

On April 19, 2006, Employer filed a Petition to Suspend Benefits and alleged that as of February 14, 2006, Claimant was totally disabled for reasons unrelated to the work injury. Claimant filed a Petition for Review and sought to amend his NCP to include the following in the description of his injury: “aggravation of lumbar stenosis requiring a lumbar laminectomy and resulting in foot drop.”¹ Petition to Review Compensation Benefits, January 22, 2007, at 1; Reproduced Record (R.R.) at 19a.

A hearing was held before the WCJ. Claimant, then 72 years old, testified that before the accident he had no low back pain or foot drop. Hearing Transcript, February 6, 2007, (N.T.) at 13; R.R. at 33a. He underwent a multi-level lumbar laminectomy on November 19, 1999, and did not return to work. Claimant had some pain but it was predominately in his feet. He required a cane and an ankle brace. Claimant also admitted to eye, neck, and vascular problems. N.T. at 20; R.R. at 40a. He believed the work-related lower back injury prevented him from working full or part-time.

Claimant presented the deposition testimony of his neurosurgeon, Gene Z. Salkind, M.D. (Dr. Salkind), board-certified in neurological surgery. Dr. Salkind diagnosed Claimant with “severe spinal stenosis from L1-2 down through the sacrum.” Deposition of Gene Z. Salkind (Dr. Salkind Deposition), January 4, 2007, at 12; R.R. at 130a. Dr. Salkind described spinal stenosis as a degenerative disease marked by a bony compression of the lumbar nerves and roots which takes many years to develop. Dr. Salkind Deposition at 13, 35; R.R. at 131a, 153a. Dr.

¹ Foot drop refers to the weakness of the foot extensors whereby the patient does not have the ability to bring his foot toward his body and gravity pulls the foot downwards.

Salkind believed that Claimant's lumbar stenosis was "exacerbated by his work-related injury" in that "it caused him [Claimant] to experience symptoms." Dr. Salkind Deposition at 12, 35; R.R. at 130a, 153a. Dr. Salkind performed a bilateral decompressive L1 through L5 lumbar laminectomy. Dr. Salkind Deposition at 12-13; R.R. at 130a-131a. He opined that the bony compression of the nerve roots caused Claimant's foot drop and the foot drop was also causally related to the work-injury. Dr. Salkind Deposition at 36; R.R. at 154a.

Notably, Dr. Salkind ruled out a lumbar herniated disc diagnosis. Dr. Salkind testified that he "really didn't think that [Claimant] ever had a clinically significant soft nuclear herniation in the lumbar spine." Dr. Salkind Deposition at 34; R.R. at 153a. Dr. Salkind opined that Claimant was totally disabled due to his work injury. Dr. Salkind Deposition at 32; R.R. at 150a.

With regard to Claimant's neck (non work-related condition), Dr. Salkind diagnosed Claimant with "significant degenerative disc disease in the entire cervical spine." Dr. Salkind Deposition at 22; R.R. at 140a. Dr. Salkind recommended a cervical laminectomy which Claimant declined.

Critically, Dr. Salkind acknowledged on cross examination that Claimant "very well could be disabled from the neck" and that Claimant had "some pretty significant peripheral vascular disease" which he believed that "unto itself [was] sufficient" to disable Claimant. Dr. Salkind Deposition at 45; R.R. at 163a. Dr. Salkind also admitted that Claimant's unsteady gait may have been caused by the cervical neck myelopathy. Deposition of Dr. Salkind at 40; R.R. at 167a.

Employer presented the testimony of Elizabeth Genovese, M.D. (Dr. Genovese), board-certified in internal and occupational medicine. Dr. Genovese took a detailed history, reviewed medical records and examined Claimant on February 14, 2006, and noted that he had a “very, very significantly abnormal physical examination.” Deposition of Elizabeth Genovese, M.D. (Dr. Genovese Deposition), August 17, 2006, at 19; R.R. at 65a. Claimant had diffusely diminished reflexes in both legs, diminished strength in both arms, deltoids, biceps, triceps, more so on the right side. Additionally, Claimant had fasciculation (twitching and quivering) in this right upper extremity. He had marked atrophy in his left calf muscle and grossly diminished range of motion in his ankles and toes. His EHL muscles, which bring the great toe up, were weak on both sides, as were the extensors of the toes. Finally, he had significant loss of sensation from the mid-calf down in both legs, accompanied by discoloration and coolness in both feet and foot drop. Dr. Genovese Deposition, at 16-19; R.R. at 62a-65a.

