

No. \_\_\_\_\_

---

---

In the  
Supreme Court of the United States

---

Patrick Jon Evers,  
*Petitioner,*  
v.

United States of America,  
*Respondent.*

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

---

**PETITION FOR A WRIT OF CERTIORARI**

---

Frederick J. Goetz  
*Counsel of Record*  
GOETZ & ECKLAND P.A.  
Banks Building  
615 First Avenue N.E., Suite 425  
Minneapolis, MN 55413  
(612) 874-1552

*Attorney for Petitioner*

## QUESTION PRESENTED

This case presents an important, unresolved, and recurring issue of first impression in this Court.

Petitioner appeals a conviction for violation of 18 U.S.C. §1920, which codifies as a felony crime of perjury the making of a false statement to obtain federal workers compensation benefits. Essential to this crime is that the false statement be “material;” and that it be made “in connection with an application for or receipt of benefits. A false statement is material if, “viewed alone” it has “a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed.” *United States v. Whitaker*, 848 F.2d 914, 916 (8th Cir. 1988); *United States v. Gaudin*, 515 U.S. 506, 509 (1995).

In this case, the allegedly false statements were made in the context of an undercover interview by a law enforcement agency, the United States Postal Service Office of Inspector General (USPS OIG). The “decisionmaking body” with respect to Petitioner’s entitlement to workers compensation was not the USPS OIG, but the Department of Labor (DOL). As established at trial, DOL relies ultimately on the opinions of medical care providers in deciding whether a claimant is entitled to workers compensation benefits. Here, the prosecution made no showing, certainly no showing beyond a reasonable doubt, that the doctors on whose findings DOL relied in determining Petitioner’s eligibility for benefits regarded as material the allegedly perjured representations made by Petitioner to the undercover officer.

The Supreme Court should grant certiorari to clarify and develop the materiality standard applicable to federal workers compensation benefit fraud prosecutions. Specifically, this case presents the following question which merits Supreme Court review:

Can false representations be “material” for purposes of 18 USC §1920 where such representations were neither addressed to the decisionmaking body nor shown to have been capable of influencing that body’s determination of Petitioner’s entitlement to workers compensation benefits?

## TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW . . . . .	-i-
TABLE OF AUTHORITIES . . . . .	-iv-
OPINION BELOW. . . . .	-1-
JURISDICTION. . . . .	-1-
STATUTORY PROVISION INVOLVED . . . . .	-1-
STATEMENT OF THE CASE . . . . .	-2-
REASONS FOR GRANTING THE PETITION . . .	-11-
I. Review is warranted to provide guidance and to resolve conflicting authorities regarding the materiality standard of 18 U.S.C. §1920 . . . . .	-11-
II. This case is an ideal vehicle for resolving the conflicting interpretations of an important federal statute . . . . .	-18-
CONCLUSION . . . . .	-25-
APPENDIX:	
Opinion of the Eighth Circuit Court of Appeals .	A1-A6
Judgment in a Criminal Case. . . . .	A7-A18
Memorandum of Law & Order . . . . .	A19-A32

## TABLE OF AUTHORITIES

### Cases

<i>Kungys v. United States</i> , 485 U.S. 759, 108 S.Ct. 1537, 99 L.Ed.2d 839 (1988) .....	20
<i>U.S. v. Burge</i> , 711 F.3d 803 (7th Cir. 2013).....	12
<i>U.S. v. Kantengwa</i> , 781 F.3d 545 (5th Cir. 2015) .....	11
<i>U.S. v. Letchos</i> , 316 F.2d 481 (7th Cir. 1964) .....	12
<i>United States v. Anderson-Bagshaw</i> , 509 Fed. Appx. 306 (8th Cir. 2012).....	17
<i>United States v. Evers</i> , 720 Fed. Appx. 322 (8th Cir. 2018) .....	1
<i>United States v. Henderson</i> , 416 F.3d 686 (8th Cir. 2005) .....	19
<i>United States v. Liner</i> , 435 F.3d 920 (8th Cir. 2006) 20	
<i>United States v. Moore</i> , 29 Fed. Appx. 222 (6th Cir. 2002) .....	17
<i>United States v. Robinson</i> , 809 F.3d 991 (8th Cir. 2016) .....	19
<i>United States v. Slaton</i> , 801 F.3d 1308 (11th Cir. 2015) .....	<i>passim</i>
<i>United States v. Whitaker</i> , 848 F.2d 914 (8th Cir. 1988) .....	20

