

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

B.K., Appellant

and

**U.S. POSTAL SERVICE, HUGHES STATION,
Fresno, CA, Employer**

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**Docket No. 17-0406
Issued: December 12, 2017**

Appearances:
Sally F. LaMacchia, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 14, 2016 appellant, through counsel, filed a timely appeal from a June 22, 2016 decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant forfeited his right to compensation for the periods March 5, 2000 to April 3, 2006 and January 10, 2007 to April 22, 2013, pursuant to section 8106(b)(2) of FECA; (2) whether OWCP properly found that

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

an overpayment of compensation in the amount of \$427,275.54 because of the forfeiture; and (3) whether OWCP properly found that appellant was at fault in creating the overpayment and therefore waiver of recovery of the overpayment is not warranted.

On appeal counsel asserts that appellant has been unable to work since his January 8, 2000 work injury. She maintains that the record does not support that he has conducted any employment activity on what is a family farm that has operated since 1987 and, relying on the case *C.D.*,³ asserts that OWCP failed to meet its burden of proof to establish the nature, timing, and duration of employment activity.

FACTUAL HISTORY

On January 8, 2000 appellant, then a 38-year-old letter carrier, was hit in the right shoulder when shot by a pellet gun while sitting in his work truck delivering mail. He stopped work that day and did not return. OWCP accepted a right shoulder puncture and acute stress reaction as work related. Appellant received continuation of pay from January 9 through February 22, 2000 and wage-loss compensation beginning February 23, 2000. He was placed on the periodic compensation rolls effective March 26, 2000. Appellant has not returned to work.

In reports beginning January 21, 2000, Allan G. Hedberg, Ph.D., a clinical psychologist, saw appellant weekly. He related that appellant had a high sense of apprehension and anxiety after the shooting and could not return to work. On July 7, 2000 Dr. Hedberg transferred appellant's care to Dr. Robert P. Withrow, a Board-certified psychiatrist, who diagnosed post-traumatic stress disorder (PTSD) and gunshot wound. Dr. Withrow submitted sporadic reports. On September 20, 2007 Dr. Withrow advised that he saw appellant twice monthly for psychotherapy. He diagnosed major depression and PTSD and indicated that appellant's condition had not changed.

OWCP referred appellant to Dr. Franklin Drucker, a Board-certified psychiatrist, for a second opinion evaluation on September 13, 2000 as to appellant's work capacity. In his September 13, 2000 report, and following psychological testing, he diagnosed employment-related PTSD and pellet wound to the right shoulder. Dr. Drucker advised that appellant was not psychologically capable of returning to work.

OWCP also referred appellant for a second opinion evaluation to Dr. Craig R. MacClean, a Board-certified orthopedic surgeon. In his September 25, 2000 report, Dr. MacClean advised that the employment-related right shoulder puncture wound from pellet gunshot had healed without residuals and that, from an orthopedic standpoint, appellant could return to his usual job.

OWCP again referred appellant for a second opinion evaluation to determine his work status. On July 17, 2002 Dr. Paul J. Markovitz, a Board-certified psychiatrist, provided a second opinion evaluation. He diagnosed major depression, single episode, melancholic, severe; PTSD, and healed right shoulder injury secondary to bullet wound. Dr. Markovitz advised that appellant could not work due to his employment-related psychological condition.

³ Docket No. 14-1165 (issued July 8, 2015).

By letter dated March 11, 2008, OWCP asked appellant for earnings information from January 1, 2004 to December 31, 2006 and provided a Form SSA-581 to sign and return. In a response dated August 5, 2008, appellant wrote that he was exercising his rights under the law of the land by not signing and submitting the form.

In June 2008 appellant began seeing Dr. Richard E. Land, a psychiatrist. Dr. Land submitted form progress reports beginning July 30, 2008 noting appellant's status. He diagnosed major depressive disorder, possible schizoaffective disorder, PTSD, and personality disorder. On May 21, 2009 Dr. Land noted that appellant and his father were preparing the family ranch for the coming season. On December 29, 2009 appellant related increased paranoia when three agents came to his home to investigate if he was working. On June 17, 2010 Dr. Land noted that appellant did not speak English well and was singled out for workers' compensation violations. On December 28, 2011 he reported increased anxiety and noted that there had been a stay on appellant's criminal case until March 2012. Dr. Land continued to note that appellant was under enormous stress.

OWCP also received on October 18, 2012 a report from Dr. Land in which he reported that appellant's intellectual capacity, anxiety, and inability to understand English often rendered him incompetent and difficult to treat. On November 28, 2012 Dr. Land reported that appellant's criminal case was again stayed. On December 27, 2012 he reported that appellant had been deposed by appellant's union representative. Dr. Land noted that, although appellant graduated from high school and attended junior college in the United States, he was unable to comprehend legal proceedings. He indicated that appellant seemed to comprehend little of the proceedings.⁴ On March 28, 2013 Dr. Land related that appellant was seen by Dr. Harold Seymour, a psychologist, to evaluate competency. On October 17, 2013 he related that appellant indicated that his family encouraged him not to do any work but to just stand and watch the harvest.

