

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KEITH L. KLOOCK and U.S. POSTAL SERVICE,
POST OFFICE, Southgate, MI

*Docket No. 02-2067; Submitted on the Record;
Issued December 26, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue for determination is whether appellant is entitled to continuation of pay as a result of his accepted work injury of May 12, 2001.

On August 1, 2001 appellant, then a 49-year-old letter carrier, filed a notice of traumatic injury alleging that he injured his back in the performance of duty on May 12, 2001. He stated that he suffered a subluxation to the L4-5 disc as a result of excessive lifting and bending.

Appellant had originally filed a claim for a recurrence of disability on June 13, 2001 causally related to previously accepted back claims. He listed the date of original injury as April 30, 1991. Appellant also listed the date of recurrence of disability as May 15, 2001. He specifically noted, however, on his CA-2a claim form, that his back became sore while working at a food drive sponsored by the employing establishment on May 12, 2001.

The Office of Workers' Compensation Programs advised appellant that he could not file a recurrence of disability claim as there was a specific event identified by him as the cause of his back condition. That specific event was lifting and bending on May 12, 2001. Appellant was directed to file a claim for a traumatic injury. On August 1, 2001 such a claim was filed, as noted above.

On August 6, 2001 the employing establishment controverted appellant's claim for continuation of pay.

In a decision dated September 20, 2001, the Office accepted appellant's claim for lumbar subluxation. However, in another decision issued the same date, appellant was advised that he was not entitled to continuation of pay as he had failed to file a claim within the 30-day time limit. The Office indicated that it had taken into account the Form CA-2a, filed on June 13, 2001 accepting this as the first notice of injury. The Office determined that the June 13, 2001 notice of injury was still not timely filed within 30 days of the date of injury for the allowance of continuation of pay.

Appellant requested a hearing, which was held on February 26, 2002. He testified at the hearing that, while the injury occurred on May 12, 2001, disability was not immediately apparent until May 14, 2001, at which time he needed medical treatment.¹ Appellant argued that latent disability should be acknowledged and that the 30-day tolling period for filing a claim for continuation of pay should not have begun until May 14, 2001, such that the June 13, 2001 notice of injury would be considered within the 30-day period beginning May 14, 2001. Additionally, he indicated that the employer was verbally notified of the injury on May 12, May 14 and June 13, 2001.

In a decision dated May 14, 2002, an Office hearing representative affirmed the Office's September 20, 2001 decision.

The Board has held that the responsibility for filing a claim rests with the injured employee.² Section 8122(d)(3) of the Federal Employees' Compensation 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),³ which sets forth the filing requirements for continuation of pay.⁴ There is, therefore, 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. The rationale for this finding is set forth fully in the Board's decision in *William E. Ostertag*.⁵

In this case, appellant was injured in the performance of duty on May 12, 2001. The first notice of claim was filed on June 13, 2001, in the form of a CA-2a, claim for recurrence of disability. This notice of claim was not timely filed within the provisions of section 8122(a)(2) as it was filed 31 days after the date of injury. Likewise appellant's notice of traumatic injury claim dated August 1, 2001 was not timely filed within 30 days of the May 12, 2001 injury so as to entitle appellant to continuation of pay.

Regarding the actual knowledge of the injury to the supervisor, the Board notes that while section 8122 of the Act provides an exception to filing a claim within the specified time limitation with respect to compensation for disability or death, the exception is not applicable to continuation of pay.⁶ As discussed above, section 8118 of the Act provides for payment of continuation of pay, pursuant to the time specified in section 8122(a)(2). Therefore, it is clear in

¹ In a May 14, 2001 treatment note, Dr. Bryan Beller, a chiropractor, indicated that appellant had been seen with a history of injury to the back on May 12, 2001 after lifting and bending at work.

² *Sandra N. Phillips*, 43 ECAB 311 (1991);

³ 5 U.S.C. § 8118(a)

⁴ 5 U.S.C. § 8122(d)(3); see *Michael R. Hrynychuk*, 35 ECAB 1094 (1984).

⁵ *William E. Ostertag*, 33 ECAB 1925 (1982).

⁶ 5 U.S.C. § 8122(a) reads as follows: "An original claim for compensation for disability or death must be filed within three years after the injury or death." The statute provides an exemption, which states that a claim may be regarded timely if an immediate supervisor had actual knowledge of the injury within 30 days. The knowledge must be such as to put the immediate supervisor reasonably on notice of an on-the-job injury or death.

the statute that the exception of the actual knowledge of a superior contained within section 8122(a)(1) is not implicated when determining continuation of pay.⁷

The Board also rejects appellant's contention that latent disability is applicable. First, latent disability only applies to the determination of whether an occupational injury claim is filed within three years of knowledge of the injury or illness. Second, section 8122(a)(2) specifies the time frame for filing a claim for continuation of pay and proves that written notice of the injury shall be given within 30 days. The context of section 8122 makes clear that this means within 30 days of the date 2001 of injury, not the date of disability.⁸ Secondly, the fact that appellant did not seek medical treatment until May 14, 2001 does not disprove his knowledge of the injury on May 12, 2001. Appellant has specifically acknowledged that he informed the employing establishment of his injury on May 12, 2001. He also specifically gave the date of injury as May 12, 2001 to his chiropractor. Appellant knew of his injury on May 12, 2001 regardless of when he decided to obtain medical attention.

The decision of the Office of Workers' Compensation Programs dated May 14, 2002 is hereby affirmed.

Dated, Washington, DC
December 26, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

⁷ *Saundra N. Phillips*, 43 ECAB 311 (1991).

⁸ *See Thonsam A. Faber*, 50 ECAB 566 (1999).