### Statutes

18 U.S.C. §1001 .....	13
18 U.S.C. §1621(1) .....	11
18 U.S.C. §1920 .....	<i>passim</i>
18 U.S.C. §1035 .....	2
18 U.S.C. §1920 (2016) .....	1
28 U.S.C. §1254(1) .....	1

### Other Authorities

Title 18, United States Code, Section 1920 .....	2
Title 5, United States Code, §8101.....	4, 16
Title five, United States Code, Section 8101 .....	2

## **OPINIONS BELOW**

The unpublished opinion of the United States Court of Appeals for the Eighth Circuit is reported at *United States v. Evers*, 720 Fed. Appx. 322 (8th Cir. 2018). The Eighth Circuit affirmed the March 21, 2016 judgment and conviction of the District Court of Minnesota. See Appendix at pp. A-1 to A-6.

## **JURISDICTION**

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

The Eighth Circuit's Opinion was entered on April 25, 2018.

## **STATUTORY PROVISION INVOLVED**

18 U.S.C. §1920 (2016)

Whoever knowingly and willfully falsifies, conceals, or covers up a material fact, or makes a false, fictitious, or fraudulent statement or representation, or makes or uses a false statement or report knowing the same to contain any false, fictitious, or fraudulent statement or entry in connection with the application for or receipt of compensation or other benefit or payment under subchapter I or III of chapter 81 of title 5, shall be guilty of perjury, and on conviction thereof shall be punished by a fine under this title, or by imprisonment for not more than 5

years, or both; but if the amount of the benefits falsely obtained does not exceed \$1,000, such person shall be punished by a fine under this title, or by imprisonment for not more than 1 year, or both.

### **STATEMENT OF THE CASE**

Petitioner is a former employee of the United States Postal Service (USPS) who began receiving workers compensation benefits after a back injury in 2010. Eventually, USPS became suspicious of Petitioner's workers compensation eligibility and the USPS OIG initiated an investigation. An undercover OIG investigator posed as a vocational rehabilitation counselor and conducted a taped interview of Evers with the stated purpose of determining whether he could return to work or be eligible for vocational rehabilitation.

The statements made during the interview are the basis for Evers' conviction from which appeal was taken. Evers was charged by Superseding Indictment with two counts of false statements to obtain federal employees' compensation in violation of 18 U.S.C. §1920 (Counts 1 and 2) and one count of false statements relating to health care matters in violation of 18 U.S.C. §1035 (Count 3). On March 21, 2016, a jury found Evers not guilty of Counts 1 and 3 and guilty of Count 2.

Count 2 of the Superseding Indictment alleges as follows:

On or about September 10, 2014, in the State and District of Minnesota, the defendant, Patrick Jon Evers, did knowingly and willfully falsify, conceal and cover up a material fact and did knowingly and willfully make and use a false statement and report knowing the same to contain a false, fictitious and fraudulent statement in connection with the application for and receipt of compensation and payment under the Federal Employees' Compensation Act. Specifically, during an interview relating to the application and receipt of compensation and payment under the Federal Employees' Compensation Act, the defendant represented, among other things, that he was unable to lift more than twenty-one to thirty pounds repetitively, represented that he did not use any free weights while exercising, represented that in conducting bench press exercises he had someone else put weights on the weight bar for him, represented that he could lift up to approximately ninety-five to one hundred pounds when conducting bench press exercises, represented that he could perform triceps pushdown exercises if he did so while standing up against a wall with his back supported, represented that his overall life style included almost no activity, and represented that he had significant difficulty bending over to the floor when, in fact, the defendant knew these



representations were false, all in violation of Title 18, United States Code, Section 1920.

DCD<sup>1</sup> No. 51 pp. 2-3.

The elements of this offense were set forth in jury instruction number 9 as follows:

One, that the defendant knowingly and willfully made a false statement of fact, or made a false statement that concealed or covered up a fact;

Two, that the fact was material;

Three, that the defendant did so in connection with the application for or receipt of compensation or other benefit or payment under Title five, United States Code, Section 8101 *et seq.*; and

Four, that the amount of compensation, benefit, or payment falsely obtained exceeded \$1,000.00.

