

compensation. By decision dated March 28, 2001, the Office determined the selected position of stock control clerk represented his wage-earning capacity and appellant's compensation was reduced.

Appellant was periodically requested to submit evidence regarding his earnings. In a letter dated September 1, 2006, the Office requested that he complete a Form EN1032 covering the prior 15 months. Appellant was advised that a false or evasive answer could be grounds for forfeiture of compensation benefits. The form contains a certification clause acknowledging that anyone who fraudulently conceals or fails to report income may be subject to criminal prosecution, and that all statements made on the form are true, complete and correct to the best of a claimant's knowledge.

In a Form EN1032 dated November 9, 2006, appellant responded "yes" to a question as to whether he was self-employed or involved in a business enterprise in the last 15 months. He reported employment activity in a plant nursery at \$7.00 an hour, approximately \$200.00 a week. In a Form EN1032 dated September 27, 2007, appellant again indicated that he worked in a plant nursery office. He reported the rate of pay at \$7.00 an hour, 20 to 30 hours a week.

The record contains a statement of earnings from the Social Security Administration (SSA) indicating that appellant had \$20,551.00 in self-employment earnings for the year 2006. No earnings for 2005 were reported. Appellant completed an EN1032 dated October 20, 2008, reporting employment activity at the plant nursery at \$7.00 an hour and 280.00 a week. An SSA document received by the Office on January 16, 2009 showed earnings of \$49,801.00 in 2007.

By decision dated March 16, 2009, the Office determined that appellant forfeited his compensation from August 10, 2005 to October 20, 2008. In an accompanying memorandum, it stated that the period covered by the EN1032's was August 10, 2005 to October 20, 2008. The Office stated that appellant had been advised of his obligations to report earnings, and he had knowingly submitted false and evasive answers, requiring forfeiture of his compensation from August 10, 2005 to October 20, 2008.

In a letter dated March 23, 2009, appellant stated that he did not feel he had knowingly underreported his earnings. He stated the earnings he reported to the Office were estimates because he did not draw an actual check from the nursery. Appellant indicated that he deposited his compensation payment in the same account that the nursery business used, making it difficult to estimate his actual earnings.

By letter dated July 28, 2009, the Office advised appellant of a preliminary determination that an overpayment of \$103,117.02 had been created from August 10, 2005 to October 20, 2008. It also made a preliminary determination that he was at fault in creating the overpayment. Appellant requested a precoupment hearing on the overpayment issues.

At the November 24, 2009 hearing, appellant indicated that he was the owner of a wholesale nursery business that had been operating since approximately 2000. He stated that during the overpayment period, he did "paperwork in the office. I kind of go out and broker plants and just try to sell plants." According to appellant he would draw money from the business account, approximately \$21 b0.00 a week, although he would not draw funds every

week. An accountant testified that the business had a loss in 2005, profits of approximately \$22,000.00 in 2006 and \$54,000.00 in 2007, with a loss in 2008.

By decision dated February 4, 2010, an Office hearing representative affirmed the preliminary determination of a \$103,117.02 overpayment. The hearing representative also finalized a finding of fault in creating the overpayment. By decision dated February 19, 2010, the Office requested that appellant submit payment for the entire amount of the overpayment.²

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 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 ... under section 8129 of this title, unless recovery is waived under that section.”³

ANALYSIS -- ISSUE 1

The Office made a finding that an overpayment was created from August 10, 2005 to October 20, 2008 because appellant had knowingly understated his earnings on three specific EN1032 forms: November 9, 2006, September 27, 2007 and October 20, 2008. In the February 4, 2010 Office decision, the hearing representative did not consider each form separately. To properly address the issue, the Office should establish for each Form EN1032 filed that: (1) there was an understatement of earnings; and (2) the understatement was knowingly made.

With respect to the November 9, 2006 Form EN-1032, the Office did not establish that earnings were understated. Appellant reported on the form he earned \$7.00 an hour and approximately \$200.00 a week. The evidence cited by the hearing representative was the SSA earnings and the testimony of the accountant regarding profit or losses for specific years. As of November 9, 2006 the annual profit for 2006 for the nursery business had yet to be determined. The Office cannot require appellant to account for earnings from annual business profits in 2006 before those annual profits have been determined. The Form EN1032 requires him to state his earnings for the prior 15 months, which would include earnings he received directly from the

² The Board’s jurisdiction over recovery of an overpayment is limited to cases where the Office seeks recovery from continuing compensation payments under the Act. *M.C.*, Docket No. 10-881 (issued February 7, 2011).

