U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID A. LACOVEY and U.S. POSTAL SERVICE,
POST OFFICE Washington, D.C.

Docket No. 95-1882; Submitted on the Record;
Issued July 21, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of $4,837.91 during the periods November 4, 1982 though December 24, 1982 and February 5, 1983 though March 7, 1983 due to appellant's dual receipt of compensation wage-loss benefits and leave pay; (2) whether the Office properly found that appellant was at fault in the creation of the overpayment in the amount of $4,837.91 and that the overpayment was, therefore, not subject to waiver; (3) whether the Office properly determined that appellant forfeited his right to compensation for the period December 19, 1988 through April 15, 1991 because he knowingly failed to report employment and/or earnings; and (4) whether the Office properly found that appellant was at fault in the creation of the overpayment resulting from the forfeiture and that, therefore, the overpayment was not subject to waiver.

In the present case, the Office has accepted that appellant, a postal supervisor, fell on September 23, 1977 sustaining a ruptured disc at L4-5. Appellant received payment of temporary total disability benefits since September 23, 1977, except for an intermittent period during 1982 during which he returned to work. On September 24, 1986 the Office issued a preliminary determination that an overpayment of compensation had occurred in the amount of $4,837.91 during the periods November 4, 1982 through December 24, 1982 and February 5, 1983 through March 7, 1983, periods during which appellant was in receipt of both compensation benefits and leave payments. This preliminary determination also found that appellant was at fault in the creation of the overpayment because he should have been aware that he was not entitled to receive leave pay and compensation for wage loss for the same period. Following further development by the Office, on September 23, 1993, a final decision was issued finding that an

overpayment had occurred during the time periods in question in the amount of $4,837.91 and that appellant was at fault in the matter.[1]

The Board finds that the Office properly determined that an overpayment existed in the amount of $4,837.91 because appellant received payment of compensation benefits during the same period of time, in which he had been paid annual leave and sick leave benefits.

The Federal Employees' Compensation Act specifically provides that an employee who uses sick or annual leave may not receive compensation for any period covered by such leave. 5 U.S.C. § 8118 provides as follows: "An employee may use annual or sick leave to his credit at the time the disability begins, but his compensation for disability does not begin and the time periods specified by section 8117 of this title [regarding the three-day waiting period] do not begin to run, until the use of the annual and sick leave ends."

Appellant returned to work on April 14, 1982 on a part-time basis. On November 4, 1982 appellant again fell at work and stopped work. On June 9, 1993 appellant wrote to the Office advising that he had used 466 hours of "leave" from November 4, 1982 through March 1983, with net pay of $4,527.87. Appellant stated that he had not received wage-loss compensation for the last nine weeks, however, if his compensation was brought current, he would "payback" the leave payments received. In another letter to the Office, received by the Office on August 11, 1983, appellant explained that following the November 4, 1982 injury, he had financial obligations and was forced to look to another source to continue meeting his obligations. Appellant stated that he was able to and did receive advanced sick and annual leave "knowing full well that we would have to repay this at a later date, once our compensation payments were current." Appellant stated that on March 24, 1983, he received his first compensation check, following the November 4, 1982 injury, in the amount of $7,407.12. At hearings held on April 29, 1994 and January 25, 1984 appellant did not dispute the fact that the overpayment occurred, or the amount of the overpayment, but did dispute that he was at fault in the creation of the overpayment.

In a memorandum to the record dated August 19, 1983, the Office computation was shown indicating that appellant received payment of compensation benefits for the period

[1] In his decision dated January 17, 1995, the Office hearing representative vacated the Office's September 23, 1993 decision, pertaining to the overpayment of $4,837.91. The hearing representative thereafter made new findings and issued a final overpayment decision. The hearing representative noted that on September 9, 1983 appellant had timely requested a hearing with regard to the Office's August 22, 1983 decision, concerning this overpayment. In remanding the case on May 3, 1984, the hearing representative noted that appellant had sought opportunity for a prerecoupment hearing, which had not been granted. The hearing representative directed the return of all monies collected and issuance of a new preliminary finding with appeal rights. The Office made a new preliminary finding on March 19, 1986 and a final finding on September 24, 1986 that appellant was at fault with regard to the overpayment of $4,837.91 and commencing deductions of $200.00 every 28 days effective September 28, 1986, such decision was canceled by the Office on November 21, 1986 and all monies collected were returned. On September 23, 1993 the Office finalized the overpayment decision and commenced deduction of $200.00 every 28 days. The hearing representative found that such action was clearly inappropriate and a denial due process as appellant had sought a prerecoupment hearing for at least 10 years. The hearing representative vacated the September 23, 1993 decision and directed the Office to cease deduction of $200.00 every 28 days and return all funds collected pursuant to the decision of September 23, 1993.

