



the amount of repayment. Further he noted that he never did any physical labor at his wife's business and it was impractical for her to hire an employee to do what he did. The business did not make any profit for many years. Appellant requested that the Board waive all or a portion of the payment in order to give his family some hope for the future.

### **FACTUAL HISTORY**

This case has previously been before the Board. On August 26, 2008 the Board affirmed an overpayment in the amount of \$12,339.86 due to an underdeduction of health insurance premiums and found appellant without fault in the overpayment.<sup>1</sup> The facts of the case as set forth in the prior decision are incorporated by reference. The relevant facts of the case are set forth herein.

On August 21, 1989 appellant, then a 30-year-old maintenance mechanic, filed a claim (Form CA-1) for injury to his low back and left leg. The Office accepted the claim for postlaminectomy syndrome. Appellant was placed on the periodic rolls. During the period of his total disability, he was requested to file periodic EN1032 disclosure forms. The affidavits required appellant to report earnings from employment or self-employment during the 15-month period prior to the completion and signing of each affidavit. The affidavits advised signers that false, evasive or omitted answers might subject them to forfeiture of compensation benefits, civil liability or criminal prosecution. The affidavits contained the following instructions:

**“Report ALL employment for which you received a salary, wages, income, sales commissions, piece work, or payment of any kind....**

**“Report ALL self-employment or involvement in business enterprises.** These include but are not limited to: farming; sales work; operating a business, including a store or restaurant; and providing services in exchange for money, goods, or other services. The kinds of services which you must report include such activities as carpentry, mechanical work, painting, contracting, childcare, odd jobs, etc. Report activities such as keeping books and records, or managing and/or overseeing a business of any kind, including a family business. Even if your activities were part time or intermittent, you must report them.

**“Report as your ‘rate of pay’ what you were paid.** Include the value of such things as housing, meals, clothing and reimbursed expenses, if they were received as part of your employment.

**“Report ANY work or ownership in any business enterprise,** even if the business lost money or if profits or income were reinvested or paid to others. If you performed any duties in any business enterprise for which you were not paid, you must show as rate of pay what it would have cost the employer or organization to hire someone to perform the work or duties you did, even if your work was for yourself or a family member....” (Emphasis in the original.)

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<sup>1</sup> Docket No. 07-1613 (issued August 26, 2008); *petition for recon. denied* (issued April 2, 2009).

Appellant submitted these forms on December 19, 2002, November 21, 2003, August 5, 2004, September 11, 2005, July 24, 2006, October 29, 2007, June 4 and July 16, 2008, April 22 and August 3, 2009. On November 13, 2009 he entered a plea of guilty to seven counts of violations of 18 U.S.C. § 1920 for knowingly and willfully making false statements on Form EN1032 affidavits between December 19, 2002 and June 4, 2008.

Appellant reported on the affidavits that he was not self-employed, receiving income, or otherwise involved in any business enterprise despite the fact that he knew he performed work and received income in connection with his wife's business, Safe N Sound Storage (SNSS), a boat and recreational vehicle storage business located in Auburn, California.

The government, as part of the plea agreement, stated that it would have proved that appellant's involvement with SNSS included meeting with clients and customers, signing rental contracts and accepting payment for services and appearing on behalf of SNSS at videotaped public hearings. Appellant also was engaged in litigation with customers, contractors and neighbors of SNSS and represented on an official court filing that he and his wife owned SNSS. In a meeting with appellant and special agents of the Office of Inspector General, Department of Defense, appellant admitted that he was at the location at all times, that he was the one responsible for the decisions at the business and that the business was all he did. He claimed it was his "dream job" and that he had been in the business for eight years.<sup>2</sup>

As a result of the plea of guilt to violating 18 U.S.C. § 1920, by decision dated November 19, 2009, the Office terminated appellant's right to further compensation benefits effective November 13, 2009.

By decision dated December 4, 2009, the Office also found that appellant had forfeited all compensation for the period September 19, 2001 to November 12, 2009 because he had failed to report employment income as required under 5 U.S.C. § 8106(b).

The Office issued a preliminary determination of overpayment of compensation for the same period in the amount of \$243,452.61 and finalized the overpayment in a decision dated January 5, 2010. It found that, based on the plea agreement, appellant knew or reasonably should have known that he could not receive compensation for total disability while at the same time working and earning wages. The Office found appellant at fault in the creation of the overpayment and requested a check in that amount payable within 30 days to the Office.

