

authorized by the Office. Appellant stopped work and received compensation for an extended period of disability.

In a Form EN1032 signed on November 28, 1984, appellant responded “no” in response to questions regarding whether he had self-employment or employment other than self-employment during the 15 months prior to his completion of the form. Under the heading for employment other than self-employment, the form requested that appellant report all such employment for which he received salary, wages, sales commissions, piecework or other payment. If he performed work in furtherance of a relative’s or spouse’s business, he was asked to show as “rate of pay” what it would have cost the employer or organization to hire someone to perform the work he performed. Under the heading for self-employment, the form asked appellant to report any such enterprise (such as farming, sales, service, operating a store, business, etc.) in which he worked and from which he received revenue, even if operated at a loss or if profits were reinvested. He was required to show as “rate of pay” what it would have cost him to have hired someone to perform the work he performed.¹ Appellant completed EN1032 forms in a similar fashion on February 4, 1985, April 19, 1986, September 14, 1987, November 2, 1988, November 15, 1989, December 5, 1990, October 25, 1991, September 3, 1992 and September 3, 1993.

On September 5, 1994 appellant again responded “no” in response to questions on a Form EN1032 regarding whether he had self-employment or employment other than self-employment during the 15 months prior to his completion of the form. The form requested that he report employment other self-employment for which he received salary, wages, sales commissions, piecework or other payment. Appellant was to report all self-employment or involvement in business enterprises including, but not limited to, farming, sales work, operating a business (including a store or restaurant) and providing services in exchange for money, goods or other services. The form further advised that the kind of services he was required to report included such activities as carpentry, mechanical work, painting, contracting, child care, odd jobs, etc. Appellant was required to report activities such as keeping books and records or managing and/or overseeing a business of any kind, including a family business and even part-time or intermittent activities were to be reported. He was to report work or any ownership interest in any business enterprise even if he was not paid, the work was for a family member or relative, the business lost money, or income was reinvested or paid to others. For each year between 1995 and 2006, appellant signed similarly worded EN1032 forms in which he indicated that he did not have self-employment or employment other than self-employment during the 15 months prior to his completion of the forms.²

The Office of the Inspector General of the employing establishment began an investigation in September 2005 of appellant’s activities while receiving Office compensation. The investigators indicated that several parishioners told them that appellant had served as a

¹ All the EN1032 forms appellant signed asked him to certify that the information he provided was correct. He was advised that he might be subject to criminal prosecution if he made a false statement or misrepresentation of a material fact in claiming a payment of benefits under the Federal Employees’ Compensation Act or fraudulently concealed or failed to report income or other information which could have an effect on benefits.

² The first of these forms was signed on September 5, 1995 and the last was signed on August 14, 2006.

pastor for the New Covenant Free Pentecostal Church in Kingsport, TN, since approximately 1988, that he performed three services per week (2 on Sunday and 1 on Wednesday) which lasted approximately 45 minutes each and that he was not paid for his work.³ Several parishioners stated that appellant supported the Appalachian Children's Home in Barbourville, KY, by making donations and visiting the home several times per year. William Gross, the deacon of the church, stated that appellant never received a salary for his service as a pastor, but noted that appellant received gift cards to local restaurants three times per year on special occasions⁴ and had a cellular telephone paid for by the church so that parishioners could contact him. Mr. Gross stated that appellant had the use of a leased van paid for by the church until the lease expired and the van was returned.

On March 31, 2006 the investigators received a statement from appellant in which he indicated that he was ordained a minister in March 1978, that he became a pastor of the New Covenant Free Pentecostal Church in December 1987 and that he received no salary for his activities as a pastor. He stated that he was a supporter of the Appalachian Children's Home and that he and his wife sent the organization a monthly check. Appellant stated that he and his wife attended a conference each year at the Appalachian Children's Home and that the organization paid for a hotel room and provided all meals for five days. He indicated that he received no other compensation or benefits from the Appalachian Children's Home.

On April 3, 2006 appellant responded to questions from the investigators. He stated the New Covenant Free Pentecostal Church started in a storefront in 1987 and that the parishioners pooled their money to buy the building where the church has been housed since 1989. Appellant noted that he preached three times per week but never received any salary. He stated that he never listed these activities on the EN1032 forms because he did not consider it to be employment or volunteer work, but rather considered it to be a calling or God's work. Appellant indicated that a van was leased for him in about 2000 for his and the parishioners' use, that the lease was paid by the church and that the van was returned at the end of a three-year lease.

