



column during a motor vehicle accident. The Office accepted his claim for a right knee contusion (bruise).<sup>1</sup>

In an emergency room report dated August 22, 1995, Dr. John Leonard, a specialist in emergency medicine, stated that appellant was involved in a motor vehicle accident while working and felt pain and stinging in his right knee. He indicated that x-rays revealed soft tissue swelling but no acute fractures. Dr. Leonard noted minimal swelling and ecchymosis on the right medial aspect of the knee but pain with valgus stress and decreased range of motion. He diagnosed an “acute right knee injury, rule out ligamentous injury.”

In a September 8, 1995 report, Dr. Thomas D. Schmitz, a Board-certified orthopedic surgeon, indicated that appellant’s right knee injury had resolved and required no further treatment.

On June 26, 2001 appellant filed a claim for a recurrence of disability on June 11, 2001. He stated:

“Since [the] original injury I have had my right knee lock off and on. Since returning to work getting in and out of two-ton truck, right knee began to hurt and swell. As time has gone by knee has gotten worse. Both knees now swollen and hurting. I play no sport and have had no accidents or other injury to my knees.”

Appellant stated that, when he saw a physician on June 26, 2001 regarding a back condition, he was referred to an orthopedic surgeon for his knee condition.

In reports dated June 26 and August 9, 2001, Dr. James F. Zucherman, a Board-certified orthopedic surgeon, diagnosed internal derangement of appellant’s right knee and indicated that he needed to see a joint specialist for his knee “which was injured on the job in 1995 and 1989.” He indicated that appellant could work six hours a day and recommended arthroscopic debridement of the knee.

In an August 9, 2001 report, Dr. William H. Montgomery, a Board-certified orthopedic surgeon, diagnosed right knee arthritis with a probable loose body and meniscal tear. He opined that this condition constituted an aggravation of appellant’s 1995 injury.

On October 30, 2001 the Office referred appellant, together with a statement of accepted facts (SOAF) and copies of medical reports, to Dr. Jerrold M. Sherman, a Board-certified orthopedic surgeon, for an examination and evaluation as to whether he sustained a recurrence of disability on June 11, 2001 causally related to his August 22, 1995 employment-related right knee contusion.

In a report dated December 19, 2001, Dr. Sherman provided a history of appellant’s condition and physical findings on examination. He diagnosed early osteoarthritis of the medial compartment of the right knee and a resolved contusion of the right knee secondary to the

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<sup>1</sup> The record shows that appellant sustained a right knee strain on November 1, 1989. The Office has combined the 1989 and 1994 cases.

August 22, 1995 employment injury. Dr. Sherman stated that the osteoarthritic condition preexisted the 1995 employment injury and was not aggravated or accelerated by the 1995 employment injury. He indicated that the disability caused by the August 22, 1995 right knee contusion ceased as of August 30, 1995 and no further medical treatment was required. Dr. Sherman provided physical findings on examination as follows:

“[Appellant] enters the examination room with a normal gait. He wears an elastic brace on his right knee. He requires no cane or assistive device to ambulate. He refuses to walk on his heels or toes claiming increased knee pain. He does a three-quarter squat maneuver without difficulty.

“EXAMINATION OF THE RIGHT KNEE: Reveals a normal appearance without swelling. The right knee has a 100 percent normal range of motion flexing from 0 to 140 degrees with the complaint of pain in the knee at the extreme of flexion. The ligaments are intact to varus and valgus stress. Normal drawer signs. Negative McMurray’s and Lachman’s. [Appellant] complains of tenderness over the anterior and lateral aspect of the right knee joint. There is no pain when the patella is depressed against the femur nor any crepitation....

“X-RAY REPORT: Complete x-ray examination of the right knee reveals mild osteoarthritic changes involving the medial compartment with mild narrowing and some possible intra-articular calcified loose bodies. There is a small osteophyte at the margin of the medial compartment of the knee and a small osteophyte from the superior edge of the patella.”

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“[Appellant] suffers no residuals as a result of the August 22, 1995 incident. The initial x-rays from soon after the August 22, 1995 injury are unchanged from the x-rays today demonstrating no aggravation or change as a result of the August 1995 incident.”

By decision dated February 15, 2002, the Office denied appellant’s claim on the grounds that the weight of the medical evidence, represented by the opinion of Dr. Sherman, established that he did not sustain a recurrence of disability on June 11, 2001 causally related to his August 22, 1995 employment-related right knee contusion.<sup>2</sup>

In a report dated March 4, 2002, Dr. Montgomery indicated that appellant sustained a new injury to his right knee on June 11, 2001.