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

Section 8148(a) of the Federal Employees' Compensation Act specifically states the result of a criminal conviction related to fraud in the application for or receipt of compensation benefits. "Any individual convicted of a violation of section 1920 of Title 18, or any other Federal or State criminal statute relating to fraud in the application for or receipt of any benefit under [the Act] ... shall forfeit (as of the date of such conviction) any entitlement to any benefit such individual would otherwise be entitled to under [the Act] for any injury occurring on or

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<sup>2</sup> On May 2, 2001 appellant was sentenced to one year and nine months incarceration and three years of supervised release.

before the date of such conviction. Such forfeiture shall be in addition to any action the Secretary may take under section 8106 [forfeiture] or 8129 [recovery of overpayments].”<sup>3</sup>

Section 10.17 of the Office’s implementing federal regulations clarify:

“When a beneficiary either pleads guilty to or is found guilty on either Federal or State criminal charges of defrauding the Federal Government in connection with a claim for benefits, the beneficiary’s entitlement to any further compensation benefits will terminate effective the date either the guilty plea is accepted or a verdict of guilty is returned after trial, for any injury occurring on or before the date of such guilty plea or verdict. Termination of entitlement under this section is not affected by any subsequent change in or recurrence of the beneficiary’s medical condition.”<sup>4</sup>

The Office’s procedure manual states that in support of termination or suspension of compensation the record must contain copies of the indictment or information, the plea agreement, if any, the document containing the guilty verdict and/or the court’s docket sheet. Further, this evidence must establish: (1) the individual was convicted; and (2) the conviction is related to the claim for, or receipt of, compensation benefits under the Act.<sup>5</sup> The termination is effective on the date of the verdict or on the date the guilty plea is accepted and guilt adjudicated.<sup>6</sup> Because of the criminal basis for the termination, no pretermination notice is required before a final decision is issued.<sup>7</sup>

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

The Board finds that the Office properly terminated appellant’s compensation effective November 13, 2009.

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee’s benefits. It relied on 5 U.S.C. § 8148(a) and 20 C.F.R. § 10.17 to terminate future compensation benefits effective on the date of the guilty plea (November 13, 2009).

On November 13, 2009 appellant entered a plea of guilty to seven counts of violating 18 U.S.C. § 1920 when he knowingly made false statements regarding his employment, self-employment and income on Office EN1032 forms dated from December 19, 2002 to June 4, 2008 to obtain federal employees’ compensation.

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<sup>3</sup> 5 U.S.C. § 8148(a). Public Law No. 103-333, which amended the Act by adding 5 U.S.C. § 8148, was enacted on September 30, 1994.

<sup>4</sup> 20 C.F.R. § 10.17.

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.12(d) (March 1997).

<sup>6</sup> 20 C.F.R. § 10.17; *see also Paul Hanley*, 53 ECAB 424, 426-27 (2002);

<sup>7</sup> *Supra* note 5 at Chapter 2.1400.12(f)(2) (March 1997).

As appellant was convicted of an offense under 18 U.S.C. § 1920, the Office properly terminated his compensation benefits effective November 13, 2009, the date the guilty plea was accepted and guilt adjudicated.<sup>8</sup>

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

Section 8106(b) of the Act<sup>9</sup> provides that an employee who fails to make an affidavit or report when required; or 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.

The Board has held that it is not enough merely to establish that there were unreported earnings or unemployment. A claimant can be subjected to the forfeiture provisions of 5 U.S.C. § 8106(b) only if he knowingly failed to report employment or earnings.<sup>10</sup> The term knowingly as defined in the Office's implementing regulations, means with knowledge, consciously, willfully or intentionally.<sup>11</sup>

Section 10.5(g) of the Office's regulations further define earnings from employment or self-employment as gross earnings or wages before any deduction and includes the value of subsistence, quarters, reimbursed expenses and any other goods or services received in kind as remuneration; or a reasonable estimate of the cost to have someone else perform the duties of an individual who accepts no remuneration. Neither lack of profits, nor the characterization of the duties as a hobby, removes an unremunerated individual's responsibility to report the estimated cost to have someone else perform his or her duties.<sup>12</sup>

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

The Board finds that the Office properly forfeited appellant's compensation for the period September 19, 2001 through August 3, 2009. The Board further finds the record insufficient to support forfeiture from August 4 through November 12, 2009.

