



On May 15, 2009 the Office informed appellant that he submitted insufficient evidence to adjudicate his claim. It requested that he describe the employment-related activities he believed contributed to his condition, explain how often he performed such activities and clarify whether he believed his medical condition resulted from a traumatic injury or an occupational disease. In addition, the Office requested that appellant submit a medical report from a treating physician, discussing his symptoms, examination results, diagnosis, and providing an opinion regarding the cause of his medical condition.

By letter dated May 24, 2009, appellant responded, noting that on December 23, 2008 at approximately 2:00 p.m., he performed various diagnostic tests on a cytology machine as part of a troubleshooting protocol. For one of the tests, he needed to pull the machine forward in order to remove fittings and valves on the back of the instrument. Appellant attributed his injury to his attempt at pulling the heavy machine forward. Over the next several days, he experienced discomfort and pain in his neck and shoulder. He sought medical treatment and was advised on December 29, 2008 that he sustained a herniated cervical disc. Appellant explained that on January 2, 2009 he informed his supervisor of his work-related injury and the need for surgery.

In a January 2, 2009 report, Dr. Russell Amundson, a Board-certified neurosurgeon, reviewed diagnostic testing that showed a significant disc herniation at C6-7 to the left. He performed surgery on January 14, 2009 for an anterior discectomy and fusion. Dr. Amundson submitted follow up reports through June 8, 2009.

On July 17, 2009 the Office accepted appellant's claim for a traumatic injury on December 23, 2008.<sup>1</sup> It accepted that he sustained a herniated cervical disc with radiculopathy. In a separate decision of that date, the Office denied appellant's claim for continuation of pay, finding that he did not file his claim on a form approved by the Office within 30 days of the date of injury.

On August 9, 2009 appellant requested an oral hearing before the Office's Branch of Hearings and Review. He submitted cell phone records pertaining to communication with his supervisor, Dr. Eugene Einhorn, who he informed about the December 23, 2008 work injury. Appellant noted that his supervisor never advised or informed him regarding his right to file a claim for compensation under the Federal Employees' Compensation Act.

A hearing was held on November 16, 2009 at which appellant appeared. Appellant stated that he worked over 11 years at full time and another 9 years part time as a cytotechnologist at the employing establishment and described his injury on December 23, 2008. Regarding continuation of pay, he noted that he was out of work for approximately 10 weeks and should be paid for this period instead of having to use annual and sick leave. Appellant explained that he did not immediately report his December 23, 2008 work-related injury because he went on vacation the next day. He did not realize how serious the condition was until January 2, 2009, when he was informed of the need for surgery. Appellant reiterated that his supervisor never advised him to file a workers' compensation claim until April, contending that this failure mitigated in favor of continuation of pay. He submitted additional evidence.

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<sup>1</sup> A traumatic injury is defined as condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. 20 C.F.R. § 10.5(ee).

In a January 27, 2010 decision, an Office hearing representative affirmed the denial of continuation of pay. She found that appellant filed his notice of injury on April 28, 2009, more than 30 days after the December 23, 2008 employment injury.

### **LEGAL PRECEDENT**

Section 8118 of the Act authorizes continuation of pay for an employee who has filed a valid claim for a traumatic injury.<sup>2</sup> The Act further provides, however, that payment of continuation of pay not to exceed 45 days is contingent upon the employee filing an approved form with his immediate superior within 30 days of the injury.<sup>3</sup> If an injured employee fails to make a written claim for a period of wage loss within 30 days, he or she is not entitled to continuation of pay.<sup>4</sup> The Office's implementing federal regulations provide, in pertinent part, that to be eligible for continuation of pay, an employee must: (1) have a "traumatic injury" which is job related and the cause of the disability, and/or the cause of lost time due to the need for medical examination and treatment; (2) file a Form CA-1 within 30 days of the date of the injury; and (3) begin losing time from work due to the traumatic injury within 45 days of the injury.<sup>5</sup>

### **ANALYSIS**

The Board finds that appellant is not entitled to continuation of pay based on his December 23, 2008 employment injury because he failed to timely file his claim within 30 days, as required under the Act.

Appellant sustained injury on December 23, 2008, but did not file a claim with his supervisor until April 28, 2009, more than 30 days after his injury. The Act and implementing regulations provide that written notice of injury must be filed with the immediate supervisor on a form approved by the Office within 30 days. Appellant contends that he notified his supervisor of his injury but was not told of the need to file a claim until April. 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 of "exceptional circumstances," is not applicable to section 8118(a) which sets forth the filing requirements for continuation of pay.<sup>6</sup> The rationale for this finding was set forth in *William E. Ostertag*.<sup>7</sup> Although appellant notified his superior of his medical condition and work-related injury on January 2, 2009, the Act provides no exception to the 30-day time limitation for continuation of pay.<sup>8</sup> There is a clear distinction between the filing of a claim for compensation and a claim for continuation of pay.

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<sup>2</sup> 5 U.S.C. § 8118(a).

<sup>3</sup> *Id.* at §§ 8118(a) and 8122(a)(2).

<sup>4</sup> *J.M.*, 61 ECAB \_\_\_\_ (Docket No. 09-1563, issued February 26, 2010). See also *Laura L. Harrison*, 52 ECAB 515 (2001).

<sup>5</sup> 20 C.F.R. § 10.205(a)(1-3).

<sup>6</sup> *Dodge Osborne*, 44 ECAB 849 (1993).

<sup>7</sup> 33 ECAB 1925, 1932 (1982).

<sup>8</sup> *Laura L. Harrison*, *supra* note 4.

Actual notice is an exception to the three-year filing requirement of a claim for compensation benefits and has no bearing on the 30-day filing requirement for continuation of pay.<sup>9</sup>

The Board has found that no exceptional or mitigating circumstance can entitle a claimant to continuation of pay if the employee fails to file a proper form within 30 days of the work-related injury.<sup>10</sup> Appellant's failure to file a claim within 30 days of his work-related injury bars his entitlement to continuation of pay. Even though appellant is not entitled to continuation of pay, his claim was accepted so as to make him eligible for other compensation benefits under the Act. The Office's July 17, 2009 letter accepting his claim advised him to submit a CA-7 claim for disability compensation for any time lost from work due to his injury.

### **CONCLUSION**

The Board finds that appellant is not entitled to continuation of pay for his December 23, 2008 employment injury.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the January 27, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 4, 2010  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>9</sup> *Loretta R. Celi*, 51 ECAB 560 (2000).

<sup>10</sup> *J.M.*, *supra* note 4.