U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT RINGO and U.S. POSTAL SERVICE,
POST OFFICE, University City, MO

Docket No. 99-2281; Submitted on the Record;
Issued December 11, 2001

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant forfeited his right to compensation from March 7, 1988 to August 4, 1992; (2) whether the Office properly determined that appellant was not without fault in the creation of an $80,320.61 overpayment of compensation, which was, therefore, not subject to waiver; and (3) whether the overpayment of compensation was "extinguished" by a February 18, 1995 settlement of a lawsuit brought by the employing establishment against appellant under the Program Fraud Civil Remedies Act (PFCRA).

This case is before the Board for the second time.[1] Previously, the Board affirmed an April 22, 1988 decision of the Office, finding a $3,602.18 overpayment of compensation from October 27, 1987 through January 16, 1988, when appellant's benefits were suspended for obstructing a scheduled medical examination.[2] Appellant's compensation was reinstated effective April 21, 1988. The law and facts of the prior decision are hereby incorporated by reference.

The Office periodically required appellant to submit an affidavit of earnings and employment form, advising that he was obliged to report "immediately" any employment to the Office and that fraudulently concealing or failing to report income could subject him to criminal prosecution. In affidavits dated September 17, 1989, October 9, 1990, September 25, 1991 and August 4, 1992, appellant stated that he had not been employed or self-employed for the previous 15 months. Also, in a January 23, 1989 claim for continuing compensation from

[1] Docket No. 96-387 (issued November 16, 1998).

[2] The Office accepted that on April 26, 1983, appellant, then a 33-year-old letter carrier, sustained low back and right wrist strains, a lumbar sprain, L5-S1 disc herniation; and S1 radiculopathy when lifting a heavily loaded gurney. Following intermittent absences and periods of light-duty work, appellant stopped work on June 6, 1984 and did not return.

March 7, 1988 to January 23, 1989, appellant did not complete the section dealing with employment or self-employment.

The record reveals that appellant owned and operated Bi-State Interiors, doing business as Ringo's Carpets, from December 1987 to May 1992. Appellant incorporated Bi-State Interiors on December 2, 1987. On July 16, 1987 he opened a business checking account and deposited $38,000.00 in checks from December 1988 to January 1990. He opened a second bank account for Bi-State Interiors on November 10, 1989. More than $30,000.00 in customer payments was deposited in this account. Appellant also wrote checks to carpet wholesalers from these accounts and withdrew funds in cash. In a May 26, 1990 credit application, appellant listed himself as president of Bi-State Interiors. After an August 23, 1990 fire at Bi-State Interiors, appellant told fire inspectors that he was the business owner.

Appellant was involved in an April 9, 1991 motor vehicle accident and submitted an automobile insurance claim for lost wages. In a May 29, 1991 insurance questionnaire, Debbie Flagg, operations manager of Bi-State Interiors, stated that appellant worked 40 to 45 hours a week as an estimator, installer and foreman and received an average weekly salary of $1,065.00. In a May 1991 sworn statement to Ann Bozarth, an insurance claims adjuster, appellant stated that he did "estimating, installing carpet … working as a foreman and supervising other people, from 8 to 10 hours per day, approximately 40 hours per week, at $22.50 per hour." Appellant submitted paycheck stubs dated March 29, April 5 and 12, 1991, showing earnings of $900.00 a week. Appellant's 1990 statement of taxable earnings showed $49,929.22 in wages.

On October 1, 1992 appellant entered a plea agreement in U.S. District Court for the Eastern District of Missouri. Appellant admitted that he submitted false Office forms stating that he had not been employed or self-employed to avoid reducing his compensation benefits. Appellant also admitted to negotiating flooring installation contracts, installing carpeting, purchasing goods and merchandise, establishing financing terms with customers and suppliers, holding himself out at various times as the President, Secretary and Director of Bi-State Interiors and earning wages and other income.[3]

Of the charges contained in a 20-count indictment, appellant pled guilty to Count I, mail fraud, in violation of 18 U.S.C. § 1341 and Count XX, making a false statement, in violation of 18 U.S.C. § 1001.[4] In return for appellant's guilty plea, the court dismissed the remaining 18 counts and did not order restitution.

By decision dated December 21, 1992, the Office found that appellant had no loss of wage-earning capacity related to the accepted April 26, 1983 injury and denied his claim. The Office found that appellant owned and operated Ringo's Carpets and Bi-State Interiors from December 2, 1987 onward, demonstrating that he was physically able to lay carpet and perform

[3] The exhibits accompanying an October 5, 1992 postal inspector's report contain statements of witnesses who observed appellant installing carpet during periods for which he claimed and received total disability compensation. Certificates of incorporation and reregistration showed appellant as president and owner of Bi-State Interiors, doing business as Ringo's Carpets.

