United States Department of Labor
Employees' Compensation Appeals Board

P.M., Appellant	)	
and	)	**Docket No. 07-2169**
	)	**Issued: March 3, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Port Monmouth, NJ, Employer	)	

Appearances:
Kathleen A. Sheedy, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 22, 2007 appellant, through his attorney, filed a timely appeal from a September 13, 2006 merit decision of the Office of Workers' Compensation Programs finding that he forfeited his entitlement to compensation and a May 24, 2007 hearing representative's decision affirming the forfeiture of compensation and finalizing an overpayment of compensation for which he was at fault in its creation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly found that appellant forfeited his entitlement to compensation from January 28, 2002 through September 14, 2004 because he knowingly failed to report employment activities; (2) whether he received an overpayment of compensation in the amount of $58,493.06 during the period of the forfeiture; (3) whether he was at fault in the creation of the overpayment; and (4) whether the Office properly determined that it would deduct $500.00 every four weeks from his continuing compensation to repay the overpayment.

FACTUAL HISTORY

On November 13, 1995 appellant, then a 43-year-old clerk, filed a claim for an injury to his lower back and left leg occurring on that date when he picked up tubs of flats. He stopped work on November 28, 1995 and did not return. The Office accepted his claim for lumbosacral strain and a herniated disc at L4-5.

On May 1, 1999 appellant began working 12 hours per week in private employment. On May 27, 2001 the Office reduced his compensation effective May 1, 1999 based on his actual earnings as a doorman.[1] Appellant stopped working as a doorman in May 2001.

Appellant completed periodic EN1032 form questionnaires regarding whether he had any earnings from employment or self-employment during the previous 15 months. The EN1032 forms advised 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 and any volunteer work performed. 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 April 15, 2003, March 12 and September 14, 2004. On each form he indicated that he was not engaged in either employment or self-employment and did not perform volunteer work.

On February 25, 2005 an investigator with the employing establishment and an investigator with the Office of the Inspector General (OIG) of the United States Department of Labor interviewed appellant regarding his activities with Southside Florist. The investigators witnessed him driving a van owned by Southside Florist immediately before the interview. Appellant related that he was assisting the owners so that they could attend a funeral. He denied that he worked for the florists or that he received compensation. Appellant related that he worked from around 7:00 a.m. until noon on Valentine's Day. He never received any tips and he was not on a schedule. Appellant was uncertain why there was a schedule for Valentine's Day.

On February 24, March 15 and 24, 2005 the investigators interviewed Barbara Vandenberge, the proprietor of Southside Florist. Ms. Vandenberge could not remember when appellant began working for the shop. She stated that "her workers were paid off the books and she did not maintain timekeeping records. On busy days Ms. Vandenberge used delivery sheets. Appellant worked alone on Sundays so that Ms. Vandenberge and her partner could take the day off. On other days "his duties included mostly delivering flowers by van to customers, and occasionally waiting on customers in the florist." Ms. Vandenberge determined after reviewing sales slips that appellant began working at the florist shop on January 28, 2002.

In a statement dated March 24, 2005, Ms. Vandenberge related that she opened Southside Florist in September 2001. Her family and friends assisted her to make the shop a success and to

[1] The Office terminated appellant's compensation in March 1997 for refusing suitable work under 5 U.S.C. § 8106(c). By decision dated December 23, 1999, it vacated its March 6, 1997 termination decision and found that he was entitled to compensation for total disability after March 16, 1997.

help revitalize the surrounding area. Appellant assisted depending on his physical condition. Ms. Vandenberge stated:

> "He would help us make flower deliveries, drive the delivery van, help us keep the shop tidy, answer the phone or take an order if we were busy. The extent of his help varied depending upon our need and his physical ability to assist.
>
> "We never had the need to keep formal records of [appellant's] help. Our schedule for Valentine's Day week was used more as an organizational tool than a payroll record since so much of the help we received from friends that week was done without pay. Likewise our delivery sheets were a back up in case a customer questioned whether a delivery was made. We have none of the records specified in the subpoena since we did not consider [appellant] to be an employee."

