

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nelida Brignol,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1049 C.D. 2010
	:	Submitted: September 17, 2010
	:	
Workers' Compensation Appeal	:	
Board (US Airways and AIG Claim	:	
Services, Inc.),	:	
	:	
Respondents	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE BROBSON**

FILED: March 14, 2011

Petitioner Nelida Brignol (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board), dated May 4, 2010. The Board affirmed the decision and order of a Workers' Compensation Judge (WCJ), granting US Airways' and AIG Claim Services, Inc.'s (collectively, Employer) termination petition, denying as moot Employer's suspension petition, and granting, in part, Claimant's review petition. For the reasons stated below, we affirm.

Claimant sustained a lumbar sprain/strain in the course and scope of her employment with Employer on April 2, 2006. On May 24, 2007, Employer filed suspension and/or termination petitions, alleging that Claimant was fully

recovered from her April 2, 2006, work injury. On December 12, 2007, Claimant filed a petition to review compensation benefits, seeking to amend Claimant's Notice of Compensation Payable (NCP) to include herniated discs at L4-5 and L5-S1 with radiculopathy and aggravation of degenerative joint disease.

At the hearing before the WCJ, Employer presented the deposition testimony of Marc Manzione, M.D., a board certified orthopedic surgeon, in support of its suspension/termination petitions. (Reproduced Record (R.R.) at 6a.)

Dr. Manzione testified that he first examined Claimant on October 4, 2006, at which time Claimant was attending physical therapy three (3) times per week and receiving injections in her lower back. (*Id.* at 7a-8a.) Dr. Manzione testified that he next examined Claimant on May 24, 2007, and Claimant described the same symptoms that she initially described to him during her October 2006 examination. (*Id.* at 8a.) Dr. Manzione testified that at Claimant's May 2007 examination, Claimant could stand and walk in a normal fashion and was able to get on and off the examining table and up and down from a lying or sitting position normally and without difficulty. (*Id.* at 8a-9a.) Dr. Manzione testified that when he examined Claimant's lower back in May 2007, however, the motion in her lower back was markedly restricted, and Claimant indicated to him that she experienced lower back pain preventing further motion. (*Id.* at 8a.) Dr. Manzione testified that Claimant's remarks regarding restricted motion and lower back pain were in

contrast to observations he made during the May 2007 examination when Claimant took off her socks and moved her back well beyond the limits she previously exhibited and without apparent difficulty or discomfort. (*Id.* at 8a.) Dr. Manzione testified that the inconsistencies between Claimant's remarks and her actions during the examination suggested symptom embellishment. (*Id.* at 9a.)

Dr. Manzione testified that he reviewed the medical records of Dr. Sophia Lam, M.D., an anesthesiologist who practices pain management, and Claimant's June 2007 EMG study and arrived at the opinion that Claimant was fully recovered from her work-related injury. (*Id.* at 9a-10a.) Dr. Manzione testified that Claimant's July 2007 EMG findings showed moderately severe *subacute* right L5 radiculopathy with possible involvement of the right S1 nerve root which were not related to Claimant's work-related injury (of more than a year earlier), because the subacute findings had been present for only a relatively short time. (*Id.* at 11a.) He explained that subacute findings usually develop over a period of one (1) to three (3) months from the EMG study date. (*Id.*) Dr. Manzione testified that typically people who suffer from radiculopathy due to degenerative disease will experience flare ups, and Claimant's July 2007 EMG study showed left sided abnormalities that were very minor and equivocal. (*Id.*) The EMG findings were of the type that are typical of someone who experiences intermittent radicular symptoms as a result of lumbar degenerative disease and not

the type of EMG findings one sees with an acute post-traumatic lumbar disc herniation. (*Id.*) Dr. Manzione testified that Claimant may have suffered some irritation of her lower back nerves as a result of her April 2, 2006 work-related injury, and he stated that it would be reasonable to call that a radiculopathy. (*Id.* at 14a.) Dr. Manzione opined that Claimant no longer suffered any ongoing problems related to her April 2, 2006 work incident that would prevent her from working. (*Id.* at 12a.)

