



report employment activities; (2) whether he received a \$228,311.94 overpayment of compensation from October 17, 2006 to December 18, 2012 because he forfeited his entitlement to compensation for this period; (3) whether appellant was at fault in creating the overpayment; and (4) whether OWCP properly determined that it would recover the overpayment by deducting \$100.00 from continuing compensation payments.

### **FACTUAL HISTORY**

On June 30, 1994 appellant, then a 38-year-old electronics industrial controls mechanic, filed a traumatic injury claim (Form CA-1) alleging that on June 13, 1994 he sustained injuries when a tray fell on his head and shoulder. OWCP accepted the claim for a concussion, neck sprain, aggravation of degeneration of a cervical disc, organic brain syndrome, and other specified visual disturbances. It paid appellant compensation for total disability beginning August 17, 1994 on the periodic rolls.

OWCP provided appellant with Forms EN1032 to complete regarding his earnings and employment activity for the previous 15 months. The forms explained that a claimant must report all self-employment or involvement in any business enterprise, including, but not limited to, farming, sales work, operating a business or providing services in exchange for money, goods or other services. In addition, the EN1032 forms advised appellant that, if duties were performed in any business enterprise for which he was not paid, he was to report the rate of pay it would have cost to hire someone to perform such duties. The forms contained certification clauses which informed him of the consequences of inaccurately reporting his employment activities, such as being subjected to criminal penalties and losing the right to receive workers' compensation. Appellant completed and signed Forms EN1032 on December 17, 2007, December 4, 2008, December 4, 2009, January 11, and December 9, 2011, and December 18, 2012. On the forms, he indicated that he performed no work, including volunteer work, for the previous 15-month period.

On November 4, 2014 the employing establishment's investigative service submitted an investigative summary. It advised that surveillance established that appellant participated in unreported farming activities from 2007 to 2012. The summary provided that investigators questioned him on October 4, 2012 regarding the farm registration license plate on his vehicle, while covertly recording the interview. Appellant told them that he had performed farming activities on his son's farm since 2003 and that he needed the license plate to tow farm equipment and trailers. He received no income from his son for assisting with the farm. In a May 9, 2013 interview, appellant reviewed the EN1032 forms with the investigators and again indicated that he had not received earnings for helping his son. He admitted assisting with "miscellaneous jobs that needs done in support of the farming operation." Appellant required farm registration license plates "to tow various farm equipment and unlicensed farm trailers, while relocating farm equipment or hauling grain and hay rolls." He informed the investigators that he performed farming activities, including plowing, planting, mowing, and towing, for around 75 to 80 hours each year between 2007 and 2012.

The employing establishment, in the investigative summary, related that it conducted 43 surveillance attempts from October 7, 2010 and April 8, 2013, which yielded 17 observations of appellant. It described each observation, which included him driving a farm grain truck and

delivering a load of grain on October 22, 2010, using a tractor on October 27, 2010 to mow a corn plot, getting corn seed on April 21, 2011, and picking up an agricultural sprayer on April 14, 2011. The surveillance also showed appellant driving to places such as a grocery store, tobacco shop, and drug store.

The investigative summary further described interviews with appellant's son, C.C., on October 4, 2012 and May 9, 2013. On May 9, 2013 C.C. related that his father helped with planting, grain delivery, harvesting, and picking up agricultural supplies. He indicated that he did not pay appellant but, did buy him gas for his vehicle and sometimes bought him lunch. The investigators spoke to owners of a crop production service who confirmed that appellant had purchased agricultural supplies and seed for the past few years. The investigators described interviews with other individuals who had witnessed him assisting his son with various farm activities. Two employees of an agricultural supply store indicated that appellant had picked up seeds and agricultural supplies. An individual advised that he saw him load hay that he had purchased onto his trailer and another indicated that he "routinely helps [his son] with planting, harvesting crops, grain delivery, prepping fields, moving/towing farm equipment, and picking up agricultural supplies and seed."

With the investigative summary, the employing establishment submitted descriptions of surveillances conducted from 2010 to 2013, photographs, and investigative reports describing the interviews conducted by the investigators. In an October 26, 2012 investigative report, M.G., an investigator, summarized the oral interview with appellant on October 4, 2012, ostensibly about his use of a farm tag on his vehicle. He related that appellant advised that he worked about 20 hours a week helping with farming activities and that he had not received any money for his assistance or earned any income, especially considering his use of fuel for his truck. M.G. reported that appellant and his sons harvested and sold hay rolls.

