

**United States Department of Labor  
Employees' Compensation Appeals Board**

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MARVIN T. JOHNSON, Appellant )

and )

DEPARTMENT OF THE NAVY, NAVAL )  
SURFACE WARFARE CENTER, Indian Head, )  
MD, Employer )

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**Docket No. 04-1431  
Issued: November 5, 2004**

*Appearances:*  
*Marvin T. Johnson, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

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

**JURISDICTION**

On May 7, 2004 appellant filed an appeal of a February 4, 2004 merit decision of the Office of Workers' Compensation Programs, finding that he forfeited entitlement to compensation paid from January 16, 1994 to October 17, 2000 for knowingly failing to report earnings during that period. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

**ISSUE**

The issue is whether appellant forfeited his entitlement to compensation paid from January 16, 1994 to October 17, 2000 for knowingly failing to report earnings during that period.

**FACTUAL HISTORY**

On July 24, 1985 appellant, then a 38-year-old ordnance equipment repairer, filed a claim for compensation for a traumatic injury to his lower back sustained on July 17, 1985 while helping a coworker remove a lid from a container. By letter dated April 22, 1988, the Office

advised him that it had accepted that he sustained a back strain and also advised him that if he obtained or returned to any employment he should notify the Office immediately as he was not permitted to receive payments for temporary total disability while employed.

Following a lumbar discectomy on July 7, 1993 that was authorized by the Office, appellant returned to part-time work at the employing establishment and the Office paid compensation for partial disability. On February 4, 1994 the Office issued him a check in the amount of \$797.76 as compensation for partial disability for the period from December 26, 1993 to January 8, 1994.

On January 23, 1994 appellant filed a claim for compensation for the period January 9 to 22, 1994 on an Office Form CA-8. On this form appellant left blank the section he was instructed to complete if he worked anywhere during the period for which compensation was claimed. The employing establishment reported that he last worked there on January 14, 1994 and that his total disability started on January 17, 1994. On February 4, 1994 appellant filed a claim for compensation on Office Form CA-8 for the period January 23 to February 18, 1994. On this form he left blank the section he was instructed to complete if he worked anywhere during the period for which compensation was claimed. By check dated March 18, 1994, the Office paid appellant compensation for the period January 9 to February 18, 1994.

Thereafter appellant filed claims for compensation on Office Forms CA-8 on February 23, 1994 for February 20 to March 12, 1994, on April 27, 1994 for April 4 to 15, 1994, on April 26, 1994 for April 18 to 29, 1994, on May 15, 1994 for May 2 to June 10, 1994, on June 14, 1994 for June 12 to 25, 1994, on July 7, 1994 for June 26 to July 9, 1994, on July 18, 1994 for July 10 to August 20, 1994, on August 2, 1994 for August 21 to September 17, 1994, on October 4, 1994 for September 18 to October 22, 1994 and on October 24, 1994 for October 23 to November 19, 1994. On each of these forms he left blank the section he was instructed to complete if he worked anywhere during the period for which compensation was claimed. By letter dated November 1, 1994, he requested that the Office place him on the automatic pay roll, stating that the medical evidence he was submitting showed he was temporarily totally disabled for a period of 90 days or longer.

The Office paid appellant compensation for temporary total disability for all the above periods and transferred him from the daily rolls to the periodic rolls beginning November 13, 1994.

On November 6, 1995 appellant completed an Office Form EN1032, on which he was instructed to report all employment for which he received a salary, wages, income, sales commissions, piecework or payment of any kind. He answered "no" to the form's question "Did you work for any employer during the past 15 months?"

Appellant returned to limited duty at the employing establishment four hours per day on November 21, 1995 and worked a total of 96 hours from that date until February 22, 1996, the last day he worked. During this period, he also received 38 hours of holiday pay and 8 hours of administrative leave when the base was closed for snow. The Office declared an overpayment of compensation in the amount of \$1,862.86, because he received compensation for total disability from the Office during the 142 hours he was paid by the employing establishment from

November 21, 1995 to February 22, 1996. By decision dated August 19, 1996, the Office determined that waiver of recovery of this overpayment was not warranted.

On September 30, 1996 and September 6, 1997 appellant completed Office Forms EN1032, answering “no” to the question “Did you work for any employer during the past 15 months?” In a May 14, 1998 letter, appellant advised the Office that he had started a home-based business as a long distance representative for Excel Communications, working about five hours per week. In response to an Office request for more information on this business, appellant further described this business and stated that he had earned about \$800.00 from January 31 to May 31, 1998.

On an Office Form EN1032 appellant completed on November 10, 1998 he answered “no” to the question “Did you work for any employer during the past 15 months?” and “yes” to the question whether he was self-employed or involved in any business enterprise, explaining that he made calls to get individuals to sign up for long distance services with Excel Communications, earning \$1,300.00. On an Office Form EN1032 appellant completed on September 9, 1999, he answered “no” to the question “Did you work for any employer during the past 15 months?” and “yes” to the question whether he was self-employed or involved in any business enterprise, explaining that he sold long distance services for Excel Communications, earning about \$1,200.00. In a March 8, 2000 letter, appellant stated that he had attempted to work for World Skyline, Inc. selling internet service over the telephone, but had to resign because of back symptoms.