November 4, 1982 through April 9, 1983 in the amount of $9,558.00, whereas appellant should have received benefits for 54.75 days, in the amount of $4,720.09, resulting in an overpayment of compensation in the amount of $4,837.91. At the hearing held on January 25, 1984, appellant indicated that he never intended to receive a dual benefit, but intended to claim compensation benefits for the purpose of leave repurchase. Appellant stated "it was intended to be paid back as a leave buy back situation with the [employing establishment]." At a hearing held on April 29, 1994, however, appellant testified that when he received the March 24, 1983 compensation check in the amount of $7,407.12, he believed that the appropriate sick and annual leave had already been deducted from this payment.

When appellant stopped work on November 4, 1983, due to his dire financial straits, he chose to receive sick leave pay and annual leave pay from the employing establishment. Appellant thereafter received compensation benefits for the entire period commencing November 4, 1983. Therefore, the Board finds that an overpayment occurred in the amount of $4,837.91 because appellant received dual compensation for periods of time following his November 4, 1992 injury until April 9, 1983.

The Board also finds that appellant was not without fault in creating the overpayment of compensation.

Section 8129(a) of the Act[2] provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments, to which an individual is entitled. The only exception to this requirement is a situation, meets the tests set forth as follows in section 8129(b): "Adjustment of 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 the Act or would be against equity and good conscience."[3] No waiver of overpayment, however, is possible if the claimant is not without fault in helping to create the overpayment.

In determining whether an individual is not without fault, or, alternatively, "with fault," section 10.320 of the Code of Federal Regulations states in relevant part:

"An individual is with fault in the creation of an overpayment who:

> (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
>
> (2) Failed to furnish information which the individual knew or should have known to be material; or

[2] 5 U.S.C. § 8129(a).

[3] 5 U.S.C. § 8129(b).

> (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."[4]

In this case, the Office applied the third standard in finding appellant to be at fault in creating the overpayment.

Appellant has indicated that he knew he was not entitled to receipt of dual benefits. Appellant has also indicated that he in fact knew he was in receipt of dual benefits, but that he intended to buy back his leave with the compensation payments he had received, when all of his compensation benefits were current. When appellant received the lump-sum check for $7,407.12 on March 24, 1983 and his subsequent check for the period through April 8, 1983, he should have returned to the Office these compensation checks, because he had been paid leave for the periods in question. Appellant should have requested leave buy back and asked the Office to pay to the employing establishment the appropriate amount of compensation for the period and he should have requested that the Office reissue him a check in the proper amount. While appellant has subsequently alleged at the April 29, 1994 hearing, that he thought that the sum of money owed for leave buy back had already been subtracted from his compensation checks, this allegation is contrary to the letters of record appellant wrote to the Office in 1983 and to his earlier testimony at the hearing held on July 24, 1984, wherein appellant acknowledged that he knew he was in receipt of dual benefits, but wanted to repay the Office after his compensation benefits were made current.

The Board has long held that statements made contemporaneously with an incident are of greater probative value than conflicting statements regarding the same matter offered some years hence. The Board has noted that "time does not enhance the memory."[5]

The Board, therefore, concludes that the Office properly found that an overpayment existed in the amount of $4,837.91 and that appellant was not without fault in the creation of the overpayment.

The Board also finds that the Office properly determined that appellant forfeited his right to compensation for the period December 19, 1988 through April 15, 1991 because he knowingly failed to report employment and/or earnings.

On October 22, 1993 the Office made a preliminary determination that appellant had failed to report all earnings from employment as required by 5 U.S.C. § 8106(b)(1)(2) for the period December 19, 1988 through April 15, 1991 and, therefore, forfeited compensation received during this period. The Office also found that as appellant had actual earnings for the periods January 1, 1988 through December 18, 1988 and April 16, 1991 through December 31, 1991, he had received an overpayment of compensation during these time periods. By decision

[4] 20 C.F.R. § 10.320(b).

