

STATE OF NEW HAMPSHIRE

SUPREME COURT

2022 TERM

MAY SESSION

Appeal of Fran Rancourt

2021-0153

APPELLANT'S BRIEF

**RULE 10 APPEAL FROM THE
NEW HAMPSHIRE DEPARTMENT OF LABOR
COMPENSATION APPEALS BOARD**

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QUESTIONS PRESENTED

- I. THE BOARD ERRED AS A MATTER OF LAW, COMMITTED CLEAR ERROR, WAS UNREASONABLE, OR ABUSED ITS DISCRETION, IN FINDING THE CARRIER MET ITS BURDEN OF PROOF UNDER RSA 281-A:48, THAT CLAIMANT HAD A CHANGE IN WORK CAPACITY AND AN EARNING CAPACITY WHICH JUSTIFIED A REDUCTION IN BENEFITS FROM TEMPORARY TOTAL DISABILITY (TTD) TO THE DIMINISHED EARNINGS CAPACITY RATE (“DEC”), WHEN THE OVERWHELMING WEIGHT OF THE EVIDENCE, INCLUDING THAT HER DOCTORS HAD NOT RELEASED HER TO WORK AT THE TIME OF THE DOL HEARING (OR SINCE), SHE CONTINUES TO SUFFER SERIOUS DEBILITATING INJURIES DUE TO HER HEAD INJURY, AND AN EARNING CAPACITY REQUIRES BEING ABLE TO COMPETE IN THE OPEN LABOR MARKET, WHICH ALL SUPPORTED CONTINUED TEMPORARY TOTAL DISABILITY.

These issues were argued at hearing and resulted in the Decision of Compensation Appeals Board, 2/5/21 (Br:40-46^[1]); and were disputed in Claimant’s Motion for Partial Reconsideration, Rehearing and/or Clarification, 3/18/21 (Apx:47-48).

- II. THE BOARD ERRED AS A MATTER OF LAW, WAS UNREASONABLE, COMMITTED CLEAR ERROR, OR ABUSED ITS DISCRETION, IN FINDING AGAINST CLAIMANT ON CHANGE OF CONDITION UNDER RSA 281-A:48 AND REDUCING HER BENEFITS TO DEC, DUE TO AN ALELGED LACK OF AN “OBJECTIVE TEST” SUPPORTING HER TEMPORARY TOTAL DISABILITY, WHEN SAME IS NOT REQUIRED UNDER THE LAW, AND IN FACT THERE WAS AMPLE OBJECTIVE EVIDENCE IN SUPPORT OF MAINTAINING HER ON TTD, INCLUDING THE SMALL HOLE IN THE TOP OF HER HEAD, AND A DOCTORS’ EXPLANATION OF THE OBJECTIVE CRITERIA AND TESTING, WHICH WERE UNCONTROVERTED.

Same citation as Issue I, except at Apx:5.

- III. THE BOARD ERRED AS A MATTER OF LAW, WAS UNREASONABLE, COMMITTED CLEAR ERROR, OR ABUSED ITS DISCRETION, WHEN BY REQUIRING AN “OBJECTIVE” TEST TO SUPPORT DISABILITY, WHERE THERE WAS NO MEDICAL SUPPORT FOR SAME, INCLUDING BY AN IME DOCTOR, THEREBY SUBSTITUTING ITS OWN MEDICAL OPINION INSTEAD OF RELYING ON THE MEDICAL EVIDENCE.

^[1] Page citations are as follows: to the Notice of Appeal as “NOA:(p.#)”; to the medical packet as “MP:(p.#)” or just the page number (#); to the supplemental medical packet as “S:(p.#)”; to Appellant’s Brief, including attached decisions, as “Br:(p.#)”; and to Appellant’s Appendix to Brief as “Apx:(p.#)”. The medical packet and supplement were to be included with the record from the DOL/CAB.

Same citation as Issue I, except at Apx:7.

- IV.¹ THE BOARD ERRED AS A MATTER OF LAW, COMMITTED CLEAR ERROR, WAS UNREASONABLE, OR ABUSED ITS DISCRETION, IN RULING AGAINST DR. RANCOURT ON RSA 281-A:48 BY CONCLUDING A TRIP TO MAINE TO RIDE ON A BOAT FOR ONE OR MORE TIMES MEANT SHE HAD AN EARNING OR WORK CAPACITY, WHERE ALL OF HER TREATING DOCTORS STILL HAD HER IN AN OUT OF WORK STATUS, AND NO DOCTOR OPINED THAT SAID ACTIVITY MEANT THERE WAS A WORK OR EARNING CAPACITY, THEREBY SUBSTITUTING ITS OWN MEDICAL OPINION FOR THE MEDICAL PROVIDERS.

Same citation as Issue I, except at Apx:5.

- V. THE BOARD ERRED AS A MATTER OF LAW, COMMITTED CLEAR ERROR, WAS UNREASONABLE, OR ABUSED ITS DISCRETION, BY FAILING TO PROPERLY WEIGH THE MEDICAL EVIDENCE BY GIVING THE TREATING PROVIDERS SUBSTANTIALLY MORE WEIGHT, BECAUSE TREATING PROVIDERS HAVE MORE FAMILIARITY WITH CLAIMANT'S CONDITION THAN AN IME DOCTOR.

Same citation as Issue I, except at Apx:5.

- VI. THE BOARD ERRED AS A MATTER OF LAW, COMMITTED CLEAR ERROR, WAS UNREASONABLE, OR ABUSED ITS DISCRETION, BY FAILING TO FIND THE CLAIMANT'S HAMSTRING INJURY WAS CAUSALLY RELATED TO THE UNDERLYING HEAD INJURY, BECAUSE DUE TO SAME HER BALANCE WAS OFF AND SHE SUFFERED MANY FALLS.

Same citation as Issue I, except at Apx:4, 5, and 9.

¹ Issue IV was V in the NOA, and V here was IV in the NOA.

PROVISIONS OF STATUTES AND OTHER AUTHORITIES

281-A:2 – Definitions (in pertinent part)

X-a. “Gainful employment” means employment which reasonably conforms with the employee’s age, education, training, temperament and mental and physical capacity to adapt to other forms of labor than that to which the employee was accustomed.

Source. 1988... eff. June 25, 2019; 251:1, 2, eff. July 17, 2019; 346:143, eff. July 1, 2019.

RSA 281-A:48 – Extent of Disability (in pertinent part)

I. Any party at interest with regard to an injury occurring after July 1, 1965, may petition the commissioner to review a denial or an award of compensation made pursuant to RSA 281-A:40 by filing a petition with the commissioner not later than the fourth anniversary of the date of such denial or the last payment of compensation under such award or pursuant to RSA 281-A:40, as the case may be, upon the ground of a change in conditions, mistake as to the nature or extent of the injury or disability, fraud, undue influence, or coercion...

II. Upon the filing of a petition and after notice to all interested parties and hearing, the commissioner shall enter an order, stating the reasons therefor, either:

- (a) Granting or denying an original award of compensation if none has previously been paid;
- (b) Ending, diminishing, or increasing the compensation previously paid or fixed by award, subject to the maximum or minimum provided in this chapter.

III. If a petitioner files for reducing or for ending compensation, the petitioner shall submit along with the petition medical evidence that the injured employee is physically able to perform his or her regular work or is able to engage in gainful employment. On the basis of such medical evidence, the commissioner may authorize suspension of further payments pending a hearing on the petition; otherwise, compensation shall continue on the basis of the existing award pending the hearing and any further order by the commissioner. All procedure on a petition under this section shall be the same as provided in this chapter for original hearings....

Source. 1988, 194:2. 1993, 142:2. 1998, 73:1, eff. Jan. 1, 1999. 2016, 294:1, eff. Sept. 19, 2016.

Lab 510.02 Rules Governing Review (in pertinent part)

(a) No carrier shall reduce or terminate benefit payments for reasons other than provided by statute, Lab 506.02 (p), or Lab 510.04 without obtaining prior approval of the commissioner pursuant to (b) through (d) below. ...

(c) Upon receipt of the petition and any objection to the petition, the commissioner shall:

(1) Review the medical reports issued since the date of the last decision by the commissioner or commissioner's representative to determine if there has been a revision of any full-time, light or full duty work release applicable to the employee;

(2) Review the limitation and restrictions placed upon the employee by the treating physician;

- (3) Review the documentation indicating the availability of work for the employee;
- (4) Review the employee's involvement in an approved vocational rehabilitation program; and
- (5) Review such other facts noted by the parties in their filings that might restrict the employee from returning to work.

(d) Based upon the evidence presented and the review pursuant to (c) above, the commissioner shall grant or deny the petition to reduce or terminate the employee's benefits.