In December 2013 the employing establishment's Office of Inspector General (OIG) provided January 28 and April 9, 2010 investigation reports covering the period September 30, 2009 to April 1, 2010. Special Agent (SA) Sara Harlan indicated that, after a review of employees on FECA compensation, she began investigating appellant, noting that in 2006 it was reported that he was operating a farm, but that in 2009 the U.S. Attorney's office declined to prosecute due to lack of investigative resources. SA Harlan attached a February 8, 2006 investigative report, completed by postal inspector David Guerra, which noted that Fresno County public records showed that appellant owned several parcels of land used to grow grapes for raisin production. The report included copies of checks payable to appellant from packing companies, annual OWCP EN1032 forms signed by appellant from May 25, 2000 to May 22, 2005, and a December 30, 1998 power of attorney signed by appellant's brother Gurjant Khosa, listing appellant as agent.

In the 2010 investigative reports, SA Harlan noted that subpoenas had been served and had been interviews conducted which verified that appellant operated a farming business from which he earned income. She noted that the record included EN1032 forms signed by appellant

⁴ In a January 30, 2013 decision, the Merit Systems Protection Board reversed an Office of Personnel Management decision denying appellant's application for disability retirement benefits. It found that appellant continued to have a medical condition that prevented him from performing the essential elements of his job. On April 22, 2013 appellant elected FECA compensation, effective January 8, 2000.

on April 3, 2006, April 10, 2008, and April 16, 2009. SA Harlan and a workers' compensation analyst, Toby Bogges, conducted interviews with owners and managers of Victor Packing, Four Bar C Farms, Sun-Maid Growers, Midland Tractor, Deep Star Farm Labor, Boghosian Raisin Packing Company, a certified public accountant, and an insurance agent. Each report indicated that appellant personally did business with each business regarding his farming.⁵

On November 17, 2009 SA Harlan, WCA Bogges, and State of California Employment Development Department (EDD) investigator, Melissa Silver, interviewed appellant who, per the report, confirmed that he was the owner of Balbir S. Khosa (BSK) Farms alone, and that he owned Balbir and Gurjant Khosa (B&G) Farms with his brother. Appellant acknowledged that he had been in the business of growing raisins since 1987, then in partnership with his father, but on his own since 1999, and that he ran the day-to-day operations that included managing employees with the help of his father.

A January 14, 2010 memorandum of interview reported that SA Harlan and a second special agent interviewed appellant's brother, Gurjant Khosa. The memorandum indicated that Gurjant Khosa was aware that appellant was collecting FECA benefits for a work-related mental condition, and that he and appellant had started B&G Farms together in 2004. He maintained that appellant was not involved much in the business due to mental problems, and that his father and another brother, Jasvir Khosa helped run the farm. Gurjant Khosa noted that he gave appellant power of attorney before the employment injury but that he had forgotten about it and had intended to revoke it. Gurjant Khosa indicated that he went to the farms every weekend or every other weekend to conduct business, and that he hired the labor contractors. SA Harlan informed Gurjant Khosa that records had been subpoenaed, and that these included contracts with appellant's signature and endorsed checks made out to the business, endorsed by appellant.

Attachments to the investigative reports included a durable power of attorney dated December 30, 1998 which was granted to appellant by his brother Gurjant Khosa on, copies of *subpoenae duces tecum*, contracts and invoices signed by appellant for farm labor and trucking services for BSK Farms and B&G Farms dated from January 10, 2006 to December 15, 2009, a record of check payments from November 2, 1999 to January 13, 2005, cancelled checks signed by appellant covering periods from November 2, 1999 to November 5, 2009, federal tax returns for BSK Farms and B&G Farms for the years 2006, 2007, and 2008, records of telephone calls made by appellant ordering farm equipment for his brother Jasvir Khosa in August to December 2009, and a copy of appellant's driver's license. On a designation of representative form dated October 10, 2009 for B&G Farms, signed by appellant and his brother Gurjant Khosa appellant was designated the representative of B&G Farms "to act and vote for, and in its behalf in all proceedings and meetings of Sun-Maid Growers of California, including those where members are permitted or required to cast a ballot or vote, and to fill any official position that the

⁵ The investigative report described a November 24, 2009 interview by SA Harlan and WCA Bogges with Navdeep Sidhaliwal, owner of Deep Star Farm Labor. The report indicates that SA Harlan showed Mr. Sidhaliwal a photograph that he identified as appellant and indicated that he conducted business with him. On December 11, 2009 WCA Bogges contacted Jose Ochoa and subpoenaed his records. Mr. Ochoa confirmed that his crews worked for appellant during the 2009 raisin harvest and in prior years. He identified appellant's photograph and confirmed he was the only person with whom he did business.

undersigned member would be eligible.” The designation was to remain in effect until written notice was given to the contrary.⁶

The record includes OWCP EN1032 forms signed by appellant from May 25, 2000 to April 22, 2013. On the form signed by him on May 25, 2000, he indicated that, for the past 15 months he worked for the employing establishment until his injury, and did not work thereafter. Appellant was not self-employed or involved in any business enterprise. On forms signed on June 5, 2001 and June 28, 2002, he indicated that he and his wife owned a grape farm that his wife managed, and that he earned no income. On forms signed by him on September 6, 2003, July 27, 2004, May 22, 2005, and April 3, 2006, appellant indicated that he had not worked for any employer, and was not self-employed or involved in a business enterprise. He listed no income. On EN1032 forms signed by appellant on April 10, 2008 and April 16, 2009, he indicated that he had not worked for any employer during the past 15 months. Regarding self-employment, he noted that he was not involved in a business. Appellant advised that his brothers and wife ran the business. He listed no income.