[5] *Vernon R. Stewart*, 5 ECAB 276 (1953).

dated January 17, 1995, an Office hearing representative finalized the October 22, 1993 decision regarding forfeiture of compensation.[6]

Section 8106(b) of the Act[7] states in pertinent part:

> "The Secretary of Labor may require a partially disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times the Secretary specifies.... An employee who--
>
> (1) fails to make an affidavit or report when required; or
>
> (2) 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. Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee or otherwise recovered under section 8129 of this title, unless recovery is waived under that section."

In this case, two Form CA-1032s submitted by appellant constitute the basis for the Office's determination that appellant should forfeit compensation. On March 19, 1990 appellant completed a Form CA-1032 wherein he indicated that during 1989 he had been self-employed with Mount Vernon Realty, earning $10.00 per hour as a salesperson, however, that no sales were made but expenses were incurred. On April 15, 1991 appellant completed another Form CA-1032 wherein he stated that since January 1, 1990 he was self-employed in sales, working approximately 5 hours per week, with annual earnings of $3,829.00.

In a preliminary determination dated October 22, 1993, the Office determined that an overpayment of compensation had occurred in the amount of $68,693.17. The Office also advised appellant that he had forfeited his rights to compensation benefits from December 19, 1988 to April 15, 1991 because he understated and failed to make an accurate affidavit of earnings from employment as required under 5 U.S.C. § 8106(b)(1)(2). Appellant was further advised that a preliminary finding had been made that he was at fault in the matter because he

[6] The Office hearing representative noted that the Office's October 22, 1993 preliminary determination of an overpayment in the amount of $68,693.17 was based in part upon an erroneous determination of appellant's wage-earning capacity during the periods January 1, 1988 through December 18, 1988 and April 16, 1991 through December 31, 1991. The hearing representative noted that the District Office was advised by Hearing and Review "Memorandum to File" dated March 17,1993 to determine appellant's wage-earning capacity utilizing an average of appellant's actual earnings from July 24, 1987 to present, however, the District Office determined on September 8, 1993 that such could not be performed "because appellant's earnings did not fairly and reasonably represent his wage-earning capacity as a Realtor." The Office thereafter only adjusted appellant's compensation based upon an average of his actual earnings for the periods that he reported a net income profit from the sales of real estate. The hearing representative found that the evidence of record did support a finding that appellant had full-time employment in real estate and that one half of commissions received by the corporate officers of Annapolis Realty Development Inc. were earned by appellant. The hearing representative directed the Office to determine appellant's entitlement to compensation effective April 16, 1987, on the basis that appellant's earnings as a realtor fairly and reasonably represented his wage-earning capacity.

[7] 5 U.S.C. § 8106(b).

was aware, or reasonably should have been aware, that he was required to report all earnings from employment while in receipt of compensation for wage loss due to total disability from work; yet he failed to do so. By decision dated October 22, 1993, the Office found that appellant had understated and failed to make a complete affidavit of employment and earnings for the period December 19, 1988 through April 15, 1991 as required under 5 U.S.C. § 8106(b)(1)(2) and that, therefore, compensation received during this time period would be forfeited.[8]

The Board has reviewed the evidence of record and finds that appellant did knowingly fail to report all of his earnings for the period December 19, 1988 through April 15,1991. An investigative memorandum was prepared by the United States Postal Inspection Service regarding appellant, dated June 20, 1991. This investigative memorandum also provides affidavits and other documentation of appellant's employment as a realtor, from April 16, 1987.

The documentation of record substantiates that on April 16, 1987 appellant signed an Independent Contractor's Agreement with Mt. Vernon Realty. Mrs. LaCovey, appellant's wife, signed a similar agreement with Mt. Vernon Realty on June 15, 1987. Appellant and his wife formed a corporation called Annapolis Development Realty in July 1989. Mrs. LaCovey wrote to Mt. Vernon Realty requesting that effective September 1, 1989, all commissions and checks, which the LaCoveys earned through real estate transactions be made payable to Annapolis Development Realty Inc. Articles of Incorporation and tax returns regarding Annapolis Development Realty list Ramona LaCovey as President and Treasurer and appellant as Vice-President and Secretary. On September 15, 1989, appellant was both the listing and sales agent on a settlement agreement for a land purchase of property called Baytown Village in Annapolis, MD. The final sale price on the property was three million and fifty thousand dollars ($3,050,000) and from that appellant received $103,873.00 in sales commission. The sales commission check was made payable to Annapolis Development Realty. At the end of calendar year 1989, Mt. Vernon Realty issued a Form 1099, which listed the amount of earnings made by Annapolis Development Realty. Annapolis Development Realty earned $121,692.11. Mt. Vernon Realty indicated that of the $121,692.11, $103,893.00 was earned by appellant and the difference was sales commissions earned by Mrs. LaCovey. The buyer of the Baytown Village property was interviewed and indicated that appellant had the exclusive right to act as the seller's agent at Baytown Village, Mrs. LaCovey, also a real estate agent, "did not have anything to do with the Baytown Village land purchase deal."