(e) If either party disagrees with the commissioner's determination he or she may request a hearing in accordance with RSA 281-A: 43.

Source. #2264, eff 1-6-83; ss by #2935, eff 12-27-84, EXPIRED: 12-27-90

New. #5235, eff 9-27-91, EXPIRED: 9-27-97

New. #6631, INTERIM, eff 11-16-97, EXPIRED: 3-16-98

New. #6806, eff 7-18-98 (formerly Lab 509.02); ss by #7585, eff 10-30-01, EXPIRED: 10-30-09; ss by #11067, eff 4-1-16.

Lab 510.03 Diminished Earning Capacity

Pursuant to RSA 281-A: 48, in the absence of work opportunity and on the basis of medical and other evidence, the earning capacity of a partially disabled person shall be 60% of the difference between 80% of the statutory minimum wage under RSA 279 in effect on the date of injury using the average number of hours per week the claimant worked and the claimant's established average weekly wage at the time of injury, accordingly.

Source. #2264, eff 1-6-83; ss by #2935, eff 12-27-84, EXPIRED: 12-27-90

New. #5235, eff 9-27-91, EXPIRED: 9-27-97

New. #6631, INTERIM, eff 11-16-97, EXPIRED: 3-16-98

New. #6806, eff 7-18-98 (formerly Lab 509.03); ss by #8682, INTERIM, eff 7-15-06, EXPIRED: 1-11-07

New. #9019, eff 11-1-07; ss by #11067, eff 4-1-16.

§ 404.1567. Physical exertion requirements

To determine the physical exertion requirements of work in the national economy, we classify jobs as *sedentary*, *light*, *medium*, *heavy*, and *very heavy*. These terms have the same meaning as they have in the *Dictionary of Occupational Titles*, published by the Department of Labor. In making disability determinations under this subpart, we use the following definitions:

(a) *Sedentary work.* Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

(b) *Light work.* Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time.

(c) *Medium work.* Medium work involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds. If someone can do medium work, we determine that he or she can also do sedentary and light work.

(d) *Heavy work.* Heavy work involves lifting no more than 100 pounds at a time with frequent lifting or carrying of objects weighing up to 50 pounds. If someone can do heavy work, we determine that he or she can also do medium, light, and sedentary work.

(e) *Very heavy work.* Very heavy work involves lifting objects weighing more than 100 pounds at a time with frequent lifting or carrying of objects weighing 50 pounds or more. If someone can do very heavy work, we determine that he or she can also do heavy, medium, light and sedentary work.

CONCISE STATEMENT OF THE CASE and STATEMENT OF FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

Concise Statement of the Case:

On 11/20/17, Dr. Rancourt suffered a traumatic brain injury after falling on the ice at work, which resulted in severe lacerations to her head, including a small hole in the top of her head, and resulting in a concussion with severe post-concussion syndrome. Br:41, 45 (picture of head injury) Apx:11. Dr. Rancourt continues to suffer significant debilitating physical and mental processing (non-exertional) problems including, but not limited to, concentrating, confusion, lack of balance, trouble counting, headaches, double vision at times (even with special pyramid glasses), and cannot look at a computer screen for more than approximately 20 minutes at a time. Tr. 82:4-16. MP:54-57, 147-148, 234-237. On or about 07/30/19, she also suffered a hamstring injury from lack of balance due to the head injury, which was before the CAB under extent of disability.

Dr. Rancourt's injury was accepted as compensable, entitling her to TTD benefits which were undisputed until on or about May 14, 2020 when the Carrier requested a hearing on RSA 281-A:48, Review of Eligibility for Compensation, based solely on a March 2, 2020 IME.² Apx:23-34. See also, Glassman addendum. Apx:63-65. On July 7, 2020 the Claimant requested a hearing on RSA 281-A:15, Computing Average Weekly Wage, based on concurrent employment.

The DOL hearing was held 7/21/20 with a decision rendered 8/19/20, which denied Dr. Rancourt's request for an increase in her AWW/CR under RSA 281-A:15, and

² The DOL also denied the Carrier's requests under RSA 281-A:8 Employees Presumed to Have Accepted, and RSA 281-A:35, Voluntary Payment, which were not appealed to the CAB, and therefore require no further explanation here.

denied her hamstring injury was due to balance issues and therefore causally related to her original injury. Also, the DOL found Dr. Rancourt had a change of condition and reduced her benefits from TTD to DEC.³ Dr. Rancourt partially appealed on the issues of RSA 281-A:48 (extent of disability which included whether the hamstring injury was causally related), and RSA 281-A:15 (concurrent wages).⁴ The Carrier did not appeal issues it lost.

The *de novo* CAB hearing held on 1/6/21 generated a 2/5/21 decision, the subject of this appeal. The CAB found in favor of Dr. Rancourt on RSA 281-A:15, concurrent employment, but ruled against her on RSA 281-A:48, confirming her reduction to the DEC rate as of 7/21/20, the DOL hearing date for change of condition which the Carrier had to prove. The CAB also found that the hamstring injury did not arise from her head injury. The Carrier did not appeal RSA 281-A:15.

Dr. Rancourt timely appealed the CAB decision to this Court, however due to an error the video/zoom hearing recording was missing, and no transcript could be produced. Therefore, this Court granted a motion for remand to the CAB for the sole purpose of rehearing to produce a new transcript, which was held on 12.8.21. NHSC Order of 10/15/21. A transcript has now been produced and provided to this Court.⁵

³ Dr. Rancourt's AWW adjusted for concurrent employment was \$2,412.97, with a CR of \$1,447.78; her DEC rate based on the adjusted CR is \$1,232.02. Memos of Payment (2) Apx:61-62.

⁴ The CAB hearing was *de novo*, which makes the DOL reasoning irrelevant to this appeal. Therefore, Claimant states only the denial or granting re: each issue.

⁵ However, it was virtually impossible to do justice to the original hearing which took at least three hours, due to the passage of time, and because it is a very difficult task for all involved.

The CAB erred in finding against Dr. Rancourt on extent of disability and reducing her from TTD to DEC, as all competent medical evidence directed a finding in her favor, and therefore the Carrier did not meet its burden for change of condition. It also erred in finding against Dr. Rancourt that her hamstring injury was not causally related to her head injury, which she suffered due to her dizziness and balance issues, as multiple treating providers explained the causal relationship.

Statement of Facts Material to Questions Presented

Dr. Rancourt was VP of Academic Affairs for White Mountains Community College, and also taught online courses part time for DeVry University and Plymouth State. Br:41, 45. Tr. 12:17-18,13:9-11,33:15-16. Dr. Rancourt's TBI, also referred to as post-concussion syndrome, has persisted and been continuously disabling. As to extent of disability and entitlement to TTD, it was the Carrier's burden to prove that Dr. Rancourt had both work and earning capacities as of 7/21/20, the date of the DOL hearing. Even if Dr. Rancourt had a physical capacity equivalent to sedentary and/or light duty related solely to her hamstring injury, there was absolutely no competent evidence she had an earning capacity or work capacity related to her head injury, particularly due to her multiple non-exertional limitations related to her head injury.⁶ Dr. Rancourt has multiple treating providers who continued to place her in an out of work status due to her head injury, which are uncontroverted, because although the IME doctor gave her a limited work capacity based on her physical injury to her hamstring, he was silent as to Dr. Rancourt's work capacity based on her head injury and non-exertional limitations, like balance, seeing and hearing.

⁶ Dr. Glassman, in an IME addendum, tried to recast his release as applying to her head injury but was clearly based only on her leg injury, as discussed more fully below.

In a last-ditch effort to say something about restrictions due to the head injury, presumably due to a repeated request from the Carrier, the IME doctor issued an addendum with a conclusory statement saying he meant the physical capacity applied to the head injury. However, this is not credible given the remainder of his reports, which are discussed in greater detail below. Apx:25-34. It also specifically does not clarify the non-exertional limitations, making these of the treating providers essentially uncontroverted.

