

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$50,802.10 because he forfeited compensation for the period November 29, 2013 through June 25, 2015; and (2) whether appellant was at fault in the creation of the overpayment and thus not entitled to waiver.

FACTUAL HISTORY

On October 12, 2013 appellant, then a 44-year-old rural carrier, pulled a muscle in his neck, shoulder, and upper back in the performance of duty. He stopped work on October 15, 2013. OWCP accepted the claim for a sprain of the neck and left shoulder, a left superior glenoid labrum lesion, and a disorder of bursae and tendons in the left shoulder region.

Appellant, on December 17, 2013, filed a claim for compensation (Form CA-7) requesting wage-loss compensation from November 29 to December 13, 2013. The form advised that he must report any and all earnings from employment, self-employment, or involvement in a business enterprise for which he received a salary, wages, income, commissions, or payment of any kind during the periods claimed. It further provided that fraudulently concealing employment or failing to report income may result in forfeiture of compensation benefits and/or criminal prosecution. Appellant signed the form and responded "No" to the question regarding whether he had worked outside of his federal job for the period claimed.

Appellant submitted claims for compensation for total disability (Form CA-7) from November 29, 2013 to June 13, 2014 and from July 26 through September 14, 2014. On the forms, he indicated that he had not performed any work during the period claimed. OWCP paid wage-loss compensation for total disability from November 29, 2013 on the supplemental rolls until appellant was placed on the periodic rolls on May 4, 2014.

In a Form EN1032 signed July 7, 2014, appellant advised that he was self-employed and involved in a business enterprise for the preceding 15-month period as co-owner/manager of Hilltop Auto Body. He asserted that he had not participated in the business enterprise since his October 12, 2013 work injury. Appellant indicated that he received no pay or actual earnings from the business. The EN1032 form instructed him to report all employment for which he received a salary, wages, income, sales commissions, piecework, or payment of any kind. The form also indicated that appellant should report all self-employment or involvement in business enterprises, including (but not limited to) farming, sales work, operating a business, and providing services in exchange of money, goods, or other services. It additionally requested that he provide the pay for his services, including the value of things such as housing, meals, clothing, and reimbursed expenses. The form contained certification clauses, which informed appellant of the consequences of failing to accurately report his employment activities, such as being subjected to criminal penalties and losing the right to receive workers' compensation.

Appellant returned to part-time modified employment on September 26, 2014. He submitted CA-7 forms, claims for compensation for intermittent wage loss from October 7, 2014 to July 24, 2015. Appellant either indicated on the forms that he had not worked during the

period claimed or he did not respond to the question. OWCP paid wage-loss compensation for intermittent time lost from work from September 21, 2014 until July 24, 2015.

The employing establishment's Office of the Inspector General (OIG), on October 7, 2014, advised OWCP that it was investigating appellant for not reporting his self-employment as required. In a case summary report covering January 30 to October 4, 2014, it discussed his notation on the July 7, 2014 Form EN1032 that he had no involvement with Hilltop Auto Body since October 12, 2013. The OIG advised that insurance companies wrote checks made out either directly to appellant or to Hilltop Auto Body from October 2013 to March 2014. Internet advertising identified him as the business owner. The OIG advised that Hilltop Auto Body provided an estimate to an insurance company on October 22, 2013 and the insurance company mailed a payment for the check to appellant's personal mailing address. It made three other payments for the claim to him on October 30 and November 1 and 11, 2013. On another claim, an insurance company wrote a check directly to appellant for \$911.48 on May 15, 2014 based on an estimate made by Hilltop Auto Body on May 5, 2014. The OIG described other payments made by insurance companies in January 2014. It advised that a note from an insurance company indicated that a representative spoke with appellant about a rental bill on January 25, 2014 and about a supplemental payment on November 5, 2013. Invoices and estimates from February and March 2014 from Hilltop Auto Body identified him as the point of contact for the company and provided his mailing address. The OIG's office provided copies of payments on claims made to either Hilltop Auto Body or appellant from October 22 to November 11, 2013. It also submitted estimates to insurance companies providing the repair facility as Hilltop Auto Body on October 22, 2013 and in January and May 2014, copies of checks made out to either Hilltop Auto Body or him from insurance companies dated December 13, 2013 and February 2014, and invoices from Hilltop Auto Body to customers dated October 15, 2013 and February and March 2014 listing him as the point of contact.

