

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SUSAN M. DYKSTRA and DEPARTMENT OF THE ARMY,  
U.S. ARMY HEALTH SERVICES COMMAND, Fort Lewis, Wash.

*Docket No. 96-262; Submitted on the Record;  
Issued January 6, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant continuation of pay on the grounds that appellant failed to give written notice within the applicable time limitation provision of the Federal Employees' Compensation Act.

On March 30, 1995 appellant, then a 42-year-old military personnel clerk, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on February 9, 1995, she suffered a herniated disc in her neck while moving furniture and office supplies. Appellant's Form CA-1 indicates that she stopped work on April 11, 1995 and returned to work on May 8, 1995.

The Office, by decision dated August 14, 1995, accepted appellant's claim for an aggravation of degenerative disc disease and authorized payment of compensation and medical expenses for appellant's C5-6 disc excision surgery and all related periods of disability.

By letter decision dated August 14, 1995, the Office notified appellant that she was not entitled to continuation of pay for her absence from work beginning April 11, 1995 on the basis that she failed to file her claim within the required 30-day period. The Office further notified appellant that its decision was applicable to continuation of pay only and did not affect her entitlement to other compensation benefits.

The Board finds that the Office properly denied appellant continuation of pay on the grounds that she failed to give written notice within the applicable time limitation provision of the Act.<sup>1</sup>

Section 8118<sup>2</sup> of the Act provides for payment of continuation of pay, not to exceed 45 days, to an employee "who filed a claim for a period of wage loss due to a traumatic injury with

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<sup>1</sup> 5 USC § 8101 *et seq.*

<sup>2</sup> 5 U.S.C. § 8118.

his immediate superior on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2)<sup>3</sup> of this title.” The latter section provides that written notice of injury shall be given “within 30 days.” The context of section 8122 makes clear that this means within 30 days of the injury.<sup>4</sup>

In a letter dated July 25, 1995, appellant contends that she reported her injury to her immediate supervisor and that her supervisor failed to file an incident report. Appellant alleges that she kept her immediate supervisor constantly informed of the status of her injury and her lack of progress in healing. Appellant alleges that she delayed treatment as she first thought her injury just involved a severe muscle strain and, when her pain started to get worse following her own treatment for muscle strain, she sought medical treatment for her condition on March 30, 1995.<sup>5</sup>

Oral notification to the employing establishment of an employment-related injury within 30 days of the injury is not sufficient to constitute notice of injury within the statutory requirements of section 8118 of the Act. The context of this section makes clear that in order to benefit from its continuation of pay provision, an employee must file *written* notice of the injury and words of claim must be included in such notice.<sup>6</sup> The only document in the case record which constitutes a claim is the Form CA-1, notice of traumatic injury and claim for continuation of pay compensation, dated and filed by appellant on March 30, 1995. As this claim was filed more than 30 days after the February 9, 1995 injury, the claim for continuation of pay is barred by the applicable time limitation provision of the Act.

Appellant’s contention that she did not realize the severity of her condition until March 30, 1997 is not sufficient to toll the running of the 30-day filing requirement. The Board has held that section 8122(d)(3) of the Act, which allows the Office to excuse failure to comply with the time limitation provision for filing a claim for compensation because of “exceptional circumstances,” is not applicable to section 8118(a)<sup>7</sup> which sets forth the filing requirements for continuation of pay.<sup>8</sup> There is no provision under the Act for excusing an employee’s failure to file a claim for continuation of pay within 30 days of the employment injury. The fact that a claimant may be unaware that he sustained an injury on the date of an employment incident or is unaware of the severity of an injury sustained at the time of the incident until several days or

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<sup>3</sup> 5 U.S.C. § 8122(a)(2).

<sup>4</sup> See *George A. Harnell*, 29 ECAB 338 (1978).

<sup>5</sup> Appellant further states that on April 13, 1995, her supervisor completed the forms she filled out and took them to the Civilian Personnel Office. Contrary to appellant’s contention, the record reflects that the CA-1 form was dated March 30, 1995 and signed by appellant.

<sup>6</sup> 5 U.S.C. § 8118.

<sup>7</sup> 5 U.S.C. § 8118(a).

<sup>8</sup> 5 U.S.C. § 8122(d)(3).

weeks later is not sufficient to toll the running of the 30-day filing requirement.<sup>9</sup> The rationale for this finding is set forth in the *William E. Ostertag* decision of the Board.<sup>10</sup>

Appellant's further contention that she immediately notified her supervisor about the injury and kept him apprised of the status of her injury is also insufficient to constitute proper notice of injury. The Board notes that the instant case is similar to *Lois M. Townsend*<sup>11</sup> and *Russell P. Chambers*.<sup>12</sup> In each of those cases, the claimant asserted that notification of the employment injury had been provided to the official supervisor and that the official supervisor had failed to provide or submit proper notice of injury. The Board found that since written notice of injury had not been timely filed, the claimant was not entitled to continuation of pay. In keeping with the *Townsend* and *Chambers* decisions, appellant, in the instant case, is not entitled to continuation of pay because proper written notice of injury was not filed within 30 days of the injury.

This decision does not preclude appellant from receiving compensation, as distinguished from continuation of pay, for any disability resulting from the February 9, 1995 employment injury as the Office also pointed out to appellant in its letter decision of August 14, 1995.

The decision of the Office of Workers' Compensation Programs dated August 14, 1995 is hereby affirmed.<sup>13</sup>

Dated, Washington, D.C.  
January 6, 1998

Michael J. Walsh  
Chairman

George E. Rivers  
Member

A. Peter Kanjorski  
Alternate Member

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<sup>9</sup> *Michael R. Hrynychuk*, 35 ECAB 1094 (1984).

<sup>10</sup> 33 ECAB 1925 (1982).

<sup>11</sup> 29 ECAB 470 (1978).

<sup>12</sup> 32 ECAB 550 (1981).

<sup>13</sup> Appellant submitted new evidence on appeal. However, the Board may not review such evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c).