



stated that she had continued to experience low back pain since the original injury. Appellant did not provide a specific time and date of her recurrence instead noting that she experienced gradually recurring episodes of pain in her lower back increasing in duration, intensity and frequency. She submitted a form report dated April 7, 2004 diagnosing low back injury.

In a report dated March 11, 2004, Dr. Jeff Krantz, an osteopath, reviewed a magnetic resonance imaging (MRI) scan of appellant's lumbar spine and diagnosed annular tear and bulge at L5-S1.

Dr. Randall Hendricks, a Board-certified orthopedic surgeon, completed a report on April 14, 2004 and included appellant's history of back injury on November 1, 2000. He stated that appellant had intermittent back symptoms since her injury and had sought treatment from her primary care physician, Dr. D. Price Kraft, a Board-certified family practitioner, beginning in 2001. Dr. Hendricks noted that appellant was rear-ended in November 2003 and, since that minor accident, appellant had increased back pain. He stated that in the last week appellant's pain had dramatically increased. In an April 28, 2004 report, Dr. Hendricks diagnosed a protrusion of the L5-S1 disc and recommended surgery. On May 26, 2004 he again noted that appellant attributed her current back condition to her November 1, 2000 employment injury. Dr. Hendricks stated that he had reviewed appellant's medical records from the original employment injury. He stated:

“So there is some evidence to suggest that the patient did injure her back at work in November 2000 and she tells me these symptoms have continued. I told the patient that I do see some causal relationship.”

On June 24, 2004 the Office accepted that appellant sustained a lumbar strain on November 1, 2000. Dr. Hendricks recommended surgery on June 28, 2004. He requested approval from the Office for an L5-S1 discectomy and fusion. The Office medical adviser reviewed appellant's medical records on August 26, 2004 and recommended that her accepted condition be expanded to include degenerative disc disease at L5-S1. He found that the medical evidence did not support surgery and recommended a second opinion examination.

The Office informed appellant that her claim had been accepted for the additional condition on degenerative disc disease at L5-S1 on September 16, 2004. The Office referred a statement of accepted facts, a list of questions and appellant for examination by Dr. William D. Smith, a Board-certified orthopedic surgeon, on September 22, 2004. On November 8, 2004 the Office informed appellant that there was insufficient evidence to accept her April 16, 2004 claim for recurrence of disability and requested additional factual and medical evidence.

In a report dated October 13, 2004, Dr. Smith noted appellant's history of injury on November 1, 2000 as well as her November 2003 nonemployment-related automobile accident. He diagnosed degenerative lumbar disc disease and opined that this condition was due to appellant's November 2000 lifting incident and recommended surgical intervention.

Dr. Hendricks completed a report on November 22, 2004 and opined that appellant had a single work incident in November 2000. He then stated:

“From everything I can deduce in speaking with the patient, she had a single on-the-job injury in November 2003 that started her low back and leg pain and subsequently that has been further evaluated to show that she has a disc herniation which is quite sizable in nature. In my opinion, this represents a single work-related event and not a cumulative situation.”

The Office responded on December 9, 2004 and informed Dr. Hendricks that the November 2003 automobile accident was not employment related. The Office further requested any medical records supporting treatment for appellant’s low back condition from 2000 through 2004. The Office stated that Dr. Smith’s opinion was considered invalid as it was not based on a proper factual background.

Appellant submitted treatment notes from Dr. Kraft, her attending physician, dated in March and December 2001, June and July 2002 and February and March 2004 describing her lower back complaints. She also submitted a report from her November 1, 2000 emergency room treatment.

In a report dated January 5, 2005, Dr. Hendricks stated that he had reviewed the medical records and found little evidence that appellant sought treatment for her back condition from November 2000 until 2004. He further stated that appellant considered the motor vehicle accident to be minor and that this accident did not aggravate her back. Dr. Hendricks noted that appellant believed that her back had gradually worsened from 2000 until 2004. He again recommended surgery and stated that there was little evidence to establish a causal connection between appellant’s employment injury and her current condition. On January 19, 2005 Dr. Hendricks supported appellant’s continued need for work restrictions and surgery due to her back condition.

By decision dated February 15, 2005, the Office denied appellant’s claim for recurrence of disability on April 16, 2004. The Office found that appellant had not submitted sufficient bridging evidence that she sought treatment for her accepted back condition from November 2000 until her recurrence of disability in April 2004. The Office further stated that the medical evidence was not sufficient to establish causal relationship between her current condition and her accepted employment injury.

Appellant requested an oral hearing on February 24, 2005. She testified at the oral hearing on October 20, 2005 regarding her accepted employment injury, treatment by Dr. Kraft and the November 2003 motor vehicle accident. By decision dated December 12, 2005, the hearing representative affirmed the Office’s February 15, 2005 decision.

### **LEGAL PRECEDENT**

The Office is not a disinterested arbiter but rather performs the role of adjudicator on the one hand and gatherer of the relevant facts and protector of the compensation fund on the other, a role that imposes an obligation on the Office to see that its administrative processes are

impartially and fairly conducted. Although the claimant has the burden of establishing entitlement to compensation, the Office shares responsibility in the development of the evidence. Once the Office starts to procure medical opinion, it must do a complete job. The Office has the responsibility to obtain from its referral physician an evaluation that will resolve the issue involved in the case.<sup>1</sup>

### ANALYSIS

The Office referred appellant, a statement of accepted facts and a list of questions to Dr. Smith, a Board-certified orthopedic surgeon, on September 22, 2004 at the direction of the Office medical adviser. In a report dated October 13, 2004, Dr. Smith noted appellant's history of injury on November 1, 2000 as well as her November 2003 nonemployment-related automobile accident. He diagnosed degenerative lumbar disc disease and opined that this condition was due to appellant's November 2000 lifting incident and recommended surgical intervention.

The Office subsequently determined that Dr. Smith's October 13, 2004 report was based on an inaccurate factual background and was not entitled to the weight of the medical evidence. The Office did not request a supplemental report from Dr. Smith and did not provide him with an amended statement of accepted facts to determine whether his opinion was altered based on the lack of bridging evidence or additional facts surrounding the automobile accident included in the record. Having thus undertaken further development of the medical evidence by referring appellant's claim to Dr. Smith, the Office should have allowed Dr. Smith the opportunity to provide his opinion based on the complete facts in the record,<sup>2</sup> rather than merely discounting his opinion as inaccurate.

### CONCLUSION

The Board finds that this case is not in posture for decision as the Office did not properly develop the medical evidence from Dr. Smith after referring appellant for a second opinion evaluation. On remand, the Office should prepare an amended statement of accepted facts and additional questions for Dr. Smith to determine if his opinion is altered based on the evidence currently in the record.

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<sup>1</sup> *Richard F. Williams*, 55 ECAB 343, 347 (2004).

<sup>2</sup> The Board notes that appellant has submitted some evidence from Dr. Kraft regarding her additional treatment for back pain between November 2000 and April 2004 not discussed by the Office in either the February 15 or December 12, 2005 decisions. The Office should include citations to this evidence in the amended statement of accepted facts.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 12 and February 15, 2005 decisions of the Office of Workers' Compensation Programs are set aside and remanded for further development consistent with this decision of the Board.

Issued: February 8, 2007  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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