

June 1995

FEDERAL EMPLOYEES' COMPENSATION ACT

Redefining Continuation of Pay Could Result in Additional Refunds to the Government



General Government Division

B-259958

June 8, 1995

The Honorable Joseph I. Lieberman
The Honorable Thad Cochran
United States Senate

At your request, we recently reviewed several issues relating to the Federal Employees' Compensation Act (FECA) and how it is administered by the Department of Labor's Office of Workers' Compensation Programs (OWCP). Part of our work, which provides the basis for this report, focuses on the costs and benefits of a former federal government practice of obtaining refunds for continuation of pay (COP) benefits when federal employees receive damages from third parties who are liable for the employees' work-related injuries that caused them to be absent from work. The government used to obtain COP refunds in third-party cases, but it discontinued this practice in 1986 following decisions by the Employees' Compensation Appeals Board (ECAB) and a federal appeals court.

FECA (5 U.S.C. 8118) authorizes federal agencies to continue paying employees their regular salaries for up to 45 days (called the COP period) when they are absent from work due to work-related traumatic injuries.¹ COP benefits end after 45 days. If employees continue to be absent from work due to their injuries, they are entitled to compensation benefits for lost wages, rather than their regular salaries.² Third-party liability occurs when a person or entity other than the U.S. government is responsible for an employee's on-the-job injury (e.g., a dog bite or an automobile-related injury).

This report addresses the costs and benefits of the government reestablishing its former practice of obtaining refunds of COP when employees recover damages from responsible third parties. (App. I contains a detailed description of our objectives, scope, and methodology.)

¹OWCP defines traumatic injury as a wound or other condition of the body caused by external force that is identifiable by time and place of occurrence and member of the body affected. It must be caused by a specific event or incident, or series of events or incidents, within a single day or work shift.

²FECA distinguishes between COP and compensation benefits. COP is regular salary paid by the agency that employs the injured employee. Compensation benefits, on the other hand, are paid by OWCP from the Employees' Compensation Fund and include payments for wages lost beyond the 45-day COP period and payments for (1) medical expenses, (2) vocational rehabilitation, (3) bodily impairment or disfigurement, and (4) survivors' compensation.

Results in Brief

Because of current interpretations of FECA by ECAB and a federal appeals court, the federal government has no legal basis to obtain refunds of COP paid to injured employees when those employees recover damages from third parties who are liable for their on-the-job injuries. A basis could be provided, however, by amending FECA. As a result of the current interpretations, employees can receive regular salary payments from their employing agencies and reimbursement from third parties—in effect, a double recovery of income for their first 45 days of absence from work due to injury. In contrast, employees may not receive double recoveries for compensation benefits, such as medical expenses whenever they are incurred or compensation in lieu of pay after 45 days, because FECA provides that the government can recoup funds for these expenditures from employees receiving third-party recoveries.

We determined that the government could recover an estimated \$1 million to \$2 million per year if it were to obtain refunds of COP in third-party cases. The Postal Service would realize about 70 percent of these recoveries. This could be accomplished if Congress were to amend FECA to require that COP payments in third-party cases be treated like compensation benefits for the purpose of refunds to the government from third-party recoveries. Thus, injured employees could not receive double recoveries for COP periods because the government could also recoup funds for COP expenditures from employees receiving third-party recoveries. According to Labor and Postal Service officials, the amount of COP that could be refunded to the government when employees receive damages from responsible third parties would greatly exceed the administrative costs to recover it.

Background

Initially enacted in 1916, FECA (5 U.S.C. 8101-8193) is the workers' compensation law for federal employees. FECA authorizes the government to compensate employees when they are temporarily or permanently disabled due to an injury or disease sustained while performing their duties. Other benefits provided by FECA include payments for (1) medical expenses, (2) vocational rehabilitation services, (3) bodily impairment or disfigurement, and (4) survivors' compensation.

Compensation benefits paid under FECA are financed by the Employees' Compensation Fund. OWCP bills agencies annually for the amount of payments made from the fund on account of injuries suffered by their employees. Agencies then reimburse the fund from their appropriations or operating revenues. In fiscal year 1994, OWCP reported that it paid about

\$1.9 billion from the fund for injured employees' compensation and other benefits.