³ 5 U.S.C. § 8106(b).

business, and if he performed unpaid work, the amount he would have had to pay someone to perform the work.⁴ The Office made no findings on these issues for the period covered by the November 9, 2006 Form EN1032. Appellant indicated that he sometimes took out approximately \$210.00 a week, but other times he did not. The Office did not refer to any specific relevant evidence or make appropriate findings as to what amount he should have reported on the November 9, 2006 Form EN1032. It is therefore not established that appellant understated his earnings and the forfeiture of compensation based on the November 9, 2006 Form EN1032 is not supported by the record.

At the time of the September 27, 2007 Form EN1032, appellant did have established earnings as reported by the SSA for 2006. The period covered by the form is June 27, 2006 to September 27, 2007. The reported earnings for 2006 were approximately \$400.00 a week and these should have been reported on the Form EN1032. Since appellant reported only up to \$7.00 an hour, 20 to 30 hours a week in earnings, he did understate his earnings. Moreover, the evidence of record supports a finding that the understatement was “knowingly.” The Form EN1032 clearly required him to report earnings for the prior 15 months, including any employment for which he received wages, income or payment of any kind. Appellant argued that he was making an “estimate” of his earnings on the form, without explaining why he failed to report documented earnings from the nursery business. The certification clause of the Form EN1032 states the claimant is certifying all statements are true, complete and correct to the best of his knowledge. Based on the probative evidence, the Board finds that appellant knowingly understated his earnings on the September 27, 2007 Form EN1032.⁵ Pursuant to 5 U.S.C. § 8106, appellant’s compensation from June 27, 2006 to September 27, 2007 is forfeited and the Office may recover the overpayment.

Similarly, the October 20, 2008 Form EN1032 represents a knowing understatement of earnings. The period of the form is July 20, 2007 to October 20, 2008, and appellant had documented earnings in 2007 of over \$950.00 a week. His statement on the October 20, 2008 Form EN1032 that he earned only \$280.00 a week represents understated earnings. In view of the clear requirement to report the earnings and the documented evidence of those earnings, the Office properly found that appellant “knowingly” understated his earnings.

The Board accordingly finds that the evidence supports a finding that appellant forfeited his compensation from June 27, 2006 to October 20, 2008. The evidence of record does not support a forfeiture from August 10, 2005 to June 26, 2006. On return of the case record, the Office should properly calculate the amount of the overpayment in this case.

LEGAL PRECEDENT -- ISSUE 2

5 U.S.C. § 8129 provides: “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

⁴ See *M.C.*, *supra* note 2.

⁵ See *P.M.*, Docket No. 07-2169 (issued March 3, 2009)

conscience.”⁶ Waiver of an overpayment is not permitted unless the claimant is “without fault” in creating the overpayment.⁷ On the issue of fault, 20 C.F.R. § 10.433 provides that an individual will be found at fault if he or she has done any of the following: “(1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (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 was incorrect.”

ANALYSIS -- ISSUE 2

As the Board noted above, appellant was found to have knowingly understated his earnings on the September 27, 2007 and October 20, 2008 Form EN1032. Under the standards for finding fault in the creation of an overpayment, a claimant is at fault if he failed to provide information that he knew or should have known was material or made an incorrect statement as to a material fact that he knew or should have known was incorrect. The discussion of the evidence on forfeiture establishes that appellant did make an incorrect statement as to a material fact that he knew or should have known was incorrect. Appellant signed the EN1032 forms which required him to report earnings and advised him in explicit language that he might be subject to criminal penalties if he knowingly made a false statement or misrepresentation or concealed a fact to obtain compensation. By signing the form, is deemed to have acknowledged his duty to fill out the form properly, including the duty to accurately report any employment or self-employment activities and income.⁸ The Board finds the understatement of earnings is an incorrect statement as to a material fact that appellant knew or should have known was incorrect.

Pursuant to 20 C.F.R. § 10.433, appellant was at fault in creating an overpayment from June 27, 2006 to October 20, 2008. Since he was at fault, waiver of the overpayment is not permitted.

CONCLUSION

The Board finds that the evidence establishes an overpayment of compensation from June 27, 2006 to October 20, 2008. The case will be remanded for recalculation of the amount of the overpayment. For the period of the overpayment, appellant was at fault in creating the overpayment and is not entitled to waiver.

⁶ 5 U.S.C. § 8129(b).

⁷ *Norman F. Bligh*, 41 ECAB 230 (1989).

⁸ *P.M.*, *supra* note 5.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 4, 2010 is affirmed with respect to fact of overpayment for the period June 27, 2006 to October 20, 2008 and a finding of fault. The decision is reversed with respect to an overpayment from August 10, 2005 to June 26, 2006 and the case remanded for proper calculation of the amount of overpayment.

Issued: April 15, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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