

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RUFUS L. TARTAGLIA and U.S. POSTAL SERVICE,
POST OFFICE, Utica, N.Y.

*Docket No. 97-594; Submitted on the Record;
Issued January 27, 1999*

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant forfeited his right to compensation in the amount of \$63,988.70, covering the period October 10, 1987 through January 4, 1993, because he knowingly failed to report employment and/or earnings; and (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment resulting from the forfeiture and that, therefore, the overpayment was not subject to waiver.

On June 26, 1974 appellant, a 39-year-old letter carrier, alleged that he sustained an injury to his right knee when a basket he was loading onto an elevator struck his right knee. Appellant filed a Form CA-1 claim for traumatic injury on the date of injury, which was accepted by the Office for a fracture of the right medial epicondyle; the Office also authorized the payment of medical benefits and compensation for intermittent periods of both temporary total and partial disability commencing June 26, 1974. The Office subsequently expanded the accepted claim to include tendinitis of the right shoulder.

By letter dated March 5, 1975, the Office notified appellant that he had been placed on the periodic rolls, effective February 6, 1975. The Office advised him of his responsibility for seeking work suitable to his disabled condition once he was no longer totally disabled, that he was responsible for informing the Office at once if he returned to work. The Office also advised him that, in the event he obtained employment outside of the employing establishment, he was required to submit information to the Office regarding where he was employed, the date he commenced employment, the type of work he was performing and the weekly pay rate his new job entailed. Appellant subsequently completed several CA-1032 forms dated September 29, 1988, November 2, 1989 and November 20, 1991 which included the period from October 10, 1987 through November 20, 1991. Appellant indicated on each of these forms that he was not employed in a capacity other than part time at his employing establishment and that he was not self-employed during the periods in question.

In an October 26, 1992 investigative memorandum to the Office, the employing establishment advised the Office that appellant had been employed with AJ's Floor Covering Outlet (AJ's) installing carpet since 1987 at a weekly wage of approximately \$100.00. The employing establishment attached exhibits to support its contentions and advised the Office that a copy of the investigation report had been provided to the United States Attorney's Office for the Northern District of New York.

By letter dated December 1, 1992, the Office requested that appellant clarify the nature and extent of his work for AJ's.

In response to the Office's request, appellant informed the Office by letter dated December 9, 1992 that he did not have any ownership interest in AJ's, although he had assisted the owners of the business by watching the desk, measuring jobs in the field and occasionally attending and assisting in carpet installation, and that he had been reimbursed for the use of his car.

Appellant submitted a Form CA-1032 dated January 4, 1993, in which he indicated he was neither employed nor self-employed during the previous 15 months. Appellant indicated, however, that he had received monthly "remuneration" of \$100.00 through June 26, 1992.

In a February 27, 1995 investigative memorandum, the employing establishment advised the Office that on February 9, 1995, appellant had been convicted by a jury in U.S. District Court on all five counts issued against him; two counts of making a false statement; two counts of mail fraud; and one count of theft of government money. The memorandum stated that these charges had been made against appellant because he was working at outside employment (AJ's) while receiving compensation under the Federal Employees Compensation Act for partial disability, and indicated that appellant did not truthfully respond to questions on Forms CA-1032 covering a period from 1987 through 1992. The employing establishment attached a copy of the trial minutes. The employing establishment also submitted a copy of the indictment in this case, in which appellant had been specifically charged with two counts of making a false statement on the Form CA-1032 he had signed on November 20, 1991 and during an interview on June 26, 1992 in violation of section 18 U.S.C. § 1001 one count of theft of government money in violation of 18 U.S.C. § 641 and two counts of mail fraud with regard to the CA-1032 forms he had signed on November 2, 1989 and November 20, 1991 in violations of 18 U.S.C. § 1341.

By decision dated February 25, 1995, the Office found that a jury had convicted appellant on February 9, 1995 of violating 18 U.S.C. §§ 641, 1001 and 1341 in connection with his compensation claim and determined that he had forfeited his right to any further compensation benefits for his accepted June 26, 1974 employment injury, effective February 19, 1995, pursuant to 5 U.S.C. § 8148.

