



## **FACTUAL HISTORY**

On June 14, 1983 appellant, then a 34-year-old electrician, filed a claim for a traumatic injury occurring on June 6, 1983 when he twisted his back stepping on a rubber belt. He stopped work on June 6, 1983 and returned to work with restrictions on June 15, 1983. Appellant resigned from the employing establishment for personal reasons on June 20, 1983. The Office accepted his claim for a back condition and paid him compensation for total disability beginning June 1983.

The Office required appellant to complete periodic EN1032 form questionnaires regarding whether he had any earnings from employment or self-employment for the previous 15 months. The EN1032 forms advised appellant that he must report all employment for which he received a salary, wages, income, sales commissions, piecework or any payment of any kind, that he must report self-employment and that he must report any such enterprise in which he worked. The forms requested that he report employment and earnings for the 15 months prior to the completion of any given form. The Office advised appellant on the EN1032 forms that he was obligated to “immediately” report any employment to the Office and that fraudulently concealing or failing to report income could subject him to criminal prosecution. Appellant completed and signed EN1032 forms on May 28, 2002, May 19, 2003, December 2, 2004 and June 13, 2005. On each form, he indicated that he was not engaged in any employment or self-employment. The Office paid appellant compensation for total disability for the periods covered by the EN1032 forms.

Records from the Social Security Administration (SSA) reveal that appellant received earnings from employment in 2002 through 2004. He earned \$7,934.00 in 2002, \$8,411.25 in 2003 and \$2,182.50 in 2004 working for Jack Hornsby Electric, Incorporated (Inc.).

In a report dated April 10, 2006, an investigator with the Office of the Inspector General (OIG) for the employing establishment notified the Office that appellant worked as day laborer for Jack Hornsby Electric, Inc. from 2002 to 2004. The business was owned by appellant’s brother, Jack Hornsby, and sister-in-law, Sandra Hornsby. The investigator noted that appellant experienced two cerebral vascular accidents in 2005 and now had difficulty speaking and walking. Ms. Hornsby, his sister-in-law, assisted him with personal matters.

The investigator submitted a memorandum of an interview with Ms. Hornsby conducted on January 12, 2006. Ms. Hornsby confirmed that appellant worked as a day laborer for the Jack Hornsby Electric, Inc. She related that in 2005 he had a major stroke and that she had to assist him with financial management and correspondence. In another interview on January 12, 2006, appellant informed the investigator that he helped his brother with his electrical business but maintained that he received only reimbursement for expenses and no salary.<sup>1</sup>

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<sup>1</sup> The investigator submitted copies of police incident reports showing that appellant indicated on December 18, 2003 that he worked for Hornsby Electric, Inc. and on April 10, 2001 reported that he was a self-employed electrician. On March 27, 2000 he listed employment with Hornsby Electric, Inc.

By letter dated June 12, 2006, Ms. Hornsby, in her capacity as Vice President of Jack Hornsby Electric, Inc. related that appellant earned \$23,155.25 in 2001, \$7,934.00 in 2002, \$8,411.25 in 2003 and \$2,182.50 in 2004.

By decision dated September 20, 2006, the Office determined that appellant forfeited entitlement to compensation for the periods February 28, 2001 to May 19, 2003 and September 2, 2003 to June 13, 2005. The Office found that he knowingly omitted his earnings and employment on EN1032 forms covering these periods.

On September 2, 2006 the Office notified appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$128,206.95 because he forfeited compensation for the periods February 28, 2001 through May 19, 2003 and September 2, 2003 through June 13, 2005. The Office further made a preliminary determination that he was at fault in the creation of the overpayment. In addition, the Office advised appellant that he could request a telephone conference, a final decision based on the written evidence only, or a hearing within 30 days of the date of the letter if he disagreed that the overpayment occurred, if he disagreed with the amount of overpayment, if he believed that the overpayment occurred through no fault of his own and if he believed that recovery of the overpayment should be waived. The Office requested that appellant complete an attached overpayment recovery questionnaire and submit supporting documentation.

Appellant signed an overpayment recovery questionnaire on October 10, 2006. His sister-in-law completed the questionnaire and listed his financial expenses. Ms. Hornsby indicated that he had no income. In an accompanying form, appellant requested a telephone conference on the overpayment.

By decision dated November 2, 2006, the Office finalized its finding that he received a \$128,206.95 overpayment based on his forfeiture of compensation from February 28, 2001 to May 19, 2003 and September 2, 2003 to June 13, 2005. The Office additionally found that he was at fault in the creation of the overpayment and thus not eligible for waiver. The Office determined that it would withhold half of the total amount of his continuing compensation payment, \$1,486.67, to recover the overpayment. The Office indicated that the overpayment recovery questionnaire was incomplete as it did not list his income and was completed by an unauthorized person.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8106(b) of the Federal Employees' Compensation 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>2</sup>

The Board has held that it is not enough merely to establish that there were unreported earnings or unemployment. Appellant can be subjected to the forfeiture provisions of 5 U.S.C.

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<sup>2</sup> 5 U.S.C. § 8106(b).

§ 8106(b) only if he “knowingly” failed to report employment or earnings.<sup>3</sup> The term “knowingly” as defined in the Office’s implementing regulation, means “with knowledge, consciously, willfully or intentionally.”<sup>4</sup>

### **ANALYSIS -- ISSUE 1**

The Office found that appellant forfeited his entitlement to compensation for the periods February 28, 2001 to May 19, 2003 and September 2, 2003 to June 13, 2005. For the period February 28, 2001 to May 19, 2003, appellant signed a Form EN1032 on May 28, 2002 covering the period February 28, 2001 through May 28, 2002 and a Form EN1032 on May 19, 2003 covering the period February 19, 2002 through May 19, 2003. On the EN1032 forms, appellant indicated that he was not employed or self-employed. The SSA records, however, reveal that he earned \$7,934 in 2002 and \$8,411.25 in 2003 working for Jack Hornsby Electric, Inc. Ms. Hornsby, the Vice President of the company, confirmed that appellant worked as a day laborer from 2002 through 2004. Appellant asserted that he did not earn income working for the company but instead received reimbursement for expenses. His contention, however, is not credible given the SSA records and the evidence from Ms. Hornsby. The Board thus finds that appellant had undisclosed earnings on EN1032 forms covering the period February 28, 2001 to May 19, 2003.