Claimant presented the deposition testimony of Sara Marks Tabby, M.D., who is board certified in physical medicine and rehabilitation. Dr. Tabby began treating Claimant in May 2006. (Certified Record (C.R.), oral deposition of Dr. Tabby, dated May 5, 2008, p.9.) Dr. Tabby testified that she initially diagnosed Claimant with a lumbar herniated disc at L4-5 and L5-S1 with degenerative joint changes. (*Id.* at 11.) Dr. Tabby testified she last saw Claimant on October 23, 2007, and was of the opinion that Claimant should come off of the OxyContin and go back into physical therapy, with emphasis on a home exercise program. (*Id.* at 16, 17.) Dr. Tabby testified that Claimant did not show up for her December 2007 appointment, and she has not seen Claimant since her October 2007 appointment. (*Id.* at 28.) Dr. Tabby testified that she reviewed Claimant's medical records, including those of Dr. Lam, and opined that Claimant's disc herniations and radiculopathy were work-related. (*Id.*) Dr. Tabby testified that

Claimant is disabled as a result of her work-related injury, but she is capable of sedentary work. (*Id.* at 22.) Dr. Tabby testified on cross-examination that Claimant's April 2006 work injury did not cause the degenerative changes in Claimant's lumbar spine documented in Claimant's May 2006 MRI study. (*Id.* at 37.)

Claimant testified that she feels she can no longer return to her job because she is no longer capable of lifting. (WCJ opinion p.11, attached to Petitioner's brief.) Claimant testified she does not feel capable of performing sedentary work for a long period of time, and she cannot do any type of work. (*Id.*)

By decision and order dated May 27, 2009, the WCJ rejected Claimant's testimony of ongoing work-related complaints and inability to perform her pre-injury position based upon a review of Claimant's testimony in conjunction with the medical evidence of record. (*Id.*) The WCJ found Dr. Manzione's testimony more credible and persuasive than any contrary testimony of Dr. Tabby based upon Dr. Manzione's extensive examination of Claimant, the medical records, and studies. (*Id.* at p.13.) The WCJ determined, based upon Dr. Manzione's testimony, that Claimant did not sustain any disc herniations, disc pathology, or aggravation of previous arthritic degenerative lumbar disease in the course and scope of her employment with Employer. (*Id.* at p.14.) The WCJ

found Claimant was fully recovered from all of her April 2, 2006, work injuries as of May 24, 2007. (*Id.*)

The WCJ concluded that Claimant sustained her burden to prove that she sustained radiculopathy in the course and scope of her employment, but she failed to prove that she sustained herniations, other disc pathology, and/or aggravation of previous arthritic degenerative lumbar disease in the course and scope of employment. (*Id.* at p.15.) The WCJ granted Claimant's petition to review compensation benefits to the extent it sought to amend the NCP to include radiculopathy. (*Id.*) The WCJ concluded that Employer sustained its burden to prove that all disability related to the April 2, 2006 work injury ceased. (*Id.* at p.16.) The WCJ, therefore, granted Employer's termination petition and dismissed Employer's suspension petition as moot. (*Id.*)

Claimant appealed the WCJ's decision to the Board. By order dated May 4, 2010, the Board affirmed the WCJ's decision and order. Claimant filed the subject petition for review with this Court.

On appeal,¹ Claimant argues that the WCJ and Board erred in granting Employer's termination petition when Employer failed to sustain its burden to prove that Claimant was fully recovered from her work injury. Claimant posits that Dr. Manzione only testified that Claimant was fully recovered from the lumbar strain and sprain, but not from her lumbar radiculopathy. Claimant also argues that the WCJ and Board erred in failing to amend Claimant's NCP to include an aggravation of arthritic degenerative lumbar disease. Finally, Claimant argues that the Board erred in determining that the WCJ issued a reasoned decision.