See Trial Transcript (“TT”) at p. 931

The instruction defined a “material fact” as “a fact that would naturally influence or is capable of influencing a decision concerning the application for or receipt of federal workers compensation benefits. Whether a statement is ‘material’ does not depend on whether anyone was actually deceived or misled.” *Id.*

---

<sup>1</sup> “DCD” refers to the District Court Docket.

The evidence at trial was that on or about August 13, 2014, Anthony Williams, district manager for the USPS, sent Mr. Evers a letter directing that he appear for an interview with a Postal Service “Contractor.” See Government Trial Exhibit 34. The interview with the “contractor” was said to be part of an initiative to reduce workers compensation costs by identifying “claimants who can be placed either in a productive limited duty position or referred to an outplacement vocational rehabilitation program.” *Id.*

The purported reason for the interview was in fact a ruse. Rather than meeting with a USPS contractor, on September 10, 2014, Mr. Evers met with an agent from the USPS OIG. During the course of this ruse interview, as alleged in the Superseding Indictment, Mr. Evers made a number of false statements to the USPS OIG undercover agent about his physical capabilities. (DCD No. 51 pp. 2-3).

The agency that makes the decision concerning the application for or receipt of federal workers compensation benefits, however, is not the USPS but the Department of Labor Office of Workers Compensation Programs (DOL OWCP). The decision that DOL OWCP was trying to make with respect to Mr. Evers as of September 10, 2014, was whether he was eligible for continued receipt of federal workers compensation benefits.

Heather Zeigler from OWCP testified at trial. She was clear in her testimony that the DOL OWCP alone determines whether an injured federal worker

is eligible for federal benefits. TT at p. 104. There was no testimony from Ms. Zeigler or any other witness that the DOL OWCP ever considered what was said at the ruse interview in determining Petitioner's eligibility. Nor did Ms. Zeigler state that any of the allegedly false statements that Mr. Evers made during the course of the ruse interview were capable of influencing the OWCP's decision as to Evers' eligibility for future workers compensation benefits. She did testify that surveillance videos acquired by USPS investigators showing Evers doing upper body exercises at a gym might have been capable of influencing her decision concerning his receipt of federal workers compensation benefits, but she would want to review that evidence with Evers' doctors, both the treating and independent doctors, to see if the videos would change their opinions as to his restrictions and work capabilities. In other words, this video evidence – not the representations made in the ruse interview – might have been capable of influencing DOL's decision but only if the medical care providers found them to be material.

As to Petitioner's medical care providers, there was no evidence in this case through the testimony of any of the doctors who treated Petitioner and who testified at trial -- Dr. Monsein, Dr. Kurtti or Dr. Stark – that their opinions about Petitioner's work restrictions and physical capabilities were capable of being influenced by any of the alleged false statements that Petitioner made during the ruse interview. Dr. Kurtti and Dr. Stark testified that they had seen surveillance videos of Petitioner doing upper body exercises at the gym and did not find

these facts to be medically significant. *See* TT at p. 393 (testimony of Dr. Monsein); p. 760 (testimony of Dr. Kurtti); and p. 824 (testimony of Dr. Stark). As Dr. Kurtti explained, one cannot correlate the exercises that Petitioner is doing in the surveillance videos with the work environment. TT at p. 760.<sup>2</sup> If the videos of Petitioner performing the upper body exercises was immaterial to the doctors, then the false statements he made to the OIG agents concerning the same exercise would also be immaterial.

The third of Petitioner's medical providers was Dr. Monsein, who ran a chronic pain program that Petitioner attended. The prosecution introduced testimony that DOL OWCP relied upon Monsein's opinion in determining Petitioner's eligibility for benefits. However, nothing Petitioner said to the undercover officer had any bearing on Dr. Monsein's opinions.<sup>3</sup> Indeed, the interview with the undercover

---

<sup>2</sup> Petitioner's doctors testified that Petitioner has serious, permanent, debilitating conditions of his lower back, his sacroiliac joint, and his hips that mean he cannot do the jobs offered to him at the USPS given the physical requirements of those positions. Evers' false statements during the ruse interview about working with free weights, how much he could bench press, whether he put weights on a bar or had someone help him, and the like have nothing to do with his being able to do a job that requires frequent bending, twisting and reaching while standing on a hard floor for hours at a time.