By memorandum dated August 1, 2000, the Department of Labor’s Office of the Inspector General (OIG) advised the Office that appellant worked full time as the pastor of a church, earning \$500.00 per month from January to December 1994, \$700.00 per month from January 1995 to September 1996, \$1,000.00 per month from October 1996 to October 1998 and \$1,500.00 per month from November 1998 to April 1999.

On an Office Form EN1032 appellant completed on October 17, 2000 he described the work he performed for World Skyline, Inc. in February 2000, indicating his actual earnings were \$50.00. In an October 17, 2000 letter, he stated:

“In completing this annual form for workmen’s compensation benefits I think it is proper to note this information that you are already aware of. I am still a minister and pastor at the Maranatha Baptist Church, P.O. Box 1296 Oak Grove, Va. 22441. As I have already stated to the investigators, I never contracted in any way including verbally to perform any services for any kind of compensation including money. I came to Maranatha to share my faith and practice my religion. And it is upon that belief I did not think it was necessary to report it in the past.”

In a March 26, 2001 letter, appellant stated that he was still the pastor of his church and that since he had been informed that he should report the money he received from his church, he had received \$1,450.00 for the months of February and March, but nothing for the month of January. Effective April 4, 2001 he elected to receive retirement benefits from the Office of Personnel Management in preference to benefits payable by the Office under the Federal Employees’ Compensation Act.

On May 28, 2003 the OIG sent its memorandum of investigation and supporting exhibits to the Office. The memorandum stated that appellant received payments from Maranatha Baptist Bible Church for his employment as pastor from January 1994 through the present at the times and in the amounts listed in its August 1, 2000 memorandum, that these checks were issued to him or to his mortgage company on a regular basis, that appellant also received other payments from the church to commemorate birthdays, anniversaries and holidays, that the total amount he received from the church from January 1, 1994 through June 30, 2000 was at least \$66,700.00 and that copies of the cancelled checks and church records documenting their issuance were not included in the investigative report, but were available for review.

The exhibits included a February 28, 2003 plea agreement and the May 9, 2003 judgment in a criminal case, in the United States District Court for the Eastern District of Virginia, where appellant pleaded guilty to one felony count of making false statements to obtain federal employees' compensation<sup>1</sup> based on his failure to report earnings on the Office's November 10, 1998 Form EN1032. He was placed on supervised probation for four years, including six months of home confinement and restitution to the Department of Labor in the amount of \$54,179.12 was ordered.<sup>2</sup> The OIG memorandum noted that the Court did not determine that the restitution was a global settlement.

Also included as an exhibit was a memorandum recounting an OIG interview of appellant on September 11, 2000 in which he acknowledged that he performed Sunday worship services, marriages, funerals and revivals as pastor of Maranatha Baptist Church, but stated that he did not consider this position as "employment," as he was never told that being a pastor was a job, he did not keep regular hours at the church, he did not preach every Sunday during a time when there were several pastors at the church and he told the church that he would be pastor even if they did not pay him. Appellant stated that the church deacons offered to pay him \$500.00 per month to become the pastor of Maranatha Baptist Church and that he told them he could not have a job due to his injury compensation and because he had promised God he would not accept any money for doing God's work. He continued that, when his first check listed "salary" he told the church he could not have a salary and could not work and the church told him it was not a salary but rather a "gift."

By decision dated December 30, 2003, the Office found that appellant had forfeited his entitlement to further benefits under the Act because he had been convicted of fraud. By decision dated February 4, 2004, the Office found that he forfeited his entitlement to compensation during the period January 16, 1994 to October 17, 2000, for knowingly failing to report his earnings as pastor of Maranatha Baptist Bible Church on Office Forms CA-8 and EN1032.

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<sup>1</sup> 18 U.S.C. § 1920.

<sup>2</sup> This amount represented the difference between the amount appellant received in compensation for temporary total disability from January 1, 1994 to June 30, 2000 and the amount he would have received if he had been paid for loss of wage-earning capacity based on his earnings as a pastor.

On February 4, 2004 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$132,156.94,<sup>3</sup> that arose from his forfeiture of entitlement to compensation from January 16, 1994 to October 17, 2000. The Office preliminarily determined that he was at fault in the creation of this overpayment because he knowingly omitted pertinent information in his reports to the Office. The Office finalized these determinations by decision dated March 5, 2004.

### **LEGAL PRECEDENT**

Section 8106(b) of the Federal Employees' Compensation Act<sup>4</sup> 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 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 [section] 8129 of this title, unless recovery is waived under that section.”

