

**United States Department of Labor  
Employees' Compensation Appeals Board**

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C.L., Appellant )

and )

**DEPARTMENT OF VETERANS AFFAIRS,**  
**VETERANS ADMINISTRATION MEDICAL**  
**CENTER, Long Beach, CA, Employer** )

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**Docket No. 06-1149**  
**Issued: September 20, 2006**

*Appearances:*  
*Daniel M. Goodkin, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge

**JURISDICTION**

On April 17, 2006 appellant filed a timely appeal from Office of Workers' Compensation Programs' decisions dated May 26 and September 1, 2005 and February 16, 2006 denying her recurrence of disability claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant sustained a recurrence of disability on July 19, 2004 or a herniated disc causally related to her January 8, 2003 employment injury.

**FACTUAL HISTORY**

On January 10, 2003 appellant, then a 44-year-old registered nurse, filed an occupational disease claim alleging that on January 8, 2003 she sustained a low back strain while lifting a patient from a wheelchair to a gurney. An x-ray report dated January 31, 2003 indicated a

normal lumbosacral spine. Medical notes dated May 22, 2003 indicated that appellant's low back strain had resolved and she was released to regular duty.<sup>1</sup>

Appellant filed a claim for a recurrence of disability on July 19, 2004. She stated that, following her January 8, 2003 low back strain, she was on limited duty until from January 10 to June 10, 2003. Appellant returned to regular work from June 10, 2003 through January 10, 2004. On January 10, 2004 she was assigned duties as a temporary clerk with no lifting, twisting or stooping. On October 19, 2004 appellant returned to regular duty but requested an accommodation in job duties on November 12, 2004 due to her back condition. On November 18, 2004 she received a light-duty assignment. Appellant indicated that she identified July 19, 2004 as the date of recurrence of disability because she sought treatment from her primary care physician, Dr. Yang on that date. She indicated that she had been treated by employing establishment physicians until she consulted Dr. Yang.

In a July 31, 2004 report of a lumbar spine magnetic resonance imaging (MRI) scan, Dr. Robert D. Sostrin, a Board-certified radiologist, indicated findings of degenerative disc disease and a disc protrusion at L5-S1.

On December 29, 2004 the Office issued a retroactive acceptance of the January 8, 2003 injury as an acute back strain.<sup>2</sup>

In a report dated February 2, 2005, Dr. Robert W. Hunt, an attending Board-certified orthopedic surgeon, diagnosed a herniated disc at L4-5 as revealed on an MRI scan.

In a February 28, 2005 report, Dr. Hunt provided a history of appellant's condition, job duties and findings on physical examination. He indicated that she volunteered to fill in for a clerk from January to October 2004 and did not perform her nursing duties during that time. Although appellant was released from active treatment and her limitations were discontinued in May 2003, she continued to have low back pain and consulted her primary care physician in July 2004. Dr. Hunt diagnosed a herniated disc as revealed in a July 31, 2004 MRI scan and stated:

"I believe the findings on my examination to be consistent with the described mechanism of injury and I believe the injury to be the direct result of [appellant's] employment...."

In an April 22, 2005 report, Dr. Hunt stated that appellant's herniated disc at L5-S1, as revealed on an MRI scan, was caused by the January 8, 2003 employment injury when she lifted a patient. He stated that she did not have degenerative disc disease of the lumbar spine as indicated in the July 31, 2004 MRI scan report. Dr. Hunt noted that appellant's January 31, 2003 x-rays were normal and degenerative disc changes "would be expected to be visualized on x-ray." He stated that February 2, 2005 x-rays revealed narrowing of the interspace at L5-S1

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<sup>1</sup> It is unclear whether the signatures on these notes include a physician's signature.

<sup>2</sup> The Office noted that appellant's original claim was a minor uncontested claim accepted for medical care up to \$1,500.00 without formal adjudication.

which was consistent with the MRI scan findings. The remainder of the lumbar spine was normal and without findings of degenerative disease. Dr. Hunt indicated that the mechanism of injury as described by appellant clearly supported a herniated disc as causally related to the January 8, 2003 employment injury and correlated with the MRI scan findings of a single level disc bulge. Appellant's physical examination was consistent with the description of the injury, her subjective complaints and the MRI scan findings.

In a July 15, 2005 report, Dr. Hunt stated that there was no evidence in the medical records that appellant's work-related lumbar strain on January 8, 2003 had resolved as of May 22, 2003. He stated that the heavy lifting, in a bent over position, that appellant performed on January 8, 2003 caused her herniated disc at L5-S1. Dr. Hunt indicated that her work duties between May 2003 and February 1, 2005, which included repetitive bending, stooping, squatting and heavy lifting, worsened her herniated disc. In an August 8, 2005 report, Dr. Hunt stated that appellant remained temporarily totally disabled.