Furthermore, this IME doctor suggested Dr. Rancourt see concussion specialists, such as physical, occupational, speech and cognitive therapists, which implied he was not a concussion specialist. (578-79).⁷ Dr. Rancourt did just that, saw those experts to whom Glassman deferred, as treating providers. These experts, many of whom included objective tests, overwhelmingly found that Dr. Rancourt continued to be disabled from working due to her head injury. For example⁸, shortly after the injury:

11/22/17 WCMF doi 11/20/17 HA (headache), neck pain, dizziness, nausea, concussion / causal relationship of injury to employment (“causal”) / Out of Work (“OOW”)(165) Lockard MD

11/22/17 Recent head injury. Loss of consciousness: yes briefly. Headache: severe, through the R side of head and at the point of impact, frequency: all the time. Aggravating factors: turning or leaning head to R. Positive for nausea, photophobia, dizziness.... (166-7) DX: concussion with loss of consciousness. (169) Lockard MD

In addition, the injury caused symptoms from early on that persist to this day, and at least five treating providers have consistently reported she is not released to work, therefore having no work capacity:

12/12/17 Certification of Health Care – Employee’s Serious Health Condition (Lockard MD)
Condition commenced 11/20/17. Probable duration undetermined (147)

⁷ “As far as further treatment, it is felt that there is a need for further treatment which would include being seen by concussion specialist, being referred for specific physical therapy, occupational therapy, speech and cognitive therapy for concussion. In addition, we see that she has ... hearing voices and hallucinations.” (MP:578-579) (IME, 3/6/18)

⁸ This is only a snapshot of the voluminous and longitudinal medical record, recited here in one place for the Court’s convenience. Dr. Glassman’s IMEs are discussed in more detail in Issues I below.

Unable to perform: reading, directing and managing academic instruction, programs (*rest illegible*) (147)

Along with the head laceration pt sustained a severe concussion which has **caused the following sx's: headaches, photophobia, phonophobia, dizziness, fatigue reduced executive cognitive function, reduced problem solving ability** (147) This patient is still suffering from the aforementioned concussion symptoms. When these symptoms are resolved, she will likely be able to return to work – but the duration of her symptoms is as of yet, undetermined. (148)(**emphasis added whenever bold type used in medical records chronology**)

01/29/18 FU head injury. Depression: chronic, but since her head injury symptoms have worsened. Insomnia: hard to fall asleep. Fatigue/loss of energy. Auditory hallucinations – hearing a man's voice daily x 2 weeks, it is not telling her negative things, but it is bothersome in that it keeps her up at night. Neurological: still with frontal HA and scalp numbness (130) Depression: possibly with psychotic features due to her protracted concussion symptoms **and loss of executive function. Head injury: still severe functional impairment cognitively.** Recommend rest, see counselor if possible. (132)Lockard MD

03/28/18 WCMF doi 11/20/17 / post concussion syndrome, hallucinations / causal / OOW(113) Lockard MD

03/28/18 ...slow recovery of executive cognitive function and has developed auditory hallucinations (114) headache: throbbing, not every day, multiple times per week. Still having auditory hallucinations that wake her up at night... (115)It is unlikely that the voices are from the concussion – but it is possible that the AVH's are a manifestation [sic] of e [sic] temporal lobe seizure d/c from the head injury. (116) ...pt to continue to rest, avoid caffeine. Depression: with psychotic features. Will have her increase the zypreza to 15 mg at night. (117)Lockard MD

05/11/18 Neurology Consult Note: Auditory hallucinations. **In the context of recent head trauma and concussive symptoms thereafter, patient would be at risk for temporal lobe damage that could be a risk factor for auditory seizures.** She reports resolution of the auditory hallucinations while on zypreza...patient does continue to have concussive symptoms, though improving. She notes right leg sensory and motor deficits...her exam does show mild weakness and sensory deficit in the right leg. (225)Eleftheriou MD

05/24/18 WCMF doi "see prev" / persistent recurrent HA's, fatigue, TBI / causal / OOW(106) Lockard MD

- L leg drags per neurologist...the doc is concerned that due to her prolonged symptoms, that she may have a bone chip from her skull embedded in her brain cause her HAs...so she has a MRI scheduled. (107)Lockard MD

06/27/18 WCMF doi "see previous" / persistent HA, poor balance, auditory hallucination / causal / OOW (94) Lockard MD

06/27/18 confusion: has some trouble processing multiple instructions...hearing voices again -- which has been helped by the increase dose of Zyprexa. **Now having balance problems -- has fallen -- feels less steady** (95) Headaches chronic due to TBI, may use vicodin once at night prn. Balance problems: due to TBI and/or deconditioning. (97)Lockard MD

08/06/18 NEUROLOGY CONSULT NOTE.⁹

Post concussive syndrome: Symptoms started after a fall in November 2017...since then she **developed symptoms of headaches, sound and light sensitivity, difficulty multitasking, lack of concentration which is very much not like her. She was diagnosed with a concussion. ...she then developed auditory hallucinations... Since the last visit, she reports that the auditory hallucinations are now reported as mumbled sounds.(216) May not be able to RTW after head injury.** PHYSICAL EXAM: She is anxious. Head shows healing wound on left head vertex with slight indentation. **She is photosensitive.** (217) Eleftheriou MD (*note this "healing wound" is nine months after the injury*).

09/04/18 WCMF doi 11/2017 headaches, decreased focus, concentration, forgetful / causal / OOW (82)Smith DO

09/04/18 fu concussion from fall in Nov 2017, here with husband. Persistent sx's: **HA's frontal, daily, "off balance" with head motion, light sens[itivity]. (although better), decr[eased] concentration/focus, more forgetful, cannot multitask, blurred vision has resolved.** Still unable to work/WC visit today.(82.1) TBI injury with loss of consciousness with persistent HA's and lack of focus. Refer to ST and trial of Topirimate for HA's,fu 1 mo. (82.3)Smith DO

10/04/18 WCMF doi 11/2017 / HA, concentration, forgetful / causal / OOW (72)Smith DO

11/12/18 WCMF doi 11/20/17 headaches, lower focus, concentration, forgetful / causal / OOW (67)Smith DO

01/02/19 WCMF doi 11/20/17 / double vision, light sensitivity, brain fog / causal / OOW (272) Pruszenski OD, FCOVD¹⁰

(All provider office notes going with the workers' compensation forms will not be repeated, but the page numbers are near the ones referenced for the forms.)

⁹ Chief Complaint: FU for auditory hallucinations, postconcussive syndrome. MRI brain was done which was unremarkable for any focal lesions, parenchymal or extraparenchymal traumatic injury that was evidence, including temporal lobe pathology...Unclear etiology of auditory symptoms, may be postconcussive in nature and would expect to improve with time...

¹⁰ FCOVD stands for "Fellow of the College of Optometrists in Vision Development." The College of Optometrists in Vision Development (COVD for short) is the national organization dedicated to vision development and vision therapy. ... it shows they have a high level of expertise. To become a FCOVD a doctor must have a minimum of 5 years experience, attend continuing education in the area of vision therapy, submit written work, be mentored by an experienced vision therapy doctor, and finally pass an oral interview. <https://www.insightvisionoc.com/vision-therapy/faao-fcovid-stand/>

01/21/19 WCMF doi 11/20/17, double vision, headaches, brain fog, light sensitivity / causal / OOW (63)Smith DO

03/06/19 AUDIOLOGICAL EVAL: referred by Smith DO due to hearing loss. She experiences dizziness and reports that her physicians think it may be related to her vision. She notices difficulties hearing since the accident and feels that her speed of processing auditory information is slower. . . **Pure tone air and bone conduction thresholds revealed a mild sloping to moderately-severe high frequency sensorineural loss in both ears.** (434) RECOMMENDATIONS: She is a candidate for binaural hearing aids if she finds that she is starting to have significant listening difficulties. (435)Weihsing, PhD, CCC-A, FAAA Audiologist *Note: This is an “objective” test.*

03/22/19 WCMF doi 11/20/17/ double vision, light sensitivity, brain fog / causal / OOW(267) Pruszenski OD, FCOVD

05/23/19 WCMF doi 11/17/ concussion, HA, concentration, forgetfulness / causal / OOW(54) Smith DO

09/10/19 WCMF doi 11/2017 head injury/concussion; causal/OOW(23) Smith DO

10/07/19 Due to concussion injury she is highly sensitive and care needs to (414) be taken if she is going to be in the gym. Noise, commotion, movements, etc. bother her, spinning treadmill caused her to become nauseous and we needed to move away. (415) Mailman LPTA

01/14/20 Physician’s Certification – Smith DO SRMG (S50) (set forth in issue I)

01/29/20 ...easily distracted due to prior head injury. PMH of balance difficulties from DAI (Diffuse Axonal Injury – head injury) Now due to balance loss, at end of July 2019 she sustained a work related injury after side-stepping into a small boat. (19/31) This case is moderately complex due to her significant PMH of a brain injury (diffuse axonal injury) and its effect on her ability to perform safe functional mobility, remain compliant with recommendations. (22/31) Lane PT

02/03/20 WCMF doi 11/20/17 **head injury, recent hamstring tear due to fall/poor balance and spatial relations due to original head injury / OOW (10) Smith DO**

02/21/20 SPEECH THERAPY – Patient needs significant amount of reminders to review strategies daily to increase ability to predict when specific strategy may be needed.(294) Browning, MS, CCC-SLP (Certificate of Clinical Competence (CCC) Speech-Language Pathology (SLP).

