

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONALD A. WILKINS and DEPARTMENT OF THE NAVY,
MARINE CORPS BASE, Camp Lejeune, NC

*Docket No. 97-1575; Submitted on the Record;
Issued September 21, 1999*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether appellant forfeited his right to compensation benefits for the period November 14, 1988 to December 9, 1994 on the grounds that he knowingly failed to report earnings from self-employment; and (2) whether the Office of Workers' Compensation Programs properly found that appellant was not without fault in the creation of the overpayment of compensation benefits and therefore the overpayment of compensation was not subject to waiver.

On November 9, 1987 appellant, then a 51-year-old parts and tool attendant, sustained a lumbosacral strain and aggravation of degenerative disc disease in the performance of duty when his chair slipped out from under him. Appellant was subsequently placed on the periodic compensation rolls to receive compensation benefits for temporary total disability.

In an Office CA-1032 form in which appellant was asked to provide information regarding his employment history, signed and dated on February 14, 1990, appellant indicated that he was not employed and was not self-employed for the 15-month period preceding the date of the form.¹ He wrote "wife operates and runs clothing store in home[,] mail order and retail sale."

In a CA-1032 form dated February 28, 1991, covering the previous 15-month period and signed by appellant,² appellant indicated that he was neither employed nor self-employed during this period.

¹ The instructions which accompanied the CA-1032 forms stated in bold type that a false or evasive answer to any question, or the omission of an answer could be grounds for suspending compensation benefits and civil liability or criminal prosecution. The instructions stated that earnings from self-employment such as operating a business must be reported, even if operated at a loss.

² Each CA-1032 form completed and signed by appellant covered the previous 15-month period.

In a CA-1032 form dated November 28, 1991, appellant indicated that he was neither employed nor self-employed during this period.

In a CA-1032 form dated December 3, 1992, appellant stated that he was neither employed nor self-employed during this period.

In a letter dated July 28, 1993, an employing establishment supervisory employee relations specialist submitted to the Office a copy of a business card for "Circle W Square Dance Fashions" with an address, [tele]phone number, hours of operation, and the names "Don and Jackie Wilkins." The employing establishment stated that this business was located in appellant's home and that both appellant and his wife operated the business which had been in existence for several years.

On September 29, 1993 the employing establishment submitted a page from a July 1993 issue of publication entitled "American Square Dance" which contained an advertisement for Circle W Square Dance Fashions with the name of appellant and his wife and their address and telephone number and which noted that credit cards were acceptable as payment.

In a CA-1032 form dated December 2, 1993, appellant indicated that he was neither employed nor self-employed during this period.

In a CA-1032 form dated December 9, 1994, appellant stated that he was neither employed nor self-employed during this period.

An investigative report dated April 27, 1995, related that employing establishment undercover agents went to appellant's home where the business "Circle W Western Wear and Square Dance Apparel" was located. The investigators noted that appellant and his wife were present during an electronic audio recording of conversations and that the undercover agents told appellant that they were planning to open a nightclub and wished to discuss the possibility of accepting some of his merchandise on a consignment basis. The investigators noted that appellant voluntarily invited them into his home and business area and made various admissions and statements acknowledging that he was retired from the employing establishment and was drawing 75 percent of his employing establishment salary as a result of a back injury. Appellant stated that he and his wife operated the business from their home and also offered their product line internationally through a mail order catalogue. Appellant stated that he was a silent partner in the business and that his wife was the owner. The agents enclosed a transcript of the conversation with appellant and his wife.

In an investigative memorandum from the employing establishment dated May 16, 1995 Agent Jeffery Ruffino stated that he interviewed appellant at his residence. He asked appellant why his income tax returns reflected that he was the person running the business and why he described himself on his tax returns as being in retail clothing sales, a merchant, or self-employed and appellant stated that the business was set up for tax purposes as a sole proprietorship in his name. He stated that the business had lost money for the past seven years. Mr. Ruffino obtained from appellant a copy of schedule C for appellant's 1994 tax return which indicated that the clothing business grossed \$10,705.00 with a net profit of \$413.00. In answer to the question on schedule C as to whether the individual submitting the return materially

participated in the operation of the business during 1994, appellant checked the block marked “yes.” When Mr. Ruffino asked appellant why he had not reported the business to the Office and showed him a copy of the instructions which were attached to the CA-1032 form he completed in November 1994, he first said that he did not understand the instructions, then he said he did not read the instructions, and finally he said “I guess if they want me to report it I have to report it.” Mr. Ruffino attached a copy of appellant’s 1994 schedule C to his investigative report.

In a worksheet dated December 18, 1995, the Office calculated that appellant received compensation benefits in the amount of \$115,579.13 for the period November 14, 1988 through December 9, 1994.

The record contains a 1996 settlement agreement between appellant and the United States in which appellant paid \$5,413.00 in lieu of a civil suit for liability under the False Claims Act.³ The document stipulated that the agreement did not act as a settlement to any other issues such as tax liability, administrative remedies by the United States or its agencies outside the scope of the False Claims Act or other violations of the False Claims Act outside the scope of the agreement.