[4] Both counts are Class D felonies. Appellant was sentenced to five months house arrest and two years probation.

administrative tasks. According to appellant's 1990 W-2 form and 1991 paycheck stubs, he earned $900.00 a week, an amount greater than his date-of-injury postal earnings of $573.60 a week.

By decision dated December 22, 1992, the Office found that appellant had forfeited his right to compensation from March 7, 1988 to August 4, 1992 because he failed to disclose employment and earnings from his carpet business on forms dated January 23 and September 17, 1989, October 9, 1990, September 25, 1991 and August 4, 1992. The Office further found that appellant was not without fault in creating the $80,320.61 overpayment.

In a January 11, 1993 letter, appellant requested an oral hearing, which was held on December 14, 1994. Appellant testified that his wife, Patricia Ringo, actually owned and operated the carpet business, but that he signed business forms and credit applications, or allowed his wife to forge his signature, because his wife's other businesses had gone bankrupt and she could not get credit. Appellant stated that he did no carpeting work, but assisted his wife in operating the business. Appellant asserted that he lied to Ms. Bozarth in the May 1991 auto insurance investigation to obtain insurance benefits.[5]

In a December 1994 civil complaint, the employing establishment accused appellant of four counts of filing a false affidavit of earnings and employment in violation of the PFCRA, 31 U.S.C. § 3802(a)(1), on the following dates: Count 1, September 17, 1989; Count 2, October 9, 1990; Count 3, September 9, 1991; and Count 4 August 4, 1992. Appellant claimed full benefits from June 17, 1988 to August 4, 1992 but was self-employed for the entire period. The employing establishment sought to recover $75,352.31 in compensation, plus a $5,000.00 civil penalty for each of the four false claims, for a total penalty of $20,000.00.

In a January 16, 1995 overpayment recovery questionnaire, appellant stated that he received no income from Bi-State Interiors and that any checks to him were for a loan made to Mrs. Ringo before they were married in 1988.

In a February 18, 1995 settlement agreement between appellant and the employing establishment, the parties stipulated that appellant would not admit to engaging in any type of wrongdoing or violating any statute, regulation, or rule of law. Appellant agreed to pay the employing establishment $5,000.00 on or before March 10, 1995. Paragraph six provided that the settlement applied only to Count 1 of the complaint, pertaining to the September 17, 1989 form.

In a February 28, 1995 order, a postal administrative law judge dismissed Counts 2 to 4 of the PFCRA action with prejudice, in exchange for appellant's payment of $5,000.00 to the employing establishment.

By decision dated August 14, 1995, an Office hearing representative determined that appellant was liable for repayment of the $80,320.61, with interest. The hearing representative

[5] In a December 27, 1994 letter, appellant's attorney contended that the October 1, 1992 stipulation of appellant's involvement in Bi-State interiors was not true and that appellant pled guilty so that his wife would not be charged with "some federal offense."

found that appellant knowingly failed to report his employment activities from November 1987 to May 1992 and that those duties fairly and reasonably represented his wage-earning capacity during that period. The Office directed recovery of the overpayment by collection of $800.00 a month.[6]

By merit decision dated May 20, 1999, the Office denied modification, finding that the PFCRA settlement did not constitute a "global settlement" in full satisfaction of the debt owed the United States, which would preclude the Office from recovering "the full amount of the debt, taking credit for any restitution amounts received."

Appellant filed his appeal with the Board on July 19, 1999, contending that the overpayment was "extinguished" under the doctrine of *res judicata* under the PFCRA settlement and dismissal.[7] In a March 22, 2000 motion, the Director asserted that the PFCRA settlement and dismissal did not extinguish the overpayment and that the settlement was not *res judicata*. The Director argued that paragraph six of the PFCRA settlement agreement "effectively voided that part of the debt that arose out of the [EN]-1032 form appellant signed on September 17, 1989." Thus, the Director noted that the Office would "compromise the amount of debt attributable solely to the September 17, 1989 EN-1032 form."

