United States Department of Labor
Employees' Compensation Appeals Board

R.W., Appellant	)	
and	)	**Docket No. 09-1607**
	)	**Issued: July 26, 2010**
GOVERNMENT PRINTING OFFICE,	)	
MAINTENANCE DEPARTMENT,	)	
Washington, DC, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
No appearance, for the Director

Oral Argument April 9, 2010

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 8, 2009 appellant filed a timely appeal from the July 2, 2008 and March 5, 2009 merit decisions of the Office of Workers' Compensation Programs concerning forfeiture and an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant forfeited his right to compensation for the period May 15, 2002 to September 30, 2007; (2) whether the Office properly found that he received a $226,821.74 overpayment of compensation; and (3) whether the Office properly found that he was at fault in creating the overpayment of compensation, thereby precluding waiver.

FACTUAL HISTORY

The Office accepted that on April 1, 1993 appellant, then a 48-year-old elevator repairman, sustained a lumbosacral sprain and a herniated nucleus pulposus at L4-5 due to taking a motor and bracket off a roll lift. Appellant stopped work from April 14 to November 14, 1993 and returned to light-duty work at the employing establishment on November 15, 1993. He stopped work on November 29, 1993 and did not return. Appellant received wage-loss compensation from the Office for periods of total disability and underwent an authorized laminectomy and discectomy surgery at L4-5 on July 6, 1995.[1]

In a May 2, 2007 memorandum of interview, Nathaniel Brown, III, a special agent for the employer's Office of Inspector General, indicated that he was memorializing an interview he conducted with appellant on that date. Appellant stated that around 1984 he and a friend, Daniel Barrett, started a company in Maryland called B&W Housing. The two men sold houses, which they had remodeled or arranged to have built without particular buyers in mind. After appellant moved to Myrtle Beach, South Carolina, in 1998, he and Mr. Barrett started a company called B&W Properties of Myrtle Beach and bought three properties. Appellant indicated that he was the property manager of the properties and stated that the activity gave him "something to do." He located renters, collected rent, went to the properties if the renters were having problems with the house and did minor repairs if necessary, such as fix an appliance. Appellant hired his brother, David Williams, if a job was too difficult or large for him. He and his brother invested equally in a house in Myrtle Beach in 2002 or 2003 and appellant went to the job site regularly and picked up supplies at home improvement stores. The two men sold the property and made a small profit. Appellant indicated that he helped neighbors with small projects around their houses but did not charge them any money.

In a May 7, 2007 memorandum of interview, Mr. Brown indicated that he was memorializing an interview he conducted with Mr. Barrett on that date. Mr. Barrett stated that in the 1980s he bought several rental properties with appellant in Maryland and that they started a company called B&W Housing in order to facilitate their investment in the properties.[2] The formation of the company was recommended by Mr. Barrett's accountant in order to ensure that they would only have limited liability in case something happened at one of the properties. Appellant moved to Myrtle Beach in the late 1990s after he was injured at work and the two men bought several rental properties there. Mr. Barrett indicated that he and appellant got $500.00 to $600.00 per month in rent for each property and placed the money back into their company. He indicated that appellant was managing the properties in Maryland and wanted to manage the properties in South Carolina in order "to stay busy." Managing the properties consisted of finding renters, collecting rent, checking on the houses and making repairs when necessary. Mr. Barrett stated that he believed that appellant performed some minor repairs on the properties but often had his brother, Mr. Williams, work on the properties. He also knew many subcontractors in the area.

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[1] In October 1996, the Office accepted that appellant sustained depression, chronic pain disorder and chronic insomnia due to his April 1, 1993 work injury.

[2] Mr. Barrett believed that he and appellant bought properties which they renovated and sold, but noted that "he could not recall."

In a May 2, 2007 memorandum of interview, Mr. Brown memorialized an interview he conducted with Mr. Williams on that date. He reported that in 2002 he moved to Myrtle Beach and bought a house with appellant, which they remodeled and sold eight months later for a small profit. Mr. Williams advised that he or subcontractors performed construction, electrical and plumbing work on the houses and stated that appellant performed no real work. Mr. Williams, Mr. Barrett and appellant had a company called B&W Properties of Myrtle Beach and owned two duplexes and a single-family house, which they rented out. Mr. Williams performed work on all the houses at different times and appellant "may perform minor work on these properties" but called him if there was a project he could not perform himself.

