

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

V.P., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, SAN JOSE)
INTERNATIONAL AIRPORT, CA, Employer)

**Docket No. 09-71
Issued: August 12, 2009**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 9, 2008 appellant filed a timely appeal from March 7, August 4 and September 5, 2008 decisions of the Office of Workers' Compensation Programs finding that she forfeited her compensation benefits resulting in an overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit issues of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation benefits effective February 27, 2008 on the grounds that she forfeited her right to compensation benefits for the period May 12, 2003 through February 26, 2008; (2) whether the Office properly found that an overpayment in compensation in the amount of \$158,209.92, had been created because appellant did not report earnings; and (3) whether the Office properly found that appellant was at fault in the creation of the overpayment and, therefore, the overpayment was not subject to waiver.

FACTUAL HISTORY

On March 29, 2003 appellant, then a 35-year-old supervisory security screener, sustained an employment-related lumbar back strain and thoracic back contusion when pushed by a coworker. She worked limited-duty sporadically, filed Form CA-7 claims for compensation and received compensation for intermittent wage loss. On February 9, 2004 the employing establishment could no longer accommodate appellant's work restrictions. Appellant was placed on the periodic rolls effective February 22, 2004 and referred to vocational rehabilitation.¹ In July 2005, she moved from Redwood City, California to Palm Springs, California. In October 2005, appellant moved to Ocala, Florida. In February 2006, she moved Sparks, Nevada. In November 2007, appellant moved to Port Hueneme, California.²

Appellant submitted Office EN1032 forms, signed on June 5 and 22, 2005, June 19, 2006 and June 8, 2007. On June 5 and 22, 2005 she stated that she had no earnings. On the form signed on June 8, 2007 appellant advised that she had worked on a video in the summer of 2004 and had no earnings since. By letter dated August 9, 2007, she reported that she worked for one day in August 2004, earning \$2,000.00 in cash.

On March 5, 2008 the Office of the Inspector General (OIG) of the Department of Labor notified the Office that a criminal investigation had been conducted regarding whether appellant violated 18 U.S.C. § 1920, making false statements to obtain benefits under the Federal Employees' Compensation Act.³ The OIG attached a plea agreement reached in the U.S. District Court for the Northern District of California, signed and filed on February 27, 2008. The plea agreement noted that appellant had earned income while working as an actress, model and fitness instructor. Appellant entered a guilty plea to one count under 18 U.S.C. § 1920 of making a false statement to obtain federal workers' compensation benefits and that, on June 5 and 22, 2005, June 19, 2006 and June 8, 2007, she knowingly and willingly made false statements on EN1032 forms regarding her earnings. She acknowledged that the agreement did not bind any other federal agency. Restitution of \$7,739.00 was ordered.

By decision dated March 7, 2008, the Office terminated appellant's wage-loss compensation effective February 27, 2008. Pursuant to section 8148 of the Act, appellant forfeited her right to future compensation as she was convicted of a violation relating to fraud in the application for or receipt of benefits under the Act. In an August 4, 2008 decision, the Office found that appellant forfeited her right to compensation for the period May 12, 2003 to February 27, 2008, because she did not report earnings from employment as required under the Act.

¹ Compensation was also paid from February 9 to 21, 2004.

² Appellant was referred for vocational rehabilitation in February 2004, September 2005 and April 2007. In July 26, 2007, a training program as a gambling dealer or surveillance system monitor was approved and she began training at the Reno Tahoe Job Training Academy as a casino dealer. Appellant discontinued her training when she was arrested by the Federal Bureau of Investigation in November 2007.

³ 5 U.S.C. §§ 8101-8193.

