



employment; (2) whether she received an overpayment of \$31,600.83 as a result of the forfeiture; and (3) whether OWCP properly found that appellant was at fault in the creation of the overpayment and thus not entitled to waiver of recovery of the overpayment.

### **FACTUAL HISTORY**

On August 9, 2011 appellant, then a 45-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her head, left shoulder, and neck when a shelf fell on her head. OWCP accepted the claim for a head contusion and left shoulder sprain. It paid appellant compensation for total disability beginning October 24, 2011 as the employing establishment did not have work available with her restrictions.

Appellant underwent a left shoulder acromioplasty and distal claviclectomy on April 5, 2012. OWCP paid her compensation on the periodic rolls, effective July 29, 2012.

On October 14, 2012 appellant signed a Form EN1032 regarding her earnings and employment activity for the preceding 15-month period. The form advised that she must report all employment for which she received a salary, wages, income, sales commissions, piecework, or any payment of any kind, and that she must also report self-employment or involvement in any business enterprise in the past 15 months. It further informed appellant that fraudulently concealing or failing to report income could subject her to criminal prosecution. On the form, she marked an "x" rather than responding "yes" or "no" to the questions of whether she worked for an employer or was self-employed during the past 15 months.

In an amended Form EN1032 signed October 25, 2012, appellant indicated that she did not work for an employer and was not self-employed or involved in a business enterprise during the previous 15-month period. In response to the question on the form that asked whether, if she had answered "no" to questions asking whether she was employed or self-employed, she had been "unemployed for all periods during the past 15 months," she responded that she did not understand the question.

In a July 31, 2015 report of investigation, the employing establishment's Office of the Inspector General (OIG) advised that appellant certified on an October 2012 Form CA-1032 that she was not employed even though she worked as an outside sales agent with Roy's Stow Travel Agency during that period, booking 15 trips and earning around \$1,926.00 in commissions. It advised that she made travel arrangements for 15 trips that left between July 14, 2011 and October 14, 2012. OIG also indicated that appellant arranged four trips departing from July 30, 2012 to October 30, 2013, but that the date she booked the travel was unknown. Records from the travel agency indicated that appellant received \$56.00 on February 22, 2011, \$489.57 on September 5, 2011, \$845.64 on October 31, 2011, \$285.34 on December 12, 2011, and \$305.55 on May 31, 2012.

A reporting agent and special agent with OIG interviewed T.R., the owner of Roy's Stow Travel Agency, on July 16, 2014. He related that appellant was self-employed and paid on commission when she brought business to his company. When appellant booked travel for T.R.'s company she received half of any commission. She had an identification number that she used to book travel through companies such as Apple Vacations, and was covered by his

insurance in case of a lawsuit. Appellant performed the work at home for about five years and stopped work a few years prior to the interview.

An April 25, 2012 e-mail to Roy's Stow Travel indicated that \$802.58 in commissions would be deposited into the company account. Appellant was listed as a reservation contact for three commissions with a date of April 12, 2012.

Travel records compiled by the OIG's office for 2011 to 2013 showed that on September 15, 2012 appellant booked travel for a party with a departure date of October 19, 2012. Appellant booked travel for 12 other individuals with departure dates ranging from October 31, 2011 to August 15, 2012.

J.M., an employee of Apple Vacations, provided an e-mail summarizing commissions appellant received from 2011 to 2013. Appellant earned \$182.40 for a trip that she booked departing November 8, 2011 and \$132.00 for a trip that she booked departing October 19, 2012.

The OIG further listed commissions received by appellant from May 1, 2011 through August 3, 2013 and an itinerary for an October 2013 trip booked by appellant. It also submitted copies of checks to her from the travel agency dated September 9, November 3, and December 13, 2011, and May 4 and June 4, 2012. An income statement from the travel agency provided that appellant made \$1,676.55 in commission in the year ending December 31, 2011 and \$395.55 in commission for the year ending December 31, 2012.

By letter dated October 5, 2015, OWCP advised appellant that it had received information that she had earnings as a sales agent for the period July 14, 2011 through October 14, 2012. It requested that she discuss any work performed during this period.

Appellant, in a response received November 9, 2015, testified that she did not have earnings from July 2011 to October 2012 and that any money she received during that time was for work performed before that time period.

In a decision dated May 26, 2016, OWCP found that appellant had forfeited her compensation from October 24, 2011 to October 14, 2012. It determined that she had knowingly omitted earnings from self-employment on the October 14, 2012 Form EN1032.

On May 26, 2016 OWCP notified appellant of its preliminary determination that she received an overpayment of \$31,600.83 as she forfeited entitlement to compensation from October 24, 2011 to October 14, 2012. It further advised her of its preliminary determination that she was at fault in creating the overpayment. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documents. Additionally, it notified her that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing.