By letter dated February 11, 1997, the Office advised appellant that it had made a preliminary determination that an overpayment of compensation had occurred in his case in the amount of \$110,166.13⁴ and that the overpayment occurred because he had failed to report self-employment income or activity for the period covered by CA-1032 forms dated February 19, 1990, February 28 and November 28, 1991, December 3, 1992, December 2, 1993 and December 9, 1994. The Office also advised that a preliminary finding had been made that appellant was at fault in the creation of the overpayment because he had knowingly failed to report his self-employment activities. He was advised that he had the right to submit evidence or argument if he disagreed with the fact that the overpayment occurred, the amount of the overpayment, or the finding as to fault.

By decision dated March 12, 1997, the Office stated that it had made a final determination that an overpayment of compensation had occurred in appellant’s case in the amount \$110,166.13 because he had knowingly failed to report self-employment activities as required by the Federal Employees’ Compensation Act for the period November 14, 1988 through December 9, 1994.

The Board finds that the Office properly found that appellant forfeited his right to compensation for the period November 14, 1988 to December 9, 1994 because he knowingly failed to report earnings from self-employment during this period.

³ 31 U.S.C. §§ 3729-3733.

⁴ The record shows that the Office deducted from the overpayment amount the \$5,413.00 restitution payment from appellant.

Section 8106(b) of the Act⁵ 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.”⁶

In the present case, the record establishes that appellant omitted earnings on various forms claiming compensation for the period November 14, 1988 to December 9, 1994. In these forms, the Office 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 CA-1032 forms. The record reveals that appellant operated a western wear and square dance clothing business from his home during this period. The record shows that he reported earnings from the business in his income tax returns, reported that he was the sole proprietor of the business, and indicated that he materially participated in the business. The record shows that advertisements and business cards for the business contained his name and his wife’s name and his home address. Thus, the evidence of record establishes that appellant was self-employed and had earnings during the period in question.

Appellant, however, can only be subjected to the forfeiture provision of section 8106 of the Act if he “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 penalty,⁷ and, as a penalty provision, it must be narrowly construed.⁸ The term “knowingly” is

⁵ 5 U.S.C. § 8106(b).

⁶ 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.*

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.10(c) (July 1993).

⁸ See *Christine P. Burgess*, 43 ECAB 449, 458 (1992).

not defined within the Act or its regulations. In common usage “knowingly” is defined as: “[w]ith knowledge; consciously; intelligently; willfully; intentionally.”⁹

The evidence of record establishes that appellant “knowingly” failed to report his earnings to the Office for the period November 14, 1988 to December 9, 1994. The Office repeatedly advised appellant, in the CA-0132 forms it sent him for completion, of his responsibility to report all employment and earnings, but he failed to report such employment and earnings when he completed these forms and denied that he was employed or self-employed. These forms advised appellant that any person who knowingly made a false statement, misrepresentation, concealment of fact or any other act of fraud to obtain compensation under the Federal Employees’ Compensation Act would be subject to various civil, administrative and criminal penalties and, given the strong language of this clause, appellant was aware of materiality of his failure to report his employment from his home business. Furthermore, as noted above, the record shows that appellant, while failing to report his self-employment to the Office, did report such employment activities to the Internal Revenue Service and identified himself as the owner of the business.

Under these circumstances, the Board concludes that appellant “knowingly” omitted his earnings under section 8106(b)(2) of the Act by failing to report his employment activities and earnings on the applicable CA-1032 forms for the period November 14, 1988 to December 9, 1994. Accordingly, the Board finds that the Office properly determined that appellant forfeited his right to compensation for the period November 14, 1988 to December 9, 1994.

The Board further finds that appellant was not without fault in creating the overpayment of compensation for the period November 14, 1988 to December 9, 1994, and, therefore, the overpayment for the period was not subject to waiver.

Section 8129(a) 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.”¹⁰ Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.¹¹

In determining whether an individual is not “without fault,” section 10.320(b) of Title 20 of the Code of Federal 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

⁹ Black’s Law Dictionary (5th ed. 1979); see *Anthony A. Nobile*, 44 ECAB 268, 272 (1992).

¹⁰ 5 U.S.C. § 8129(b).

¹¹ See *Linda E. Padilla*, 45 ECAB 768, 772 (1994).

(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.”¹²

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 have been reported, efforts to comply with the reporting requirements, opportunities to comply with the 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).”¹³

Based on the forfeiture of his right to compensation for the period November 14, 1988 to December 9, 1994, appellant received an overpayment of compensation for this period and 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 was self-employed and had earnings from his self-employment during this period and knowingly stated he was not employed or self-employed and failed to furnish information regarding his home-based business. He thus failed to furnish material information to the Office and he made incorrect statements regarding material facts which he knew or should have known to be incorrect.

The Board further finds that the Office properly pursued collection of the full amount of the overpayment of compensation.¹⁴

As the settlement agreement reached between appellant and the Unites States regarding the False Claims Act stipulated that the agreement did not act as a settlement to any other issues such as tax liability, administrative remedies by the Unites States or its agencies outside the scope of the False Claims Act or other violations of the False Claims Act outside the scope of the agreement, *i.e.*, that it was a “global settlement,” the Office was not precluded from continuing to pursue collection of the full amount of the debt.¹⁵

¹² 20 C.F.R. § 10.320(b).

¹³ 20 C.F.R. § 10.320(c).

¹⁴ As noted above, the Office deducted from the overpayment recovery amount the \$5,413.00 restitution paid by appellant for violation of the False Claims Act.

¹⁵ *Clarence D. Ross*, 42 ECAB 556, 565-66 (1991).

The March 12, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
September 21, 1999

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member