On forms signed by appellant on August 7, 2010 and May 14, 2011, he indicated that he had not worked for any employer during the past 15 months. Regarding self-employment or involvement in a business enterprise, he indicated that he owned a farm and that before the work injury to the current time, he was not involved in the business, which was run by his brothers and wife. Appellant noted that he did not do any physical work, and only did tasks which his doctor recommended, including driving around fields and going for walks in the fields. He indicated that he did not earn anything, but that insurance paid money for crop loss each reporting period. On the EN1032 form signed by appellant on May 26, 2012 he reported that he was not employed the past 15 months, and that he was not involved in a business that was run by his family. He noted that he received money from crop insurance. On the form he signed on April 22, 2013, appellant reported that he was not employed the past 15 months, and that he was not involved in a business that his family ran. He listed no income.

On December 5, 2013 Dr. Land described appellant’s care and noted the accepted diagnoses, all of which were work related. He opined that appellant remained totally disabled and that the fraud investigation aggravated his condition. On January 15 and February 14, 2014 Dr. Land reported that the depression was improved.

In a March 18, 2014 decision, OWCP found that appellant forfeited compensation for the periods March 5, 2000 to April 3, 2006 and January 10, 2007 to April 22, 2013. It explained that on OWCP EN1032 forms he signed on June 5, 2001, June 28, 2002, September 6, 2003, July 27, 2004, May 22, 2005, April 3, 2006, April 10, 2008, April 16, 2009, August 7, 2010, May 14,

⁶ Subpoenas for records were served on Sun Maid Growers of California, Raisin Administrative Committee, Deep Star Farm Labor Contractor, Boghosian Raisin Packing Co., Caruthers Raisin Packing, Grainger, Victor Packing Co., Hurluf V. Hansen Trucking, Jose M. Ochoa and Zaava Farm Labor Service, Midland Tractor, Wayne Ota, CPA, and Gill Insurance. Sun Maid records included contracts signed by appellant for BSK Farms dated from January 3, 2005 to December 15, 2009, checks from Sun Maid made out to a bank account for BSK Farms, all of which were either endorsed by appellant or deposited to the account at United Security Bank, dated from January 11, 2006 to October 9, 2009, in amounts ranging from \$2,621.97 to \$165,728.45, and to B&G Farms dated December 1 and 16, 2006 in amounts of \$18,398.49 and \$4,809.58. Cancelled checks made out to BSK Farm and B&G Farm from National Raisin Co., Boghosian Raisin Packing Co., Caruthers Raisin Packing, and Victor Packing Co. dated October 3, 2001 to February 15, 2003 were also included.

2011, May 26, 2012, and April 22, 2013 he revealed that he was not involved in managing a business enterprise but this was contradicted by evidence including checks made out to him, contracts signed by him, and client interviews. The totality of the evidence established that appellant was actively involved in the management and operations of the business for the periods at issue. It noted that he received \$189,739.37 in FECA compensation for the period March 5, 2000 through April 3, 2006, and \$237,536.17 for the period January 10, 2007 through April 22, 2013, for a total of \$427,275.54 in forfeited compensation. Computer print-outs documented appellant's receipt of this amount of compensation for these periods.

On March 19, 2014 OWCP made a preliminary determination that appellant received a \$427,275.54 overpayment of compensation because he failed to report employment activities for the periods March 5, 2000 to April 3, 2006 and January 10, 2007 to April 22, 2013. It found appellant at fault in creating the overpayment because he knowingly accepted compensation to which he was not entitled. Appellant was provided an overpayment action request and an overpayment recovery questionnaire (Form OWCP 20).

Appellant, through his then-representative, timely requested a hearing with OWCP's Branch of Hearings and Review from the March 18, 2014 forfeiture decision and requested a prerecoumment hearing from the March 19, 2014 preliminary overpayment finding.⁷

Appellant did not appear at the hearing, held on December 15, 2014. Counsel argued at the hearing that, as appellant owned a farm before the work injury and had only signed a few papers, his work was *de minimis*. Testimony was taken from witnesses. Dr. Land testified and described appellant's previous and current psychiatric treatment, and his current symptoms, noting that he had been tested by Dr. Eric Morgenthaler and Dr. Seymour. He diagnosed PTSD and opined that appellant could not work and could not comprehend the questions on an EN1032 form. Dr. Land asserted that psychological testing indicated that appellant was not attempting to defraud. Mr. Ochoa disputed that he had conducted business with appellant, but rather stated that he conducted business solely with his brothers Jasvir and Gurjant Khosa.

Navdeep Bhaliwal, owner of Deep Star Farm Labor, also testified that he disagreed with the OIG report, stating that he only did business with appellant before his injury and afterward dealt with Jasvir and Gurjant Khosa. Appellant's brother Jasvir testified that he was the oldest of four brothers and each owned a farm. He stated that appellant had not worked since the employment injury, and that Jasvir did all the work, made all the contracts, and only gave appellant paperwork to sign. Jasvir testified that he was the sole contract negotiator for appellant's farm, and that appellant could not drive. Appellant's brother Gurjant testified that he worked for the employing establishment from 1997 to September 2000. He stated that at that time he gave appellant power of attorney to handle affairs when he left. Gurjant maintained that, since the accident, appellant was not capable of carrying on normal daily functions so all brothers helped out and his brother Harvinder Khosa took over appellant's finances until Gurjant returned in 2000 at which time Gurjant resumed all bookkeeping.

Gurjant testified that the only work appellant did was sign documents and that Jasvir was always with appellant when they needed to make a decision. Appellant's brother, Harvinder, testified that he owned a market and that appellant only came there to get gas for his car.

⁷ Dr. Land continued to submit monthly form reports, noting appellant's increased paranoia.