On August 4, 2008 the Office also made a preliminary determination that appellant received an overpayment in compensation in the amount of \$158,209.92 because she knowingly failed to report earnings from employment from May 12, 2003 to February 27, 2008. Appellant was found at fault in creating the overpayment because she failed to provide information that she knew or should have known was material to her receipt of compensation. The actions she could take were explained to her and she was given 30 days to respond. Computer print-outs and an overpayment worksheet contained in the record show that appellant received wage-loss compensation totaling \$158,209.92 for the period May 12, 2003 to February 27, 2008. The August 4, 2008 decision and preliminary overpayment findings were sent to her address of record in Port Hueneme, California.

By decision dated September 5, 2008, the Office finalized the preliminary determination that appellant was at fault in creating the \$158,209.92 overpayment because she forfeited her right to compensation for the period May 12, 2003 to February 26, 2008.

LEGAL PRECEDENT -- ISSUE 1

Section 8148 of the Act provides that any individual convicted of a violation of 18 U.S.C. § 1920 or any other federal or state criminal statute relating to fraud in the application for or receipt of any benefit under the Act, shall forfeit, as of the date of such conviction, any entitlement to any benefit such individual would otherwise be entitled to under the Act for any injury occurring on or before the date of such conviction. Such forfeiture shall be in addition to any action the Secretary may take under section 8106 or 8129 of the Act.⁴

ANALYSIS -- ISSUE 1

The Board finds that the Office properly terminated appellant's compensation benefits. The U.S. District Court for the Northern District of California found her guilty of violating 18 U.S.C. § 1920. Specifically, the Court found her guilty of making a false statement to obtain federal workers' compensation benefits. Under section 8148 of the Act, appellant forfeited her entitlement to benefits under the Act for her injury occurring on or before the date of such conviction.⁵ The Board therefore finds that she forfeited her right to compensation effective February 27, 2008, the date of her conviction and the Office properly terminated her compensation benefits effective that day.

LEGAL PRECEDENT -- ISSUE 2

Section 8106(b) provides that 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. It provides that an employee who fails to make an affidavit or report when required or knowingly omits or understates any part of his or

⁴ 5 U.S.C. § 8148(a); *see F.C.*, 59 ECAB ____ (Docket No. 07-1541, issued November 16, 2007).

⁵ *Id.*

her earnings forfeits his or her right to compensation with respect to any period for which the affidavit or report was required.⁶

Section 10.5(g) of the Office's regulations defines earnings from employment or self-employment as follows:

“(1) Gross earnings or wages before any deduction and includes the value of subsistence, quarters, reimbursed expenses and any other goods or services received in kind as remuneration; or

“(2) A reasonable estimate of the cost to have someone else perform the duties of an individual who accepts no remuneration. Neither lack of profits, nor the characterization of the duties as a hobby, removes an unremunerated individual's responsibility to report the estimated cost to have someone else perform his or her duties.”⁷

In order to establish that a compensationeer should forfeit the compensation received for the periods covered by completed EN1032 forms, the evidence must establish that he or she knowingly omitted or understated his or her employment and earnings.⁸ As forfeiture is a penalty, it is not enough merely to establish that there were underreported earnings from employment. The inquiry is whether appellant knowingly omitted or understated her earnings from employment for the periods covered by the EN1032 forms. A claimant can be subjected to the forfeiture provision of section 8106(b) only if he or she “knowingly” failed to report employment or earnings. The term “knowingly” as defined in the Office's implementing regulations, means “with knowledge, consciously, willfully or intentionally.”⁹

The language on Office EN1032 forms is clear and unambiguous in requiring a claimant to report earnings for the previous 15 months from any employer, self-employment or a business enterprise in which he or she worked. The forms further emphasize that severe penalties may be applied for failure to report all work activities thoroughly and completely.

ANALYSIS -- ISSUE 2

The Board finds that appellant forfeited wage-loss compensation for the period March 5, 2004 through June 8, 2007. For purposes of this appeal, it is sufficient that on February 27, 2007 she pled guilty in District Court to making a false statement to obtain federal workers' compensation benefits, based on the filing of EN1032 forms submitted on June 5 and 22, 2005, June 19, 2006 and June 8, 2007. As the EN1032 forms signed by appellant cover the previous 15-month period, this satisfies the requirements of section 8106(b) of the Act and establishes that she knowingly omitted work activities in the period covered by the forms which, in this case,

⁶ 5 U.S.C. § 8106(b); *see F.C., supra* note 4.