In several memoranda of interview, Mr. Brown detailed other interviews held on May 2, 2007. Eduardo Rafael indicated that he saw appellant when he came by his house, one of appellant's rental properties and looked at problems such as a broken air conditioner or dishwasher. Appellant fixed an appliance at Mr. Rafael's house but he also had his brother make repairs at the house. Maxine Hypes, a neighbor of appellant, stated that she saw appellant on a daily basis working in his yard and workshop. Glenda Davi, another neighbor, stated that appellant would do small projects for her without charge, such as fixing a pipe on her sprinkler system.

The record contains Internal Revenue Service (IRS) S-Corporation tax forms (Form 1120S) for B&W Properties of Myrtle Beach, Inc., and 25th Avenue, a limited liability company (LLC), completed by appellant's accountant, Daniel Coale. The forms cover the years 2004 through 2006 and, under Schedule K-1, include entries for "ordinary business income."[3] A report prepared by the private company United Self-Insured Services entitled "comprehensive individual claim credibility analysis" noted that appellant owned three properties in South Carolina. The report memorialized a conversation in which David Williams indicated that he and appellant performed most of the construction, interior modeling and carpentry work on houses that they bought together for remodeling and sale. It is unclear who conducted the interview or prepared the report. In EN1032 forms completed on August 15, 2003, December 30, 2004, January 5 and December 14, 2006 (each of which covered a 15-month period going back from the date of completion) appellant answered "no" on each form in response to a question asking whether he was self-employed or involved in any business for the 15-month period prior to completing each form. In a Form EN1032 completed on September 30, 2007, appellant indicated in the section for reporting self-employment that since January 2006 he had spent 20 minutes each month depositing rent checks.

In an August 22, 2007 report of investigation, Sonja L. Scott, a special agent for the employing establishment's Office of Inspector General, provided excerpts from the May 2007 memoranda of interview and discussed the entries from appellant's tax returns between 2004 and 2006, including deductions made for repairs and payments to subcontractors.[4] She asserted that

[3] Under Schedule K-1, the following entries were made for ordinary business income for B&W Properties: an $8,662.00 loss for 2004, $3,109.00 in income for 2005 and $296.00 in income for 2006. In 2005, 25th Avenue had $14.00 in ordinary business income and, in 2006, it had $148.00 of such income.

[4] In a May 23, 2007 letter to Ms. Scott, appellant listed properties he owned and indicated that any repairs on the properties were performed by David Williams or hired workers.

the tax deductions established that appellant acted not only as a property manager, but also as a general contractor who directed subcontractors. Ms. Scott stated that bank statements showed several debits to a Lowe's Home Improvement Store made on the B&W Properties account and posited that this circumstance showed that appellant had performed work at rental properties.[5] She concluded that the interviews, tax records and bank statements established that appellant falsified EN1032 forms completed on August 15, 2003, December 30, 2004, January 5 and December 14, 2006 when he answered "no" in response to whether he was self-employed or involved in any business for the 15-month period prior to completing each form.

In an October 17, 2007 letter to the Office, appellant stated that since 1988 he was half owner in a company that invested in real estate. Since 1993, he had only received rent from the company as a passive investor and it was his belief that investments were not encompassed by the EN1032 forms he completed for the Office. Appellant stated that it was incorrect that he performed construction repairs and work on the homes of neighbors and he had not been able to perform such work since his 1993 injury.

In a November 27, 2007 letter to the Office concerning the $2,598.00 he reported to the Social Security Administration (SSA), appellant stated that he belonged to an investment group, which purchased a rental, property and had been depositing a rent check each month. He was unaware that, according to IRS rules, his portion of the business income was not considered nonpassive income on the Schedule K-1 form but rather was considered passive income in the amount of $2,813.00.[6] Appellant stated that he spent about 20 minutes a month depositing the rent check he received. On March 27, 2008 an Office claims examiner noted that he had telephoned the IRS about appellant's Schedule K-1 income. He was informed that some income from partnerships could be considered self-employment income and had to be reported to the SSA. The claims examiner stated, "[S]o the claimant's letter of November 27, 2007 is a reasonable explanation of why the SSA reported wages."

