

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

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**T.P., Appellant**

**and**

**DEPARTMENT OF THE NAVY, NAVAL  
SHIPYARD, Philadelphia, PA, Employer**

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**Docket No. 17-0717  
Issued: April 11, 2018**

*Appearances:*

*Peter Bryant, Esq., for the appellant<sup>1</sup>*

*No appearance, for the Director*

Oral Argument October 18, 2017

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On February 10, 2017 appellant, through counsel, filed a timely appeal from August 18 and September 27, 2016 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that appellant submitted additional evidence after OWCP rendered its January 20, 2017 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision and therefore, this additional evidence cannot be considered on appeal. 20 C.F.R. § 501.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

## **ISSUES**

The issues are: (1) whether appellant forfeited his right to compensation for the period January 15, 1993 through February 12, 2012 because he knowingly failed to report his employment activities and earnings; (2) whether he received an overpayment of compensation in the amount of \$139,848.73; and (3) whether OWCP properly determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>4</sup> The facts as presented in the prior Board decisions are incorporated herein by reference. The relevant facts are as follows.

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

Appellant was required to submit information with respect to any outside employment on EN1032 forms.<sup>5</sup> On September 16, 1984 OWCP sent appellant an EN1032 form which differed from prior forms as it was changed to provide separate sections for “employment other than self-employment” and “self-employment.” The form explained that “employment other than self-employment” including work for a relative’s business, with rate of pay being the cost of hiring someone else to perform the work. Self-employment included operating a business, and the form again noted that the rate of pay would be the cost of hiring someone to perform the work performed by appellant. The form also explained that the period covered by the form was the prior 15 months.<sup>6</sup>

Appellant completed EN1032 forms on December 10, 1984, January 3, 1986, and January 6, 1987 indicating that he had earnings of \$200.00 per week in private employment with “Donatucci Kitchens.” In EN1032 forms dated December 10, 1987, December 12, 1988, and December 6, 1989, appellant reported that he was self-employed working 25 to 40 hours per week with “TGP Kitchens” and earned \$250.00 per week. On EN1032 forms dated August 13, 1991, February 4, 1992, and February 13, 1993, appellant reported that he was employed with “A&P Kitchens” with earnings of \$564.00 every two weeks.

In an EN1032 form completed on January 15, 1995, appellant reported that he was employed with A&P Kitchens with earnings of \$592.00 every two weeks. He reported no self-employment. This form provided slightly different language from prior forms with respect to employment activity. It noted that “all self-employment or involvement in business enterprise”

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<sup>4</sup> Docket No. 15-1016 (issued March 23, 2016).

<sup>5</sup> The cover letter is a CA-1032 form, but the Board will refer to the responses on the enclosed EN1032 form.

<sup>6</sup> The prior forms of record referred either to 12 months, or did not clearly indicate the period covered.

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

OWCP continued to send appellant EN1032 forms on March 4, 1996, October 9, 1997, June 28, 2000, October 25, 2001, November 9, 2001, February 4, 2003, May 4, 2004, April 20, 2006, April 10, 2007, March 20, 2008, March 18, 2009, March 18, 2010, March 9, 2011, and February 8, 2012 requesting employment information pertaining to the prior 15 months.<sup>7</sup>

Appellant continued to report earnings at A&P Kitchens on EN1032 forms and responded “no” as to self-employment in forms dated April 2, 1996, October 21, 1997, May 17, 1999, July 18, 2000, November 16, 2001, November 16, 2001,<sup>8</sup> April 18, 2004, May 6 and 9, 2006, April 12, 2007, March 24, 2008, March 28, 2009, March 23, 2010, March 18, 2011, and February 12, 2012.

