

Claimant alleged that she suffered from thoracic outlet syndrome (TOS) with upper extremity neurovascular compression, as a result of repetitive motion trauma resulting from the performance of her job activities. Employer contested that Claimant suffered a work related injury.

Hearings relating to the claim petition were conducted by WCJ Mullen, during which Claimant testified on her own behalf. Allen J. Togut, M.D., testified on behalf of Claimant as to her medical condition. Richard B. Kasdan, M.D., testified as Employer's medical expert.¹

Claimant testified that she developed back pain between her shoulder blades. She sought treatment from her physician, who recommended that she engage in physical therapy. As a result of the physical therapy, Claimant began to experience additional symptoms of numbness and tingling in her ring and middle fingers and weakness in her arms. Claimant also developed headaches. Following several referrals and an MRI, Claimant was examined by Dr. Togut, who specializes in TOS. Dr. Togut recommended, in part, that Claimant cease working. She stopped working as of July 2, 2001, and has not returned to work since that date. She testified that after she stopped working, the symptoms remained, although they lessened. She could not perform certain activities at home that involved her upper extremities.

Dr. Togut testified that he was Board-certified in both general and thoracic surgery, and he has concentrated his practice in TOS. He first examined Claimant on July 2, 2001. Dr. Togut diagnosed Claimant as suffering from neurogenic TOS as a

¹ Additionally, Stuart S. Burstein, M.D., testified of behalf of Employer that Claimant does not suffer depression as a result of the work injury.

result of the cumulative trauma of her work activities. He also opined that Claimant was permanently and totally disabled as a result of the work injury.²

Dr. Kasdan testified that he was Board-certified in neurology. He examined Claimant on March 20, 2002, and he reviewed Claimant's medical records and diagnostic studies. Dr. Kasdan explained the maneuvers he performed when evaluating Claimant to determine whether she suffers from TOS. He testified that the diagnostic studies did not reveal any anatomic cause for Claimant's complaints, and he did not hear any diminution in Claimant's pulse. He opined that, as of the date of his examination, Claimant was not suffering from TOS. He further opined that, even if

² WCJ Mullen summarized Dr. Togut's testimony, in part, as follows:

Claimant told him that she had severe pain in her right trapezius muscle and less on the left trapezius. These muscles attach to the spine and to the shoulder blade. The pain went between the shoulder blades, up to the back of her head and down the back of her arm. She had tingling and numbness in the little, ring, and middle finger of each hand. She was dropping items. When she had severe pain her hands would become cold. She told him she had had these symptoms since approximately December of 2000. Her prior history was not significant for his purposes. Her prior headaches and hand difficulties were different from her current symptoms, which included her neck, her trapezius muscles, her shoulder blades and the back of her arms. [Dr. Togut] presented several anatomic drawings to explain his testimony. [Dr. Togut] testified concerning the results of his physical examination of Claimant. Based upon the result of his physical examination, particularly the bruit, or loss of arterial pulse, on the right, and the Roos test for pain, tingling and numbness, and color, led him to a diagnosis of neurogenic thoracic outlet syndrome. Based upon the history of Claimant's work activities, and her symptoms resulting from those activities, he opined that Claimant's condition was caused by the cumulative trauma of her work activities over the seven years that she performed those activities. It was Dr. Togut's opinion that Claimant was permanently totally disabled from all substantial gainful employment.

(WCJ Mullen's decision at 1, attached to Petitioner's brief).

Claimant suffered a temporary aggravation of an underlying anatomic condition as of March 13, 2001, she was fully recovered from any such aggravation. As of the date of his examination, there was no evidence of dysfunction in the nerves or muscle, no spasm, neurovascular change, weakness, sensory loss, pulse diminution, or any other condition which impaired Claimant as of the date of his examination.