Counsel stated that he did not want appellant to testify because of the pending criminal fraud case. She maintained that appellant had not participated in any physical work activity or made any real business decisions since the January 2000 employment injury.

Regarding the overpayment, the hearing representative discussed the definition of knowingly and advised that appellant should submit the overpayment questionnaire with supplemental financial statements. Counsel maintained that appellant was totally disabled due to mental confusion and therefore did not knowingly accept compensation to which he was not entitled.

On January 22, 2015 the employing establishment forwarded a sworn declaration of that date from SA Harlan. SA Harlan recounted investigating appellant for misrepresenting information on EN1032 forms with respect to his income and outside income sources, based on allegations that he operated a raisin farm without reporting income from and/or participation in this activity. She advised that interviews were conducted with numerous individuals who engaged in business transactions with appellant, all of which were described in the investigative report. SA Harlan noted that copies of contracts, checks, and other financial records signed by appellant were reviewed, and that a copy of the report with attachments was sent to OWCP. She indicated that she reviewed the transcript from the December 15, 2014 hearing and disagreed with Dr. Land that appellant had impaired judgment, maintaining that this was contradicted by medical reports from Dr. Land. SA Harlan noted that she had personally interviewed appellant on November 17, 2009 along with a union representative and that during the interview appellant communicated in a proper and appropriate manner. She advised that appellant understood the questions presented to him and responded appropriately, that his responses were logical, coherent, and directed to the question that were asked, that he answered questions regarding his tax forms, persons who assisted him in operating the farm, and his role in operating the farm, and further described his involvement as running the day-to-day farm operations including shaking raisins.⁸ SA Harlan related that at no time during this interview did appellant display any incoherence, illogical communication, impaired judgment or delusional thought processes as described by Dr. Land. She noted that digital video discs (DVDs) of the interview were forwarded to OWCP. SA Harlan further indicated that she and another special agent arrested appellant at his residence without incident and that, during the arrest, appellant claimed that he could not speak English and requested that his son serve as an interpreter. She also related that she was present at a hearing on appellant's criminal case, and that he did not request an interpreter and was able to speak and understand English. SA Harlan advised that, on January 20, 2015, an assistant district attorney confirmed that appellant was charged with two counts of fraud, and the case was going forward in California state court.

⁸ SA Harlan indicated that WCA Bogges interviewed Mr. Ochoa. She noted that she spoke with produce wholesalers who purchased crops from appellant, vendors who provided transportation and equipment, an insurance agent, the farm's bookkeeper, and with representatives of Victor Packing, Sun-Maid Growers of California, Caruthers Raisin Packing, and Boghosian Raisin Packing Company, who confirmed their business arrangements to purchase raisins from BSK Farms and dealings with appellant when negotiating contracts. Each of these companies provided copies of contracts, invoices and checks made payable to appellant and to B&G Farms. The details of these interviews and the records provided were included in the investigation report. SA Harlan also indicated that she interviewed a representative from Hurluf Hansen Trucking who provided trucking services for transporting crops. The representative provided documents pertaining to hauling services and indicated that he dealt with appellant.

In correspondence dated February 14, 2015, counsel disputed SA Harlan's declaration and maintained that appellant's brother Gurjant operated the farm.

By decision dated March 12, 2015, an OWCP hearing representative set aside the March 18, 2014 forfeiture decision and the March 19, 2014 preliminary overpayment determination. He found that it was undisputed that appellant owned an interest in two farms and signed EN1032 forms stating that he was not involved in a business enterprise or that he performed no work or had no active function in the business. The hearing representative further found that it was undisputed that appellant signed checks and contracts in connection with the ownership of the farms. He found, however, that further development was needed because it was unclear if appellant had earnings from work and, if so, whether he knowingly omitted or underreported those earnings. The hearing representative noted that SA Harlan had not provided detailed transcripts, affidavits, or signed statements from the interviewees to supplement her summaries, and that the signed checks and contracts did not necessarily establish, on their own, earnings from work rather than a passive business action, as sworn hearing testimony indicated. He noted that he had reviewed the video and audio recordings but advised that appellant should have an opportunity to review them. The hearing representative found that Dr. Land's statements at the hearing called his objectivity into question about appellant's competency, and noted that a March 2013 mental competency examination by Harold L. Seymour, Ph.D., a clinical psychologist, was not in the record. On remand OWCP was to obtain a copy of Dr. Seymour's report. It was also to ask the employing establishment if there were any signed statements or affidavits provided by the witnesses who were interviewed by SA Harlan and, if so, to provide them to OWCP. Following this and other development needed, OWCP was to issue a *de novo* forfeiture decision and, if appropriate, a new preliminary overpayment determination.

In separate letters dated April 16, 2015, OWCP asked appellant to provide a copy of Dr. Seymour's report, and asked the employing establishment to provide copies of the video and audio recordings and any signed statements or affidavits provided to SA Harlan.

Appellant's representative forwarded a March 27, 2013 report in which Dr. Seymour noted that criminal proceedings against appellant had been suspended pursuant to court order for his evaluation. Dr. Seymour noted that records were supplied by defense counsel and the district attorney including the January 2010 investigation report, and medical records from attending physicians and OWCP physicians. He advised that he spoke with Dr. Land on March 26, 2013, who told Dr. Seymour that appellant was psychiatrically stable at present and had increased anxiety secondary to his criminal case. Dr. Seymour described the criminal charges against appellant, the history of the work injury, and appellant's medical and psychological history. He described test results, noting that appellant could identify the charges, knew the role of a judge, jury, his attorney, and the district attorney, understood a plea bargain, and indicated that he felt stable and ready to proceed with the criminal case.⁹ Dr. Seymour advised that appellant could read English at about a fourth grade level which could have implications when considering any documents he could be asked to review or sign, such as a plea form. He found that on mental status examination appellant appeared fully oriented and appeared to be of average intelligence

⁹ Dr. Seymour administered the Revised Competency Assessment Instrument test, a reading examination, and a mental status examination.

with intact insight and judgment. Dr. Seymour diagnosed chronic PTSD and possible mood disorder. He concluded that appellant was competent to stand trial.