In a signed April 2, 1996 EN1032 form sent by OWCP on March 4, 1996, appellant reported earning \$592.00 every two weeks at A&P Kitchens for the period January 15, 1995 through April 2, 1996. In a signed October 21, 1997 form sent on October 9, 1997, he reported earning \$592.00 every two weeks for the period April 1996 through October 21, 1997. In a signed May 17, 1999 form, appellant reported earning \$592.00 every two weeks for the period January 1998 through May 17, 1999. In a signed July 18, 2000 form sent on June 28, 2000, he reported earning \$598.00 every two weeks for the period May 1999 through July 18, 2000. In a signed November 16, 2001 form sent on October 25, 2001, he reported earning \$598.00 every two weeks for the period January 1 through December 31, 2000. In another signed November 16, 2001 EN1032 form sent on November 9, 2001, appellant reported earning \$750.00 every two weeks for the period December 31, 2000 through November 16, 2001. In a signed April 18, 2004 form sent on February 4, 2003, he reported earning \$700.00 per week for the period December 31, 2002 through December 31, 2003. In a signed May 6, 2006 form sent on May 4, 2004, appellant reported earning \$700.00 per week for the period December 31, 2002 through December 31, 2003. In a signed May 9, 2006 form sent on May 20, 2006, he reported earning \$800.00 per week for the period January 1, 2004 through December 31, 2005. In a signed April 12, 2007 form sent on April 10, 2007, appellant reported earning \$800.00 per week for the period January 1 through December 31, 2005. In a signed March 24, 2008 form sent on March 20, 2008, he reported earning \$850.00 per week for the period January 1 through December 31, 2007. In a signed March 28, 2009 form sent on March 18, 2009, appellant reported earning \$850.00 per week for the period January 1, 2008 through March 27, 2009. In a signed March 23, 2010 form sent on March 18, 2010, he reported earning \$850.00 per week for the period January 1, 2009 through March 23, 2010. In a signed March 18, 2011 form sent on March 9, 2011, appellant reported earning \$850.00 per week for the period January 1, 2010 through March 18, 2011. In a signed February 12, 2012 form sent on February 8, 2012, he

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<sup>7</sup> The Board notes that OWCP also sent an EN1032 form sometime in 1998/1999. However, the date on the form is illegible to determine the exact date sent and what 15-month period it covered.

<sup>8</sup> The Board notes that appellant submitted two EN1032 forms dated November 16, 2001 which covered different periods of employment on each form.

reported earning \$850.00 per week for the period March 18, 2011 through February 12, 2012. When asked if he was self-employed or involved in any business enterprise in the past 15 months, appellant responded “no” on all forms submitted.

By letter dated June 13, 2011, OWCP received a report from the employing establishment’s investigation service. The report included a two-page letter from a special agent reporting that appellant was an owner of “A&P Custom Kitchens.” The documents enclosed contain “Business Entity Filing History” from the State of Pennsylvania. According to the history, the business known as “A&P Custom Kitchens” was created on March 25, 1988 and listed T.P., Sr. as treasurer. Another individual is named as president. A plumbing business (P&B Plumbing and Heating) created on May 23, 1974 lists appellant as an owner. In addition, “P.A.D. Associates,” created July 17, 2000, lists appellant as an owner. A business known as “A&P Equipment Services,” created August 19, 1991, lists appellant as treasurer. Finally, a business known as “A&P Laminations,” created on June 15, 2000, lists T.P., Sr. as President and appellant as treasurer.

An itemized statement of earnings received from the Social Security Administration revealed that appellant earned the following yearly total wages at A&P Custom Kitchens: \$19,500.00 in 1998; \$19,500.00 in 1999; \$19,500.00 in 2000; \$26,000.00 in 2001; \$27,600.00 in 2002; \$37,800.00 in 2003; \$41,600.00 in 2004; \$41,600.00 in 2005, \$46,800.00 in 2006; and \$62,000.00 in 2007.

By development letter dated October 25, 2011, OWCP requested that appellant submit information regarding his involvement in business entities and provided him with a questionnaire for his completion.

By decision dated April 20, 2012, OWCP suspended appellant’s compensation for failure to provide the requested information.

On May 23, 2012 OWCP received evidence regarding appellant’s tax filings for 2010. A federal tax form shows business income of \$11,211.00 from A&P Laminations, \$9,453.00 from A&P Custom Kitchens, and a loss of \$1,742.00 from P.A.D. Associates. Appellant also reported 33.334 percent ownership of A&P Laminations, 50 percent ownership from A&P Custom Kitchens, and 33.334 percent ownership of P.A.D. Associates. There are also federal forms identifying appellant as a partner in Houston and Dallas, Texas partnerships, each claiming losses in 2010.

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

On October 12, 2012 appellant provided a narrative statement in response to OWCP's October 25, 2011 development letter and questionnaire. With respect to A&P Custom Kitchens, when asked whose name the business was operated in and who had been held out as the owner, he responded that he was the treasurer and his partner was the president. When asked who managed the business, appellant reported that he was a salesman and that the officers managed the business and could sign checks. When asked about his duties, he responded that he managed all sales and purchasing of indoor materials while his partner managed all outside installations. Appellant further reported that both he and his partner managed advertising, hours of operations, and setting of prices. He explained that booking and accounting were done by an outside company.

