



## **FACTUAL HISTORY**

On September 22, 1966 appellant, then a 20-year-old machinist, filed an occupational disease claim (Form CA-2) alleging that he fractured a vertebra on that date when he tripped over a hose and fell down a ladder. OWCP accepted the claim for a closed C1 fracture. Appellant returned to limited-duty work on March 22, 1967 and claimed a recurrence of disability as of September 25, 1967. He began receiving wage-loss compensation for total disability and did not return to work.

By decision dated July 15, 1969, OWCP reduced appellant's wage-loss compensation benefits, finding that the selected position of salesman represented appellant's wage-earning capacity. It found he was capable of earning \$66.82 per week and his wage-loss compensation was reduced to reflect his wage-earning capacity as of June 5, 1969.

Appellant was required to submit annually information with respect to any outside employment on EN1032 forms.<sup>3</sup> In a form completed by appellant on June 25, 1975, he indicated that he earned \$125.00 per week as a self-employed salesman. On January 16, 1978 appellant indicated on a Form EN1032 that he was earning \$150.00 per week as a salesman for a private company, and on August 14, 1979 he indicated that he was earning \$200.00 per week as a salesman for the company. He continued to indicate on EN1032 forms that he had earnings as a salesman on EN1032 forms dated October 15, 1981, October 14, 1982, and October 28, 1983.

On September 16, 1984 OWCP sent appellant an EN1032 form. This form differed from prior forms as it now provided separate sections for "employment other than self-employment" and "self-employment." The form explained that "employment other than self-employment" including work for a relative's business, with rate of pay being the cost of hiring someone else to perform the work. Self-employment included operating a business, and again noted that the rate of pay would be the cost of hiring someone to perform the work performed by appellant. The form also stated that the period covered by the form was the prior 15 months.<sup>4</sup>

Appellant completed EN1032 forms on December 10, 1984, January 3, 1986, and January 6, 1987 indicating that he had earnings of \$200.00 per week in private employment with "Donatucci Kitchens." On December 10, 1987, December 12, 1988, and December 6, 1989 he reported on EN1032 forms that he was self-employed with "TGP Kitchens" and earned \$250.00 per week. On EN1032 forms dated August 13, 1991, February 4, 1992, and February 13, 1993, appellant reported that he was employed with "A&P Kitchens" with earnings of \$564.00 every two weeks.

In a Form EN1032 completed on January 15, 1995, appellant reported that he was employed with A&P Kitchens with earnings of \$592.00 every two weeks. He reported no self-employment. The form provided slightly different language from prior forms with respect to employment activity. It provided that "all self-employment or involvement in business enterprise" must be reported, with a more extensive list of the kinds of self-employment that

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<sup>3</sup> The cover letter is a CA-1032 form, but the Board will refer to the responses on the enclosed EN1032 form. .

<sup>4</sup> The prior forms of record referred either to 12 months, or did not clearly indicate the period covered.

must be reported (such as carpentry, painting, child care, odd jobs, etc.), and includes part time or intermittent work. The form indicated that “any work or ownership interest in any business enterprise should be reported, even if the business lost money or profits were reinvested. The rate of pay includes the cost of hiring someone to perform the tasks completed by appellant.

Appellant continued to report earnings at A&P Kitchens on EN1032 forms. He responded “no” as to self-employment. In forms dated March 4, 1996, October 21, 1997, and May 17, 1999 appellant reported \$592.00 every two weeks. On July 18, 2000 and November 16, 2001 appellant reported on the Form EN1032 earnings of \$598.00 every two weeks. For April 18 and May 6, 2004, he reported \$700.00 per week. The record contains EN1032 forms dated May 9, 2006 and April 12, 2007 reporting earnings at A&P Kitchens of \$800.00 per week. Appellant reported \$850.00 per week earnings at A&P Kitchens in EN1032 forms dated March 24, 2008, March 28, 2009, March 23, 2010, March 18, 2011, and February 12, 2012.

