

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

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MICHAEL J. RUSSO, Appellant )

and )

SMITHSONIAN INSTITUTION, OFFICE OF )  
PROTECTION SERVICES, COOPER-HEWITT )  
NATIONAL DESIGN MUSEUM, New York, NY, )  
Employer )

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**Docket No. 04-447  
Issued: August 27, 2004**

*Appearances:*  
Thomas Uliase, Esq., for the appellant  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Member  
DAVID S. GERSON, Alternate Member  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On December 9, 2003 appellant filed a timely appeal from a September 3, 2003 decision of a hearing representative of the Office of Workers' Compensation Programs, which affirmed a May 3, 2002 decision finding that appellant failed to establish he sustained an injury in the performance of duty. 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 has met his burden of proof in establishing he sustained an injury in the performance of duty on December 28, 2001.

**FACTUAL HISTORY**

On December 28, 2001 appellant, then a 45-year-old lieutenant in protection services, experienced lower back pain while entering his office.

Dr. Steven T. Lee, a Board-certified radiologist, stated in a December 31, 2001 report that x-rays showed moderate degenerative changes at L4-5. In a January 14, 2002 report, Dr. John S. Lyons, a radiologist, indicated that a magnetic resonance imaging (MRI) scan showed bulging, dehydration and narrowing of the L4-5 and L5-S1 discs and muscles spasms. He indicated that no disc herniations were detected. In a February 26, 2002 form report, Dr. Joseph Jaskolski, a Board-certified family practitioner, indicated that he examined appellant on January 4, 2002. He diagnosed herniations at L4-5 and L5-S1 discs with associated radiculopathy and muscle spasms based on an MRI scan. He indicated that the herniated disc was not related to the December 28, 2001 fall but commented that the fall did occur at work.

In a March 22, 2002 report, Dr. Ladislav Habina, a Board-certified anesthesiologist, reported that appellant currently had a flattened lateral lordosis with significant paravertebral and gluteal muscles spasm and with slight deviation to the left. She found significant paravertebral pain on both sides at L4-5 but only minimal pain on the right. Dr. Habina diagnosed lumbosacral radiculopathy, facet joint syndrome, chronic sacroiliitis and left sciatica. In an April 9, 2002 medical reporting form (CA-20), Dr. John Halverstam, a Board-certified anesthesiologist specializing in pain management, diagnosed lumbar radiculopathy. He gave a history of appellant falling onto a metal chair at work on December 28, 2001. Dr. Halverstam checked the "yes" box on the CA-20 form to indicate that he related the diagnosed condition to the December 28, 2001 incident.

By letter dated March 21, 2002, the Office requested additional factual and medical evidence as the current evidence of record was insufficient to establish his claim. In a February 8, 2002 statement, received by the Office on March 22, 2002, appellant indicated that after he had signed in to work, he was walking toward his office when he began to feel pain in his lower back. As he was about to unlock his office, the back pain became so severe that he collapsed and managed to fall into a metal chair sitting outside his office door. Appellant indicated that the back pain had become excruciating. Two subordinates helped him into his office after the pain had subsided slightly. He leaned over his desk but was unable to stand or sit. Appellant was taken by ambulance to an emergency room.

In a follow-up letter dated April 19, 2002, the Office requested clarification as to what appellant meant by stating that he "fell onto a metal chair." Appellant did not submit additional information.

In a May 3, 2002 decision, the Office denied appellant's claim for compensation on the grounds that the initial evidence of record was insufficient to establish that he experienced the claimed event at the time, place and in the manner alleged because he did not describe any mechanism of injury. Therefore, he failed to establish fact of injury.

Appellant requested a hearing before an Office hearing representative. He subsequently submitted a September 8, 2002 report from Dr. Joseph S. Lombardi, a Board-certified orthopedic surgeon. He reported that appellant had tenderness in the lower lumbar spine. Dr. Lombardi indicated that the straight leg raising test was positive for low back pain bilaterally. Muscle strength and sensation were found to be normal. He stated that an MRI scan showed severe disc degeneration and a right-sided herniated disc at L4-5 and a center and left-sided herniated disc at L5-S1. He also noted that appellant had superimposed spinal stenosis at L3-4, L4-5 and L5-S1.

