

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

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<b>J.H., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 20-1588</b>
	)	<b>Issued: June 16, 2021</b>
<b>U.S. POSTAL SERVICE, SOUTH HILLS POST OFFICE, Pittsburgh, PA, Employer</b>	)	
	)	

*Appearances:*  
*Alan J. Shapiro, Esq.*, for the appellant<sup>1</sup>  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On September 3, 2020 appellant, through counsel, filed a timely appeal from June 1 and 2, 2020 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.

**ISSUES**

The issues are: (1) whether OWCP properly determined that appellant forfeited his entitlement to compensation for the period January 18, 2016 through April 18, 2017 as he

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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.*

knowingly failed to report his employment activities and earnings, pursuant to 5 U.S.C. § 8106(b)(2); (2) whether it properly found that appellant received an overpayment of compensation in the amount of \$38,178.96; 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**

On January 29, 2008 appellant, then a 46-year-old driver, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his head when he fell on ice while in the performance of duty. OWCP accepted the claim for head contusion, with less than one hour loss of consciousness, and neck sprain and strain. Appellant stopped work on January 29, 2008 and was paid compensation on the supplemental rolls beginning March 25, 2008 and on the periodic rolls beginning February 12, 2012.

On April 18, 2017 appellant signed a Form EN1032 regarding his earnings and employment activity for the preceding 15-month period. The form advised that he must report all employment for which he received a salary, wages, income, sales commissions, piecework, or any payment of any kind, and that he 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 him to criminal prosecution. On the form he marked “No” in response to questions regarding whether he worked for an employer, or was self-employed or involved in a business enterprise during the previous 15-month period.<sup>3</sup>

In an August 23, 2019 report, by an employing establishment Office of the Inspector General (OIG) agent, J.M., summarized his interview with appellant on March 12, 2019. Appellant reported working an average of 20 to 30 hours a week at an automotive repair shop since at least 2016. He indicated that he did not get paid by the automotive repair shop, but worked on a trade or “barter system.” Appellant reported that he worked on customers’ vehicles so he could work on his own vehicles. He stated that the owner of the automotive repair shop, W.Z., bought him parts and lunch in exchange for helping fix customers’ cars. The agent showed appellant a copy of OWCP’s Form EN1032 signed by him on April 18, 2017. Appellant acknowledged working at the automotive repair shop during this time under a barter arrangement with W.Z. However, he answered “No” to working for any employer during the prior 15 months, “No” to being self-employed and “Yes” that he was unemployed for all periods during the past 15 months. In response to Part B -- Volunteer work, “During the past 15 months, did you perform any volunteer work including volunteer work for which ANY FORM of monetary or in-kind compensation was received?” he answered “No.” The agent further inquired regarding a transcript from an OWCP March 7, 2018 hearing in which appellant was asked “[h]ave you worked

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<sup>3</sup> On August 8, 2017 OWCP issued a notice proposing to terminate appellant’s wage-loss compensation and medical benefits as he no longer had disability or residuals causally related to his accepted head contusion, loss of consciousness, and neck sprain and strain. It allowed appellant 30 days to respond to the proposal. By decision dated September 8, 2017, OWCP terminated appellant’s wage-loss compensation and medical benefits, effective September 17, 2017. By *de novo* decision dated October 23, 2018, OWCP affirmed the September 8, 2017 termination decision. By decision dated May 29, 2019, it affirmed the October 23, 2018 decision, finding that the September 8, 2017 termination “remains intact.”

anywhere since 2008 no [sic] at the Post Office, any other employment?” and he responded “No. Sir.” When asked why he did not disclose the bartering arrangement with the automotive repair shop, appellant did not offer any additional details.

On March 12, 2019 the employing establishment OIG interviewed the owner of the automotive repair shop, W.Z., who stated that appellant worked at the automotive repair shop approximately 15 to 20 hours a week. W.Z. indicated that appellant was not employed by the automotive repair shop, but he paid him in favors. He confirmed that he paid appellant in vehicle parts and bought him lunch in exchange for appellant fixing customer cars.

In an August 23, 2019 case summary report, the employing establishment’s OIG advised that appellant certified on an April 2017 Form EN1032 that he was not employed. The letter included a report from a special agent, M.M., reporting that appellant was a mechanic working at the automotive repair shop. The evidence indicated that appellant was observed working on vehicles from approximately September 19, 2016 through March 12, 2019 at the automotive repair shop. The employing establishment’s OIG provided several reports, which detailed the employing establishment’s OIG’s investigative activities, along with attachments that documented surveillance.