On October 4, 2012 M.G. related that he had conducted a consensual wire intercept by telephone of appellant's son, C.C., on October 4, 2012. C.C. indicated that appellant helped "during crop harvesting, picking up farm supplies and assist[ing] by moving various farm equipment from location to location."

M.G., in an October 26, 2012 interim report of investigation, related that investigators believed that appellant assisted his sons, C.C. and D.C., to maintain a farm. In a wire intercept obtained October 4, 2012, C.C. related that appellant helped him about 10 hours a week with farming about 500 acres. The lease for the farm was in C.C.'s name. He had not paid either appellant or D.C. for their help and did not have any other employees. On October 22, 2012 C.C. told investigators he would send them any paperwork showing his father's participation on the farm.

In a June 19, 2013 investigative report, M.G. provided a summary of second interviews conducted with appellant. On May 9, 2013 two investigators showed appellant copies of his EN1032 forms. Appellant told the investigators that he lost money helping his son with farming activities. In 2010 he helped his son plowing, planting, and mowing hay but had not done any farming in 2011 or 2012. In 2013 appellant picked up liquid fertilizer from a business and transported it to a farm equipment shed. After surgery in 2012 his health deteriorated and he could not do many activities. Appellant advised that a few years earlier he had assisted his son

with farming. He helped with planting during spring of 2010. Appellant related that he also moved grain to a storage facility in 2010 and earlier. A few days earlier he took a nitrogen tank to a supply store and then returned the tank to his shed. Appellant also picked up corn seed. His son did not pay him any money or provide him with gasoline, but did pay for the farm supplies. Appellant asserted that he performed no farming in 2012, but in 2009 to 2011 plowed, picked up fertilizer, and seeds. He later indicated that he helped with farming activities for around 75 to 80 hours from approximately 2007 to 2012. M.G. also described interviews with other individuals regarding appellant's farming activities.

The employing establishment submitted an April 22, 2010 farmer affidavit for a farm truck registration plate. Appellant advised on the affidavit that he was engaged in raising and growing farm products, that the farm was under his management or control, and that the vehicle would be used to transport farm supplies to his farm operation.

By decision dated December 11, 2014, OWCP forfeited appellant's entitlement to compensation from October 17, 2006 to December 18, 2012 as he knowingly failed to report work activity on Forms EN1032. It determined that he admitted working 75 hours a year from 2007 through 2012 performing farming activities.

On December 17, 2014 OWCP informed appellant of its preliminary determination of overpayment of compensation in the amount of \$228,311.94 for the period October 17, 2006 to December 18, 2012 based on the forfeiture and that he was at fault in creating the overpayment. It advised appellant that he was at fault in the creation of the overpayment and requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, OWCP notified him that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a preresoucement hearing.

Appellant requested an oral hearing before an OWCP hearing representative on the forfeiture decision, which was held on August 12, 2015. At the telephone hearing, he denied engaging in employment after his June 13, 1994 work injury. Appellant related that after his injury he experienced difficulties with his memory, with anxiety, and in social situations. He advised that he could perform tasks such as mowing the yard or lifting sacks of dog food. Appellant indicated that he would run errands for his son when asked, including picking up parts, fertilizer, and seed. He denied receiving any compensation for the errands from 2007 through 2012. Appellant asserted that he believed that he accurately completed the Forms EN1032 dated 2007 to 2012 as he did not believe performing errands for his son constituted work. He advised that farming in his location was a serious occupation and that he did not consider his actions farming.

The employing establishment, on September 1, 2015, described the dates that appellant was observed performing activities that included purchasing corn seed, operating a grain truck or tractor, and towing an agricultural sprayer.

On September 30, 2015 counsel contended that OWCP had failed to establish that appellant was engaged in farming. Appellant maintained that he assisted his son with errands. Counsel noted that the employing establishment conducted two and a half years of surveillance

which only showed appellant running a few errands on seven occasions. He also argued that the summaries of interviews were not admissible as they did not constitute written statements under oath. Counsel asserted that appellant did not knowingly make a false statement as he did not view the activities as farming.

In a decision dated October 27, 2015, OWCP's hearing representative affirmed the December 11, 2014 decision. She found that appellant had failed to negate his responsibility to report such activities.

Appellant, on November 25, 2015, submitted the overpayment recovery questionnaire and requested a telephone conference. At the conference, he discussed his assets and income.

By decision dated March 2, 2016, OWCP finalized its preliminary determination, finding that appellant received an overpayment of compensation in the amount of \$228,311.94 due to his forfeiture of compensation from October 17, 2006 through December 18, 2012 and that he was at fault in creating the overpayment. It determined that it would recover the overpayment by deducting \$100.00 every 28 days from continuing compensation.