In a July 2, 2008 decision, the Office determined that appellant forfeited his right to compensation for the period May 15, 2002 to September 30, 2007 because he knowingly understated or underreported earnings and employment activities related to his management of rental properties. The amount of compensation forfeited was $226,821.74.[7] The Office noted that appellant completed EN1032 forms on August 15, 2003, December 30, 2004, January 5 and December 14, 2006 and September 30, 2007 (each of which covered a 15-month period going back from the date of completion) but found that he failed to fully report earnings for the periods covered by the forms. While appellant claimed that he only received rent, the Office found that he performed work as a landlord or property manager. Appellant's income could not be considered passive income from an investment or capital gains because, according to his statements and those

[5] Appellant's March 2007 bank statement shows two entries for a Lowe's Home Improvement Store.

[6] It does not appear that the documents regarding appellant's dealings with the SSA are in the record.

[7] The Office calculated the amount of the forfeiture based on the compensation appellant received from July 1, 2002 to September 30, 2007 because it was not clear from the payment history how much he received from May 15 to July 1, 2002 "due to overlapping payments." Although the Office determined that appellant forfeited his right to compensation for the period May 15, 2002 to September 30, 2007, it should be noted that the EN1032 forms completed by appellant did not cover the period August 16 to September 30, 2003.

of his brother, he performed at least light construction work and was active in the management of a real estate company. The Office found that there was no evidence to establish that appellant did not understand that the forms notified him to report any earnings or work he performed. The decision stated:

> "According to an interview conducted with you on [May 2, 2007] you admitted not only that you owned rental property but that since 1998 you have been the property manager for rental properties you co-own, that you locate renters, collect rent, go to properties and do small repair work. An interview with your brother on the same day corroborates these activities. Since you have never reported this work on your [EN1032 forms], stating on each one … that you never worked for the period 15 months prior, you have provided false statements and forfeiture of all compensation is appropriate. When confronted with this evidence you denied any involvement other than collecting rent for approximately 20 minutes per month, which still makes you an active participant in a business."

In a July 2, 2008 letter, the Office advised appellant of its preliminary determination that he received a $226,821.74 overpayment of compensation because he provided false statements on EN1032 forms for the period May 15, 2002 to September 30, 2007 and forfeited compensation for this period. It made a preliminary determination that he was at fault in the creation of the overpayment because he knew or should have known that he failed to report earnings on EN1032 forms. It advised appellant that he could submit evidence challenging the fact, amount or finding of fault and request waiver of the overpayment. The Office informed appellant that he could submit additional evidence in writing or at prerecoupment hearing, but that a prerecoupment hearing must be requested within 30 days of the date of the written notice of overpayment. It requested that appellant complete and return an enclosed financial information questionnaire within 30 days even if he was not requesting waiver of the overpayment.

In a September 9, 2008 letter, appellant disputed the Office's preliminary overpayment determination. He disagreed that he performed light construction work or was active in business management during the periods covered by the EN1032 forms he completed. Appellant asserted that he was a passive investor in real estate and stated that all activities concerning the management of the company he co-owned were performed by others, including management company workers or other hired personnel. The IRS had determined that the monies he received from the company constituted partnership income rather than wages. Appellant denied any admission that he was a property manager or that he located renters, collected rent, went to properties or performed small repair work. He stated that he spent 20 minutes each month depositing the proceeds he received from his investment properties.

In a July 21, 2008 letter, appellant's accountant, Mr. Coale, stated that his firm had been filing S Corporation tax forms (Form 1120S) for the companies B&W Housing, Inc., and B&W Properties of Myrtle Beach, Inc. He stated that appellant did not have any earned income during the past several years, but rather only had passive and nonpassive income from various investments. In 2006, appellant was the general partner in a limited liability company known as 25th Avenue, LLC, but he was not compensated for any services, which could qualify as earned income. Mr. Coale stated that appellant was issued a Schedule K-1 form and the income from

this form was reported on his individual income tax return. A $397.00 payment was made to the SSA on a $2,813.00 dividend based on the proportionate distribution to appellant of the overall earnings of 25th Avenue, LLC. Mr. Coale stated that this distribution was not earned income but was nonpassive income because of appellant's role as general partner in 25th Avenue, LLC. He noted that the term nonpassive income did not imply that the monies qualified as earned income. To his knowledge, appellant had never been compensated for any services performed in connection with his investments during the past several years.

