Hogan v. Workers' Compensation Appeal Board (Giant Eagle, Inc.), No. 2032 C.D. 2011, filed November 8, 2012.

Issue: Whether the WCJ's Decision/Order granting employer's Termination Petition and denying claimant's Review and Penalty Petitions was supported by the credible, substantial evidence of record when employer's medical expert opined that although claimant had fully recovered from his work injury, he should continue to perform stretching exercises for his low back.

Answer: The WCJ's Findings of Fact and Conclusions of Law are supported by the substantial evidence of record and the WCJ did not err as a matter of law in accepting the opinions of employer's medical expert that claimant had fully recovered from his work injury.

Analysis: On January 2, 2008, claimant, a truck driver, sustained a work injury while unloading a tractor-trailer. As a result of the work incident, claimant issued a Notice of Temporary Compensation Payable that described claimant's injury as a "left groin contusion." Thereafter, employer issued an Amended Notice of Compensation Payable that expanded the description of claimant's work injury to include a lumbar strain.

Following the work injury, claimant returned to work in a light duty capacity; however, on August 17, 2008, claimant returned to his pre-injury position until August 25, 2008 when he stopped working due to an increase in low back pain. Thereafter, claimant returned to his pre-injury position on December 14, 2008.

On September 5, 2008, employer filed a Petition to Terminate claimant's benefits. On April 9, 2009, claimant filed a Penalty Petition alleging that employer unilaterally suspended claimant's benefits even though he returned to work on December 14, 2008 without a loss of earnings. Claimant also filed a Petition to Review Compensation Benefits alleging that his work injury should be expanded to include "erectile dysfunction."

By Decision/Order, dated September 2, 2010, the WCJ granted defendant's Termination Petition and denied claimant's Review and Penalty Petitions. Claimant appealed and the WCAB affirmed the Decision/Order of the WCJ.

Claimant, pro se, filed a Petition for Review of the WCAB's August 30, 2011 Decision/Order. In his Petition for Review, claimant alleged that: (1) the WCJ erred in relying on the employer's medical expert's date of recovery; (2) the WCJ erred in relying on the integrity and credibility of employer's expert; (3) "whether a physician's incomplete and inaccurate testimony is incompetent as a matter of law;" (4) whether the WCJ erred in failing to consider objective findings on a diagnostic study; and (5) whether arbitrarily terminating benefits violates the Due Process Clause.

In its Decision/Order, the Commonwealth Court noted that although employer's medical expert, Dr. Kasdan, testified that claimant was fully recovered from his work injuries but on cross-examination also recommended that claimant do back stretches and take ibuprofen prior to work, the doctor's opinion was not equivocal and was sufficient in establishing the employer's burden of proof. In rendering its opinion, the Court noted that the doctor clearly

stated on the record that claimant had fully recovered from his work injuries and was physically capable of returning to work without any restrictions. Although on cross-examination he recommended that claimant do stretches, on redirect, the doctor clearly stated that his fully recovery opinion did not change in any manner as a result of the questions on cross-examination.

Similarly, the Commonwealth Court opined that the claimant's argument that the employer's vascular surgeon, Dr. Hirsh, incompetently testified because he had not performed any diagnostic studies on claimant was not convincing. In doing so, the Commonwealth Court noted that it is the medical expert's duty to review medical records; however, the expert is not required to send an individual for additional testing.

The Commonwealth Court also rejected the claimant's argument that the employer's Termination Petition should not be granted in light of the abnormal diagnostic studies. In doing so, the Court noted that the record contained conflicting medical evidence and, in accordance with the Act, the WCJ adequately explained the conflicts and his reason behind his acceptance and rejection of the evidence of record.

Lastly, with regard to claimant's Due Process argument, the claimant argued that his benefits were arbitrarily terminated and, because his Penalty Petition was denied, his right to Due Process was violated. In response, the Court noted that at the hearing held before the WCJ in January 2009, the claimant and his attorney advised the WCJ that claimant had returned to his pre-injury position without a loss of earnings. Thus, the Court held that the claimant failed to establish his burden of proving that the employer violated the Act by suspending claimant's benefits as of the date that he returned to his pre-injury position.

Conclusion and Practical Advice: If an employer's medical expert arguably compromises his opinions on cross-examination, it is important for employer's counsel to ask the doctor, on re-direct examination, if any of the questions asked on cross-examination caused the doctor to change his opinions in any manner.

Silver v. Workers' Compensation Appeal Board (Reger Rizzo Kavulich & Darnall), No. 967 C.D. 2012, filed November 29, 2012.

Issue: Whether the reassignment of a petition after a first hearing is held violates due process and whether the statement of a doctor who testifies that the claimant's work activities "could have" caused an exacerbation of his pre-existing conditions is equivocal.

Answer: So long as the parties receive the Notice of Reassignment and have an opportunity to object to a reassignment, a reassignment of a petition to a different WCJ does not violate an individual's due process right. Furthermore, if a doctor opines that an individual did not sustain a work injury and also notes that the claimant's activities "definitely could have" caused an exacerbation of pre-existing conditions, the doctors statement regarding an exacerbation of pre-existing conditions can be discredited by the WCJ as equivocal.

Analysis: Claimant, an associate in the workers' compensation department for the employer, filed a Claim Petition alleging that he sustained injuries to his neck, back and knees as a result of unpacking boxes to use them to pack the personal items that were in his office at the end of his employment. Claimant's petition was originally assigned to WCJ Callahan who conducted the first hearing in the matter. The petition was then reassigned to WCJ Beach.

Employer had advised the claimant that he was being terminated effective September 8, 2006. On his last day of employment, he lifted and unloaded copy paper boxes with the office manager, and packed his office contents into those boxes and alleges that he developed low back, shoulder, neck, and knee pain as a result of same. On that day, he advised the office manager that he over did it and may need the list of panel physicians; however, he did not tell the office manager about any specific injury.