Based on her review of MRI’s and her examination, Dr. Genovese, like Dr. Salkind, attributed the objective findings in Claimant’s upper extremities to an extremely severe cervical stenosis, a degenerative arthritic disease, and severe myelopathy and severe foraminal stenosis at multiple levels. Dr. Genovese Deposition at 20-21; R.R. at 66a-67a. She also diagnosed him with severe peripheral vascular disease involving both lower extremities; history of lumbar stenosis, hyperlipidemia, reactive airway disease by history, glaucoma by history and carotid disease by history. She opined that none of these conditions were related to the accepted work injury. According to Dr. Genovese, Claimant’s cervical stenosis was “in and of itself enough to completely disable him. It ma[d]e him incapable of even sedentary work because he [did not] have any hand dexterity.” Dr. Genovese Deposition at 34-35; R.R. at 80a-81a.

Regarding Claimant's non work-related peripheral vascular disease, Dr. Genovese reviewed an aortogram performed in 2003 which showed that the artery going down to the leg was "totally and severely damaged or occluded." Dr. Genovese Deposition at 24; R.R. at 70a. She testified that these findings were completely consistent with his physical examination which showed coolness and loss of sensation in his feet. Genovese Deposition at 24-25; R.R. at 70a-71a. According to Dr. Genovese, the severe peripheral nerve damage in Claimant's legs placed him at high risk for gangrene. Dr. Genovese Deposition at 26; R.R. at 72a.

In terms of Claimant's lumbar spine, Claimant stated to Dr. Genovese that he sustained five herniated discs in his lumbar spine as the result of the work-injury. However, Dr. Genovese reviewed the 1999 MRI which showed no herniated discs that were "big enough to be significant." Dr. Genovese Deposition at 27-28; R.R. at 73a-74a. Even assuming that an anomaly at T12-L1 was a herniation, it was not in the lower back, it was on the right and Claimant's symptoms were predominately left-sided. Dr. Genovese was at a loss to explain what happened to the other four herniated discs. She agreed that Claimant had spinal stenosis and accepted, hypothetically, that perhaps the surgery was to treat an aggravation of the spinal stenosis. Dr. Genovese Deposition at 29; R.R. at 75a. However, Dr. Genovese did not believe that an aggravation of his spinal stenosis, alone, would result in total disability because Claimant could still find employment that did not require a lot of walking.

Important to this controversy was Dr. Genovese's candid admission throughout her testimony that she was "not exactly sure, in terms of the 1999 surgery, how that was tied into the work injury." Dr. Genovese Deposition at 52; R.R. at 98a. Dr. Genovese testified that she "speculated in favor of trying to figure

out what the work injury could have been” and that she was “still trying to figure out what disc herniation was the work one.” Dr. Genovese Deposition at 36, 48; R.R. at 82a, 94a. Notwithstanding her reservations, however, Dr. Genovese was of the opinion that whatever low back injury he did sustain at work, it was not the reason Claimant could not work. She testified to a reasonable degree of medical certainty, that “absolutely” it was Claimant’s cervical and vascular conditions that rendered him totally disabled. Dr. Genovese Deposition at 49-50; R.R. at 95a-96.

The WCJ granted Employer’s Suspension Petition and denied Claimant’s Petition for Review. The WCJ accepted Dr. Genovese’s testimony and based upon that credibility determination found as fact that “Claimant’s non work-related medical conditions preclude him from returning to employment.” WCJ Decision, August 16, 2007, at Finding of Fact (F.F.) Nos. 10, 13 at 5. The WCJ also found that Claimant “is capable of some sedentary or light duty employment based only on his low back condition” and suspended benefits. WCJ Decision, F.F. No 13 at 5.

Claimant appealed to the Board. He argued that Dr. Genovese’s testimony was equivocal because she was unable to offer an opinion as to the exact diagnosis of the Claimant’s work injury.