Appellant also signed an EN1032 form on December 2, 2004 covering the period September 2 to December 2, 2004 and an EN1032 form on June 13, 2005 covering the period March 13, 2004 through June 13, 2005. He indicated on the forms that he had no employment or self-employment. SSA records, however, show that he earned \$7,934.00 in 2004 working for Jack Hornsby Electric, and Ms. Hornsby acknowledged that he was employed as a day laborer for the company throughout 2004. Appellant, consequently, had undisclosed earnings during the time covered by the June 13, 2005 and December 2, 2005 EN1032 forms. The Board has held that when an EN1032 form is improperly completed resulting in a forfeiture of compensation, the period of the forfeiture is the entire 15-month period covered by the form in question, even if he or she had no earnings during a portion of the period.<sup>5</sup>

Appellant can be subject to the forfeiture provision of section 8106(b) only if he “knowingly” failed to report earnings or employment. The Office has the burden of proof to establish that a claimant did, either with knowledge, consciously, willfully, or intentionally, fail to report earnings from employment.<sup>6</sup> In this case, appellant completed EN1032 forms which advised him that he must report both all employment and all earnings from employment and self-employment. The EN1032 forms clearly stated that he could be subject to criminal prosecution for false or evasive answers or omissions. The factual circumstances of record, including appellant’s signing of strongly worded certification clauses on the EN1032 forms, provide

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<sup>3</sup> *Barbara L. Kanter*, 46 ECAB 165 (1994).

<sup>4</sup> 20 C.F.R. § 10.5(n).

<sup>5</sup> *Martin James Sullivan*, 50 ECAB 158 (1998).

<sup>6</sup> 20 C.F.R. § 10.5(n).

persuasive evidence that he “knowingly” understated his earnings and employment information.<sup>7</sup> The Office, therefore, properly found that he forfeited his compensation for the periods February 28, 2001 to May 19, 2003 and September 2, 2003 to June 13, 2005.

### **LEGAL PRECEDENT -- ISSUE 2**

Under section 8129 of the Act and the implementing regulations, an overpayment must be recovered unless 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.<sup>8</sup>

Section 10.431 of implementing regulations provides that, before seeking recovery of an overpayment or adjust benefits, the Office will advise the individual in writing that the overpayment exists and the amount of the overpayment.<sup>9</sup> The written notification must also include a preliminary finding regarding whether the individual was at fault in the creation of the overpayment.<sup>10</sup> Additionally, the Office is obliged to advise the individual of his or her right to inspect and copy the government records relating to the overpayment.<sup>11</sup> Lastly, the preliminary notice must inform the individual of his or her right to challenge the fact or amount of the overpayment, the right to contest the preliminary finding of fault in the creation of the overpayment, if applicable, and the right to request a waiver of recovery of the overpayment.<sup>12</sup> The recipient of the alleged overpayment may present evidence in response to the Office’s preliminary notice either in writing or at a precoupment hearing.<sup>13</sup> The evidence must be presented or the hearing requested within 30 days of the date of the written notice of overpayment.<sup>14</sup> Failure to request the hearing within this 30-day time period shall constitute a waiver of that right.<sup>15</sup>

### **ANALYSIS -- ISSUE 2**

On September 2, 2006 the Office informed appellant of its preliminary determination that he received an overpayment based on his forfeiture of compensation for the periods February 28, 2001 through May 19, 2003 and September 2, 2003 through June 13, 2005. The Office further advised him of its preliminary determination that he was at fault in the creation of the

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<sup>7</sup> See generally *Robert C. Gilliam*, 50 ECAB 334 (1998).

<sup>8</sup> 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

<sup>9</sup> 20 C.F.R. § 10.431(a).

<sup>10</sup> 20 C.F.R. § 10.431(b).

<sup>11</sup> 20 C.F.R. § 431(c).

<sup>12</sup> 20 C.F.R. § 431(d).

<sup>13</sup> 20 C.F.R. § 432.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

overpayment. The Office notified him that he could request a telephone conference, a final decision based on the written evidence or a hearing within 30 days if he wished to contest the existence or amount of the overpayment or request waiver of the overpayment.

On October 10, 2006 appellant submitted a signed overpayment recovery questionnaire. In an accompanying form, he requested a telephone conference. The Office, however, did not conduct a telephone conference before issuing its final overpayment decision. The Board, therefore, finds that appellant was not provided the opportunity to provide testimonial evidence regarding the overpayment.<sup>16</sup> The case, consequently, will be remanded for a telephone conference. Following this and such other development as deemed necessary, the Office shall issue an appropriate decision.

### **CONCLUSION**

The Board finds that appellant forfeited entitlement to compensation for the periods February 28, 2001 through May 19, 2003 and September 2, 2003 to June 13, 2005 because he knowingly failed to report earnings from employment. The Board further finds that the Office improperly issued the November 2, 2006 overpayment decision.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 2, 2006 is set aside and the case is remanded for further proceedings consistent with this decision by the Board. The decision dated September 20, 2006 is affirmed.

Issued: July 2, 2007  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>16</sup> See *Sherrie L. Stanley*, 53 ECAB 533 (2002).