Appellant submitted tax information from 2011 showing wage income from A&P Custom Kitchens of \$65,000, with additional income from partnerships or S Corporations of \$29,827.00 from A&P Custom Kitchens, \$1,121.00 from A&P Laminations, and a loss from P.A.D. Associates. On November 14, 2012 he submitted tax forms from 2005 through 2008. For 2005, the tax information reported \$41,600.00 in salary from A&P Custom Kitchens. Appellant also reported \$18,974.00 in income from partnerships or S Corporations.<sup>9</sup> For 2006, he reported \$46,800.00 in wage income, and \$46,745.00 in partnership or S corporation income. As to 2007, wage income from A&P Custom Kitchens was \$62,000.00, with \$40,889.00 in partnership or S Corporation. In 2008, appellant reported \$65,000.00 in income, and \$10,629.00 in partnership or S Corporation income.

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

In a letter dated February 22, 2013, OWCP made a preliminary determination that an overpayment in the amount of \$167,698.06 was created due to the forfeiture of compensation and that appellant was at fault in the creation of the overpayment. It informed him of his review rights and instructed him to complete an enclosed overpayment recovery questionnaire form (OWCP-20) and submit supporting documentation within 30 days.

On March 19, 2013 appellant, through his representative, requested a hearing before an OWCP hearing representative with respect to the preliminary overpayment determination. He also requested a hearing with respect to the February 21, 2013 forfeiture decision.

A hearing was held on September 12, 2013. Appellant's representative argued that appellant had completed the EN1032 forms honestly and disclosed earnings, considering himself an employee of the company.

By decision dated January 9, 2014, an OWCP hearing representative found that appellant had forfeited his right to compensation for the period December 13, 1988 to February 12, 2012, finding that "the evidence of record supports that the claimant was engaged in employment

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<sup>9</sup> The information indicated that the income came from A&P Custom Kitchens, A&P Laminations, P.A.D. Associates, and a Texas partnership.

activities during the period covered.” The hearing representative determined that an overpayment in the amount of \$167,698.06 was created. In addition, the hearing representative found that appellant was at fault in creation of the overpayment and therefore not entitled to waiver.

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

By decision dated October 6, 2014, OWCP modified its January 9, 2014 decision with respect to the forfeiture and overpayment amount. It found that there was no overpayment for the period December 13, 1988 to January 14, 1993 because the reporting requirement at that time did not clearly indicate that earnings from a business were required to be reported. OWCP found the reporting requirements on the EN1032 forms changed with the form signed on January 15, 1995, and that appellant did not report any self-employment or involvement in any business enterprise thereafter. It indicated that the form required information on “any work or ownership interest in any business enterprise,” and appellant was “involved in multiple businesses” from January 15, 1995 until the present time. According to OWCP, appellant’s argument that he believed he was completing the forms properly was not credible, given that he possessed the intelligence required to participate in the ownership and operation of multiple businesses. It found that the findings that appellant forfeited his right to compensation and that an overpayment was created were modified. As to the overpayment amount, OWCP noted the original amount was \$167,698.06 from December 13, 1988 to February 12, 2012. It then identified the modified period as commencing January 15, 1993. According to OWCP, the amount paid from December 13, 1988 to January 14, 1993 was \$24,402.55, and the difference between \$167,698.06 and \$24,402.55 is the modified overpayment amount of \$143,009.73.<sup>10</sup>

On April 1, 2015 appellant, through counsel, appealed the October 6, 2014 OWCP decision to the Board.<sup>11</sup>

By decision dated March 23, 2016, the Board found that the issues of forfeiture, overpayment, and waiver of recovery of the overpayment were not in posture for decision. The Board explained that a full and proper analysis of the forfeiture issue required OWCP to make specific findings as to specific EN1032 forms. The Board noted that OWCP must explain the evidence upon which it was basing its forfeiture finding. If the forfeiture finding was for understating earnings, it must cite to evidence of the actual earnings for the period. If it was for omitting earnings, other employment activity, or “ownership interest,” such that compensation

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<sup>10</sup> The Board notes that the difference between \$167,698.06 and \$24,402.55 is \$143,295.51.

<sup>11</sup> *Supra* note 4.

may be forfeited, OWCP must make that finding clear and cite to the supporting, relevant evidence. It requested that OWCP make findings as to each specific form that it determined constituted a forfeiture of compensation, noting it should be clear as to what evidence established that for a specific form appellant had knowingly omitted or understated any part of his earnings such that he was subject to forfeiture under 5 U.S.C. § 8106(b).<sup>12</sup> The Board set aside the October 6, 2014 decision and remanded the case for proper findings and an appropriate decision with respect to forfeiture, overpayment, and waiver of recovery.