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<sup>2</sup> The Office noted that if the medical evidence established that appellant’s right knee problem in 2001 was causally related to new employment factors, it could have administratively handled the recurrence claim as a new occupational claim but the medical evidence of record was not sufficient to support an occupational disease claim.

On March 15, 2002 appellant requested an oral hearing before an Office hearing representative. He also requested that a subpoena be issued for Kip Dorsey to testify at the hearing.<sup>3</sup>

By letter dated September 13, 2002, the Office hearing representative denied appellant's request for a subpoena. He noted that appellant had not indicated that Mr. Dorsey could not be asked to testify voluntarily or why appellant could not submit a notarized statement from Mr. Dorsey.<sup>4</sup>

In reports dated April 7 and 22, 2003, Dr. R. Thomas Grotz, an orthopedic surgeon, provided a history of appellant's condition and noted that on June 11, 2001 he had right knee swelling after continued hopping on and off his postal truck. He indicated that on April 22, 2003 he performed arthroscopy on appellant's right knee to correct several problems caused by traumatic arthritis. Dr. Grotz indicated that the June 11, 2001 incident aggravated appellant's 1995 right knee injury, stating "the cumulative tasks at work appear to be contributory, and [appellant] now appears to have a bonafide loose body meniscus tear and traumatic arthritis."

In reports dated May 5 and 12, 2003, Dr. Grotz noted that x-ray findings were negative but he diagnosed a moderately severe condition of bilateral<sup>5</sup> traumatic arthritis. He stated:

"[Appellant was out of work, including November 1, 1989 through December 14, 1989, subsequent to the fall of November 1, 1989, when the quadriceps [muscle] was torn and his knee injured. Also, [he] was out of work August 22 to 25, 1995, subsequent to the dashboard injury."

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"My impression is that [appellant's] right knee is in the early stages of healing, though it will have a residual internal derangement."

Dr. Grotz, citing a medical article, stated that trauma could cause premature osteoarthritis if it interfered with the mechanics and circulation of the joints and ligaments and noted that individuals who engage in squatting, kneeling and generally heavy loading have been strongly associated with osteoarthritis of the knee...."

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<sup>3</sup> Appellant stated that Mr. Dorsey had observed Dr. Sherman's examination.

<sup>4</sup> The record shows that appellant submitted a notarized statement from Mr. Dorsey dated May 15, 2003 at the oral hearing. In this statement, Mr. Dorsey, a paramedic, provided his observations and criticisms of Dr. Sherman's examination.

<sup>5</sup> Dr. Grotz indicated that appellant's left leg developed traumatic arthritis due to increased use of that leg to compensate for his right knee problem.

In an October 3, 2002 report, Dr. Montgomery noted that appellant sustained right knee injuries in 1989 and August 22, 1995. He stated:

“Based on x-rays taken in this office and [appellant’s] history, the loose bodies in his right knee are related to the August 22, 1995 injury. [Appellant] states that the swelling in his knee did not occur until he attempted to return to work on May 5, 2001....

“It is most likely that the injury at work in June 2001 is secondary to an aggravation of his preexisting condition from his injury of August 22, 1995. He was referred to me secondary to my subspecialization in sports medicine injuries and injuries of the knee and I have recommended an arthroscopic procedure for him.”

On May 15, 2003 a hearing was held and appellant testified. He asserted that there were errors in the SOAF. He alleged that the SOAF stated erroneously that he lost no time from work after his November 1, 1989 employment injury but he was disabled through December 14, 1989, the SOAF indicated he missed no time from work due to the 1995 employment injury but he was off work until September 1, 1995 and the August 22, 1995 injury date was stated as August 25, 1995 in one paragraph.<sup>6</sup>

By letter dated May 28, 2003, appellant submitted corrections to the hearing transcript.

By decision dated June 30, 2003, the Office hearing representative affirmed the February 15, 2002 decision.<sup>7</sup>

On March 15, 2002 appellant requested reconsideration and submitted a report dated December 1, 2003 from Dr. Grotz who indicated that the cartilage of appellant’s right knee was crushed during the accepted work injury on August 22, 1995, eventually necessitating a right knee replacement on September 16, 2003.

In reports dated February 11 and May 2, 2004, Dr. Grotz stated, “it is scientifically within reasonable probability ... that [appellant’s] knee injuries are ... industrially compensative.

By decision dated June 10, 2004, the Office denied modification of its June 30, 2003 decision.<sup>8</sup>

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<sup>6</sup> Appellant also indicated that the SOAF contained some errors concerning his back injuries and asserted that information about his back injuries was irrelevant to his right knee claim.