<sup>3</sup> Dr. Monsein was asked whether the surveillance video obtained by the USPS OIG was capable of influencing his decision as to Mr. Evers' work restrictions. He said that could "potentially" have influenced his restrictions, but he could not say for sure. TT at p. 393.

officer occurred some months after Petitioner completed the chronic pain program at the Courage Center.

In sum, the only statements pertinent to materiality as charged in Count 2 of the Superseding Indictment under which Petitioner was convicted are the false statements Petitioner made during the ruse interview. There was no testimony from any doctor that anything Evers said during the ruse interview was at all part of the information they considered in determining his treatment. Rather, their assessment was based upon what Evers told them directly and other medical records they reviewed.

As to what Petitioner told them, his doctors testified without exception that he did not make false statements to them about his physical capabilities. Petitioner's primary treating physician, Dr. Daniel Kurtti, testified:

Q. And finally, having worked with Mr. Evers for as long as you did and having had that conversation in February and seeing the surveillance videos, do you believe that Mr. Evers had ever at any time made any false statements or misrepresentations to you about his physical capabilities while he was under your care?

A. No.

---

TT at p. 761, lines 16-22. Similarly, when Petitioner's pain specialist, Dr. Mathew Monsein, was asked if he could say beyond a reasonable doubt that Evers ever made a false statement to him during his course of treatment at the Courage Center, Dr. Monsein answered "no, I cannot say that." TT p. 392, lines 16-19. Even one of the doctor's hired by the USPS to examine Petitioner, Dr. John Stark, testified that he did not believe that Petitioner misrepresented his physical abilities. TT p. 825. Dr. Stark's testimony was as follows:

Q. After reviewing the surveillance video, having talked to Mr. Evers before, did you believe he was being dishonest with you about his physical capabilities?

A. No.

Q. Why not?

A. Well, I, again, my job is to evaluate people all day, you know, what they tell me and how legitimate it is their complaints and how consistent it is with whatever else I might have seen. So, you know, it's obvious that you would get an impression from a person who's straight and direct and consistent in telling you stuff you've heard before, and that's what I saw when I met him, examined him.

Q. That's how you found Mr. Evers to be?

A. That's how I found him.

TT at p. 825, lines 5-18.

The false statements that underlie Count 2 are limited to those made during the undercover

interview of September 10, 2014. See Superseding Indictment, DCD 51 at pp. 2-3. There was no evidence at trial that any of Petitioner's treating doctors or any doctor hired by the USPS believed that Evers' false statements about the particularities of his upper body workout regimen made in the ruse interview were important to their decision making about his ability to perform his job responsibilities which were impacted by lower body issues.<sup>4</sup>

Given the DOL's reliance on medical opinion in determining eligibility, because the statements made in the USPS OIG interview were not shown by the prosecution to be capable of influencing the doctors' decisions, they were not capable of influencing the DOL's decision to award benefits.

Finally, there was no evidence at trial showing any causal link between Petitioner's statements at the ruse interview and his receipt of any benefits. Mr. Evers received no benefits as a result of anything he said during the ruse interview. No restrictions were imposed as a result of anything he said during the ruse interview. And there was no evidence that

---

<sup>4</sup> USPS OIG Agent Rebecca Wayerski testified that had Mr. Evers been truthful about his weight lifting during the ruse interview, it may or may not have changed the course of her investigation on behalf of the USPS OIG. She testified that in other cases when the subject of a ruse interview had been truthful, this had resulted in the USPS OIG working with the individual to find a suitable position. She did not testify, however, that representations made by Evers in the ruse interview had influenced or were capable of influencing the decision of the DOL OWCP.

OWCP paid any benefits to Evers as a result of the false statements made during the ruse interview.

In the face of this testimony, a jury nonetheless convicted Petitioner on one count of violating 18 U.S.C. §1920. The United States District Court for the District of Minnesota entered final judgment on the verdict and denying post-trial motions on April 5, 2017. Petitioner timely appealed to the United States Court of Appeals for the Eighth Circuit, which affirmed the District Court.