The extent of disability should be left to the experts treating Dr. Rancourt, just as Dr. Glassman suggested in his earlier 3/6/18 IME cited at more length below, stating she should “see

a concussion specialist”, physical therapy, occupational therapy, speech and cognitive therapy. (Apx:79-80). As Glassman essentially defers to the experts on concussions, and does not discuss limitations due to her ongoing problems, but her treating providers, concussion specialists, Eleftheriou MD; Pruszenski OD, FCOVD; and Browning, MS,CCC-SLP do, the CAB should rely on them. For example, these records are after Glassman’s last exam of 3/2/20:

05/15/20 SPEECH THERAPY – **Pt has been compliant with always having ear plugs/glasses to decrease auditory/visual distraction....she has felt increased “fuzzy” brain; more word finding issues and difficulty with tasks since not coming to treatment the past 2.5 months.** (289)Browning, MS, CCC-SLP *(note: treatment delayed due to covid)*

06/05/20 SPEECH THERAPY – Pt has had a bit of a regression secondary to not using her preplanning strategy with her external aid. **Pt overextended cognitive ask of filling out Medicare Social Security disability forms as well as collecting records of expenses, taxes and other pertinent information for her attorney all in 1 day. Since then she has experienced increased word finding difficulty increased irritability and is feeling very overwhelmed.** SUBJECTIVE: pt was very distracted first part of telehealth visit secondary to not have visual. She was able to focus better with my image present. (281)Browning, MS, CCC-SLP

06/24/20 WCMF doi 11/20/17 concussion/causal/OOW(S6)Pruszenski OD, FCOVD

06/24/20 **Struggling significantly with depth perception, light sensitivity, noise (“thunder in ear”) and the ability to decipher what she is looking at... Having balance issues, catches herself running into things...therapeutic specs are better (can read up to an hour!) still struggling to get used to DV – they make her nauseous. Pt states she fell again in September 2019, Dr. Chen...discussed with the pt she will likely experience more falls because of TBI. Headaches frontal today 4-5/10. ...cannot see to teach online course.** (252/S7) **ASSESSMENT: concussion without LOC; Diplopia; convergence insufficiency; other irregular eye movements; vertical heterophoria; Esophoria(254/S9)** Pruszenski OD, FCOVD(from “Diplopia” on are objection signs of her injury)

07/13/20 WCMF doi 11/20/17 head injury – recent hamstring tear due to fall/poor balance...special relations / causal / OOW (2.1)Smith DO

07/13/20 WC fu. Still very off balance, fall down stairs 3 wks ago. L lat ankle pain and swelling persist. Seeing Victory Visual center for eye exercise. **Still some vertigo/nausea with head motion...using pyramid glasses 15 min/day– helps her read...gaining some balance and ROM back (2.2)** fall was secondary to pt’s chronic head injury sx’s – she has poor balance/spatial relations (2.3) Cont PT, ST and visual reha. FU 3 mos. (2.5) Smith DO @ SRMG

7/21/20 DOL Hearing (date at which time condition/extent of disability is judged).

Claimant’s speech language pathologist, gave a comprehensive report about her condition:
07/12/20 BROWNING TREATING EXPERT REPORT(synopsis).

- It is my opinion that Fran suffered a coup contrecoup injury to her brain with axonal shearing (Apx:12)
- This causes a kind of bruising; one which does not generally appear on CT or MRI images, and which often results in transient headaches, nausea, and impairment of cognition(Apx:12)
- long term symptoms of brain injury result. These often include impairment of attention, memory and mental efficiency and sometimes include alterations in mood regulation (e.g., impulsivity, over-reaction, dis-inhibition).
- concussion often alters balance, quickness of protective reflexes
- Fran continues to need cues and prompts to put all of the learned strategies into daily living (Apx:12)

07/23/20 WCMF doi 07/30/19 Left hamstring/causal/OOW due to concussion(S55) Chen MD

12/23/20 Amy Pruszenski OD, FCOVD – TREATING EXPERT REPORT (synopsis)

Question B: With regard to Dr. Rancourt's head injury of 11/20/17 what is Dr. Rancourt's current diagnosis with respect to her vision, including double-vision, light sensitivity, amount of time she can spend within an 8 hour period in front of a computer. Apx:86

Answer B: Current diagnoses with respect to the head injury of 11/20/2017 are as follows:

Diagnosis	Description
1.SO6.OSOD	Concussion without loss of consciousness, subsequent encounter
2.H53.2	Diplopia (double vision)
3.H51.11	Convergence insufficiency (eyes under cross, which is typical of head injury)
4.H55.89	Other irregular eye movements

Apx:15

Question C: Please state as of 7/21/10 and continuing, whether Dr. Rancourt has any work capacity, and expand upon your workers’ compensation form dated 6/24/20. Please describe the reasons for your opinion in as detailed a manner as possible.Apx:86

C. It is my professional opinion that Dr. Rancourt is not able to return to work because her poor eye coordination and eye tracking make reading and computer work challenging, inducing severe headaches, brain fog, dizziness, nausea, and visual confusion. These types of eye coordination issues may cause double vision, or loss of place, skipping or adding words. In addition, because vision guides our actions, she has issues with hitting the right keys, so accuracy and consistency would be a problem in performance, and she would have difficulty remembering things. Her poor depth perception due to the eye coordination issues also make her a frequent fall risk when moving around, consistent with what the orthopedic surgeon indicates. Apx:15

Question D: Please state whether you believe it was more probable than not due to Dr. Rancourt’s head injury and resulting symptoms of double vision, light sensitivity, and balance issues, she fell on 07/30/29 when attempting to get into a boat that she and another witness testify was tied (both bow and stern) to a dock. Apx:86

Answer D: It is my professional opinion that poor eye coordination (convergence insufficiency and exophoria) like Dr. Rancourt suffers due to her head injury on 11/20/2017 can definitely give her double vision, light sensitivity and visual confusion, leading to misjudging where she and other things are in space/balance issues, which can more probably than not cause falls such as she experienced while trying to get into the boat on 07/30/2019. Apx:15

Question E: What other vision problems is she suffering from due to her 11/20/17 injury?

Apx:86

Answer E: ...In addition, the effort it takes to perform basic visual functions can induce extreme fatigue and pain/headache/dizziness. Because vision is processed in our visual system in the brain, Dr. Rancourt confuses what she sees, sometimes – this may depend on her fatigue level or how much is going on in the environment around her. Apx:15

These reports reflect the specialists' opinions and treatments, and include objective tests, like eye tracking. The CAB should not have determined that the Carrier met its burden on change of condition, and should have reinstated Dr. Rancourt to Temporary Total Disability.

As to the issue of the hamstring injury, multiple treating doctors opined that said injury was related to her head injury, due to her balance and vision issues. Those medical records are more fully detailed in Issue VI below.

SUMMARY OF ARGUMENT

The CAB erred in finding the Carrier met its burden of proof on change of condition, that Dr. Rancourt had work and earning capacities, as of the DOL hearing date of 7/21/20. This was an accepted claim, and temporary total disability (“TTD”) was paid up to 8/19/20, the date of the DOL lower-level decision. The primary issues appealed are whether the Carrier proved Dr. Rancourt had a work and an earning capacity as of 7/21/20, which justified the CAB downwardly adjust her benefits to DEC, under RSA 281-A:48 and LAB 510.03, which request was based on an IME of Glassman dated 3/2/20, with addendum.

A reasonable, or even cursory, reading of the medical records, prove Dr. Rancourt had no work or earning capacity due to her multiple exertional and non-exertional limitations as set forth in the concise statements above, with her disability being supported by at least five treating providers. Although the CAB apparently required objective testing to show on-going disability, there is no such requirement to prove disability in an accepted, or any, workers’ compensation case. However, objective evidence, in addition to the hole in the top of her head which took many months to heal (Apx:11), did exist, as explained by her treating providers, including concussion experts, the type that Glassman recommended. They fully explained their testing and Dr. Rancourt’s condition, disability and inability to work. In fact, even Dr. Glassman’s exam showed objective testing supportive of disability. Apx:29.

Other errors include misstating some of the factual evidence, which even if as stated should have nothing to do with this case. Whether she went on a boat ride in Maine 1 or 3 times, and whether she lost consciousness at the time of the injury are not relevant to a finding on extent of disability. The errors also included failing to give the required greater persuasive weight to the treating physicians, and particularly failing to recognize the limits of the Glassman

opinions, since he did not fully describe the symptoms of her ongoing head injury and he suggested she see concussion specialists, which she did. Said providers treated Dr. Rancourt extensively and were more familiar with her condition than was Glassman, and were of the opinion that Dr. Rancourt continued to be totally disabled, and should have been given greater weight.