In a November 11, 2005 report, Dr. Hunt stated:

"A negative x-ray taken shortly after the injury, within 30 days, would not show the full extent of an injury, unless the injury sustained was an acute fracture. Narrowing of a vertebral space post injury or other post-traumatic bony change would show up, but not within that short time frame. A herniated disc would not show up at all, even if immediately present as a result of an injury, as x-rays only detect bony changes.

"I have reviewed what appears to be nurs[ing] notes dated [May 22, 2003]. [Appellant] complained of pain in her left low back with radiating pain down the left leg only occurring occasionally. The examination was negative, with no pain on palpation of the lumbar area, full range of motion, negative straight leg raising bilaterally and normal gait. The assessment appears to be resolved, right lower back strain. [Appellant] was returned to regular duty, but advised to follow up with the [primary care physician] for problems with the left back and leg....

"What this document seems to be saying is that [appellant] had continuing problems on the left side of her low back, with radiating pain into the left leg.... As the nurse recommended [that she] follow up with the [primary care physician] for the left back and leg problems, it is evident that the nurse did not think [appellant's] entire problem had resolved as of [May 22, 2003]."

By decisions dated February 14, May 26 and September 1, 2005 and February 16, 2006, the Office found that the medical evidence did not establish that appellant sustained a recurrence of disability on July 19, 2004 or a herniated disc causally related to her January 8, 2003 employment-related low back strain.<sup>3</sup>

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<sup>3</sup> Appellant submitted additional evidence subsequent to the February 16, 2006 decision. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

## LEGAL PRECEDENT

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.<sup>4</sup> This burden includes the necessity of providing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical rationale.<sup>5</sup>

*“Recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.”*<sup>6</sup>

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that the claimant’s condition became apparent during a period of employment, nor her belief that her condition was aggravated by her employment is sufficient to establish causal relationship.<sup>7</sup>

## ANALYSIS

On January 8, 2003 appellant sustained a work-related acute low back strain while lifting a patient from a wheelchair to a gurney. She filed a claim for a recurrence of disability on July 19, 2004. Appellant indicated that she identified July 19, 2004 as the date of recurrence of disability because she sought treatment from her primary care physician on that date. On January 10, 2004 she was assigned duties as a temporary clerk with no lifting, twisting or stooping and performed that job until October 19, 2004.

In reports dated February 2 and 28, April 22, July 15 and November 11, 2005, Dr. Hunt provided a history of appellant’s condition, job duties and findings on physical examination. He diagnosed a herniated disc at L5-S1 as revealed on an MRI scan. Dr. Hunt opined that the heavy lifting, in a bent over position, that appellant performed on January 8, 2003 caused a herniated disc at L5-S1. In his July 15, 2005 report, Dr. Hunt indicated that her work duties between May 2003 and February 1, 2005, which included repetitive bending, stooping, squatting and heavy lifting, worsened her herniated disc. However, in his February 28, 2005 report, Dr. Hunt indicated that appellant volunteered to fill in for a clerk from January to October 2004 and did not perform her nursing duties during that time which included the repetitive bending, stooping, squatting and heavy lifting. Therefore, his reports do not contain an accurate factual background as to her duties at the time of her claimed recurrence of disability on July 14, 2004. Dr. Hunt

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<sup>4</sup> *Charles H. Tomaszewski*, 39 ECAB 461 (1988).

<sup>5</sup> *Lourdes Davila*, 45 ECAB 139 (1993).

<sup>6</sup> 20 C.F.R. § 10.5(x).

<sup>7</sup> *Walter D. Morehead*, 31 ECAB 188 (1979).

indicated that, although appellant was released from active treatment and her limitations were discontinued in May 2003, she continued to have low back pain. However, he failed to explain why there is no evidence of medical treatment between May 2003 and July 31, 2004, when the MRI scan was performed. Such explanation is necessary in light of Dr. Hunt's position that appellant had continuing back problems due to her January 8, 2003 employment injury. He stated that she did not have degenerative disc disease of the lumbar spine as was indicated in the July 31, 2004 MRI scan. However, Dr. Hunt did not provide sufficient explanation as to why his opinion should be accepted over the finding of the Board-certified radiologist who interpreted the July 14, 2004 MRI scan. In a November 11, 2005 report, Dr. Hunt stated that a negative x-ray taken shortly after the injury would not reveal a herniated disc. However, the fact that a herniated disc might not appear on an x-ray does not establish that appellant had this condition at the time of her employment injury in 2003. As noted, neither the fact that the claimant's condition became apparent during a period of employment, nor her belief that her condition was aggravated by her employment is sufficient to establish causal relationship. Due to the deficiencies in Dr. Hunt's reports, his opinion regarding causal relationship is not sufficient to establish that appellant sustained a recurrence of disability on July 14, 2004 causally related to her work-related January 8, 2003 lumbar strain or that her herniated disc was causally related to her employment injury.

### **CONCLUSION**

The Board finds that appellant failed to establish that she sustained a recurrence of disability on July 19, 2004 or a herniated disc causally related to her January 8, 2003 employment injury.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated February 16, 2006 and September 1 and May 26, 2005 are affirmed.

Issued: September 20, 2006  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board