On December 15, 2008 Mr. Barrett signed a document, which addressed the text of his May 7, 2007 memorandum of interview. He noted that the statement he "allegedly made" had been used to determine that appellant was actively managing real estate since 2002; but asserted that this characterization was false. Mr. Barrett stated, "With regard to the question as to whether, since 2002, [appellant] finds renters, collects rent, or performs any repairs, minor or otherwise, I am unaware of any such activity on the part of [appellant]."[8] On January 2, 2009 Mr. Williams signed a document, which addressed the text of his May 2, 2007 memorandum of interview. He noted that since 2002 appellant did nothing other than act as a passive investor and, to his knowledge, had not performed any work. Mr. Williams advised that the characterization that appellant engaged in minor repairs or running errands was false. He noted, "With regard to the question as to whether, since 2002, [appellant] finds renters, collects rent, or performs any repairs, minor or otherwise, I am unaware of any such activity on the part of [appellant]."

In a December 19, 2008 letter, Mr. Brown stated that he had reviewed the August 22, 2007 report of investigation, the associated memoranda of the interviews held with appellant, Mr. Barrett, Mr. Williams and others and all available notes taken during the interviews. He attested that these records "accurately and completely document the statements made by [appellant] and other witnesses during the course of this investigation."

At a November 14, 2008 hearing before an Office hearing representative, appellant reiterated that he did not serve as a property manager, locate renters, collect rent or perform minor repairs on properties nor admit to such activities when questioned by the investigator from the Office of Inspector General. Appellant stated that his brother performed management duties and that he only deposited rental checks. His attorney asserted that the investigator only provided summaries of interviews and that the record did not contain any transcripts of the interviews. Appellant denied that he picked up building supplies as indicated in the summary of his brother's statement to the investigator.

In a March 5, 2009 decision, an Office hearing representative affirmed the Office's forfeiture decision, found a $226,821.74 overpayment of compensation caused by the forfeiture and determined that appellant was at fault in creating the overpayment of compensation, thereby precluding waiver.[9] The Office hearing representative noted that appellant provided a Schedule K-1 from his accounting firm concerning passive income reported to the SSA and acknowledged

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[8] The record also contains a document signed on December 28, 2008 which contains virtually the same contents.

[9] The Office hearing representative indicated that appellant had "multiple investment properties that would suggest he is able to repay the overpayment in full" and found that the overpayment was due and payable in full.

that the IRS did not consider this income to be earned wages. She noted that this did not negate appellant's interview with the Office of Inspector General and his admission of active involvement in his investment properties. Although appellant asserted that the characterization of his activities by the Office of Inspector General was inaccurate, the statements of the Office of Inspector General were found to have greater credibility than those of appellant.[10]

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of the Federal Employees' Compensation Act[11] 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 --
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> (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."[12]

The Board has distinguished between income received from investment and earnings received by performing work. The former is not considered to be evidence of a claimant's ability to work and earn wages but rather is considered to be a return on investment. The latter is considered to be wages if the source of income can be established to be the product of the claimant's work.[13] In the case of *Gregg B. Manston*,[14] the Board found that, while passive land investment can be considered an investment, activity such as property management can be considered employment from which a claimant derives earnings as the product of his work. Management activities may be considered self-employment activities if someone else could be

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[10] The Office hearing representative noted Mr. Brown's December 19, 2008 statement attesting to the accuracy of the May 2007 interviews.

[11] 5 U.S.C. § 8106(b).

[12] 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.* at 260. The Board has held that the test of what constitutes reportable earnings is not whether appellant received a salary but what it would have cost to have someone else perform the work. *See Monroe E. Hartzog*, 40 ECAB 322, 329 (1988).

[13] *Anthony V. Knox*, 50 ECAB 402 (1999); *Burnett Terry*, 46 ECAB 457 (1995).

