

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CALVIN PERROTTI and U.S. POSTAL SERVICE,  
OZONE PARK STATION, Jamaica, NY

*Docket No. 00-362; Oral Argument Held May 15, 2001;  
Issued July 13, 2001*

Appearances: *Charles M. Eiss, Esq.*, for appellant; *Catherine P. Carter, Esq.*,  
for the Director, Office of Workers' Compensation Programs.

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DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,  
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant forfeited his right to compensation from January 21, 1985 through November 4, 1992 and from August 1, 1993 through November 7, 1995 pursuant to 5 U.S.C. § 8106(b) when he knowingly under reported his self-employment and earnings to the Office of Workers' Compensation Programs; (2) whether the Office properly determined that the amount of the overpayment was \$146,169.42; (3) whether the Office properly found that appellant was with fault in the creation of the overpayment and, therefore, denied waiver of the overpayment; and (4) whether the amount of restitution ordered by the U.S. district court constituted full satisfaction of the debt owed the United States.

The Office accepted that appellant, then a 45-year-old carrier, sustained chronic lumbosacral sprain aggravated due to an injury on March 8, 1977. The Office paid appropriate compensation benefits for temporary total disability benefits and placed appellant on the automatic rolls effective June 10, 1977.<sup>1</sup> Appellant completed Forms EN-1032 on April 20, 1986, June 2, December 16, 1987, February 16, 1988, February 6, 1989, February 15, 1990, February 21, 1991, February 7 and November 4, 1992 and November 5, 1993, November 4, 1994 and November 7, 1995. On each of the forms, appellant indicated that he was self-employed, working part time and had annual earnings ranging from \$4,500.00 to \$8,060.00.

On May 21, 1996 the employing establishment submitted an investigative memorandum indicating that appellant had under reported his income during the periods covered by his Form EN-1032s. The employing establishment obtained evidence that appellant's wages had been under reported. Appellant admitted to inspectors in an undercover meeting that he was earning

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<sup>1</sup> At this time appellant elected to receive disability compensation rather than his civil service annuity from the Office of Personnel Management.

more than \$1,000.00 a week from his business and doing more than \$500.00 a week in customer sales.

On April 3, 1996 a federal arrest warrant was issued charging appellant with violation of 18 U.S.C. §§ 1001, 1341, 1920, 1341, mail fraud. Appellant was arrested on April 4, 1996. On May 31, 1996 appellant entered a plea agreement confirming that he under reported his income and was convicted of violating 18 U.S.C. § 1341, mail fraud, on September 19, 1996.

By decision dated November 4, 1997, the Office found that appellant forfeited his right to compensation under 5 U.S.C. § 8106(b) in the amount of \$146,169.42 from January 21, 1985 through November 4, 1992 and from August 1, 1993 through November 7, 1995. The Office also sent appellant a preliminary determination that he was at fault in the creation of the resulting overpayment in the amount of \$146,169.42. By decision dated March 23, 1995, the Office finalized the overpayment and found that, because appellant was at fault in the creation of the overpayment, the overpayment was not subject to waiver.

Appellant requested an oral hearing which was held on July 29, 1998.

By decision dated July 15, 1999, the Office hearing representative affirmed the Office's November 4, 1997 decision. The hearing representative found that the overpayment was due and payable as soon as possible and rejected appellant's argument that the September 19, 1996 judgment directing appellant to make restitution to the employing establishment and the Internal Revenue Service constituted a global settlement agreement encompassing the debt owed to the Office.

The Board finds that appellant forfeited his right to compensation benefits because he knowingly failed to report his earnings.

Section 8106(b) of the Federal Employees' Compensation Act provides as follows:

"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. The employee shall include in the affidavit or report the value of housing, board, lodging and other advantages which are part of his earnings in employment or self-employment and which can be estimated in money. 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.”<sup>2</sup>

The Board has held that it is not enough merely to establish that there were unreported earnings. Appellant can be subjected to the forfeiture provision of 5 U.S.C. § 8106(b) only if he “knowingly” failed to report employment or earnings.<sup>3</sup> 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>4</sup> The Board has found that the Office can meet this burden of proof in several ways, including by appellant’s own admission to the Office that he failed to report employment or earnings, which he knew he should have reported, or by establishing that appellant has pled guilty to violating applicable federal statutes by falsely completing the affidavits in Form EN-1032.<sup>5</sup>

The evidence of record establishes that appellant “knowingly” omitted his earnings from the Office. The record reflects that appellant was charged in U.S. district court with mail fraud pursuant to 18 U.S.C. §§ 1001, 1341, 1920. Appellant entered a plea of guilty and was adjudged guilty of violating 18 U.S.C. §§ 1001, 1341, 1920 when he falsely completed the affidavit in Form EN-1032 and wrongfully accepted government benefits from January 21, 1985 through November 4, 1992 and from August 1, 1993 through November 7, 1995. The court found that appellant had accepted \$146,169.42 during these period and ordered restitution in the amount of \$5,904.00 to the employing establishment and \$35,260.00 to the Internal Revenue Service by judgment entered on September 19, 1996.

