

On appeal, counsel contends that OWCP erred in its forfeiture determination when it found that appellant failed to report employment activities with Alhi Sales, Inc. (Alhi), the family business, for the period in question. He contends that OWCP regulations do not require reporting investment income or passive ownership in a business and that OWCP should have requested clarification from appellant regarding his ownership in the family business.

FACTUAL HISTORY

On April 15, 1993 appellant, then a 37-year-old criminal investigator, filed a traumatic injury claim alleging that on April 8, 1993 he injured his right arm and right shoulder blade while participating in a health improvement program.³ OWCP accepted the claim for right shoulder tendinitis, cervical strain, right elbow tendinitis, right shoulder adhesive capsulitis, intervertebral disc disorder with myelopathy and herniated disc at C5-6 placed him on the periodic rolls for temporary total disability.⁴

On February 10, 1994 appellant filed an occupational disease claim alleging that his post-traumatic stress disorder and depression with anxiety were aggravated by his employment injury.⁵ OWCP accepted the claim for temporary aggravation of adjustment disorder with depression. On December 11, 1995 it placed appellant on the periodic rolls in receipt of wage-loss compensation for temporary total disability.

As a benefit receipt, OWCP 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 appellant provide information covering the 15-month period preceding the date of the request. The reports contain a clear warning advising him that a false or evasive answer to any question or the omission of an answer may be grounds for forfeiting his compensation benefits. The record contains EN1032 forms signed by appellant on September 17, 2002, August 29, 2003, September 10, 2004, December 1, 2005 and August 21, 2006. In forms dated August 29, 2003, September 10, 2004, December 1, 2005, he wrote an "X" next to the question "were you self-employed or involved in any business enterprise in the past 15 months? A. Yes or No: ___" and wrote "No ___ see attached." Appellant signed and dated the form relevant to this appeal on August 29, 2003. In an attachment, he noted that he helped his mother with whatever he could, was not employed, did not receive any wages, income or salary from any business activity and, if further information was required, that he would be happy to provide additional information. For the attachments associated with EN1032 forms signed and dated September 10, 2004 and December 1, 2005, appellant wrote that he was involved with the family business based on advice from his physician. He assisted his family within his physical limitations and was not involved in management decisions or the running of the business. Appellant was only a shareholder in the family business and held no director or officer position with the corporation.

³ This was assigned claim number xxxxxx773.

⁴ On March 3, 1998 OWCP granted appellant a schedule award for a 34 percent permanent impairment of his right arm.

⁵ This was assigned claim number xxxxxx572. OWCP combined claim number xxxxxx572 with claim number xxxxxx773, with the latter number as the master file number.

On the EN1032 form signed August 21, 2006 he circled “no” in response to the question of whether he was self-employed or involved in any business activity within the past 15 months.

The record contains an August 17, 2009 investigative report from the Department of Labor, Office of the Inspector General. The report provided information received from various family members and employees of Alhi that were interviewed. It was found there was sufficient evidence to establish that appellant failed to properly report income from Alhi, as required. The report found that he had been significantly involved in the operation of Alhi from 2002 to 2006, which had not been properly reported on the EN1032 forms he submitted. The investigation was initiated based on a complaint from appellant’s brother. The report contained details of the investigation, a summary of witness statements and a recommendation that OWCP determine whether an overpayment had occurred. The report was not accompanied by any witness statements or signed affidavits from those individuals questioned.

On October 20, 2009 OWCP issued a preliminary finding of an overpayment in the amount of \$284,696.94. Appellant was found to have failed to report income and other business activities that affected the benefits received from May 29, 2002 through August 21, 2006. He was found at fault in the creation of the overpayment by knowingly misrepresenting his business activity and employment status during the periods covered by the EN1032 forms signed September 17, 2002, August 29, 2003, September 10, 2004 and December 1, 2005. OWCP concluded that appellant had forfeited his right to compensation for the period May 29, 2002 through August 21, 2006. It provided a calculation of the overpayment, based on compensation received by him May 29, 2002 to March 22, 2003 in the amount of \$49,956.08; March 22, 2003 to March 20, 2004 in the amount of \$66,423.57; March 21, 2004 to March 19, 2005 in the amount of \$67,550.43; March 20 to 18, 2006 in the amount of \$69,839.86 and March 19 to August 21, 2006 in the amount of \$30,927.00, for a total overpayment of \$284,696.94. OWCP informed appellant that he had 30 days to request a prerecoupment hearing on the issues of fault and a possible waiver.