Appellant's representative forwarded a March 26, 2015 signed statement in which Steve Nelson with Midland Tractor advised that the company had done business with B&G Farm since 2003, and that all equipment purchase negotiations were conducted by appellant's brother Jasvir and not appellant. In a signed statement, Jerry Emerzian with Rancho Realty indicated that he had dealt with appellant and Gurjant Khosa, a brother, for 20 years and had always dealt with Gurjant for appellant's business dealings, and if he spoke with appellant, appellant would refer him to Gurjant. In an April 24, 2015 notarized statement, Karl L. Noyes, an accountant, noted that he prepared appellant's tax returns for the past 10 years, and that all of the bookkeeping and farming information had been provided by Gurjant Khosa, who paid all bills and handled financial matters for appellant. In an April 30, 2015 notarized statement, Michelle Halgren, a real estate broker with Farmers Financial Services, indicated that Gurjant Khosa was the major decision-maker for all related loans for both appellant personally and B&G Farms. In a May 12, 2015 signed statement, Jim Percy, a buyer with Caruthers Raisin Packing Co., advised that he did business with B&G Farms since 2005 and that all raisin arrangements for appellant, Gurjant Khosa, and B&G Farms were conducted by Jasvir Khosa, and never with appellant, and that no negotiations had been conducted with appellant.

In May 14, 2015 correspondence, the employing establishment indicated that a copy of investigative audio and visual recordings was forwarded to OWCP by the OIG. The employing establishment forwarded a signed affidavit in which SA Harlan reiterated declarations she made in her January 22, 2015 statement. She indicated that she had been a sworn law enforcement officer for 15 years, and that all interviews were summarized in the Report of Investigation. SA Harlan maintained that it was not OIG policy to obtain sworn statements from witnesses during an investigation, and it was not a practice that was generally followed in federal law enforcement. She continued that she reviewed copies of contracts, checks, and other financial records signed by appellant. As to the interview with appellant, SA Harlan noted that appellant discussed various account irregularities regarding his account for his farm and for farms that were operated by other family members, and discussed personal loans he obtained to finance the farming operation in 2008 and 2009 due to the impact of price stabilization for raisins. She advised that she was at the interview, had reviewed the audio and video tapes of the interview, and swore and affirmed that the written transcript of the interview was true and accurate. SA Harlan concluded that, for purposes of OWCP's proceeding, she incorporated the statements included in the report of investigation as sworn declarations, and declared under penalty of perjury under the laws of the United States that the foregoing was true and correct.

A written interview transcript conducted on November 17, 2009 was submitted on May 19, 2015. EDD Silver conducted the interview with appellant. SA Harlan was also present. EDD Silver asked appellant questions regarding forms required for his farming operation, the contractors hired, and to whom the grapes were sold. He replied that he had been farming grapes for raisins since 1987 with his father and brothers in partnership, and the property was later separated, noting that since 1999 he had one property alone and others with his brothers. Appellant discussed crop yields and business practices. He indicated that he did not do the business bookkeeping, that his brothers ran the business and were there daily to supervise, although he also indicated that he hired contractors to do the work, that he would mechanically shake grapes at his house, and that he also supervised contract workers.

Dr. Land continued to submit form reports noting appellant's status. On May 21, 2015 he opined that appellant was psychotic.

In a June 29, 2015 decision, OWCP found that appellant forfeited compensation for the periods March 5, 2000 to April 3, 2006 and January 10, 2007 to April 22, 2013. The decision noted that SA Harlan submitted a detailed declaration and copy of the November 17, 2009 interview transcript, and that Dr. Seymour had provided a March 27, 2013 report. OWCP also noted appellant's responses on OWCP EN1032 forms, signed by him on June 5, 2001, June 28, 2002, September 6, 2003, July 27, 2004, May 22, 2005, April 3, 2006, April 10, 2008, April 16, 2009, August 7, 2010, May 14, 2011, May 26, 2012, and April 22, 2013, the OIG reports, and corroborating evidence. It found that the totality of the evidence clearly established that appellant knowingly omitted earnings, work activities, and involvement in a business enterprise for the forfeiture periods. OWCP found that he received FECA compensation of \$189,739.37 for the period March 5, 2000 to April 3, 2006, and \$237,536.17 for the period January 10, 2007 to April 22, 2013, for a total of \$427,275.54 in forfeited compensation.

On June 30, 2015 OWCP issued a preliminary determination that appellant received a \$427,275.54 overpayment of compensation because he failed to report employment activities for the periods March 5, 2000 to April 3, 2006 and January 10, 2007 to April 22, 2013 on OWCP EN1032 forms. It found appellant at fault in creating the overpayment because he knowingly failed to report business activities and submitted falsified EN1032 forms covering the above periods. Appellant was provided an overpayment action request and an overpayment recovery questionnaire (Form OWCP-20).

Appellant's representative timely requested a hearing from both the June 29, 2014 forfeiture decision and the June 30, 2015 preliminary overpayment finding. Appellant disagreed that the overpayment occurred, disagreed with the amount of the overpayment, and disagreed with the fault finding, indicating that he did not work.