In addition, the medical evidence that her hamstring injury was related to her head injury was basically uncontroverted, as Glassman's opinion was equivocal thereon, noting only the injury was not "directly" related when the claim was an indirect relationship, that it was caused by symptoms from the original head injury. Multiple treating providers found the hamstring injury to be related, and their opinions should have been accepted as uncontroverted due to Glassman not fully addressing the claim.

Thus, the CAB clearly misconstrued the record and its rulings and findings are in error, unsupported, and unreasonable, and should be reversed, with TTD reinstated, and the hamstring injury deemed related to the original injury.

I. THE BOARD ERRED AS A MATTER OF LAW, COMMITTED CLEAR ERROR, WAS UNREASONABLE, OR ABUSED ITS DISCRETION, IN FINDING THE CARRIER MET ITS BURDEN OF PROOF UNDER RSA 281-A:48, THAT CLAIMANT HAD A CHANGE IN WORK CAPACITY AND AN EARNING CAPACITY WHICH JUSTIFIED A REDUCTION IN BENEFITS FROM TEMPORARY TOTAL DISABILITY (TTD) TO THE DIMINISHED EARNINGS CAPACITY RATE ("DEC"), WHEN THE OVERWHELMING WEIGHT OF THE EVIDENCE, INCLUDING THAT HER DOCTORS HAD NOT RELEASED HER TO WORK AT THE TIME OF THE DOL HEARING (OR SINCE), SHE CONTINUES TO SUFFER SERIOUS DEBILITATING INJURIES DUE TO HER HEAD INJURY, AND AN EARNING CAPACITY REQUIRES BEING ABLE TO COMPETE IN THE OPEN LABOR MARKET, WHICH ALL SUPPORTED CONTINUED TEMPORARY TOTAL DISABILITY.

A. Dr. Rancourt Has No Work or Earning Capacity Under the Law

Dr. Rancourt has no work capacity or earning capacity, as is clear from her medical records and as defined by law. A change in condition under RSA 281-A:48 requires that the CAB review all of the medical and other evidence, including testimony, and make findings on both work capacity, and if there is any work capacity then determine whether there is an earning capacity. The CAB should not have reached earning capacity.

“Work capacity and earning capacity measure different things. Work capacity refers to whether the claimant may now be able to perform some kind of work, see *id.*, while earning capacity refers to the claimant’s ability to compete in the open labor market. See *Appeal of CNA Ins. Co.*, 148 N.H. 317, 323-24 (2002). Although work capacity may be relevant to earning capacity, it is not dispositive. *Appeal of Jackson*, 142 N.H. 204, at 206.” *Appeal of Woodmansee*, 150 N.H. 63, 68 (N.H. 2003). “The test is whether the worker is now able to earn, in suitable work under normal employment conditions, as much as he or she earned at the time of injury. See *Appeal of CNA Ins. Co.*, 148 N.H. at 317.” *Woodmansee* at 67-8. The Court went on as follows:

As we have previously explained, ‘The Workers’ Compensation Act is designed to compensate workers who suffer a loss of earning capacity as a result of a work-connected injury.’ *Appeal of Normand*, 137 NH 617, 621 (1993). Thus, while ‘[t]ypically, the ‘change in condition’ which justifies reopening and termination of disability benefits is ordinarily a change, for better or worse, in claimant’s physical condition,’ *Appeal of Hiscoe*, 147 NH at 230 (quotation and brackets omitted).

Appeal of Woodmansee, 150 N.H. 63, 67 (2003).

The Court has also ruled:

...we conclude that ‘gainful employment’ and ‘earning capacity’ do not have the same meaning under RSA 281-A:48. In *Woodmansee*, we defined ‘earning capacity’ as ‘an **objective measure of a worker’s ability to earn wages**’ and ‘**whether the worker is now able to earn, in suitable work under normal employment conditions, as much as he or she earned at the time of injury.**’ *Woodmansee*, 150 NH at 68; see Larson, *supra*. We also held that a determination of a claimant’s earning capacity must reference

‘the worker’s overall value in the marketplace,...taking into account such variables as his age, education and job training.’ *Id.* (brackets and quotation omitted).

Appeal of Carnahan, 160 NH 73, 80 (NH 2010)(emphasis added).

The term “gainful employment” means “means employment which reasonably conforms with the employee’s age, education, training, temperament and mental and physical capacity to adapt to other forms of labor than that to which the employee was accustomed.” RSA 281-A:2. There is no medical evidence that Dr. Rancourt could return to any employment, much less her regular employment as a college VP. Dr. Rancourt’s multiple treating providers clearly outline her exertional and non-exertional limitations, over a long period of time, concluding she is totally disabled from working; whereas, Glassman whose first two IME’s also found no full time work capacity, failed to consider her nonexertional limitations during her third IME, the one used to request the hearing. The medical evidence is further described and argued below.

B. Dr. Rancourt Continues To Be Disabled Due to Her TBI and Symptoms

It is the Carrier’s burden to prove that Dr. Rancourt had a work and earning capacity as of 7/21/20, the date of the DOL hearing below, which they have failed to do. Even if Dr. Rancourt had a physical capacity equivalent to sedentary or light duty related solely to her hamstring, there was no evidence of earning or work capacity related to her head injury, as discussed at length above. Instead, the evidence overwhelmingly proved she disability from working.

Dr. Rancourt’s significant debilitating non-exertional physical and mental processing limitations and restrictions included, but were not limited to, problems concentrating, confusion, trouble counting above 10, severe headaches, blurry vision, double vision at times even with

special pyramid glasses, light sensitivity, cannot look at a computer screen for more than approximately 20 minutes at a time, loss of sustained computer skills, memory loss, attention deficit, speech deficit, poor recall, poor balance and depth perception and frequent falls due thereto, nausea, unable to be in groups of more than a couple people due to noise, auditory hallucinations, cannot multi-task, insomnia, fatigue/loss of energy, loss of executive function, loss of problem solving ability. See Br:11-12,14-20. Concise Statement Case/Facts, citing medical records not repeated here, including MP:2.5,MP:54-57,and S:2,S:50. See also, Tr.100:5-15. Whether Dr. Rancourt could lift 10-20 pounds occasionally was irrelevant to her former work, or any similar highly skilled position.

On 1/14/20 Smith explained how the TBI injury effects Dr. Rancourt:

- Diagnosis: TBI, speech deficit, hamstring tear, concussion, dizziness, Axonal shearing*
- Severity of impairment: Severe memory loss, attention, speech deficit, balance: chronic and permanent
- Limitations on sitting/standing/walking/lifting: Poor balance/depth perception, frequent falls
- Limitations to ADL: Needs assistance with cooking, washing, hygiene, dressing, poor balance
- Residual functioning: Cannot sequence events, plan activities, loss of computer skill
- Social/behavioral limitations: short attention span, mood changes, easily distracted

01/14/20 Physician's Certification – Smith DO SRMG (S50)(*note, “axonal shearing” is a physical injury to the brain, which is objective and diagnosed by multiple treating providers.)¹¹

Also, Dr. Rancourt testified that she has to leave a document she is reading after 15 minutes because her brain shuts down...and then she has to rest for at least an hour (Tr. 76:8-18,

¹¹ Diffuse axonal injury is the shearing (tearing) of the brain's long connecting nerve fibers (axons) that happens when the brain is injured as it shifts and rotates inside the bony skull. DAI usually causes coma and injury to many different parts of the brain. The changes in the brain are often microscopic and may not be evident on computed tomography (CT scan) or magnetic resonance imaging (MRI) scans.
<https://www.hopkinsmedicine.org/health/conditions-and-diseases/traumatic-brain-injury#:~:text=Diffuse%20axonal%20injury%20is%20the,different%20parts%20of%20the%20brain.>

21-77:16). Apx:6-7¹², MP:2.5 (7/13/20), MP:54-57 (5/23/19), and S:2 (12/23/20). In fact, during the original zoom hearing she mostly looked away from the computer, used special glasses and had to take a break to lie down. (Counsel's recollection since no recording.) Dr. Rancourt testified about needing to rest frequently during the day, and not being able to use a computer very long.

Dr. Rancourt's husband, Paul Chandler, testified as did her friend Jeff Schall. Her friend Suzanne Wasileski testified by stipulation, and indicated socializing with Dr. Rancourt was entirely different post-accident; she was distracted, could only meet in small groups, could not keep incidents she was relating straight, and stamina was less than an hour, whereas before she could tell jokes and stories, and her stamina was fine. Br:42, Joint Stipulation of Wasiliski Testimony (Apx:57-60). Mr. Chandler testified that after Dr. Rancourt's injury, she suffers from balance issues, her depth perception has been impacted to the point he had to install a railing on the outdoor stairs because of her inability to judge how far down or up each stair was causing her to trip and/or fall; extremely forgetful i.e. leaves the stove on/forgets to turn it off; and will start something, become distracted, and forget what she was working on. She needs a quiet environment; suffers from frequent headaches, and rarely uses the computer. Tr:128-134.