Following development on remand, by decision dated August 18, 2016, OWCP determined that appellant had forfeited his right to compensation for the period January 15, 1993 to February 12, 2012 because he knowingly failed to report self-employment activities and also understated the amount of his weekly earnings on EN1032 forms, resulting in a \$143,009.73 overpayment of compensation.

By letter dated August 25, 2016, OWCP made a preliminary determination that appellant received an overpayment of compensation in the amount of \$139,848.73 because he forfeited his compensation from January 15, 1993 through February 12, 2012.<sup>13</sup> It found that he was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. OWCP informed him of his review rights and instructed him to complete an enclosed overpayment recovery questionnaire form and submit supporting documentation within 30 days. No response was received.

By decision dated September 27, 2016, OWCP finalized its preliminary determination, finding that appellant was overpaid in the amount of \$139,848.73 because he forfeited his compensation from January 15, 1993 to February 12, 2012. It found that appellant was at fault in the creation of the overpayment because he knowingly accepted payments that he knew he was not entitled to and he failed to furnish information which he should have known to be material. Recovery was directed by submitting a check for the full amount of the overpayment.

### **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>14</sup>

A partially disabled employee may be required to report his or her earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times

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<sup>12</sup> Since the overpayment was based on the forfeiture, the Board did not address the overpayment and waiver issues. It noted that once the forfeiture issue was properly resolved, OWCP could properly determine an overpayment amount, if any, and issue a decision with respect to an overpayment and waiver.

<sup>13</sup> OWCP explained that the August 18, 2016 forfeiture decision determined that the overpayment amounted to \$143,009.73. It noted that the interest that had accumulated with that debt had been removed, adjusting the new overpayment amount to \$139,848.73.

<sup>14</sup> 5 U.S.C. § 8106(b).

specified by OWCP.<sup>15</sup> Earnings from employment or self-employment means: (1) gross earnings or wages before any deductions 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.<sup>16</sup> 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 job duties.<sup>17</sup>

An employee can only be subjected to the forfeiture provision of 5 U.S.C. § 8106(b) if he or she “knowingly” omitted or understated earnings. It is not enough to merely establish that there were unreported earnings or employment. OWCP procedures recognize that forfeiture is a penalty,<sup>18</sup> and, as a penalty provision, it must be narrowly construed.<sup>19</sup> In OWCP's regulations, “knowingly” is defined as: “with knowledge, consciously, willfully, or intentionally.”<sup>20</sup> OWCP has the burden of proof to establish that a claimant, either with knowledge, consciously, willfully, or intentionally, failed to report earnings or employment activities.<sup>21</sup> It procedures provide that an OWCP forfeiture decision should specifically discuss the evidence which supports that the claimant knowingly failed to report earnings or employment.<sup>22</sup> To meet its burden of proof to establish forfeiture, OWCP is required to examine closely the employee's activities and statements. It may meet this burden without an admission by an employee if the circumstances of the case establish that he or she failed to reveal fully and truthfully the full extent of his or her employment activities and earnings.<sup>23</sup>

OWCP's implementing regulations provide:

“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.”<sup>24</sup>

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of

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<sup>15</sup> 20 C.F.R. § 10.525 (2008).

<sup>16</sup> *Id.* at § 10.5(g).

<sup>17</sup> *Id.*

<sup>18</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Forfeiture*, Chapter 2.1402.8 (May 2012).

<sup>19</sup> *Christine P. Burgess*, 43 ECAB 449 (1992).

<sup>20</sup> 20 C.F.R. § 10.5(n); *see Anthony A. Nobile*, 44 ECAB 268 (1992).

<sup>21</sup> *Billy J. McCamey*, Docket No. 00-2725 (issued June 11, 2002).

<sup>22</sup> *See supra* note 18 at Chapter 2.1402.8d.

<sup>23</sup> *Terry A. Geer*, 51 ECAB 168 (1999).

<sup>24</sup> 20 C.F.R. § 10.529.



duty.<sup>25</sup> Section 8129(a) provides, in pertinent part, “When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”<sup>26</sup>

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

OWCP found that appellant forfeited his compensation from January 15, 1993 to February 12, 2012. The basis for the forfeiture was OWCP’s finding that appellant had violated 5 U.S.C. § 8106(b) in completing 16 EN1032 forms from January 15, 1995 to February 12, 2012, where he failed to report self-employment and involvement in a business, and knowingly omitted or understated his earnings and employment activities. Each form covers a period of 15 months.