First, we will address Claimant's argument that the WCJ and Board erred in granting Employer's termination petition. To succeed in a termination petition, the employer bears the burden to prove that the claimant's disability has ceased and/or that any current disability is unrelated to the claimant's work injury. *Jones v. Workers' Comp. Appeal Bd. (J.C. Penney Co.)*, 747 A.2d 430, 432 (Pa. Cmwlth.), *appeal denied*, 564 Pa. 718, 764 A.2d 1074 (2000). An employer may satisfy this burden by presenting unequivocal and competent medical evidence of

¹ Our standard of review in a workers' compensation appeal is limited to determining whether an error of law was committed, constitutional rights were violated, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704. We acknowledge our Supreme Court's decision in *Leon E. Wintermyer, Inc. v. Workers' Comp. Appeal Bd. (Marlowe)*, 571 Pa. 189, 812 A.2d 478 (2002), wherein the Court held that "review for capricious disregard of material, competent evidence is an appropriate component of appellate consideration in every case in which such question is properly brought before the court." *Wintermyer*, 571 Pa. at 203, 812 A.2d at 487.

the claimant's full recovery from his/her work-related injuries. *Koszowski v. Workmen's Comp. Appeal Board (Greyhound Lines, Inc.)*, 595 A.2d 697, 699 (Pa. Cmwlth. 1991). Where an employer alleges the existence of an independent cause of Claimant's continuing disability unrelated to the work injury, the burden remains on the employer to prove that such cause exists. *Beissel v. Workmen's Comp. Appeal Bd. (John Wanamaker, Inc.)*, 502 Pa. 178, 184, 465 A.2d 969, 972 (1983). In other words, where a physician renders an unequivocal opinion that the employee has fully recovered from the accepted work injury, but acknowledges that there is evidence of other medical conditions in the same area, the employer is required to prove by unequivocal medical testimony that the other condition is not related to the work injury. *Indian Creek Supply v. Workers' Comp. Appeal Bd. (Anderson)*, 729 A.2d 157, 161 (Pa. Cmwlth. 1999), *appeal denied*, 563 Pa. 622, 757 A.2d 936 (2000). Furthermore, in order to terminate benefits, an employer must address all of a claimant's injuries. *Central Park Lodge v. Workers' Comp. Appeal Bd. (Robinson)*, 718 A.2d 368, 370 (Pa. Cmwlth. 1998). An employer's burden is considerable, since disability is presumed to continue until demonstrated otherwise. *Giant Eagle, Inc. v. Workmen's Comp Appeal Bd. (Chambers)*, 635 A.2d 1123, 1127 (Pa. Cmwlth. 1993). Finally, a WCJ is free to accept or reject, in whole or in part, the testimony of any witness, including medical witnesses.

Greenwich Collieries v. Workmen's Comp. Appeal Bd. (Buck), 664 A.2d 703, 706 (Pa. Cmwlth. 1995).

Where medical testimony is required relating to causation, it must be unequivocal to support an award. *Haney v. Workmen's Comp. Appeal Bd. (Patterson-Kelley Co., Inc.)*, 442 A.2d 1223, 1225 (Pa. Cmwlth. 1982). Generally, this means that the medical witness must testify that, in his medical opinion, the result in question did come from the assigned cause. *Lewis v. Workmen's Comp. Appeal Board (Pittsburgh Bd. of Educ.)*, 508 Pa. 360, 365, 498 A.2d 800, 802 (1985). An expression of medical opinion will satisfy the standard of unequivocal medical testimony if the expert testifies that in the expert's professional opinion, there is a relationship or that the expert thinks or believes there is a relationship. *Martin v. Workers' Comp. Appeal Bd. (Red Rose Transit Auth.)*, 783 A.2d 384, 389 (Pa. Cmwlth. 2001), *appeal denied sub nom.*, 568 Pa. 710, 796 A.2d 988 (2002). Medical evidence which is less than positive or which is based upon possibilities may not constitute legally competent evidence for the purpose of establishing the causal relationship. *Lewis*, 508 Pa. at 366, 498 A.2d at 802. The opinion of a medical expert on causation must be reviewed as a whole. *Id.*, 498 A.2d at 803.