By decision dated November 26, 2019, OWCP found that appellant forfeited his entitlement to compensation for the period January 18, 2016 through April 18, 2017 because he knowingly failed to disclose his outside earnings and employment, pursuant to section 8106(b)(2) of FECA.<sup>4</sup> It explained that he had knowingly failed to report earnings and employment activities when submitting an April 18, 2017 Form EN1032, which covered the prior 15 months of activity.

On November 26, 2019 OWCP notified appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$38,178.96 as he forfeited entitlement to compensation from January 18, 2016 through April 18, 2017. It further advised him of its preliminary determination that he was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, it 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 prerecoupment hearing.<sup>5</sup>

On December 5, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP’s Branch of Hearings and Review regarding the November 26, 2019 forfeiture decision. On December 5, 2019 counsel requested a prerecoupment hearing regarding

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<sup>4</sup> 5 U.S.C. § 8106(b)(2).

<sup>5</sup> In a payment history worksheet dated November 26, 2019 OWCP provided a payment history for the period January 18, 2016 through April 18, 2017: from January 18 through February 6, 2016 OWCP paid appellant \$1,661.43; from February 7 through March 5, 2016 OWCP paid appellant \$2,327.61; from March 6, 2016 through February 4, 2017 OWCP paid appellant \$2,335.00 every 28 days for 12 periods for a total payment of \$28,020.00; from February 5 through March 4, 2017 OWCP paid appellant \$2,341.71; from March 5 through April 1 2017 OWCP paid appellant \$2,382.00; and from April 2 through 18, 2017 OWCP paid appellant \$1,446.21 for a total of \$38,178.96.

the November 26, 2019 preliminary overpayment determination. He subsequently requested that hearings for both decisions be changed to requests for a review of the written record.

By decision dated June 1, 2020, OWCP's hearing representative affirmed the November 26, 2019 forfeiture decision.

By decision dated June 2, 2020, OWCP finalized its preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$38,178.96 because he forfeited his compensation from January 18, 2016 through April 18, 2017. It found that appellant was at fault in the creation of the overpayment because he made an incorrect statement as to a material fact, which he knew or should have known to be incorrect thereby precluding waiver of recovery of the overpayment. OWCP required recovery of the overpayment by payment in full.

### **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 her earnings, forfeits his or her right to compensation with respect to any period for which the affidavit or report was required.<sup>6</sup>

An employee, however, can only be subjected to the forfeiture provision of 5 U.S.C. § 8106 if he or she knowingly failed to report employment or earnings. It is not enough to merely establish that there were unreported earnings.<sup>7</sup> OWCP procedures recognize that forfeiture is a penalty,<sup>8</sup> and, as a penalty provision, it must be narrowly construed.<sup>9</sup> The term "knowingly" is defined within OWCP's regulations as with knowledge, consciously, willfully, or intentionally.<sup>10</sup>

OWCP's regulations define earnings from employment or self-employment as: (1) gross earnings or wages before any deductions and includes the value of subsistence, quarters, reimbursed expenses and any offer 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>11</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 duties.<sup>12</sup>

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<sup>6</sup> 5 U.S.C. § 8106(b)(1) and (2), respectively.

<sup>7</sup> *T.G.*, Docket No. 19-0051 (issued August 20, 2019); *P.H.*, Docket No. 17-1362 (issued March 13, 2018).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Forfeiture*, Chapter 2.1402.8 (May 2012).

<sup>9</sup> *Christine P. Burgess*, 43 ECAB 449 (1992).

<sup>10</sup> 20 C.F.R. § 10.5(n); *R.A.*, Docket No. 18-0406 (issued January 28, 2019); *Anthony A. Nobile*, 44 ECAB 268 (1992).

<sup>11</sup> *Id.* at § 10.5(g).

<sup>12</sup> *Id.*

## ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant forfeited his entitlement to wage-loss compensation for the period January 18, 2016 through April 18, 2017 as he knowingly failed to report employment activities and earnings, pursuant to 5 U.S.C. § 8106(b)(2).

OWCP found that appellant forfeited his entitlement to compensation from January 18, 2016 through April 18, 2017 because he failed to report earnings from employment on a Form EN1032 signed on April 18, 2017. On the form appellant indicated that he did not perform any work for an employer and was not self-employed. He listed no earnings from employment or self-employment.