On appeal counsel contends that OWCP relied upon inadmissible evidence as the only evidence provided by the investigators were summaries of interviews with appellant and other witnesses without the opportunity for cross examination. He also asserts that, even if appellant had performed some tasks, he did not believe that it was work that required reporting on EN1032 forms. Counsel further contends that there is no evidence supporting work activities for years other than 2011 and 2012.

The Director, on appeal, argues that appellant completed EN1032 forms from December 2007 to December 2012 indicating that he did not work, but on May 9, 2013 when interviewed by investigators with the employing establishment, he advised that he worked 75 to 80 hours performing farming activities from 2007 through 2012. Appellant's son verified his work activity and indicated that he paid him gas for his vehicle and an occasional lunch. The Director observes that the investigators submitted documentation supporting the farming activity, including photographs, observations of him making deliveries, and an April 22, 2010 farmer affidavit. He also advises that in 1995 appellant reported volunteer work at school, but failed to document his farm work activity on the latter forms. The Director maintains that surveillance showed 17 observations of him performing farming activities. He further contends that appellant was at fault in creating the overpayment as he failed to report his employment activity on EN1032 forms. The Director notes that the investigative summary and appellant's admission supports that the period of the forfeiture should be from 2007 to 2012 and not only 2011 and 2012 as argued by his counsel.

### **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."<sup>3</sup>

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<sup>3</sup> 5 U.S.C. § 8106(b).

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.<sup>4</sup> The term “knowingly” as defined in OWCP’s implementing regulation, means “with knowledge, consciously, willfully, or intentionally.”<sup>5</sup>

Section 10.5(g) of OWCP’s implementing federal 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.”<sup>6</sup>

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

The Board has held that OWCP may not base its application of the forfeiture provision strictly on conclusions drawn in an investigation; rather, the evidence of record must establish that the claimant had unreported earnings from employment that were knowingly not reported.<sup>10</sup>

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

OWCP determined that appellant forfeited his right to compensation from October 17, 2006 to December 18, 2012 because he knowingly failed to report work activities on EN1032

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

<sup>5</sup> 20 C.F.R. § 10.5(n).

<sup>6</sup> *Id.* at § 10.5(g).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Forfeiture*, Chapter 2.1402.8 (May 2012).

<sup>8</sup> *See Christine P. Burgess*, 43 ECAB 449, 458 (1992).

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

<sup>10</sup> *B.Y.*, Docket No. 11-1798 (issued July 24, 2012); *Louis P. McKenna, Jr.*, 46 ECAB 328 (1994).

forms dated December 17, 2007 through December 18, 2012. The Board finds, however, that it has not established that he forfeited entitlement to compensation for any period other than October 11, 2009 to January 11, 2011.

In finding that appellant forfeited compensation from October 17, 2006 to October 10, 2009 and from January 12, 2011 to December 18, 2012, OWCP relied upon summaries of interviews obtained by investigators with the employing establishment's Office of the Inspector General (OIG). The investigators described surveillance they conducted from 2007 to 2012. The observations included observing appellant delivering grain on October 22, 2010, mowing a corn plot on October 27, 2010, picking up corn seed on April 21, 2011, and using an agricultural sprayer on April 14, 2011. The OIG investigators summarized interviews conducted with appellant on October 4, 2012 and May 9, 2013 and with C.C., his son who owned and operated the farm. Investigators also summarized interviews with witnesses, some of whom described him picking up seeds and agricultural supplies, loading hay, moving equipment, and helping in the fields. The record, however, does not contain any transcripts detailing the questions asked of either appellant or the witnesses or the actual responses made by those interviewed. There are also no individual statements signed by any of the parties questioned.

In *Claudia J. Thibault*,<sup>11</sup> the Board found that OWCP relied only upon a memorandum in which an agent with the employing establishment's OIG memorialized a telephone interview with a witness who commented on the employee's activities in finding forfeiture. The Board noted that a special agent wrote the memorandum instead of the person interviewed. It determined that this was insufficient evidence to outweigh the employee's testimony that she did not have earnings.

In the case of *R.W.*,<sup>12</sup> the Board found that OWCP based its forfeiture determination on memorandum in which a special agent from the employer's OIG provided summaries of interviews conducted with the employee and several witnesses. The memorandum did not specify the actual questions asked of the witnesses or contain the actual answers provided. There was nothing signed by any of the individuals attesting to the accuracy of the information provided. The Board found that the evidence was insufficient to support the forfeiture decision.