Regarding OWCP’s findings with respect to the forfeiture period, the Board notes that OWCP’s October 6, 2014 decision appeared to find that the forfeiture period commenced on October 15, 1993, which was 15 months prior to the January 15, 1995 EN1032 form. There were also references to “[January 15, 1993]” which presumably constituted a typographical error. The Board noted this error in its prior March 23, 2016 decision,<sup>27</sup> and found that the forfeiture period began on October 15, 1993. OWCP’s August 18, 2016 decision failed to rectify its mistake, finding that appellant forfeited his right to compensation from January 15, 1993 to February 12, 2012.<sup>28</sup> As the 15-month period covering this form would begin on October 15, 1993, the Board finds that the period of forfeiture is from October 15, 1993 to February 12, 2012, and should exclude the period January 15 to October 14, 1993.

Appellant reported earnings from A&P Custom Kitchens as a salesman on EN1032 forms dated January 15, 1995 through February 12, 2012. When asked if he was self-employed or involved in any business enterprise in the past 15 months, appellant responded “no.” The Board finds that there is substantial evidence of record showing that appellant had employment activity and ownership which he knew should have been reported on the above-noted EN1032 forms.<sup>29</sup>

The record reflects that appellant owned and operated a business enterprise which was not disclosed on the requisite EN1032 forms. The Pennsylvania Business Entity Filing History and Certificate of Incorporation reflect that appellant was co-owner and treasurer of A&P Customs Kitchen since March 25, 1988. In a statement received on October 12, 2012, appellant

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<sup>25</sup> 5 U.S.C. § 8102.

<sup>26</sup> *Id.* at § 8129(a).

<sup>27</sup> *Supra* note 4.

<sup>28</sup> As noted in the Board’s prior decision, the EN1032 form completed on January 15, 1995 provided slightly different language from prior forms with respect to employment activities. The form provides that “all self-employment or involvement in business enterprise” must be reported, with a more extensive list of the kinds of self-employment that must be reported (such as carpentry, painting, child care, odd jobs, etc.), and includes part-time or intermittent work. The form indicates that “any work or ownership interest in any business enterprise should be reported, even if the business lost money or profits were reinvested. The rate of pay includes the cost of hiring someone to perform the tasks completed by appellant.

<sup>29</sup> *J.A.*, Docket No. 14-1863 (issued July 7, 2015).

acknowledged that he was treasurer of the business and his partner was president, explaining that the officers managed the company and could sign checks. While he identified himself as a salesman, he reported that his duties included managing all sales and purchasing of indoor materials while his partner managed all outside installations. Appellant further described his duties by reporting that both he and his partner managed advertising, hours of operations, and setting of prices, while booking and accounting were done by an outside company.

The Board notes that, while appellant identified himself as a salesman of A&P Customs Kitchen, his duties and responsibilities involved that of a business owner and officer.<sup>30</sup> Appellant identified these duties in his October 12, 2012 statement which surpassed those of a salesperson as described in OWCP's July 15, 1969 loss of wage-earning capacity determination.<sup>31</sup> Despite having ownership interest in A&P Custom Kitchens, receiving earnings from the company, and also serving as an officer with duties of an owner/operator, appellant failed to disclose this information on numerous EN1032 forms.

OWCP notified appellant of his responsibility to complete the forms and provide relevant information concerning his employment status and earnings during the periods covered by the forms. The EN1032 forms signed by appellant used such terms as business, enterprise, and service to explain the obligation for reporting all forms of employment, self-employment, and earnings.<sup>32</sup> The explicit language of the EN1032 forms clearly advised appellant that the nature of his work, self-employment, and involvement in the business would require him to report such employment activities on the forms. Appellant's signing of strongly-worded certification clauses on the EN1032 forms further shows that he was aware of materiality of his failure to report his employment.<sup>33</sup>

With respect to the period of forfeiture, in EN1032 forms signed on January 15, 1995, April 2, 1996, and October 21, 1997, appellant reported no self-employment or involvement in any business enterprise in the past 15 months. These forms reflect that appellant knowingly omitted self-employment for the period October 15, 1993 through October 21, 1997.

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<sup>30</sup> *C.F.*, Docket No. 16-0916 (issued June 28, 2017).