Dr. Lombardi diagnosed spinal stenosis with two herniated discs in the lower lumbar spine. He stated, "In my medical opinion, within a reasonable degree of medical probability, the patient's injuries are permanent in nature."

The hearing was conducted on June 16, 2003. Appellant testified that, after he entered the building and walked to his office door, he bent down to unlock the door when he felt pain in his back. He then seated himself on a metal chair located outside his office. The hearing representative indicated to appellant and his attorney that the medical evidence of record needed clarification on whether his condition was causally related to the December 28, 2001 incident.

Appellant submitted a July 8, 2003 report from Dr. Jaskolski who stated that appellant had not complained of back pain for 16 years until the December 2001 incident.<sup>1</sup> He indicated that appellant was at work, engaged in his normal duties when his injury occurred. Dr. Jaskolski noted that subsequent evaluation revealed herniated discs at L4-5 and L5-S1 which correlated with his symptoms. He concluded, within a reasonable degree of medical probability, that appellant's pain and injury was related to the event at work in December 2001.

In a July 11, 2003 report, Dr. Lombardi commented that appellant's spinal stenosis was caused by a combination of bulging discs and facet arthritis causing a narrowing of the spinal canal. He indicated that this condition, in all medical probability, preexisted the December 28, 2001 incident. Dr. Lombardi stated that the act of bending forward put increased pressure on appellant's L5-S1 disc, causing it to herniate. He added that the herniation was further activated by appellant's fall into the chair. Dr. Lombardi commented that appellant had a preexisting bulging L5-S1 disc and the simple act of bending forward to put a key into a keyhole was enough to further herniate the L5-S1 disc, causing severe back pain left sciatica. He explained that bending forward, or flexing the lumbar spine, places increased pressure on the anterior aspect of a lumbar disc. The increased pressure on the disc causes a posterior displacement of the nuclear material. In a disc that already is bulging, the increased anterior pressure would result in a disc herniation. He concluded that this explanation was "the cause and effect of the mechanics of [appellant's] injury" on December 28, 2001.

In a September 3, 2003 decision, the Office hearing representative modified the May 3, 2002 decision to reflect that there was no evidence establishing causal relationship and affirmed the decision as modified. He found that appellant had established that he sustained an employment incident on December 28, 2001 but that he had not established that the medical condition for which he sought compensation was employment related. He found the reports of Dr. Jaskolski and Dr. Halverstam to be unrationalized and therefore did not establish a medical relationship between the work incident and the diagnosed medical condition.

### **LEGAL PRECEDENT**

To determine whether an employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the

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<sup>1</sup> Dr. Jaskolski noted that appellant had back pain after a motor vehicle accident but the back pain resolved in two weeks.

employment incident at the time, place and in the manner alleged.<sup>2</sup> Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.<sup>3</sup> An employee may establish that an injury occurred in the performance of duty as alleged but fail to establish that his or her disability and/or a specific condition for which compensation is claimed are causally related to the injury.<sup>4</sup> A claimant seeking benefits under the Federal Employees' Compensation Act<sup>5</sup> has the burden of establishing by reliable, probative, and substantial evidence that any disability for work or specific condition for which compensation is claimed is causally related to the employment injury.<sup>6</sup> To establish causal relationship between a condition, including any attendant disability claimed, and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.<sup>7</sup> Neither the fact that the condition manifests itself during a period of federal employment, nor the belief of the claimant that factors of employment caused or aggravated the condition, is sufficient in itself to establish causal relationship.<sup>8</sup>

### ANALYSIS

The Office hearing representative found that the employment incident described by appellant occurred on December 28, 2001 at the time, place and in the manner he alleged. The question then becomes whether appellant has established that he sustained an injury on that date that was causally related to the December 28, 2001 employment incident.

