

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LESTER DANIELS, JR. and U.S. POSTAL SERVICE,  
POST OFFICE, Macon, Ga.

*Docket No. 96-395; Submitted on the Record;  
Issued March 26, 1998*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issues are: (1) whether appellant forfeited his right to compensation benefits for the period January 27, 1989 to April 2, 1990 when he knowingly failed to report employment activities and earnings; and (2) whether the Office of Workers' Compensation Programs properly found that appellant was at fault in the creation of an overpayment in the amount of \$25,843.18, thus precluding waiver of recovery of the overpayment.

On November 16, 1988 appellant, then a 38-year-old city letter carrier, sustained a herniated nucleus pulposus in the performance of duty. Appellant received continuation of pay from November 17 to December 31, 1988. He was placed on the periodic compensation rolls to receive compensation benefits for temporary total disability effective October 22, 1989. Appellant returned to limited duty on June 15, 1990.

In CA-8 forms dated October 27, 1989, appellant claimed compensation benefits for lost wages for the period August 12 through November 3, 1989. Appellant wrote "N/A [Not Applicable]" in answer to the form question as to whether he had worked for anyone during this period. Under "Commission and Self-Employment," appellant wrote "N/A [Not Applicable]" and left blank the spaces for type of activity performed, whether he earned any income and whether the income was from commission or self-employment. He placed his signature under the warning that any person who knowingly made any false statement, misrepresentation, concealment of fact or any act of fraud to obtain compensation under the Federal Employees' Compensation Act would be subject to criminal prosecution.

In a letter dated November 8, 1989, the Office informed appellant that, to avoid an overpayment, he must notify the Office immediately if he returned to work. In that event, the letter advised appellant that he was required to submit information regarding the name of his employer, the date of his return to work, the rate of pay, and the type and hours of work.

On April 2, 1990 appellant completed and signed an affidavit on a Form CA-1032 covering the previous 15 months. In signing the form, appellant certified that he was neither employed nor self-employed in any work during the covered periods. The form advised him that he must report all employment, including the value of housing, meals, equipment and reimbursed expenses in a business; that he must report self-employment (such as sales, service, operating a store or business) and report any such enterprise in which he worked “even if it operated at a loss.” The form specifically warned appellant that anyone “who fraudulently conceals or fails to report income or other information which would have an effect on benefits or who makes a false statement or misrepresentation of a material fact” in claiming compensation benefits under the Act might be subject to criminal prosecution.

In an investigative memorandum dated November 30, 1994, an employing establishment inspector stated that an investigation revealed that appellant had been working as a real estate salesman during the time that he was receiving compensation benefits for total disability and that he had concealed his work activities and income on a Form CA-1032 dated April 2, 1990 and on a Form CA-8 dated October 27, 1989. The inspector noted that appellant had also actively solicited an employee of the employing establishment as a potential real estate customer and that in September 1989 appellant had sold this employee a home and earned a sales commission of \$1,568.00.

The case record contains a photocopy of a salesperson license issued to appellant by the Georgia Real Estate Commission which noted that he was originally licensed on February 10, 1988, was assigned to a broker, Smith Realty & Auction, on December 17, 1988 and that the license was valid until January 31, 1992.

A Certification of Licensure dated September 29, 1994 from the Georgia Real Estate Commission indicated that appellant had held an active salesperson license since February 10, 1988. An attachment indicated that appellant was a salesperson for Smith Realty & Auction from December 17, 1988 to February 7, 1991.

In a letter dated September 12, 1989 to Mr. Tommy Caruthers, appellant noted Mr. Caruthers’ interest in purchasing a house and stated that he “would like to offer my professional services to you.” Appellant attached a business card indicating that he was a “real estate consultant” working for “Norris & Williams Realty, Inc.”

In a memorandum of a November 3, 1994 interview with an employing establishment inspector, Mr. Caruthers stated that after he received the letter from appellant, appellant telephoned him and offered to assist him in finding a home to purchase. He stated that appellant drove him to five or six houses and that he eventually purchased one of the houses which appellant had shown him. Mr. Caruthers noted that appellant had a special key which he used to gain entrance to the houses. He stated that Cyndi Haskins of SSK Realty finalized the sale of the house.

A document dated November 15, 1989 and signed by Ms. Haskins indicates a house sold to a Mr. Adamson with appellant listed as the “salesperson.”

In a memorandum of a November 3, 1994 interview with an employing establishment inspector, Ms. Haskins stated that the settlement for the sale of the house to Mr. Adamson was held November 15, 1989 and that appellant was present, along with his broker. She stated that appellant's broker received 60 percent of the commission for the sale of the Adamson house because appellant was the selling agent. Ms. Haskins stated that appellant also referred Mr. Caruthers to her and, after he purchased a house, she attempted to pay appellant a 20 percent referral fee but was unable to do so as appellant appeared not to be a member of the Multiple Listing Service. She stated that appellant contacted her numerous times regarding his payment and wanted money paid to him directly "bypassing" his broker and that she finally gave him a "gift check" so that he would not "harass" her any longer.