## **REASONS FOR GRANTING THE PETITION**

### **I. REVIEW IS WARRANTED TO PROVIDE GUIDANCE AND TO RESOLVE CONFLICTING AUTHORITIES REGARDING THE MATERIALITY STANDARD OF 18 U.S.C. §1920**

An essential element of a claim of statutory fraud constituting the felony of perjury under 18 U.S.C. §1920 is that the alleged false representation be a representation of “material fact” and be made “in connection with the application for or receipt of compensation.” The statute contains no definition of “material.” In the absence of a statutory definition, the courts have borrowed the definition used historically in other federal perjury cases. *See, e.g., U.S. v. Kantengwa*, 781 F.3d 545 (5th Cir. 2015) (statement is “material” under statute criminalizing perjury, 18 U.S.C. § 1621(1), if it is capable of influencing the tribunal on the issue before it; the statement need not be material to any particular



issue in the case, but rather may be material to any proper matter of the decisionmaker's inquiry); *U.S. v. Burge*, 711 F.3d 803 (7th Cir. 2013) (a false statement is "material under the perjury statute if it has a natural tendency to influence, or is capable of influencing the decision of the decisionmaking body to which it was addressed); *U.S. v. Letchos*, 316 F.2d 481 (7th Cir. 1964) (materiality of defendant's denial, as witness in trial, that he had previously made statement to government agents which were inconsistent with his trial testimony was obvious from evidence introduced in perjury prosecution).

As the Eighth Circuit signaled its opinion in Petitioner's case, the standard definition of "material" developed in the context of federal statutory perjury law requires that the false representation be shown to have been material to the decisionmaker to which the representation was addressed. The identity of the decisionmaker is not likely to be disputed in a perjury cases involving false representations made under oath in a judicial proceeding, and whether the representation is material to the tribunal's decision can be assessed under settled principles of law. As this case illustrates, however, what "material" means in the context of an indictment for false representation in connection with the application for or receipt of workers compensation benefits under 18 U.S.C. § 1920 is far less uniformly understood.

Section 1920 requires explicitly that the material representation be made "in connection with the application for or receipt of compensation or other payment." The statutory language also makes clear

that the focus of the statute is on representations resulting in a payment of benefits “falsely obtained.” Thus, §1920 does not replicate 18 U.S.C. § 1001 which criminalizes false statements knowingly and willfully made “in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States.” The false statements criminalized under § 1920 must meet other statutory requirements. But how narrowly or broadly “material” should be read and what it means for a material representation to be made “in connection with the” application for or receipt of compensation is anything but uniformly construed.

*United States v. Slaton*, 801 F.3d 1308 (11th Cir. 2015) is a case in point. *Slaton* has been repeatedly cited by the prosecution and was relied upon by both the District Court and the Eighth Circuit in their opinions in this case because, on a superficial reading, it appears to have factual parallels to Petitioner’s case. In *Slaton*, the defendant was convicted of false statements to obtain workers compensation under §1920, among other offenses. A number of the charged counts in that case emanated from a ruse interview with USPS OIG special agents posing as Postal Service employees purportedly gathering information to assess whether the defendant could return to work in any capacity. *Id.* at 1315-16. In the interview, the defendant misrepresented his physical capabilities. *Id.* On appeal, he argued that because the statements in the ruse interview had not been relayed to those at the Department of Labor who make workers compensation determinations, the false statements

were not made “in connection with” the receipt of workers compensation remedies. *Id.*

The Eleventh Circuit rejected defendant’s argument, pronouncing that §1920 was “a broadly worded statute that criminalizes making any false statement of material fact *in connection with* the receipt of worker’s compensation. It does not specify that the false statement must be made to DOL.” *Id.* at 1315. As a result, “the government did not have to prove that the Postal Service related Slaton’s statements to DOL .... [I]t was enough for the government to show that Slaton knowingly made material misrepresentations to the Postal Service in connection with his receipt of benefits.” *Id.* at 1315-16. Because the charged statements concerned the defendant’s ability to work, materiality was not in dispute. *Id.*

