

FACTUAL HISTORY

OWCP accepted that on May 10, 1985 appellant, then a 35-year-old mechanic, sustained a torn ligament of his left knee. It was later accepted that he sustained a single episode of major depression as a consequence of the May 10, 1985 injury.²

Between 1993 and 2007, appellant completed EN1032 forms.³ The EN1032 forms instructed appellant to report all employment for which he received a salary, wages, income, sales commissions, piecework, or payment of any kind. Appellant was directed to report all self-employment or involvement in business enterprises, including (but not limited to) farming, sales work, operating a business, and providing services in exchange for money, goods, or other services. The kinds of services that he was required to report included such activities as carpentry, mechanical work, painting, contracting, child care, keeping books and records, odd jobs, and managing and overseeing a business of any kind, including a family business. Such activities had to be reported even if they were part time or intermittent.

The EN1032 forms also instructed appellant to 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 another. If appellant performed any duties in a business enterprise for which he was not paid, he had to show as the rate of pay what it would have cost the employing establishment or organization to hire someone to perform the work or duties he did, even if the work was for him or a family member or relative. The forms contained certification clauses which informed appellant of the consequences of not accurately reporting his employment activities, such as being subjected to criminal penalties and losing the right to receive workers' compensation benefits.

In a September 17, 2010 report, agents from the Office of Inspector General (OIG) for the employing establishment found that appellant performed work between 1993 and 2005 for a "handyman" or home improvement company which he owned with his wife. The report contains an affidavit which appellant signed in the presence of an OIG agent on August 17, 2009. Appellant stated that in approximately 1993 he and his wife opened a business known as B&J Remodeling and Handyman and that around 1995 the name was changed to A&A Remodeling and Handymen. The business employed two employees and sometimes four additional employees on a short-term basis. Appellant indicated that the business did small remodeling jobs, including repairing sinks, replacing water heaters, and fixing holes in walls. He noted that it was brought to his attention that he completed several EN1032 forms incorrectly and stated, "I feel that I should have filled out the forms differently and acknowledged that my wife and I owned the business and listed my involvement in same." Due to his depression, appellant asked his physician if it would be all right for him to spend some time down at the job sites and, at some point prior to 1993, his physician stated that it was all right for him to visit a job site as long as he did not overtax his body. He asserted that he did not think that he was improperly completing the EN1032 forms when he completed them. Appellant stated that from the start of the business in 1993 until he started to have throat problems due to cancer in late 2000 he was

² On June 16, 2002 appellant began to receive compensation on the periodic rolls.

³ The EN1032 forms were dated August 2, 1993, July 31, 1994, July 19, 1995, July 16, 1997, July 1, 1999, August 5, 2000, June 5, 2001, June 26, 2002, July 7, 2003, June 4, 2004, June 9, 2005, and July 13, 2007.

only at the job sites an average of 20 minutes to four hours a week or less and not always every week. He went to purchase supplies with the employees mainly to get out of the house and also so that he could write checks for the company due to fact that his wife had full-time employment and was unavailable. Appellant stated that he never went to the store by himself because his physical conditions limited what he was able to do.

Appellant further stated in his August 17, 2009 affidavit that, while at the job sites, he gave the employees moral support and instructions and, if he was capable, he did minor tasks such as screwing, sawing, and measuring. He asserted that he did not ever do anything to overstress his condition. Appellant stated that in April 2001 he had surgery for throat cancer to remove cancerous tumors. He indicated that between surgery, radiation, and physical therapy this treatment lasted approximately one year and he did not remember being involved with the business during this time. Appellant also had two hip replacements in 2003 and 2004 and did not recall participating in any business activities. He also noted, "I may have, but I do not remember due to the pain medication I was taking at the time." Appellant stated that from approximately 2001 Michael Schoenecker was more involved with the daily running of the business, but that his wife was helping with the paperwork. He noted that he did go to the bank to make deposits and cashed payroll checks on a weekly basis when he was able. The time appellant spent doing this took about 20 minutes per week or less if his wife was unable to make the bank run. The business was closed by his wife in November 2005 because his wife was working a full-time job and the business was losing money.