When third parties are responsible for employees' injuries, Labor may require that employees pursue collection action against third parties. When employees recover damages from third parties, FECA (5 U.S.C. 8132) requires these employees to reimburse the government amounts that would cover the compensation benefits they received. The underlying purposes of requiring employees to reimburse compensation paid by the government in these circumstances are to (1) prevent federal employees from obtaining double recoveries—i.e., compensation benefits from the government and damages from a third party for the same injury—and (2) minimize the cost of FECA to the federal government.³

Labor also may require that employees assign their collection rights against third parties to it. However, a Labor attorney told us Labor has not required such assignments because it has not had the staff to pursue third-party claims on behalf of employees. Employees, on the other hand, have an incentive to pursue third-party claims because FECA allows employees to retain at least 20 percent of the net amount they recover after expenses of the suit or settlement have been deducted.

Labor has authorized the Postal Service to administer some third-party claims filed by Postal Service employees and to accept voluntary assignments of employees' rights to pursue third-party claims in some cases. A 1980 agreement between OWCP and the Postal Service provides that the Postal Service may administratively pursue collection of damages from third parties liable for some traumatic injuries sustained by Postal Service employees. Postal Service employees, because of the nature of their work, have a greater risk of exposure to injuries caused by third parties than many other federal employees. For example, mail carriers are more likely to be exposed to dog bites and unsafe stairs and porches. The Postal Service's injury compensation manager told us that the Postal Service will pursue damages from responsible third parties on behalf of its employees in cases where it believes the amount of money that could be recovered is significant enough to expend the resources.

When either OWCP or the Postal Service receives claims involving third parties, they are to inform employees of their responsibility to pursue collection action against the third party. Employees are also to be informed that they should contact either OWCP or the Postal Service and

³See *United States v. Lorenzetti*, 467 U.S. 167, 177 (1984).

obtain a statement of disbursements made by the government before they settle with the third party.

In 1974, Congress enacted the COP provision because of delays that occurred between the time an injured employee filed a traumatic injury claim and the time the employee actually started receiving compensation benefits.⁴ According to a Senate Committee report, Congress made it clear that COP was to be treated as regular salary, subject to federal and state income taxes.⁵ In contrast, workers' compensation benefits are tax free. It was not clear, however, whether Congress intended that COP should or should not be recovered in third-party cases. In fiscal year 1993, OWCP estimated that federal agencies paid \$61 million for COP.

According to a Labor official, following the enactment of the COP provision, Labor began seeking and obtaining refunds of COP from federal employees who received third-party recoveries. This official explained that Labor based its right to obtain COP refunds on FECA's requirement that employees reimburse compensation benefits paid by the federal government from third-party recoveries and on the common law right of equitable subrogation.⁶ When OWCP received refunds from employees, it credited the Employees' Compensation Fund for the amount of the refund that represented compensation benefits, and it returned the COP portion of the refund to the agency that paid the injured employee's salary.

The Federal Government Is Currently Not Reimbursed for COP

Currently, the federal government has no legal basis to obtain refunds of COP paid to employees when they receive recoveries from third parties liable for their injuries. This position resulted from decisions by ECAB⁷ and the U.S. Court of Appeals for the Ninth Circuit. These decisions, however, did not affect OWCP's authority to obtain refunds of (1) compensation benefits in lieu of pay received by injured employees following the 45-day COP period and (2) such other compensation benefits as medical expenses

⁴FECA authorizes COP for traumatic injuries only. Employees with approved occupational disease claims receive compensation benefits for lost wages. OWCP defines occupational diseases as conditions produced in the work environment over a period longer than 1 workday or shift. Occupational diseases may result from (1) systemic infection; (2) repeated stress or strain; (3) exposure to toxins, poisons, or fumes; or (4) other continuing conditions of the work environment.

⁵S. Rep. No. 1081, 93d Cong., 2d sess., reprinted in 1974 U.S. Code & Ad. News 5341, 5344.

⁶Equitable subrogation is a legal theory, developed in common law courts, which allows one person to acquire the rights of another person to bring a claim for damages against a third party.

⁷ECAB was established within the Department of Labor as an entity separate from OWCP to consider and decide appeals from final decisions of OWCP in any case arising under FECA.

paid to or on behalf of injured employees during or after the 45-day COP period.

In a June 1985 decision, ECAB held that OWCP could not recover COP when employees received damages from third parties. ECAB recognized that the purpose of reimbursing compensation benefits when employees received damages from third parties was to prevent the employees from obtaining double recoveries. However, ECAB stated that FECA specifically provided that COP was not compensation, and FECA only required refund of compensation benefits in third-party cases.⁸ In August 1985, the U.S. Court of Appeals for the Ninth Circuit held that FECA established the government's exclusive remedy for reimbursement from any damages federal employees might recover from third parties and no common law remedy, such as equitable subrogation, was available.⁹ In response to the ECAB decision, OWCP issued a bulletin in March 1986 stating that it would no longer include COP in the amount to be refunded by employees following third-party recoveries.