<sup>31</sup> Duties of a salesperson were identified as, "Displays merchandise, describes selling features to customer, and advises customer in making selection by explaining use of particular article or suggesting other articles. Prepares sales slip and receives payment for article. Replenishes supply of merchandise on display. May demonstrate use of merchandise. May examine defective article returned by customer to determine if refund or replacement should be made. May estimate quantity of merchandise required to fill customer's need."

<sup>32</sup> The EN1032 forms instructed appellant to report all self-employment or involvement in business enterprises, including (but not limited to) operating a business, and providing services in exchange for money, goods, or other services. It further requested appellant report any work or ownership interest in any business enterprise, even if the business lost money or if profits or income were reinvested or paid to others. If noted that if he performed any duties in any business enterprise for which he was not paid, he must show as rate of pay what it would have cost the employer or organization to hire someone to perform the work or duties he did, even if the work was for himself or a family member or relative.

<sup>33</sup> The Board notes that the record reflects appellant's ownership interest in other business enterprises. As appellant's ownership interest in A&P Custom Kitchens establishes the forfeiture of his compensation for the period reflected above, the Board need not discuss the other enterprises at this juncture.

The Board notes that the record reflects that an EN1032 form was submitted to appellant sometime in 1998/1999. However, the exact date of the form is illegible. In an EN1032 form signed on May 17, 1999, appellant reported no self-employment or involvement in any business enterprise. He provided employment information for A&P Custom Kitchens addressing the dates of employment as January 1998 through May 17, 1999.

The gap between the October 21, 1997 EN1032 form and May 17, 1999 form results in no EN1032 form addressing the period October 22, 1997 to February 16, 1998. However, appellant's May 17, 1999 EN1032 form addressed employment information for the period January 1998 through May 17, 1999. Therefore, there is no documentation addressing the period of October 22 to December 31, 1997. The record does not contain evidence that OWCP requested appellant file an EN1032 form covering this period to establish that he failed to make an affidavit or report when required; or knowingly omitted or understated his earnings such that 5 U.S.C. § 8106(b) may be applied. As such, the Board finds that OWCP failed to establish a forfeiture/overpayment for the period of October 22 through December 31, 1997.

In an EN1032 form signed on July 18, 2000, appellant reported no self-employment or involvement in any business enterprise in the past 15 months and indicated his dates of employment covered the period May 1999 through July 18, 2000. In an EN1032 form signed on November 16, 2001, appellant reported no self-employment or involvement in any business enterprise in the past 15 months and indicated the dates of employment covering the period January 1 to December 31, 2000. In a different EN1032 form signed on November 16, 2001, appellant reported no self-employment or involvement in any business enterprise in the past 15 months and indicated the dates of employment covering the period December 31, 2000 to November 16, 2001.

The Board notes that there is a large gap in the EN1032 forms signed on November 16, 2001 through April 18, 2004. The period of employment pertaining to earnings as a salesman not addressed by appellant on these forms spanned from November 17, 2001 to December 30, 2002. The record reflects that OWCP sent an EN1032 form to appellant on February 4, 2003 requesting employment information pertaining to the prior 15 months. This form would cover the period November 4, 2001 through February 4, 2003. Appellant did not submit this form until April 18, 2004, over one year later. However, his signed April 18, 2004 EN1032 form reported of no self-employment or business activities in the prior 15 months. As such, this covered the period requested by OWCP from November 4, 2001 through February 4, 2003, which includes the gap from the nonreporting period November 17, 2001 to December 30, 2002, establishing that appellant failed to knowingly report self-employment or involvement in any business enterprise.

In an EN1032 form signed on May 6, 2006, appellant reported no self-employment or involvement in any business enterprise in the past 15 months and indicated his dates of employment covered the period December 31, 2002 to December 31, 2003. In an EN1032 form signed on May 9, 2006, he reported no self-employment or involvement in any business enterprise in the past 15 months and indicated the dates of employment covering the period January 1, 2004 to December 31, 2005.

On April 20, 2006 OWCP requested appellant submit an affidavit of employment earnings covering the prior 15-month period from January 20, 2005 to April 20, 2006. In an

EN1032 form signed on May 9, 2006, appellant reported no self-employment or involvement in any business enterprise in the past 15 months and indicated the dates of employment covering the period January 1, 2004 to December 31, 2005. On April 10, 2007 OWCP requested appellant submit an affidavit of employment earnings covering the prior 15 month period January 10, 2006 to April 10, 2007. In an EN1032 form signed on April 12, 2007, appellant reported no self-employment or involvement in any business enterprise in the past 15 months and indicated the dates of employment covering the period January 1 to December 31, 2005. In an EN1032 form signed on March 24, 2008, appellant reported no self-employment or involvement in any business enterprise in the past 15 months and indicated the dates of employment covering the period January 1 to December 31, 2007.

