

FACTUAL HISTORY

On March 21, 2001 appellant, a 47-year-old window clerk, filed an occupational disease claim that was accepted for aggravation of degenerative lumbar osteoarthritis at L2-3 and herniated disc at L3-4. He underwent lumbar laminotomy and discectomy at L3-4 on March 26, 2001. Appellant was placed on the periodic rolls and was paid compensation benefits until May 15, 2005, when he elected disability retirement benefits in lieu of benefits under the Federal Employees' Compensation Act.

As a benefit recipient, the Office periodically required appellant to submit updated information (Form EN1032) regarding his employment, volunteer work, dependents, other federal benefits or payments received and any third-party settlements. The reports required that he provide information covering the 15-month period preceding the date of the request. The record contains a Form EN1032 signed by appellant on October 7, 2003. In response to the question as to whether he worked for any employer during the previous 15 months, appellant answered, "No." In response to the question as to whether he was self-employed or involved in any business enterprise in the previous 15 months, he responded, "No." Appellant answered "Yes" when asked to state whether he was unemployed for all periods during the previous 15 months.

In an investigative memorandum dated April 28, 2004, the U.S. Postal Service Inspection Service informed the Office that appellant had participated in, and received income from, a craft business from August 2002 to April 2004. Undercover Agent Charles Kelley and Postal Inspector G.E. Alpizar observed appellant and his wife working at craft fairs on numerous occasions. At a January 18, 2003 craft fair in Humble, Texas, appellant's wife informed the postal inspector that appellant made all of the wooden cutout crafts being sold with a scroll saw, and that he made a wide assortment of the crafts. She indicated that she and her husband manned a booth every month at the "Humble Trade Days" fair. Appellant's wife stated that the previous weekend, they had manned their booth at "Conroe Frontier Days," where they would also have their booth the following weekend. She provided a business card to the inspector containing the name "C&C Custom Creations." On the same date, appellant informed the inspector that it took him six hours to make wooden desk sets, and that he did "customs jobs via special order." The record contains receipts of items purchased on that date from appellant by the inspector in amounts totaling \$190.00. On April 19, 2003 the inspector bought additional crafts from appellant in the amount of \$300.00. Appellant stated that he had his wife complete the invoices because, according to the Department of Labor, he was not supposed to work. He also reiterated that he created crafts for his wife to sell.

On February 27, 2004 appellant was interviewed by Inspector Kelley and Special Agent William Ney. He stated that his wife "sometimes" sells his scroll work at craft shows, which they attend mainly during the Christmas season. Appellant indicated that they went to three shows in 2003 and made approximately \$700.00 during the year. He contended that he was not trying to defraud anyone. Agent Ney indicated that, when confronted with statements made to undercover agents regarding the operation of his business, appellant did not deny that he had performed the work and admitted that he was wrong in answering "no" to the self-employment question on Form EN1032 provided by the Office. Appellant stated that he thought about the

“self-employment question” from the standpoint of “total dollars to still receive social security.” He further stated that they paid taxes on the money and did not intend to defraud the government.

In a March 12, 2004 interview, appellant’s wife stated that the business was hers and was kept separate from her husband. She indicated that he did make wooden cutouts that she sells and that he assists at the booth for a limited amount of time. Appellant stated that he technically filed a false form with the Office concerning his involvement with his wife’s craft business. He reiterated that he did not know how to answer the question regarding self-employment on Form EN1032.

On July 28, 2005 the Office issued a preliminary finding of overpayment in the amount of \$36,822.98 due to appellant’s failure to notify the Office of earnings from his craft business from January 18 to October 7, 2003. Finding that appellant was at fault in the creation of the overpayment by knowingly omitting information he knew was pertinent to his case and would result in a reduction of monetary benefits, the Office concluded that he had forfeited his right to compensation for the period July 8, 2002 to October 7, 2003, the 15-month period preceding the date of the Office’s request. The Office provided a calculation of the overpayment, based on compensation received by appellant from July 8, 2002 to October 7, 2003 in the total amount of \$36,822.98. The Office informed appellant that he had 30 days to request a preresoupment hearing on the issues of fault and a possible waiver.