After ECAB's and the Court of Appeals' decisions, three class action suits were filed on behalf of federal employees who had previously refunded COP to the government.¹⁰ These suits sought to compel the government to repay COP that employees had refunded to it following third-party recoveries. The suits were either litigated or settled in favor of the employees. According to a Labor official, the suits provided for the government to return over \$5 million to claimants who had previously refunded COP to the government. Table 1 summarizes the claimants and amounts of COP involved in the class action suits.

⁸Paul L. Dion, 36 ECAB 656 (1985).

⁹Janakes v. United States Postal Service, 768 F.2d 1091 (9th Cir. 1985).

¹⁰Evich v. Brock, No. C85 6091 JPV (N.D. Cal. 1986); National Association of Letter Carriers, AFL-CIO v. United States Postal Service, Civil Action No. 88-2525 TAF (D. D.C. 1989); and Owens v. The United States Department of Labor, Civil Action No. 89-981 TAF (D. D.C. 1989).

Table 1: Claimants and Amounts of COP Benefits Involved in Class Action Suits

Name of suit	Claimants	COP repaid to claimants	Time frame covered
Evich	1,146 employees in the Ninth Circuit from 20 different agencies (including the Postal Service)	\$999,956	August 1979 to March 1986
National Association of Letter Carriers	2,946 Postal Service employees not included in Evich	\$2,645,536	September 1982 to March 1986
Owens	1,192 employees from 42 different agencies (including the Postal Service) not included in Evich or Letter Carriers	\$1,795,984	April 1983 to March 1986

Source: GAO analysis of Labor's Office of the Solicitor data.

Estimated Recoverable Amount Is \$1 Million to \$2 Million Per Year

Based on our and OWCP's calculations, we estimated that the federal government could recover from \$1 million to \$2 million per year if it obtained refunds of COP in third-party cases. We also estimated that the Postal Service would realize about 70 percent of these recoveries. The amount of COP recovered would be in addition to the amount of compensation benefits refunded to Labor from third-party recoveries, which totaled \$11.5 million in fiscal year 1994.

Because the government has not obtained COP refunds in third-party cases in recent years, we used several different methods to determine how much the government might recover in these types of cases if FECA were to be amended. Using information on (1) COP benefits paid in the past from the class actions filed by employees who had previously refunded COP, (2) Postal Service COP recoveries in third-party cases during fiscal year 1985, and (3) a sample of COP paid in third-party cases by the Postal Service in calendar year 1994, we estimated that the annual amount of COP that could be recovered ranged from \$1.3 million to \$2 million. For the estimates that were based on the amount of COP paid and recovered in the past, we also factored in the rate of federal General Schedule pay increases from 1986 to 1995. We developed these estimates, using the best data available, because current information on the total amount of COP that agencies paid in third-party cases was not readily available.

OWCP estimated that approximately \$1 million per year could be recovered for COP in third-party cases. OWCP based its estimate on one of the class

action suits that required the government to repay COP it had previously recovered following the settlement of third-party claims. According to OWCP, the first of the class action suits, Evich, was the most representative of the federal employee population as a whole. Evich covered employees in the Ninth Circuit (several western states) who worked for 20 different departments and agencies, including the Postal Service. Also, of the three suits, Evich covered the longest period (6.5 years). OWCP used (1) the amount of COP returned to the employees after the suit was settled, (2) the percentage of the federal employee population in the Ninth Circuit, and (3) its estimate of total COP paid in 1993, to project an estimate of governmentwide COP that could be recovered in third-party cases each year.

Costs to Obtain Refunds of COP Should Be Minimal

According to officials and staff from Labor and the Postal Service, additional costs and effort to obtain refunds of COP in third-party cases would be minimal. It would involve reinstating the procedures previously used to obtain employee refunds of compensation benefits and COP.

Currently, OWCP gives employees a statement showing the amount of compensation benefits it paid to them or on their behalf and the amount of the third-party recoveries employees are to remit to the federal government. Before 1986, the amount of COP was obtained from the employing agencies and included on this statement for calculating the net amount to be remitted. An OWCP official told us that some agencies have a separate COP code in their payroll systems that would allow the agencies to easily determine the amount of COP paid to their employees. The OWCP official said that agencies that do not specifically track COP would have to determine the COP amount from the individual employee's payroll records.

The procedure is similar for cases the Postal Service administers pursuant to its 1980 agreement with OWCP. The Postal Service obtains the amount of compensation paid to or on behalf of its employees from OWCP and gives its employees a statement similar to the one OWCP gives non-Postal employees. Before 1986, the Postal Service included the COP amount on the statement to calculate the net amount employees were to remit. A Postal Service official told us that COP amounts are readily available for individual employees because the Postal Service has a separate COP code in its payroll system.