Dr. Lee reported that appellant had moderate degenerative changes at L4-5. Dr. Lyons stated that an MRI scan showed bulging, dehydration and narrowing of the L4-5 and L5-S1 discs and muscles spasms. He indicated that the scan did not show any herniated discs. Dr. Habina concluded that appellant had lumbosacral radiculopathy, facet joint syndrome, chronic sacroiliitis and left sciatica. None of these physicians, however, related appellant's back condition to the December 28, 2001 employment incident. Therefore, these medical reports are of little probative value and do not help establish appellant's claim.

Dr. Halverstam diagnosed lumbar radiculopathy as well. He marked a "yes" box on a form to indicate that appellant's diagnosed condition was related to the employment incident. However, the Board has held that such a report has little probative value where there is no

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<sup>2</sup> See *John J. Carlone*, 41 ECAB 354 (1989).

<sup>3</sup> *Id.* For a definition of the term "traumatic injury," see 20 C.F.R. § 10.5(ee).

<sup>4</sup> As used in the Act, the term "disability" means incapacity because of an injury in employment to earn wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity. See *Frazier V. Nichol*, 37 ECAB 528 (1986).

<sup>5</sup> 5 U.S.C. § 8101-8193.

<sup>6</sup> *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>7</sup> *Daniel M. Ibarra*, 48 ECAB 218, 219 (1996).

<sup>8</sup> 20 C.F.R. § 10.115(e).

explanation or rationale supporting the opinion on causal relationship between the diagnosed condition and the employment-related injury.<sup>9</sup>

Dr. Jaskolski diagnosed disc herniations at L4-5 and L5-S1 with associated radiculopathy and muscle spasms. He stated that the herniated discs were not related to the December 28, 2001 incident. In a subsequent report, Dr. Jaskolski stated that appellant had not complained of back pain for 16 years prior to the December 28, 2001 incident. He commented that, after the incident, examination showed herniated discs at L4-5 and L5-S1 which correlated with appellant's symptoms. He concluded, therefore, that appellant's pain and medical condition were related to the employment incident. Dr. Jaskolski's opinions are contradictory. His reports, therefore, are of diminished probative value. Dr. Jaskolski's rationale in his July 8, 2003 report amounts to a statement that appellant had no back condition prior to the employment incident but had a back condition after the incident. The Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.<sup>10</sup> Dr. Jaskolski's July 8, 2003 report is insufficient to establish appellant's claim.

Dr. Lombardi, in his September 8, 2002 report, did not address the issue of causal relationship between the December 28, 2001 employment incident and appellant's back condition. In a July 11, 2003 report, Dr. Lombardi stated that appellant had spinal stenosis due to bulging discs and facet arthritis and, in all medical probability, preexisted the employment incident. He indicated that in the act of bending forward put a key in the lock of his office door was a flexion of the lumbar spine which put increased pressure on the anterior aspect of a lumbar disc. Dr. Lombardi noted that the increased pressure on the disc would cause a posterior displacement of the nuclear material in the disc. He commented that, in a disc that was already bulging, the increased pressure would result in a herniated disc. Dr. Lombardi commented that the herniation was further activated by appellant's fall into the chair. He concluded that the explanation he provided was the cause and effect of the back pain appellant felt on December 28, 2001. This report is speculative and, therefore, has little probative value. It is insufficient to meet appellant's burden of proof.

### **CONCLUSION**

Appellant, while establishing that the employment incident on December 28, 2001 occurred as he alleged, fail to establish that the incident was causally related to his subsequent back condition.

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<sup>9</sup> See *Calvin E. King*, 51 ECAB 394, 401 (2000); *Lillian M. Jones*, 34 ECAB 379, 381 (1982).

<sup>10</sup> *Ernest St. Pierre*, 51 ECAB 623, 626 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs' hearing representative dated September 3, 2003 be affirmed.

Issued: August 27, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member