In form reports dated July 24, 2015 to March 31, 2016, Dr. Land described appellant's condition. He also discussed both appellant's FECA proceedings and his criminal case, which continued to be held in abeyance.

On March 16, 2016 OWCP forwarded appellant an EN1032 form to complete. Appellant was afforded 30 days to complete and return the form.

Appellant did not testify at the hearing, held on April 5, 2016. Appellant's representative noted reviewing the video and audio discs and maintained that appellant did not comprehend what was going on during the interview. He noted that the printed transcript of the interview contained 78 places found indiscernible by the transcriber. Dr. Land testified that appellant appeared confused and impaired during the interview. He asserted that this was supported by Dr. Morgenthaler's test findings and opined that appellant could not understand the EN1032 form. Appellant's brother Gurjant Khosa testified that he had conducted all financial transactions since he returned to the business in September 2000, including two loans. He maintained that he instructed appellant to sign all documents. Appellant's brother Jasvir Khosa testified that appellant could do nothing, and that he made all business decisions. Appellant's representative indicated that he would provide Dr. Morgenthaler's report and argued that, due to appellant's psychiatric illness, he did not knowingly misstate information on EN1032 forms.

An overpayment recovery questionnaire, signed by appellant's brother Gurjant on May 5, 2016, noted monthly income of \$2,340.00, monthly expenses of \$39,755.51, and assets of \$37,974.12. He attached appellant's 2015 income tax return, bank and Thrift Savings Account statements, and bills for property tax, mortgages, a home equity loan, utilities, and credit cards.

In a May 12, 2016 decision, OWCP suspended appellant's wage-loss compensation, effective May 29, 2016, because he did not submit the required EN1032 form.

On May 19, 2016 SA Harlan provided another sworn statement. She again described the investigation and disagreed with Dr. Land's assessment of appellant's capacity in the November 17, 2009 interview. SA Harlan noted that appellant's criminal case for fraud was pending, and that he had been found competent and able to communicate effectively with counsel and the court in that case.¹⁰ She indicated that she was present during the interview of appellant and affirmed that the video and audio recordings were true and accurate.

In a June 22, 2016 decision, an OWCP hearing representative found that appellant forfeited compensation for the periods March 5, 2000 to April 3, 2006 and January 10, 2007 to April 22, 2013. She noted that the record established that appellant signed multiple and various contracts and other business documents with different companies, and endorsed checks related to his raisin business, and thus he was engaged in a variety of business activities that reasonably could be characterized as active participation in business. The hearing representative also finalized the overpayment decision, finding that appellant was at fault in creating a \$427,275.54 overpayment of compensation. She found Dr. Land's opinion, that appellant did not understand English and was mentally incapable of understanding reporting requirements, of limited probative value, noting that appellant graduated from high school and attended junior college in the United States, and that Dr. Seymour had found him competent to stand trial. As to repayment, the hearing representative noted that appellant's brother Gurjant completed the OWCP-20 form. She noted that appellant's income was not sufficiently described, that there was insufficient documentation to support the excessive monthly expenses claimed. She found there was sufficient documentation to show that appellant could repay the overpayment at the rate of \$1,000.00 a month.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of FECA provides that 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. 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.”¹¹

¹⁰ Information regarding the criminal case indicates that he was charged in California state court with two felony counts of false or fraudulent claims or statements, and that the case was continued on May 12, 2016.

¹¹ 5 U.S.C. § 8106(b); *see F.C.*, 59 ECAB 666 (2007).

Section 10.5(g) of OWCP's regulations defines 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.”¹²

In order to establish that a compensationner should forfeit the compensation received for the periods covered by completed OWCP EN1032 forms, the evidence must establish that he or she knowingly omitted or understated his or her employment and earnings.¹³ As forfeiture is a penalty, it is not enough merely to establish that there were underreported earnings from employment.

OWCP can, in several ways, meet its burden of proof in establishing that a claimant “knowingly” failed to report employment or earnings. This includes the claimant's own admission to OWCP that he or she failed to report employment or earnings which he or she knew should be reported, or establishing that the claimant has pled guilty to violating applicable federal statutes by falsely completing the affidavits in the EN1032 form.¹⁴ The inquiry is whether appellant knowingly omitted or understated his earnings from employment for the periods covered by the EN1032 forms. The term “knowingly” as defined in OWCP's implementing regulations and Board precedent means “with knowledge; consciously; intelligently; willfully; intentionally.”¹⁵ The language on OWCP EN1032 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.¹⁶

ANALYSIS -- ISSUE 1

OWCP found that appellant forfeited his right to compensation for the periods March 5, 2000 to April 3, 2006 and January 10, 2007 to April 22, 2013. The Board finds that the record establishes that appellant knowingly omitted employment activities and earnings on EN1032 forms which cover the periods March 5, 2000 to April 3, 2006 and January 10, 2007 to

¹² 20 C.F.R. § 10.5(g).

¹³ *Robert R. Holmes*, 49 ECAB 161 (1997); 20 C.F.R. § 10.5(n).

¹⁴ *Robert Ringo*, 53 ECAB 258 (2001).

¹⁵ *Joan Ross*, 57 ECAB 694 (2006).

¹⁶ *Id.*

August 7, 2010. The Board further finds that OWCP has not established that appellant's compensation should be forfeited for the period August 8, 2010 to April 22, 2013 as the record is essentially silent regarding appellant's work activities, if any, for this period.