⁷ 20 C.F.R. § 10.5(g).

⁸ *Robert R. Holmes*, 49 ECAB 161 (1997).

⁹ 20 C.F.R. § 10.5(n); *see Cheryl Thomas*, 55 ECAB 610 (2004).

cover the March 5, 2004 to June 8, 2007 period. The Board therefore finds that she forfeited her right to compensation for this period.

The Board, however, finds that there was no forfeiture of appellant's wage-loss compensation for the periods May 12, 2003 to March 5, 2004 and June 8, 2007 to February 27, 2008. In its August 4, 2008 decision, finding that appellant forfeited compensation for the period May 12, 2003 through February 26, 2008, the Office relied on the February 27, 2008 plea agreement. In this agreement, however, appellant pled guilty only to those periods covered on the EN1032 forms signed by her on June 5 and 22, 2005, June 19, 2006 and June 8, 2007. Thus, the agreement covered the period beginning on March 5, 2004 and did not cover the period May 12, 2003 to March 5, 2004. Appellant continued to work for the employing establishment until February 9, 2004 and filed CA-7 form claims for intermittent wage-loss beginning on May 10, 2003. She received sporadic wage-loss compensation beginning on May 12, 2003, based on filing the CA-7 form claims, up until she was placed on the periodic rolls effective February 22, 2004. The Board has held that the language on the CA-7 forms of the type signed by appellant is not specific to reasonably put a claimant on notice that he or she has to report all earnings, no matter the source. The CA-7 forms do not indicate that a claimant has to report all earnings, but merely ask whether a claimant has worked outside a federal job during the claimed periods.¹⁰ The Board therefore finds that the Office did not meet its burden of proof to establish that appellant forfeited her right to compensation for the period covered by the CA-7 forms submitted by appellant, *i.e.*, May 12, 2003 to March 5, 2004.

Regarding the period from June 5, 2007, the date of the last EN1032 forms signed by appellant to which she pled guilty to making a false statement, up to February 27, 2008, the date she signed the plea agreement, the March 2, 2004 letter placing her on the periodic rolls does not contain language advising her to report earnings.¹¹ The Board finds that this is not sufficient to establish that appellant knowingly failed to report earnings such that she consciously, willfully or intentionally failed to report compensation for this period.¹²

As the forfeiture provision is narrowly construed, the Board finds that the Office improperly concluded that appellant forfeited her compensation for the periods May 12, 2003 to March 5, 2004 and June 8, 2007 to February 27, 2008.¹³

LEGAL PRECEDENT -- ISSUE 3

Section 8102(a) of the Act provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.¹⁴ A claimant, however, is not entitled to

¹⁰ *Karen Spurling*, 56 ECAB 189 (2004).

¹¹ The letter states: "To avoid an overpayment of compensation: NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK."

¹² *J.J.*, 59 ECAB ____ (Docket No. 08-263, issued June 3, 2008).

¹³ *Karen Spurling*, *supra* note 10.

¹⁴ 5 U.S.C. § 8102(a).

receive temporary total disability and actual earnings for the same period.¹⁵ The Office procedures provide that an overpayment in compensation is created when a claimant returns to work and continues to receive compensation.¹⁶

Section 10.529 of Office regulations provide that, if an employee knowingly omits or understates any 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. A false or evasive statement, omission, concealment or misrepresentation with respect to employment activity or earnings in a report may also subject an employee to criminal prosecution. Where the right to compensation is forfeited, the Office shall recover any compensation already paid for the period of forfeiture pursuant to section 8129 of the Act and other relevant statutes.¹⁷

