

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANDY C. BIELUN and DEPARTMENT OF THE NAVY,
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 03-569; Submitted on the Record;
Issued July 17, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant has a herniated disc at L2-3 causally related to his employment.

On November 30, 1989 appellant, then a 31-year-old painter, filed a claim for a traumatic injury sustained that day, when he twisted his back while scaling paint.

The Office of Workers' Compensation Programs accepted that appellant sustained a back strain and began payment of compensation for temporary total disability.

From April 2 to May 15, 1990, appellant underwent a work-hardening program at the direction of his attending physician, Dr. Avrom S. Brown, a family practitioner.

Appellant's employment was terminated effective August 26, 1993 on the basis that he was disabled to perform his duties.

By decision dated July 12, 1996, the Office terminated appellant's compensation on the basis that his injury-related disability had ceased. The Office based its decision on the May 9, 1995 report of Dr. E. Balasubramanian, a Board-certified orthopedic surgeon, to whom the Office referred appellant to resolve a conflict of medical opinion.

Appellant requested a hearing, which was held on March 25, 1997 and submitted a report dated November 15, 1996 from Dr. Lawrence F. Honick, a Board-certified orthopedic surgeon, stating that the weight lifting in appellant's work-hardening program had caused multiple herniated discs and associated problems that rendered him permanently unemployable.

By decision dated May 29, 1997, an Office hearing representative found that the evidence supported that the residuals of appellant's accepted physical condition from his employment injury had ceased. The decision stated that the only detailed medical report submitted since the

termination of appellant's compensation was from Dr. Honick and attributed his continued symptoms not to the November 1989 employment injury, but to the work-hardening program.

By letter dated November 3, 1997, appellant requested reconsideration, contending that he sustained herniated discs due to the work-hardening program authorized by the Office.

By decision dated April 15, 1998, the Office denied modification of the May 29, 1997 decision on the basis that the evidence did not show that the work-hardening program caused further spinal injury and even if it did, the effects were no longer present by 1996.

By letter dated March 29, 1999, appellant, through his attorney, requested reconsideration and submitted additional medical evidence. In a report dated October 27, 1997, Dr. Michael L. Brooks, a Board-certified diagnostic radiologist, stated the images from a December 11, 1989 magnetic resonance imaging (MRI) scan were not available for review, but that Dr. Mark Goldberg, a Board-certified radiologist, stated that they showed mild disc degeneration at L2-3 with mild disc space narrowing and disc degeneration at L4-5 and L5-S1, with no focal disc herniation. Dr. Brooks stated that a May 17, 1990 MRI scan showed a broad based disc herniation at L3-4 and focal disc herniation at L2-3. He concluded:

“[A]ssuming the description of Dr. Goldberg is accurate, disc abnormalities were present including degeneration and bulging at the L4-5 and L5-S1 levels and with the exception of a mild degree of disc degeneration at L2-3, the L2-3 and L3-4 discs were otherwise within normal limits. Subsequent imaging studies including MRI [scan]s dating from May 1990, demonstrates disc herniations at L2-3 and L3-4, which are confirmed on discography. These disc herniations were not present on the prior examination of December 1989 and only are initially visualized in May 1990, after [appellant's] work-hardening program. It can, therefore, be stated after my review of these imaging studies and assuming Dr. Goldberg's report to be factual, that it is within reasonable medical certainty to state that mechanical stress and trauma to the lumbar spine associated with [his] work-hardening program can be attributed to production of disc herniations at L2-3 and L3-4 in [appellant].”

A transcript of Dr. Brooks November 18, 1997 testimony in appellant's lawsuit against the center where he underwent the work-hardening program in April and May 1990 was submitted. In his testimony Dr. Brooks explained that he could ascertain that the disc herniations seen on the May 17, 1990 MRI scan were recent by how white and bright they were.

An Office medical adviser reviewed the medical evidence on April 16, 1999 and stated: “If you decide there was a consequential injury due to [appellant's] work-hardening program, his current impairment and medical treatment would be causally related.”

By decision dated June 22, 1999, the Office found that the new evidence failed to establish that appellant's new disc herniations were related to his November 30, 1989 employment injury.