In calendar year 1990, Mt. Vernon Realty issued appellant a Form 1099, which listed his earnings as $3,829.26, the amount appellant reported to the Department of Labor on his form 1032 for that time period. On December 6, 1990, however, appellant was both the listing and selling agent for a closing on property located at 458 College Parkway, Arnold, MD. Appellant earned $23,120.00 as commission on this property. The record reflects that appellant wrote to Mt. Vernon Realty on December 12, 1990, requesting that the commission for the property in Arnold MD should be made payable to his wife. Mt. Vernon Realty complied with appellant's request. A statement was obtained from Ms. Kristen Althaus, a former office secretary at Mt. Vernon Realty in Annapolis, who was interviewed by the postal investigator on May 8, 1991.

[8] The record indicates that appellant received compensation wage-loss benefits in the amount of $53,963.74 from January 14, 1989 through June 1, 1991.

Ms. Althuas stated that she began work at the Mt. Vernon office in Annapolis in August 1989 and appellant and his wife were listed as full-time agents with the firm. Ms. Althaus stated that appellant was in fact an active real estate agent. Ms. Althaus stated that she had been instructed by Mrs. LaCovey that her name, instead of appellant's name, was to be placed on the case information sheet involving all of appellant's transactions. The case information sheet is used by Mt. Vernon Realty to determine sales commission earnings. Mr. Nelson Bennett, a former Manager of the Mt. Vernon Realty Office in Annapolis, from August 1988 through February 1989 was interviewed on May 7, 1991. Mr. Bennett stated that appellant was a full-time real estate agent with the Mt. Vernon Realty office during that time. He also stated that as of early August 1988, appellant was working to develop a subdivision, which he had listed in Deale, Md. As the sub-division was being built, appellant spent a considerable amount of time marketing and/or supervising the sales on this project.

Section 8106(b) of the Act,[9] provides that the Office may require a partially disabled employee to report his or her employment, self-employment and earnings, by affidavit or otherwise, in the manner and at such times as the Office specifies. The Office customarily requests that appellant provide this information through the submission of annual CA-1032 forms. This section of the Act is further defined by regulation[10] which provides:

> "Affidavit or report by employee of employment and earnings."
>
> * * *
>
> "(c) Earnings from employment referred to in this section or elsewhere in this part means gross earnings or wages before any deductions and includes the value of subsistence, quarters, reimbursed expenses, or any other advantages received in kind as part of the wages or remuneration ...."

In analyzing whether appellant had earnings or wages the Board notes that wages have been defined as:

> "Every form of remuneration payable for a given period to an individual for personal services, including salaries, commissions, vacation pay, dismissal wages, bonuses and reasonable value of board, rent, housing, lodging, payment in kind, tips and any other similar advantage received from the individual's employer or directly with respect to work for him."[11]

As appellant did receive monetary remuneration from real estate commissions, appellant did indeed have "earnings" pursuant to 20 C.F.R. § 10.125 and 5 U.S.C. § 8106(c) and was required to report all such earnings to the Office. The record reflects that appellant substantially underreported his earnings during 1989 and 1990.

---

[9] 5 U.S.C. § 8106(b).

[10] 20 C.F.R. § 10.125 (c).

[11] *See Christine P. Burgess*, 43 ECAB 449 (1992).

If an appellant has any earnings during a period covered by a report, which he or she knowingly fails to report, appellant is not entitled to any compensation for any part of the period covered by the report even though he or she may not have had earnings during a portion of that period.[12] Therefore, appellant forfeited his compensation for the periods covered by the CA-1032 forms, December 18, 1988 though April 15, 1991, as he completed the forms on March 19, 1990 and April 15, 1991.