On June 6, 2016 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative regarding the May 26, 2016 decision. On June 10, 2016 she requested a precoupment hearing or teleconference regarding the preliminary overpayment determination.

In an overpayment recovery questionnaire dated June 23, 2016, appellant provided her monthly income and expenses. She further indicated that she had stocks and bonds.

At a telephone hearing, held on January 23, 2017, appellant related that she worked as a travel agent before her August 9, 2011 work injury. She indicated that the commissions she received after that date were for work performed prior to her injury. Counsel noted that her commissions from September 9, 2011 and May 13, 2012 were not paid until July 29, 2012 and predated when she began to receive compensation. He did not challenge the amount of any overpayment. Counsel further asserted that OWCP denied appellant due process by failing to send him a copy of the Form EN1032 and asking him to verify its accuracy. The hearing representative requested that appellant submit additional evidence regarding her expenses, including financial documentation.

Appellant submitted receipts for travel departing November 2011, September 17, 2011, and April 12, 2012. She also submitted salary information for the period January 23 to February 18, 2017.

By decision dated February 28, 2017, OWCP's hearing representative affirmed the May 26, 2016 forfeiture decision and found that appellant received an overpayment of \$31,600.83 for the period October 24, 2011 to October 14, 2012 as a result of the forfeiture. She noted that the evidence confirmed that she received commissions for travel conducted January 3, 2011 and October 19, 2012. The hearing representative concluded that appellant received unreported earnings during the period of the forfeiture. She found that the fact that the Form CA-1032 was not sent to counsel did not absolve her of her responsibility to accurately complete the form, noting that she could have consulted counsel if she required assistance. The hearing representative further found that appellant was at fault in creating the overpayment and thus not entitled to waiver. She found that the entire overpayment was due and payable as she did not provide documentation regarding her expenses.

### **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 or her earnings, forfeits his or her right to compensation with respect to any period for which the affidavit or report was required."<sup>3</sup>

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 she "knowingly" failed to report employment or earnings.<sup>4</sup> The term "knowingly" as defined in OWCP's implementing regulation, means "with knowledge, consciously, willfully, or intentionally."<sup>5</sup>

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<sup>3</sup> 5 U.S.C. § 8106(b).

<sup>4</sup> *Barbara L. Kanter*, 46 ECAB 165 (1994).

<sup>5</sup> 20 C.F.R. § 10.5(n).

## ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a head contusion and left shoulder sprain on August 9, 2011. It paid her wage-loss compensation beginning October 24, 2011 and placed her on the periodic rolls effective July 29, 2012.

OWCP found that appellant forfeited her entitlement to compensation from October 24, 2011 to October 14, 2012 because she failed to report earnings from employment on a Form EN1032 signed on October 25, 2012. On the form, appellant indicated that she did not perform any work for an employer and was not self-employed. She listed no earnings from employment or self-employment.

On July 31, 2015 an investigator with the employing establishment's OIG related that appellant worked as a sales agent with Roy's Stow Travel Agency during the period covered by the October 2012 EN1032 form, earning approximately \$1,926.00 in commissions. It specified that she arranged 15 trips that took place from July 14 and October 14, 2012. OIG interviewed T.R., the owner of the travel agency, on July 16, 2014. He advised that appellant received a commission when she booked travel with his company and that she was self-employed. Appellant had worked for about five years, performing the work at home, and had stopped a few years earlier. Records from the travel agency indicated that appellant received \$56.00 on February 22, 2011, \$489.57 on September 5, 2011, \$845.64 on October 31, 2011, \$285.34 on December 12, 2011, and \$305.55 on May 31, 2012.

On August 5, 2015 the OIG provided a travel arrangement summary indicating that appellant booked travel arrangements for a customer on September 15, 2012. It provided other dates that she made travel arrangement with booking dates that were unknown or outside the period of the forfeiture. The OIG's office further provided checks showing that appellant received commissions from the travel agency during the period October 24, 2011 to October 14, 2012. Appellant was thus involved in a business enterprise and had unreported earnings during the time period covered by the October 25, 2012 Form EN1032.

Appellant argued that she received the commissions for work performed prior to her August 9, 2011 work injury. The evidence from the OIG, however, provides that she made travel arrangements for a client on September 14, 2012, during the period covered by the form. Furthermore, as noted, she had unreported earnings throughout the period at issue.<sup>6</sup>

OWCP regulations provide that, if an employee knowingly omits or understates earnings or work activity in making a report, she shall forfeit the right to compensation with respect to any period for which the report was required.<sup>7</sup>

Appellant can be subject to the forfeiture provision of section 8106(b) only if she "knowingly" failed to report earnings or employment. OWCP has the burden of proof to

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<sup>6</sup> The Board also notes that it has held that 5 U.S.C. § 8106(b)(2) makes no exception for earnings in concurrent dissimilar employment. *Earl D. Long*, 50 ECAB 464, 467 (1999).