Appellant submitted a March 27, 2006 statement and an undated statement, received by the Office on May 19, 2006. He asserted that he did not receive salary of any kind while serving as a pastor to his congregation of about 20 regular members. He stated that all tithes and offerings went directly deposited into the church account to pay for bills and ministry outreach programs and indicated that his name was not on any bank accounts related to the church. Appellant noted that he supported the Appalachian Children's Home with a monthly donation and had a voice in decisions regarding the home along with several other ministers. He stated that he attended a yearly meeting to discuss issues pertaining to the home and noted that he and his wife would typically be provided with a hotel for four nights and meals for five days at the home.

³ The investigative report indicates that one of the investigators attended a sermon given by appellant on February 4, 2006.

⁴ In a separate undated statement, received by the Office on May 19, 2006, Mr. Gross stated that on appellant's birthday, Christmas and "Pastor Appreciation Day" he would receive a gift, usually a gift card for him and his wife to a local restaurant.

By decision dated October 10, 2006, the Office determined that appellant forfeited \$974,032.99 in compensation for the period November 4, 1983 to August 14, 2006. The Office found that appellant knowingly omitted and failed to report his activities and earnings as a pastor and as a volunteer for the Appalachian Children's Home on various EN1032 forms he completed for the period November 4, 1983 to August 14, 2006. The Office asserted that the language of the EN1032 forms advised appellant of his obligation to report such activities and earnings.⁵

LEGAL PRECEDENT

Section 8106(b) of the Act⁶ 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. The employee shall include in the affidavit or report the value of housing, board, lodging and other advantages which are part of his earnings in employment or self-employment and which can be estimated in money. 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.”⁷

In analyzing whether an employee in receipt of compensation has earnings or wages, the Board, in *Christine P. Burgess*,⁸ noted wages are defined as:

“Every form of remuneration payable for a given period to an individual for personal services, including salaries, commissions, vacation pay, dismissal wages, bonuses and reasonable value of board, rent, housing, lodging, payments in kind,

⁵ The record contains an October 10, 2006 preliminary determination that appellant received a \$974,032.99 overpayment of compensation. A claimant may only appeal a final decision to the Board. The record does not contain any final overpayment decision of the Office and, therefore, this matter is not currently before the Board. 20 C.F.R. §§ 501.2(c).

⁶ 5 U.S.C. § 8106(b).

⁷ While section 8106(b)(2) refers only to partially disabled employees, the Board has held that the test for determining partial disability is whether, for the period under consideration, the employee was in fact either totally disabled or merely partially disabled and not whether he received compensation for that period for total or partial loss of wage-earning capacity. *Ronald H. Ripple*, 24 ECAB 254, 260 (1973). The Board explained that a totally disabled employee normally would not have any employment earnings and, therefore, a statutory provision about such earnings would be meaningless. *Id.* at 260.

⁸ 43 ECAB 449 (1992).

tips and any other similar advantage received from the individual's employer or directly with respect to work for him.”⁹

In *Burgess*, the Board found that the record established that the employee received reimbursed expenses and “other advantages” as part of wages or remuneration in the form of free travel, lodging, food and transportation costs as a result of performing the duties of an escort for a travel service. Based on these reimbursed expenses and payments in kind, the Board found that the employee had “earnings” as defined under section 8106(c) which she was required to report to the Office. Similarly, in *Barbara L. Kanter*,¹⁰ the Board found that the employee received monetary remuneration from the sales of dogs from her self-employment as a dog breeder. The Board noted that the employee's self-employment activities were not so *de minimis* that her earnings did not have to be reported to the Office as required under the Act.

In *James M. Steck*,¹¹ the employee served as a youth minister for a Baptist church and was required to perform regular church services, provide ministry to parishioners for approximately 15 hours a week and keep some regular office hours. In compensation for his services, the employee and his family were provided with a church parsonage, rent free, and all utilities were paid for by the church, with the exception of the telephone. Because the parsonage was in disrepair and was not ready for occupation at the time the employee was hired, the church paid him \$125.00 a week for approximately two months to cover living expenses incurred by him and his family while the parsonage was being renovated. The Board determined that the Office properly found that the employee had self-employment and earnings given the extent of his activities and the compensation he received, albeit largely in kind, from the church for his work as a youth minister. The Board affirmed the Office's holding that the employee forfeited compensation for knowingly failing to report earnings from employment activity.

ANALYSIS

In the present case, the Office found that appellant forfeited his right to compensation for the period November 4, 1983 to August 14, 2006 on the basis that he knowingly failed to report his earnings and employment on Office EN1032 forms which covered this period. The Office determined that, due to this knowing failure to report, appellant forfeited the \$974,032.99 in compensation he received between November 4, 1983 and August 14, 2006.