[14] 45 ECAB 344 (1994).

hired to perform such activities, if the employee was not performing them. The distinction to be made is between passive business investment profit and active work resulting in earnings. Before the Office can declare a forfeiture of compensation, it must establish that appellant received earnings from self-employment, not from passive investment in business ventures.[15]

The Board has held that the Office may not base its application of the forfeiture provision strictly on conclusions drawn in an investigation; rather, the evidence of record must establish that the claimant has had unreported earnings from employment which were knowingly not reported.[16] In FECA Bulletin No. 83-7, the Office noted that an investigative report showing that a claimant has had unreported earnings from employment must be used in conjunction with other evidence of record in order to properly find a forfeiture of compensation.[17] The Board cited this bulletin in *Claudia J. Thibault,*[18] in finding that the evidence of record was insufficient to establish that the employee had earnings within the meaning of the Act. In declaring a forfeiture of compensation, the only document that the Office presented in support of its position was a memorandum in which a special agent from the Office of Inspector General for the employees' employing establishment memorialized a telephone interview with a witness who commented on her activities. The Board noted that the memorandum was written by the special agent rather than the person interviewed and found that the evidence was not sufficient to outweigh the claimant's testimony that she did not have earnings.

An employee 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 a penalty,[19] and, as a penalty provision, it must be narrowly construed.[20] The term "knowingly" is not defined within the Act or its regulations. In common usage "knowingly" is defined as: "[w]ith knowledge; consciously; intelligently; willfully; intentionally."[21]

ANALYSIS -- ISSUE 1

In the present case, the Office determined that appellant forfeited his right to compensation from May 15, 2002 to September 30, 2007 because he knowingly failed to report earnings and employment activities related to his management of real estate on several EN1032 forms.[22] The

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[15] *See Anthony V. Knox*, *supra* note 13.

[16] *Louis P. McKenna, Jr.,* 46 ECAB 328 (1994).

[17] FECA Bulletin No. 83-7 (issued March 31, 1984).

[18] 40 ECAB 836 (1989).

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

[20] *See Christine P. Burgess*, 43 ECAB 449, 458 (1992).

[21] Black's Law Dictionary (5th ed. 1979); *see Anthony A. Nobile*, 44 ECAB 268, 271-73 (1992).

[22] During the period of forfeiture, appellant was a co-owner of two businesses, B&W Properties of Myrtle Beach, Inc., and 25th Avenue, LLC.

amount of Office compensation found to be forfeited was $226,821.74. The Office found this resulted in a $226,821.74 overpayment of compensation for which he was at fault in creating the overpayment of compensation, thereby precluding waiver.

On appeal, counsel argued that the Office did not support its forfeiture determination because it did not present sufficient evidence to establish appellant's failure to report earnings and employment activities. He claimed that the investigative reports of record only contained unsigned summaries of witness statements and had misrepresented the statements of appellant, his business partner Mr. Barrett, his brother Mr. Williams and others. Counsel asserted that appellant's rental properties were passive investments, that he did not actively manage these properties and that later affidavits of appellant, Mr. Williams and Mr. Barrett clarified their earlier statements.

The Board has held that the Office may not base its application of the forfeiture provision strictly on conclusions drawn in an investigation, but rather the evidence of record must establish that the claimant has had unreported earnings from employment which were knowingly not reported.[23] The Board finds that the Office did not present sufficient evidence to establish that appellant failed to report earnings or employment activities on the EN1032 forms he completed such that he should be subjected to the forfeiture provisions of the Act.[24]

In finding that appellant forfeited compensation, the Office relied on memoranda of interviews obtained by Special Agent Brown of the Office of Inspector General in May 2007. Mr. Brown reported that appellant stated during a May 2007 interview that he acted as a property manager, which included the tasks of locating renters, collecting rent, going to properties if the renters were having problems and performing minor repairs if necessary, such as fixing an appliance. He also asserted that appellant stated that in 2002 or 2003 he went to a job site regularly and picked up supplies at home improvement store. In another interview held in May 2007, Mr. Brown reported that Mr. Barrett indicated that appellant managed properties in Maryland and South Carolina and that managing the properties consisted of finding renters, collecting rent, checking on the houses and making minor repairs when necessary.[25]

The Board finds that the Office did not present sufficient evidence to support its determination that appellant failed to report earnings or employment activities during the period May 15, 2002 to September 30, 2007. In the memoranda of interview memorializing the interviews conducted in May 2007, Mr. Brown merely provided summaries of the interviews he held with appellant, Mr. Barrett, Mr. Williams and others. Appellant, Mr. Barrett and Mr. Williams later disputed the characterization of their statements as reported by Mr. Brown in his May 2007 memoranda. The record does not contain any transcript detailing the questions Mr. Brown asked of the various interviewees or the actual responses made by the interviewees.

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[23] *See supra* note 16.

