

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

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<b>R.P., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 14-771</b>
	)	<b>Issued: October 1, 2014</b>
<b>U.S. POSTAL SERVICE, POST OFFICE, Albany, NY, Employer</b>	)	
	)	

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*Appearances:*  
*Alan J. Shapiro, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On February 17, 2014 appellant, through her attorney, filed a timely appeal from two January 24, 2014 merit decisions of the Office of Workers' Compensation Programs (OWCP) regarding overpayments of compensation. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 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 OWCP properly determined that appellant forfeited her right to compensation for the period May 11, 2007 through August 23, 2009 as she failed to report her work activity; (2) whether OWCP properly found an overpayment of compensation in the amount of \$66,119.04 was created for this period; (3) whether appellant received an overpayment of \$11,810.44 for the period August 24, 2009 through March 9, 2013 because she received compensation at the augmented rate when she had no eligible dependents; and (4) whether OWCP properly found that appellant was at fault in the creation of the overpayments and they were not subject to waiver.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On March 26, 2007 appellant, then a 44-year-old regular carrier, sustained injury when she fell off a loading dock that was 33 inches high onto her back and leg. OWCP accepted the claim for a tear of the right knee medial meniscus, right knee contusion and contusion of the back. It authorized a right knee replacement. Appellant received continuation of pay and was placed on the periodic compensation rolls as of May 11, 2007. She was paid wage-loss compensation at the augmented rate of 75 percent as she claimed her daughter and a grandson as dependents.<sup>2</sup>

In a June 7, 2007 letter, OWCP requested that appellant provide additional information to determine whether her daughter was eligible for compensation beyond her 18<sup>th</sup> birthday. It advised that compensation could continue to be paid on behalf of an unmarried child age 18 or older who was either a full-time student or incapable of self-support. OWCP notified appellant that the law prohibited the acceptance of compensation when a dependent was no longer eligible and to notify it immediately. From the information reported on the CA-7 forms, appellant listed the date of birth of her daughter as April 23, 1985 but originally reported the date of birth as April 23, 1995. It appeared that she also had a grandson and requested that she provide copies of a legal adoption judgment from the courts, if she legally adopted him.

In response, appellant stated that her daughter was born April 23, 1995. She submitted a copy of a State of New York certification of birth listing that her daughter was born on April 23, 1995. A February 28, 2005 order directing custody advised that appellant was granted sole legal and physical custody of her grandson, born December 23, 2004.

Appellant received wage-loss compensation and submitted signed Forms EN1032 on July 28, 2008, August 22, 2009 and September 13, 2010.<sup>3</sup> Other forms undated but received October 19, 2011 and October 14, 2012, claimed dependent status for her daughter and grandson and, later, a granddaughter. On each of the forms, which require a claimant to report earnings for the previous 15 months, she stated that she was not employed, self-employed and had not performed any volunteer work.

In a September 4, 2009 letter, OWCP advised appellant that there was a discrepancy in the evidence of record regarding whether her daughter was born in 1985 or 1995. It requested that she verify her daughter's date of birth by submitting the daughter's birth certificate. Appellant resubmitted her daughter's birth certificate, which noted that she was born on April 23, 1995.

An investigation conducted by the employing establishment's Office of the Inspector General for the period June 11, 2010 to January 13, 2011, found, in relevant part, that appellant was gainfully employed during 2008 and 2009 cleaning lakefront rental properties for an upstate New York real estate business. In a January 11, 2011 statement, Joy Geidel, Broker/Owner of Heaven Realty noted that she would contact appellant by telephone when work was available.

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<sup>2</sup> A May 27, 2007 CA-7 form completed by appellant listed her daughter's birthdate as April 23, 1985. Other records listed the date of birth as April 23, 1995.

<sup>3</sup> Appellant also claimed dependent status for a custodial granddaughter born September 5, 2006.

She provided copies of checks paid to appellant for cleaning services. The checks were dated July 12 and 19 and August 2, 9 and 16, 2008, July 25 and 31 and August 8, 2009.

In an August 21, 2008 letter, appellant stated that her ex-husband had physical custody of their daughter for the entire 2008-09 school year.