By letter dated October 8, 1999, the Office advised appellant that it was reopening the case on its own motion. On November 4, 1999 the Office referred appellant, the case record and

a statement of accepted facts to Dr. Bong S. Lee, a Board-certified orthopedic surgeon, to resolve a conflict of medical opinion as to “[w]hether [his] current condition is medically connected to the work injury and/or subsequent activities during work hardening.”

In a report dated December 6, 1999, Dr. Lee set forth appellant’s history, complaints and findings on examination. After reviewing the diagnostic studies, he diagnosed chronic low back pain syndrome and concluded:

“[Appellant’s] symptoms were precipitated by the incident of November 30, 1989, based on the medical history and the records. The symptoms were perpetuated by the active work-hardening activities....

“All of the diagnostic studies are not impressive, although there is MRI and CT [computerized tomography] scan[s] evidence of degeneration and perhaps even small disc herniations. However, the MRI and CT [scans] findings are not consistent with the clinical findings on examination, which are negative for any neurologic deficit. Also, [appellant’s] present objective findings are not consistent with the subjective complaints. His complaints are far out of proportion to his objective findings.”

By letter dated February 9, 2000, the Office requested Dr. Lee’s opinion whether appellant had herniated discs and, if so, whether they were related to his work injury or the subsequent work-hardening activities. In a report dated February 23, 2000, Dr. Lee stated that the early MRI scan of the lumbar spine did not show any herniation, that the most recent MRI scan on December 29, 1998 indicated a new disc herniation at L4-5 and that he was “not able to make any definite comment regarding the new finding of disc herniation of L4-5 reported on this MRI [scan] of 1998, as to whether it is the result of any subsequent work[-]hardening activities.”

By decision dated January 24, 2001, the Office found that appellant “continues with residual, disability from the work injury to include work[-]hardening activities.”

By letter dated January 31, 2001, appellant, through his attorney, requested that the Office advise him what specific conditions had been accepted.

By decision dated March 16, 2001, the Office advised appellant that it had accepted a herniated disc at L3-4.

The Board finds that the case is not in posture for a decision on the issue of whether appellant has a herniated disc at L2-3 causally related to his employment.

Several physicians reviewed appellant’s May 17, 1990 MRI scan and offered differing interpretations of what it showed with regard to the disc at L2-3. Drs. Brooks, Brown and Dr. Charlene M. Smith, a Board-certified radiologist, Dr. William H. Simon, a Board-certified orthopedic surgeon, and Philip Yussen, a Board-certified radiologist, interpreted this study as showing a herniated disc at L2-3. Dr. Noubar Didizian, a Board-certified orthopedic surgeon, and Dr. Perry Black, a Board-certified neurosurgeon, indicated this study did not show a herniated disc at L2-3.

The case will, therefore, be remanded to the Office for resolution of the conflict of medical opinion on the question of whether appellant has a herniated disc at L2-3 and if so, whether the herniated disc at L2-3 is causally related to the work-hardening program that appellant underwent from April 2 to May 15, 1990.¹ Drs. Honick and Brooks stated that the work-hardening caused appellant's disc herniations at L2-3 and L3-4.² The Office requested that Dr. Lee, to whom it referred appellant,³ address this question, but Dr. Lee did not provide an opinion on this issue.

The March 16, 2001 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for further development, followed by an appropriate decision on the issue of whether appellant sustained an employment-related herniated disc at L2-3.

Dated, Washington, DC
July 17, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

¹ If treatment is performed as a result of an employment injury and it causes further impairment, this constitutes a consequential injury and is compensable. *Gaare R. Davis*, 48 ECAB 612 (1997).

² Unlike Dr. Brooks, Dr. Honick did not specify the level of the "multiple disc herniations" he attributed to the work-hardening program.

³ The Office's November 4, 1999 letter referring appellant to Dr. Lee indicated this referral was made to resolve a conflict of medical opinion, but, as noted in the body of the Board's decision, there was no conflict of medical opinion on the issue of whether appellant had a herniated disc or discs causally related to his approved work-hardening program.