The OIG report also contains a summary of an interview that an OIG agent conducted on August 17, 2009 with appellant and his wife. Appellant stated that his function in the home improvement business was looking at the renovation jobs and then purchasing materials to perform the jobs. He noted that he and his wife shared in returning telephone calls to clients. Appellant's wife indicated that appellant went to the store and purchased the building materials because he had a background in carpentry work and he knew what to purchase for the specific job.⁴ He stated that he did not consider his actions as work and therefore he did not report the activity on the EN1032 forms. Appellant noted that he wrote most of the checks and reviewed the jobs to determine what materials to purchase. The bulk of the work the business did was with Ronald Muck and Mr. Schoenecker. Appellant stated that he really did not perform bids on the work as both Mr. Muck and Mr. Schoenecker were knowledgeable about the jobs and told him how much they would pay. He stated that he was most active in the business in approximately 1993 or 1994 but continued to provide time to the business until approximately November 2000. Appellant admitted to occasionally "swinging" a hammer and "driving" a screw, giving advice to his crew, and purchasing materials, but most of his time with the business was spent just checking on the job and visiting so he could get out of his house. He stated that it was impossible to explain what he did because his time was so sporadic. Some days appellant might spend 20 minutes at the job site and other days he might spend three to four hours and then other days he would not do anything with the business. He discussed his medical problems beginning in late 2000 and stated that he did some work for the business from November 2000 until his wife closed it in approximately November 2005. Appellant could not

⁴ Appellant's wife referenced a letter received from OWCP concerning a \$1,800.00 check that was reported to the Internal Revenue Service under appellant's name and social security number. She stated that the check was a bonus check from the employing establishment, Western Resources, and that their accountant made a mistake and thought appellant had earned the money and therefore needed to pay social security benefits for the amount earned.

remember how much he did but stated his activity was minimal because he was either having medical problems and or he was in Florida for approximately four months every year.

The OIG investigative report also contains a summary of an agent's interview with Mr. Schoenecker on December 11, 2008. The summary reflected that Mr. Schoenecker stated that he first met appellant in 1999 or 2000 and started having his company perform work around that time on some houses that he was flipping. Mr. Schoenecker thought that appellant owned A&A Remodeling and Handymen and that he had two or three employees. He stated that most of the carpentry work was done by appellant's employees with appellant supervising. Mr. Schoenecker noticed that appellant walked with a limp and assumed that this condition prevented him from performing heavy work. He indicated that he used A&A Remodeling and Handymen for about 20 houses until he received a call from appellant in November 2005 advising him that A&A Remodeling and Handymen was ending as a business. In a summary of a December 20, 2001 interview, Mr. Muck stated that he first used A&A Remodeling and Handymen in 1999 and that the company had performed about 40 jobs since that time. The jobs ranged from fixing leaky faucets to carrying out extensive renovations. Mr. Muck stated that appellant usually was present at the job sites supervising his employees. He indicated that appellant was the person who supplied the bids for the various jobs.

In a March 24, 2011 decision, OWCP determined that appellant forfeited all wage-loss compensation received for the period March 1, 1992 to June 15, 2006 due to his failure to report his self-employment and earnings on various EN1032 forms covering this period. It found that he worked as a general contractor in a home improvement business which he owned with his wife, but that he failed to report his employment activities and earnings on these forms.

In an April 20, 2011 letter, OWCP advised appellant of its preliminary determination that he had received a \$429,961.37 overpayment of compensation for the period March 1, 1992 to June 15, 2006. It indicated that the overpayment was based on the forfeiture of compensation received for the period March 1, 1992 to June 15, 2006 and it made a preliminary determination that he was at fault in the creation of the overpayment.

Appellant requested a prerecoument hearing with an OWCP hearing representative. In an August 4, 2011 decision, the hearing representative "set aside" OWCP's April 20, 2011 preliminary determination and remanded the case to OWCP to further consider whether the evidence showed that his compensation should be forfeited for the entire period he received compensation between March 1, 1992 and June 15, 2006.⁵ Although she suggested that she was only addressing the overpayment of compensation matter, her decision directly impacted the underlying basis for the preliminary overpayment determination, *i.e.*, the forfeiture of compensation. Therefore, the hearing representative effectively set aside OWCP's March 24, 2011 forfeiture decision and remanded the case to OWCP for further development of the forfeiture and overpayment matters.⁶

⁵ OWCP's April 20, 2011 letter did not constitute a final decision on the overpayment matter, but rather was a preliminary overpayment determination.