The EN1032 forms forwarded by OWCP to appellant advised him of his responsibility to complete the forms and provide relevant information concerning his employment status and earnings during the 15-month period covered by the forms. These forms signed by appellant noted that he must report all self-employment or involvement in business enterprises and specifically listed farming. This included such activities as overseeing a business of any kind, including a family business. The explicit language of the EN1032 forms clearly advised appellant that the nature of his farming business required him to report such activities.

On EN1032 forms signed by appellant on May 25, 2000, September 6, 2003, July 27, 2004, May 22, 2005, and April 3, 2006, he indicated that he did not work after the date of injury. On EN1032 forms he signed on June 5, 2001 and June 28, 2002, appellant noted that he and his wife owned a grape farm and his wife managed the farm. On the forms signed by appellant on April 10, 2008 and April 16, 2009, he indicated that he was not involved in the business, which was run by his wife and brothers. On the EN1032 form signed by appellant on August 7, 2010, he indicated that he was not involved in the business which was run by his brothers and his wife, and that he did no physical work other than occasional driving around the fields and going for walks.

Other than these brief statements on the EN1032 forms, there is no evidence of record regarding his wife's inclusion in the farming business. As to the brothers' involvement, the record is replete with evidence showing appellant's involvement in the business for the periods March 5, 2000 to April 3, 2006 and January 10, 2007 to August 7, 2010.

Appellant's signing of a strongly worded certification clause on each of the EN1032 forms further demonstrates that he was aware of the materiality of his failure to report his employment. He did not appear at either the December 15, 2014 or the April 5, 2016 hearing. Counsel prevented appellant from testifying during the pendency of his criminal case.¹⁷ While Dr. Land maintained that appellant was not capable of understanding the EN1032 forms, this is belied by the evidence of record. Dr. Land testified that he relied on testing by Dr. Morgenthaler but Dr. Morgenthaler's test results are not in the record. Dr. Seymour, on the other hand, found that appellant was competent to stand trial.

Although appellant's brothers also testified about appellant's mental capacity, the Board finds that, based on the evidence of record, their testimony is of diminished probative value. Jasvir Khosa testified that he only gave appellant paperwork to sign. He also testified that appellant did not drive. Appellant's brother, Harvinder Khosa, who owns a market and testified at the 2014 hearing, stated that appellant only came to the market to get gas for his car, thus contradicting his brother Jasvir about whether appellant drove. Brother Gurjant Khosa testified that appellant was not capable of carrying on normal daily functions. The record, however, contains a designation of representative form dated October 10, 2009 for B&G Farms, signed by appellant and his brother Gurjant, designating appellant as the representative of B&G Farms "to act and vote for, and in its behalf in all proceedings and meetings of Sun-Maid Growers of

¹⁷ As noted, the criminal case continued to be held in abeyance.

California, including those where members are permitted or required to cast a ballot or vote, and to fill any official position that the undersigned member would be eligible.” The designation was to remain in effect until written notice was given to the contrary.

At the November 17, 2009 interview which is captured on DVD recordings appellant discussed crop yields and business practices. He indicated that he did not do the business bookkeeping, that his brothers ran the business, and that they were there daily to supervise. Appellant, however, also stated that he hired contractors to do the work, that he would mechanically shake grapes at his house, and that he also supervised the contract workers. Moreover, in a clear and articulate letter dated August 5, 2008, appellant signed a letter explaining his reasons for not signing the SSA form 581 as requested by OWCP.

The Board thus finds that the evidence of record fails to establish that appellant lacked the necessary competence to properly complete the EN1032 forms.¹⁸

As to whether appellant knowingly omitted or underreported business activity, in addition to the DVD evidence, the record contains copious documentary evidence including a durable power of attorney granted to appellant by his brother Gurjant on December 30, 1998, copies of *subpoena duces tecum*, work agreements and invoices signed by appellant for farm labor and trucking services for BSK Farms and B&G Farms dating from January 10, 2006 to December 15, 2009, a record of check payments from November 2, 1999 to January 13, 2005, cancelled checks, all signed by appellant covering periods from November 2, 1999 to November 5, 2009, federal tax returns for BSK Farms and B&G Farms for the years 2006, 2007, and 2008, and records of telephone calls made by appellant ordering farm equipment for his brother Jasvir in August to December 2009, plus the October 10, 2009 designation of representative form, noted above. Mr. Ochoa and Mr. Bhaliwal¹⁹ testified at the December 15, 2014 hearing that they disagreed with the OIG report regarding their responses and indicated that they did not conduct business with appellant. However, this does not render the report of no probative value as it is reinforced by copious documentation of appellant’s business activities. Likewise, the fact that additional business representatives provided statements or testimony that appellant did not conduct business with them does not prove that he conducted no business at all.

On appeal appellant cites to *C.D.* as support for his case. His reliance on *C.D.*, however, is without merit.²⁰ In that case, the Board found that OWCP’s reliance on corporation papers, without sufficient documentary support to show that the employee had carried out any duties, was insufficient to meet its burden of proof to establish forfeiture. In the case at hand, as noted, the record contains DVDs of an interview with appellant plus copious business documents signed by appellant. OWCP’s claims examiner, appellant and counsel, and the Board were all able to review not only the investigative report with affidavits, the transcript of the interview, but also appellant’s recorded statements *via* the DVDs where he discussed his farming business that

¹⁸ See *F.H.*, Docket No. 07-1379 (issued November 24, 2008).

¹⁹ It appears that Mr. Bhaliwal is identified as Navdeep Sidhaliwal in the OIG report.

