

units. The Office accepted his claim for bilateral wrist sprains and aggravation of bilateral carpal tunnel syndrome. Appellant stopped work on June 25, 2003. He received continuation of pay for 45 days to August 10, 2003. Appellant was placed on the periodic compensation rolls to receive compensation for temporary total disability effective August 11, 2003. He returned to work in a light-duty capacity on December 2, 2003.

The Office paid appellant compensation in the amount of \$9,119.03 for temporary total disability for the period August 11 to December 1, 2003, \$3,164.05 for August 11 to September 17, 2003, \$1,338.56 for September 18 to October 3, 2003, \$2,236.60 for October 4 to November 1, 2003, \$2,262.62 for November 2 to 29, 2003 and \$117.20 for November 30 to December 1, 2003.

In an Office (Form CA-1032) dated November 6, 2003, received by the Office on December 2, 2003 and signed by appellant, he answered "No" to the question of whether he had been self-employed or involved in any business enterprise in the last 15 months.

In a December 16, 2003 memorandum, postal inspectors reported that they interviewed appellant regarding his business activities in 2003. The inspectors showed him a copy of an advertising flyer from his sprinkler system winterizing business. Appellant indicated that he had serviced approximately 20 to 30 customers during the previous year, charging \$15.00 to \$20.00 per job. He stated that he knew it was wrong not to report his business activities but he needed extra income for child support, his mortgage and automobile loans. In a December 18, 2003 investigative memorandum, a postal inspector stated that he observed appellant performing work on sprinkler systems at residences on October 23 and November 23, 2003. In a December 16, 2003 statement provided to postal inspectors, appellant stated that he had lied on his Form CA-1032 when he indicated that he had no outside earnings. He stated that he had a small lawn sprinkler winterizing business which provided income that he needed to supplement his compensation payments from the Office in order to pay for child support, his mortgage and household bills.

By decision dated August 24, 2005, the Office found that appellant had forfeited his entitlement to compensation for the period August 11 through December 1, 2003 on the grounds that he knowingly failed to report earnings as required under section 8106(b) of the Federal Employees' Compensation Act.¹

In an August 24, 2005 letter, the Office issued a preliminary determination that an overpayment had occurred in the amount of \$9,119.03 for the period August 11 to December 1, 2003, pursuant to section 8106 of the Act, due to appellant's failure to report his earnings from outside employment on a CA-1032 form. The Office further found that appellant was not without fault in the creation of the overpayment because he knowingly omitted his earnings from outside employment. The Office informed appellant that, if he disagreed with the preliminary determination, he could, within 30 days, submit evidence or argument to the Office or request a precoupment hearing with the Branch of Hearings and Review. On September 22, 2005 appellant asked the Office to issue a decision on the issues of fault and waiver of the overpayment.

¹ 5 U.S.C. § 8106(b).

By decision dated March 8, 2007, the Office finalized the preliminary determination that a \$9,119.03 overpayment occurred because appellant knowingly omitted or failed to report earnings or self-employment on Office Form CA-1032, that the compensation he received for lost wages for the period August 11 through December 1, 2003 was forfeit and he was at fault in the creation of the overpayment and ineligible for waiver. The Office instructed appellant to submit a check in the amount of \$9,119.03.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of the 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 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.”²

The Board has held that it is not enough merely to establish that there were unreported earnings or employment. Appellant can be subjected to the forfeiture provision of section 8106(b) only if he “knowingly” failed to report “earnings” from employment.³ The term “knowingly,” as defined in the Office’s implementing regulation, means “with knowledge, consciously, willfully or intentionally.”⁴ The Board has held that forfeiture, being a penalty provision, must be narrowly construed.⁵

ANALYSIS -- ISSUE 1

The Office found that appellant forfeited his right to compensation for the period August 11 to December 1, 2003 pursuant to section 8106(b)(2) on the basis that he knowingly failed to report employment and earnings on a CA-1032 form.

² 5 U.S.C. § 8106(b).

³ *Karen Spurling*, 56 ECAB ____ (Docket No. 04-1233, issued December 16, 2004); *Barbara L. Kanter*, 46 ECAB 165 (1994).

⁴ 20 C.F.R. § 10.5(n).

⁵ *Karen Spurling*, *supra* note 3; *Christine P. Burgess*, 43 ECAB 449 (1992).