The Board finds that appellant forfeited his right to compensation from March 7, 1988 to August 4, 1992 because he knowingly failed to report his employment activities.[8]

Section 8106(b) of the Federal Employees' Compensation Act provides that an employee who "fails to make an affidavit or report when required, or knowingly omits or understates any part of his earnings; forfeits his right to compensation with respect to any period for which the affidavit or report was required."[9]

The Board has held that it is not enough merely to establish that there were unreported earnings or employment. Appellant can be subjected to the forfeiture provision of 5 U.S.C. § 8106(b) only if he "knowingly" failed to report employment or earnings.[10] The term "knowingly" is not defined in the Act or its implementing regulations. In common usage, the

[6] The hearing representative found that appellant's contentions that he did not perform any work for or receive any income from Bi-State Interiors were not credible, especially as he admitted felonious fraud in the October 1, 1992 stipulation, lied to an insurance investigator and acquiesced to his wife forging his signature.

[7] On December 14, 1999 the Director filed a motion to dismiss for lack of jurisdiction, asserting that the Office's recovery order was not based on the Act. On January 5, 2000 appellant filed comments opposing the Director's Motion to Dismiss. By Order dated January 31, 2000, the Board held that it had jurisdiction to consider if the $5,000.00 restitution made as part of the settlement agreement would be in "full satisfaction" of the debt owed the United States, such that the Office would be precluded from pursuing collection of the full debt amount. Appellant filed an April 13, 2000 brief, asserting that the employing establishment was the true party at interest and was privy to the settlement agreement and that, therefore, the settlement did extinguish the overpayment.

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

[9] 5 U.S.C. § 8106(b).

[10] *See Barbara L. Kanter*, *supra* note 8.

Board has recognized that the definition of "knowingly" includes such concepts as "with knowledge," "consciously," "intelligently," "willfully," or "intentionally."[11] The Board has held that the Office can meet this burden of proof in several ways, including appellant's own admission to the Office that he failed to report employment or earnings which he knew he should report, or establishing that appellant has pled guilty to violating applicable federal statutes by falsely completing the affidavits in the Form EN-1032.[12]

The evidence of record establishes that appellant "knowingly" concealed his earnings from employment from the Office. On October 1, 1992 appellant pled guilty in U.S. District Court to the felonies of mail fraud, in violation of 18 U.S.C. § 1341 and making a false statement, in violation of 18 U.S.C. § 1001. Appellant admitted filing false EN-1032 forms dated September 17, 1989, October 9, 1990, September 25, 1991 and August 4, 1992 stating that he had not been employed or self-employed. Appellant also admitted to negotiating contracts, making purchases, installing carpet and acting as an officer on behalf of Bi-State Interiors. Also, at the December 14, 1994 hearing, appellant admitted that he "assisted" his wife in operating the business.

The Board finds that appellant's guilty plea and his admission at the Office hearing that he assisted his wife in operating the carpet business, constitute persuasive evidence that appellant knowingly omitted his earnings when he completed the affidavit on Form EN-1032 on September 17, 1989, October 9, 1990, September 25, 1991 and August 4, 1992. The Board, therefore, finds that the provisions of 5 U.S.C. § 8106(b)(2) apply to the periods covered by the affidavit and that appellant has forfeited his compensation from March 7, 1988 to August 14, 1992.

The Board also finds that there was an overpayment of compensation in the amount of $80,320.61 because appellant forfeited his compensation from March 7, 1988 to August 4, 1992.

During that period, appellant was paid compensation for wage loss in the amount of $80,320.61. The period of forfeiture is determined by the date appellant completed the Office form, which requires that information be provided concerning activities during the previous 15 months. If the form is improperly completed resulting in a finding of forfeiture, the Board has found that the period of forfeiture is the entire 15-month period covered by the form in question.[13] Since appellant has forfeited his right to compensation during this period, this sum constitutes an overpayment of compensation.

The Board finds that appellant was not without fault in the creation of the $80,320.61 overpayment, which is not, therefore, subject to waiver.

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[11] *Charles Walker*, 44 ECAB 641 (1993).

[12] *See Barbara L. Kanter*, *supra* note 8.

[13] *William G. Norton, Jr.*, 45 ECAB 630 (1994).

Section 8129(b) of the Act[14] 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 the Office's implementing regulations[15] provides that in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

> "(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
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> "(2) Failed to provide information which he or she knew or should have known to be material; or
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> "(3) Accepted a payment which he or she knew or should have known to be incorrect."