Mr. Schall testified that after her injury, she has a hard time focusing on conversations, often drifting off topic; no longer articulate and/or coherent; has depth perception issues, trips a lot, especially on stairs and once at a convenience store on uneven

¹² Dr. Rancourt has to rest during the day, can't look at a computer screen more than 20 minutes, dizziness, balance issues, problems with depth perception, double vision, headaches, memory issues, and all of the other problems expressed herein and as set forth in the medical records. S:2, S:50.

pavement. Tr:147-154.

Dr. Rancourt and Mr. Schall testified about their walks, approximately ½ mile around her home property, that she used a walking stick, and was to try to walk as therapy for the hamstring injury. A claimant is not expected to be house-bound, with no attempt to exercise or go places, especially where depression is involved. This is another example of CAB focus on physical activities having nothing to do with the relevant nonexertional restrictions. Dr. Rancourt is still disabled from working due to her head injury and persistent symptoms, as supported by the medical and lay testimony.

C. Dr. Glassman’s IME of 2020, and the Two Prior thereto, Show That Dr. Rancourt Has No Work or Earning Capacity

The CAB misconstrued the IME reports of Glassman, and did not read them in context.

The CAB stated as its primary basis for change in condition, as follows:

The opinion of Dr. Glassman, after having performed three IME’s on the claimant are persuasive in this matter. Dr. Glassman does find that the claimant is capable of returning back to her work with restrictions. The claimant had indicated that she was 60% improved as of the release to return to work on March 2, 2020. Dr. Glassman does agree that her neurological issues are related to her date of injury; however, he does not feel that there is a causal relationship between the November 20, 2017 injury and the left leg injury that was caused by the fall in the boat.

Br:44

First, the number of IME examinations does not render an IME doctor, hired for a specific opinion, as persuasive. If the number of exams was the criteria, then the treating providers here, who treated her dozens of times, would win by sure volume. As discussed below, treating providers should be given more weight due to their greater familiarity with the Claimant, and no doubt because they are more credible, not hired guns used repeatedly by carriers with an expected result.

Second, Glassman did not find she could return “**back to her work** with restrictions” as

stated by the CAB. He said “[t]he claimant does not have the ability to return to work full duty. It is felt that she could work full-time modified duty. It is felt that she can perform partial duty work.” MP:560 (3/2/20). He said basically the same in his addendum report. MP:552 (5/20/20). Not only did he fail to explain what “modified” or “partial” duty work was, he primarily opined on her physical limitations regarding lifting, which has nothing to do with her TBI. In fact, although citing some of the primary disabling nonexertional limitations¹³, he fails to note the restrictions related thereto, which multiple treating providers had expounded upon, and are the primary disabling conditions. Nonexertional demands of work are defined as "postural (balancing, climbing, stooping, crouching, kneeling, crawling); ...visual (near acuity, far acuity, depth perception, accommodation, color vision, field of vision); communicative (hearing, speaking). SS Program Operations Manual System – The Medical-Vocational Guidelines, Apx:95. Dr. Rancourt suffers from many of these as limitations, some of which Glassman acknowledges even in his last report. Taking the pertinent parts of the Glassman IMEs in order:

(1) 3/16/18 Glassman- PHYSICAL CAPABILITIES: lift and carry 10lbs occasionally, 5lbs frequently 4 hrs a day, 3 days a week. Occasional bend, kneel squat, climb, stand, walk, reach below waist level, above waist level; frequent sitting, reach out waist level. **As per her job as a VP of academic affairs, her concentration and memory are crucial and these are significantly affected in this case** (579) MMI: not at MMI. Reassessment could be determined 3 mos from now. (579) She thinks she could possibly teach online course 2-3 hours a week. She has a temporary partial disability at this time. (580) ...majority of her symptoms are causally related to the injury dated of 11/20/17. Please note there appears to have been a pre-existing history of anxiety, which likely has been temporarily exacerbated at this time. (580) The claimant cannot return to full duty work at this time but could do partial duty modified work part time. (581)

¹³ *Nonexertional Impairment*. Any impairment which does not directly affect the ability to sit, stand, walk, lift, carry, push, or pull. This includes impairments which affect the mind, vision, hearing, speech, and use of the body to climb, balance, stoop, kneel, crouch, crawl, reach, handle, and use of the fingers for fine activities. *Nonexertional Limitation*. An impairment-caused limitation of function which directly affects capability to perform work activities other than the primary strength activities. SSR 83-10: Titles II and XVI: Determining Capability to do other work – the Medical-Vocational Rules of Appendix 2. https://www.ssa.gov/OP_Home/rulings/di/02/SSR83-10-di-02.html

Glassman IME, 3/16/18 (with page number references);Apx.80-82.

Dr. Glassman correctly notes that concentration and memory are crucial to her work as VP. He says she could try from 6-12 hours per week, but that is not a full time job, and it doesn't take into account her nonexertional limitations. Glassman's second IME on 5/22/19 stated the following:

The claimant does not have the ability to return to full duty work at this time. It is felt that she could be evaluated for partial duty work, working 3-4 hours a day, 2-3 days a week. She would likely need to be able to take a rest break of 5-10 minutes every 1-2 hours as needed. **As far as reading or computer work, it would be recommended to avoid more than 30 minutes of computer work per hour and this likely would be best broken up in 10-15 minute segments.** Lifting up to 10 lbs maximally and 5 lbs frequently would be appropriate. Therefore, this should actually be sedentary duty. Reevaluation after working 2 weeks would be appropriate to determine any further progress. (570)

Glassman IME, 5/22/19 (with page number references); See also Apx:72

Again, this is not a full-time work release, nor does it account for her nonexertional limitations, except the severe reduction of hours. A trial of 6-12 hours per week, sedentary with restrictions, does not reflect an actual work and earning capacity, particularly not in a competitive labor market.

In Glassman's third IME dated 3/2/20, he stated as follows:

Q: What are Claimant's **physical capabilities (558) (emphasis added¹⁴)**

(Note: Then he answers as to her physical capabilities, not her mental capabilities):

A: she has the ability to lift 20lbs occasionally, 10lbs frequently during the course of an 8-hr work day, 5 days/week. Bending, kneeling, squatting, and climbing can be done occasionally. Sitting can be done frequently. Standing, walking, driving can be done occasionally. Reaching below and below waist level occasionally. Reaching at waist level frequently. Fine motor activities of fingering, handling, grasping can be done without limitations bilaterally for the UE. (559)

Q: Reached MMI?

¹⁴ Obviously, the Carrier did not ask him a question that they did not want an answer to, which was what are her restrictions due to her head injury.

A: **C has reached MMI...as of two years post injury, which would have been 11/20/19 (559)**

Q: Has C returned to pre-accident status?

A: **She has not returned to her pre-accident status. She still has ongoing deficits and ongoing symptoms. (559)**

Q: Has treatment been reasonable and necessary?

A: **postconcussion syndrome, treatment has been reasonable, medically necessary and causally related to doi 11/20/17 (559)**

Glassman IME, 3/2/20 (with page number references); Apx:31-33.

Again, this does not address her nonexertional limitations, which must be taken into account. Then, the Carrier, in one last attempt, requests an addendum report, which was issued on 5/20/20:

- DOI 11/20/17...At the time of the independent medical re-examination I felt the claimant had a diagnosis of post-concussion syndrome and posttraumatic vision syndrome.(551)
- I did not feel that there was any direct causal relation between her left leg complaints and injury of 11/20/17.(551)
- It was felt that she was at MMI for her post-concussion syndrome and she was at MMI.(551)
- She had a full-time light duty work capability of lifting 20lbs occasionally, 10lbs frequently, 8 hrs/day, 5 days/wk. **I did not feel that she would be able to RTW full duty, but she could work full-time modified duty.(552)**
- ...the restrictions that I documented in my IME reexamination from 3/2/20, were specifically for her post-concussion syndrome. There were not for any orthopaedic issues or diagnoses. (552)

Glassman IME, 5/20/20 (with page number references); Apx:63-64.

Dr. Glassman did not provide any description of what modified or limited duty was, and this opinion is simply not credible. The lifting restrictions have no bearing on the nonexertional limits due to her brain injury, although he apparently confirmed with objective testing, that she continued with post-concussion syndrome as well as posttraumatic vision syndrome. (MP:552).