The OIG provided an addendum report dated December 10, 2014 covering the period October 5 to December 4, 2014. It submitted memoranda of interviews from witnesses identifying appellant as the owner of Hilltop Auto Body and the recipient of checks for the work performed. A customer, C.C., related that in January and February 2014 she left a vehicle with appellant for repairs, gave him a check, and picked up her vehicle from him. Customer J.J. related that in May 2014 appellant estimated the damages to her vehicle and handled the business side of repairs. Customer H.L. discussed car repairs with appellant in May 2014 and rented a replacement vehicle from him. Customer R.L., during the summer of 2014, spoke with appellant about repair work to his vehicle and paid him by check in August 2014. The OIG related that bank account statements identified appellant as using a sole proprietorship account for Hilltop Auto Body with deposits for April through July 2014 totaling \$127,992.00. Appellant signed outgoing checks using funds from the account, including to a home appliance store and the Department of Motor Vehicles. The OIG submitted evidence showing that Hilltop Auto Body deposited over \$29,000.00 in payments from March to May 2014 and \$127,992 from April through July 2014. It further submitted deposit slips and checks made out to either appellant or Hilltop Auto Body dated April through October 2014 and monthly statement from his small business checking account showing deposits and withdrawals from April through July 2014.

The record shows that, as part of his 2013 federal tax return, appellant completed a Schedule C, Profit or Loss from Business, showing gross sales of \$217,861.00 and gross income

of \$94,577.00. He listed a net loss on the form of \$31,638.00. Appellant identified himself on the form as a sole proprietor of Hilltop Auto Body. He responded “yes” to the question on the form of whether he materially participated in the operation of the business in 2013.

In a July 7, 2015 addendum report, covering the period July 7, 2014 to July 7, 2015, the OIG documented deposit slips and checks made out to either appellant or Hilltop Auto Body dated July 16, 2014 to May 18, 2015 and invoices through June 2015. The checks and deposits were made during the periods in which appellant claimed FECA compensation from July 2014 through June 2015 using Forms CA-7. The OIG also advised that he received “hundreds of customer invoices dated between July 2014 and July 2015,” noting that the invoices included his name and mobile telephone number. It submitted a 2014 Schedule C for him as sole proprietor of Hilltop Auto Body showing gross sales of \$246,455.00 and gross income as \$112,604.00. Appellant responded “yes” to the question on the form of whether he materially participated in the operation of his business during that year. He claimed a net loss from the business of \$7,653.00.

By decision dated July 23, 2015, OWCP found that appellant forfeited his entitlement to compensation for the period November 29, 2013 to June 25, 2015 because he knowingly failed to disclose his outside earnings and employment. It determined that he did not wholly disclose his earnings and employment on a July 7, 2014 EN1032 form covering the period April 7, 2013 through July 7, 2014 and failed to disclose employment on CA-7 forms covering the period July 26, 2014 through June 25, 2015.

OWCP, on July 23, 2015, notified appellant of its preliminary finding that he received a \$50,802.10 overpayment of compensation because he had forfeited entitlement to compensation from November 29, 2013 through June 25, 2015. It calculated the overpayment by determining the compensation benefits paid to him during the period set forth in the July 23, 2015 decision. OWCP also advised appellant of its preliminary finding that he was at fault in creating the overpayment. It requested that he complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documents. OWCP notified appellant that, within 30 days, he could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing.

On August 20, 2015 appellant requested a telephone conference. He challenged fact and amount of the overpayment as well as OWCP’s finding that he was at fault in its creation. Appellant asserted that he disclosed on the EN1032 form that he was co-owner of a company, because he believed that he owned the company with his wife, though he now understood that he was a sole proprietor. He advised that his duties were managerial and constituted less than three or four hours a week. Appellant asserted that he did not receive a salary, wages, or other remuneration and did not know how to estimate a value for his activities as an employing establishment would not “pay someone for this type of sporadic and odd-hours work.” He asserted that he did not list his employment on the CA-7 forms as he did not have earnings. Appellant questioned why the overpayment was calculated using his gross income as he had no net income after expenses.

In an attached overpayment recovery questionnaire (Form OWCP-20), appellant provided his monthly income as \$5,118.00. From his monthly income, he subtracted net losses of \$637.75

from Hilltop Auto Body and \$562.00 from rental losses for a total monthly income of \$3,918.25. Appellant advised that he had \$13,000.00 in a savings account and property worth over \$900,000.00. He also owned rental vehicles and trucks worth \$63,000.00.

On October 5, 2015 appellant, through counsel, requested reconsideration of the July 23, 2015 forfeiture decision.

OWCP held a telephone conference with appellant and his counsel on March 3, 2016. In a memorandum of conference, counsel advised that appellant had reported that he co-owned a business and asserted that his involvement was passive in nature. She also contended that appellant had not received income from the business and that tax returns showed that the business operated at a loss. Counsel noted that the employing establishment had terminated his employment and questioned how OWCP calculated the overpayment of compensation.

