

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**ISADORE B. BANKS, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Little Rock, AR, Employer**

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**Docket No. 04-1735  
Issued: February 11, 2005**

*Appearances:*  
*Ronald G. Ray, Sr., Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Alternate Member  
MICHAEL E. GROOM, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On June 29, 2004 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated May 28 and April 28, 2004. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the forfeiture and overpayment issues.

**ISSUES**

The issues are: (1) whether the Office properly found that appellant forfeited his entitlement to compensation from April 19, 2000 to July 13, 2002 because he knowingly failed to report earnings from a business enterprise during this period; (2) whether appellant received an overpayment of compensation in the amount of \$65,508.86 during the period of the forfeiture; and (3) whether the Office properly found that appellant was at fault in the creation of the overpayment and, therefore, the overpayment was not subject to waiver.

**FACTUAL HISTORY**

On February 28, 1991 appellant, then a 37-year-old city letter carrier, filed a traumatic injury claim alleging that he injured his head and left thigh in a motor vehicle accident. The

Office accepted his claim for concussion and contusion of the left hip on July 12, 1999 and later expanded his claim to include lumbar strain. Appellant has concurrent nonemployment-related conditions of degenerative disc disease and schizoaffective disorder. The Office entered appellant on the periodic rolls.

By decision dated January 19, 1992, the Office denied appellant's claim for a schedule award. The Board affirmed this in a January 22, 1996 decision.<sup>1</sup>

Appellant completed EN1032 forms on July 26, 1999 and July 19, 2001 indicating that he did not work for an employer, was not self-employed nor was he involved in a business enterprise.

The employing establishment submitted an investigative memorandum dated April 19, 2002 detailing appellant's actions. On October 24, 2000 appellant signed Articles of Incorporation for corporations named "Banks Auto Group" (BAG) and "Evans Transportation Company" (ETC). Appellant was listed as the president and incorporator of BAG and as an incorporator of ETC. On an application for a business license for ETC, appellant was listed as the owner. Appellant signed as an agent of ETC on February 21, 2001 to obtain a vehicle permit. He wrote a personal check for the permit on that date. Appellant again signed as an agent of ETC on March 26, 2001 to obtain a vehicle permit.

On July 2, 2002 a grand jury indicted appellant in the U.S. District Court, Eastern District of Arkansas finding that on the EN1032 dated July 19, 2001 he violated 18 U.S.C. § 1920. The grand jury found that appellant "did knowingly and willfully made a false, fictitious and fraudulent statement as to a material fact" by denying that he had no involvement in a business enterprise when in fact he was involved in a business enterprise known as ETC. The Office received a docket sheet for the District Court stating that, on March 4, 2004, Judge Wilson found appellant guilty of the single count indictment.

By decision dated August 21, 2002, the Office terminated appellant's compensation and medical benefits effective July 9, 2002.

Appellant completed a Form EN1032 on August 27, 2002. He indicated that he was not employed, self-employed or involved in a business enterprise in the past. However, appellant stated, "I have been listed as an interested party in Evans Transportation, Inc., but I am not an employee, nor did I manage the business, nor did I receive a paycheck from the business."

In a letter dated April 28, 2004, the Office noted that appellant was found guilty of one count of fraud to gain benefits under the Act, in accordance with 18 U.S.C. § 1920. The Office noted that appellant's compensation and medical benefits had been terminated in the August 21, 2002 decision and that he was not entitled to further benefits under the Act.

By decision dated April 28, 2004, the Office found that appellant had forfeited his right to compensation for the period April 19, 2000 to July 13, 2002. The Office found that appellant

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<sup>1</sup> Docket No. 94-957 (issued January 22, 1996).

had completed EN1032 forms on July 19, 2001, July 13<sup>2</sup> and August 27, 2002 and that he had forfeited compensation from April 19, 2000 through July 13, 2002 in the amount of \$62,508.86. The Office's worksheet does not provide the compensation figures from April 19, 2000 to July 19, 2001, and from July 19, 2001 to July 13, 2002. Instead there is merely a composite figure.

The Office issued a preliminary determination on April 28, 2004 that appellant received an overpayment in the amount of \$62,508.86 as he failed to report his employment and earnings during the periods he was employed with ETC and received compensation for wage loss from April 19, 2000 to July 13, 2002.

By decision dated May 28, 2004, the Office finalized the April 28, 2004 preliminary determination and found that appellant had received an overpayment of compensation in the amount of \$62,508.86, that he was at fault in the creation of the overpayment and that the overpayment was not subject to waiver.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8106(b) of the Federal Employees' Compensation 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 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."<sup>3</sup> (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.<sup>4</sup> The term "knowingly" is defined in the regulations as "with knowledge, consciously, willfully or intentionally."<sup>5</sup>

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<sup>2</sup> The Board was unable to locate a form signed by appellant on July 13, 2002 either in the record or on Oasis.

<sup>3</sup> 5 U.S.C. § 8106(b).

<sup>4</sup> *Anthony A. Nobile*, 44 ECAB 268, 271-72 (1992).

<sup>5</sup> 20 C.F.R. § 10.5(n).