In this case, the WCJ concluded that Claimant proved that she sustained radiculopathy in the course and scope of her employment, but she failed

to prove that she suffered herniations, other disc pathology, and/or aggravation of previous arthritic degenerative lumbar disease in the course and scope of employment. (WCJ opinion p.12, attached to Petitioner's brief.) Claimant argues that because Dr. Manzione testified only that Claimant was fully recovered from a lumbar strain/sprain and did not testify that Claimant no longer suffered from radiculopathy, Employer failed to sustain its burden to prove full recovery as a matter of law.

Dr. Manzione testified that he examined Claimant on two occasions and studied additional medical records, including Claimant's emergency room evaluation and the results of Claimant's EMG study performed on July 9, 2007. (R.R. at 10a-11a.) Dr. Manzione testified that Claimant may very well have suffered some irritation of her lower back nerves as a result of her April 2, 2006 work injury, and that it was reasonable to describe it as radiculopathy. (*Id.* at 14a.) Dr. Manzione further testified that he does not dispute that Claimant's July 2007 EMG study documented lumbar radiculopathy. (*Id.*) In fact, Dr. Manzione testified that the July 2007 EMG study showed moderately severe *subacute* right L5 radiculopathy along with possible involvement of the right S1 nerve root. (*Id.*) Dr. Manzione testified that because the abnormalities in the July 2007 EMG study were described as *subacute* abnormalities, they are not attributable to trauma which had been sustained a year earlier. (*Id.*) Dr. Manzione testified that subacute or

acute means abnormalities which have been present for a relatively short time period, generally a period of one (1) to three (3) months. (*Id.*) He testified that patients who suffer from radiculopathy due to degenerative disease typically will experience acute flare-ups of radiculopathy, which is something that is expected given the degenerative changes indicated on Claimant's MRI scan. (*Id.* at 11a.) He further testified that "the EMG studies showed left-sided abnormalities which were very minor and equivocal . . . and were the type of abnormalities which are typical of someone who experiences intermittent radicular symptoms as the result of lumbar degenerative disease." (*Id.* at 11a.)

As to any on-going radiculopathy, Dr. Manzione testified that during his examination in May 2007, he specifically checked for the presence of active lumbar radiculopathy. (*Id.* at 9a.) He explained as follows:

I noted that with the sitting root test both lower extremities could be elevated fully. I noted that with full elevation of either leg the patient complained of lower back pain. This same test when performed with the patient supine or lying down resulted in complaints of lower back pain when either lower extremity was elevated to only 20 degrees. The patient indicated that the lower back pain prevented further elevation of either lower extremity. I noted that the straight leg raising and sitting root test did not result in any lower extremity symptoms and were therefore negative for lumbar radiculopathy. I commented that the inconsistencies between these two tests could not be explained on the basis of organic pathology and was something else that was suggestive of symptom embellishment.

(*Id.*)

Dr. Manzione testified that by the time of his second evaluation of Claimant on May 24, 2007, Claimant had made a full recovery from the lumbar strain and sprain which had occurred on April 2, 2006. (*Id.* at 10a.) He also opined that Claimant did not suffer from any ongoing problems related to her April 2, 2006, work incident that would prevent her from working. (*Id.* at 12a.) Rather, he opined that Claimant has a well-documented degenerative condition of her lower back which caused her to experience some lower back and radicular symptoms as the result of a degenerative condition. (*Id.*)

A review of the record reveals that although Dr. Manzione did not specifically state that Claimant had fully recovered from her radiculopathy (*id.* at 12a), he testified that tests he performed in May 2007 were negative for radiculopathy and indicated symptom embellishment by Claimant. (*Id.* at 9a, 11a.) Also, subacute radiculopathy shown in the July 2007 EMG study was not related to the work incident of more than a year earlier, but was consistent with a flare-up of Claimant's non-work-related degenerative condition. (*Id.* at 12a.) This testimony, taken as a whole, reveals that Dr. Manzione believed that Claimant had recovered from any initial radiculopathy that may have been caused by her April 2006 work injury, and that any residual complaints were related to her degenerative condition, not the work injury.