On May 9, 2008, the Board issued an opinion and affirmed the WCJ. The Board rejected Claimant’s assertion that Dr. Genovese’s testimony was speculative and therefore incompetent and equivocal. The Board concluded that Dr. Genovese properly based her opinions on her clinical examination of Claimant and that her testimony “left no doubt that, absent his non work-related conditions,

Claimant could undertake sedentary to light duty work.” Board Opinion, May 9, 2008, at 8.

On appeal², Claimant raises two issues. First, he argues that the Board must be reversed because Dr. Genovese’s testimony was not competent and, therefore, was not sufficient to support a suspension of benefits. Second, he asserts that the Board erred when it affirmed the WCJ’s denial of his Review Petition.

1. Employer’s Suspension Petition

Claimant contends that the Board should be reversed because the evidence relied on by the WCJ to suspend benefits was speculative and equivocal. Specifically, Claimant points to Dr. Genovese’s admission that it was not possible for her to offer an opinion as to the exact diagnosis of the Claimant’s work injury and could only speculate regarding the cause of Claimant’s work-related disability. This Court must disagree.

A suspension of benefits is appropriate where a claimant’s present disability is due to non work-related factors. Noverati v. Workmen’s Compensation Appeal Board (Newtown Squire Inn), 686 A.2d 455 (Pa. Cmwlth. 1996).

Here, after performing a thorough physical examination of Claimant, and reviewing medical records, Dr. Genovese concluded that, considering his work

² This Court’s scope of review is limited to determining whether constitutional rights were violated, an error of law was committed or whether substantial evidence supports the workers’ compensation judge’s necessary factual findings. Morris Painting, Inc. v. Workers’ Compensation Appeal Board (Piotrowski), 814 A.2d 879 (Pa. Cmwlth. 2003).

injury in a vacuum, Claimant could perform sedentary work as long as it did not involve a lot of walking or standing. However, she went on to conclude that Claimant could not work at all because he was totally disabled due to his unrelated conditions in the nature of cervical stenosis, multi-level severe myelopathy, and peripheral vascular disease which rendered him unable to use his lower *or* his upper extremities. In other words, she opined unequivocally that regardless of the residual work related disability Claimant was totally disabled due to other non work-related conditions.

Claimant puts emphasis on the fact that Dr. Genovese questioned whether Claimant sustained a disc herniation in his lumbar spine because the MRI films did not show any herniations. However, she accepted that Claimant sustained that injury for purposes of argument and accounted for it when she rendered her expert opinion. However, a medical expert's testimony may remain competent even if the expert expresses some uncertainty or lack of information about medical bills. Industrial Recision Services v. Workers' Compensation Appeal Board (Farbo), 808 A.2d 994 (Pa. Cmwlth. 2002). Medical testimony is equivocal if it is vague or leaves doubt. Reinforced Molding Corp. v. Workers' Compensation Appeal Board (Haney), 717 A.2d 1096 (Pa. Cmwlth. 1998), appeal denied, 568 Pa. 652, 704 A.2d 365 (1999).

Regardless of her inability to substantiate, to her satisfaction, the exact nature of his work injury based on the films she reviewed, Dr. Genovese's testimony left no doubt that the condition in Claimant's lumbar spine no longer rendered him totally disabled. In fact, her inability to validate Claimant's statement that he sustained five herniated discs was consistent with Dr. Salkind's

testimony that he did not see evidence of any herniated discs when he performed the surgery.

Further, Dr. Genovese speculated *in Claimant's favor* that his work injury included the foot drop. Again, she did not believe that this condition rendered him totally disabled. While she speculated as to his work related disability she did not waver from her opinion that he was not totally disabled due to any condition related to his lower back. She accepted the injury for purposes of her opinion and it did not materially affect her opinion that Claimant was totally disabled from other non work-related conditions.

The bottom line is that Claimant's entire spine was laden with arthritic degenerative disease and other severely disabling non work-related conditions. Employer's doctor did not believe that Claimant's inability to work was due to residual disability from his work related lower back injury. Rather, Dr. Genovese believed Claimant's present inability to work was due to his severe cervical stenosis, multi-level severe myelopathy, and peripheral vascular disease.