The amount of effort needed to obtain COP information would not appear to place unreasonable burden on agencies that do not specifically track it.

Information from the class action suits indicated that the number of employees per agency for which COP data were needed was small. Only 6 of the 42 non-Postal Service agencies covered by the class action suits had received refunds of COP from more than 50 employees over a period of 35 to 78 months. We have no reason to believe that the number of third-party cases has changed dramatically since settlement of these class action suits, or that it will change dramatically in the future. Therefore, on an annual basis, we would expect that most agencies would have to identify COP costs in third-party cases for only a small number of employees each year.

Conclusions

Current treatment of COP for third-party recovery purposes does not (1) prevent employees from receiving COP benefits as well as damages from third parties for the same injury (in effect, a double recovery) or (2) minimize the cost of FECA to the federal government. Because FECA distinguishes between COP and compensation benefits, the government can only recover amounts paid for compensation benefits when federal employees' injuries are caused by third parties. When Congress enacted the COP provision, it was not clear whether Congress specifically intended that COP should not be recovered in third-party cases.

To prevent double recoveries of COP benefits and third party damages and to minimize the federal government's costs of FECA, Congress would need to redefine COP so that OWCP could include it in the amount of compensation benefits for which employees are required to reimburse the government when they recover damages from third parties. While some employing agencies would need to spend more time than others to identify COP benefits paid to individual employees, the Postal Service, which is the agency most likely to have the most third-party claims, and some other agencies already have the capability to identify COP amounts for individual employees. Also, available evidence suggests that other agencies could establish cost-effective procedures to identify COP in the relatively few cases they would encounter.

Recommendation to Congress

To preclude employees from, in effect, receiving double recoveries and to help reduce the costs to the federal government of employees' work-related injuries caused by third parties, we recommend that Congress amend FECA to expressly provide for refunds of amounts paid as COP when employees receive third-party recoveries. Subsection (e) of 5 U.S.C. 8118, the statutory provision that authorizes COP, could be amended

to provide that COP shall not be considered compensation “except for the purpose of refunds to the United States from third person recoveries pursuant to section 8132 of this title.” In addition, to ensure that refunds of COP are returned to the employing agency that paid the COP, section 8132 could be amended to provide that amounts refunded shall be credited to the Employees’ Compensation Fund “except for continuation of pay under section 8118 of this title, which shall be credited to the employing agency that paid it.”

Agency Comments

We requested comments on a draft of this report from the Secretary of Labor and the Postmaster General or their designees. Labor agreed with our conclusions and recommendation. In an April 21, 1995, letter (see app. II), Labor’s Assistant Secretary for Employment Standards said Labor believes that returning to the practice of recovering COP and thereby avoiding double recoveries is equitable and a promising way to lower federal government costs.

We met with the Postal Service’s Vice President/Controller and other officials on April 10, 1995, to obtain Postal Service’s formal comments on our draft. The Postal Service agreed with our findings, conclusions, and recommendation. Further, Postal Service officials agreed to implement a procedure to obtain COP refunds in third-party cases if FECA is amended as we recommend.

We are sending copies of this report to interested congressional committees, the Secretary of Labor, the Postmaster General, and the Director of the Office of Management and Budget. Copies will also be made available to others upon request.

The major contributors to this report are listed in appendix III. If you have any questions about this report, please contact me on (202) 512-3511.

A handwritten signature in black ink, appearing to read "Timothy P. Bowling". The signature is fluid and cursive, with the first name "Timothy" and last name "Bowling" clearly distinguishable.

Timothy P. Bowling
Associate Director
Federal Human Resource Management
Issues

Objectives, Scope, and Methodology

At the request of the former Chairman and Ranking Minority Member of the Subcommittee on Regulation and Government Information, Senate Committee on Governmental Affairs, we reviewed several issues relating to FECA. This Subcommittee was eliminated in early 1995 when the new Congress reorganized some Senate committees. However, as agreed with the former Chairman's staff, we continued to review the issue of recovering COP in third-party liability cases. Our objectives were to determine the costs and benefits of the federal government reestablishing its former practice of obtaining refunds of COP when employees recover damages from responsible third parties including (1) the estimated annual amount of COP that the government could recover and (2) whether recoveries would be offset by the administrative costs incurred.