The Board finds that the Office has not established that appellant had “earnings” or other forms of remuneration from his activities as a pastor for the New Covenant Free Pentecostal Church or the services he provided for the Appalachian Children's Home during the period of forfeiture.¹² The evidence in this case does not establish that appellant received any wages, tips or similar advantage from the church or children's home with respect to his activities, to include

⁹ *Id.* at 457, citing Black's Law Dictionary, (Special Deluxe, 5th ed. 1979).

¹⁰ 46 ECAB 165 (1994).

¹¹ 49 ECAB 134 (1997).

¹² The Board notes that there is no evidence that appellant served as a pastor prior to 1987.

the receipt of any benefits beyond a *de minimis* amount, in exchange for his services.¹³ Appellant and a number of church parishioners testified that he did not receive any salary or compensation for the activities he engaged in as a church pastor or for the services he provided to the children's home.

The record reveals that Mr. Gross, the deacon of the church, stated that on appellant's birthday, Christmas and "Pastor Appreciation Day" he would receive a gift, usually a gift card for him and his wife to dine at a local restaurant. He indicated that appellant had a cellular telephone paid for by the church so that parishioners could contact him. Appellant acknowledged that the church leased a van for him in about 2000 for his and the parishioners' use and that the van was returned at the end of a three-year lease. He stated that he attended a yearly meeting at the Appalachian Children's Home and noted that he and his wife would typically be provided with a hotel for four nights and meals for five days at the home.

The Office has not presented any evidence to establish the value of these items to appellant and it has not otherwise been established that they represent anything but *de minimis* benefits which would not rise to the level of earnings. The Office has not shown that appellant received earnings, either in the form of salary, tips or benefits that were beyond *de minimis*. Even in the absence of evidence regarding the specific value of the above-described items received by appellant, it does not appear that he received benefits that were even close in value to those received by the employee in *James M. Steck*. The employee in that case received living expenses for himself and his family while a church parsonage was being renovated to serve as their home and, after the renovation was completed, he and his family lived in the parsonage on a rent-free basis. The employee also received payments for all of his utilities, except for the telephone. In the present case, however, three times per year the church provided appellant and his family with gift certificates for meals and once per year the children's home provided appellant and his wife with four nights of lodging and five days of meals while they attended a conference. The church also allowed appellant to use a leased van for a period but this van was also used by the church's parishioners. There is no indication that the church or the children's home provided appellant with benefits, such as housing for himself and his family over an extended period.

For these reasons, appellant did not have earnings to report resulting from his activities for the church and children's home on the EN1032 forms he completed.¹⁴ The evidence clearly establishes that appellant engaged in activities for which he was not paid. With no evidence of the receipt of earnings or remuneration above a *de minimis* level from his efforts, the record provides no basis for invoking the penalty provision of section 8106(b)(2).¹⁵ This case is distinguishable from those instances where forfeiture has been invoked based on a claimant's

¹³ See *Cecil S. Ortagus*, 38 ECAB 141 (1986) (setting aside a period of forfeiture as there was no evidence that there were earnings); *Jack Langley*, 34 ECAB 1077 (1983) (noting the Office's application of the forfeiture provision of the Act is not proper where an employee has no outside earnings).

¹⁴ The Board further notes that the EN1032 forms used such terms as "business" and "enterprise" to describe the activities that had to be reported and it would have been reasonable for appellant to assume that his activities did not fall within such categories of activity.

¹⁵ See *Daniel A. Mashe*, 50 ECAB 419 (1999).

self-employment in a family-owned business or where a personal financial interest is otherwise established as accruing to the benefit of the employee, members of his family or other associates. The record does not demonstrate any financial interest by appellant in the church or children's home or that any notable benefit inured to him based on his activities.¹⁶

The record on appeal fails to establish that appellant had any earnings or other form of remuneration from his activities during the period of the forfeiture. The Board finds that the Office did not properly invoke the penalty provision under section 8106(b)(2). For this reason, the finding that appellant forfeited \$974,032.99 in compensation based on the application of the forfeiture provision in this case will be set aside.

CONCLUSION

The Board finds that the Office improperly determined that appellant forfeited \$974,032.99 in compensation for the period November 4, 1983 to August 14, 2006.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' October 10, 2006 decision is reversed.

Issued: November 16, 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

¹⁶ Compare *Gary L. Allen*, 47 ECAB 409 (1996) (the employee had earnings from a lawn mowing service); *Gary Don Young*, 45 ECAB 344 (1994) (the employee received earnings under his wife's social security number); *Anthony Nobile*, 44 ECAB 268 (1992) (the employee operated a family liquor store).