In an undated form, appellant requested a preresoupment hearing on the issues of fault and possible waiver. Appellant did not contest that he received income from the sale of crafts. However, he disagreed that an overpayment occurred and stated that, if an overpayment occurred, it occurred through no fault of his. Appellant contended that, if any overpayment was due, it should not be “over \$350.00, as [his] wife says she did not make over \$700.00, and that would be half mine at best.”

Appellant submitted financial documents for the period October 26, 2004 to September 7, 2005, including retirement account statements, credit card statements, checking and savings account statements, property tax assessments and credit union statements. A 2002 federal tax return (Form 1040), filed jointly in the names of appellant and his wife, reflected wages, salaries and tips of \$34,333.00; pension income in the amount of \$12,228.00; and business loss in the amount of \$5,382.00, for an adjusted gross income of \$41,335.00. As an attachment to the 2002 federal tax return, appellant submitted Schedule C (Profit or Loss from Business) reflecting that appellant was the proprietor of an arts and crafts business named “C & C Custom Creations,” with gross receipts of \$2,397.00.

In an overpayment recovery questionnaire dated August, 2005, appellant reiterated that he should not be required to repay the amount claimed. He stated that his total monthly income was approximately \$4,267.00 and his monthly expenses were \$2,500.00. Cash on hand was minimal. Appellant alleged that he never really understood how to complete the Form EN1032 provided by the Office. Noting that, under Internal Revenue Service (IRS) regulations, a hobby is not a business until profits result in three out of five tax years, appellant expressed his belief that his wife’s business was not a forbidden business activity that he was required to report. He alleged that a union representative had informed him that there were no clear guidelines on

reporting income and that, as the income from the craft sales was minimal, he should not have to report it. Appellant stated that he was not sure whether his wife actually made any money after expenses, but that he did not really know much about it one way or the other, since “it is her deal.” He indicated that his wife informed him that she made about \$700.00.

At the April 20, 2006 hearing, appellant’s representative contended that it was inequitable to require him to repay over \$36,000.00, in light of the fact that he had received income in the amount of only \$700.00. Appellant alleged that he would suffer a financial hardship if required to repay the overpayment amount. He testified that he did not intend to defraud the government, that he just “took it for a whim,” not really looking at the full consequences of his actions. Appellant reiterated that he considered his craft to be a hobby rather than a business.

By decision dated July 21, 2006, an Office hearing representative finalized the overpayment determination finding that appellant had forfeited his right to compensation for the period July 8, 2002 to October 7, 2003. The representative found an overpayment of compensation in the amount of \$36,822.98, due to appellant’s failure to notify the Office of earnings from his craft business from January 18 to October 7, 2003, and that he was at fault in the creation of the overpayment and, therefore, was not entitled to a waiver of recovery. The Office directed recovery in the amount of \$300.00 per month.

LEGAL PRECEDENT -- ISSUE 1

Pursuant to 20 C.F.R. § 10.525, an employee who is receiving compensation for partial or total disability will periodically be required to submit a report of earnings from employment or self-employment, either part time or full time.¹ Failure to report income may result in forfeiture of all benefits paid during the reporting period.² The regulations further provide that, if an employee knowingly omits or understates earnings or work activity in making a report, he or she shall forfeit the right to compensation with respect to any period for which the report was required.³ Where the right to compensation is forfeited, the Office shall recover any compensation already paid for the period of forfeiture pursuant to 5 U.S.C. § 8129.⁴

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.”⁵

It is not enough for the Office to merely establish that a claimant had employment or earnings. A claimant can only be subjected to the forfeiture provision of 5 U.S.C. § 8106(b)(2) if

¹ 20 C.F.R. § 10.525 (2006).

² 5 U.S.C. § 8106(b); 20 C.F.R. § 10.525(b) (2006).

³ 20 C.F.R. § 10.529(a) (2006).

⁴ 20 C.F.R. § 10.529(b) (2006).