In a memorandum of an October 13, 1994 interview with an employing establishment inspector, Mr. Sherrill Smith, a real estate broker, stated that appellant was a real estate agent associated with his company, Smith Realty & Auction Company, from December 17, 1988 through February 7, 1991. He stated that following the settlement for the sale of the Adamson house, his company received a check for \$3,136.00 and that appellant received \$1,568.00 as a sales commission for the sale of this house.

In an affidavit dated December 28, 1994, Mr. Adamson stated that appellant referred him to Ms. Haskins but that Ms. Haskins showed him the house and processed the entire transaction through to closing.

In a memorandum of an interview with employing establishment inspectors dated November 22, 1994, appellant stated that he had held a real estate license for five to seven years and sold real estate part time. He stated that during the period for which he received compensation benefits for lost wages at the employing establishment, he made telephone calls from his home relating to real estate sales and that he referred individuals to his broker. Appellant denied that he solicited customers for real estate business but stated that he received a "referral fee" from his real estate broker for any property sold.

In an affidavit dated November 20, 1994, Ms. Haskins stated that she wrote the sales contract for the sale of the house to Mr. and Mrs. Adamson and followed through to closing on the house and that appellant was compensated for the sale only because she chose to compensate him. She stated that appellant did no work in regard to the sale of the house.

By letter dated January 23, 1995, the Office advised appellant that it had made a preliminary determination that an overpayment had been created in his case in the amount of \$24,666.56 and that the overpayment occurred because appellant had failed to report earnings that he had received as a real estate agent during the period February 2, 1989 through April 2, 1990. The Office advised appellant that he had been found to be at fault in the creation of the overpayment of compensation benefits.

By decision dated January 25, 1995, the Office found that appellant had forfeited his compensation benefits for the period February 2, 1989 through April 2, 1990 for the reason that he knowingly failed to report employment and earnings for that period while in receipt of compensation benefits for total disability.

In a letter dated February 6, 1995, a real estate broker, Gene Kernaghan, stated that Ms. Haskins wrote a contract for the sale of a house to Norman and Helen Adamson and that appellant had referred the Adamsons to Ms. Haskins. He stated that Ms. Haskins, a new agent, showed the property and wrote the contract so as to give the “selling agent” commission to the real estate company who was “holding” appellant’s real estate license. Mr. Kernaghan stated that it was his understanding that appellant was not actively engaged in real estate sales, was not a member of the local Multiple Listing Service and did not have a lockbox key to gain access to listed properties. He stated that a more experienced agent than Ms. Haskins would not have given the “selling agent” portion of the commission to a company that was merely a referral agent in the transaction.

On February 19, 1995 appellant requested a hearing on the issue of fault and waiver of overpayment of compensation benefits.

In worksheets dated July 1995, the Office recalculated the amount of forfeited compensation benefits for the period January 27, 1989 through April 2, 1990 and determined that the correct amount of forfeiture was \$25,843.18. The Office noted that the date of forfeiture commencement was January 27, 1989 because appellant had used leave for the period January 9 through 26, 1989.

On August 21, 1995 a hearing was held before an Office hearing representative at which time appellant testified.

Subsequent to the hearing, the Office received a copy of a May 31, 1996 decision of the Merit Systems Protection Board in which the administrative judge noted that appellant testified that “he did not consider merely referring someone to a real estate agent, albeit a referral which would entitle him to a fee, to constitute self-employment.” The judge also noted that appellant testified that he did not consider a referral fee to constitute a commission. The judge stated that he did not find the claimant’s testimony “worthy of belief.” He stated, “I do not believe that anyone with appellant’s knowledge, background and experience would believe that a percentage of a real estate commission is not considered a commission.” The judge noted that the CA-1032 forms asked a claimant to list all earnings from self-employment during the preceding 15 months and that this period included the time when appellant both earned and was paid the referral fee for the sale of the Adamson home. He found that appellant’s failure to list the \$1,500.00 referral fee on the Form CA-1032 constituted falsification, noting that appellant “had to have known he was in the real estate business and his referral fee clearly constituted income from self-employment.”

By decision dated October 10, 1995, the Office hearing representative affirmed the Office’s January 25, 1995 decision but modified the amount of overpayment to reflect that the correct amount was \$25,843.18.

The Board finds that appellant forfeited his right to compensation for the period January 27, 1989 through April 2, 1990 because he knowingly failed to report earnings from his real estate work.

Section 8106(b) of the Act<sup>1</sup> provides that a partially disabled employee must report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times specified by the Secretary of Labor. The penalty for failing to make an affidavit or report when required or knowingly omitting or understating any part of an employee's earnings is forfeiture of his or her right to compensation during the period for which the affidavit or report was required.<sup>2</sup>

The Office, however, to establish that appellant should forfeit the compensation he received during the period, must establish that he knowingly failed to report employment or earnings. As forfeiture is a penalty, it is not enough merely to establish that there were unreported earnings from employment. The inquiry is whether appellant knowingly failed to report his employment activities and earnings. The term "knowingly" is not defined within the Act or its implementing regulations. In common usage, the Board has recognized that the definition of "knowingly" includes such concepts as "with knowledge," "consciously," "intelligently," "willfully," or "intentionally."<sup>3</sup>