The WCJ found Dr. Genovese's opinion that Claimant was totally disabled due to his non work-related medical conditions to be credible. The WCJ has complete authority over questions of credibility, conflicting medical evidence and evidentiary weight. Sherrod v. Workmen's Compensation Appeal Board (Thoroughgood, Inc.), 666 A.2d 383 (Pa. Cmwlt. 1995). The WCJ is free to accept or reject, in whole or in part, the testimony of any witness. Lombardo v. Workers' Compensation Appeal Board (Topps Construction), 698 A.2d 1378 (Pa. Cmwlt. 1997).

Because WCJ credited Dr. Genovese, Employer successfully established that Claimant's present disability was due to non work-related factors, the Board did not err when it affirmed the WCJ.

2. Claimant's Review Petition

Claimant next argues that he should have been allowed to amend his NCP to include "aggravation of lumbar stenosis requiring a lumbar laminectomy and resulting in foot drop" based on the WCJ's acceptance of Dr. Genovese's expert opinion. Specifically, in his Brief, Claimant quotes a sentence from Dr. Genovese's April 2, 2007, report, written after her deposition, where she stated that the work injury "did result in a lumbar strain which, apparently led to aggravation of his underlying condition/symptoms to the point where he ultimately required surgery." Dr. Genovese Report, April 2, 2007, at 3; R.R. at 116a.

Claimant has quoted this sentence entirely out of context. Dr. Genovese wrote the report in response to Employer's request for her to clarify whether she believed Claimant aggravated his lumbar stenosis which necessitated surgery. The statement came from an earlier report which Dr. Genovese was asked to clarify.

First, Dr. Genovese qualified this statement upon which Claimant relies later in the report, where she explained why she made this statement in her original IME report:

I had not been asked to see [Claimant] in order to ascertain whether his low back complaints were or were not related to his work injury, but instead had been asked to address only whether his current treatment, and, to a lesser extent his disability, were related to his lumbar

problems or other medical conditions which he had, namely cervical stenosis, peripheral vascular disease, hyperlipidemia and reactive airway disease.

Dr. Genovese Report, April 2, 2007, at 3-4; R.R. at 116a-117a.

Dr. Genovese went on to conclude in the Summary section of her report:

Consequently, it is my opinion, in answer to the question that you posed that **the records do not indicate that [Claimant] aggravated a lumbar stenosis which necessitated a lumbar laminectomy resulting in a foot drop as a result of the work injury of September 1, 1996** but instead describe him as having sustained a herniated nucleus pulposus. If that was indeed the case, all of the treatment he received for his lumbar stenosis, and all of the sequelae thereof, would be UNRELATED to his work injury. **His foot drop may or may not have been part of his initial work injury, but as he himself told me that he developed back pain initially (which would be consistent with a diagnosis of lumbar strain)** and only developed leg pain subsequently, it is most reasonable to state that his initial back symptoms were reflective of lumbar strain, and that their continuation subsequently was due to his underlying lumbar stenosis rather than the strain per se. Regardless of the scenario, if one assumes that [Claimant's] foot drop did not result from a lumbar herniated disc, it is most reasonable to link it to his lumbar stenosis. **And while it is possible that the injury of 1996 led to an exacerbation of symptoms from his lumbar stenosis which continued subsequently, it is equally possible that his lumbar strain resolved, with symptoms then appearing after some time that were SOLELY due to his pre-existing condition. This would include the foot drop.**

Dr. Genovese Report, April 2, 2007, at 4; R.R. at 117a (emphasis added).

It is clear from reading the report in its entirety that Dr. Genovese was not of the opinion that the work injury aggravated his underlying stenosis to the point where he ultimately required surgery. Rather, she remained uncertain as to the nature of the original injury and its affect on Claimant's stenosis. She agreed that it was a possibility that the injury aggravated the stenosis. However, she opinioned it was "equally possible" that back strain resolved, and the symptoms later developed to the point where the surgery became necessary. It would have been improper for the WCJ to allow Claimant to amend the NCP based a single sentence taken out of context.

The order of the Board is affirmed.

BERNARD L. McGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sidney Parelman,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
Workers' Compensation Appeal	:	
Board (Roosevelt Memorial Park),	:	No. 1005 C.D. 2008
Respondent	:	

ORDER

AND NOW, this 18th day of December, 2008, the order of the Workers' Compensation Appeal Board is hereby affirmed.

BERNARD L. MCGINLEY, Judge