⁵ 5 U.S.C. § 8106(b).

he “knowingly” failed to report employment or earnings.⁶ The term “knowingly” as defined in the Office’s implementing regulation, means “with knowledge, consciously, willfully or intentionally.”⁷

The Office has the burden of proof to establish 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.⁸ 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. The Office may meet this standard without an admission by appellant, if he failed to fully and truthfully complete the EN1032 forms and the circumstances of the case establish that he 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 EN1032 form that he was not employed or self-employed, was false.⁹

ANALYSIS -- ISSUE 1

On October 7, 2003 appellant signed a Form EN1032, stating that he was unemployed, had not engaged in any self-employment activities and earned no income from July 8, 2002 to October 7, 2003. The record, however, contains clear evidence to the contrary and reflects that he failed to report his earnings for the period January 18 to October 7, 2003. Although appellant alleged that he did not fully understand the questions posed on the Form EN1032, he did not deny that he falsely stated his income or that he failed to report his self-employment during the period in question. The issue to be resolved is whether appellant knowingly omitted or understated any part of his earnings for the period January 18 to October 7, 2003.¹⁰

The Office regulations define “knowingly” as with knowledge, consciously, willfully or intentionally.¹¹ Absent an admission by appellant, a knowing omission or understatement of income can be established where circumstances indicate that appellant did not fully and truthfully complete a Form EN1032 and thus, failed to reveal the full extent of his employment activities and earnings.¹² The Board finds that appellant knowingly failed to report his earnings from his craft business.¹³

⁶ *Barbara L. Kanter*, 46 ECAB 165 (1994).

⁷ 20 C.F.R. § 10.5(n); see *Donald L. Overstreet*, 54 ECAB 678 (2003).

⁸ See *Michael D. Mathews*, 51 ECAB 247 (1999).

⁹ See *Donald L. Overstreet*, *supra* note 7; see also *Terryl A. Geer*, 51 ECAB 168 (1999).

¹⁰ 5 U.S.C. § 8106(b)(2).

¹¹ 20 C.F.R. § 10.5(n) (2006).

¹² *Donald L. Overstreet*, *supra* note 7.

¹³ *Barbara L. Kanter*, *supra* note 6.

The evidence establishes that appellant and his wife operated C&C Custom Creations, an ongoing business enterprise. The couple routinely attended craft fairs together, where they sold woodcutting items made by appellant. They handed out business cards, bearing the name of the business and solicited special orders. Income from the business necessitated the filing of a Schedule C (Profit and Loss for Business), as an attachment to appellant's federal 2002 tax return, which identified him as the proprietor of the arts and crafts business. The Board finds that appellant's act of filing a tax return, which advised the IRS of income generated by the business, is persuasive evidence that he knowingly understated his earnings in his Form EN1032.

Appellant explained his failure to report his earnings by stating that he did not understand the question posed to him on the Form EN1032 regarding self-employment income. Referencing an IRS regulation which allegedly provides that a hobby is not considered to be a business until profits result in three out of five tax years, appellant expressed his belief that his wife's business was a hobby, not a forbidden activity that he was required to report. However, appellant was informed by the Office that he had an affirmative obligation to report any and all income received. Therefore, the Board finds appellant's claim of ignorance to be without merit.

Appellant's act of seeking advice from a union representative as to his obligation to report his business income, is evidence that he consciously failed to report the income. Had appellant asked the Office, rather than a union representative, to clarify his obligation to report his self-employment income, he might have avoided the unfortunate outcome in this case.

The postal service investigation provided further evidence of appellant's knowing failure to report his income. Appellant informed an undercover agent that he had his wife complete the sales invoices because, according to the Department of Labor, he was not supposed to work. His admitted act of deceiving the Office by attempting to hide his involvement in the business is clear evidence of his intentional understatement of income.

