the parties agreed that the dollar amount determined by the Office would be agreed to by the court.

A hearing was subsequently held with an Office hearing representative on January 31, 2001. In a June 21, 2001 decision, the Office hearing representative modified the Office's March 28, 1992 decision to reflect that appellant had forfeited his right to compensation for knowingly understating his reported earnings on Forms 1032 submitted for the following periods: July 7, 1979 to July 2, 1980, April 5, 1982 to April 4, 1983 and June 7, 1984 through May 11, 1990.³

On November 13, 2001 appellant requested reconsideration and submitted a package of 12 tabbed exhibits, which included correspondence between appellant and the Office hearing representative, certified copies of transcripts of voice-mail messages left for appellant by the Office hearing representative, household maintenance receipts, vehicle expense receipts, an affidavit from Joanne Muntean, copies of hospital records, medical bills and receipts for medical treatment that was not covered by insurance, SSA record of 1985 earnings and affidavits from appellant's certified public accountant.

In a decision dated January 30, 2002, the Office denied modification of its prior decision. The Office specifically held that appellant's net monthly income was \$1,243.00 while his total monthly expenses were \$954.00, leaving an available income of \$289.00 per month to reimburse the overpayment of \$143,570.31. The Office directed that an initial payment of \$4,000.00 be made from appellant's credit union account and then repayment of the remaining debt was to ensue at the rate of \$240.00 per month.

The Board finds that the Office properly determined that appellant forfeited his right to compensation for the following periods: July 7, 1979 through July 2, 1980, April 5, 1982 through April 4, 1983 and June 7, 1984 through May 11, 1990.

³ The Office hearing representative noted that, while the Office had originally found a forfeiture for the period from January 15, 1977 to May 30, 1990, the Office had not received all of the 1032 forms completed by appellant for the entire period. The Office hearing representative recalculated the forfeiture based on completing the Forms 1032 submitted by appellant which understated his earnings.

Section 8106(b) of the Federal Employees' Compensation Act⁴ 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 --

(1) fails to make an affidavit or report when required; or

(2) knowingly omits or understates any part of his or her earnings;

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 [s]ection 8129 of this title, unless recovery is waived under that section.”

In the present case, regarding the issue of forfeiture, the record establishes that appellant's CA-1032 forms signed by him on July 2, 1980, April 4, 1983, June 8, August 23 and October 15, 1985, January 2 and October 20, 1986, October 7, 1987, October 20, 1988, September 15, 1989 and May 11, 1990, he either failed to report profit he received as the owner of a drum shop or he failed to indicate the proper amount of salary he obtained from teaching music. Appellant also reported on occasion no earnings when his SSA records show earnings for the same period.

Appellant, however, can only be subjected to the forfeiture provision of section 8106 of the Act if he “knowingly” omitted or understated earnings.⁵ It is not enough to merely establish that there were unreported earnings. The Office procedure manual recognizes that forfeiture is penalty and, as a penalty provision, it must be narrowly construed. The term “knowingly” is defined by the regulations and means “with knowledge, consciously, willfully or intentionally.”⁶

The Office has the burden of proof in establishing that appellant did, either with knowledge, consciously, willfully or intentionally, fail to report earnings from self-employment. To meet this burden of proof, the Office is required to closely examine appellant's activities and statements in reporting employment earnings.⁷ 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 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. Furthermore,

⁴ 5 U.S.C. § 8106(b).

⁵ See *Michael D. Mathews*, 51 ECAB 247 (1999); *Barbara L. Kanter*, 46 ECAB 165 (1994).

⁶ 20 C.F.R. § 10.5(n) (1999).

⁷ See *Michael D. Mathews*, *supra* note 5.

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 the CA-1032 form, that he was not employed or self-employed, was false.⁸

The record shows that appellant pled guilty to violating 18 U.S.C. § 1920 by falsely completing the affidavit section of a CA-1032 form dated September 15, 2001 in an attempt to obtain workers' compensation benefits. This is persuasive evidence that he knowingly omitted or understated earnings on the other CA-1032 forms in question.⁹ With respect to the remaining CA-1032 forms, the Office correctly determined that the totality of the factual circumstances of this case lead to the conclusion that appellant failed to fully and truthfully reveal the full extent of his employment activities and earnings. The Board has carefully considered the entire record and concludes that appellant knowingly failed to report or underreported his earnings on the aforementioned CA-1032 forms. Appellant repeatedly stated to the Office that the drum shop belong to his wife, but his name was on the company letter head and advertisements for the store included his picture and credentials. He sought a position on the local school board expounding on his resume and application that he was a local businessman. Appellant received income each year as a private music teacher and even taught lessons at the music shop. Yet, when he was asked by the Office to report earnings on his CA-1032 forms, appellant repeatedly signed forms that either understated or failed to report his earnings at the drum shop.