Furthermore, the office manager testified that claimant was overly helpful and "pretty insistent" on helping to unpack the boxes.

Prior to the alleged incident, claimant had sustained low back injuries on two occasions in the 1980s, and again injured his low back in 1990 when he was involved in a motor vehicle accident and, as a result of same, underwent lumbar spine surgery at L5-S1.

In support of his Petition, claimant presented the report of Dr. Valentino who opined that claimant's work injury resulted in an aggravation of cervical and lumbar degenerative disc disease, radiculopathy, aggravation of the degenerative joint disease in both knees, and internal derangement of the right knee.

In opposition to claimant's Petition, employer presented the report of Dr. McHugh who opined that none of claimant's symptoms or complaints were attributable to his work activities but that the activities that claimant performed on the alleged date of injury "could have" caused an exacerbation of his pre-existing conditions.

WCJ Beach denied claimant's petition on the basis that claimant suffered from degenerative disc disease in his cervical and lumbar spine which pre-dated his work injury. Furthermore, the WCJ noted that the fact that claimant's alleged work injury occurred on his last day of employment casted doubt on claimant's veracity along with the fact that he was so eager to assist the office manager and then, later, sequestered himself in the office before presenting to the office manager that he had been over doing it. Furthermore, the WCJ accepted as credible the medical evidence of the employer and rejected the medical evidence submitted by the claimant.

Claimant appealed and the WCAB affirmed the WCJ's Decision. Claimant then filed a Petition for Review.

In response to claimant's allegations that the Bureau improperly transferred the matter, the Court noted that Section 415 of the Act allows the Bureau to substitute one referee for another so long as notice of the substitution is provided. Based upon the notice, the parties then have the opportunity to object to the reassignment.

Here, it is undisputed that claimant received the Notice of Reassignment and, after the reassignment, testified live before WCJ Beach and did not object to the reassignment. It was only after the final hearing that claimant objected to the assignment through a letter drafted to the WCJ; however, claimant never moved the letter into evidence. Thus, the Court held that the claimant failed to timely object to the reassignment and was not, in any way, prejudiced as a result of the transfer.

Furthermore, claimant argued that the WCJ disregarded the statement of employer's medical expert that the heavy lifting activities of September 1, 2006 "definitely could have" caused an exacerbation of claimant's pre-existing conditions. However, the Court noted that the statement was equivocal and lacked the type of certainty required of an expert opinion and, thus, the WCJ was not required to base a finding of fact on it.

Furthermore, in response to the claimant's argument that the WCJ failed to issue a reasoned decision, the Court held that claimant was attempting to challenge credibility determinations which are unassailable on appeal.

Conclusion and Practical Advice: If a petition is reassigned and, for any reason a party feels that it is not proper, the party must raise the objection with the newly assigned WCJ, on the record, as soon as possible. Furthermore, if a doctor testifies that something "could have" happened, it is not sufficient to unequivocally establish causation.

Bell v. Workers' Compensation Appeal Board (School District of Philadelphia), No. 946 C.D. 2012, filed November 29, 2012.

Issue: Whether the WCJ erred as a matter of law in granting employer's Termination Petition when the WCJ's own observations of claimant's work injury contradicted with the physical examination findings of employer's medical expert.

Answer: The WCJ did not err as a matter of law in granting employer's Termination Petition because the WCJ's own observations of claimant's work injury were not medically based and, thus, not sufficient to overcome the credible testimony of employer's medical expert.

Analysis: On September 10, 2002, claimant was working as a teacher's assistant for the employer when she sustained injuries to her left wrist and hip. As a result of the work incident, claimant issued a Notice of Compensation Payable acknowledging claimant's work injury as compensable in the stated nature of a left wrist distal radius fracture and left hip contusion. Thereafter, employer issued a corrected NCP that expanded claimant's work injury to include left wrist complex regional pain syndrome.

Thereafter, employer filed a Termination Petition based upon the full recovery opinions of its IME doctor. In support of its Petition, employer presented the doctor's testimony which included that, at the time of his IME of claimant, claimant's physical examination revealed no abnormal skin color or temperature, no hyperhidrosis, normal hair distribution, no changes in her nail beds, no swelling and no atrophy. Based upon the lack of objective signs of RSD,

employer's doctor opined that claimant had fully recovered from her work injuries; however, in doing so, the doctor acknowledged that the symptoms of RSD could vary from day to day.

In opposition to the employer's Petition, claimant's medical expert testified that claimant continued to suffer from her work related RSD.

Furthermore, at the final hearing the claimant testified live before the WCJ at which time the WCJ observed claimant's left wrist and noted that it was slightly darker in color than her right wrist and that there was a slight degree of swelling.

The WCJ granted employer's Termination Petition crediting employer's doctor's testimony as credible, unequivocal, logical and coherent in establishing that claimant fully recovered from her work injury. The WCJ rejected the claimant's medical expert as not credible or convincing that claimant continues to suffer from the residual effects of her work injury.

Claimant appealed to the Board, which affirmed the WCJ's Decision. Claimant again appealed arguing that the WCJ erred in granting the Termination Petition because the WCJ's own observations of claimant's left wrist contradicted with the physical examination findings of employer's medical expert.

In rendering its opinion, the Court noted that while the WCJ did not reconcile employer's doctor's opinion with the WCJ's own observations of claimant's left wrist, the WCJ is not a qualified medical expert whose observations would be competent to counter employer's doctor's expert opinion. Thus, the Court affirmed the granting of the Termination Petition.

Conclusion and Practical Advice: Observations of a layperson regarding objective findings of a medical condition are not medically sufficient to overcome the opinions of a medical expert.