By decision and order dated September 29, 2003, WCJ Mullen credited the testimony of Dr. Togut that, as of March 13, 2001, Claimant suffered from bilateral neurogenic TOS due to the cumulative trauma from performing her work activities. However, WCJ Mullen rejected Dr. Togut's testimony to the extent that he opined that Claimant's condition could not improve and Claimant would never be able to return to substantial gainful activity. Instead, WCJ Mullen found credible Dr. Kasdan's testimony that, at the time of his examination, he found no objective evidence of continuing TOS symptoms. Therefore, she credited Dr. Kasdan's testimony that as of March 20, 2002, Claimant was fully recovered from any work-related injury. WCJ Mullen awarded benefits for the period of July 2, 2001, through March 19, 2002, and she terminated benefits as of March 20, 2002.

Thereafter, on March 12, 2005, Claimant filed a petition to reinstate workers' compensation benefits, alleging a recurrence of her bilateral TOS as of February 18, 2005, the date of an examination by William Jeffreys, M.D., a Board-certified neurologist to whom Dr. Togut referred Claimant. Employer filed a timely answer, denying the allegations.

Hearings on the petition to reinstate benefits were held by WCJ Vonada. Claimant testified on her own behalf, and Dr. Jeffreys also testified on her behalf. Dr. Kasdan again testified on behalf of Employer.

Claimant testified that she continues to lose strength in her arms and experiences numbness, stinging and tingling in her hands. She must rest her arms against the wall when she does her hair or takes showers. She has difficulty performing tasks such as picking up a gallon of milk or vacuuming. Claimant testified that she also has progressive polyneuropathy affecting her legs and a diagnosis of major depression. She receives Social Security Disability benefits. On cross-examination, she admitted that the nature of her symptoms is the same as during the prior litigation. She also admitted that she did not inform Dr. Jeffreys that WCJ Mullen had found that she was fully recovered as of March 20, 2002.

Dr. Jeffreys testified that he evaluated Claimant on February 18, 2005, during which he took a history of Claimant. Dr. Jeffreys explained that TOS occurs when the major arteries, veins and nerve trunks are compressed between the ribs and the clavicle. The onset of TOS is consistent with Claimant's work as a sewing machine operator where she would assume a position with her shoulders forward and down. Dr. Jeffreys testified that he performed three (3) different maneuvers to determine whether Claimant's pulse was dampened and then cut off when her shoulders were hyper extended and abducted. He explained that when dampening occurs, a bruit can be heard underneath either clavicle. The bruit can be heard when the pulse is cut off. He testified that in this position, Claimant developed increasing numbness and tingling in both upper extremities within five (5) to ten (10) seconds. He detected a positive response while performing the Allen maneuver. The Halstead and the Adson's maneuvers were negative. Dr. Jeffreys testified that Dr. Kasdan did not perform the maneuver that he performed which resulted in dampening Claimant's pulse.

Dr. Jeffreys opined that Claimant suffers from TOS, costroclavicular variety, resulting from her work as a sewing machine operator. He also testified that

TOS can progressively worsen or deteriorate even in the absence of the activity which caused the condition.

Dr. Kasdan opined that Claimant remained fully recovered from her prior diagnosis of TOS, and he would not place any restrictions on her ability to work. As to testing, he testified that he performed the Adson's maneuver, which was negative.

WCJ Vonada found that the testimony of Dr. Jeffreys was more credible than that of Dr. Kasdan. WCJ Vonada found Dr. Jeffreys to be more credible due to his detailed discussion of the nature of TOS and his testimony regarding Claimant's pulse during testing. WCJ Vonada concluded that Claimant met her burden to demonstrate that her disability arising out of her work injury of March 13, 2001, in the nature of bilateral, costoclavicular TOS, recurred as of February 18, 2005, the date of Dr. Jeffreys' examination. By decision and order dated July 13, 2006, WCJ Vonada granted Claimant's petition to reinstate benefits.

Employer appealed the matter to the Board, and the Board affirmed. Employer then filed the subject petition for review with this Court.

On appeal,³ Employer argues that the Board erred in affirming WCJ Vonada's decision and order when it was precluded by the doctrine of res judicata.