<sup>7</sup> The hearing representative indicated that appellant should file an occupational disease claim if he believed his bilateral knee condition was caused by his ongoing physical activities at work.

<sup>8</sup> The record contains evidence submitted subsequent to the Office’s June 10, 2004 decision. However, the jurisdiction of the Board 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).

### **LEGAL PRECEDENT -- ISSUE 1**

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>9</sup> This burden includes the necessity of furnishing 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>10</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>11</sup>

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.<sup>12</sup>

### **ANALYSIS -- ISSUE 1**

In a September 8, 1995 report, Dr. Schmitz indicated that appellant's right knee injury caused by the August 22, 1995 motor vehicle accident had resolved and he needed no further treatment.

In a report dated December 19, 2001, Dr. Sherman provided a history of appellant's condition and physical findings on examination which were essentially negative. An x-ray report showed osteoarthritic changes in the right knee. He stated that the x-rays were unchanged from the x-rays taken at the time of the August 22, 1995 employment injury, demonstrating that there was no aggravation or change in the arthritis due to the August 22, 1995 employment injury. Dr. Sherman diagnosed early osteoarthritis of the medial compartment of the right knee and a resolved contusion of the right knee secondary to the August 22, 1995 employment injury. He stated that the osteoarthritic condition preexisted the 1995 employment injury and was not aggravated or accelerated by the 1995 employment injury. Dr. Sherman indicated that the disability caused by the August 22, 1995 right knee contusion ceased as of August 30, 1995 and no further medical treatment was required. The Board finds that the report of Dr. Sherman is thorough and well rationalized and establishes that appellant did not sustain a recurrence of disability on June 11, 2001 causally related to his August 22, 1995 employment injury. He reviewed the medical records, conducted a physical examination and noted minimal objective

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<sup>9</sup> *Charles H. Tomaszewski*, 39 ECAB 461 (1988).

<sup>10</sup> *Lourdes Davila*, 45 ECAB 139 (1993).

<sup>11</sup> 20 C.F.R. § 10.5(x).

<sup>12</sup> *Walter D. Morehead*, 31 ECAB 188 (1979).

findings. Dr. Sherman opined that appellant's ongoing right knee problems were caused by osteoarthritis which was not caused or aggravated by the August 22, 1995 right knee contusion.

Appellant alleged inaccuracies in the SOAF provided to Dr. Sherman. Although the SOAF indicated that appellant did not lose time from work after his 1989 and 1995 employment injuries, Dr. Sherman indicated in his report that he was aware that appellant lost one week from work following the 1995 injury.<sup>13</sup>

Appellant criticized his examination by Dr. Sherman. He alleged that Dr. Sherman indicated that he had received only one medical report from the Office, took no x-rays, did not ask about his specific job requirements and did not properly test his patella. Dr. Sherman responded to appellant's criticisms in a letter, stating that he received additional medical records from the Office before he wrote his report. He indicated that he reviewed the SOAF and medical records. Regarding the allegation that Dr. Sherman did not inquire about appellant's specific job duties, his duties are not relevant because, as noted above, to establish a recurrence of disability appellant must establish a spontaneous change in his medical condition which had resulted from a previous injury or illness (his right knee contusion), without an intervening injury or new exposure to the work environment that caused the illness. Regarding the allegation that Dr. Sherman did not take x-rays, the record shows that Dr. Sherman did take x-rays at the time of his examination. Regarding appellant's allegation concerning the examination of his patella, the record shows that Dr. Sherman did examine appellant's patella.

In reports dated June 26 and August 9, 2001, Dr. Zucherman diagnosed internal derangement of appellant's right knee and indicated that this condition was related to the employment injuries in 1989 and 1995. However, internal derangement is not an accepted condition and he provided insufficient medical rationale in support of his conclusion that this condition was causally related to the August 22, 1995 employment injury. In an August 9, 2001 report, Dr. Montgomery diagnosed knee arthritis with a probable loose body and meniscal tear and opined that this condition was an aggravation of the 1995 employment injury. However, he did not provide medical rationale in support of this opinion. In a report dated March 4, 2002, Dr. Montgomery indicated that appellant sustained a new injury to his right knee on June 11, 2001 which contradicts his earlier reports in which he indicated that appellant's right knee problems in 2001 were related to the August 22, 1995 employment injury. In an October 3, 2002 report, he stated that appellant's June 2001 injury was secondary to an aggravation of his August 22, 1995 employment injury. This report contradicts Dr. Montgomery's March 4, 2002 report stating that appellant's right condition in June 2001 was a new injury. Due to these deficiencies, Dr. Montgomery's report are not sufficient to establish that appellant sustained a recurrence of disability on June 11, 2001 causally related to his August 22, 1995 right knee contusion.