By decision dated March 24, 2016, OWCP found that appellant received an overpayment of \$50,802.10 from November 29, 2013 through June 25, 2015 because he had forfeited his entitlement to compensation for this period. It further determined that he was at fault in creating the overpayment. OWCP instructed appellant to forward a check for the full amount of the overpayment as repayment.

On appeal counsel contends that appellant correctly responded on the CA-7 forms that he did not have a salary or wages of any kind, as tax returns from the business shows that he did not make a profit. She also contends that he disclosed his business on the EN1032 form and accurately indicated that he had no earnings. Counsel argues that the forfeiture erroneously considered gross income from the business. She also claims that OWCP failed to consider evidence submitted on March 3 and 8, 2016, following the telephone conference, relevant to the alleged overpayment. Counsel asserts that OWCP did not consider normal business expenses and further contends that the forfeiture decision is not final as she had requested reconsideration of the decision.

LEGAL PRECEDENT -- ISSUE 1

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.”⁴

OWCP’s implementing regulations provides:

“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.”⁵

⁴ 5 U.S.C. § 8106(b).

⁵ 20 C.F.R. § 10.529.

The Board has held that it is not enough merely to establish that there were unreported earnings or unemployment. Appellant can be subjected to the forfeiture provisions of 5 U.S.C. § 8106(b) only if he “knowingly” failed to report employment or earnings.⁶ The term “knowingly” as defined in OWCP’s implementing regulations, means “with knowledge, consciously, willfully or intentionally.”⁷

Section 8102 of FECA⁸ provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁹ Section 8129(a) provides, in pertinent part, “When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation, but that the case is not in posture for a determination of the amount of overpayment. OWCP paid him compensation for total disability from November 29, 2013 to September 25, 2014 and for intermittent disability beginning September 25, 2014. It found that appellant forfeited compensation because he knowingly failed to report earnings on a Form EN1032 covering the period November 29, 2013 to July 7, 2014 and failed to report his employment and earnings on CA-7 forms covering the period July 26, 2014 to June 25, 2015. There is no EN1032 form or Form CA-7 applicable to the period July 7 to 26, 2014, and thus no basis to support a forfeiture of compensation for this period. Consequently, OWCP has not established that appellant received an overpayment of compensation from July 7 to 26, 2014.

The Board finds that appellant received an overpayment of compensation from November 29, 2013 to July 7, 2014 as he forfeited entitlement to monetary compensation. OWCP based its finding that he forfeited his entitlement to compensation from November 29, 2013 through July 7, 2014 on his failure to fully disclose his work activities and earnings on a July 7, 2014 Form EN1032. On the July 7, 2014 EN1032 form, appellant indicated that he had been co-owner/manager of Hilltop Auto Body for the preceding 15-month period, but maintained that he had not participated in the business enterprise following his October 12, 2013 work injury.

The OIG, in reports dated October 7 and December 10, 2014, related that appellant had received checks, provided estimates, discussed car repairs, and leased rental cars to customers during the period January through August 2014. It enclosed copies of checks made out to either

⁶ *Barbara L. Kanter*, 46 ECAB 165 (1994).

⁷ 20 C.F.R. § 10.5(n).

⁸ *Supra* note 2.

⁹ 5 U.S.C. § 8102.

¹⁰ *Id.* at § 8129(a).

him or Hilltop Auto Body and provided memorandum of witnesses describing business interactions with appellant in January, February, May, and August 2014. Bank statements for the sole proprietorship account for Hilltop Auto Body showed deposits from April through July 2014 totaling \$127,992.00. Tax returns dated 2013 and 2014 indicated that appellant was the sole proprietor of Hilltop Auto Body and that he materially participated in the operation of the business. Hilltop Auto Body received gross income of \$94,577.00 in 2013 and \$112,604.00 in 2014. The record thus supports that appellant, contrary to his indication on the Form EN1032, participated in his business as manager/sole proprietor of Hilltop Auto Body after October 12, 2013 during the period covered by the July 7, 2014 Form EN1032.

Appellant can be subject to the forfeiture provision of section 8106(b) only if he “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.¹¹ Appellant completed a Form CA-1032 which advised him that he must report both all employment and all earnings from employment and self-employment. The form 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.¹² Additionally, his filing of a tax return advising the Internal Revenue Service of the income generated by his business is persuasive evidence that he knew that he had income from employment.¹³ OWCP, therefore, properly found that appellant forfeited compensation for the period November 29, 2013 through July 7, 2014 based on the July 7, 2014 Form CA-1032.

For the period July 26, 2014 through June 25, 2015, appellant submitted CA-7 forms dated July 26, 2014 through July 6, 2015 requesting compensation for intermittent wage loss. On the forms, he indicated that he either did not work or did not respond to the question on the form regarding whether he engaged in any employment during the period claimed. The OIG submitted numerous checks, deposits, and invoices demonstrating that appellant participated in work activities at Hilltop Auto Body during the time he claimed compensation on the forms. Additionally, his tax return from 2014 showing gross sales for his sole proprietorship of \$246,455.00 is persuasive evidence that he engaged in continual business activity during the period in question.