On August 10, 1995 the Office issued a preliminary determination that an overpayment had occurred in the amount of \$63,988.00 for the period October 10, 1987 through January 4, 1993 pursuant to section 8106 of the Act,¹ due to appellant's failure to report his employment

¹ 5 U.S.C. § 8106.

activities and outside earnings to the Office. The Office found that appellant was not without fault in the creation of the overpayment, stating that appellant's February 9, 1995 conviction was based on his failure to fully report his employment with AJ's during the period from November 21, 1987 through June 26, 1992. The Office stated that appellant had completed forms CA-1032 from October 10, 1987 through January 4, 1993, during which his compensation had totaled \$63,988.00, and found that he knowingly omitted his earnings during this period. The Office determined that appellant was with fault in creation of the overpayment.

On September 19, 1996 the Office received a copy of the May 16, 1995 judgment order in appellant's criminal case. The order stated that appellant had been found guilty on all five counts of the indictment and had been sentenced to five years of probation, including six months of home detention and had been ordered to make restitution to the Department of Labor in the amount of \$112,247.67 in monthly installments of at least \$100.00.

In a decision dated October 1, 1996, the Office finalized its preliminary determination that appellant was at fault in creating the \$63,988.00 overpayment of compensation, which had resulted when he knowingly omitted his earnings for the period October 10, 1987 through January 4, 1993 on his CA-1032 yearly reporting forms. The Office further found that, as appellant knowingly did not report his earnings for this period, all benefits paid were forfeited, and, as appellant was at fault in creating the overpayment of compensation, recovery of the overpayment could not be waived. The Office also ordered appellant to repay the overpayment, and any applicable interest, by making payments in the amount of \$100.00 per month, until such time as repayment of the overpayment was completed.

The Board finds that the Office properly determined that appellant forfeited his right to compensation in the amount of \$63,988.70, covering the period October 10, 1987 through January 4, 1993, because he knowingly failed to report employment and/or earnings.

Section 8106(b) of the Act provides in pertinent part:

“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

The record establishes that when appellant was placed on the periodic roll effective February 6, 1975 for temporary total disability compensation, the Office advised him on March 5, 1975 of the conditions under which he would receive such payments. The Office specifically notified appellant that if he obtained employment, including self-employment, he

² 5 U.S.C. § 8106(b). 20 C.F.R. § 10.125(c) concerning affidavits or reports by employees of employment and earnings, provides in part, “Earnings from employment referred to in this section or elsewhere in this part means gross earnings or wages before any deductions and includes the value of subsistence, quarters, reimbursed expenses, or any other advantages received in kind as a part of wages or remuneration.”

was to submit certain information to the Office “at once” and that his willful failure to comply with the conditions of his receipt of compensation could result in the termination or forfeiture of benefits and liability for any overpayment. Appellant was therefore notified, as early as February 6, 1975, that he was required to report his earnings from employment. However, by CA-1032 forms completed September 29, 1988, November 2, 1989, November 20, 1991 and January 4, 1993, appellant certified that he was neither employed nor had self-employment during the 15-month periods covered by the forms. Moreover, he affirmatively represented to the Office that he was unemployed and remained unable to earn wages.

The employing establishment’s investigation, revealed, however, that appellant was actively engaged in employment with AJ’s, ordering stock, receiving deliveries, performing carpet and linoleum installation, representing himself as a “Project Manager” and “product manager” and that he had even signed contracts on behalf of AJ’s. The employing establishment’s memorandum indicated appellant garnered significant earnings from such work activities which exceeded the \$100.00 periodic monthly “remuneration” to which he had admitted. Therefore, appellant did have “earnings” pursuant to 5 U.S.C. § 8106(b) and the implementing regulations and was required to report these earnings to the Office. Appellant, however, can only be subjected to the forfeiture provision of section 8106(b) if he “knowingly” failed to report employment or earnings.³

As forfeiture is a penalty, it is not enough merely to establish that there were unreported earnings from employment. The relevant inquiry on this appeal, therefore, 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.”⁴

The factual evidence developed in this case indicates that appellant was convicted of violating 18 U.S.C. § 1001 with respect to the Form CA-1032 he signed November 20, 1991. That statute provides:

“Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$ 10,000[.00] or imprisoned not more than five years, or both.”