²⁰ *Supra* note 3.

began in 1987. This additional evidence has weight beyond that of the mere investigative report.²¹

The EN1032 forms require reporting employment activities even if no wages are earned. Appellant's activities included management activity of the farm operations. Thus, the Board finds that, based on appellant's omissions of employment on EN1032 forms for the periods March 5, 2000 to April 3, 2006 and January 10, 2007 to August 7, 2010, appellant knowingly failed to report employment activity.²²

However, the record contains insufficient evidence to support appellant's business activity after November 17, 2009, following appellant's investigative interview. Thus, OWCP has not established that, under section 8106(b)(2) of FECA, appellant's compensation should be forfeited for the period after August 7, 2010, when he signed an EN1032 form that covered the prior 15 months and reported no personal business activity.

LEGAL PRECEDENT -- ISSUE 2

Section 10.529 of OWCP's implementing regulation provides 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.”²³

ANALYSIS -- ISSUE 2

OWCP regulations provide that OWCP may declare an overpayment of compensation for the period of a given forfeiture of compensation. If a claimant has any employment, including self-employment or involvement in a business enterprise, during a period covered by a EN1032 form 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.²⁴

As noted above, the Board has modified OWCP's forfeiture finding to determine that appellant forfeited compensation for the periods March 5, 2000 to April 3, 2006 and January 10, 2007 to August 7, 2010, but not for the period August 8, 2010 to April 22, 2013. As OWCP's

²¹ See *G.R.*, Docket No. 15-1047 (issued July 8, 2016).

²² See *J.A.*, Docket No. 14-1863 (issued July 7, 2015).

²³ 20 C.F.R. § 10.529.

²⁴ *Id.*

finding of an overpayment of compensation in the amount of \$427,275.54 was based on the entire period up to April 22, 2013, the case must be remanded to OWCP to recalculate the overpayment, based on appellant's forfeiture of compensation for the periods March 5, 2000 to April 3, 2006 and January 10, 2007 to August 7, 2010 only.

LEGAL PRECEDENT -- ISSUE 3

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience."²⁵

Section 10.433(a) of OWCP's regulations provides that OWCP:

"[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which 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 in 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; or
- (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)."²⁶

To determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.²⁷

ANALYSIS -- ISSUE 3

OWCP properly determined that appellant was at fault in the creation of the overpayment because he failed to provide information which he knew or should have known to be material on OWCP EN1032 forms covering the periods March 5, 2000 to April 3, 2006 and January 10, 2007 to August 7, 2010. As discussed above, the record supports that appellant had employment activity for these periods, covered by EN1032 forms signed by him on May 25, 2000, June 5,

²⁵ 5 U.S.C. § 8129; *see Linda E. Padilla*, 45 ECAB 768 (1994).

²⁶ 20 C.F.R. § 10.433; *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

²⁷ *Id.* at § 10.433(b); *Duane C. Rawlings*, 55 ECAB 366 (2004).

2001, June 28, 2002, September 6, 2003, July 27, 2004, May 22, 2005, April 3, 2006, April 10, 2008, April 16, 2009, and August 7, 2010.

The explicit language of the EN1032 forms demonstrates that appellant knew or should have known that the nature of his farming work would require him to report such employment activities on the forms.²⁸ Since appellant had unreported employment activity during these periods, he knowingly failed to furnish this material information to OWCP. Appellant signed a certification clause on the EN1032 forms which advised him in explicit language that he might be subject to civil, administrative or criminal penalties if he knowingly made a false statement or misrepresentation or concealed a fact to obtain compensation. By signing these forms, appellant is deemed to have acknowledged his duty to fill out the forms properly, including the duty to report any employment, self-employment, or involvement in a business enterprise. As appellant indicated that he had no employment or earnings from employment during the covered periods, he failed to furnish information which he knew or should have known to be material to OWCP. As he is at fault in creating the overpayment, it is not subject to waiver of recovery.²⁹

However, as noted, the precise amount of the overpayment will be calculated by OWCP on remand. After this and further proceedings deemed necessary, OWCP shall issue an appropriate preliminary and final overpayment decision.

Lastly, the Board notes that its jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA. Appellant's wage-loss compensation was suspended on May 29, 2016, prior to the decision on appeal dated June 22, 2016. Thus, as appellant was not in receipt of wage-loss compensation benefits at the time of OWCP's decision, the Board does not have jurisdiction with respect to OWCP's recovery of the overpayment.³⁰

CONCLUSION

The Board finds that OWCP properly determined that appellant forfeited his right to compensation pursuant to section 8106(b)(2) of FECA, for the periods March 5, 2000 to April 3, 2006 and January 10, 2007 to August 7, 2010 and that he was at fault in creating the resulting overpayment of compensation. The case is remanded to OWCP for calculation of the exact amount of the overpayment and issuance of an appropriate preliminary overpayment determination and *de novo* final overpayment decision.

²⁸ J.A., *supra* note 22.

²⁹ *Harold F. Franklin*, 57 ECAB 387 (2006).

³⁰ *See D.R.*, 59 ECAB 148 (2007) (with respect to the recovery of an overpayment, the Board's jurisdiction is limited to those cases where OWCP seeks recovery from continuing compensation benefits under FECA).

ORDER

IT IS HEREBY ORDERED THAT the June 22, 2016 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part.³¹

Issued: December 12, 2017
Washington, DC

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

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

³¹ Colleen Duffy Kiko, Judge, participated in the original decision but was no longer a member of the Board effective December 11, 2017.