In a September 28, 2012 letter, OWCP advised appellant that she needed to clarify when her daughter was born, as she initially indicated that her daughter's date of birth was April 23, 1985 but listed on the Form CA-1032 that it was April 23, 1995. It also noted that appellant claimed during the time compensation had been paid that her daughter lived with her but signed a letter, which indicated that her daughter lived with her father during the 2008-09 school year. OWCP requested that appellant provide the periods her daughter lived with her and address whether she paid support to her ex-husband for any periods her daughter did not live with her. It requested such information be submitted within 30 days or it would reduce her compensation to the statutory  $\frac{2}{3}$  rate on the basis that she did not have an eligible dependent for augmented compensation. No additional information was received.

On April 24, 2013 OWCP made a preliminary determination that appellant received an overpayment of compensation for the period May 11, 2007 through March 9, 2013 for which she was at fault. For the period May 11, 2007 through August 23, 2009, it advised that she was paid compensation in the amount of \$65,448.95 that was forfeited, as she had knowingly failed to report earnings received for the work she performed during that period. For the period August 24, 2009 through March 9, 2013, OWCP made a preliminary determination that appellant was not entitled to compensation at the augmented rate as she did not have an eligible dependent. For that period, the difference between compensation paid at the augmented rate \$106,294.00 and compensation at the basic  $\frac{2}{3}$  rate \$94,464.67 was \$11,829.33 which represented the overpayment amount. OWCP made a preliminary finding that appellant was at fault as she knew or should have reasonably known that she was not entitled to compensation at the augmented rate as she did not make support payments for her daughter during the 2008-09 school year. It noted that the first payment for the beginning of the 2008 school year began on August 31, 2008 and her compensation payments were reduced to the  $\frac{2}{3}$  compensation rate effective March 10, 2013. OWCP further advised that appellant's grandson, whom she claimed as a dependent and had legal custody, was not a dependent unless he was legally adopted. Appellant was provided an overpayment recovery questionnaire and advised of her appeal rights.

On April 30, 2013 appellant's representative requested a telephonic hearing before the Branch of Hearings and Review. By decision dated November 27, 2013, the hearing representative affirmed the finding of forfeiture. The case was remanded for further findings as to how the amount of overpayment was calculated, to be followed by separate new preliminary findings.

An overpayment calculation record pertaining to the forfeiture, dated December 6, 2013, noted that appellant received gross compensation in the amount of \$1,071.67 on May 25, 2007; \$972.82 on May 25, 2007; \$974.25 on June 8, 2007; and 28 gross payments of \$2,192.07 from July 7, 2007 to August 1, 2009. This record also indicates that she received \$2,192.07 for the period August 2 through 29, 2009, but should have received \$1,722.34 at a daily rate of \$78.29 for 22 days from August 2 through 23, 2009. OWCP's case management compensation history record notes that the May 25, 2007 payment of \$1,071.67 was cancelled.

By separate preliminary decisions dated December 6, 2013, OWCP found that appellant received an overpayment in the amount of \$11,810.44 because she received augmented compensation after August 31, 2008 when she had no eligible dependent. It also found that she received an overpayment in the amount of \$66,119.04 because compensation paid from May 11, 2007 through August 23, 2009 was forfeited based on appellant's failure to report her employment activities and earnings as required.

By separate decisions dated January 24, 2014, OWCP finalized the overpayment of compensation for the period May 11, 2007 through March 9, 2013. From May 11, 2007 through August 23, 2009, it found that appellant had forfeited compensation of \$66,119.04 as she did not report earnings from employment during that period. For the period August 24, 2009 through March 9, 2013, OWCP found an overpayment of \$11,810.44 as she did not have any eligible dependents and was not entitled to augmented compensation. It denied waiver as appellant was found with fault in both overpayments.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8106(b) of FECA provides that the Secretary of Labor may require a partially disabled employee to report his or her earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times the Secretary specifies. It states that an employee who:

“(1) fails to make an affidavit or report when required; or

“(2) Knowingly omits or understates any part of his or her earnings forfeits his or her right to compensation with respect to any period for which the affidavit or report was required.”<sup>4</sup>

Section 10.5(g) of OWCP's regulations define 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.”<sup>5</sup>

In order to establish that a compensation recipient should forfeit the compensation received for the periods covered by completed CA-1032 forms, the evidence must establish that he or she knowingly omitted or understated his or her employment and earnings.<sup>6</sup> As forfeiture is a

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<sup>4</sup> 5 U.S.C. § 8106(b); *see F.C.*, 59 ECAB 666 (2007).

<sup>5</sup> 20 C.F.R. § 10.5(g) (2011).