Ms. Vandenberge related that appellant provided most of his assistance on Sundays working in the shop for four hours. She stated, "During that time [he] would frequently open the shop, answer the phone, take orders and wait on the occasional customer. Without his help, we would have had to work seven days per week or close on Sundays completely." Appellant initially helped out on January 28, 2002 and last worked on February 24, 2005. Ms. Vandenberge stated:

> "[Appellant] has never asked for payment for his help and has refused payment on those occasions when we have tried to pay him. We have tried to reciprocate for his kindness and support with small kindnesses of our own such as providing him with free flowers if he needed them for a funeral or other occasions, treating him to lunch periodically when he was in the shop or giving him money for gas when it seemed he was having a hard time and could [not] afford to put gas in his car. These things were done for him as our friend."

The record contains a Valentine's week time sheet listing the hours worked by appellant and records of delivery and sales slips.

In a March 30, 2005 investigative memorandum, an investigator with the employing establishment related that the inspection service conducted surveillance on appellant on various dates from June 17, 2004 until February 17, 2005. On 16 different occasions investigators observed him loading flowers into a delivery van and delivering the flowers. On October 6, 2004 appellant received a $5.00 tip following a delivery. On November 3, 2004 undercover inspectors asked him whether he had any jobs and he indicated that he did not believe that he was allowed to work and receive workers' compensation. Appellant related that he understood the requirement to report earnings and employment to the Office.

On September 13, 2006 the Office determined that appellant forfeited entitlement to compensation for the period January 28, 2002 through September 14, 2004. It found that he knowingly failed to report employment on EN1032 forms covering this period. On September 13, 2006 the Office also notified appellant of its preliminary determination that he received a $58,493.06 overpayment of compensation for the period January 28, 2002 through

September 14, 2004 based on his forfeiture of compensation. It further advised appellant of its preliminary determination that he was at fault in the creation of the overpayment. The Office requested that he complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing.

On October 4, 2006 appellant, through his attorney, requested an oral hearing on the forfeiture determination and a prerecoupment hearing. He submitted a completed overpayment recovery questionnaire and challenged the finding that he was at fault in creating the overpayment. Appellant listed income of $1,715.16 per month and expenses of $1,205.00 per month.

At the telephonic hearing, held on March 1, 2007, appellant's attorney contended that he was not employed by Southside Florist. While visiting his friend, Lorna Becker, an employee of the florist, he ran a few errands and answered the telephone but did not receive any earnings. Appellant received free flowers, gasoline money and lunch as gifts from a friend and not payment for services. At the hearing, Ms. Vandenberge related that she knew appellant socially and each occasionally treated the other to lunch. She denied that he worked for the florist shop. Ms. Vandenberge related that appellant helped out answering the telephone and running errands because he was a friend. She indicated that she guessed when she provided a start date of January 28, 2002 for appellant and denied giving the employing establishment's investigators an exact date that he began helping at the shop. Ms. Vandenberge related that the delivery sheets were sometimes handwritten by persons other than the one making the delivery. She noted that appellant might have watched the store approximately five Sundays but asserted that he did not have duties. On Valentine's Day appellant was listed on a schedule and did assist in making deliveries. Ms. Vandenberge indicated that appellant made deliveries during a six-month period in 2004. She provided occasional free flowers, money for gasoline and meals as a friend and not as remuneration. Appellant related that he considered his activities at the florist as helping friends rather than volunteer work or employment. He indicated that he received one $5.00 tip. Appellant also received occasional money for gasoline, free flowers and meals as help from a friend. He was aware that he should report volunteer work on the EN1032 forms but did not consider what he was doing volunteer work. Appellant did not remember whether he assisted in the florist shop in 2002. He denied working at the florist shop in 2003. He spent time in the florist shop in 2004 and drove a vehicle on Valentine's Day in 2005. Appellant related that he now paid $500.00 in rent, spent $200.00 per month on food, paid car insurance of $1,100.00 per year and made payments on a loan of $1,700.00. The hearing representative held the record open 30 days for him to submit further information regarding his financial situation.