The Board notes that appellant never specifically addressed the period of employment from January 1 to December 31, 2006 with regards to his wages earned. However, his signed May 9, 2006 and April 12, 2007 EN1032 forms reported no self-employment or involvement in any business enterprise in the past 15 months which covered the period January 1 to December 31, 2006. As such, this reflects that appellant knowingly failed to report his employment activities and omitted his earnings.<sup>34</sup>

The remaining EN1032 forms signed on March 28, 2009, March 23, 2010, March 18, 2011, and February 12, 2012 cover the period January 1, 2008 to February 12, 2012 where appellant failed to report self-employment or involvement in any business enterprise.

The Board also finds that appellant under reported his earnings on the signed EN1032 forms for much of the forfeiture period in question.<sup>35</sup> Social security earnings and tax records indicate that appellant under reported or omitted his earnings as a salesman at A&P Customs Kitchens on EN1032 forms covering the period for 1998, 1999, 2000, 2001, 2002, 2003, 2006, 2007, 2008, 2010, and 2011. The following reflect appellant's established weekly earnings as identified from SSA and tax records, and the weekly earnings reported by appellant on his EN1032 forms, resulting in an understated amount: 1998 earned \$375.00 weekly, reported \$296.00; 1999 earned \$375.00 weekly, reported \$296.00; 2000 earned \$375.00 weekly, reported \$299.00; 2001 earned \$500.00 weekly, reported \$375.00; 2002 earned \$530.00, failed to report earnings; 2003 reported \$727.00, earned \$700.00; 2006 earned \$900.00, failed to report earnings; 2007 earned \$1,192.00, reported \$850.00; 2008 earned \$1,250.00, reported \$850.00; 2010 earned \$1,483.00, reported \$850.00; 2011 earned \$1,250.00, reported \$850.00.

Appellant can be subject to the forfeiture provision of section 8106(b) only if he "knowingly" failed to report earnings or employment. OWCP has the burden of proof to establish that appellant did, either with knowledge, consciously, willfully, or intentionally, fail to report earnings from employment.<sup>36</sup> Appellant completed the EN1032 forms which advised him that he must report all employment and earnings from employment and self-employment, and involvement in any business enterprise. The factual circumstances of record, including appellant's signing of the strongly worded certification clauses on the EN1032 forms, provide

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<sup>34</sup> 20 C.F.R. § 10.5(n).

<sup>35</sup> *E.V.*, Docket No. 15-0803 (issued October 15, 2015).

<sup>36</sup> *T.G.*, Docket No. 16-1379 (issued August 4, 2017).

persuasive evidence that he “knowingly” understated and omitted his earnings and employment activities.<sup>37</sup>

On appeal, counsel argues that appellant did not knowingly fail to report his ownership in the business or understate his earnings. He explained that it was only in 1995 that the EN1032 form required appellant to list ownership business in any nonpublic enterprise. Counsel argues that appellant did not know he needed to disclose information regarding his business interests, other than wages earned, as the EN1032 forms provided from 1970 through 1994 did not request this information. The Board rejects this argument. As previously noted, the forms provided clear instructions regarding disclosure of employment activities. Moreover, counsel asserts that appellant accurately reported self-employment in 1987 and 1988 after the EN1032 form had changed in 1984. This provides support that appellant was aware that there were changes to the forms over the years which required different information regarding employment.

Counsel further argues that appellant’s signature on the EN1032 forms is not enough to satisfy the knowingly standard and that OWCP should have relied on his testimony. As the Board explained above, appellant’s own statements pertaining to his involvement in A&P Custom Kitchen, duties for the business, duties as a salesman, position as an officer, and filing of taxes, coupled with the signed EN1032 forms, SSA earnings reports, and tax records all provide support that he knowingly failed to report employment activities and under stated earnings. Counsel further argues that when appellant’s business was incorporated in 1988, he believed he was no longer self-employed because he owned the business. The Board notes that the EN1032 forms require that appellant report whether he was self-employed or involved in any business enterprise. Despite such requirement, appellant failed to disclose his involvement in A&P Custom Kitchen and only disclosed that he was a salesman of the company.

