

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM BARNES and U.S. POSTAL SERVICE,
POST OFFICE, Santa Barbara, CA

*Docket No. 99-851; Submitted on the Record;
Issued December 13, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant forfeited his compensation for the period March 1, 1995 through May 30, 1997; and (2) whether the Office properly found that appellant was at fault in the creation of a \$34,000.00 overpayment of compensation and, therefore, the overpayment was not subject to waiver.

On September 9, 1991 appellant, then a 32-year-old mail carrier, sustained an employment-related lumbar strain, disc protrusion at L4-5 and L5-S1 and contusion/sprain to the right hip when he was struck by a mailbox that fell off a wall. He was placed on the periodic rolls. On May 29, 1996 and May 30, 1997 appellant completed CA-1032 forms in which he indicated that he had not been employed or self-employed during each of the previous 15 months.

In an investigative report dated November 26, 1997, the employing establishment informed the Office that appellant had been working for and earning wages from a carpet cleaning company and provided supportive documentation. On November 13, 1997 appellant plead guilty in U.S. District Court to making false statements to obtain benefits under the Federal Employees' Compensation Act.

By decision dated November 21, 1997, the Office terminated appellant's compensation, effective November 13, 1997, on the grounds that he was no longer entitled to compensation because he had been convicted of an offense relating to fraud in the application for or the receipt of compensation benefits under the Act. In a November 26, 1997 letter, the Office informed him that it had made a preliminary determination that he had received a \$50,680.17 overpayment of compensation for the period March 1, 1995 through May 30, 1997. The Office stated that it had found appellant at fault in the creation of the overpayment because he had falsified information contained on the CA-1032 forms which he submitted during the period in question and informed him of his rights regarding the overpayment of compensation, instructing him to submit the

financial information requested on an accompanying overpayment questionnaire. On December 10, 1997 appellant requested a hearing that was held on September 15, 1998. In a decision dated November 23 and finalized November 24, 1998, an Office hearing representative found that appellant forfeited compensation for the period March 1, 1995 through May 30, 1997. She found appellant at fault in creating the overpayment and reduced the amount of the overpayment to \$34,000.00, the restitution amount set by the U.S. District Court.¹ The instant appeal follows.

The Board finds that the Office properly determined that appellant forfeited his compensation for the period through March 1, 1995 to May 30, 1997 because he knowingly failed to report earnings from employment during this period.

Section 8106(b) of the Act provides 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.”²

An employee can only be subjected to the forfeiture provision of section 8106 of the Act if he or she “knowingly” omitted or understated earnings. It is not enough to merely establish that there were unreported earnings. The Office procedure manual recognizes that forfeiture is a penalty,³ and, as a penalty provision, it must be narrowly construed.⁴ The term “knowingly” is not defined within the Act or its regulations. In common usage, “knowingly” is defined as:

¹ The hearing representative further noted that, should appellant fail to make full restitution during the probation period established by the court, the Office would pursue collection of the full overpayment.

² While section 8106(b)(2) refers only to partially disabled employees, the Board has held that the test for determining partial disability is whether, for the period under consideration, the employee was in fact either totally disabled or merely partially disabled and not whether he received compensation for that period for total or partial loss of wage-earning capacity. *Ronald H. Ripple*, 24 ECAB 254, 260 (1973). The Board explained that a totally disabled employee normally would not have any employment earnings and, therefore, a statutory provision about such earnings would be meaningless. *Id.*

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.10(c) (July 1993).

⁴ See *Christine P. Burgess*, 43 ECAB 449, 458 (1992).

“[w]ith knowledge; consciously; intelligently; willfully; intentionally.”⁵ In this case, appellant plead guilty to making false statements on the CA-1032 forms at issue in this case. By pleading guilty, he acknowledged that he knowingly falsified these forms by not reporting his earnings during the periods at issue. The Board, therefore, finds that he knowingly forfeited his right to compensation for the period March 1, 1995 through May 30, 1997.⁶

The Board further finds that the Office properly determined that appellant was at fault in creating the overpayment of compensation for the period March 1, 1995 through May 30, 1997 and, therefore, the overpayment for that period was not subject to waiver.

Section 8129 of the Act provides that an overpayment of compensation shall be recovered by the Office unless “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.”⁷ Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.⁸

In determining whether an individual is with fault, section 10.320(b) of the Office’s regulations provides 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
- (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”⁹

With respect to whether an individual is without fault, section 10.320(c) of the Office’s regulations provides in relevant part:

“Whether an individual is ‘without fault’ depends on all the circumstances surrounding the overpayment in the particular case. The Office will consider the individual’s understanding of any reporting requirements, the agreement to report events affecting payments, knowledge of the occurrence of events that should

⁵ *Black’s Law Dictionary* (5th ed. 1979); see *Anthony A. Nobile*, 44 ECAB 268, 271-73 (1992).

⁶ *Gregg Manston*, 48 ECAB 226 (1996).

⁷ 5 U.S.C. § 8129.

⁸ See *Linda E. Padilla*, 45 ECAB 768 (1994).

⁹ 20 C.F.R. § 10.320(b) (1998).

have been reported, efforts to comply with reporting requirements, opportunities to comply with reporting requirements, understanding of the obligation to return payments which were not due and ability to comply with any reporting requirements (*e.g.*, age, comprehension, memory, physical and mental condition).”¹⁰

The record in this case indicates that during the period in question appellant received wage-loss compensation totaling \$50,680.17. Based on the forfeiture of his right to compensation for the period March 1, 1995 through May 30, 1997, appellant received an overpayment of compensation for this period. The Board finds that he was at fault in the creation of the overpayment under both the first and second standards described in section 10.320(b) above, as the record establishes that he had employment and earnings from his employment during this period and knowingly stated he was not employed or self-employed. He thus failed to furnish material information to the Office.

The decision of the Office of Workers’ Compensation Programs dated November 23 and finalized November 24, 1998 is hereby affirmed.

Dated, Washington, DC
December 13, 2000

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

¹⁰ 20 C.F.R. § 10.320(c) (1998).