The doctrine of res judicata prevents the relitigation of claims and issues in subsequent proceedings. Temple University v. Workers' Compensation Appeal Board

³ Our scope 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' Compensation Appeal Board (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.

(Parson), 753 A.2d 289 (Pa. Cmwlth.), petition for allowance of appeal denied, 564 Pa. 720, 764 A.2d 1075 (2000). The term “res judicata” encompasses two related, yet distinct, principles: technical res judicata and collateral estoppel. Id. Technical res judicata provides that when a final judgment on the merits exists, a future suit between the parties on the same cause of action is precluded. Maranc v. Workers’ Compensation Appeal Board (Bienenfeld), 751 A.2d 1196 (Pa. Cmwlth. 2000). On the other hand, collateral estoppel acts to foreclose relitigation in a subsequent action of an issue of fact or law that was actually litigated and was necessary to a prior final judgment. PMA Insurance Group v. Workmen’s Compensation Appeal Board (Kelley), 665 A.2d 538 (Pa. Cmwlth. 1995), petition for allowance of appeal denied, 544 Pa. 618, 674 A.2d 1078 (1996).

Following entry of a termination order, a claimant is entitled to reinstatement of benefits upon meeting the following burden of proof: (1) that disability has increased or recurred after the date of the prior award, and (2) proof that claimant’s physical condition has actually changed in some manner. Pieper v. Ametek-Thermox Instruments Division, 526 Pa. 25, 584 A.2d 301 (1990); see also Lowe v. Workmen’s Compensation Appeal Board (Pennsylvania Mines Corporation), 683 A.2d 1327 (Pa. Cmwlth. 1996); Hastings v. Workmen’s Compensation Appeal Board (Mastech Construction), 667 A.2d 485 (Pa. Cmwlth. 1995), petition for allowance of appeal denied, 544 Pa. 678, 678 A.2d 367 (1996).

Employer argues that the doctrine of res judicata/collateral estoppel applies to the exact nature of Claimant’s work injury and that she was fully recovered from it as of March 20, 2002, because those matters were fully litigated and established during the proceedings before WCJ Mullen. Therefore, any efforts to reinstate benefits based upon the March 13, 2001, work injury must be consistent with the findings and conclusions of

WCJ Mullen. Employer contends that WCJ Mullen made two significant findings, which Claimant's doctor, Dr. Jeffreys, completely disregarded during his testimony in the proceedings for the petition to reinstate benefits. First, Dr. Jeffreys disregarded the established fact that Claimant's work injury was bilateral neurogenic TOS, not costoclavicular TOS. Second, Dr. Jeffreys disregarded the established fact that Claimant fully recovered from all aspects of her work injury as of March 20, 2002.

As to the description of Claimant's injury, Employer notes that Dr. Jeffreys opined that there was no evidence of neurogenic TOS at the time of his evaluation. Rather, Dr. Jeffreys opined that Claimant was suffering from costoclavicular TOS. (R.R. at 109a-110a). Employer takes the position that Dr. Jeffreys' testimony is legally incompetent since it disputes the previous finding by WCJ Mullen regarding the exact nature of the injury. Claimant contends that Dr. Jeffreys' testimony did not contradict the decision of WCJ Mullen on the claim petition because he indicated that costoclavicular TOS is simply a different manifestation of the same injury.

The Board, in considering this argument, wrote:

In the previous litigation, WCJ Mullen found that Claimant sustained a work-related injury in the nature of bilateral neurogenic thoracic outlet syndrome, from which she was fully recovered as of March 20, 2002. In the present litigation, Dr. Jeffreys opined that Claimant did not have neurogenic bilateral thoracic outlet syndrome, the injury recognized by WCJ Mullen's Order, but instead opined that Claimant had costoclavicular thoracic outlet syndrome. However, Dr. Jeffreys also opined that although there is a difference between the two types of thoracic outlet syndrome, they are not two completely different entities. Rather, there is a continuum of problems that have to do with the vascular and neurostructures that go through the thoracic outlet. Thus, contrary to [Employer's] argument, we cannot conclude that Dr. Jeffreys' opinion as to the nature of Claimant's work injury was so far removed from that of the accepted work

injury as to invoke the principles of res judicata and/or collateral estoppel. Therefore, WCJ Vonada was not precluded from considering whether Claimant was entitled to a reinstatement of her benefits based on Dr. Jeffrey's testimony.

