

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GRADY A. TUBBS and U.S. POSTAL SERVICE,
ARROYO ANNEX, Pasadena, CA

*Docket No. 01-351; Submitted on the Record;
Issued March 26, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant forfeited his right to compensation for knowingly omitting or understating his earnings during the periods from February 17, 1984 to June 24, 1989, September 28, 1989 to November 13, 1993 and March 6, 1994 to June 9, 1995; and (2) whether appellant was at fault in the resulting overpayment of compensation.

Appellant sustained injuries to his low back and hip on February 28, 1973 and April 1, 1974 while working as a mailhandler. He last worked for the employing establishment on February 10, 1975 and the Office of Workers' Compensation Programs began paying compensation for temporary total disability. Appellant's application for disability retirement was approved effective June 18, 1975, but appellant elected to receive compensation under the Federal Employees' Compensation Act.

A November 24, 1995 investigative memorandum and December 27, 1995 supplemental investigative memorandum from a postal inspector, accompanied by exhibits, found that appellant worked as a general contractor during periods for which he submitted Office CA-1032 forms indicating he had not worked.

By decision dated January 22, 1996, the Office found that appellant had forfeited his right to compensation for knowingly omitting or understating his earnings during the periods from November 17, 1980 to May 9, 1982, February 17, 1984 to June 24, 1989, September 28, 1989 to November 13, 1993 and March 6, 1994 to June 9, 1995.

On January 24, 1996 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$228,072.58 that arose from his forfeiture of compensation. The Office preliminarily found that appellant was at fault in the matter of the overpayment on the basis of his knowing failure to report his earnings.

On July 29, 1996 the U.S. District Court for the Central District of California accepted appellant's plea of guilty to a violation of 18 U.S.C. § 1920, "False statement or fraud to obtain

federal employee's compensation." The charge of violating this section was based on his submission of a June 6, 1995 Office Form CA-1032 stating he was not self-employed, when in fact he knew he was self-employed. On March 3, 1997 appellant was sentenced to three years of probation and ordered to pay a \$25.00 special assessment and restitution in the amount of \$28,609.57, the amount of compensation he received during the 15 months covered by the June 6, 1995 Form CA-1032.

By decision dated March 24, 1997, the Office found that appellant was not entitled to further compensation pursuant to 5 U.S.C. § 8148,¹ due to his guilty plea to one count in violation of 18 U.S.C. § 1920.

At appellant's request, a hearing was held on April 27, 1999 on the issues of forfeiture and overpayment. His representative contended that appellant was not required to report his earnings because he was totally, not partially disabled and that the amount of the court ordered restitution should be subtracted from the amount of the overpayment. Appellant stated that his contracting business was not profitable and that he did not seek or obtain assistance in completing the Office's Form CA-1032.

By decision dated July 6, 2000, an Office hearing representative found that appellant forfeited his right to compensation for knowingly omitting or understating his earnings during the periods from February 17, 1984 to June 24, 1989, September 28, 1989 to November 13, 1993 and March 6, 1994 to June 9, 1995. The Office hearing representative found that appellant's Form CA-1032 signed on February 17, 1982 did not show an understatement of earnings, and that appellant had not forfeited his right to compensation for the period from November 17, 1980 to May 9, 1982. Deducting the amount of compensation appellant received from November 17, 1980 to May 9, 1982, the amount of the overpayment was recalculated as \$208,708.11, with the \$28,607.57 restitution amount being a duplicate portion, resulting in a remaining overpayment in the amount of \$180,098.54. The Office hearing representative found that appellant was at fault in the creation of this overpayment of compensation for the reason that he failed to furnish information which he knew or should have known was material.

The Board finds that appellant forfeited his right to compensation for knowingly omitting or understating earnings during the periods from March 20, 1986 to June 20, 1987, March 24, 1988 to June 24, 1989, September 28, 1989 to November 13, 1993 and March 6, 1994 to June 6, 1995, but not for the periods from February 17, 1984 to March 20, 1986 and June 20, 1987 to August 11, 1988.

¹ This section of the Act states that any individual convicted of a violation of 18 U.S.C. § 1920 shall forfeit as of the date of the conviction any entitlement to any benefit such individual would otherwise be entitled to under the Act.

Section 8106(b) of the Act² 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.”

Appellant contends he was not required to report self-employment during the period in question, for the reason that he was receiving compensation for total, not partial disability, during this period, and section 8106 addresses only partially disabled employees. Appellant’s attorney cites the case of *U.S. v. Machi*, 962 F.Supp. 442 (S.D. N.Y. 1997), in which the District Court found that the defendant could not be found guilty of violating 18 U.S.C. § 1920 before it was amended on September 30, 1994, as the pre-amendment version required a knowingly false statement “in an affidavit or report required by section 8106” of the Act. In finding that the defendant, who was receiving compensation for total disability, was not required to file reports under 5 U.S.C. § 8106, which applies to partially disabled employees, the District Court found that the language of the ninth Circuit in *U.S. v. Dorey*³ was persuasive.⁴