In this case, appellant completed a Form CA-8 dated October 27, 1989 in which he claimed compensation benefits for lost wages for his federal job for August 12 through November 3, 1989. Appellant wrote "N/A [Not Applicable]" in answer to the form question as to whether he had worked for anyone during this period. Under "Commission and Self-Employment," appellant wrote "N/A" and left blank the spaces for type of activity performed, whether he earned any income and whether the income was from commission or self-employment. He placed his signature under the warning that any person who knowingly made any false statement, misrepresentation, concealment of fact or any act of fraud to obtain compensation under the Act would be subject to criminal prosecution. On April 2, 1990 appellant signed an affidavit on a Form CA-1032 covering the previous 15 months. In signing the form, appellant certified that he was neither employed nor self-employed in any work during the covered periods. The form advised him that he must report all employment, including self-employment. The form specifically warned appellant that anyone "who fraudulently conceals or fails to report income or other information which would have an effect on benefits or who makes a false statement or misrepresentation of a material fact" in claiming compensation benefits under the Act might be subject to criminal prosecution.

In an investigative memorandum dated November 30, 1994, an employing establishment inspector stated that an investigation revealed that appellant had been working as a real estate salesman during the time that he was receiving compensation benefits for total disability and that he had concealed his work activities and income on a Form CA-1032 dated April 2, 1990 and a Form CA-8 dated October 27, 1989. The inspector noted that appellant had also actively solicited an employee of the employing establishment as a potential real estate customer and that in September 1989 appellant had sold this employee a home and earned a sales commission of \$1,568.00. The investigative report contains copies of supporting documentation including a

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<sup>1</sup> 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8106(b).

<sup>2</sup> *Charles Walker*, 44 ECAB 641, 644 (1993).

<sup>3</sup> *Christine P. Burgess*, 43 ECAB 449 (1992).

copy of appellant's history as a real estate agent according to the records of a Georgia Real Estate Commission which showed that appellant had been acting as a real estate agent since December 17, 1989. The report also included a copy of appellant's real estate license, a memorandum of an interview with his real estate broker and other witness statements establishing that appellant was acting as a real estate agent during the period that he was receiving compensation benefits for total disability. The case record contains a photocopy of a salesperson license issued to appellant by the Georgia Real Estate Commission which noted that he was originally licensed on February 10, 1988, was assigned to a broker, Smith Realty & Auction, on December 17, 1988 and that the license was valid until January 31, 1992.

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A document dated November 15, 1989 and signed by Ms. Haskins indicates a house sold to a Mr. Adamson with appellant listed as the "salesperson."

In a memorandum of an October 13, 1994 interview with an employing establishment inspector, Mr. Smith, a real estate broker, stated that appellant was a real estate agent associated with his company, Smith Realty & Auction Company, from December 17, 1988 through February 7, 1991. He stated that following the settlement for the sale of the Adamson house, his company received a check for \$3,136.00 and that appellant received \$1,568.00 as a sales commission for the sale of this house.

In a memorandum of an interview with employing establishment inspectors dated November 22, 1994, appellant stated that he had held a real estate license for five to seven years and sold real estate part time. He stated that during the period for which he received compensation benefits for lost wages at the employing establishment, he made telephone calls from his home relating to real estate sales and that he referred individuals to his broker. Appellant denied that he solicited customers for real estate business but stated that he received a "referral fee" from his real estate broker for any property sold.

Considering all of the circumstances and the evidence of record, the Board concludes that appellant "knowingly" omitted his real estate earnings under section 8106(b)(2) of the Act by failing to report his real estate sales activities and earnings on the Form CA-1032 for the period January 27, 1989 through April 2, 1990 and in the CA-8 forms he completed. Accordingly, the Board finds that the Office properly determined that appellant forfeited his right to compensation for the period January 27, 1989 through April 2, 1990.

The Board further finds that appellant was at fault in the creation of the overpayment.

Section 8129(b) of the Act provides, "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 the Act or would be against equity and

good conscience.”<sup>4</sup> Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault, section 10.32(b) of the Office’s 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 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.”<sup>5</sup>

In this case, the Office applied the second standard in determining that appellant was at fault in creating the overpayment.

The evidence of record demonstrates that appellant indicated on the Form CA-1032 that he did not receive any income from commissions or self-employment. However, the evidence of record shows that appellant failed to provide information which he knew or should have known to be material. He did not report his real estate commission which was a material fact specifically noted on the Form CA-1032. He knew or should have known from his reading of the Form CA-1032 that his real estate commission was a material fact that should be reported. Appellant, therefore, was at fault in the creation of the overpayment and is not entitled to waiver of the overpayment.

The decisions of the Office of Workers’ Compensation Programs dated October 10 and January 25, 1995 are affirmed.

Dated, Washington, D.C.  
March 26, 1998

David S. Gerson  
Member

Willie T.C. Thomas

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<sup>4</sup> 5 U.S.C. § 8129(b).

<sup>5</sup> 20 C.F.R. § 10.32(b).

Alternate Member

Michael E. Groom  
Alternate Member