<sup>7</sup> 20 C.F.R. § 10.529(b); *Harold F. Franklin*, 57 ECAB 287 (2006).

establish that a claimant did, either with knowledge, consciously, willfully, or intentionally, fail to report earnings from employment.<sup>8</sup> Appellant completed CA-1032 forms which advised her that she must report both all employment and all earnings from employment and self-employment. The form clearly provided that she 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 Form CA-1032, provide persuasive evidence that she "knowingly" understated her earnings and employment information.<sup>9</sup> Appellant misrepresented her earnings and employment activity and, therefore, forfeited her right to all compensation for the period October 24, 2011 to October 14, 2012.<sup>10</sup>

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

Under 5 U.S.C. § 8106(b), 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>11</sup>

Section 10.529 of OWCP's implementing regulations 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 [recovery of overpayments] and other relevant statutes."<sup>12</sup>

### **ANALYSIS -- ISSUE 2**

Appellant forfeited her right to compensation for the period October 24, 2011 to October 14, 2012. As noted above, OWCP may declare an overpayment of compensation for any compensation already paid for the period of a forfeiture of compensation. If a claimant has any employment, including self-employment or involvement in a business enterprise, during a period covered by a Form CA-1032 which he or she fails to report, a claimant is not entitled to compensation for any portion of the period covered by the report, even though he or she may not have had earnings during a portion of that period.<sup>13</sup> OWCP determined that it paid appellant net

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<sup>8</sup> 20 C.F.R. § 10.5(n).

<sup>9</sup> See *G.R.*, Docket No. 15-1047 (issued July 8, 2016).

<sup>10</sup> See *G.Z.*, Docket No. 16-0892 (issued May 19, 2017).

<sup>11</sup> 5 U.S.C. § 8106(b).

<sup>12</sup> 20 C.F.R. § 10.529; see also *G.G.*, Docket No. 14-1848 (issued August 4, 2016).

<sup>13</sup> See *Louis P. McKenna, Jr.*, 46 ECAB 428 (1994).

compensation in the amount of \$31,600.83 during the period in question and there is no contrary evidence. The Board, accordingly, finds that there exists an overpayment of \$31,600.83.<sup>14</sup>

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

5 U.S.C. 8129(b) provides: Adjustment or recovery by the United States may not be made when 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.<sup>15</sup> A claimant who is at fault in creating the overpayment is not entitled to waiver.<sup>16</sup> On the issue of fault, 20 C.F.R. § 10.433 provides that an individual will be found at fault if she has done any of the following: “(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 was incorrect.”<sup>17</sup>

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

OWCP properly determined that appellant was at fault in the creation of the overpayment because she failed to provide information which she knew or should have known to be material on a Form EN1032 covering the period October 24, 2011 to October 14, 2012. The record establishes that appellant had unreported employment activity during this period and knowingly failed to furnish this material information to OWCP. Appellant acknowledged a certification clause on the Form EN1032 which advised her in explicit language that she might be subject to civil, administrative, or criminal penalties if she knowingly made a false statement or misrepresentation or concealed a fact to obtain compensation. By signing these forms, she is deemed to have acknowledged her duty to report any employment, self-employment, or involvement in a business enterprise. Appellant indicated that she had no employment or earnings from employment during the covered periods, and thus failed to furnish information which she knew or should have known to be material to OWCP.<sup>18</sup> As she is not without fault in creating the overpayment, it is not subject to waiver of recovery.<sup>19</sup>

### **CONCLUSION**

The Board finds that appellant forfeited her entitlement to compensation from October 24, 2011 to October 14, 2012 as she knowingly failed to report earnings from employment. The Board further finds that she received an overpayment of \$31,600.83 as a result

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<sup>14</sup> See *J.N.*, Docket No. 13-1761 (issued July 1, 2014).

<sup>15</sup> 5 U.S.C. § 8129(b).

<sup>16</sup> See *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

<sup>17</sup> 20 C.F.R. § 10.433; see *Sinclair L. Taylor*, 52 ECAB 227 (2001).

<sup>18</sup> See *supra* note 10.

<sup>19</sup> See *Harold F. Franklin*, *supra* note 7.

of the forfeiture and that she was at fault in the creation of the overpayment and thus not entitled to waiver of recovery of the overpayment.<sup>20</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 28, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 20, 2017  
Washington, DC

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

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

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

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<sup>20</sup> The OWCP hearing representative found that the overpayment was due and payable but did not decide the rate of recovery. The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA. See *George A. Rodriguez*, 57 ECAB 224 (2005); *Marshall L. West*, 36 ECAB 490 (1985).