

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of STEPHEN BOYLE and DEPARTMENT OF THE NAVY,  
NAVAL SURFACE WARFARE CENTER, Philadelphia, Pa.

*Docket No. 97-2436; Submitted on the Record;  
Issued April 22, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly found that appellant was not entitled to continuation of pay.

Appellant, a 31-year-old mechanical engineer, alleged that he strained his neck on September 26, 1996 while in the performance of duty.

Appellant filed a Form CA-2a, claim for recurrence of disability, on November 18, 1996, claiming that the injury he sustained on September 26, 1996 was caused or aggravated by an injury he had sustained on February 27, 1989.

In a letter dated December 17, 1996, the employing establishment controverted appellant's recurrence claim. The employing establishment stated that appellant had been scheduled to travel to Egypt on October 21, 1996, and that at the time his travel orders were prepared on October 9, 1996, he did not indicate to his supervisor that he would be unable to travel because of his injury. The employing establishment stated that, at a meeting held on October 17, 1996, appellant was informed that he had lost his security clearance, and that he was being placed on administrative leave. The employing establishment stated that on October 18, 1996 appellant contacted the Office requesting paperwork for a recurrence of injury, and that, following its receipt of the recurrence claim on November 20, 1996, it first became informed that appellant was allegedly injured on September 26, 1996.

In a letter dated January 13, 1997, the Office advised the employing establishment to have appellant complete a Form CA-1, as it was adjudicating the September 26, 1996 incident as a new injury.

Appellant filed a Form CA-1 claim for benefits on January 28, 1997, seeking benefits based on continuation of pay due to the alleged September 26, 1996 employment incident.

Appellant asserted that he had sustained a herniated cervical disc at C4-5 due to the September 26, 1996 employment incident.

In a letter dated February 19, 1997, the employing establishment controverted appellant's claim for continuation of pay. The employing establishment stated that, in light of the fact that appellant did not inform his supervisor or file any forms until November 18, 1996, he failed to meet the 30-day deadline for filing a claim based on continuation of pay, and was therefore not entitled to such benefits.

Appellant submitted a statement dated March 4, 1997, in which he claimed he had been unable to work since November 21, 1996 due to his alleged cervical injury.

By letters dated March 13, 1997, the Office informed appellant and the employing establishment that it had accepted his claim for herniated disc at C4-5, but that it had not yet determined whether appellant was entitled to continuation of pay. The Office noted the employing establishment's assertion that it was not informed of the injury until November 1996, and requested written evidence from appellant in support of his assertion that he informed his supervisor of the September 26, 1996 injury on October 18, 1996. The Office stated that appellant had 21 days to submit the information requested.

By decision dated April 10, 1997, the Office denied appellant's claim for continuation of pay, stating that the evidence of record indicated he failed to submit a timely claim. The Office stated that appellant was required under the Federal Employees' Compensation Act<sup>1</sup> to provide written notice to the employing establishment within 30 days of his September 26, 1996 injury, and that the record indicated appellant had not provided such notice until November 18, 1996, the date he filed his Form CA-2a. The Office advised appellant that he could claim compensation based on wage loss by filing a Form CA-7.

The Board finds that the Office properly found that appellant was not entitled to continuation of pay.

Section 8119<sup>2</sup> requires, in pertinent part, that written notice of the injury shall be given to the employee's immediate superior within 30 days after the injury.

In the instant case, appellant did not provide any written notice to his supervisor that he had sustained an injury on September 26, 1996 until November 18, 1996, more than 30 days after he sustained his accepted cervical injury. Although it is unrefuted that appellant verbally informed his supervisor on October 18, 1996 that he had sustained an injury on September 26, 1996, there is no evidence in the record, and appellant has not asserted, that he provided written notice of injury to his supervisor prior to November 18, 1996.

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 provisions for filing a claim for compensation because

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> 5 U.S.C. § 8119.

of “exceptional circumstances,” is not applicable to section 8118(a) which sets forth the filing requirements for continuation of pay.<sup>3</sup> The rationale for this finding is set forth fully in the Board’s decision in *William E. Ostertag*.<sup>4</sup> There is, therefore, 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.<sup>5</sup>

Accordingly, the decision of the Office dated April 10, 1997 denying appellant’s claim for continuation of pay on the basis of an untimely filing is affirmed. Even though appellant is not entitled to continuation of pay, his claim was timely so as to make him eligible for consideration of other compensation benefits under other provisions of the Act. The Office informed appellant of his possible entitlement to these benefits in its April 10, 1997 decision.

The decision of the Office of Workers’ Compensation Programs dated April 10, 1997 is hereby affirmed.

Dated, Washington, D.C.  
April 22, 1999

George E. Rivers  
Member

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

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<sup>3</sup> See *William E. Ostertag*, 33 ECAB 1925, 1932 (1982); see also *Robert E. Kimzey*, 40 ECAB 762, 764 (1989); *Sylvia P. Blackwell*, 35 ECAB 811, 813 (1984); *Patricia J. Kelsesky*, 35 ECAB 549, 551 (1984).

<sup>4</sup> See 33 ECAB 1925 (1982), *supra* note 3 at 1932.

<sup>5</sup> *Robert E. Kimzey*, *supra* note 3 at 765; *Patricia J. Kelsesky*, *supra* note 3 at 551-52.