<sup>6</sup> *Robert R. Holmes*, 49 ECAB 161 (1997); 20 C.F.R. § 10.5(n) (2011).

penalty, it is not enough merely to establish that there were underreported earnings from employment. The inquiry is whether appellant knowingly omitted or understated his or her earnings from employment for the periods covered by the CA-1032 forms. The term knowingly as defined in OWCP's implementing regulations and the Board precedent means with knowledge; consciously; intelligently; willfully; intentionally.<sup>7</sup> The language on CA-1032 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.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

OWCP determined that appellant forfeited her right to compensation for the period May 11, 2007 through August 23, 2009 in the amount of \$66,119.04. Appellant signed EN1032 forms on July 28, 2008, August 22, 2009 and September 13, 2010. She stated that she was not employed, self-employed and had not performed volunteer work on the forms, each of which covered the preceding 15 months. The investigative report from the employing establishment, which covered the period June 11, 2010 to January 13, 2011, determined that appellant performed work for cleaning services during July and August 2008 and July and August 2009. The evidence contained canceled checks made out to her to support that she performed services for which she received earnings in July and August 2008 and July and August 2009. The checks were dated July 12 and 19 and August 2, 9 and 16, 2008, July 25 and 31 and August 8, 2009. It is clear from the record that appellant had unreported earnings from her employment activities for the period July 2008 through August 2009.<sup>9</sup>

Appellant can be subject to the forfeiture provision of section 8106(b) only if she knowingly failed to report earnings or employment. OWCP has the burden of proof to establish that a claimant did, either with knowledge, consciously, willfully or intentionally, fail to report earnings from employment.<sup>10</sup> Although the penalty of forfeiture is to be narrowly applied, it is applicable in light of a false declaration on an EN1032 form. Appellant worked for two months in 2008 and two months in 2009. She signed two EN1032 forms, in which she certified that she had no work or earnings. These forms advised appellant that she must report all employment and all earnings from employment, self-employment and involvement in a business enterprise. The forms clearly notified her that she could be subject to criminal prosecution for false or evasive answers or omissions. One EN1032 form was signed on July 28, 2008; the second EN1032 form was signed on August 22, 2009. Appellant engaged in work activities and had earnings in July 2008 through August 2009 that were within the 15-month span of each declaration. She is properly subject to the two periods of forfeiture based on her false declarations in both EN1032 forms. This increases appellant's forfeiture period from 15 months to 26-plus months. This result is consistent with a proper application of the penalty provision. The Board notes that appellant signed the 2009 EN1032 form on August 22, 2009 however

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<sup>7</sup> *Christine C. Burgess*, 43 ECAB 449 (1992).

<sup>8</sup> A.C., Docket No. 11-1760 (issued April 13, 2012).

<sup>9</sup> See *Harold F. Franklin*, 57 ECAB 387 (2006).

<sup>10</sup> 20 C.F.R. § 10.5(g) (2011).

OWCP's findings incorrectly noted the date as August 23, 2009. The correct period of forfeiture was therefore from May 11, 2007 through August 22, 2009.

The evidence of record, consists of appellant signing a false response to a strongly worded certification clause on the EN1032 forms. The Board finds that she knowingly failed to report earnings that she received from Heaven Realty.<sup>11</sup> If a claimant has any earnings during a period covered by an EN1032 form, which he or she knowingly fails to report, he or she 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.<sup>12</sup> The Board therefore finds that appellant forfeited compensation for the period May 11, 2007 through August 22, 2009.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8106(b) of FECA provides in pertinent part:

“The Secretary of Labor may require a partially disabled employee to report his or her earnings from employment of self-employment by affidavit or otherwise, in the manner and at times the Secretary specifies. An employee who--

1. fails to make an affidavit or report when required; or
2. knowingly omits or understates any part of his or her earnings;

forfeits his or her right to compensation with respect to any period for which the affidavit or report was required. Compensation forfeited under this subsection, if already paid, shall be recovered ... under section 8129 of this title, unless recovery is waived under that section.”<sup>13</sup>

Section 10.529 of OWCP's implementing regulations provide 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.

“(b) Where the right to compensation is forfeited, OWCP shall recover any compensation already paid for the period of forfeiture pursuant to 5 U.S.C. § 8129 and other relevant statutes.”<sup>14</sup>

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<sup>11</sup> See *A.M.*, Docket No. 13-222 (issued September 25, 2013); see also *Harold F. Franklin*, *supra* note 9.