On July 5, 2011 OWCP received a report from the employing establishment investigation service. The report included a two-page letter from a special agent reporting that appellant was an owner of “A&P Custom Kitchens.” The documents enclosed contained “[b]usiness [e]ntity [f]iling [h]istory” from the State of Pennsylvania. According to the history, the business known as “A&P Custom Kitchens” was created on March 25, 1988 and lists appellant as treasurer. Another individual is named as president. A plumbing business (P&B Plumbing and Heating) created on May 23, 1974 lists appellant as an owner. In addition, “P.A.D. Associates,” created July 17, 2000, lists appellant as an owner. A business known as “A&P Equipment Services,” created August 19, 1991, lists appellant as treasurer. Finally, a business known as “A&P Laminations,” created on June 15, 2000, lists appellant as president and appellant as treasurer.

By letter dated October 25, 2011, OWCP requested that appellant submitted information regarding his involvement in business entities. In a decision dated April 20, 2012, it suspended his compensation for failure to provide the requested information.

On May 23, 2012 OWCP received evidence regarding appellant’s tax filings for 2010. A federal tax form shows business income of \$11,211.00 from A&P Laminations, \$9,453.00 from A&P Custom Kitchens, and a loss of \$1,742.00 from P.A.D. Associates. There are also federal forms identifying appellant as a partner in Houston and Dallas, Texas partnerships, each claiming losses in 2010.

In a statement received on May 23, 2012, appellant explained that P&B Plumbing and Heating had been out of business since 1979, and A&P Equipment Services had been out of business since 1994. He reported that he worked as a sales representative for A&P Custom Kitchens, and had authority to sign checks. With respect to A&P Laminations, appellant reported that he was on the “Board” but another individual operated the business. Appellant indicated that P.A.D. Associates was a holding company. As to earnings, he submitted tax information regarding 2010 with annual wages of \$77,167.00. Appellant also reported additional income from partnership or S Corporations of \$11,211.00 from A&P Laminations, \$9,453.00 from A&P Custom Kitchens, and a loss of \$1,742.00 from P.A.D. Associates.

By decision dated September 26, 2012, OWCP held that appellant’s compensation remained suspended as he did not adequately respond to the requested information.

Appellant submitted additional evidence on October 12, 2012. He indicated that he was the treasurer of A&P Custom Kitchens, with duties of manager and salesman. Appellant submitted tax information from 2011 showing wage income from A&P Custom Kitchens of \$65,000.00, with additional income from partnerships or S Corporations of \$29,827.00 from A&P Custom Kitchens, \$1,121.00 from A&P Laminations, and a loss from P.A.D. Associates. On November 14, 2012 appellant submitted tax forms from 2005 through 2008. For 2005, the tax information reported \$41,600.00 in salary from A&P Custom Kitchens. Appellant also reported \$18,974.00 in income from partnerships or S Corporations.<sup>5</sup> For 2006, he reported \$46,800.00 in wage income, and \$46,745.00 in partnership or S Corporations income. As to 2007, wage income from A&P Custom Kitchens was \$62,000.00, with \$40,889.00 in partnership or S Corporations. In 2008, appellant reported \$65,000.00 in income, and \$10,629.00 in partnership or S Corporations income.

In a letter dated February 20, 2013, OWCP advised appellant that it proposed to modify his wage-earning capacity determination. It found he had the capacity to earn wages as an owner and manager of \$1,250.00 per week. According to OWCP, appellant had increased his earnings and based on his new earning capacity, he had no loss of wage-earning capacity. The current pay rate for the date-of-injury position was \$777.20 per week.

By decision dated February 21, 2013, OWCP found appellant forfeited his compensation from December 13, 1988 to February 12, 2012. It found that he “consistently understated” earnings on the EN1032 forms, citing the wages claimed in 2007, 2008, 2010, and 2011. OWCP found that appellant “knowingly failed to report, or understated earnings and employment activities” on EN1032 forms commencing December 6, 1989 through February 12, 2012.

On February 20, 2013 OWCP advised appellant that it proposed to reduce his compensation and modify the July 15, 1969 wage-earning capacity determination. It found appellant had the capacity to earn \$1,250.00 per week as a business owner and manager. According to OWCP, the current pay rate for a general salesperson in appellant’s area was \$343.85 per week.

In a letter dated February 22, 2013, OWCP made a preliminary determination that an overpayment of \$167,698.06 was created due to the forfeiture of compensation. It indicated that it had made a preliminary determination that appellant was at fault in creating the overpayment.

Appellant, through his representative, requested a hearing before an OWCP hearing representative with respect to the preliminary overpayment determination. He also requested a hearing with respect to the February 21, 2013 forfeiture decision.