### **ANALYSIS -- ISSUE 1**

The Office found that appellant forfeited compensation from April 19, 2000 to July 13, 2002 based on EN1032 forms that he signed on July 19, 2001 and July 13, 2002. The record before the Board does not contain an EN1032 signed on July 13, 2002 and consequentially, the Office has not established that appellant forfeited his compensation benefits for the period covered by such a form.

Appellant signed a Form EN1032 on July 19, 2001 which covers the period July 19, 2001 to April 19, 2000. On this form he indicated that he was neither employed, self-employed nor involved in a business enterprise. The employing establishment submitted an investigative memorandum with exhibits establishing that on October 24, 2000 appellant signed Articles of Incorporation for two corporations. Appellant was listed as the president and incorporator of one and as an incorporator of the other. He was listed as the owner of ETC on the business license. Appellant signed as an agent for that corporation on February 21, 2001 to obtain a vehicle permit. He wrote a personal check for the permit on that date. Appellant again signed as an agent on March 26, 2001 to obtain a vehicle permit.

On July 2, 2002 a grand jury indicted appellant finding that he had committed fraud on the July 19, 2001 EN1032 in violation of 18 U.S.C. § 1920 by denying that he was involved in a business enterprise when in fact he was involved in ETC. On March 4, 2004 appellant was found guilty of the charges of the indictment.

The Board finds that the Office met its burden of proof in establishing that appellant did with knowledge fail to report his involvement in a business enterprise on the July 19, 2001 EN1032. Appellant signed the form which advised him to report any involvement with a business enterprise and he omitted his involvement with ETC. The Office form clearly stated that a false or evasive answer to any question or the omission of an answer may be grounds for forfeiting compensation benefits and subject a claimant to civil liability, or if fraud to criminal prosecution. The factual circumstances of the record, including appellant's failure to report his involvement in two separate business enterprises and the guilty verdict regarding fraud on the July 19, 2001 Form EN1032 provides persuasive evidence that he "knowingly" failed to report his business involvement.

In regard to the Form EN1032 completed on August 27, 2002, appellant listed his involvement in ETC. The record does not contain any information regarding the extent of appellant's involvement with this company or any other enterprise after March 26, 2001. This involvement predates the 15-month period of August 27, 2002. Consequently, there is no evidence that appellant knowingly failed to report his involvement with a business enterprise on this form.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 10.529 of the Office's implementing regulation provides as follows:

“(a) If an employee knowingly omits or understates any earnings or work activity in making a report, he or she shall forfeit the right to compensation with respect to

any period for which the report was required. A false or evasive statement, omission, concealment or misrepresentation with respect to employment activity or earnings in a report may also subject an employee to criminal prosecution.

“(b) Where the right to compensation is forfeited, [the Office] shall recover any compensation already paid for the period of the forfeiture pursuant to 5 U.S.C. [§] 8129 [recovery of overpayments] and other relevant statutes.”<sup>6</sup>

### **ANALYSIS -- ISSUE 2**

As appellant knowingly failed to report work activity he forfeited the right to compensation for the 15-month period covered by the July 19, 2001 Form EN1032. As the Office did not provide its calculations for the period from July 19, 2001 to April 19, 2000, but instead from July 13, 2002 to April 19, 2000, the Board is unable to determine the amount of this overpayment. On remand, the Office should calculate the correct overpayment amount for the period from April 19 to July 19, 2001.

### **LEGAL PRECEDENT -- ISSUE 3**

Section 8129(a) of the Act<sup>7</sup> 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.”<sup>8</sup> Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is at fault, section 10.433(a) of the Office’s regulation<sup>9</sup> provides in relevant part:

“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

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<sup>6</sup> 20 C.F.R. § 10.529.

<sup>7</sup> 5 U.S.C. §§ 8101-8193, 8129(a).

<sup>8</sup> 5 U.S.C. § 8129(b).

<sup>9</sup> 20 C.F.R. § 10.433(a).

(1) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual.)”

**ANALYSIS -- ISSUE 3**

In this case, the Office applied the second standard in determining that appellant was at fault in creating the overpayment. The Board finds that appellant failed to furnish information to the Office which he knew was material, when he knowingly failed to report his involvement in a business enterprise on the July 13, 2001 EN1032. Pursuant to section 8106(b), appellant has forfeited his right to compensation during this period. 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.

**CONCLUSION**

The Board finds that appellant forfeited his compensation benefits during the period April 19 to July 19, 2000 as he knowingly failed to report his involvement in a business enterprise on the July 19, 2000 Form EN1032. The Board further finds that appellant has received an overpayment of compensation for that period and remands the case for the Office to determine the amount of the overpayment. Finally, the Board finds that appellant was at fault in the creation of the overpayment such that the overpayment is not subject to waiver. Regarding the Office’s finding of forfeiture and overpayment for the period July 19, 2000 to July 13, 2001, the Board finds that the Office failed to meet its burden of proof regarding this period.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 28 and April 28, 2004 decisions of the Office of Workers' Compensation Programs are affirmed in part, and reversed in part. The May 28, 2004 decision is also remanded for further development consistent with this decision of the Board.

Issued: February 11, 2005  
Washington, DC

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member