On March 26, 2007 an inspector with the employing establishment asserted that Ms. Vandenberge and Ms. Becker minimized appellant's activities at the florist shop. The inspector stated, "Although they did not call it work, the duties he performed at the florist constitute work." She further noted that Ms. Vandenberge reviewed sales slips in determining that appellant began working on January 28, 2002.

By decision dated May 24, 2007, the hearing representative affirmed the September 13, 2006 forfeiture determination and finalized the finding that appellant received an overpayment of

$58,493.06 for the period of the forfeiture. She further finalized the finding that appellant was at fault in creating the overpayment and found that the overpayment would be recovered by deducting $500.00 from continuing compensation payments.

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."[2]

The Board has held that it is not enough merely to establish that there were unreported earnings or unemployment. A claimant can be subjected to the forfeiture provisions of 5 U.S.C. § 8106(b) only if he "knowingly" failed to report employment or earnings.[3] The term "knowingly" as defined in the Office's implementing regulation, means "with knowledge, consciously, willfully or intentionally."[4]

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 or 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."[5]

ANALYSIS -- ISSUE 1

The Office found that appellant forfeited his right to compensation for the period January 28, 2002 through September 14, 2004 because he knowingly failed to report his earnings and employment on EN1032 forms covering this period. Appellant signed EN1032 forms on April 15, 2003, March 12 and September 14, 2004 covering the period January 28, 2002 through September 14, 2004. On the forms, he indicated that he was not employed and did not engage in self-employment. Appellant further denied performing volunteer work. Inspectors with the employing establishment, however, conducted surveillance of him on multiple occasions between June 17, 2004 and February 17, 2005. The inspectors observed appellant loading

[2] 5 U.S.C. § 8106(b).

[3] *Barbara L. Kanter*, 46 ECAB 165 (1994).

[4] 20 C.F.R. § 10.5(n).

[5] 20 C.F.R. § 10.5(g); *see also J.S.*, 58 ECAB ___ (Docket No. 06-2113, issued May 10, 2007).

flowers into a delivery van for Southside Florist and delivering flowers to customers. On October 6, 2004 appellant received a $5.00 tip following a delivery. In a statement dated March 24, 2005, Ms. Vandenberge, the proprietor of Southside Florist, related that appellant delivered flowers in the van, tidied the shop, answered the telephones and sometimes helped customers in the store. On Sundays appellant worked in the store for four hours. He began helping at the florist shop on January 28, 2002. Ms. Vandenberge related that she did not pay appellant and that he had refused offered payment. She provided free flowers for a funeral, treated him to lunch or provided money for gasoline occasionally as she was his friend. At the hearing, Ms. Vandenberge disputed that appellant performed work for the florist shop and also contended that she was unable to determine when he began helping at the shop.

The Board finds that the evidence establishes that appellant failed to report earnings from employment. The Office's regulation defines earnings to include 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."[6] Appellant clearly performed duties for Southside Florist which the owners would have had to pay an individual to perform. He answered the telephone, delivered flowers and tended to the shop by himself on certain Sundays. At the hearing, appellant maintained that he did not help in the florist shop in 2003 and was unsure whether he helped there in 2002. In a March 24, 2005 signed statement, Ms. Vandenberge asserted that he first assisted in the shop on January 28, 2002 and last assisted on February 24, 2005. While she later testified that she was unable to determine the exact dates that he began assisting in the florist shop, her March 24, 2005 written statement to the investigators that he assisted in the shop beginning January 28, 2002 and ending February 24, 2005 is more credible as it is more contemporaneous and as it was made to law enforcement personnel.

Appellant can be subject to the forfeiture provision of section 8106(b) only if he "knowingly" failed to report a reasonable estimate of the cost to have someone else perform the duties he performed. 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.[7] 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 also required him to report all volunteer work. 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 persuasive evidence that he "knowingly" understated his earnings and employment information.[8] The Office, therefore, properly found that he forfeited his entitlement to compensation from January 28, 2002 through September 14, 2004.

[6] *Id*.