For example, in his report of 3/2/20, he stated as follows:

Extraocular muscles were intact. Convergence testing was positive at 10 inches for blurred vision. Head rotation maneuvers and vestibular eye movements are notable for

some slight nausea.¹⁵ Balance testing was done for 2 seconds to 10 seconds on the hard surface today. She said 'they are working on that at physical therapy.' As far as a Mini-Mental Status exam, she was alert and oriented x4. She had two out of 3 object recall at one minute. She got the colors correct, but the objects are only two out of three. Recall was three out of three at five minutes. Ambulation showed some slight left leg antalgia.

Glassman IME, 3/2/20 (with page number references); Apx.29.

In plain words: upon his testing her vision it was blurred at ten inches, she became nauseous during the testing and had a poor memory to recall three objects, clearly not functioning at a level to perform any gainful employment, particularly her regular, or a similar skilled job, with a very high combined AWW of \$2,412.97. Apx:61-62. In addition, although Dr. Glassman said in his addendum that the restrictions he documented in his 3/2/20 exam were for her post-concussion syndrome, this is hard to square.(552) One cannot reasonably read the totality of his reports, and believe that Dr. Rancourt's only restrictions are 10-20 pounds of weight, nor that Glassman believes that. He does not explain her limitations on a computer, balancing, resting, and all of her other nonexertional limitations and restrictions, as her treating physicians have, dozens of times. For example, how the blurred vision, and nausea when focusing at 10 inches would impact her employability. Dr. Rancourt's providers should be considered uncontroverted as to her limitations, lack of work and earning capacities, and disability.

D. Conclusion to Issue I¹⁶

The medical record makes clear that Dr. Rancourt has been and remains temporarily and totally disabled from the workforce. Dr. Rancourt's testimony, and that of her witnesses, was consistent with the medical evidence, from over five treating providers, who provided

¹⁵ It is important to remember, that this objective testing was done almost 3.5 years post injury, and Dr. Glassman put her at a medical endpoint as of November 2019, so the significant limitations are permanent.

¹⁶ Other issues II-V below are relevant to this discussion, but on discrete errors partially discussed above.

comments and restrictions based on the nonexertional limitations still being suffered by Dr. Rancourt. Glassman's opinions do not sufficiently address nonexertional limitations, while confirming ongoing permanent limitations based on his own objective testing. Therefore, the finding against Dr. Rancourt on extent of disability should be reversed.

II. THE BOARD ERRED AS A MATTER OF LAW, WAS UNREASONABLE, COMMITTED CLEAR ERROR, OR ABUSED ITS DISCRETION, IN FINDING AGAINST CLAIMANT ON CHANGE OF CONDITION UNDER RSA 281-A:48 AND REDUCING HER BENEFITS TO DEC, DUE TO AN ALELGED LACK OF AN "OBJECTIVE TEST" SUPPORTING HER TERMPORARY TOTAL DISABILITY, WHEN SAME IS NOT REQUIRED UNDER THE LAW, AND IN FACT THERE WAS AMPLE OBJECTIVE EVIDENCE IN SUPPORT OF MAINTAINING HER ON TTD, INCLUDING THE SMALL HOLE IN THE TOP OF HER HEAD, AND A DOCTORS' EXPLANATION OF THE OBJECTIVE CRITERIA AND TESTING, WHICH WERE UNCONTROVERTED.

Appellant incorporates the arguments from Issue I above herein, and further argues the CAB erred in requiring objective evidence, and also by failing to recognize the multiple examples of same. Br:44-45. First, there is no requirement under the law to have "objective" evidence. In fact, doctor's examinations have been referred to as being "objective". *Appeal of Martino*, 138 N.H. 612, 615 (N.H. 1994)(Doctor does not find anything to support claims in his objective examination.) *Appeal of Lalime*, 141 N.H. 534, 537 (N.H.1996)(objective tests need not find anything to entitle claimant to be reimbursed for treatment, just undergoing the tests needed to be objectively reasonable). Objective evidence is not required, however even if it is, there are many objective exams and results here, beyond the hole in the top of her head. For example, the audiologist test on 3/22/19 (435); 6/24/20 Struggling significantly with depth perception, light sensitivity, noise ("thunder in ear") and the ability to decipher what she is looking at... Having balance issues, catches herself running into things...therapeutic specs are better...still struggling

to get used to DV – they make her nauseous. Pt states she fell again in September 2019, Dr. Chen...discussed with the pt she will likely experience more falls because of TBI. “Headaches frontal today 4-5/10....cannot see to teach online course. (252/S7)ASSESSMENT: concussion without LOC; Diplopia; convergence insufficiency; other irregular eye movements; vertical heterophoria; Esophoria (254/S9) Pruzenski OD, FCOVD” (from “Diplopia” on are objection signs of her injury and these are diagnosed by eye examinations.); and Glassman examining her 3/2/20 and finding she had blurred vision at ten inches and it made her nauseous, and she had trouble recalling objects. Apx:29. Furthermore, at least two doctors diagnosed “axonal shearing”, which is part of her brain injury. See Smith 1/14/20, cited at Br.:24-25 citing multiple testing, and footnote 13 defining axonal shearing. Also, Browning, indicated that it was her “opinion that Fran suffered a coup contrecoup injury to her brain with axonal shearing. Dr. Browning went on to explain “[t]his causes a kind of bruising; one which does not generally appear on CT or MRI images, and which often results in transient headaches, nausea, and impairment of cognition” *Id.* 7/12/20 Browning expert report (Apx:12). There was also the constellation of symptoms seen by others, as described above in medical records, and witnessed by others. Therefore, the CAB erred by requiring “objective” evidence, but even if that was not an error, their bigger error was in failing to recognize same, and find for Dr. Rancourt.

III. THE BOARD ERRED AS A MATTER OF LAW, WAS UNREASONABLE, COMMITTED CLEAR ERROR, OR ABUSED ITS DISCRETION, WHEN BY REQUIRING AN “OBJECTIVE” TEST TO SUPPORT DISABILITY, WHERE THERE WAS NO MEDICAL SUPPORT FOR SAME, INCLUDING BY AN IME DOCTOR, THEREBY SUBSTITUTING ITS OWN MEDICAL OPINION INSTEAD OF RELYING ON THE MEDICAL EVIDENCE.

Appellant incorporates the arguments in Issue II above herein, as it is closely intertwined herewith. The CAB’s assumption that objective evidence is important or required is contrary to

the law and facts, and constitutes exercising their own medical opinion where, as here, the IME doctor did not opine there was an alleged lack of medical evidence, or that it was important. As noted above, Glassman made many objective findings of his own. Even assuming objective evidence was required and was not present, which is explained in Issue II to be incorrect, where no medical doctor has opined such an alleged act to be significant, the only way the CAB could reach this conclusion is by substituting its own medical judgment and opinion.

“Medical causation is a matter properly within the province of medical experts, and the board is required to base its findings on this issue upon the medical evidence rather than solely upon its own lay opinion.” *Appeal of Demeritt*, 142 N.H. 807, 810 (1998) (quotation omitted). Tribunals are *not* free to disregard the uncontroverted medical evidence, *for any reason*, as to do so is an error of law. “[A] trier of fact is free to accept or reject an expert's testimony, in whole or in part, when faced with conflicting expert testimony.” *Tzimas v. Coiffures by Michael*, 135 N.H. 498 (N.H., 1992), (citing *Bartlett Tree Experts Co. v. Johnson*, 129 NH 703,706 (1987)).

However, here there is no contrary evidence stating objective evidence, to the extent it could be required, is lacking. Dr. Rancourt’s treating providers convincingly explained the nature of her injury and the objective evidence in support of her continued total disability, as set forth above in the fact section. In fact, there are ample objective exams, including detailed vision and hearing exams. Therefore, the CAB’s criticism on this point was in error.

IV. THE BOARD ERRED AS A MATTER OF LAW, COMMITTED CLEAR ERROR, WAS UNREASONABLE, OR ABUSED ITS DISCRETION, IN RULING AGAINST DR. RANCOURT ON RSA 281-A:48 BY CONCLUDING A TRIP TO MAINE TO RIDE ON A BOAT FOR ONE OR MORE TIMES MEANT SHE HAD AN EARNING OR WORK CAPACITY, WHERE ALL OF HER TREATING DOCTORS STILL HAD HER IN AN OUT OF WORK STATUS, AND NO DOCTOR OPINED THAT SAID ACTIVITY MEANT THERE WAS A WORK

OR EARNING CAPACITY, THEREBY SUBSTITUTING ITS OWN MEDICAL OPINION FOR THE MEDICAL PROVIDERS.

Appellant incorporates herein the arguments in Issues I – III above herein, as they are closely intertwined. The Board may not substitute its own opinion for that of the physicians and providers who gave their opinions that Dr. Rancourt’s condition was such that she no longer had a work or earning capacity. In this case, there was no on point and conflicting expert testimony on extent of disability, and the Board may not substitute its own opinion on medical causation and extent, for that of the multiple treating providers who found Dr. Rancourt to be disabled with no work or earning capacity.