Thus, with regard to the Form CA-1032 appellant signed on November 20, 1991, the evidence of record establishes that appellant “knowingly and willingly” falsified, concealed or covered up a material fact and made false, fictitious and fraudulent statements and

³ *Charles Walker*, 44 ECAB 641 (1993); *Christine P. Burgess*, 43 ECAB 449 (1992).

⁴ *Id.*; see also *Black’s Law Dictionary* (6th ed. 1990).

representations. The Board therefore finds that appellant's conviction by a jury in a court of law is sufficient to meet the Office's burden of proof to establish appellant knowingly failed to report employment during the period of employment covered by the November 20, 1991 Form CA-1032.

With regard to the other periods of employment for which appellant is responsible; *i.e.*, those covered by the Forms CA-1032 he signed on September 29, 1988, November 2, 1989 and January 4, 1993, appellant also failed to report his weekly rate of pay or his annual earnings from his employment with AJ's, despite the fact that the employing establishment's investigation revealed that appellant was actively engaged in employment during the periods in question. Therefore, appellant did have "earnings" pursuant to 5 U.S.C. § 8106(b) and the implementing regulations and was required to report these earnings to the Office. The Board therefore finds that, regarding the CA-1032 forms he signed on September 29, 1988, November 2, 1989 and January 4, 1993, appellant consciously and knowingly omitted relevant information concerning his employment activities with AJ'S, which generated substantial earnings for the employee.⁵ Appellant responded "no" to the questions concerning employment or self-employment and answered "yes" to the question inquiring whether he was unemployed for all periods during the previous 15 months. Even though appellant may have performed work or had earnings on an irregular basis during this period, he knew that he was required to report any earnings produced from his work activities.⁶ Nevertheless, in response to the Office's inquiries, appellant signed the CA-1032 forms certifying that all statements provided in response to the questions on the form were true, complete and correct to the best of his knowledge and belief.

Accordingly, the Board finds that the clear weight of the evidence in this case is sufficient to establish that appellant knowingly failed to report earnings for the period October 10, 1987 to January 4, 1993 in violation of 5 U.S.C. § 8106(b) and the Board therefore affirms the Office's determination that appellant forfeited the total amount of compensation he received for that period.⁷

The Board finds that the Office properly determined that appellant was at fault in the creation of the overpayment resulting from the forfeiture and that, therefore, the overpayment 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

⁵ The Board notes that the U.S. District Court ordered appellant to make restitution to the Department of Labor in the amount of \$112,247.67.

⁶ See *Charles Walker*, *supra* note 2; see *Mamie L. Morgan*, 41 ECAB 661 (1990).

⁷ *Wayne P. Hammer*, 44 ECAB 286 (1992).

against equity and good conscience.”⁸ Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.⁹

Section 10.320 of the implementing federal regulations provides the following:

“In determining whether an individual is with fault, the Office will consider all pertinent circumstances including age, intelligence, education and physical and mental condition. 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.”¹⁰

The Board finds that appellant was at fault in the matter of the overpayment under the second criteria above, that is, on the grounds that appellant failed to report or to accurately report total earnings on each of the CA-1032 forms in question. The evidence in this case establishes that appellant failed to report certain earnings information. The evidence also establishes that appellant should have known that this information was material. On March 5, 1975 the Office specifically advised appellant that his compensation would be based on the difference between his pay rate as determined for compensation purposes and his wage-earning capacity. In addition, the Office advised him that he was required to report on his employment, as well as on his efforts to find employment, whenever requested, and that he must notify the Office at once if he obtained employment, giving the name and address of his employer, the type of work, and his weekly rate of pay. Notwithstanding this notification, appellant failed to report certain earnings information on each of the CA-1032 forms in question. For this reason, the Board finds that appellant was with fault in the matter of overpayment of compensation under the second criterion above, thereby precluding waiver of recovery.

⁸ 5 U.S.C. § 8129(a)-(b).

⁹ *Wayne P. Hammer*, 44 ECAB 286 (1992).

¹⁰ 20 C.F.R. § 10.320.

The decision of the Office of Workers' Compensation Programs dated October 1, 1996 is hereby affirmed.

Dated, Washington, D.C.
January 27, 1999

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member