[7] 20 C.F.R. § 10.5(n).

[8] *See generally Robert C. Gilliam*, 50 ECAB 334 (1998).

LEGAL PRECEDENT -- ISSUE 2

Section 10.529 of the Office's implementing regulation provides as follows:

> "(a) 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.
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> "(b) 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 [recovery of overpayments] and other relevant statues."[9]

ANALYSIS -- ISSUE 2

The Office's regulations provide that the Office may declare an overpayment of compensation for the period of a given forfeiture of compensation. If a claimant has any earnings during a period covered by a Form EN1032 which he knowingly fails to report, he is not entitled to any compensation for any portion of the period covered by the report, even though he or she may not have had earnings during a portion of that period.[10] The Office paid appellant compensation in the amount of $58,493.06 for the period January 28, 2002 through September 14, 2004. The Office properly found that appellant forfeited his entitlement to compensation during this time because he failed to report earnings from employment on EN1032 forms; consequently, there exists an overpayment of compensation in the amount of $58,493.06.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(b) of the Act[11] provides that "[a]djustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience." Section 10.433 of the Office's implementing regulations[12] provides that in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

> "(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
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> "(2) Failed to provide information which he or she knew or should have known to be material; or

[9] 20 C.F.R. § 10.529.

[10] *Louis P. McKenna, Jr.*, 46 ECAB 328 (1994).

[11] 5 U.S.C. § 8129(b).

[12] 20 C.F.R. § 10.433.

"(3) Accepted a payment which he or she knew or should have known to be incorrect."

ANALYSIS -- ISSUE 3

The Office properly determined that appellant was at fault in the creation of the overpayment because he failed to provide information which he knew or should have known to be material on EN1032 forms covering the period January 28, 2002 through September 14, 2004. He had earnings as defined by section 10.5(g) of the Office's regulations from working in a florist shop during this period. Appellant did not report employment and earnings on EN1032 forms covering January 28, 2002 through September 14, 2004 and did not report any volunteer work; thus, he failed to furnish material information to the Office. Appellant signed certification clauses on EN1032 forms which advised him in explicit language that he might be subject to civil, administrative or criminal penalties if he knowingly made a false statement or misrepresentation or concealed a fact to obtain compensation. Consequently, by signing the form, appellant is deemed to have acknowledged his duty to fill out the form properly, including the duty to report any employment or self-employment activities and income. Appellant, therefore, failed to furnish information which he knew or should have known to be material to the Office. As he is not without fault in creating the overpayment, it is not subject to waiver.[13]

LEGAL PRECEDENT -- ISSUE 4

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act.[14] Section 10.441(a) of the regulation provides:

"When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, [the Office] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship."[15]

ANALYSIS -- ISSUE 4

Appellant did not provide detailed, documented information about his current financial circumstances. It is his responsibility to provide information about income, expenses and assets.[16] Based on his testimony at the hearing, the hearing representative determined that

[13] *See Dale Mackelprang*, 55 ECAB 174 (2003) (waiver of an overpayment is not permitted unless the claimant is without fault in creating the overpayment).

[14] *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

[15] 20 C.F.R. § 10.441(a).

[16] 20 C.F.R. § 10.438; *Steven R. Cofrancesco*, 57 ECAB 662 (2007).

appellant earned $1,715.00 per month and had expenses of $898.33 per month. She found that repaying $500.00 per month from continuing compensation would not create a hardship. The hearing representative properly gave due regard to the relevant factors set forth in section 10.441(a) based on the information provided so as to minimize hardship in recovering the overpayment.

CONCLUSION

The Board finds that the Office properly determined that appellant forfeited his entitlement to compensation from January 28, 2002 through September 14, 2004 because he knowingly failed to report employment activities. The Board further finds that he received an overpayment of $58,493.06 during the period of the forfeiture and that he was at fault in the creation of the overpayment. The Board also finds that the Office properly determined that it would deduct $500.00 every four weeks from his continuing compensation to repay the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 24, 2007 and September 13, 2006 are affirmed.

Issued: March 3, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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