On October 31, 2009 appellant requested a prerecoupment hearing before an OWCP hearing representative. He also submitted an overpayment recovery questionnaire.

A hearing was held on February 24, 2009 at which appellant testified and was represented by counsel. Testimony was given regarding the incorporation of the family business in approximately 1970. Appellant related that he became a shareholder based on his investment in the company and was given 10 shares. He worked at Alhi until he went to work for the employing establishment. Following his federal employment, appellant continued to be involved with sales, accounting and finance for Alhi; but following his work injury in 1993, he reduced the time worked for the business. Following his father’s death in December 2001, he received additional shares resulting in a total of 13 shares. Appellant spent three to five hours a week at Alhi where he provided financial advice to his mother to make sure things were done efficiently. He recommended a company credit card for employees to use instead of petty cash and a change in accountants. Appellant testified that his statement attached to the EN1032 form noted that he was helping his mother.

Following the hearing, appellant submitted affidavits from several family members and employees supporting his contention that he was not active in the running Alhi, but merely provided support to his mother following the death of his father in December 2001.

In a January 24, 2010 affidavit, appellant's mother stated that he was available four to five hours a week at Alhi without pay during the 1990's and that during the period 2002 to 2005 he would help depending on his health and as needed. She indicated that appellant had no business position within Alhi as he was not a business manager, comptroller or sales manager and had no authorization to sign any checks. The only involvement by appellant was to provide financial experience and advice. Appellant's mother stated that appellant was never paid any wages or salary for the assistance he provided the family business. In 2002, she requested him to accompany a salesperson on her behalf since he was already on vacation in Dallas, Texas. Appellant's mother stated that appellant secured credit cards for the business in his name and that of his brother. The credit cards were used for business expenses and by employees of the company.

Appellant's sister related in a March 4, 2010 affidavit that, after 2002, appellant would occasionally offer financial and business advice. She also stated that appellant had no authority to sign checks or any signature authority at the bank.

In a March 15, 2010 affidavit, appellant's son stated that after 2002 appellant would occasionally help by providing business and financial advice. He noted that he was aware that the credit card issued in appellant's name for Alhi was used to pay business expenses and was used by various company employees. Appellant's son related that appellant had no signature authority at the bank and checks were signed by other family members.

On February 23, 2010 Randy Kane, a former employee of Alhi, stated that appellant was one of the three owners of Alhi. On the occasions that appellant traveled with him, Mr. Kane stated that it was because appellant provided advice on company matters, negotiations and was looking out for Alhi's business interest.

By decision dated October 5, 2010, OWCP's hearing representative modified the forfeiture period to May 29, 2002 to August 29, 2003, which resulted in an overpayment of compensation in the amount of \$82,320.23. Appellant was found at fault in the creation of the overpayment and waiver of recovery was not warranted.

LEGAL PRECEDENT

Section 8106(b) of FECA 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.⁶

OWCP 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, it is required to closely examine appellant's activities and statements in reporting employment earnings.⁷

OWCP may meet this burden by appellant's own subsequent admission to OWCP that he failed to report employment or earnings, which he knew he should report. It may meet this

⁶ 5 U.S.C. § 8106(b)(1) and (2)

⁷ See *Michael D. Mathews*, 51 ECAB 247 (1999).