On November 13, 2009 appellant entered a plea of guilty to seven counts of violating 18 U.S.C. § 1920 when he knowingly made false statements regarding his employment, self-employment and income on Office EN1032 forms dated from December 19, 2002 to June 4, 2008 to obtain federal employees' compensation benefits.

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<sup>8</sup> The record contains the appropriate court documents specified by Office procedure.

<sup>9</sup> 5 U.S.C. § 8106(b).

<sup>10</sup> *Barbara L. Kanter*, 46 ECAB 165, 169 (1994).

<sup>11</sup> 20 C.F.R. § 10.5(n).

<sup>12</sup> 20 C.F.R. § 10.5(g); *see also J.S.*, 58 ECAB 515, 519 (2007).

Based on the facts presented in the plea agreement, appellant's involvement with SNSS clearly equated to "earnings" as defined by 20 C.F.R. § 10.5(g). These duties included meeting with clients and customers, signing rental contracts and accepting payment for services, appearing on behalf of SNSS at videotaped public hearings, engaging in litigation with customers, contractors and neighbors of SNSS and represented in an official court filing that he and his wife owned SNSS. Appellant further admitted that he was at the location at all times, that he was the one responsible for the decisions at the business and that the business was all he did and had been doing for eight years.

This plea of guilt is sufficient to establish that appellant knowingly omitted work activities from the EN1032 forms for the period covered by the plea agreement (December 19, 2002 through June 4, 2008). As the EN1032 forms signed by appellant cover the previous 15-month period, the Board affirms the forfeiture for the period from September 19, 2001 through June 4, 2008.

Further, appellant submitted three additional EN1032 affidavits that were not incorporated in the plea agreement. These forms dated July 16, 2008, April 22 and August 3, 2009 incorporated the period April 16, 2007 to August 3, 2009. In the July 16, 2008 report, appellant reported neither duties nor income associated with working with his wife's business, SNSS. In the April 22, 2009 report, he referenced meeting with tenants to sign rental contracts, appearing at county meetings and court trials and answering telephones and in his August 3, 2009 report, he referenced representing his wife regarding property improvements and signing rental contracts. In none of these EN1032 forms did appellant report any income associated with those duties. His involvement with SNSS, though, equates to earnings as defined by 20 C.F.R. § 10.5(g). Although appellant claimed he had no earnings from the business and that the business did not make money for most of its years, he was still required to report "a reasonable estimate of the cost to have someone else perform the duties of an individual who accepts no remuneration."<sup>13</sup> Neither lack of profits, nor the characterization of the duties as a hobby, removes an unremunerated individual's responsibility to report the estimated cost to have someone else perform his or her duties.<sup>14</sup>

The Board finds that the evidence establishes that appellant knowingly underreported earnings associated with a family business for the period April 16, 2007 through August 3, 2009 and that this period was therefore appropriately subject to forfeiture.

The record does not reflect any additional affidavits in which appellant failed to report his income from August 4 to November 12, 2009. The forfeiture provision is a penalty provision and is thus narrowly construed.<sup>15</sup> As there are no EN1032 affidavits upon which to base a forfeiture of compensation payments for the period August 4 through November 13, 2009, the Board reverses the forfeiture for that period.

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<sup>13</sup> See *B.T.*, Docket No. 09-2190 (issued August 6, 2010).

<sup>14</sup> *Supra* note 12; see also *C.R.*, 61 ECAB \_\_\_\_ (Docket No. 09-720, issued October 15, 2009); *B.S.*, 61 ECAB \_\_\_\_ (Docket No. 09-741, issued May 14, 2010).

<sup>15</sup> *Karen Spurling*, 56 ECAB 189, 194 fn.9 (2004).

Appellant argues that he never did any physical labor or earned any income for the business, but as noted above, there are other aspects to the definition of earnings under Office regulations and the Board finds the Office properly forfeited compensation benefits for the period from September 19, 2001 to August 3, 2009.