⁶ In her August 4, 2011 decision, the hearing representative directed that, once all necessary development was completed, a new decision should be issued.

In a December 2, 2011 letter, OWCP advised appellant of its preliminary determination that he had received a \$382,003.58 overpayment of compensation for the periods March 1, 1992 to July 19, 1995, May 16, 1996 to July 16, 1997, and May 1, 1998 to June 15, 2006.⁷ Appellant was asked to complete and return a financial information questionnaire (Form OWCP-20).

Appellant completed a Form OWCP-20 on January 12, 2012 which listed figures for monthly income, monthly expenses, and assets and submitted documents further detailing his monthly expenses. He later submitted billing statements and other documents regarding his monthly expenses.

Appellant requested a preresoupment hearing with the hearing representative. At the April 20, 2012 hearing, he testified that his contribution to the home improvement business was minimal. Appellant asserted that an unspecified person at OWCP told him that he could own a business as long as he did not “work it.” He indicated that between 1993 and 2000 he spent about 20 minutes to four hours during some weeks performing such tasks as writing checks for supplies. When asked whether he recalled doing anything for the business from 2001 onwards, appellant responded, “No, I don’t recall.” He testified that in 2001 Mr. Schoenecker “took over” the daily running of the business.

In a June 12, 2012 decision, the hearing representative found that appellant received a \$382,003.56 overpayment of compensation and that he was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. She indicated that he was not considering the matter of forfeiture stating, “In the present case, the issue is not whether the claimant has forfeited compensation, but whether he is at fault in the matter of the overpayment.”

In a November 12, 2012 brief, counsel argued that appellant’s involvement in the home improvement business between 1993 and 2005 was so minimal that there was no requirement that this activity be reported on the EN1032 forms. He asserted that appellant’s activities were significantly curtailed by throat surgery in 2001 and hip surgeries in 2003 and 2004.

In a May 7, 2013 decision,⁸ the Board set aside OWCP’s June 12, 2012 decision and remanded the case to OWCP for further development to include issuance of a decision which contained detailed facts and findings regarding the matters of forfeiture and overpayment of compensation.

In a September 6, 2013 decision, OWCP determined that appellant forfeited wage-loss compensation for the periods March 1, 1992 to July 19, 1995, May 16, 1996 to July 16, 1997, and May 1, 1998 to June 15, 2006 due to his failure to report his self-employment and earnings on various EN1032 forms covering this period. It found that he worked as a general contractor

⁷ OWCP stated, “This overpayment decision is a recalculation of the overpayment decision dated April 20, 2011. That decision was remanded by the hearing representative to exclude the period in which [OWCP] could not locate the [EN]1032 [forms] for the period 1996 and 1998.” In her August 4, 2011 decision, the hearing representative did not, in fact, direct OWCP to exclude any given period from the overpayment, but rather effectively directed OWCP to further develop the forfeiture and overpayment matters and issue an appropriate decision.

⁸ Docket No. 12-1793 (issued May 7, 2013).

in a home improvement business which he owned with his wife, but that he failed to report his employment activities and earnings on these forms.

In a September 6, 2013 letter, OWCP advised appellant of its preliminary determination that he had received a \$382,003.58 overpayment of compensation. It indicated that the overpayment was based on the forfeiture of compensation received for the periods March 1, 1992 to July 19, 1995, May 16, 1996 to July 16, 1997, and May 1, 1998 to June 15, 2006 and it made a preliminary determination that he was at fault in creating the overpayment.

Appellant completed a Form OWCP-20 on December 13, 2013 in which he listed figures for monthly income, monthly expenses, and assets and submitted documents further detailing his monthly expenses. He also submitted billing statements and other documents regarding his monthly expenses.

During an April 9, 2014 telephone hearing, appellant testified that he did occasionally go to the job sites and that he helped out a little if he could and talked to the workers. He indicated that he did not report his activities on the EN1032 forms because he did not do any notable work or receive a paycheck.

