



meniscus of the knee when on February 1, 2011 he fell while descending stairs in the performance of duty. Appellant received compensation for total disability on the periodic rolls as of February 12, 2011.<sup>2</sup>

Between April 18 and November 21, 2011, appellant submitted 21 Form CA-7 claims for compensation for wage loss from February 7 to November 25, 2011. The forms noted under section 3 that he must report all earnings from employment during periods claimed. On each claim for compensation, appellant checked a box indicating that he had not received earnings from self-employment or involvement with business enterprises on the claimed periods.

In accordance with established procedure, after being placed on the periodic rolls, appellant was required to complete EN1032 forms regarding his earnings and employment activity for the previous 15 months. The forms explained that a claimant must report all self-employment or involvement in any business enterprise, including, but not limited to, farming, sales work, operating a business or providing services in exchange for money, goods or other services. In addition, the EN1032 forms advised appellant that, if duties were performed in any business enterprise for which he was not paid, he was to report the rate of pay it would have cost to hire someone to perform such duties. On EN1032 forms signed on August 21, 2012 and August 14, 2013, appellant reported that he had no self-employment or business enterprise involvement for the previous 15 months.

On June 9, 2014 OWCP received an investigative memorandum dated May 8, 2014 from the Office of the Inspector General (OIG). According to the OIG report, appellant was employed as an independent contractor and sound engineer for Glen Traeger and Michael Lerich in 2010, 2011, and 2012. Mr. Lerich stated that appellant provided cartage services for performance companies and he had brought stage/band equipment to client locations during performances, during the period September 2012 to December 2012. He also noted that appellant set up stages for performances, loaded and unloaded speakers, and carried equipment weighing over 50 pounds. Mr. Lerich stated that appellant did not show any obvious signs of injury or disability, and that he had paid appellant \$4,950.00 in 2012. Mr. Traeger stated that appellant was paid \$5,430.00 in 2010, \$1,500.00 in 2011, and \$3,500.00 in 2012 for his services.

An e-mail of record from Glen Traeger dated March 18, 2013 verified that appellant worked as a sound engineer at live events in 2010, 2011 and 2012. Mr. Traeger noted that appellant was an independent contractor, not an employee. He again verified that appellant earned \$5,430.00 in 2010, \$1,500.00 in 2011, and \$3,500.00 in 2012.

Investigators interviewed appellant on April 10, 2014. During this interview, appellant stated that he had worked for Mr. Traeger and Mr. Lerich and that he had worked as a sound engineer to make ends meet. He stated that the last time he had worked for Mr. Traeger was in February 2011. Appellant also explained that he was able to perform the physical requirements of these jobs by having his children or others assist in heavy lifting, and that he only had to move buttons. He noted that he had worked for Mr. Traeger and Mr. Lerich only during periods in

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<sup>2</sup> While appellant received wage-loss compensation benefits dating back to February 12, 2011, the first payment date was August 5, 2011, at which time he received a net payment of \$12,638.88. He initially received single roll payments, and was placed on the periodic rolls as of December 17, 2011.

which he did not receive OWCP payments. Appellant stated that he did not remember working in 2012, but that he stopped working for Mr. Lerich in August or September 2011.

On February 2, 2015 OWCP determined that appellant had forfeited his right to compensation for the period May 21, 2011 through August 14, 2013.<sup>3</sup>

### **LEGAL PRECEDENT**

Section 8106(b) of FECA<sup>4</sup> provides in pertinent part:

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.... An employee who --

- (1) fails to make an affidavit or report when required; or
- (2) 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. Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee or otherwise recovered under section 8129 of this title, unless recovery is waived under that section.<sup>5</sup>

An employee can only be subjected to the forfeiture provision of 5 U.S.C. § 8106(b) if he or she knowingly omitted or understated earnings. It is not enough to merely establish that there were unreported earnings. OWCP's procedures recognize that forfeiture is a penalty,<sup>6</sup> and, as a penalty provision, it must be narrowly construed.<sup>7</sup> In OWCP's regulations, knowingly is defined as: with knowledge, consciously, willfully, or intentionally.<sup>8</sup> To meet this burden, OWCP is required to examine closely appellant's activities and statements. It may meet this burden without an admission by an employee if the circumstances of the case establish that he or she failed to reveal fully and truthfully the full extent of his or her employment activities and earnings.<sup>9</sup>

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<sup>3</sup> OWCP also issued a preliminary determination of overpayment on February 2, 2015. Appellant appealed the forfeiture decision of February 2, 2015 before the final determination of overpayment decision was issued.