Appellant, however, can only be subjected to the forfeiture provision of section 8106(b) of the Act if he or she “knowingly” failed to report earnings from employment or self-employment. As forfeiture is a penalty, it is not enough merely to establish that there were unreported earnings.<sup>5</sup> Being a penalty provision, the forfeiture provided for by section 8106(b) of the Act must be narrowly construed.<sup>6</sup> The term “knowingly” is defined in the Office’s regulation to mean “with knowledge; consciously; willfully; or intentionally.”<sup>7</sup>

The Office has the burden of proof to establish that appellant, either with knowledge, consciously, willfully or intentionally failed to report earnings.<sup>8</sup> To meet this burden of proof, the

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<sup>3</sup> This amount was computed by subtracting the \$54,179.12 in restitution ordered by the Court from \$186,336.06, the amount of compensation appellant was paid from January 16, 1994 through October 17, 2000.

<sup>4</sup> 5 U.S.C. § 8106(b).

<sup>5</sup> *Charles Walker*, 44 ECAB 641 (1993).

<sup>6</sup> *Anthony A. Nobile*, 44 ECAB 268 (1992); *Christine P. Burgess*, 43 ECAB 449 (1992).

<sup>7</sup> 20 C.F.R. § 10.5(n).

<sup>8</sup> *Barbara L. Kanter*, 46 ECAB 165 (1994); *Anthony A. Nobile*, *supra* note 6.

Office is required to closely examine his activities and statements in reporting earnings.<sup>9</sup> The Office may meet this burden in several ways: by an employee's admission that they failed to report earnings they knew should be reported; by establishing that an employee pleaded guilty to violating applicable federal statutes by falsely completing the affidavits in a Form EN1032;<sup>10</sup> or by showing that upon further inquiry by the Office as to employment activities, the employee continued not to fully and truthfully reveal the nature of the employment activities.<sup>11</sup> Forfeiture can also be declared for failing to make an affidavit or report when required.<sup>12</sup>

### ANALYSIS

The investigation by the Department of Labor's OIG shows that appellant was continuously employed as a pastor at the Maranatha Baptist Bible Church from January 1994 through the date of its interview of appellant on September 11, 2000. In an October 17, 2000 letter, appellant admitted that he was still pastor of this church. Appellant completed Office forms EN1032 on November 6, 1995, September 30, 1996, September 6, 1997, November 10, 1998, September 9, 1999 and October 17, 2000 on which he did not report his substantial earnings as a pastor, which increased from \$500.00 per month to \$1,500.00 per month.

Before appellant began to receive and return these Office forms instructing him to report any employment for the past 15 months, he filed numerous Office Forms CA-8, which instructed him to report if he worked anywhere during the period for which compensation was claimed. He did not report his employment as a pastor on any of these forms, on which he claimed compensation for the period January 16 to November 19, 1994, with the exception of March 13 to April 3, 1994.<sup>13</sup> For this three-week period the record does not contain a Form CA-8 claiming compensation. But forfeiture still applies to this period for failure to make a report as required, as the Office advised appellant on April 22, 1988 that, if he obtained or returned to any employment he should notify the Office immediately, as he was not permitted to receive payments for temporary total disability while employed.

For the entire period of compensation subjected to forfeiture by the Office, January 16, 1994 to October 17, 2000, appellant either failed to make a report when required or omitted or understated his earnings. That he did so knowingly is established by his plea of guilty to one count of making false statements to obtain federal employees' compensation.<sup>14</sup> This count,

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<sup>9</sup> See *Royal E. Smith*, 44 ECAB 417 (1993). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.10(c) (July 1993) states that "the circumstances of the case should be carefully evaluated with respect to the claimant's age, education level and familiarity with the reporting requirements, as well as the nature of the employment/earnings involved and any other relevant factors."

<sup>10</sup> *Iris E. Ramsey*, 43 ECAB 1075 (1992).

<sup>11</sup> *Barbara L. Kanter*, *supra* note 8.

<sup>12</sup> *Lorand A. Hegedus*, 37 ECAB 162 (1985).

<sup>13</sup> The two-day gaps between the dates claimed on appellant's Forms CA-8 were his nonscheduled days.

<sup>14</sup> The Board has found that a guilty plea constitutes persuasive evidence that an employee knowingly omitted earnings. *James D. O'Neal*, 48 ECAB 255 (1996).

though, related only to the EN1032 appellant completed on November 10, 1998. That the omission of earnings for the remainder of the period was done knowingly is shown by appellant's statements to the OIG on September 11, 2000, particularly his statements that he told the deacons of his church that he could not have a job due to his injury compensation and that he objected to the listing of "salary" on his first check from the church because he could not have a salary and could not work.

**CONCLUSION**

Appellant forfeited his entitlement to compensation paid from January 16, 1994 to October 17, 2000 for knowingly failing to report earnings during that period.<sup>15</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 4, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 5, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

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<sup>15</sup> As the February 4, 2004 forfeiture decision did not declare the dollar amount of compensation forfeited and appellant did not appeal the Office's March 5, 2004 overpayment decision that did, the Board has not reviewed the correctness of the amount of the overpayment resulting from the forfeiture.