In a June 4, 2014 decision, the hearing representative affirmed OWCP's forfeiture determination for the periods March 1, 1992 to July 19, 1995, May 16, 1996 to July 16, 1997, and May 1, 1998 to June 15, 2006. She also found that appellant received a \$382,003.58 overpayment of compensation and that he was at fault in creating the overpayment because he did not provide information that he should have known to be material. The overpayment was to be recovered by deducting \$750.00 from appellant's continuing compensation every 28 days.⁹

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of FECA¹⁰ 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

⁹ The hearing representative indicated that appellant had monthly income of \$4,704.75 and monthly expenses of \$3,601.76.

¹⁰ 5 U.S.C. § 8106(b).

the employee or otherwise recovered under section 8129 of this title, unless recovery is waived under that section.”¹¹

An employee can only be subjected to the forfeiture provision of 5 U.S.C. § 8106(b) if he “knowingly” omitted or understated earnings. It is not enough to merely establish that there were unreported earnings. OWCP procedure manual recognizes that forfeiture is a penalty,¹² and, as a penalty provision, it must be narrowly construed.¹³ In OWCP’s regulations, “knowingly” is defined as: “with knowledge, consciously, willfully, or intentionally.”¹⁴ To meet this burden, OWCP is required to examine closely appellant’s activities and statements. It may meet this burden without an admission by an employee if the circumstances of the case establish that he failed to reveal fully and truthfully the full extent of his employment activities and earnings.¹⁵

Section 10.5(g) of OWCP’s regulations defines earnings from employment or self-employment as follows:

“(1) Gross earnings or wages before any deduction 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. 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.”¹⁶

ANALYSIS -- ISSUE 1

OWCP found that appellant forfeited his right to compensation for the periods March 1, 1992 to July 19, 1995, May 16, 1996 to July 16, 1997, and May 1, 1998 to June 15, 2006. The Board finds the record establishes that appellant knowingly omitted employment activities and earnings on several EN1032 forms which cover the periods May 1, 1993 to July 19, 1995, April 16, 1996 to July 16, 1997, and April 1, 1998 to June 9, 2005. After reviewing the periods for which appellant knowingly omitted employment activity and earnings within the meaning of section 8106(b)(2) of FECA, the Board must find OWCP has not established that appellant’s

¹¹ 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).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Forfeiture*, Chapter 2.1402.8 (May 2012).

¹³ *Christine P. Burgess*, 43 ECAB 449 (1992).

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

¹⁵ *Terry A. Geer*, 51 ECAB 168 (1999).

¹⁶ 20 C.F.R. § 10.5(g); see *Monroe E. Hartzog*, 40 ECAB 329 (1988).

compensation should be forfeited for the periods March 1, 1992 to April 30, 1993 and June 10, 2005 to June 15, 2006, while upholding the remainder of OWCP's amount.

In the 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.¹⁷ The explicit language of the EN1032 forms clearly advised appellant that the nature of his work in a home improvement 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.

On July 31, 1994, July 19, 1995, July 16, 1997, July 1, 1999, August 5, 2000, June 5, 2001, June 26, 2002, July 7, 2003, June 4, 2004, and June 9, 2005, appellant completed EN1032 forms but indicated that he did not have any employment, self-employment, or earnings for the 15-month periods covered by each of these forms. Before OWCP and on appeal, counsel argued that appellant's involvement in his home improvement business was so minimal that there was no requirement that this activity be reported on the EN1032 forms he completed.¹⁸

The Board finds, however, that there is substantial evidence of record showing that appellant had employment activity which he knew should have been reported on the above-noted EN1032 forms. The evidence of record shows that at some point in 1993 appellant began performing work for a home improvement company that he owned with his wife.¹⁹ In a September 17, 2010 report, agents from the OIG for the employing establishment found that appellant performed work between 1993 and 2005 for his home improvement company. In an August 17, 2009 affidavit, appellant acknowledged that for most weeks beginning in 1993 he worked at job sites for an average of about 20 minutes to four hours a week. He noted that he went to purchase supplies with the employees and wrote checks for the supplies. While at the job sites, appellant gave the employees instructions and performed tasks such as driving screws, sawing, and measuring. He noted that his activities decreased after he started having additional health problems in late 2000, but stated that he still went to the bank to make deposits and cashed payroll checks on a weekly basis when he was able. In an August 17, 2009 interview an OIG agent conducted with appellant and his wife, appellant stated that his function in the home improvement business was looking at the renovation jobs and then purchasing materials to perform the jobs. He noted that he and his wife shared in returning telephone calls to clients.