The facts of this case are substantially similar to *R.W.* for the periods October 17, 2006 to October 10, 2009 and January 12, 2011 to December 18, 2012. Given the absence of the actual signed statements of those interviews and the transcripts of the interviews, there is inadequate evidence to establish that appellant was engaged in employment activities which required reporting on the Forms EN1032 covering the periods September 17, 2006 to October 10, 2009 and January 12, 2011 to December 18, 2012.<sup>13</sup>

The Board finds, however, that appellant forfeited entitlement to compensation for the 15-month period covered by the January 11, 2011 EN1032 form, October 11, 2009 to

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<sup>11</sup> 40 ECAB 836 (1989).

<sup>12</sup> Docket No. 09-1607 (issued July 26, 2010).

<sup>13</sup> See *D.O.*, Docket No. 13-1809 (issued September 11, 2014).

January 11, 2011. He signed a farmer affidavit dated April 22, 2010 acknowledging that he engaged in farming activities, that he had a farm under his management and control, and that he used his vehicle to transport farm supplies. Appellant's signing of the farmer affidavit constitutes probative evidence that he in fact engaged in farming activities during the period covered by the January 11, 2011 EN1032 form. If an EN1032 form is improperly completed resulting in a finding of forfeiture, the period of forfeiture is the entire 15-month period covered by the form in question.<sup>14</sup> Appellant, consequently, forfeited his entitlement to compensation from October 11, 2009 to January 11, 2011.

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

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.<sup>15</sup> Section 8129(a) of FECA 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."<sup>16</sup>

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

As discussed, the Board modified OWCP's forfeiture determination to find that appellant forfeited compensation from October 11, 2009 to January 11, 2011 rather than September 17, 2006 to December 18, 2012. OWCP's finding of an overpayment of compensation in the amount of \$228,311.94 was based on a forfeiture finding that has now been modified; consequently, the case must be remanded to OWCP to recalculate the overpayment based on his forfeiture of compensation for this period.<sup>17</sup>

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

Section 8129(b) of FECA<sup>18</sup> provides that "[a]djustment 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 this subchapter or would be against equity and good conscience." Section 10.433 of OWCP's implementing regulations provides that in determining whether a claimant is at fault, it will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

"(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

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<sup>14</sup> See *R.B.*, Docket No. 15-1946 (issued September 2, 2016); *Martin James Sullivan*, 50 ECAB 158 (1998).

<sup>15</sup> 5 U.S.C. § 8102(a).

<sup>16</sup> *Id.* at § 8129(a).

<sup>17</sup> See *J.A.*, Docket No. 14-1863 (issued July 7, 2015).

<sup>18</sup> 5 U.S.C. § 8129(b).

“(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.”<sup>19</sup>

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

The Board finds that appellant was at fault in the creation of the overpayment which occurred due to his forfeiture of compensation for the period October 11, 2009 to January 11, 2011. He verified on a farming affidavit that he engaged in farming during the period in question, but did not report such employment activities on the January 11, 2011 EN1032 form submitted to OWCP. The explicit language of the EN1032 form clearly shows that he knew or should have known that the nature of his farming activities would require him to report such employment activities on the forms.<sup>20</sup> Appellant’s signing of strongly-worded certification clauses on the EN1032 form dated January 11, 2011 demonstrated that he was aware of the materiality of his failure to report his employment. As he was at fault in the creation of the overpayment, OWCP properly determined that he was not entitled to waiver of recovery.<sup>21</sup> It will calculate the precise amount of the overpayment on remand of the case.<sup>22</sup>

### **CONCLUSION**

The Board finds that appellant forfeited his entitlement to compensation for the period October 11, 2009 to January 11, 2011, but did not forfeit entitlement to compensation for the periods September 17, 2006 through October 10, 2009 and January 12, 2011 to December 18, 2012. The Board further finds that he was at fault in the creation of the overpayment by this forfeiture thereby precluding waiver of recovery of the overpayment. The case is remanded to OWCP for calculation of the exact dollar amount of the overpayment and issuance of an appropriate decision.

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<sup>19</sup> 20 C.F.R. § 10.433.

<sup>20</sup> *Id.* at § 10.433(c).

<sup>21</sup> *See supra* note 18.

<sup>22</sup> In view of the Board’s disposition of the amount of overpayment, it is premature to consider whether OWCP properly required recovery of the overpayment by deducting \$100.00 from appellant’s continuing compensation payments.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 2, 2016 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: July 10, 2017  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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