By decision dated March 26, 2013, OWCP found appellant’s had no loss of wage-earning capacity. It indicated that it was modifying the July 15, 1969 wage-earning capacity determination, and his benefits were reduced to zero.

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<sup>5</sup> The information indicated the income came from A&P Custom Kitchens, A&P Laminations, P.A.D. Associates, and a Texas partnership.

A hearing was held on September 12, 2013. The hearing representative indicated that the issues included the forfeiture, the preliminary overpayment, and the modification of wage-earning capacity. Appellant's representative argued that appellant had completed the EN1032 forms honestly and disclosed earnings, and considered himself an employee.

By decision dated January 9, 2014, the hearing representative found appellant had forfeited his right to compensation from December 13, 1988 to February 12, 2012. He found that the evidence of record supported that the claimant was engaged in employment activities during the period covered. The hearing representative determined that an overpayment of \$167,698.06 was created. In addition, he found that appellant was at fault in creating the overpayment and therefore not entitled to waiver.

In a separate decision dated January 9, 2014, the hearing representative affirmed the March 26, 2013 OWCP decision. He found that appellant had self-rehabilitated and substantially increased his earnings.

On July 8, 2014 appellant, through counsel, requested reconsideration. Appellant argued: OWCP improperly interpreted the legal standard regarding whether profits from business should be considered in determining wage-earning capacity, did not establish that appellant knowingly failed to report earnings, improperly denied waiver, and failed to consider the statute of limitations provided under 28 U.S.C. § 2415. Counsel argued that for any EN1032 form, OWCP must bring an action related to that form within six years. Appellant submitted an affidavit dated June 30, 2014, stating that he did not know or understand that he had to include information regarding business ownership. He asserted that he believed he was an employee of A&P Custom Kitchens and entered his employment as an employee, not self-employment.

By decision dated October 6, 2014, OWCP modified the January 9, 2014 decision with respect to forfeiture and overpayment amount. It found that the reporting requirements on the EN1032 forms changed with the form signed on January 15, 1995, and appellant did not report any self-employment or involvement in any business enterprise. According to OWCP, "This is inconsistent with the evidence in the file which establishes that you were involved in several businesses during the period from 1988 to 2012." OWCP indicated that the form requested information on "any work or ownership interest in any business enterprise," and appellant was "involved in multiple businesses" from January 15, 1995 until the present time. According to OWCP, appellant's argument that he believed he was completing the forms properly was not credible, given that he possessed the intelligence required to participate in the ownership and operation of multiple businesses. OWCP concluded:

"Therefore, the decisions dated [January 9, 2014] are hereby modified and thus vacated in part, but also affirmed in part. The finding that OWCP properly modified the prior wage-earning capacity decision because you rehabilitated yourself is affirmed. The findings that you forfeited your right to compensation and that an overpayment was created is modified. The forfeiture and overpayment period is modified to [October 15, 1993 to February 12, 2012]."

As to the overpayment amount, OWCP noted the original amount was \$167,698.06 from December 13, 1988 to February 12, 2012. It then identified the modified period as commencing

January 15, 1993. According to OWCP, the amount paid from December 13, 1988 to January 14, 1993 was \$24,402.55, and the difference between \$167,698.06 and \$24,402.55 is the modified overpayment amount of \$143,009.73

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

Section 8106(b) of FECA 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 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 ... under section 8129 of this title, unless recovery is waived under that section.”<sup>6</sup>

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

In the present case, OWCP found that appellant forfeited his compensation from October 15, 1993 to February 12, 2012. The basis for the forfeiture was OWCP’s finding that appellant had violated 5 U.S.C. § 8106(b) in completing 15 Form EN1032 reports from January 15, 1995 to February 12, 2012. Each form covers a period of 15 months.

Before addressing the adequacy of OWCP’s findings in this regard, the Board notes that appellant argued before OWCP that 28 U.S.C. § 2415 applies to the current case. Title 28 covers provisions under “Judiciary and Judicial Procedure.” Section 2415 provides in pertinent part that “every action for the recovery of money erroneously paid to or on behalf of any civilian employee of any agency of the United States ... incident to the employment or services of such employee ..., shall be barred unless the complaint is filed within six years after the right of action accrues.” It is appellant’s contention that any declaration of forfeiture from an EN1032 form must be made within six years of completing the form.