<sup>12</sup> *Id.*

<sup>13</sup> 5 U.S.C. § 8106(b).

<sup>14</sup> 20 C.F.R. § 10.529 (2011).

## **ANALYSIS -- ISSUE 2**

Regarding the overpayment of compensation in the amount of \$66,119.04, OWCP regulations provide that it may declare an overpayment of compensation for the period of a forfeiture of compensation. If a claimant has any employment, including self-employment or involvement in a business enterprise, during a period covered by a Form CA-1032 which he or she fails to report, the claimant 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.<sup>15</sup> The Board has affirmed that the amount of the overpayment is the gross amount of compensation received during the period of forfeiture.<sup>16</sup>

While OWCP determined that the amount of compensation appellant forfeited during the period May 11, 2007 through August 23, 2009 was \$66,119.04, the Board finds that the proper amount is \$64,969.08. The Board notes that OWCP cancelled the initial payment for May 25, 2007 in the amount of \$1,071.67; therefore this amount should not be included in the overpayment calculation. Also, while the overpayment was calculated for 22 days for the period August 2 through 23, 2009, appellant signed the EN1032 form on August 22, 2009; therefore the overpayment should have been calculated for 21 days, at the daily rate of \$78.29. During the relevant period she received forfeited compensation in the amounts of \$972.82, \$974.25, 28 payments of \$2,192.07 and the final payment through August 22, 2009 of \$1,644.09, for a total of \$64,969.08.

## **LEGAL PRECEDENT -- ISSUE 3**

FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.<sup>17</sup> If the disability is total, the United States shall pay the employee during the disability monthly compensation equal to 66 2/3 percent of his or her monthly pay, which is known as his or her basic compensation for total disability.<sup>18</sup> Where the employee has one or more dependents as defined in FECA, he or she is entitled to have his or her basic compensation augmented at the rate of 8 1/3 percent, for a total of 75 percent of monthly pay.<sup>19</sup>

A dependent includes an unmarried child who, while living with the employee or receiving regular contributions from the employee toward his or her support, is either 18 years of age or over 18 years of age and incapable of self-support due to physical or mental disability.<sup>20</sup> A child is also considered a dependent if he or she is an unmarried student under 23 years of age

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<sup>15</sup> *Louis P. McKenna, Jr.*, 46 ECAB 428 (1994).

<sup>16</sup> *See J.D.*, Docket No. 13-86 (issued June 3, 2013).

<sup>17</sup> 5 U.S.C. § 8102(a).

<sup>18</sup> *Id.* at § 8105(a).

<sup>19</sup> *Id.* at § 8110(b).

<sup>20</sup> *Id.* at § 8110(a).

who has not completed four years of education beyond the high school level and is currently pursuing a full-time course of study at a qualifying college, university or training program.<sup>21</sup>

If a claimant receives augmented compensation during a period where he or she has no eligible dependents, the difference between the compensation he or she was entitled to receive at the two-thirds compensation rate and the augmented compensation received at the three-quarters rate constitutes an overpayment of compensation.<sup>22</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that OWCP erred in finding an overpayment of compensation for the period August 24, 2009 through March 9, 2013.

For the period August 24, 2009 through March 9, 2013, appellant received wage-loss compensation at the augmented rate. She claimed her daughter, born April 23, 1995; her grandson, born December 23, 2004; and a granddaughter, born September 5, 2006; as dependents for purposes of augmented wage-loss compensation. In order for her to receive wage-loss compensation at the augmented rate, appellant must have had at least one eligible dependent during that period. In relevant part, she may claim compensation for an unmarried child, including an adopted child or stepchild, who lives with her and is under 18 years of age.

The record reflects appellant's daughter was unmarried and under age 18 at the time appellant's compensation payments were reduced to the basic rate on March 10, 2013.<sup>23</sup> For the period August 24, 2009 through March 9, 2013, her daughter would be an eligible dependent so long as she lived with appellant and appellant provided for her support. During the period in question, appellant reported that her daughter lived with her except for the 2008-09 school year, when she lived with her father. OWCP's September 28, 2012 letter requested that she provide proof that she made support payments to her daughter's father during the 2008-09 school year; but the record is devoid of any evidence of support. OWCP noted that the first payment for the beginning of the 2008 school year was August 31, 2008. As discussed, appellant forfeited her entitlement to wage-loss compensation for the period May 11, 2007 through August 23, 2009, which would have included the 2008-09 school year. She is entitled to augmented compensation on the basis of her daughter's dependency status for the period August 24, 2009 through March 9, 2013, as her daughter was unmarried, under age 18 and there is no evidence of record that she did not reside with appellant after August 24, 2009. Accordingly, OWCP's finding that appellant received an overpayment of \$11,810.44 for the period August 24, 2009 through March 9, 2013 is reversed.