[24] In several EN1032 forms, appellant answered "no" in response to a question asking whether he was self-employed or involved in any business for the 15-month period prior to completing each form.

[25] Mr. Brown reported that Mr. Williams indicated in a May 2007 interview that appellant "may perform minor work" on these properties held in South Carolina. He also stated that Mr. Williams reported that appellant performed no "real" work in connection with his properties.

There are no individual statements signed by any of the parties questioned. Mr. Brown submitted a December 28, 2008 statement in which he attested to the accuracy of the interviews he held, but this statement alone does not cure the deficiencies in the evidence of record.

In *Claudia J. Thibault,*[26] the Board noted that the only document presented to support finding forfeiture was a memorandum in which a special agent from the Office of Inspector General for the employee's employing establishment memorialized a telephone interview with a witness who commented on the employee's activities. The Board noted that the memorandum was written by the special agent rather than the person interviewed. There was nothing signed by the witness attesting to the accuracy of the information provided. The Board found that the evidence was not sufficient to outweigh the employee's testimony that she did not have earnings. In the present case, given the absence of the actual signed statements of the interviewees, there is inadequate evidence to establish that appellant had earnings or was engaged in employment activities which were required to be reported on the EN1032 forms he submitted.

Appellant testified that the only actions he took in connection with his companies were in his role as a passive investor. The Board has distinguished between income received from investment and earnings received by performing work noting that the former is considered to be a passive return on investment rather than evidence of a claimant's ability to work and earn wages whereas the latter is considered to be wages only if the source of income can be established to be the product of the claimant's work.[27] Appellant stated on several occasions that all he did in connection with the real estate companies was to spend 20 minutes each month depositing rent checks. Mr. Barrett and Mr. Williams testified that appellant did not perform any notable work.[28] In the absence of sufficient credible evidence to show that appellant engaged in real estate management activities, his involvement with his real estate companies and receipt of monies from these companies must be seen as participation in a passive investment.[29]

Because the Office did not show that appellant had earnings that had to be reported on the EN1032 forms he completed, it did not meet its burden of proof to show that he forfeited his right to compensation for the period May 15, 2002 to September 30, 2007.

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[26] *See supra* note 18.

[27] *See supra* note 13.

[28] The Office also indicated that bank statements showed that appellant made purchases at home improvement stores and therefore engaged in property management activities. Appellant's March 2007 bank statement shows two entries for purchases made at a Lowe's Home Improvement Store. There are no other records of home improvement store purchases and it is unclear how the May 2007 bank statement would establish that appellant engaged in management activities. Tax records for appellant's companies show deductions for property repairs and payments to subcontractors, but these deductions would not establish that appellant served as a property manager or chief contractor.

[29] The record contains S Corporation tax forms (IRS Form 1120S) for B&W Properties of Myrtle Beach, Inc., and 25th Avenue, LLC which cover the years 2004 through 2006 and include entries for "ordinary business income." Appellant's accountant indicated that despite, the characterization of the monies recorded on the forms, they represented investment returns rather than earned income. The Office properly found that the characterization of the monies on the IRS forms did not in itself show that they constituted earnings that had to be reported on EN1032 forms.

LEGAL PRECEDENT -- ISSUE 2

Section 8102(a) of the Act provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.[30] Section 8129(a) of the Act provides, in pertinent part:

> "When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled."[31]

ANALYSIS -- ISSUE 2

The Office based its determination that appellant received a $226,821.74 overpayment of compensation on its finding that he forfeited his right to compensation for the period May 15, 2002 to September 30, 2007. For the reasons explained above, the Office improperly determined that appellant forfeited his right to compensation for the period May 15, 2002 to September 30, 2007. Therefore, there currently is no basis to find that appellant received a $226,821.74 overpayment. As the Office has not shown that appellant received an overpayment, it also has not shown that he was at fault in the creation of an overpayment such that it would not be subject to waiver.

CONCLUSION

The Board finds that the Office improperly determined that appellant forfeited his right to compensation for the period May 15, 2002 to September 30, 2007. The Board further finds that appellant did not receive a $226,821.74 overpayment of compensation.

[30] 5 U.S.C. § 8102(a).

[31] *Id*. at § 8129(a).

ORDER

IT IS HEREBY ORDERED THAT the March 5, 2009 and July 2, 2008 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: July 26, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board