Based on the aforementioned evidence of record, the Board concludes that appellant's signed CA-1032 forms establish that he knowingly underreported his earnings and, therefore, is found to have forfeited his right to compensation. Given the circumstances of this case, the Board finds that appellant knowingly forfeited his right to compensation for the periods from July 7, 1979 to July 2, 1980, April 5, 1982 to April 4, 1983 and June 7, 1984 to May 11, 1990.

The Board further finds that an overpayment occurred in this case based on application of the forfeiture provision. The Office determined that for the periods of July 7, 1979 to July 2, 1980, April 5, 1982 to April 4, 1983 and June 7, 1984 to May 11, 1990, appellant received wage-loss compensation in the amount of \$143,570.31. The Board finds the Office's calculation of the overpayment to be accurate.

On appeal appellant alleges that the Office may not collect more than \$15,293.00 of the overpayment as the U.S. District Court Judge stated during the criminal sentencing procedure that this amount should be collected from him. The Office's procedure manual discusses the interplay between court ordered restitution in fraud cases, explaining that when a debtor has been convicted in court of filing a false claim which resulted in an overpayment/debt due the government, it is common for the court to order the defendant to make restitution to the United

⁸ *Id.*

⁹ *Michael D. Mathews, supra* note 5.

States as a condition of probation. The amount of restitution may or may not be the full amount of the debt owed. According to the Office procedure manual:

“a. *If the court order states that the restitution amount will be in full satisfaction of the debt* owed the United States (a ‘Global Settlement’), the [c]ourt [o]rder takes precedence over the Office’s administrative debt collection process. In such cases, if the restitution amount is less than the outstanding debt principal balance, the principal balance must be reduced to the restitution amount set by the court. Also, interest may not be applied to such debts unless stipulated in the court order. However, should the probation period end and the debtor has failed to make full restitution of the amount ordered by the court, [the Office] may pursue collection of the full original debt amount.

“b. *If the Court Order does not represent a ‘Global Settlement,’* the [Office] should continue to pursue collection of the full amount of the debt, taking credit for any restitution amounts received. Unless assessment of interest is stipulated in the Court Order, interest may not be applied to the restitution amount and any restitution payments received should be applied directly to the debt principal.”¹⁰

In the present case, the court order in question did not indicate that the recovery of the debt owed the Office was limited to under \$10,000.00 as alleged by appellant. Both parties agreed that restitution was due and owing the Department of Labor, but specifically deferred the determination of a dollar amount to the administrative action currently then pending before the Office. Because there was no court order setting a dollar amount in restitution that was to take precedence over the Office’s determination of the total amount of overpayment due, then there was no global agreement in this case. The signed agreement between appellant and the Office did not constitute a global agreement whereby the overpayment would not be found to exceed \$10,000.00. For this reason, the Office was not precluded from continuing to pursue full collection of appellant’s debt in the amount of \$143,570.31.¹¹

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

Office regulations provide that 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 payments he or she receives are proper. The recipient must show good faith and

¹⁰ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300.19(a) (September 1994).

¹¹ See *Joseph M. Popp*, 48 ECAB 624 (1997); *Clarence D. Ross*, 42 ECAB 556 (1991).

exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits.¹² Section 10.433(a) specifically states:

“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;
- (2) Failed to provide information which he or she knew or should have known to be material;
- (3) Accepted a payment which he or she knew or should have been expected to know was incorrect.”¹³

In the present case, the record establishes that appellant underreported his earnings on 1032 forms provided to him for financial disclosure to the Office. The 1032 form letter specifically notified appellant of his responsibility to complete the forms and provide relevant information concerning his employment status and earnings. The evidence reveals that appellant understood the materiality of these omissions and incorrect statements. He even pled guilty in court to providing false information to the Office regarding his self-employment. From appellant overall actions in holding himself out as a businessman in his community and the earnings he received as a private music teacher and drum shop owner, it is evident that appellant made incorrect statements as to material facts which he knew or should have known to be incorrect and failed to furnish information which he knew or should have known to be material. Therefore, the Office properly found that appellant was at fault in the creation of the \$143,570.31 overpayment such that he was not entitled to waiver.

The Board also finds that it does not have jurisdiction over the method of recovery in this case.

Regarding recovery of overpayments, the Board’s jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act.¹⁴ In this case, the Office is not seeking recovery from continuing compensation benefits; therefore, the Board has no jurisdiction to review the propriety of the recovery aspect of the Office’s decision.¹⁵

¹² 20 C.F.R. § 10.432(a) (1999).

¹³ 20 C.F.R. § 10.433(a)(1)-(3) (1999).

¹⁴ *Albert Pineiro*, 51 ECAB 310 (2000); *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

¹⁵ Appellant argues on appeal that 28 U.S.C. § 2415 and § 3731 bar the Office from recovering this overpayment. The Board has no jurisdiction over this aspect of the case in this appeal.

The decision of the Office of Workers' Compensation Programs dated January 30, 2002 and June 21, 1001 are hereby affirmed.

Dated, Washington, DC
January 28, 2004

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member