

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS E. WILLIS and DEPARTMENT OF THE NAVY,
FACILITIES ENGINEERING COMMAND, NAVAL AIR STATION,
Pensacola, Fla.

*Docket No. 96-564; Submitted on the Record;
Issued March 23, 1998*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant forfeited his right to compensation for the period February 15, 1990 to December 5, 1991; and (2) whether the Office properly determined that appellant was at fault in the creation of an overpayment in the amount of \$41,856.97.

The Board has duly reviewed the case on appeal and finds that appellant forfeited his right to compensation for the period February 15, 1990 to December 5, 1991.

Appellant filed a claim for low back pain on April 16, 1986. The Office accepted appellant's claim for lumbar strain on July 21, 1986 and entered appellant on the periodic rolls. By decision dated November 9, 1994, the Office found that appellant had forfeited his compensation received from February 15, 1990 through December 5, 1991 as he had failed to report employment. On November 18, 1994 the Office noted that appellant plead guilty to defrauding the Federal Employees' Compensation Act programs and found that he was not entitled to further benefits under the Act. The Office notified appellant of a pending finding of an overpayment in the amount of \$41,856.97 on November 18, 1994.¹ Appellant requested an oral hearing on December 15, 1994 and by decision dated September 21, 1995, the hearing representative affirmed the Office's finding of forfeiture and overpayment.

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

¹ As the Office issued these decisions more than one year prior to the date of appellant's appeal to the Board on November 22, 1995, the Board lacks jurisdiction to review the decision on appeal; *see* 20 C.F.R. § 501.3(d)(2).

manner and at the time 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.”² (Emphasis added.)

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 to merely establish that there were unreported earnings. The Board has recognized that forfeiture is a penalty, and, as a penalty provision, it must be narrowly construed.³ The term “knowingly” is not defined within the Act or its regulations. The Board has adopted the common usage definition of “knowingly:” “with knowledge; consciously; intelligently; willfully; intentionally.”⁴

On January 28, February 28 and December 5, 1991 appellant completed Office Forms CA-1032 on which he answered “no” to the question whether he was employed or self-employed during the 15 months covered by the forms. The forms advised appellant: “If you performed work in furtherance of a relative or spouse’s business, you must show as ‘rate of pay’ what it would have cost the employer or organization to hire someone to perform the work you performed.”

On December 2, 1993 appellant entered a plea of guilty to counts 2, 4, 6, 8, 10 and 12 of an indictment, by which he was charged as “knowingly and willfully” making a statement that he was neither employed nor self-employed which he knew to be false as he was employed or self-employed at T & O Welding, during the period of time covered by reports dated January 28, February 28 and December 5, 1991.

The Board finds that appellant’s guilty pleas constitute persuasive evidence that appellant knowingly omitted his earnings when he completed Office Forms CA-1032 on January 28, February 28 and December 5, 1991.⁵ The provisions of section 8106(b)(2) apply to the period covered by these forms and appellant has therefore forfeited his right to compensation for the period February 15, 1990 through December 5, 1991.

On appeal, appellant, through his attorney, alleged that the Office is required to look beyond appellant’s guilty plea to determine whether he had actual knowledge of the reporting requirement. The Board has noted on several occasions that a plea agreement is sufficient to

² 5 U.S.C. § 8106(b).

³ *Anthony A. Nobile*, 44 ECAB 268 (1992).

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

⁵ *James D. O’Neal*, 48 ECAB ____ (Docket No. 94-2581, issued December 24, 1996).

establish that a claimant knowingly falsified his Form CA-1032.⁶ Appellant also alleged that neither the statute nor the applicable regulations require; “If you performed work in furtherance of a relative or spouse’s business, you must show as ‘rate of pay’ what it would have cost the employer or organization to hire someone to perform the work you performed.” The Board has held that test of what constitutes reportable earnings is not whether appellant received a salary but what it would have cost to have someone else do the work.⁷ Therefore, this provision is in accordance with Board interpretation of the Act and regulations.⁸

The Board further finds that appellant received an overpayment of compensation in the amount of \$41,856.97.

Appellant received compensation in the amount of \$41,856.97 during the period February 15, 1990 through December 5, 1991. Under section 8106(b)(2) of the Act, appellant is not entitled to any compensation for any portion of the period covered by a false report even though he may not have had earnings during a portion of that period. Since appellant forfeited his right to compensation during the period February 15, 1990 through December 5, 1991, the amount of compensation paid to him during this period constitutes an overpayment of compensation.

Section 8129(a) of the Act⁹ provides that, where an overpayment of compensation has been made “because of an error or fact of law,” adjustment shall be made by decreasing later payments to which an individual is entitled. 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 the Act or would be against equity and good conscience.”¹⁰

Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

⁶ *Id.*; *Gregg Manston*, 48 ECAB ____ (Docket No. 2969, issued December 6, 1996); *Louis P. McKenna, Jr.*, 46 ECAB 328 (1994).

⁷ *Anthony A. Nobile*, *supra* note 3 at 271.

⁸ The Board notes that the investigative memorandum establishes that appellant performed welding and clean-up in his son’s business.

⁹ 5 U.S.C. §§ 8101-8193, 8129(a).

¹⁰ 5 U.S.C. § 8129(b).

In determining whether an individual is with fault, section 10.320(b) of the Office's regulations¹¹ 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.”

In this case, the Office applied the first and second standards in determining that appellant was at fault in creating the overpayment. Appellant's omission of earnings and his subsequent guilty plea is sufficient to establish that he knew or should have known that he made an incorrect statement as to a material fact and failed to furnish information which he should have known was material. As appellant was not without fault in the creation of the overpayment, recovery of the overpayment may not be waived.

With respect to recovery of an overpayment, the Board's jurisdiction is limited to reviewing those cases whether the Office seeks recovery from continuing compensation benefits under the Act. Where appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the Office's recovery of an overpayment under the Debt Collection Act.¹²

¹¹ 20 C.F.R. § 10.320(b).

¹² See *Lewis George*, 45 ECAB 144, 154 (1993).

The decision of the Office of Workers' Compensation Programs dated September 21, 1995 is hereby affirmed.

Dated, Washington, D.C.
March 23, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member