¹⁷ 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. The kinds of services that he was required to report included such activities as carpentry, mechanical work, painting, contracting, keeping books and records, odd jobs, and managing and overseeing a business of any kind, including a family business.

¹⁸ Counsel argued that appellant only spent about 20 minutes to four hours a week at worksites to provide encouragement to other workers. He asserted that appellant's activities were significantly curtailed by throat surgery in 2001 and hip surgeries in 2003 and 2004.

¹⁹ Appellant stated that he contacted OWCP in 1993 and was told that it was okay for him and his wife to own a business, but he did not provide any specifics of this ostensible conversation or adequately explain why he felt that he did not have to report his employment activities on the EN1032 forms.

Appellant's wife confirmed that appellant went to the store and purchased the building materials. Appellant admitted to occasionally "swinging" a hammer and "driving" a screw, giving advice to his crew, and purchasing materials. He discussed his medical problems beginning in late 2000 and stated that he still did some work for the business from late 2000 until his wife closed it in approximately November 2005. Appellant's work activities between 1993 and 2005 were also documented by statements from clients and he provided similar accounts of his activities in his testimony before several hearing representatives.²⁰

Before OWCP and on appeal, counsel argued that appellant was not required to report activities related to the home improvement business he and his wife owned because he did not receive wages and his work was sporadic. However, the EN1032 forms required reporting such employment activities even if no wages were earned, the activities were part time or sporadic, or they were performed for a family business. The EN1032 forms provided that, if appellant performed any duties in a business enterprise for which he was not paid, he had to show as the rate of pay what it would have cost the employing establishment or organization to hire someone to perform the work or duties he did, even if the work was for him, a family member or a relative. Counsel argued that the type of activities performed by appellant would not require hiring another person, but the Board notes that appellant's activities, which included supervision and selecting and buying supplies, are the types of activities that would require hiring another person.

The Board notes that the first Form EN1032 on which appellant knowingly failed to report employment activities was dated July 31, 1994 and, therefore, covered the prior 15-month period May 1, 1993 to July 31, 1994. OWCP appears to have based its finding of forfeiture for the period March 1, 1992 to April 30, 1993 on Form EN1032 appellant completed on August 2, 1993. However, although the evidence shows that appellant's home improvement business began by the end of 1993, there is no clear evidence that it had started by August 2, 1993.²¹ Therefore, OWCP has not justified its finding of forfeiture for the period March 1, 1992 to April 30, 1993. In addition, it did not justify its forfeiture finding for the period June 10, 2005 to June 15, 2006 because it did not show both that a Form EN1032 completed by appellant covered this period and that he knowingly omitted employment activities or earnings on such a form. Appellant did complete Form EN1032 on July 13, 2007 which covered the period April 13, 2006 to July 13, 2007. His home improvement business was closed by the end of November 2005 and therefore he did not fail to report employment activity on this form.

²⁰ In a December 11, 2008 interview, Mr. Schoenecker indicated that appellant first performed work for him in 1999 or 2000 and that the work continued through late 2005 when the business closed. Most of the carpentry work was done by appellant's employees with appellant supervising. It appears that Mr. Schoenecker started as a client of A&A Remodeling and Handymen but later assumed a participatory role in the business itself. In a December 20, 2001 interview, Mr. Muck stated that he first used A&A Remodeling and Handymen in 1999 and that the company had performed about 40 jobs since that time. He noted that appellant usually was present at the job sites supervising his employees. Mr. Muck indicated that appellant was the person who supplied the bids for the various jobs.

²¹ Moreover, it appears that OWCP mistakenly believed that the August 2, 1993 Form EN1032 covered the period March 1, 1992 to August 2, 1993. It actually only covered the 15-month period prior to August 2, 1993, *i.e.*, May 2, 1992 to August 2, 1993.