In fact, *Slaton* is materially and significantly distinguishable on its facts from those at issue in this Petition. The evidence in *Slaton* was that decisionmaker (DOL) had, in fact, relied upon the false representations even though they had been collected by the USPS OIG. The OIG agents in *Slaton* presented some of the evidence they had collected as part of their investigation to Slaton’s treating doctor who then concluded that the physical activities Slaton was engaged in were more excessive than what he told his doctor about. *Id.* at 1311-1312. The doctor then had Slaton complete a Functional Capacity Evaluation (FCE). *Id.* at 1312. During the course of the FCE Slaton made false statements to the physical therapist who conducted the evaluation

concerning his ability to sit for extended periods of time, his use of the spinal cord stimulator, and his engaging in walking for exercise as opposed to regularly working out at a gym. *Id.* at 1312. The physical therapist in part based his evaluation of Slaton's physical capabilities on these statements. *Id.* The results of the FCE were then relayed to Slaton's treating doctor who in turn adopted the results and incorporated them into his conclusions that he relayed to the DOL about Slaton's physical abilities. *Id.* at 1312.

Subsequently, the OIG agents arranged an undercover interview with Slaton. *Id.* During the course of this interview he made false statements including concerning his use of a spinal cord stimulator, his inability to sit for long periods, and the type of exercises he did. *Id.* Ultimately, the DOL relied on Slaton's treating doctor's evaluation of his physical capabilities in determining whether he was able to perform the work of a letter carrier. *Id.* at 1312.

On appeal Slaton challenged the sufficiency of the evidence as to five of the counts of workers compensation fraud with which he was charged under 18 U.S.C. §1920 and 2. *Id.* at 1313-1314, 1315. Count 1 was based on the false statements Slaton made to his doctor and in the course of the FCE, the government's theory being that the doctor was an unwitting conduit of false information to the DOL. *Id.* at 1314. The Eleventh Circuit found that the materiality element was established as to this count based on evidence that Slaton made

misrepresentations in the FCE that “was exactly the type of information that was ‘capable of influencing’ DOL’s decision to award him benefits.” *Id.* at 1315. In reaching this conclusion as to materiality, the Eleventh Circuit noted the testimony from a DOL senior claims examiner detailing the importance of medical evidence to the DOL in evaluation of a claimant’s ability to work. *Id.*

Counts 2 through 4 alleging violations of 18 U.S.C. §§1920 and 2 were based on statements Slaton made to the OIG agents. *Id.* at 1315-1316. Unlike in Petitioner’s case, Slaton’s challenge to the sufficiency of the evidence to support the convictions on these counts was directed to the third element of the crime of perjury under §1920, that the false representations were not made “in connection with the application for or receipt of compensation or other benefits or payment under Title 5, United States Code, §8101 *et seq.*” *Id.* at 1315-1316. While the *Slaton* court found the “in connection element” was proven, there was no discussion or analysis as to whether the statements Slaton made to the agents were material to the DOL’s decision as to his eligibility for workers compensation benefits, presumably because Slaton’s challenge to his conviction on these counts had not been based on the materiality element of the claim. *Id.*

By contrast, where materiality was at issue in Count 1, there was evidence the false statements Slaton made to his doctor and physical therapist as to his physical abilities were material to the DOL’s decision as to whether to award benefits. *Id.* at 1315-1316. In particular, the evidence included that the

false statements concerning Slaton's inability to sit for long periods of time went directly to the medical restriction on his not being able to drive for more than 30 minutes at a time. As the Eleventh Circuit summarized, "(t)here was plenty of evidence showing that he made representations to his medical providers and that those misrepresentations could have impacted DOL's decision to award him workers compensation." *Id* at 1314.

Ultimately, then, *Slaton* is not on all fours with Petitioner's case. But the Eleventh Circuit's broad construction of the "in connection with" requirement so as to loosen significantly the statutory tether between an alleged false representation and the decisionmaker's determination regarding the application for or receipt of workers compensation benefits, as well as the relatively lesser attention paid by that Court to the significance of the "material" element, contrasts with the tighter connection between the alleged false representation and the decision to award or continue benefits imposed by other courts, in applying the statutory requirement that the false representation be "material." See, e.g., *United States v. Anderson-Bagshaw*, 509 Fed. Appx. 306 (8th Cir. 2012) (test for materiality was met where a claims examiner for the DOL OWCP testified that the information the defendant omitted from a claim form, the fact that they were engaged in a business, was significant to the determination of eligibility for benefits); *United States v. Moore*, 29 Fed. Appx. 222 (6th Cir. 2002) (false statements deemed material based on testimony from DOL claims examiner that the

defendant's false statement in a claims form influenced the DOL's compensation determination).