Regarding whether appellant knowingly failed to report earnings from outside his federal employment, the Board notes that the language on the CA-7 forms instructs appellant to report all earnings, whether from employment or self-employment or involvement in a business enterprise and not just salary or wages, but income, sales commissions, piecework, or payment of any kind. The Board finds that the plain language on the CA-7 forms were sufficient to put him on notice that he was required to report all earnings outside his federal employment.¹⁴ As noted

¹¹ *Supra* note 7.

¹² *See generally Robert C. Gilliam*, 50 ECAB 334 (1998).

¹³ *See F.H.*, Docket No. 07-1379 (issued November 24, 2008).

¹⁴ *See K.Z.*, Docket No. 12-0784 (issued August 27, 2012).

above, the fact that appellant completed a Schedule C showing profit or loss from business constitutes evidence that he knew that he had outside earnings from a business enterprise. OWCP, consequently, properly determined that he forfeited his entitlement to compensation from July 26, 2014 through June 25, 2015 and thus received an overpayment of compensation for this period.

On appeal appellant, through counsel, contends that he did not have a salary or wages because his business did not make a profit. He maintains that he disclosed his business on the EN1032 form and correctly advised that he did not have earnings. Appellant questions why OWCP used the gross income from his business and did not consider business expenses. OWCP's regulations, however, provide that if an employee knowingly omits or understates earnings or work activity in making a report, he shall forfeit the right to compensation with respect to any period for which the report was required.¹⁵ There is no provision for offset or payment based on the amount of income actually received. Further, whether the employee makes a profit on his activities is not relevant.¹⁶

Appellant submitted CA-7 forms requesting compensation for total disability from November 29, 2013 to June 13, 2014 and from July 26 through September 14, 2014. On the forms, he indicated that he had not performed any work during the period claimed. OWCP paid compensation for total disability from November 29, 2013 to September 25, 2014.

Counsel also asserts that OWCP failed to consider evidence appellant submitted to OWCP on March 3 and 8, 2016 following a telephone conference which included additional evidence regarding the overpayment. She did not specifically describe the evidence that she maintains OWCP failed to evaluate and the record does not contain any evidence received by OWCP between the March 3, 2016 telephone conference and the March 24, 2016 OWCP decision. Counsel also argues that the forfeiture was not final as she had requested reconsideration. The issue before the Board, however, is the overpayment resulting from the final overpayment decision.¹⁷

LEGAL PRECEDENT -- ISSUE 2

Under OWCP regulations, waiver of the recovery of an overpayment may be considered only if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹⁸ The fact that the overpayment was the result of error by OWCP or another government agency does not by itself relieve the individual who received the overpayment of liability for repayment if the individual also was at fault for receiving the overpayment.¹⁹ Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure

¹⁵ 20 C.F.R. § 10.529 (b); *see supra* note 13.

¹⁶ *See F.H., id; Terryl A. Geer*, 51 ECAB 168 (1999).

¹⁷ The Board's jurisdiction is limited to reviewing final decisions of OWCP; *see* 20 C.F.R. § 501.2(c).

¹⁸ 20 C.F.R. § 10.433(a).

¹⁹ *Id.* at § 10.435(a).

that payments he received from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known to be incorrect (this provision applies only to the overpaid individual).²⁰

ANALYSIS -- ISSUE 2

OWCP found that appellant was at fault as he knowingly accepted wage-loss compensation to which he was not entitled. It further noted that he failed to furnish information which he knew or should have known was material.

The Board finds that appellant was at fault in creating the overpayment. As noted, appellant knowingly failed to report earnings to OWCP. Accurate earnings information is material to the question of his entitlement to continuing wage-loss compensation. As appellant made incorrect statement as to material facts which he knew or should have known to be incorrect, he is at fault in creating the overpayment.²¹

With respect to recovery of the overpayment, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA.

CONCLUSION

The Board finds that appellant received an overpayment of compensation because he forfeited compensation for the periods November 29, 2013 through July 7, 2014 and July 26, 2014 to June 25, 2015, but that the case is not in posture for determination of the amount of the overpayment. The Board further finds that he was at fault in the creation of the overpayment and thus not entitled to waiver.

²⁰ *Supra* note 18; see *Kenneth E. Rush*, 51 ECAB 116 (1999).

²¹ *Supra* note 18; see also *C.O.*, Docket No. 07-0136 (issued September 6, 2007).

ORDER

IT IS HEREBY ORDERED THAT the March 24, 2016 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with the decision of the Board.

Issued: August 4, 2017
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