The WCJ found Dr. Manzione's testimony more credible and persuasive than any contrary testimony presented by Dr. Tabby based upon Dr. Manzione's experience as an orthopedic surgeon and because Dr. Manzione's testimony was based upon his actual review of Claimant's films and medical records. (WCJ opinion p.13, attached to Petitioner's brief.) In determining whether substantial evidence exists to support a WCJ's finding of fact, it is irrelevant that the record reveals evidence that would support a contrary finding; the relevant inquiry is whether the record contains substantial evidence supporting the actual findings that were made. *Grabish v. Workmen's Comp. Appeal Bd. (Trueform Foundations, Inc.)*, 453 A.2d 710, 713 (Pa. Cmwlth. 1982). The WCJ is free to accept or reject the testimony of any witness, including a medical expert, in whole or in part. *Werner v. Workmen's Comp. Appeal Bd. (Bernardi Bros., Inc.)*, 518 A.2d 892, 894 (Pa. Cmwlth. 1986). Indeed, the WCJ is the ultimate fact finder and has complete authority for all credibility determinations. *Universal Cyclops Steel Corp. v. Workmen's Comp. Appeal Bd.*, 305 A.2d 757, 760 (Pa. Cmwlth. 1973). Here, Employer met its burden by producing the unequivocal and competent medical testimony of Dr. Manzione. Therefore, there is substantial and competent evidence in the record to support the WCJ's finding that Claimant had fully recovered from her work-related injury. Thus, termination of benefits was appropriate.

Next, Claimant argues that the WCJ erred by failing to amend the NCP's description of Claimant's injury to include an aggravation of arthritic degenerative lumbar disease. Where a claimant disputes the adequacy or specificity of an NCP, he may file a petition for review to modify the original NCP. *Commercial Credit Claims v. Workers' Comp. Appeal Bd. (Lancaster)*, 556 Pa. 325, 333, 728 A.2d 902, 906 (1999). A petition to modify an NCP is treated "as if such petition were an original claim petition." Section 413 of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. § 773. In a claim petition proceeding, the claimant bears the burden of proving he suffered a work-related injury that occurred in the course of his employment and that the injury results in a loss of earning power. *Inglis House v. Workmen's Comp. Appeal Bd. (Reedy)*, 535 Pa. 135, 141, 634 A.2d 592, 595 (1993). Whether a disability results from an aggravation of a pre-existing condition or is a recurrence of a prior injury is a question of fact to be determined by the WCJ. *Reliable Foods v. Workmen's Comp. Appeal Bd. (Horrocks)*, 660 A.2d 162, 166 (Pa. Cmwlth. 1995).

The WCJ concluded that Claimant sustained her burden to prove that she sustained radiculopathy in the course and scope of her employment, but failed to sustain her burden of establishing that she sustained herniations, other disc pathology, and/or aggravation of previous arthritic degenerative lumbar disease in

the course and scope of her employment (WCJ opinion p.15, attached to Petitioner's brief.) In his deposition testimony, Dr. Manzione specifically rejected such a causal relationship between Claimant's work injury and her degenerative disc protrusions. (R.R. at 11a.) Dr. Manzione testified that Claimant's July 2007 EMG study indicated abnormalities that are typical of someone who experiences intermittent radicular symptoms as the result of lumbar degenerative disease and are not the type of EMG findings that one sees with an acute posttraumatic disc herniation. (*Id.* at 11a.) It is clear from Dr. Manzione's testimony that he was *not* of the opinion that the work injury aggravated Claimant's previous arthritic degenerative lumbar disease. (*Id.*) Based on the credible testimony of Dr. Manzione, the WCJ found that Claimant did not sustain any disc herniations, disc pathology or aggravation of previous arthritic degenerative lumbar disease in the course and scope of her employment with Employer. (WCJ's opinion p.14, attached to Petitioner's brief.) Thus, we conclude that the Board and WCJ did not err in denying Claimant's review petition to the extent that it sought to amend the NCP to include an aggravation of arthritic degenerative lumbar disease.