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

Section 8129(a) of the Act provides that, when an overpayment of compensation has been made 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.<sup>16</sup> Section 10.529 of the Office's implementing regulations provides 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.<sup>17</sup>

### **ANALYSIS -- ISSUE 3**

The Board affirms the January 5, 2010 Office decision finding an overpayment of compensation benefits for the period September 19, 2001 through August 3, 2009. The case is not in posture, however, for the Board to decide the amount of overpayment. The Office must recalculate the amount of overpayment to subtract the period August 4 to November 13, 2009 from the forfeiture period.

Appellant argues generally that the amount of overpayment is too high and that he never received that much compensation, but has provided no evidence to support this allegation. The Office has provided its records reflecting the payments made to him over the period at issue. The Board remands the case to the Office for determination of the proper amount of the overpayment.

### **LEGAL PRECEDENT -- ISSUE 4**

Section 8129(a) of the Act also 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.<sup>18</sup> 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 this subchapter or would be against equity and good conscience."<sup>19</sup> No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.

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<sup>16</sup> 5 U.S.C. § 8129(a).

<sup>17</sup> 20 C.F.R. § 10.529.

<sup>18</sup> 5 U.S.C. § 8129(a).

<sup>19</sup> *Id.* at § 8129(b).

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

“An individual is with fault in the creation of an overpayment who --

- (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....”<sup>20</sup>

#### **ANALYSIS -- ISSUE 4**

In this case, the Office applied the first and second standards in determining that appellant was at fault in creating the overpayment.

Section 10.433(b) of the Office’s regulations further provides that “[w]hether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.”<sup>21</sup>

Appellant is at fault in the creation of the overpayment. When he pled guilty to violating 18 U.S.C. § 1920, he admitted that he knowingly and willfully made false statements and omitted self-employment and earnings on each Form EN1032 affidavit signed between December 19, 2002 and June 4, 2008 and the documents contained in the case record describing his commercial activities show that he knew he was self-employed and had earnings which he was required to report on the Form EN1032.

Appellant requests that waiver be allowed for some or the entire amount of overpayment to give his family some hope for their future. The Board finds him at fault in the creation of the overpayment, thus precluding waiver of recovery of the overpayment.

#### **LEGAL PRECEDENT -- ISSUE 5**

The Board’s jurisdiction over recovery of an overpayment is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act. Section 10.441(b) of the regulations provides:

“When an overpayment has been made to an individual who is not entitled to further payments, the individual shall refund to [the Office] the amount of the

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<sup>20</sup> 20 C.F.R. § 10.433(a).

<sup>21</sup> *Id.* at § 10.433(b).

overpayment as soon as the error is discovered or his or her attention is called to same. The overpayment is subject to the provisions of the Federal Claims Collection Act of 1966 (as amended) and may be reported to the Internal Revenue Service as income.”

### **ANALYSIS -- ISSUE 5**

As appellant’s right to future compensation benefits has been terminated under the forfeiture provision of section 8148(a), he is not entitled to continuing compensation benefits and the Board does not have jurisdiction over the Office’s recovery of the overpayment.<sup>22</sup>

### **CONCLUSION**

The Board finds that the Office properly terminated appellant’s right to future compensation benefits effective November 13, 2009. The Board further finds that the Office properly determined that appellant forfeited his entitlement to compensation for the period September 19, 2001 to August 3, 2009 because he knowingly failed to report employment activities, but reverses the finding of forfeiture for the period August 4 through November 13, 2009. The Board further affirms the finding of an overpayment of compensation and that appellant was at fault in the creation of the overpayment, thereby rendering appellant ineligible for waiver. The Board remands the case to the Office for a recalculation of the amount of overpayment to deduct the period August 4 to November 13, 2009 from the period of forfeiture. The Board also finds that it is without jurisdiction over the method of repayment.<sup>23</sup>

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<sup>22</sup> *Robert Ringo*, 53 ECAB 258, 266 fn.1 (2001); *Robert S. Luciano*, 47 ECAB 793, 799 (1996).

<sup>23</sup> Upon remand, the Office should review what effect, if any, the previous overpayment decision has on the overpayment amount. *Supra* note 1.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated January 5, 2010, December 4 and November 19, 2009 are affirmed in part, reversed in part and remanded for further action consistent with this decision.

Issued: February 7, 2011  
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