In reports dated April 7 and 22, 2003, Dr. Grotz noted that on June 11, 2001 appellant had right knee swelling after continued hopping on and off his postal truck. He indicated that the June 11, 2001 incident aggravated appellant's 1995 right knee injury, stating "the cumulative tasks at work appear to be contributory, and [appellant] now appears to have a bonafide loose

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<sup>13</sup> Appellant has not alleged that the 1989 right knee injury contributed to his June 11, 2001 recurrence of disability.

body meniscus tear and traumatic arthritis.” Dr. Grotz indicated that on April 22, 2003 he performed surgery on appellant’s right knee to correct problems caused by traumatic arthritis. However, he did not explain how a right knee contusion in 1995 caused or contributed to his right knee arthritis six years later.

In reports dated May 5 and 12, 2003, Dr. Grotz noted that x-ray findings were negative but stated that trauma could cause premature osteoarthritis if it interfered with the mechanics and circulation of the joints and ligaments and noted that individuals who engage in squatting, kneeling and generally heavy loading have been strongly associated with osteoarthritis of the knee. However, he did not explain how the trauma on August 22, 1995, which resulted in only a contusion, would cause traumatic arthritis several years later. In a report dated December 1, 2003, Dr. Grotz indicated that as a result of the accepted work injury on August 22, 1995 the cartilage of appellant’s right knee was crushed eventually leading to a right knee replacement on September 16, 2003. There is no contemporaneous medical evidence that appellant’s right knee cartilage was crushed on August 22, 1995. Therefore, this report is not based on an accurate factual and medical background and is of diminished probative value. In reports dated February 11 and May 2, 2004, Dr. Grotz stated, “it is scientifically within reasonable probability ... that [appellant’s] knee injuries are ... industrially compensative.” However, he did not provide medical rationale in support of his statement. Due to these deficiencies, the reports of Dr. Grotz are not sufficient to establish that appellant sustained a recurrence of disability on June 11, 2001 causally related to his August 22, 1995 employment injury.

Appellant has submitted insufficient medical evidence to establish that he sustained a recurrence of disability on June 11, 2001 causally related to his August 22, 1995 employment-related right knee contusion. Therefore, he has failed to meet his burden of proof and the Office properly denied his recurrence claim.

On appeal, appellant argues that his claim was denied because he submitted a recurrence of disability form (Form CA-2a), rather than a claim form for a new injury (Form CA-2). However, the Office noted that appellant could submit an occupational disease claim with medical evidence establishing that his right knee condition in June 2001 was causally related to factors of his employment. He noted on the recurrence claim form that, since returning to work, he had to get in and out of two-ton trucks. Appellant alleged on appeal that his light-duty job was not suitable. The medical evidence of record is insufficient to establish a recurrence of disability.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8126<sup>14</sup> of the Federal Employees’ Compensation Act provides that the Secretary of Labor, on any matter within her jurisdiction, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles. This provision gives the Office discretion to grant or reject requests for subpoenas. The Office regulation states that subpoenas for documents will be issued only where the documents are relevant and cannot be obtained by any

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<sup>14</sup> 5 U.S.C. § 8126.

other means. Subpoenas for witnesses will be issued only where oral testimony is the best way to ascertain the facts.<sup>15</sup>

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issue in the case and show that a subpoena “is the best method or opportunity to obtain such evidence because there are no other means by which the ... testimony could have been obtained.”<sup>16</sup> The Office hearing representative retains discretion on whether to issue a subpoena.<sup>17</sup> The function of the Board on appeal is to determine whether there has been an abuse of discretion. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken that are clearly contrary to logic and probable deductions from established facts.<sup>18</sup>

### **ANALYSIS -- ISSUE 2**

Appellant submitted a request for a subpoena for a witness in this case. However, he did not show why oral testimony from the requested witness was the best way to ascertain the facts. The Board finds that the hearing representative, under the circumstances of this case, acted within his discretion in denying appellant’s request for a subpoena.

### **CONCLUSION**

The Board finds that appellant failed to establish that he sustained a recurrence of disability on June 11, 2001 causally related to his August 22, 1995 employment injury. The Board further finds that the Office properly denied appellant’s request for a subpoena.

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<sup>15</sup> 20 C.F.R. § 10.619.

<sup>16</sup> *Id.*; see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6.f (January 1999).

<sup>17</sup> *Id.*

<sup>18</sup> *Dorothy Bernard*, 37 ECAB 124 (1985).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 10, 2004 is affirmed.

Issued: April 7, 2005  
Washington, DC

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member