Finally, Claimant contends that the WCJ did not issue a reasoned decision in granting Employer's petition to terminate benefits because the WCJ failed to explain why she ignored Dr. Manzione's testimony that Claimant remains disabled as a result of the work-related radiculopathy. Stated differently, Claimant

argues that the WCJ failed to explain why she rejected uncontroverted evidence that Claimant suffered an aggravation of lumbar disease as a result of the work injury.

Section 422(a) of the Act, 77 P.S. § 834, provides further that “when faced with conflicting evidence, the [WCJ] must adequately explain the reasons for rejecting or discrediting competent evidence.” A decision is reasoned for purposes of Section 422(a) if it allows for adequate review by this Court under applicable review standards. *Daniels v. Workers’ Comp. Appeal Bd. (Tristate Transport)*, 574 Pa. 61, 77, 828 A.2d 1043, 1053 (2003). Section 422(a) of the Act, however, does not permit a party to challenge or second-guess the WCJ’s reasons for credibility determinations. *Dorsey v. Workers’ Comp. Appeal Bd. (Crossing Construction Co.)*, 893 A.2d 191, 195 (Pa. Cmwlth. 2006), *appeal denied*, 591 Pa. 667, 916 A.2d 635 (2007). Unless made arbitrarily or capriciously, a WCJ’s credibility determinations will be upheld on appeal. *Id.* at 195.

Here, Dr. Manzione testified that he examined Claimant for the second time on May 24, 2007, and specifically checked for the presence of active lumbar radiculopathy. (R.R. 7a, 9a.) Dr. Manzione testified that at the time of Claimant’s May 2007 examination, Claimant was fully recovered from her work injury based upon his examination of Claimant and his review of Claimant’s physical therapy records, the records of Dr. Lam, and Claimant’s MRI scan

performed in May 2006. (*Id.* at 9a, 10a.) Specifically, Dr. Manzione testified that Claimant's May 2007 MRI showed abnormalities consistent with degenerative disease that are the results of the normal aging process. (*Id.* at 10a.)

The WCJ found the testimony of Dr. Manzione more credible and persuasive than any contrary testimony of Dr. Tabby. (WCJ's opinion p.13, attached to Petitioner's brief.) The WCJ found on cross-examination that Dr. Tabby conceded Claimant's July 2007 EMG findings could be degenerative in nature. (*Id.* at 12.) Here, the WCJ reasoned that Dr. Manzione testimony was more credible and persuasive than any contrary testimony of Dr. Tabby. (*Id.* at 13.) The WCJ explained in finding of fact number 14:

Based upon a review of the evidentiary record as a whole, the Judge finds the testimony of Dr. Manzione more credible and persuasive than any contrary testimony of Dr. Tabby. Notably, both Drs. Tabby and Manzione last saw Claimant in October 2006 before seeing her again. Dr. Manzione next saw Claimant in May 2007 while Dr. Tabby did not see Claimant again until October 2007, after the Suspension/Termination petition was filed. Dr. Manzione's testimony is based on and supported by the extensive examination as set out in the Findings of Fact in addition to his review of the medical records and studies. Dr. Manzione's opinions regarding the MRI findings are based on his actual review of the films and his expertise as an orthopedic surgeon. Dr. Tabby relied on the MRI report. Dr. Tabby's basis for relating the findings of [the] MRI and EMG to the 4/2/06 work incident was disjointed and hard to follow. Dr. Manzione clearly and concisely explained how the findings on the MRI and EMG were not work related. Additionally, one of Dr. Tabby's reasons for relating the MRI and EMG findings to the 4/2/06 work incident was

that Claimant didn't have any prior complaints. She conceded on cross examination that this was not the case as in November 2005 or December 2005 Claimant was involved in another lifting incident where she heard a pop in her back that resulted in identical complaints and a recommendation that she have an MRI. On cross-examination, Dr. Tabby also conceded that the EMG findings could be degenerative in nature. Notably, Dr. Tabby's testimony establishes that Claimant's lower extremity complaints are left greater than right while the EMG reported severe subacute right L5 radiculopathy. While left sided abnormalities were found in the distribution of the dorsal ramus at L5-S1, and contrary to Dr. Tabby's testimony that the EMG supports a left radiculopathy, no diagnosis of any nature was attributed to the left sided findings. Also significant in reaching this determination is this Judge's rejection of Claimant's testimony.