In *Sherwood T. Rodrigues*, 37 ECAB 617 (1986) the Board addressed the argument that claimant’s who were receiving compensation for total disability were not required to report earnings under section 8106(b) of the Act. Addressing the contention that *U.S. v. Dorey* was dispositive on this question, the Board stated:

“The Appeals Court pointed out that the due process clause requires fair warning of conduct which is considered criminal and would subject an individual to such prosecution. Although the Appeals Court found that 5 U.S.C. § 8106 and 18 U.S.C. § 1001, when read together, do not provide adequate warning to individuals declared temporarily totally disabled that they must truthfully report their employment and earnings, the Appeals Court specifically limited their finding to cases where the appellant is indicted on criminal charges based on sections 8106 and 1001 of their respective Titles. The Appeals Court excluded application of its interpretation in purely administrative noncriminal adjudication. Further, the Court neither found fault with the administrative determination that

² 5 U.S.C. § 8106(b).

³ 711 F. 2d 125 (9th Cir. 1983).

⁴ *U.S. v. Machi*, 962 F. Supp. 962 442 at 444 (S.D. N.Y. 1997).

total disability can be construed as partial disability in certain administrative contexts nor did it specifically address those situations where such construction is appropriate or inappropriate in cases under the Act before the Department of Labor.⁵ Therefore, the Board concludes that the *Dorey* case is not dispositive on the issue in this administrative proceeding presently before the Board.

“The Board has provided reasoning for its construction of sections 8106 and 8105. If an employee is in fact totally disabled, normally he would not have any employment earnings to report and a provision regarding such earnings would be meaningless. The provision regarding reporting and forfeiture has relevance only with respect to periods of partial disability where an employee receiving compensation might also have employment earnings. Therefore, the test is whether, for the time period under consideration, the employee was, in fact, totally disabled or merely partially disabled, and not whether he received compensation for that period for total or partial loss of wage-earning capacity.

“As stated in *Ripple*,⁶ it is not conclusive under the circumstances in the case that the Office did not make a formal decision changing the employee’s compensation status from one of total disability to that of partial disability. Appellant’s false reports regarding his employment status kept relevant important information from the Office which would have demonstrated by his employment activities that he was only partially disabled and capable of earning substantial income.”

The Board’s reasoning in *Rodrigues* is applicable to the situation in the present case. Even if appellant could not have been convicted of a violation of 18 U.S.C. § 1920 for conduct prior to its amendment in 1994, he was required to file reports of earnings under section 8106 of the Act in the Office’s administration of the Act. Even if his expenses exceeded his revenues, appellant is still required to report his earnings.⁷

With regard to the periods for which the Office found that appellant forfeited his right to compensation for omitting earnings, appellant filed Office CA-1032 forms which he signed and dated May 17, 1985, June 23, 1986, June 20, 1987, August 11, 1988, June 24, 1989, December 28, 1990, February 6, 1992, January 10, 1994 and June 6, 1995. Each of these forms stated that it covered the 15 months prior to the date of completion and signature, and each instructed appellant to report not only employment by an employer but also to report: “Self-employment (such as farming, sales service, operating a store, business, etc.) Report any such enterprise in which you worked, and from which you received revenue, even if operated at a loss or if profits were reinvested.” On all the forms listed above, with the exception of the one

⁵ The Court stated: “We have no doubt that there are valid administrative reasons to give section 8106 a construction which can justify reading the word partially to mean totally. The due process clause, however, requires that a statute, which is used as the basis of a criminal charge, give fair warning of the conduct which is prohibited so that each person can conform his conduct to the requirements of the law.” *U.S. v. Dorey*, 711 F.2d 125 at 128 (9th Cir. 1983).

⁶ *Ronald H. Ripple*, 24 ECAB 254 (1973). See also *Elbridge H. Wright*, 36 ECAB 691 (1985).

⁷ *Armando Barbosa*, 36 ECAB 474 (1985).

dated June 6, 1995, appellant indicated that he had not worked for any employer and had not been self-employed during the previous 15 months.

With regard to the CA-1032 form appellant signed on June 6, 1995, the Board finds that appellant's plea of guilty to violating 18 U.S.C. § 1920 is persuasive evidence that he knowingly omitted or understated his earnings on this form. This plea was made under oath and was against his own interest.⁸

With regard to the Form CA-1032 appellant signed on January 10, 1994, the record contains copies of invoices for electrical work done at several sites from September to November 1993 and of bills for inspections performed for the State of California Department of Consumer Affairs on March 2, April 9, May 14 and 21, August 4 and 10, and September 27, 1993. This evidence establishes that appellant was self-employed during the 15 months covered by this form.

With regard to the Form CA-1032 appellant signed on November 5, 1992, the record contains copies of bills for inspections done for the Department of Consumer Affairs on February 12 and 27, March 4, 5 and 16 and July 24, 1992. This evidence establishes that appellant was self-employed during the 15 months covered by this form.

With regard to the Form CA-1032 appellant signed on February 6, 1992, the record contains copies of bills for inspections done for the Department of Consumer Affairs on December 31, 1990 and February 12, 1991, and a copy of an invoice dated December 4, 1991 for installing a fluorescent light. This evidence establishes that appellant was self-employed during the 15 months covered by this form.