This Court has never opined on what "material" means in the context of § 1920. The National Insurance Crime Bureau has estimated that workers compensation fraud is a \$30 billion problem annually in the United States. Given the importance of the statute here at issue and the frequency of its invocation in the context of prosecution of such fraud, it is important to both prosecutors and those accused of fraud that the statute be interpreted and applied uniformly. To that end, clarification by the Court is warranted.

## **II. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE CONFLICTING INTERPRETATIONS OF AN IMPORTANT FEDERAL STATUTE**

This case reflects clearly the tensions evidenced in decisions of the lower courts as to the proper construction of 18 U.S.C. § 1920. Throughout the prosecution of Petitioner's case, the prosecutors have advocated for a broad-brush approach to the statutory requirement that the alleged false representation be "material" to state a claim under 18 U.S.C. § 1920. In its Summary of Argument to the Court of Appeals, the government argued that it was enough to satisfy §1920 that the USPS case agent had testified that "USPS would work worked with [Petitioner] to get him back to work rather than continuing its criminal investigation" had he "been truthful during the ruse interview." In the

government's view, "[u]nder these circumstances, Evers' lies were material both because they related to his ability to work and because they influenced the government's investigation." (Brief of Appellee at p. 24-25). The government makes no claim that the ruse interview influenced or had the ability to influence DOL's determination with respect to Petitioner's receipt of workers compensation benefits.

The government has attempted to frame Petitioner's challenge to the materiality element of the sole count of conviction under 18 U.S.C. §1920 as "he claims the statements are not material because they were not made to the right people." (Brief of Appellee at p. 37). This characterization is a misstatement. In fact, Petitioner contends that, irrespective of who the statements were made to, the false statements at issue in this case are not material because they were not capable of influencing the DOL's decision as to Petitioner's eligibility for federal workers compensation benefits. In other words, the statements are immaterial due to their nature.

Petitioner agrees that to establish the "materiality" element, the government need not prove that the government agency actually relied on the false statements. *United States v. Robinson*, 809 F.3d 991, 999 (8th Cir. 2016). However, to be material the false statements must have a "natural tendency to influence" or be capable of influencing the decision of the decisionmaking body. *United States v. Henderson*, 416 F.3d 686, 692 (8th Cir. 2005); citing *Kungys v. United States*, 485 U.S. 759, 769-770, 108 S.Ct. 1537, 99 L.Ed.2d 839 (1988). The false



statements must be material to the government inquiry. *United States v. Liner*, 435 F.3d 920, 925 (8th Cir. 2006). “The issue is whether the statements, viewed alone, were capable of influencing” the deciding agency’s decision. *United States v. Whitaker*, 848 F.2d 914, 916 (8th Cir. 1988).

Here, the deciding agency is the DOL. The decision at issue in this §1920 prosecution was whether Petitioner was eligible for federal workers compensation benefits. Thus, under Eighth Circuit law as stated in the opinion from which further appeal is sought, the false statements underlying the count of conviction—statements made during the “ruse” interview of September 10, 2014—must be capable of influencing the DOL’s decision as to Petitioner’s eligibility for federal workers compensation. The evidence at trial did not establish this.

The false statements that underlie Count 2 are limited to those made during the undercover interview of September 10, 2014. (See Superseding Indictment, DCD 51 at pp. 2-3). There was no evidence at trial that any of Petitioner’s treating doctors or any doctor hired by the USPS believed that Petitioner’s false statements about the particularities of his upper body workout regimen made in the ruse interview were important to their decision making about his physical capabilities.

Looking at the nature of the statements themselves, there was no evidence that they were of the type of information that was capable of

influencing the doctors' decisions about Petitioner's physical abilities. Indeed, the doctors were not influenced by the surveillance videos showing Evers' upper body workout. Given the DOL's reliance on the doctors' opinions in determining eligibility, because the statements were not capable of influencing the doctors' decisions, they were not capable of influencing the DOL's decision to award benefits.