(Id. at 13-14.)

The WCJ concisely stated and explained her reasons for crediting Dr. Manzione's testimony over that of Dr. Tabby as to the additional injuries that Claimant sought to include on the NCP. As such, the WCJ's opinion is reasoned as it adequately allows for appellate review.

Accordingly, we affirm the decision of the Board.

P. KEVIN BROBSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nelida Brignol,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1049 C.D. 2010
	:	
	:	
Workers' Compensation Appeal	:	
Board (US Airways and AIG Claim	:	
Services, Inc.),	:	
	:	
Respondents	:	

ORDER

AND NOW, this 14th day of March, 2011, the order of the Workers' Compensation Appeal Board, dated May 4, 2010, is AFFIRMED.

P. KEVIN BROBSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nelida Brignol, :
 :
 Petitioner :
 :
 :
 v. : No. 1049 C.D. 2010
 : Submitted: September 17, 2010
 Workers' Compensation Appeal Board :
 (US Airways and AIG Claim Services, :
 Inc.), :
 Respondents :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
 HONORABLE P. KEVIN BROBSON, Judge
 HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
 BY SENIOR JUDGE FRIEDMAN

FILED: March 14, 2011

I respectfully dissent. The majority holds that Marc Manzione, M.D., testified unequivocally that Nelida Brignol (Claimant) was fully recovered from her work-related radiculopathy as of May 24, 2007. Because no one ever asked Dr. Manzione that question and because Dr. Manzione never offered an opinion on that issue, I cannot agree.

On April 2, 2006, Claimant sustained a lumbar sprain/strain, which was accompanied by radiculopathy. Claimant's employer filed a termination petition and, in support, provided the deposition testimony of Dr. Manzione. In giving his direct testimony, Dr. Manzione stated that he reviewed a workers' compensation judge's decision which identified Claimant's work injury as a lumbar sprain and strain. (Dr. Manzione's Dep., 3/6/08, N.T. at 16, R.R. at 9a.) Dr. Manzione then stated his

professional opinion that, as of May 24, 2007, Claimant “had made a full recovery from the lumbar strain and sprain.” (*Id.* at 17, R.R. at 10a.)

On cross-examination, near the end of his deposition, Dr. Manzione testified for the first time that Claimant “may very well have suffered some irritation of her lower back nerves [as a result of her work injury] and I think it’s reasonable to call that a radiculopathy.” (*Id.* at 33, R.R. at 14a.) There was no re-direct by the employer’s attorney, and, thus, Dr. Manzione never offered an expert opinion as to whether Claimant was fully recovered from her work-related radiculopathy.

“Medical evidence is sufficiently unequivocal if the medical witness, after providing a foundation, testifies that, in his professional opinion, certain facts exist, or that he believes or thinks certain facts exist, so long as the medical witness does not recant the opinion or belief first expressed.” *AT&T v. Workers’ Compensation Appeal Board (Hernandez)*, 707 A.2d 649, 653 (Pa. Cmwlth. 1998). Here, Dr. Manzione never testified that, in his professional opinion, Claimant was fully recovered from her radiculopathy. Indeed, Dr. Manzione did not even acknowledge the existence of such a work injury until his deposition was nearly ended. Thus, unlike the majority, I cannot conclude that the employer provided unequivocal expert medical testimony to show that Claimant was fully recovered from her work-related radiculopathy.

Accordingly, I would reverse.

ROCHELLE S. FRIEDMAN, Senior Judge