The application of 28 U.S.C. § 2415 under FECA was addressed in *Earl C. Poppell*.<sup>7</sup> The Board found that 28 U.S.C. § 2415 applies only when the government is seeking to recover an erroneous payment in a civil action in a court of competent jurisdiction. The Board noted this interpretation was consistent with the legislative history of 28 U.S.C. § 2415.<sup>8</sup> On appeal,

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<sup>6</sup> 5 U.S.C. § 8106(b).

<sup>7</sup> 39 ECAB 1455 (1988).

<sup>8</sup> *Id.*

appellant now refers to 28 U.S.C. § 2462, which provides that “an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued...” This section is subject to a similar analysis as found in *Poppell*. Section 2462 is another provision under “Judiciary and Judicial Procedure” that applies to actions in a civil court of competent jurisdiction. As the Board clearly indicated in *Poppell*, the statute of limitation provisions under Title 28 apply to actions brought in civil courts. They do not apply to administrative proceedings under FECA with respect to forfeiture and overpayment.

Turning now to OWCP’s findings with respect to the forfeiture period, the Board notes that the October 6, 2014 decision appeared to find that the forfeiture period commenced on October 15, 1993, which was 15 months prior to the January 15, 1995 EN1032 form. There are also references to “[January 15, 1993]” which presumably constitute a typographical error. As to the period October 15, 1993 to February 12, 2012, the Board notes there are gaps in the 15 month periods covered by the EN1032 forms. The gap between the October 21, 1997 EN1032 form and May 17, 1999 form results in no EN1032 form addressing the period October 22, 1997 to February 16, 1998. Similarly there is a gap between July 18, 2000 and the November 16, 2001 form results in no coverage from July 19 to August 15, 2000 and the gap between the November 16, 2001 form and the April 18, 2004 form results in no coverage from November 17, 2001 to January 17, 2003.

In this regard the February 21, 2013 decision makes a general reference to “missing forms” but then appears to fill any gaps by finding that periods not covered by an EN1032 can be forfeited, citing *Alton C. Vann*,<sup>9</sup> but in the *Vann* case the Board noted only that any forfeiture not based on an EN1032 form must be based on specific evidence as to employment that was not reported “as required.” 5 U.S.C. § 8106(b) requires that a claimant failed to make an affidavit or report when required; or knowingly omits or understates his earnings. If OWCP is going to find a claimant has omitted or understated his earnings, it must be clear on what document appellant has failed to report his earnings “as required” such that 5 U.S.C. § 8106(b) may be applied. OWCP cannot fill in gaps not covered by EN1032 forms by making a general finding that appellant had earnings.

As to the 15 EN1032 forms at issue in this case, the Board finds that OWCP must make additional findings. A full and proper analysis of the forfeiture issue in this case requires that OWCP make specific findings as to specific EN1032 forms. OWCP did make findings with respect to some of the EN1032 forms in its February 21, 2013 decision: the March 24, 2008, March 28, 2009, March 18, 2011 and February 12, 2012 forms. For these forms OWCP held that appellant had understated his earnings with A&P Custom Kitchens, and cited specific evidence from W-2 tax forms to support its findings. However, for many of the EN1032 forms, there are inadequate probative findings. OWCP makes a general finding in its February 21, 2013 report that appellant “knowingly failed to report, or understated, earnings and employment activities” on EN1032 forms. In the October 6, 2014 decision, OWCP found appellant was “involved in multiple businesses.” However, this does not constitute sufficient findings on the issue. If an EN1032 form covers a 15-month period, OWCP must clearly identify how, on a specific form,

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<sup>9</sup> 48 ECAB 259 (1996).

appellant omitted or understated earnings under 5 U.S.C. § 8106(b). For example, on the January 15, 1995 EN1032 form appellant reported that he had earnings from A&P Custom Kitchens of \$592.00 every two weeks. OWCP must explain upon what evidence it is basing its forfeiture finding. If it is for understating earnings, it must cite to evidence of the actual earnings for the period. If it is for omitting earnings, other employment activity, or “ownership interest,” such that compensation may be forfeited, OWCP must make that finding clear and cite to the supporting, relevant evidence. The employing establishment investigator report, for example, provided some evidence that appellant was listed as an owner of a plumbing business beginning in 1974. However, appellant indicated that the business no longer existed as of 1979, and no contrary evidence was provided. OWCP does not adequately discuss the “involvement” in businesses with respect to EN1032 forms submitted.