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. OWCP may also meet this burden if it establishes through the totality of the factual circumstances that his certification in the EN1032 forms that he was not employed or self-employed, was false.⁸

Income on profits from business are not generally held to be the fruits of wage-earning capacity but of the investment, the management and business acumen of the owner and the return on the investment of an employee's capital, even though augmented by his personal attention in looking after the business in which it is invested, cannot be considered as if it were wages. Where, however, the source of income can be differentiated, *i.e.*, as representing either profit and return on capital, or the product of the employee's work, any portion of the income directly traceable to such work may be considered as if it were "wages."⁹

The Board has distinguished between income received from investment and earnings received by performing work. The former is not considered to be evidence of a claimant's ability to work and earn wages but rather is considered to be a return on investment. The latter is considered to be wages if the source of income can be established to be the product of the claimant's work.¹⁰ In the case of *Gregg B. Manston*,¹¹ the Board found that, while passive land investment can be considered an investment, activity such as property management can be considered employment from which a claimant derives earnings as the product of his work. Management activities may be considered self-employment activities if someone else could be hired to perform such activities, if the employee was not performing them. The distinction to be made is between passive business investment profit and active work resulting in earnings. Before OWCP can declare a forfeiture of compensation, it must establish that appellant received earnings from self-employment, not from passive investment in business ventures.¹²

ANALYSIS

OWCP found that appellant forfeited his right to compensation for the period May 29, 2002 to August 29, 2003 because he knowingly failed to report employment activities related to his work with a family business, Alhi, on the Form EN1032 dated August 29, 2003. The amount of compensation found forfeited by OWCP's hearing representative was \$82,320.23 for which appellant was at fault.

On appeal, counsel argued that OWCP failed to support its forfeiture determination as there was no evidence establishing that appellant knowingly failed to report self-employment or earnings on the EN1032 form signed on August 29, 2003. In support of this argument, he contends that appellant was not required to report his activities at Alhi as he had no active role in the business and the work he performed three to five hours per week had no value in the open

⁸ See *Donald L. Overstreet*, 54 ECAB 678 (2003). See also *Terry A. Geer*, 51 ECAB 168 (1999).

⁹ *Vernon Booth*, 7 ECAB 209 (1954).

¹⁰ *Anthony V. Knox*, 50 ECAB 402 (1999); *Burnett Terry*, 46 ECAB 457 (1995).

¹¹ 45 ECAB 344 (1994).

¹² See *Anthony V. Knox*, *supra* note 10.

labor market. In addition appellant contends that OWCP failed to consider all the circumstances showing that he failed to comply with the reporting requirement in 2003. In support of his argument, appellant's counsel cites to the sections of FECA Procedure Manual at 2.402.5 and 2.812.10(c) and 11(c) and 20 C.F.R. § 10.5(g) which address the reporting requirements of self-employment, unreported earnings and investment income or ownership of a business. He also cited *Jack Sipe*,¹³ *Vernon Booth*,¹⁴ and *Anthony A. Nobile*¹⁵ to support his contention that appellant was not required to report his ownership interest in or work activities for Alhi as there was no evidence the three to five hours per week he work had "considerable value on the open labor market" and there was no evidence that appellant's involvement or work activities with Alhi could be construed as an integral to the operation of the family business.

Appellant testified that, following his father's death in December 2001, he was given an additional three shares and worked three to five hours per week giving business advice and helping his mother. The Board has distinguished between income received from investment and earnings received by performing work noting that the former is considered to be a passive return on investment rather than evidence of a claimant's ability to work and earn wages. The ability to work and earn wages is considered wages only if the source of income can be established to be the products of the claimant's work.¹⁶ Appellant's testimony and the affidavits from his mother, son, sister and Mr. Kane all support his contention that his involvement with Alhi was limited to providing business advice occasionally. The affidavits from Ms. Trimas, Mr. Jimmy Gonzalez and Mrs. Gonzalez relate that appellant occasionally worked at Alhi from three to five hours per week providing his mother, Mrs. Gonzalez, with financial and business advice. Mr. Kane stated that, when appellant traveled with him, he provided advice and looked out for Alhi's business interest, but did not participate in negotiations. There is no evidence that appellant's work for Alhi was anything but *de minimis* as he worked no more than three to five hours per week, he did not hold any office in the business, and there is no evidence that the capacity in which appellant served could be found on the open labor market. The Board finds that in the absence of sufficient credible evidence showing that appellant engaged in the active management of Alhi, that he worked more hours than three to five hours per week or that the work he performed had "considerable value on the open market," his involvement with Alhi must be seen as participation in a passive investment and not active work resulting in wages or earnings.

