

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KENNETH J. LEGENZA and DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE, Richmond, VA

*Docket No. 01-2060; Submitted on the Record;  
Issued April 9, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,  
A. PETER KANJORSKI

The issue is whether appellant is entitled to continuation of pay.

On May 7, 2001 appellant, then a 52-year-old file clerk, filed a traumatic injury claim asserting that he injured his right shoulder on April 1, 2001 while pulling storage boxes from a shelf. Appellant did not claim continuation of pay by checking the appropriate box on his claim form.

In a letter dated July 20, 2001, the Office of Workers' Compensation Programs advised appellant that it was accepting his claim for the conditions of right shoulder rotator cuff tear and surgery rotator cuff repair.

In a decision also dated July 20, 2001, the Office found that appellant was not eligible for continuation of pay because he did not file a notice of injury<sup>1</sup> within 30 days of the date of injury.

On appeal, appellant explained that he did not know the nature or extent of his injury, only that he had hurt his shoulder. He stated that he filed his claim as soon as a medical opinion was available to provide an accurate diagnosis and treatment plan. He added: "In the supervisors judgment no report was filed because we did not know what was wrong and no work time was missed due to the injury." Appellant further explained that he was given no training about filling out injury claims. He argued that he should not be penalized and denied continuation of pay as a result of this injury and the chain of events.

The Board finds that appellant is not entitled to continuation of pay.

Section 8118(a) of the Federal Employees' Compensation Act provides for payment of continuation of pay, not to exceed 45 days, to an employee "who has filed a claim with his

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<sup>1</sup> Entitlement to continuation of pay is contingent on the filing of a claim, not on the filing of notice. See text accompanying note 2, *infra*.

immediate superior on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of this title.”<sup>2</sup> 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>3</sup>

The Board has held that section 8122(d)(3) of the Act,<sup>4</sup> 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), which sets forth the filing requirements for continuation of pay. There is no provision in 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>

Because appellant did not file a claim for continuation of pay within 30 days of his employment injury, he is not entitled to continuation of pay and this is so regardless of the circumstances.<sup>6</sup>

The July 20, 2001 decision of the Office of Workers’ Compensation Programs is hereby affirmed.

Dated, Washington, DC  
April 9, 2002

Michael J. Walsh  
Chairman

Colleen Duffy Kiko  
Member

A. Peter Kanjorski  
Alternate Member

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<sup>2</sup> 5 U.S.C. § 8118(a).

<sup>3</sup> See *George A. Harrell*, 29 ECAB 338 (1978).

<sup>4</sup> 5 U.S.C. § 8122(d)(3).

<sup>5</sup> *William E. Ostertag*, 33 ECAB 1925, 1932 (1982).

<sup>6</sup> Although appellant is not entitled to have any leave converted to continuation of pay, he may, as the Office indicated in its July 20, 2001 decision, claim compensation for wage loss for the periods in question.