OWCP must make findings as to each specific form that OWCP has determined constitutes a forfeiture of compensation. It should be clear as to what evidence establishes that for a specific form appellant has knowingly omitted or understated any part of his earnings such that he is subject to forfeiture under 5 U.S.C. § 8106(b). The case will be remanded to OWCP for proper findings and an appropriate decision.

Since the overpayment was based on the forfeiture, the Board will not address the overpayment and waiver issues (Issues 1 and 2) at this time. Once the forfeiture issue is properly resolved, OWCP can properly determine an overpayment amount, if any, and issue a decision with respect to an overpayment and waiver. The Board will address the modification issue below.

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

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.<sup>10</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>11</sup>

OWCP procedures provide that it may be appropriate to modify a wage-earning capacity determination when the claimant has been vocationally rehabilitated if the claimant is employed in a new job (a job different from the job for which he or she was rated) obtained with additional training which pays at least 25 percent more than the current pay of the job for which the claimant was rated.<sup>12</sup> OWCP determines whether the claimant underwent training or vocational preparation, and whether the job differs significantly in duties, responsibilities, or technical

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<sup>10</sup> *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>11</sup> *Id.*

<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Wage-Earning Capacity Decisions*, Chapter 2.1501.5(c) (June 2013).

expertise from the job at which the claimant was rated.<sup>13</sup> If the claimant has been rehabilitated, OWCP may determine appellant's modified wage-earning capacity using the *Shadrick* formula.<sup>14</sup>

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

In the present case, OWCP had determined appellant's wage-earning capacity on July 15, 1969 based on an entry-level position of salesperson. It has modified the wage-earning capacity determination, finding that appellant has been vocationally rehabilitated. It is OWCP's burden of proof to modify a wage-earning capacity determination based on a claimants' vocational rehabilitation.

The Board finds that OWCP met its burden of proof in this case. The original salesperson position on which appellant was rated was a general sales position. The information appellant provided regarding 2011 earnings showed wages from A&P Custom Kitchens as a sales representative and manager. It is clear that this is not the same job that was the basis for the July 15, 1969 wage-earning capacity determination. In addition, it is clear that appellant has had significant additional vocational preparation since July 15, 1969. With respect to A&P Custom Kitchens, appellant acknowledged that he had significant responsibilities in managing the business and was authorized to write checks for the business. There is also evidence that appellant was involved in other businesses, as owner or officer, at times prior to 2011.

The 2011 reported earnings for A&P Custom Kitchens alone were \$65,000.00 per year, or \$1,250.00 per week. The current pay rate for the selected position of salesperson was \$343.85 per week. Appellant, therefore, was earning greater than 25 percent more than the pay rate on which the original wage-earning capacity determination was based. The Board finds that appellant has properly been found to be vocationally rehabilitated since the July 15, 1969 wage-earning capacity determination.

OWCP properly determined that appellant had no loss of wage-earning capacity. The current pay rate for the date-of-injury job was \$777.20 per week. Since appellant had actual earnings of \$1,250.00 per week that exceeded the current pay rate for the date-of-injury job, he has no loss of wage-earning capacity.<sup>15</sup>

On appeal, appellant argues that OWCP should not consider profits from his businesses. The record indicates that appellant claimed wages of \$1,250.00 per week in 2011, and appellant has indicated that wages were paid for the work performed. For the reasons discussed above, the Board finds that OWCP properly modified the wage-earning capacity determination.

#### **CONCLUSION**

The Board finds the case is not in posture for decision with respect to the forfeiture of compensation. As a result, the overpayment and waiver issues are not in posture for decision.

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* See *Albert C. Shadrick*, 5 ECAB 376 (1953). See also 20 C.F.R. § 10.403.

<sup>15</sup> See *Domenick Pezzetti*, 45 ECAB 787 (1994).

The Board further finds that OWCP properly modified the July 15, 1969 wage-earning capacity determination.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 6, 2014 is affirmed with respect to modification of wage-earning capacity determination. It is set aside and remanded with respect to forfeiture, overpayment, and waiver of the overpayment.

Issued: March 23, 2016  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board