ANALYSIS -- ISSUE 3

The Board finds that an overpayment in compensation was created for the period March 5, 2004 through June 8, 2007. Office regulations provide that the Office may declare an overpayment in compensation for the period of a given forfeiture of compensation.¹⁸ In this case, the evidence of record established that appellant forfeited compensation for the period March 5, 2004 through June 8, 2007, the period covered by her plea agreement. An overpayment in compensation would therefore be created for that period. However, as appellant did not forfeit compensation for the periods May 12, 2003 to March 5, 2004 and June 8, 2007 to February 27, 2008, an overpayment in compensation would thus not be created for these periods on this basis of forfeiture. The Office solely relied on a forfeiture finding in determining the amount of the overpayment in this case. The Board therefore finds that the case is not in posture for decision regarding the amount of the overpayment in compensation. The case will therefore be remanded to the Office to determine the correct amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 4

Section 8129 of the Act provides that an overpayment in compensation shall be recovered by the Office 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.”¹⁹

¹⁵ *Donna M. Rowan*, 54 ECAB 698 (2003).

¹⁶ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (September 1994).

¹⁷ 20 C.F.R. § 10.529; *see Joan Ross*, 57 ECAB 694 (2006).

¹⁸ *Id.*

¹⁹ 5 U.S.C. § 8129; *see Linda E. Padilla*, 45 ECAB 768 (1994).

Section 10.433(a) of the Office's regulations provide that the Office:

“[M]ay 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 from [the Office] are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in 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; or (3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual).”²⁰

To determine if an individual was at fault with respect to the creation of an overpayment, the Office examines the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.²¹

ANALYSIS -- ISSUE 4

In this case, the Office found appellant at fault in creating the overpayment in compensation because she knowingly failed to report earnings. Appellant had an obligation to show good faith and to exercise a high degree of care in reporting events that could affect the amount of her compensation.²² Beginning on June 5, 2005, she submitted Office EN1032 forms in which she indicated that she had no earnings and was not performing work activities for the period beginning March 5, 2004, continuing until June 8, 2007. The forms properly advised appellant that a false or evasive answer to any question could be grounds for forfeiting compensation benefits and advised that severe penalties could be applied for failure to report all work activities thoroughly and completely. When appellant signed her name to the forms, she certified that she understood that she must immediately report to the Office any employment or work activities. She failed to provide the Office with earnings information that she knew or should have known was material to the receipt of her wage-loss compensation. The Board finds the fact that appellant did not report her earnings on the EN1032 forms is probative evidence that she knew or should have known that she was not entitled to receive wage-loss compensation for total disability while she was in receipt of earnings from self-employment. Appellant is at fault

²⁰ 20 C.F.R. § 10.433; *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

²¹ *Id.* at § 10.433(b); *Duane C. Rawlings*, 55 ECAB 366 (2004).

²² *Sinclair L. Taylor*, *supra* note 20.

in the creation of the overpayment in compensation from March 5, 2004 to June 8, 2007.²³ As she was at fault in the creation of the overpayment, she is not entitled to waiver.²⁴

Based on the Board's finding regarding the overpayment in compensation, the Board need not address the fault finding regarding the periods May 12, 2003 to March 5 2004 and June 8, 2007 to February 27, 2008. With respect to recovery of the overpayment, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation payments under the Act. In this case, appellant is no longer receiving wage-loss compensation.²⁵

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation benefits after February 27, 2008 and that she forfeited her right to compensation for the period March 5, 2004 through February 26, 2008. The Board also finds that she was at fault in the creation of an overpayment in compensation for the period March 5, 2004 through February 26, 2008 but that the case is not in posture regarding the amount of the overpayment in compensation.

²³ *F.C.*, *supra* note 4.

²⁴ 5 U.S.C. § 8129.

²⁵ *Ricky Greenwood*, 57 ECAB 462 (2006).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 7, 2008 is affirmed. The decision dated August 4, 2008 is affirmed in part and reversed in part and the decision dated September 5, 2008 is affirmed in part and set aside in part. The case is remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: August 12, 2009
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board