Because OWCP did not show that appellant had employment or earnings that had to be reported on the EN1032 form he completed, it did not meet its burden of proof to show that he forfeited his right to compensation for the period May 29, 2002 to August 29, 2003.

¹³ 43 ECAB 773 (1992). The Board found that the income derived from the sale of cattle sold from the farm the employee owned was not the product of work activity. He only served as a farm owner who paid attention to the enterprise.

¹⁴ See *supra* note 9. The Board found that income received as an owner of a tavern was a return on the employee's business investment and not earnings or wages. Appellant engaged in such activities as providing advice, inspecting the books and "just observing" when he was physically capable.

¹⁵ 44 ECAB 268 (1992). The Board held that the test of what constitutes reportable earnings is not whether appellant received a salary but what it would have cost to have someone else do the work.

¹⁶ *Anthony V. Knox*, *supra* note 10; *Burnett Terry* *supra* note 10.

CONCLUSION

The Board finds that OWCP improperly determined that appellant forfeited his right to compensation for the period May 29, 2002 to August 29, 2003 in the amount of \$82,320.23.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 5, 2010 is reversed.

Issued: April 4, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Groom, M., Alternate Judge, concurring:

I join in the finding of the majority that the evidence of record is insufficient to establish that appellant forfeited his right to compensation from May 29, 2002 to August 29, 2003 based on his knowing failure to report earnings from self-employment.

In *Eugene R. Anderson*,¹ OWCP found the employee forfeited compensation for a period of time thus creating an overpayment in the amount of \$55,900.04. This finding was premised on several investigative memorandums that stated that he received salary as president of the Horizon Manufacturing Corporation and was in receipt of compensation for total disability even though he had collected more than \$1,000,000.00 from investors in various corporations formed between April 1977 and November 1980. The investigative memorandums provided a summary of information obtained from various witnesses, including the employee's brother-in-law, on which the forfeiture finding was based. The Board noted however that the interviews conducted were summarized by the special agents; there were no written or signed statements by any of the interviewees. The Board stated that "investigative reports referring to affidavits signed by witnesses, but which do not include the affidavits, are insufficient evidence on which to base a finding of forfeiture."² The Board noted that the investigative reports of record did not contain any signed affidavits by the listed witnesses or even claim that any witnesses had signed affidavits to substantiate as factual the matters discussed during the interviews.

The August 7, 2009 investigative report of the Office of the Inspector General in this case is similarly deficient. The case was opened after it received a complaint from appellant's brother that he was working for Alhi Sales Inc., the family business, while receiving wage-loss benefits for total disability. The report provides information obtained from various family members and individuals who had worked at the business from 2002 to 2005. But as noted by appellant's counsel on appeal, there are no witness statements or signed affidavits of record accompanying the report. There is nothing of record to verify any information contained in the report. Following submission of the report to the record, counsel presented signed affidavits from several family members. Appellant's mother noted that appellant would come and go depending on his health and helped her with advice on financial matters. She noted that, following the death of her husband in 2002, she oversaw the business, approved the purchases of products and conducted the hiring and firing of employees. This evidence is not controverted by any substantive evidence for the allegations contained in the investigative report are rendered of diminished probative value.³

¹ 40 ECAB 452 (1989).

² *Id.* at 459. See also *Robert R. Holmes*, Docket No. 86-415 (issued June 27, 1986).

³ See *Queen A. Upton*, Docket No. 98-2571 (issued December 1, 2000). See also *R.W.*, Docket No. 08-1607 (issued July 26, 2010). The Board found that investigators provided only summaries of interviews conducted with the employee and other witnesses. There were no individual signed statements by any of the parties questioned attesting to the accuracy of the information provided. The Board found this evidence was not sufficient to outweigh the employee's testimony that she did not have earnings.

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