To achieve our objectives, we interviewed officials and staff from OWCP, Labor's Office of the Solicitor, and the Postal Service. In addition, we reviewed the legislative history of FECA, specifically the provisions on COP and third-party liability. We also reviewed the (1) ECAB and Court of Appeals decisions that disallowed the government's practice of obtaining COP refunds and (2) class action suits filed by federal employees to compel the government to return COP that the employees had previously refunded to it. We discussed with Labor attorneys whether and how FECA could be amended so that COP could be included in refunds from third-party recoveries.

To determine the annual amount of COP that the government could recover, we developed three estimates and reviewed an estimate made by OWCP. For our estimates, we used information (1) from the class action suits filed by employees who had refunded COP in the past, (2) on Postal Service COP recoveries in third-party cases during fiscal year 1985, (3) from the Postal Service on its COP disbursements in third-party cases during the first half of calendar year 1994, and (4) on federal General Schedule pay increases from 1986 to 1995.

Using information from OWCP on (1) the total amount of COP that was to be refunded in each of the three class action suits and (2) the amount of COP to be refunded to employees of each agency involved in each of the three class actions, we estimated that Postal Service employees had received about 70 percent of the total amount of COP refunded. Because (1) these three suits presumably covered every employee that OWCP identified as having reimbursed the government for COP in third-party cases during some period between August 1979 and March 1986 and because (2) the federal employee population, including the proportion employed by the

Postal Service, remained relatively constant from 1986 to 1993, we assumed that Postal Service employees would continue to account for about 70 percent of all COP paid in third-party cases.

For our first estimate of the annual amount of COP that could be recovered, we obtained from the Postal Service the amount of COP it paid in third-party cases for the first 6 months of calendar year 1994. Using these data and the 70-percent figure referred to in the preceding paragraph, we estimated that annual recoveries of COP could be \$1.3 million.

For the second estimate, we used information on COP recovered by the Postal Service in fiscal year 1985 and the rate of federal General Schedule pay increases since 1985. Using these data and the 70-percent figure, we estimated that the government could recover about \$1.9 million of COP annually.

Our final estimate was based on (1) the amounts of COP returned to employees involved in the three class action suits and (2) federal General Schedule pay increases since 1985. Using these data, we estimated COP recoveries of \$2 million per year.

To assess administrative costs that would be incurred in recovering COP in third-party cases, we reviewed OWCP and Postal Service procedures manuals. We also discussed with OWCP and Postal Service officials and staff how third-party cases are currently handled and how COP refunds were handled in the past.

We did our work between March 1994 and February 1995 in accordance with generally accepted government auditing standards.

Comments From the Department of Labor

U.S. Department of Labor

Employment Standards Administration
Washington, D.C. 20210

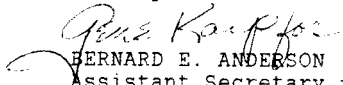


Reply to the Attention of:

APR 21 1995

MEMORANDUM FOR NANCY KINGSBURY
Director, Federal Human Resource
Management Issues, GAO

Through: CYNDI MCCORD
Principal GAO Liaison

FROM:  BERNARD E. ANDERSON
Assistant Secretary for
Employment Standards

SUBJECT: GAO Draft Audit Report entitled
Federal Employees' Compensation Act:
Redefining Continuation of Pay Could
Result in Additional Refunds to the
Government, March 1995

In response to your March 24, 1995 request, the Employment Standards Administration (ESA) has reviewed the above-referenced audit report. Our response is as follows:

GAO Recommendation to Congress (Page 15)

"To preclude employees from, in effect, receiving double recoveries and to help reduce the costs to the federal government of employees' work-related injuries caused by third parties, we recommend that Congress amend FECA to expressly provide for refunds of amounts paid as COP when employees receive third-party recoveries. Subsection (e) of 5 U.S.C. 8118, the statutory provision that authorizes COP, could be amended to provide that COP shall not be considered compensation "except for the purpose of refunds to the United States from third person recoveries pursuant to section 8132 of this title." In addition, to ensure that refunds of COP are returned to the employing agency that paid the COP, section 8132 could be amended to provide that amounts refunded shall be credited to the Employees' Compensation Fund "except for continuation of pay under section 8118 of this title, which shall be credited to the employing agency that paid it."

2

ESA Response

We believe that returning to the practice of recovering monies paid in Continuation of Pay (COP), avoiding double recoveries, is equitable and a promising way to help lower federal government costs. We agree that the amendment of sections 8118 and 8132 of the Federal Employees' Compensation Act (FECA), as described in the recommendation, will prove to be an effective and permanent way of ensuring that the government is fully reimbursed where the work-related injury is caused by a third party.

Major Contributors to This Report

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