On August 23, 2019 an investigator with the employing establishment's OIG related that appellant was a mechanic working at an automotive repair shop during the period covered by the April 2017 EN1032 form. The evidence indicated that OIG investigators observed appellant working on vehicles from approximately September 19, 2016 through March 12, 2019 at the automotive repair shop. The OIG interviewed the owner of the automotive repair shop, W.Z., who stated that appellant worked at the automotive repair shop approximately 15 to 20 hours a week. W.Z. indicated that appellant was not employed by the automotive repair shop, but he paid him in favors, such as vehicle parts and bought him lunch in exchange for appellant fixing customer cars. In a report dated March 12, 2019, the OIG investigator summarized his interview with appellant who confirmed working an average of 20 to 30 hours a week at the automotive repair shop since at least 2016. He indicated that he did not get paid, but worked on a trade or "barter system." Appellant reported that he worked on customers' vehicles so he could work on his own vehicles. He stated that the owner of the automotive repair shop, W.Z., buys him parts and lunch in exchange for helping fix customers' cars.

OWCP's regulations provide that, if an employee knowingly omits or understates 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.<sup>13</sup>

Appellant can be subject to the forfeiture provision of section 8106(b) only if he "knowingly" failed to report earnings or employment. OWCP has the burden of proof to establish that a claimant did, either with knowledge, consciously, willfully, or intentionally, fail to report earnings from employment.<sup>14</sup> Appellant completed EN1032 forms, which advised him that he must report both all employment and all earnings from employment and self-employment. The form provided that he could be subject to criminal prosecution for false or evasive answers or omissions. The factual circumstances of record, including appellant's signature on the Form EN1032, provide persuasive evidence that he "knowingly" omitted his employment information.<sup>15</sup>

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<sup>13</sup> 20 C.F.R. § 10.529(b); *Harold F. Franklin*, 57 ECAB 287 (2006).

<sup>14</sup> *Id.* at § 10.5(n).

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

The Board, thus, finds that appellant misrepresented his employment activity and, therefore, forfeited his right to all compensation for the period January 18, 2016 through April 18, 2017.

### **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>16</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>17</sup>

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

The Board finds that OWCP properly found that appellant received an overpayment of compensation in the amount of \$38,178.96.

Appellant forfeited his right to compensation for the period January 18, 2016 through April 18, 2017. 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 EN1032, 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>18</sup> OWCP determined that it paid appellant net compensation in the amount of \$38,178.96 during the period in question. The Board, accordingly, finds that an overpayment of compensation in the amount of \$38,178.96 has been established.<sup>19</sup>

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

Section 8129(b) of FECA 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

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<sup>16</sup> 5 U.S.C. § 8106(b).

<sup>17</sup> 20 C.F.R. § 10.529; *see also* *G.G.*, Docket No. 14-1848 (issued August 4, 2016).

<sup>18</sup> *See Louis P. McKenna, Jr.*, 46 ECAB 428 (1994).

<sup>19</sup> *See J.N.*, Docket No. 13-1761 (issued July 1, 2014).

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

“(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.”

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

The Board finds that OWCP properly determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

The record establishes that appellant forfeited his entitlement to compensation benefits because he had unreported employment activity during the period January 18, 2016 through April 18, 2017 and knowingly failed to furnish this material information to OWCP. Appellant acknowledged a certification clause on the Form EN1032, which advised him that he might be subject to civil, administrative, or criminal penalties if he knowingly made a false statement or misrepresentation or concealed a fact to obtain compensation. By signing this form, he is deemed to have acknowledged his duty to report any employment, self-employment, or involvement in a business enterprise. Appellant indicated that he had no employment or earnings from employment during the covered periods and, thus, failed to furnish information, which he knew or should have known to be material to OWCP.<sup>20</sup> The Board, thus, finds that he is at fault in the creation of the overpayment and is, thereby, precluded from waiver of recovery.

### **CONCLUSION**

The Board finds that OWCP properly found that appellant forfeited his entitlement to compensation from January 18, 2016 through April 18, 2017 as he knowingly failed to report earnings from employment. The Board further finds that he received an overpayment of \$38,178.96 as a result of the forfeiture and that he was at fault in the creation of the overpayment and, thus, not entitled to waiver of recovery of the overpayment.

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<sup>20</sup> See G.Z., Docket No. 16-0892 (issued May 19, 2017).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 2 and 1, 2020 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 16, 2021  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

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