The Board concludes that appellant's knowing omissions of employment activities on the EN1032 forms he completed on July 31, 1994, July 19, 1995, July 16, 1997, July 1, 1999, August 5, 2000, June 5, 2001, June 26, 2002, July 7, 2003, June 4, 2004, and June 9, 2005 justify a finding of forfeiture for the periods May 1, 1993 to July 19, 1995, April 16, 1996 to July 16, 1997, and April 1, 1998 to June 9, 2005.²² Accordingly, OWCP's forfeiture finding is modified to reflect these periods of forfeiture.

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.²³ 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."²⁴

ANALYSIS -- ISSUE 2

As noted above, the Board has modified OWCP's forfeiture finding to determine that appellant has forfeited compensation for the periods May 1, 1993 to July 19, 1995, April 16, 1996 to July 16, 1997, and April 1, 1998 to June 9, 2005. As OWCP's finding of a \$382,003.58 overpayment of compensation was based on a forfeiture finding that has now been modified, the case must be remanded to OWCP to recalculate the overpayment based on appellant's forfeiture of compensation for these periods.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(a) of FECA 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.²⁵ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment 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

²² See generally *Lewis George*, 45 ECAB 144 (1993). OWCP only found forfeiture for the period May 16, 1996 to July 16, 1997 but the Form EN1032 completed by appellant on July 16, 1997 actually covered the 15-month period prior to its completion, *i.e.*, April 16, 1996 to July 16, 1997. It also found a period of forfeiture beginning May 1, 1998 but the Form EN1032 completed by appellant on July 1, 1999 actually covered the 15-month period prior to its completion, *i.e.*, a period beginning April 1, 1998.

²³ 5 U.S.C. § 8102(a).

²⁴ *Id.* at § 8129(a).

²⁵ *Id.*

subchapter or would be against equity and good conscience.”²⁶ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.²⁷

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.433(a) of Title 20 of the Code of Federal Regulations provide 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 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....”²⁸

Section 10.433(c) of OWCP’s regulations provide:

“Whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.”²⁹

ANALYSIS -- ISSUE 3

The Board finds that appellant was at fault in the creation of the overpayment which has occurred due to his forfeiture of compensation for the periods May 1, 1993 to July 19, 1995, April 16, 1996 to July 16, 1997, and April 1, 1998 to June 9, 2005. As discussed above, appellant had employment during the periods covered by the relevant EN1032 forms in that he was employed in a home improvement business he owned with his wife, but he did not report such employment activities on the forms submitted to OWCP. The explicit language of the EN1032 forms clearly show that he knew or should have known that the nature of his work in a home improvement business would require him to report such employment activities on the forms.³⁰ Appellant’s signing of strongly-worded certification clauses on the EN1032 forms further shows that he was aware of the materiality of his failure to report his employment. Because appellant was at fault in the creation of the overpayment, OWCP properly determined that he was not entitled to waiver of recovery of the overpayment.³¹ As noted above, the precise

²⁶ *Id.* at § 8129(b).

²⁷ *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

²⁸ 20 C.F.R. § 10.433(a).

²⁹ *Id.* at § 10.433(c).

³⁰ *See supra* note 29.

³¹ *See supra* note 28.

amount of the overpayment will be calculated by OWCP on remand of the case.³² After carrying out this evaluation, OWCP will issue an appropriate decision regarding this overpayment matter.

CONCLUSION

The Board finds that appellant forfeited his right to compensation for the limited periods May 1, 1993 to July 19, 1995, April 16, 1996 to July 16, 1997, and April 1, 1998 to June 9, 2005 and that he was at fault in the creation of the overpayment created by this forfeiture, thereby precluding waiver of recovery of the overpayment. The case is remanded to OWCP for calculation of the exact dollar amount of the overpayment and issuance of an appropriate decision on the remainder of the overpayment matter.

ORDER

IT IS HEREBY ORDERED THAT the June 4, 2014 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: July 7, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

³² It is noted that it is premature for the Board to consider whether OWCP properly required recovery of the overpayment by deducting \$750.00 from appellant's continuing compensation payments every 28 days.