(Board's opinion at 6-7, attached to Petitioner's brief) (citations omitted).

In reaching its conclusion that Claimant was entitled to a reinstatement of benefits, the Board relied upon this Court's opinion in City of Philadelphia v. Workers' Compensation Appeal Board (Fluek), 898 A.2d 15 (Pa. Cmwlth.), petition for allowance of appeal denied, 590 Pa. 662, 911 A.2d 937 (2006), wherein we noted that circumstances under which a claimant should not bear the burden of establishing the causal connection between the work injury and a subsequently alleged injury or condition include situations where the injuries are closely related, i.e., involve the same body part or system or sequela.

We must agree with the analysis of the Board. Here, the testimony establishes that TOS "involves a continuum of problems that have to do with the vascular and neurostructures that go through the thoracic outlet." (See Board's opinion at 6-7, attached to Petitioner's brief). Claimant suffered from TOS from March 13, 2001, through March 19, 2002, which was neurogenic in nature. Three (3) years later, Claimant's TOS recurred, and this time it was diagnosed as costoclavicular in nature.⁴ We are satisfied that both are part of the same continuum of TOS, such that Claimant should not bear the burden of establishing the causal connection between the work injury and a subsequently alleged injury or condition. Hence, Claimant is not estopped

⁴ The first diagnosis described the type of anatomy (neurological structures) that was compressed, and the second diagnosis identified the location of the compression (between the ribs and the clavicle).

from receiving a reinstatement of benefits based upon the different adjectives used to describe her TOS.

With regard to Claimant's established recovery from her work injury, Employer contends that Dr. Jeffreys disregarded WCJ Mullen's finding that Claimant had fully recovered and based his opinion on the assumption that Claimant's alleged work-related problems continued unabated since her initial cumulative trauma injury of March 13, 2001. Dr. Jeffreys testified that Claimant did not provide him with WCJ Mullen's order. (R.R. at 112a-113a). Additionally, until the day of the deposition, he was under the impression that she had continuing problems without any abatement since 2001. Id. Employer argues that because Dr. Jeffreys' opinion is based upon assumptions contrary to the established facts, his testimony is incompetent as a matter of law and could not support Claimant's petition for reinstatement. Claimant contends that Employer ignores the fact that Dr. Jeffreys was apprised of WCJ Mullen's decision prior to giving his deposition and did not change his opinion despite vigorous cross-examination. (R.R. at 93a-94a, 110a). Furthermore, Dr. Jeffreys testified that persons suffering from TOS may have periods where they are less symptomatic or more symptomatic. (R.R. at 93a).

When considering this issue, the Board noted that Dr. Jeffreys opined that TOS may become progressively worse in symptomatology over time, even in the absence of repetitive motion.⁵ The Board concluded that WCJ Vonada did not err in determining that Dr. Jeffreys' testimony constituted competent, substantial evidence to

⁵ The Board also stated that Claimant acknowledged that she had the same symptoms during the litigation of her claim petition, but it noted that Claimant testified that the symptoms are now stronger, she has developed tremors that she did not have before, the nerve pain and headaches are worse, she is unable to lift her arms as high as she used to and she has numbness.

support a finding that Claimant's disability recurred and that her physical condition had changed after the date of the termination of benefits.