The Board finds that appellant failed to furnish information to the Office, which he knew was material, when he knowingly failed to report his earnings from self-employment in the affidavits he completed on September 17, 1989, October 9, 1990, September 25, 1991 and August 4, 1992. Pursuant to section 8106(b), appellant has forfeited his right to compensation during those periods. This forfeiture has resulted in an overpayment of compensation in the amount of $80,320.61 and appellant is not without fault in the creation of this overpayment. Accordingly, no waiver of collection of the overpayment is possible under section 8129(b) of the Act.

Finally, the Board finds that the overpayment of compensation was not "extinguished" under the doctrine of *res judicata*, by the February 18, 1995 settlement of an action brought by the employing establishment against appellant under the PFCRA.

[14] 5 U.S.C. § 8129(b).

[15] 20 C.F.R. § 10.433.

The common-law doctrine of *res judicata,* also known as claim preclusion, may apply to adjudicatory determinations of administrative bodies that have attained finality.[16] In *Leopoldo Sandoval,*[17] the Board stated that a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. The doctrine of *res judicata* seeks to "avoid multiple suits on identical entitlements or obligations between the same parties, accompanied, as they would be, by the redetermination of identical issues of duty and breach. A later administrative proceeding would be precluded by *res judicata* in the same circumstances as would a second court proceeding."

In this case, the February 18, 1995 settlement agreement was between appellant and the employing establishment. The Office was not involved in the settlement in any way and, therefore, cannot be considered a party or privy to that action. Thus, there is no identity of parties. Further, the February 18, 1995 settlement agreement was entered into pursuant to the PFCRA and not the Act. Thus, there is no identity of duty or breach of duty and *res judicata* cannot apply.

On appeal, appellant alleged that the $5,000.00 restitution paid to the employing establishment under the February 18, 1995 settlement agreement should be in lieu of further overpayment recovery. The Office's procedure manual discusses the interplay between court ordered restitution in fraud cases and the Office's administrative debt collection process, stating:

> "19. Court Ordered Restitution in Fraud cases. When a debtor has been convicted in court of filing a false claim which resulted in an overpayment/debt due the government, the court often orders the defendant to make restitution to the United States….
>
> "a. If the court order states that the restitution amount will be in full satisfaction of the debt owed the United States (a 'Global Settlement'), the Court Order takes precedence over the Office's administrative debt collection process.…
>
> "b. If the Court Order does not represent a 'Global Settlement,' the [Office] should continue to pursue collection of the full amount of the debt, taking credit for any restitution amounts received."[18]

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[16] 2 Am. Jur. 2d *Administrative Law* § 381 (1994). Collateral estoppel may generally be applied to an administrative proceeding if: (1) there is identity of parties and of the issues; (2) the parties had an adequate opportunity to litigate the issues in the administrative proceeding; (3) the issues to be estopped were actually litigated and determined in the administrative proceeding; and (4) findings on the issues to be estopped were necessary to the administrative decision.

[17] 42 ECAB 282 (1990).

[18] Federal (FECA) Procedure Manual, Part 6 -- *Debt Management*, Debt Liquidation, Chapter 6.300 (September 1994).

Based on appellant's October 1, 1992 guilty plea in U.S. District Court, the employing establishment filed the 1994 civil complaint against appellant seeking to recover $75,352.31 in compensation, plus a $5,000.00 civil penalty for each of the four false claims, for a total of $95,352.51. The February 18, 1995 settlement agreement provided for $5,000.00 restitution to the employing establishment.

The Board finds that the February 18, 1995 settlement agreement was not meant to constitute a global settlement. There is no specific language in the agreement stating that the $5,000.00 payment was in full satisfaction of the entire $95,352.51 debt due the United States. For this reason, the Office was not precluded from continuing to pursue full collection of appellant's debt in the amount of $80,320.61, taking credit for any restitution amounts received.[19]

Accordingly, the Office may recover from appellant in full the overpayment of $80,320.61, with credit to be given to the $5,000.00 restitution paid.[20]

The May 20, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
December 11, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

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[19] *See Martin James Sullivan*, 50 ECAB 158 (1998); *John E. Martin, Jr.*, 49 ECAB 298 (1998); *Vittorio Pittelli*, 49 ECAB 181 (1997); *Clarence D. Ross*, 42 ECAB 556 (1991). The Board notes that in the May 20, 1999 decision, the Office found that appellant should receive credit against the overpaid amount for "any restitution amounts received." Also, in a March 22, 2000 motion, the Director stated that the Office would "compromise the amount of debt attributable solely to the September 17, 1989 EN-1032 form."

[20] The Board does not have jurisdiction to review the Office's recovery determination as appellant is no longer receiving compensation. *Robert S. Luciano*, 47 ECAB 793 (1996).