As such, the Board finds that the appellant’s 16 signed EN1032 forms establish a forfeiture of compensation for the period October 15, 1993 to October 21, 1997, and January 1, 1998 to February 12, 2012.<sup>38</sup> Based upon these findings, the Board concludes that appellant “knowingly” omitted his earnings under section 8106(b)(2) of FECA by failing to report his self-employment activities and earnings, as well as understating his earnings, for the period October 15, 1993 to October 21, 1997, and January 1, 1998 to February 12, 2012, *i.e.*, the portion of the forfeiture period covered by the 16 EN1032 forms submitted.<sup>39</sup>

The Board also finds that OWCP failed to establish a forfeiture of compensation from January 15 to October 14, 1993. As previously noted, OWCP made a typographical error regarding the date of forfeiture beginning on January 15, 1993, as 15 months prior to the January 15, 1995 EN1032 form would cover the period beginning October 15, 1993.

The Board further finds that there is no form or document in the record on which appellant knowingly failed to report employment activities or earnings for the period October 22 to December 31, 1997. OWCP failed to establish that it provided appellant an EN1032 form covering this period and appellant did not address this period of employment on any of the

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<sup>37</sup> See generally *Robert C. Gilliam*, 50 ECAB 334 (1998).

<sup>38</sup> See *F.H.*, Docket No. 07-1379 (issued November 24, 2008).

<sup>39</sup> *G.G.*, Docket No. 14-1848 (issued August 4, 2016).

submitted EN1032 forms. Without such a form or document, the period of forfeiture must be limited to the period in which it is established that he actually worked and did not report/underreported earnings, or failed to disclose any self-employment or involvement in business enterprise.<sup>40</sup> Accordingly, OWCP's finding with respect to forfeiture for the period January 15 to October 14, 1993, and October 22 to December 31, 1997 is set aside. As noted, OWCP properly determined that appellant forfeited his right to compensation for the period October 15, 1993 to October 21, 1997, and January 1, 1998 to February 12, 2012.

### **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>41</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>42</sup>

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

As discussed, the Board modified OWCP's forfeiture determination to find that appellant forfeited compensation from October 15, 1993 to October 21, 1997 and January 1, 1998 to February 12, 2012, but the Board found that OWCP had not established forfeiture from January 15 to October 14, 1993, and October 22 to December 31, 1997. OWCP's finding of an overpayment of compensation in the amount of \$139,848.73 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 the proper period as found by the Board.<sup>43</sup>

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

Section 8129(b) of FECA<sup>44</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

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<sup>40</sup> See *C.R.*, Docket No. 08-2425 (issued August 3, 2009).

<sup>41</sup> 5 U.S.C. § 8102(a).

<sup>42</sup> *Id.* at § 8129(a).

<sup>43</sup> See *supra* note 29.

<sup>44</sup> 5 U.S.C. § 8129(b).

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

“(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>45</sup>

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

The Board finds that OWCP properly determined that appellant was at fault in the creation of the overpayment which occurred due to his forfeiture of compensation. The explicit language of the EN1032 form clearly shows that he knew or should have known that the nature of his activities would require him to report such employment activities on the forms.<sup>46</sup> Appellant’s failure to accurately report his earnings and employment activities on the EN1032 forms similarly constitutes a failure to provide information which he knew or should have known to be material.<sup>47</sup> Consequently, he is not eligible for a waiver of recovery of the overpayment.<sup>48</sup>

### **CONCLUSION**

The Board finds that appellant forfeited his right to wage-loss compensation for the period October 15, 1993 to October 21, 1997, and January 1, 1998 to February 12, 2012, thus resulting in an overpayment of compensation. However, the exact amount of the overpayment for this period is yet to be determined. The Board also finds that appellant was at fault in creating this overpayment, thereby precluding waiver of recovery. The Board further finds that OWCP’s finding of forfeiture and resulting overpayment for the period January 15 to October 14, 1993, and October 22 to December 31, 1997 is set aside.

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<sup>45</sup> 20 C.F.R. § 10.433.

<sup>46</sup> See *J.C.*, Docket No. 16-1058 (issued July 10, 2017).

<sup>47</sup> 20 C.F.R. § 10.433(a)(2).

<sup>48</sup> *Gary L. Allen*, 47 ECAB 409, 418 (1996).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 27 and August 18, 2016 decisions of the Office of Workers' Compensation Programs are affirmed in part and set aside in part. The case is remanded for further action consistent with this decision of the Board.<sup>49</sup>

Issued: April 11, 2018  
Washington, DC

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

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

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<sup>49</sup> Colleen Duffy Kiko, Judge, participated in the original decision, but was no longer a member of the Board effective December 11, 2017.