With regard to the Form CA-1032 appellant signed on December 28, 1990, the record contains a copy of a 1990 Internal Revenue Service Form 1099, "miscellaneous income," on which R.J. Construction Company listed appellant as the recipient of nonemployee compensation and a Department of Consumer Affairs remittance advice form showing that appellant's invoices dated August 16 and September 13, 1990 were paid in the amount of \$449.25 and reported to the Internal Revenue Service. This evidence establishes that appellant was self-employed during the 15 months covered by this form.

With regard to the Form CA-1032 appellant signed on June 24, 1989, the record contains a copy of appellant's invoice dated June 24, 1989 for installing a drinking fountain. This evidence establishes that appellant was self-employed during the 15 months covered by this form.

With regard to the Form CA-1032 appellant signed on June 20, 1987, the record contains copies of receipts signed by appellant on October 7, 1986 for payment for work on a window and on April 9, 1987 for sandblasting. This evidence establishes that appellant was self-employed during the 15 months covered by this form.

⁸ See *Iris E. Ramsey*, 43 ECAB 1075 (1992).

With regard to the Forms CA-1032 appellant signed on May 17, 1985, June 23, 1986 and August 11, 1988, the record contains no direct evidence that appellant worked during the 15 months previous to the dates he signed these forms. He has had a contractor's license since May 8, 1979. On his 1992 application for renewal of his contractor's license, appellant indicated that he had experience as a contractor from May 1, 1978 to the present and that he had worked for another contractor from June 5, 1982 to August 18, 1988. On a r sum  appellant indicated that he had been self-employed from May 1979 to April 1993 as owner and operator of S&T Cabinet Shop specializing in electrical and plumbing cabinets and general repairs. None of this evidence, however, nor any of the other evidence in the case record, establishes that appellant worked from February 17, 1984 to June 23, 1986 or from May 11, 1987 to August 11, 1988, the periods covered by the above forms. Appellant thus does not forfeit his right to compensation during these periods, except for those portions covered by another form.

If a claimant has any earnings during a period covered by a report, such as a Form CA-1032, he or she is not entitled to compensation during any portion of the period covered by the report, even though during a portion of that period he was totally disabled or for other reasons he had no earnings.⁹ The Office's decision will be modified to reflect that appellant forfeited his right to compensation during the periods from March 20, 1986 to June 20, 1987, March 24, 1988 to June 24, 1989, September 28, 1989 to November 13, 1993 and March 6, 1994 to June 6, 1995, but not for the periods from February 17, 1984 to March 20, 1986 and June 20, 1987 to August 11, 1988.

The Board finds that appellant's omission of earnings on his CA-1032 forms was knowing. The forms plainly advised appellant that he must report earnings from self-employment, even if his business was operated at a loss. Appellant's records obtained by the postal inspector indicate that appellant ran a contracting business, preparing estimates and invoices. He reported his work as a general contractor on a Form CA-1032 he signed on February 16, 1981. The evidence is sufficient to show that appellant knowingly omitted or understated his earnings.¹⁰

The Board finds that appellant received an overpayment of compensation based on his forfeiture of compensation, but that the amount must be recalculated by the Office to reflect the more limited period of forfeiture found by the Board. The Board further finds that appellant was at fault in the creation of the overpayment of compensation.

Section 8129(a) of the Act provides that where an overpayment of compensation has been made "because of an error of fact or 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

⁹ *Jack Langley*, 34 ECAB 1077 (1983).

¹⁰ *See Charles Walker*, 44 ECAB 641 (1993).

against equity and good conscience.”¹¹ No waiver of an overpayment is possible if the claimant is not “without fault” in helping to create the overpayment.

Section 10.433(a) of Title 20 of the Code of Federal Regulations provides:

“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.)”¹²

By knowingly omitting or understating his earnings, appellant failed to provide information he knew or should have known to be material. He therefore is at fault under the second standard listed in the Office’s regulation, and the repayment of the overpayment cannot be waived.

In her July 6, 2000 decision, an Office hearing representative found that the Office should initiate recovery of the overpayment by monthly installments of \$1,000.00. As appellant’s compensation was terminated, any recovery of the overpayment will not be an adjustment to continuing compensation under 5 U.S.C. § 8129(a). For this reason, the Board has no jurisdiction to review the monthly amount the Office proposes to recover from appellant.¹³

¹¹ 5 U.S.C. § 8129.

¹² 20 C.F.R. § 10.433(a).

¹³ *Robert N. Vachon*, 36 ECAB 502 (1985).

The July 6, 2000 decision of the Office of Workers' Compensation Programs is modified to find that appellant forfeited his right to compensation for knowingly omitting or understating earnings during the periods from March 20, 1986 to June 20, 1987, March 24, 1988 to June 24, 1989, September 28, 1989 to November 13, 1993 and March 6, 1994 to June 6, 1995, but not for the periods from February 17, 1984 to March 20, 1986 and June 20, 1987 to August 11, 1988. The July 6, 2000 decision, including its finding of fault, is affirmed as modified.

Dated, Washington, DC
March 26, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member