This case is not like *Slaton* where the materiality of the false statements underlying Count 1 was established in part by the fact that the medical providers relied on the false statements and incorporated them into their opinions that were transmitted to the Department of Labor. The false statements in *Slaton* concealed facts, e.g. Slaton's ability to sit in a car for more than 30 minutes, that went directly to his claimed disability. Here, the statements were not just made to the "wrong" people; the very nature of the statements themselves was medically, and therefore legally, immaterial.

Petitioner could not perform the limited duty jobs offered him by the USPS because they all involved repetitive bending and reaching; physical tasks that he was simply not capable of doing. See testimony of Dr. Monsein at TT p. 104; testimony of Dr. Kurtti at TT pp. 754-756; testimony of Dr. Stark at TT pp. 834-835. Petitioner's false statements during the ruse interview about working with free weights, how much he could bench press, whether he put weights on a bar or had someone help him, and the like have nothing to do with his being able to do a job that requires frequent bending, twisting and

reaching while standing on a hard floor for hours at a time.

Here, the evidence of materiality to the decision made by DOL OWCP as to Petitioner's entitlement, or lack thereof, to workers compensation benefits of the statements to the undercover OIG agent was non-existent. There was no evidence before the jury that had Petitioner truthfully answered the questions put to him at the undercover interview on September 10, 2014, truthful answers would have indicated that he could have performed the jobs offered him at the post office. Petitioner's ability to do exercises with his upper body had no bearing on his ability to engage in repetitive activity that involved bending, reaching and twisting with his lower back.

Addressing the conflicting positions on appeal, the Eighth Circuit's opinion invokes the standard definition of "material" derived from federal perjury statutory law, but then misapplies that standard in a manner that severs what Petitioner submits is the required tether under §1920 between the charged false representation and the benefits determination of the administrative agency – here DOL.

The appellate court cites two bases for its conclusion that a "reasonable jury could have found Evers' false statement to be material." First, "the OIG investigator who conducted the ruse interview testified that if Evers had been honest during the interview, she would have taken steps to help him get back to work which would have led to a curtailment of his workers compensation benefits." The ruse

interview, however, was part of a criminal investigation, not the application for or receipt of benefits. Had the interview actually been part of the DOL OWCP's rehabilitation efforts, the materiality analysis might be different.

The entire purpose of the ruse interview, however, was criminal prosecution, not rehabilitation. Nothing Petitioner said during the ruse interview was going to any doctor and was not material to any decision a doctor made regarding Petitioner's treatment or physical capabilities. Petitioner's statements during the ruse interview were simply not material to the DOL's decision.

The second basis for its conclusion that the ruse interview representations were material is refuted by the trial testimony as discussed above. The appellate court cites to the testimony of DOL claims examiner Heather Zeigler that she would have considered Petitioner's weightlifting relevant to the determination of whether Petitioner was eligible for workers compensation. But the Court ignores Zeigler's further testimony that she would have needed to run this testimony past Petitioner's medical care providers to assess whether they considered the testimony material. And, of course, the testimony of the medical doctors was that they would not have found the ruse interview testimony to be material because it added nothing to their assessment of Petitioner's capability to perform his job responsibilities.

In effect, the decision of the Eighth Circuit effectively eliminates Congress's clear requirement

that a false statement made in connection with the receipt of federal employees' compensation benefits be material. Where a statement is not capable of influencing the deciding agency's decision, it cannot be material.

Petitioner respectfully submits that had the Eighth Circuit had the benefit of law clarifying the need to assess what is "material" for purposes of §1920 with reference to the specific false representations charged<sup>5</sup> from the perspective of the entity with decision making responsibility for awarding workers compensation benefits, it would have reached a different conclusion. The absence of that clarification results in courts stretching the statutory boundaries beyond those reflected in the statutory mandate.

---

<sup>5</sup> Here, the District Court went well beyond the false representations charged in the Superseding Indictment in ruling on Petitioner's post-trial motions to consider surveillance video obtained by the USPS OIG as part of its criminal investigation.

## CONCLUSION

For the foregoing reasons, Petitioners prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submits,

FREDERICK J. GOETZ (#185425)

*Counsel of Record*

GOETZ & ECKLAND P.A.

Banks Building

615 First Avenue NE, Suite 425

Minneapolis, MN 55414

(612) 874-1552

July 23, 2018 *Counsel for Petitioner*