<sup>4</sup> 5 U.S.C. § 8106(b).

<sup>5</sup> While section 8106(b)(2) refers only to partially disabled employees, the Board has held that the test for determining partial disability is whether, for the period under consideration, the employee was in fact either totally disabled or merely partially disabled, and not whether he received compensation for that period for total or partial loss of wage-earning capacity. *Ronald H. Ripple*, 24 ECAB 254, 260 (1973).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Forfeiture*, Chapter 2.1402.8 (May 2012).

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

<sup>8</sup> 20 C.F.R. § 10.5(n); see *Anthony A. Nobile*, 44 ECAB 268 (1992).

<sup>9</sup> *Terry A. Geer*, 51 ECAB 168 (1999).

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>10</sup>

### ANALYSIS

The forfeiture determination in this case is based on the submission of specific EN1032 forms and CA-7 forms, which appellant completed in 2011, 2012, and 2013 alleging that he had no earnings. The forfeiture determination is also based on evidence received from Mr. Traeger and Mr. Lerich that appellant did in fact earn money from 2010 to 2012 performing cartage services, as well as sound engineer services. The Board affirms the finding that appellant knowingly failed to report earnings while in receipt of compensation benefits.

On the EN1032 forms, appellant denied any self-employment or involvement in a business enterprise, and reported no earnings for the previous 15 months. With respect to the EN1032 forms completed on August 21, 2012 and August 14, 2013, the evidence of record supports a finding that he failed to report earnings.

The OIG report reveals that appellant received earnings as a sound engineer while receiving compensation for total disability from OWCP. The evidence of record from Mr. Traeger substantiates that appellant had earnings during the years 2010 through 2012. Evidence was also received from Mr. Lerich that appellant had earnings in 2012, while performing cartage services. The EN1032 forms appellant signed on August 21, 2012 and August 14, 2013 required that appellant report earnings from self-employment or a business enterprise for the past 15 months. Appellant failed to report any earnings on these forms.

The Board also notes that appellant completed a series of 21 CA-7 forms between April 18 and November 21, 2011, which required that he report all earnings from employment during the periods claimed. Appellant did not report earnings on any of these forms either.

Because the evidence does establish that appellant failed to report earnings during the relevant period, the remaining question is whether the omission was knowingly. As noted above, in OWCP's regulations, knowingly is defined as: with knowledge, consciously, willfully, or intentionally.<sup>11</sup> The language in the EN1032 and CA-7 forms are clear and unambiguous

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<sup>10</sup> 20 C.F.R. § 10.5(g); see *Monroe E. Hartzog*, 40 ECAB 329 (1988).

<sup>11</sup> *Supra* note 9.

regarding self-employment, and specifically includes providing services in exchange for money, regardless of whether the income was paid to others. The OIG investigation supports that appellant was paid in exchange for his services as a sound engineer. Appellant has stated that he only worked while he was not receiving compensation benefits, however the record does not substantiate this allegation. He was in receipt of compensation benefits during the relevant period.

On appeal, appellant argues that when he was asked whether he received income, he considered income to be “money in his pocket,” and that when he split up the payments for his services as sound engineer at performances between his sons and another individual, he did not consider that income. There is no language in the EN1032 or CA-7 forms suggesting that income divided among family members or other individuals need not be reported. The form states that, even if appellant did not receive any direct payment for work benefiting a family member in a business enterprise, the value of the work must be reported. As the Board has previously explained in the case of *B.S.*,<sup>12</sup> appellant expressed her belief that she was not required to report her assistance with her husband’s business as she earned no wages. However, she was clearly informed by OWCP that she had an affirmative obligation to report any work or ownership interest in any business enterprise and that her failure to do so would result in forfeiture of compensation.

The Board also notes that the evidence received from the performance companies for which appellant worked substantiates that he performed the services and received the earnings, not other family members or individuals.

Based on the probative evidence, the Board finds that appellant knowingly omitted earnings on EN1032 and CA-7 forms from May 21, 2011 through August 14, 2013. Pursuant to 5 U.S.C. § 8106(b), OWCP properly determined that he had forfeited his compensation.

### **CONCLUSION**

Appellant forfeited his compensation from May 21, 2011 through August 14, 2013 because he knowingly omitted earnings.

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<sup>12</sup> Docket No. 09-0076 (issued September 30, 2009).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 2, 2015 is affirmed.

Issued: October 15, 2015  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board