Appellant contended that he was not required to report the earnings from his business venture in that they were *de minimus*. The facts do not support appellant's claim. A 2002 federal tax return reflects gross sales of \$2,397.00. Appellant informed a postal inspector that earnings from C&C Custom Creations were approximately \$700.00 for calendar year 2003. Although the record does not contain a tax return or other documentation to establish 2003 income for the business, the evidence reflects that appellant and his wife attended craft fairs at least once a month, and receipts for sales from appellant to the undercover agent alone totaled \$490.00. It is reasonable to assume that total income earned by the business in 2003 exceeded \$750.00. The Board finds that appellant's earnings were not *de minimus*.¹⁴

Appellant also contended that it was inequitable to require him to repay over \$36,000.00, in light of the fact that he had received income in the amount of only \$700.00. However, Office regulations provide that, if an employee knowingly omits or understates earnings or work activity in making a report, he or she shall forfeit the right to compensation with respect to any

¹⁴ See *Albert A. Garcia*, 54 ECAB 206 (2002) (earnings of \$400.00 were not considered *de minimus* where appellant did not report the full extent of earnings when he completed Form EN1032). See also *Antonio J. Giunta*, 53 ECAB 370 (2002); *Barbara L. Kanter*, *supra* note 6.

period for which the report was required.¹⁵ There is no provision for offset or payment based on the amount of income actually received. Appellant misrepresented his income and, therefore, forfeited his right to all compensation during the period in question. The Board finds that the Office met its burden of proof to establish that appellant knowingly understated his earnings to the Office in the Form EN1032 report dated October 7, 2003.

During the forfeiture period, appellant received wage-loss compensation in the amount of \$36,822.98. The regulations provide that compensation paid for the period of the forfeiture shall be recovered in accordance with the Act's provisions concerning recovery of overpayments.¹⁶ The Board notes that appellant did not dispute the amount of the compensation received during the forfeiture period. Accordingly, the Office properly declared that the forfeited compensation resulted in an overpayment of benefits in the amount of \$36,822.98.

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.¹⁷ Section 10.433 of the implementing regulations specifically provides 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.¹⁸ A recipient will be found at fault in creating an overpayment if he or she made an incorrect statement as to a material fact which he or she knew, or should have known, to be incorrect.¹⁹ Fault will also be found where a recipient failed to provide information he or she knew or should have known to be material.²⁰ Lastly, fault exists where the overpaid individual accepted a payment which he or she knew or should have known to be incorrect.²¹

ANALYSIS -- ISSUE 2

The Board finds that appellant was at fault in creating the overpayment. As noted, he knowingly failed to report earnings to the Office. Accurate earnings information is material to the question of appellant's entitlement to continuing wage-loss compensation. Because he made incorrect statements as to material facts which he knew or should have known to be incorrect,

¹⁵ 20 C.F.R. § 10.529(a) (2006).

¹⁶ 20 C.F.R. § 10.529(b) (2006).

¹⁷ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437 (2006).

¹⁸ 20 C.F.R. § 10.433(a) (2006).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

appellant is at fault in creating the overpayment.²² Therefore, appellant is not entitled to waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(a) of the Act provides that where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled.²³ However, where no further compensation benefits are due an individual, the Board does not have jurisdiction, and the recovery of an overpayment remains within the discretion of the Office. The Board's jurisdiction over recovery is limited to review of those cases where the Office seeks recovery from continuing compensation under the Act.²⁴

ANALYSIS -- ISSUE 3

With respect to recovery of the overpayment, the Board notes that its jurisdiction is limited to review of those cases where the Office seeks recovery from continuing compensation benefits under the Act.²⁵ Appellant was not in receipt of continuing compensation at the time the final decision was entered in this matter. Therefore, this Board lacks jurisdiction to review recovery of the overpayment.

CONCLUSION

The Board finds that appellant forfeited his entitlement to compensation from July 8, 2002 to October 7, 2003 because he knowingly failed to report earnings from his self-employment during this period, thereby, creating an overpayment in the amount of \$36,822.98. The Board finds that the Office properly found that appellant was at fault in the creation of the overpayment, thereby, precluding waiver. The Board further finds that, as appellant was not in receipt of continuing compensation at the time the final decision was entered in this matter, it lacks jurisdiction to review recovery of the overpayment.

²² 20 C.F.R. § 10.433(a) (2006).

²³ 5 U.S.C. § 8129(a).

²⁴ *Terry A. Keister*, 56 ECAB ____ (Docket No. 04-1136; issued May 23, 2005); *see also Albert Pineiro*, 51 ECAB 310 (2000).

²⁵ *See Terry A. Keister*, *supra* note 24.

ORDER

IT IS HEREBY ORDERED THAT the July 21, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 6, 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