The Board notes that at the hearing on July 29, 1998, appellant admitted that he had under reported his earnings during these periods. The Board finds that appellant’s guilty plea in the U.S. district court matter and his admission at the hearing constitutes persuasive evidence that appellant knowingly omitted his earnings when he completed the affidavits on Form EN-1032 on April 20, 1986 and November 7, 1995 and that the provisions of 5 U.S.C. § 8106(b)(2), therefore, apply to the period covered by the affidavit. The Board, therefore, finds that appellant has forfeited his compensation benefits from January 21, 1985 through November 4, 1992 and from August 1, 1993 through November 7, 1995.

The Board also finds that there was an overpayment of compensation in the amount of \$146,169.42.

The record reflects that, during the periods of forfeiture, appellant was paid compensation for wage loss in the amount of \$146,169.42. The period of forfeiture is determined by the date appellant completed the EN-1032 form. Each EN-1032 form requires that information be provided concerning activities during the previous 15 months. If an EN-1032 form is improperly

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<sup>2</sup> 5 U.S.C. § 8106(b).

<sup>3</sup> *Barbara L. Kanter*, 46 ECAB 165 (1994).

<sup>4</sup> *Charles Walker*, 44 ECAB 641 (1993).

<sup>5</sup> *See Barbara L. Kanter*, *supra* note 3.

completed resulting in a finding of forfeiture, the Board has found that the period of forfeiture is the entire 15-month period covered by the form in question.<sup>6</sup>

Because appellant has forfeited his right to compensation during these periods, this sum constitutes an overpayment of compensation. While the U.S. district court determined the amount of restitution to be \$5,904.00 to the employing establishment and \$35,260.00 to the Internal Revenue Service, the Office properly determined that, pursuant to the Act, the appropriate period of forfeiture was from January 21, 1985 through November 4, 1992 and from August 1, 1993 through November 7, 1995 in the amount of \$146,169.42.

Next, the Board finds that appellant is not without fault in the creation of the overpayment and that the overpayment cannot be waived.

Section 8129(b) of the Act<sup>7</sup> provides as follows:

“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 subchapter or would be against equity and good conscience.”

Section 10.433(a) of the Office’s implementing regulations<sup>8</sup> provides as follows:

“(a) [The Office] may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from [the Office] are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (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. (This provision applies only to the overpaid individual.)”

The Board finds that appellant was not without fault in the creation of the overpayment because he failed to furnish information to the Office, which he knew was material, specifically

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<sup>6</sup> *William G. Norton, Jr.*, 45 ECAB 630 (1994).

<sup>7</sup> 5 U.S.C. § 8129(b).

<sup>8</sup> 20 C.F.R. § 10.433(a) (1999).

his full earnings from self-employment in the affidavits he completed on Form EN-1032 from April 20, 1986 through November 7, 1995. Pursuant to the provisions of section 8106(b), appellant has forfeited his right to compensation during the periods in question. This forfeiture has resulted in an overpayment and appellant is not without fault in the creation of this overpayment. Accordingly, no waiver of collection of the overpayment is possible under section 8129(b) of the Act.

Lastly, the Board finds that the amount of restitution ordered by the U.S. district court did not constitute full satisfaction of the debt owed the United States.

On appeal, appellant alleged that restitution ordered by the U.S. district court to be paid to the Internal Revenue Service and the employing establishment in the total amount of \$41,164.00 should preclude further forfeiture overpayment recovery. The Office's procedure manual discusses the interplay between court-ordered restitution in fraud cases and the Office's administrative debt collection process:

*“19. Court Ordered Restitution in Fraud cases. When a debtor has been convicted in court of filing a false claim which resulted in an overpayment/debt due the government, the court often orders the defendant to make restitution to the United States as a condition of probation. The amount of restitution may or may not be the full amount of the debt owed to [the Office].*

*“a. If the court order states that the restitution amount will be in full satisfaction of the debt owed the United States (a ‘Global Settlement’), the Court Order takes precedence over the Office’s administrative debt collection process. In such cases, if the restitution amount is less than the outstanding debt principal balance, the principal balance must be reduced to the restitution amount set by the court. Also, interest may not be applied to such debts unless stipulated in the Court Order. However, should the probation period end and the debtor has failed to make full restitution of the amount ordered by the court, [the Office] may pursue collection of the full original debt amount.*

*“b. If the Court Order does not represent a ‘Global Settlement,’ the [Office] should continue to pursue collection of the full amount of the debt, taking credit for any restitution amounts received. Unless assessment of interest is stipulated in the Court Order, interest may not be applied to the restitution amount and any restitution payments received should be applied directly to the debt principal.”<sup>9</sup>*

In this case, the court order did not indicate that the recovery of \$41,164.00 from appellant was meant to be in full satisfaction of the debt owed to the United States and, therefore, a global settlement.<sup>10</sup> For this reason, the Office was not precluded from continuing to pursue full collection of appellant's debt in the amount of \$146,169.42.

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<sup>9</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300 (September 1994).

<sup>10</sup> See *Clarence D. Ross*, 42 ECAB 556 (1991).

The July 15, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
July 13, 2001

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member

Priscilla Anne Schwab  
Alternate Member