The Board notes that appellant also claimed dependent status on a grandson and a granddaughter. Under certain circumstances, compensation will be augmented for an injured employee's unmarried child. However, child and grandchild are not synonymous and the latter is not specifically recognized as an eligible dependent for purposes of augmented disability

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<sup>21</sup> *E.G.*, 59 ECAB 599 (2008).

<sup>22</sup> *Diana L. Booth*, 52 ECAB 370 (2001).

<sup>23</sup> Appellant's daughter would have turned 18 years old April 23, 2013.



compensation.<sup>24</sup> Although appellant obtained legal custody of her minor grandson in 2005, there is no evidence of record that she adopted him. A grandchild is not one of the specifically enumerated dependents for purposes of receiving augmented compensation. Furthermore, guardianship or legal custody by itself does not establish dependency. Accordingly, appellant's grandchildren are not eligible dependents under FECA.<sup>25</sup> There is no evidence of any information concerning appellant's granddaughter.

OWCP paid appellant \$106,294.00 at the augmented rate from August 24, 2009 through March 9, 2013. While it found an overpayment of \$11,829.33, this finding is reversed as she properly received the augmented compensation due to the dependency status of her unmarried daughter who was under 18 years of age during the period in question.

#### **LEGAL PRECEDENT -- ISSUE 4**

OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in either accepting or creating the overpayment.<sup>26</sup> Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper.<sup>27</sup> Recipients must show good faith and exercise a high degree of care in regard to receipt of their benefits.<sup>28</sup> A recipient will be found to be at fault with respect to creating an overpayment if he or she accepted a payment which he or she knew or should have known to be incorrect.<sup>29</sup>

#### **ANALYSIS -- ISSUE 4**

The Board finds that OWCP properly determined that appellant was at fault in creating the \$64,969.12 overpayment because she failed to provide information which she knew or should have known to be material on CA-1032 forms covering the period May 11, 2007 through August 22, 2009. The record establishes that she had unreported self-employment activity during this period and knowingly failed to furnish this material information to OWCP. Appellant signed certification clauses on the 1032 forms, which advised her in explicit language that she might be subject to civil, administrative or criminal penalties if she knowingly made a false statement or misrepresentation or concealed a fact to obtain compensation. By signing the forms, she is deemed to have acknowledged her duty to fill out the forms properly, including the duty to report any employment, self-employment or involvement in a business enterprise. Appellant failed to furnish information that she knew or should have known to be material to

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<sup>24</sup> *Jacqueline S. Harris*, 56 ECAB 252, 255 (2005). The definition of a child includes stepchildren, adopted children and posthumous children, but does not include married children. 5 U.S.C. § 8101(9). FECA separately defines grandchild for purposes of identifying eligible beneficiaries to certain death benefits under 5 U.S.C. §§ 8109 and 8133. *Id.* at § 8101(10).

<sup>25</sup> 5 U.S.C. § 8101(9); *Jacqueline S. Harris*, *id.*

<sup>26</sup> *Id.* at § 8129(b); 20 C.F.R. § 10.433(a) (2012).

<sup>27</sup> *Id.* at § 10.433(a).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at § 10.433(a)(3).

OWCP. As she is not without fault in creating the overpayment in the amount of \$64,969.08, she is not entitled to waiver.<sup>30</sup>

**CONCLUSION**

The Board finds that appellant forfeited \$64,969.08 in wage-loss compensation for the period May 11, 2007 through August 22, 2009 for which she was at fault. However, no overpayment exists for the period August 24, 2009 through March 9, 2013 as she had an eligible dependent and was entitled to augmented compensation.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 24, 2014 decisions of the Office of Workers' Compensation Programs are modified to reflect an overpayment of \$64,969.08 and reversed with regard to the \$11,810.44 overpayment.

Issued: October 1, 2014  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>30</sup> *Harold F. Franklin, supra* note 9.