Where medical testimony is required relating to causation, it must be unequivocal to support an award. Haney v. Workmen's Compensation Appeal Board (Patterson-Kelley Company, Inc.), 442 A.2d 1223 (Pa. Cmwlth. 1982). 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. See Martin v. Workers' Compensation Appeal Board (Red Rose Transit Authority), 783 A.2d 384 (Pa. Cmwlth. 2001), petition for allowance of appeal denied sub nom., Red Rose Transit Authority v. Workers' Compensation Appeal Board, 568 Pa. 710, 796 A.2d 988 (2002); Armco, Inc. v. Workmen's Compensation Appeal Board (Carrodus), 590 A.2d 827 (Pa. Cmwlth.), petition for allowance of appeal denied, 529 Pa. 636, 600 A.2d 955 (1991). The opinion of a medical expert on causation must be reviewed as a whole, and inaccurate information will not defeat the opinion as long as the opinion is not dependent upon the inaccuracies. See Industrial Recision Services v. Workers' Compensation Appeal Board (Farbo), 808 A.2d 994 (Pa. Cmwlth. 2002); Deitrich v. Workmen's Compensation Appeal Board (Shamokin Cycle Shop), 584 A.2d 372 (Pa. Cmwlth. 1990).

We agree with the Board. Dr. Jeffreys testified on direct-examination that it was his opinion that Claimant again suffers from TOS as a result of her injury while working as a sewing machine operator. (R.R. at 92a-94a). Although Dr. Jeffreys testified that he learned just prior to his deposition of WCJ's Mullen's order terminating Claimant's benefits, he never testified that he disagreed with such a determination. Dr. Jeffreys never stated that he believed that Claimant had never fully recovered or was

never asymptomatic. Instead, Dr. Jeffreys acknowledged WCJ Mullen's order terminating benefits, and he explained that there are times when a person may be more symptomatic and times when a person may be less symptomatic. Id. Dr. Jeffreys also was thoroughly cross-examined on this issue. On cross-examination, he did not concede that if Claimant had been fully recovered in 2002, then her condition in 2005 would be due only to the recently performed activities. (R.R. at 113a-114a). Instead, Dr. Jeffreys explained that once a person damages a nerve or vascular system, regardless of whether there is an anatomical variation, then those particular structures are set up to be more easily injured. Id.

Our review of Dr. Jeffreys' testimony reveals that Dr. Jeffreys initially held the opinion that Claimant had not fully recovered from her work injury. However, regardless of whether or not Dr. Jeffreys held such an opinion, it is clear that he was willing to accept that Claimant had recovered as of March 20, 2002, which would mean that Claimant's work-related TOS recurred subsequent to that date.

As the finder of fact, all credibility determinations must be resolved by the WCJ. Universal Cyclops Steel Corporation v. Worker's Compensation Appeal Board (Krawczynski), 305 A.2d 757 (Pa. Cmwlth. 1973). A WCJ, as the sole arbiter of credibility, is free to resolve conflicts in evidence and to determine the credibility of any witness, including medical experts, and an appellate court is bound by the credibility determinations made by the WCJ. Lead v. Workers' Compensation Appeal Board (Sexton), 796 A.2d 431 (Pa. Cmwlth. 2002). In the case at hand, the WCJ found the medical testimony of Dr. Jeffreys to be more credible than that of Dr. Kasdan. Because Dr. Jeffreys accepted the fact that Claimant had fully recovered from her work injury as of March 20, 2002, and the WCJ found Dr. Jeffreys' testimony to be credible, we cannot conclude that such testimony was not competent.

Accordingly, we must affirm the order of the Board.

JOSEPH F. McCLOSKEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

H.H. Brown Shoe Co. and	:	
Broadspire Services, Inc.,	:	
Petitioners	:	
	:	No. 2047 C.D. 2007
v.	:	
Workers' Compensation Appeal Board	:	
(Gipson),	:	
Respondent	:	

ORDER

AND NOW, this 13th day of May, 2008, the order of the Workers' Compensation Appeal Board is hereby affirmed.

JOSEPH F. McCLOSKEY, Senior Judge