In a CA-1032 form dated November 6, 2003, received by the Office on December 2, 2003 and signed by appellant, he answered “No” to the question as to whether he had been self-employed or involved in any business enterprise in the last 15 months. However, in a December 2003 interview with postal inspectors, appellant indicated that he had operated a lawn sprinkler winterizing business and serviced approximately 20 to 30 customers during the previous year, charging \$15.00 to \$20.00 per job. He stated that he knew it was wrong not to report his business activities but he needed extra income for child support, his mortgage and automobile loans. In a December 16, 2003 statement provided to postal inspectors, appellant indicated that he had lied on his CA-1032 form when he indicated that he had no outside earnings. In a December 18, 2003 memorandum, a postal inspector stated that he observed appellant performing work on sprinkler systems at residences on October 23 and November 23, 2003. The evidence establishes and appellant admitted to postal inspectors, that he knowingly failed to report earnings from his self-employment in 2003. Therefore, he is subject to the forfeiture provision of section 8106(b).

LEGAL PRECEDENT -- ISSUE 2

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

“(a) If an employee knowing 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 forfeiture pursuant to 5 U.S.C. § 8129 [recovery of overpayments] and other relevant statutes.”⁶

ANALYSIS -- ISSUE 2

If a claimant has any earnings during a period covered by a CA-1032 form which he or she knowingly fails to report, he or she is not entitled to any compensation for any portion of the period covered by the form, even though he or she may not have had earnings during a portion of that period.⁷ The Office paid appellant compensation in the amount of \$9,119.03 for temporary total disability for the period August 11 to December 1, 2003. As appellant forfeited compensation for this period because he failed to report income and employment on a CA-1032 form, there exists an overpayment in the amount of \$9,119.03.

LEGAL PRECEDENT -- ISSUE 3

Under section 8129 of the Act and the implementing regulation, an overpayment must be recovered unless incorrect payment has been made to an individual who is without fault and

⁶ 20 C.F.R. § 10.529.

⁷ Cheryl Thomas, 55 ECAB 610 (2004).

when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.⁸ Section 10.433 of the implementing regulation provides that the Office may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁹ The regulation further provides that 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.¹⁰ Under the regulations, a recipient will be found to be at fault with respect to creating an overpayment if he or she “Failed to provide information which he or she knew or should have known to be material.”¹¹ Whether the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.¹²

ANALYSIS -- ISSUE 3

The Office found that appellant was at fault in creating the overpayment for the period August 11 to December 1, 2003 because he omitted earnings on a CA-1032 form covering the period August 11 to December 1, 2003. The record establishes that appellant had unreported earnings from self-employment during the period of the forfeiture and knowingly failed to furnish this material information to the Office. He signed a certification clause on the CA-1032 form advising him that he might be subject to criminal prosecution if he fraudulently concealed or failed to report income or other information that would have an effect on compensation benefits, or who made a false statement or misrepresentation of a material fact in claiming a payment or benefit under the Act. Thus, by signing the form, appellant is deemed to have acknowledged his duty to complete the form properly, including the duty to report any employment or self-employment activities and income. The evidence, therefore, shows that he was aware or should have been aware of the materiality of the information that he had earnings which he had not listed on Form CA-1032. As appellant failed to provide information to the Office regarding his employment during the period covered by the form, he is at fault in creating the overpayment and is not entitled to waiver of recovery of the \$9,119.03 overpayment of compensation.¹³

⁸ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

⁹ 20 C.F.R. § 10.433(a).

¹⁰ *Id.*

¹¹ *Id.* at § 10.433(a)(2).

¹² *Id.* at § 10.433(b).

¹³ Recovery of the overpayment is not an issue in this case as appellant is not in receipt of continuing total disability payments. With respect to the recovery of the overpayment, the Board’s jurisdiction is limited to those cases where the Office seeks recovery from continuing compensation benefits under the Act. 20 C.F.R. § 10.441(a); *see also Bob R. Gilley*, 51 ECAB 377 (2000).

CONCLUSION

The Board finds that appellant forfeited his entitlement to compensation for the period August 11 to December 1, 2003 because he knowingly failed to report earnings from self-employment during this period. The Board further finds that appellant received an overpayment of compensation in the amount of \$9,119.03 during the period of forfeiture. The Board finds that the Office properly found that appellant was at fault in the creation of the overpayment and, therefore, the overpayment was not subject to waiver.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 8, 2007 is affirmed.

Issued: September 12, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board