Appellant, however, can only be subjected to the forfeiture provision of 5 U.S.C. § 8106 if he "knowingly" failed to report employment or earnings. It is not enough merely to establish that there was unreported employment or earnings. The Board has recognized that forfeiture is a penalty and, as a penalty provision, it must be narrowly construed.[13] The term "knowingly" is not defined within the Act or its regulations. The Board has adopted the common usage definition of "knowingly" as: "with knowledge; consciously; intelligently; willfully; intentionally."[14]

The Office has the burden of proof in establishing that appellant, either with knowledge, consciously, willfully or intentionally, failed to report employment or earnings. To meet this burden of proof, the Office is required to closely examine appellant's activities and statements in reporting employment or earnings.[15] The Office may meet this burden in several ways. The Office may meet this burden by appellant's own admission to the Office that he failed to report employment or earnings, which he knew he should report. Likewise, the Office may meet this burden by establishing that appellant has pled guilty to violating applicable federal statutes by falsely completing the affidavits in the Form CA-1032. Furthermore, the Office may meet this standard without an admission by appellant, if appellant failed to fully and truthfully complete the Form CA-1032 and the circumstances of the case establish that appellant, upon further inquiry by the Office as to employment activities and earnings, continued to fail to fully and truthfully reveal the full extent of his employment activities and earnings. The Office may also meet this burden if it establishes through the totality of the factual circumstances of record that appellant was employed or self- employed; that the employment activities engaged in or earnings resulting from the employment or self-employment were not *de minimis;* and that appellant's certifications in a Form CA-1032 were false.[16]

In the present case, the evidence reveals that appellant earned substantial commissions from real estate sales in 1989 and 1990. Former employee of Mt. Vernon Realty have provided statements that while appellant earned the commissions in question, paperwork was completed to reflect that appellant's wife, not appellant earned these commissions. The obvious purpose in reporting appellant's earned commissions in his wife's name would be to segregate and hide such commissions from appellant's earnings.

---

[12] *Louis P. McKenna, Jr.*, 46 ECAB 328 (1994).

[13] *Barbara L. Kanter*, 46 ECAB 165 (1994).

[14] *Id.*

[15] *See Anthony Nobile*, 44 ECAB 268 (1992).

[16] *Supra*, note 13.

The Board concludes that all of appellant's real estate sales earnings were required to be reported to the Office. As appellant did report some of his commission earnings, he in fact knew that he was required to report all of his earnings. However, appellant consciously and intentionally chose not to do so. The Board, therefore, concludes that the Office has met its burden of proof to establish that appellant knowingly failed to report employment or earnings.

The Board further finds that the Office properly found that appellant was at fault in the creation of an overpayment and that, therefore, the overpayment was not subject to waiver.

In the present case, appellant was found at fault in the creation of the overpayment under the second standard of 20 C.F.R. § 10.320(b). Under the second standard, appellant knowingly failed to furnish material information to the Office, *i.e.*, that he had additional earnings from real estate. As appellant was at fault in the creation of the overpayment, the overpayment may not be waived.

The hearing representative concluded that while overpayment in the amounts of $63,989.10 and $4,837.91 (totalling $68,827.01) had occurred, that appellant was at fault in the creation of the overpayment and that he was, therefore, not entitled to waiver. However, pursuant to the Debt Collection Act of 1982, the principal amount of the overpayment would be compromised to $36,069.06 at the time the entire overpayment was recovered. The Office hearing representative directed the Office to commence deduction of $100.00 every 28 days from appellant's continuing compensation until the balance of $36,069.06 was absorbed.

The Office's regulations at 20 C.F.R. § 10.321(a) provides: "Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any relevant factors, so as to minimize any resulting hardship upon such individual." In exercising his discretion, the hearing representative properly noted that appellant and his wife currently reported a monthly operating deficit of approximately $170.24 of expenses over income, however, appellant had a currently checking account balance of $2,500.00, a saving account balance of $20.00 and property or real estate, not counting his family home, automobile or household furnishings, with a nonmortgaged value of $123,000.00, therefore, appellant would be limited to repayment at the rate of $100.00 per month. As the hearing representative gave due regard to the relevant factors cited in 20 C.F.R. § 10.321 (a), the Board finds that he did not abuse his discretion in setting the rate of adjustment in this case.

The decision of the Office of Workers' Compensation Programs dated January 17, 1995 is hereby affirmed.

Dated, Washington, D.C.
July 21, 1998

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member