The CAB noted that she had gone to Maine a few times, driven as a passenger, and that she rode on a boat. Mr. Schall testified it was “only a few times”. Tr. 149:11-14. Regardless, this is irrelevant, and has no impact in this case. Therefore, the CAB’s finding that she was “able to go up to Millinocket, Me [sic] to go out boating on several occasions” not only was factually incorrect but of no import, particularly because it has nothing to do with her nonexertional limitations related to her head injury. Br:44.

Likewise irrelevant, and in error, was the criticism about whether or not she lost consciousness at the time of the original injury. This is an accepted claim, and none of the doctors, including Glassman, have determined whether and how long she lost consciousness was of any import in their opinions. Likewise, it should have no bearing on the CAB’s decision.

Extent of disability should be left to the experts treating Dr. Rancourt, just as Dr. Glassman suggested in his earlier 3/6/18 IME, stating she should see a concussion specialist. The CAB should heavily weigh their testimony”, physical therapy, occupational therapy, speech and cognitive therapy.(578-79). As Glassman essentially defers to the experts on concussions, as should the CAB, and does not discuss her ongoing problems; but her treating providers do, as

detailed at great length above.

V. THE BOARD ERRED AS A MATTER OF LAW, COMMITTED CLEAR ERROR, WAS UNREASONABLE, OR ABUSED ITS DISCRETION, BY FAILING TO PROPERLY WEIGH THE MEDICAL EVIDENCE BY GIVING THE TREATING PROVIDERS SUBSTANTIALLY MORE WEIGHT, BECAUSE TREATING PROVIDERS HAVE MORE FAMILIARITY WITH CLAIMANT'S CONDITION THAN AN IME DOCTOR.

Appellant incorporates the arguments in Issues I and IV above herein, as they are closely intertwined, and to avoid repetition. Rancourt had several treating providers, 2-3 of them experts in treating head injured patients, in fact, the type specifically recommended by Dr. Glassman as "concussion specialists". Furthermore, while having had an opportunity to do so, Glassman did not take issue with any of their findings, many of which were based on objective exams and testing, as indicated above.

Treating providers are to be given substantial weight in workers' compensation cases. The Court ruled in *Appeal of Chickering*, 141 NH 794, 796 (1997), "[a]s treating physicians are generally quite knowledgeable about a claimant's condition, their reports must be accorded considerable weight." The Court has also ruled that "[b]ecause a claimant's treating physicians have great familiarity with [her] condition, their reports must be accorded substantial weight. *Appeal of Kehoe*, 141 NH 412, 417 (N.H. 1996) (citing *Appeal of Morin*, 140 NH 515, 519, 669 A.2d 207, 210 (1995) (quotation omitted). Also cited in, *In re Dean Foods*, 969 A.2d 377, 383, 158 N.H. 467 (N.H., 2009).

As the opinions of the treating providers are not directly disputed by Glassman, and they are mostly concussion experts, the very type of provider that he recommended, the CAB should give them greater weight, and follow their opinions, finding that Dr. Rancourt continues to be temporarily totally disabled and entitled to TTD.

VI. THE BOARD ERRED AS A MATTER OF LAW, COMMITTED CLEAR ERROR, WAS UNREASONABLE, OR ABUSED ITS DISCRETION, BY FAILING TO FIND THE CLAIMANT'S HAMSTRING INJURY WAS CAUSALLY RELATED TO THE UNDERLYING HEAD INJURY, BECAUSE DUE TO SAME HER BALANCE WAS OFF AND SHE SUFFERED MANY FALLS.

The injury to Dr. Rancourt's hamstring, on July 30, 2019 when she stepped into a boat, is related to her work injury because of the dizziness and balance issues caused thereby, which makes it difficult for her to gage her movements and not trip where she is stepping, whether or not onto a boat. As testified to at the first hearing, the boat was in fact not moving, and was securely tied on both ends. This was not unlike other related falls Dr. Rancourt has had as cited above. Dr. Rancourt additionally relies on the medical records as quoted and cited in detail in her CAB closing which are incorporated herein. See Apx:45-48 (medical record citations therein not repeated here).

To summarize, the following treating doctors related the hamstring injury to balance and vision issues due to the head injury: Smith: 8/1/19 (48-49), 9/10/19 (23-26), 2/3/20 (10-11), 7/13/20 (2.1-2.5); and Pruszenski 8/23/19 (263-5), 12/23/20 expert report (Apx:15); Chen 9/5/19 (277-79), 11/14/19 (373), 1/9./20 (372), 2/12/20 (371). As Dr. Rancourt and others (her husband and Mr. Schall) testified, and consistent with her medical records, due to her head injury she loses balance and has had various falls. Tr:128-134, 147-154. Unfortunately, on July 30, 2019 she suffered a serious injury to her hamstring.

The only medical evidence presented as contrary to this, is Dr. Glassman's comment that her hamstring injury was not directly related to her head injury, which was not the claim. Dr. Glassman opined that he "cannot find [that] any treatments for her left leg and hamstring are directly or causally related to the injury date of November 20, 2017." Apx:32. The claim is that the hamstring injury was indirectly related, as a consequence of the balance and other issues

from the head injury. Therefore, Dr. Glassman's opinion is of no use to the Carrier, and Dr. Rancourt's treating medical opinions on this should be considered uncontroverted. Claimant requests that the Court reverse the CAB and find the hamstring injury arose out of her original injury, even though no request is made for an additional period of disability, as it would be concurrent with TTD paid on the head injury.

CONCLUSION

For the reasons set forth herein, Dr. Rancourt, Appellant, respectfully requests that this Honorable Court vacate and reverse the CAB's decision, and reinstate Temporary Total Disability benefits from the date of the lower level DOL decision, August 19, 2020, forward. In addition, we request that the Court reverse the CAB and find that the hamstring injury was causally related to the head injury.

REQUEST FOR ORAL ARGUMENT BEFORE FULL COURT

Appellant requests oral argument of fifteen minutes for each side before the full Court as application of the DEC rate absent earning capacity is important to the parties and the citizens of New Hampshire, which will be guided by a decision which is authoritative and rendered by the full Court. Leslie H. Johnson, Esquire, will argue Appellant's case.

CERTIFICATION

I hereby certify that every issue specifically raised has been presented to the administrative agency and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading.

I also certify that a copy of the decisions (referenced below), which were in writing, are appended to this brief.

02/05/21 Compensation Appeals Board's Decision
03/18/21 Compensation Appeals Board's Order Regarding Claimant, Fran Rancourt's Request for Reconsideration or Rehearing, 03/18/21

STATEMENT OF COMPLIANCE – WORD LIMITATION

I hereby certify that this brief is in compliance with the 9,500- word limitation as set forth in Supreme Court Rule 16(11), with allowed exclusions. This brief contains just under 9500 words.

Respectfully submitted,

FRAN RANCOURT, Claimant/Appellant
By His Attorney,

Dated: May 13, 2022

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February 5, 2021

DECISION OF THE WORKERS' COMPENSATION APPEALS BOARD

FRAN RANCOURT

VS.

COMMUNITY COLLEGE SYSTEM OF N.H.

DOCKET #: 2021-L-0076

APPEARANCES: The interests of the claimant were represented by Attorney Leslie Johnson
The interests of the employer and their insurer, AIM Mutual were represented by Attorney Kevin Stuart.

WITNESSES: Paul Chandler – husband of claimant
Jeff Schall – friend and former co-worker of claimant
Dr. Suzanne Wasileski – co-worker and friend of claimant

ISSUES: RSA 281-A: 48—Review of Eligibility for Compensation
RSA 281-A: 15 – Average Weekly Wage

DATE OF INJURY: November 20, 2017

DATE OF HEARING: A de novo hearing was held at the Department of Labor, Concord, NH with all witnesses as well as the claimant appearing via Web-X on January 6, 2021 at 1PM. The panel reconvened at the DOL at 10AM on January 25, 2021 after receipt of the written closings.

BACKGROUND:

The file contains a First Report of Injury indicating the Date of Injury as November 20, 2017. The injury is noted as a laceration to the skull after a fall on ice in the parking lot of the employer.

This was an accepted claim by the carrier and indemnity and medical benefits were paid.

The issues of RSA 281-A:8 and RSA 281-A:35 were listed and heard at the DOL hearing, however were not appealed and are not issues for the WCAB hearing by agreement of the parties.

FINDINGS OF FACT:

Attorney Kevin Stuart questioned the claimant first. The claimant stated that she was hired by Community College System of NH (CCSNH) on 8/17/07 to teach. She has a Doctoral degree in education. Prior to CCSNH she worked at PSU & DeVry University. She owned Wilderness Sports from 1999 – 2006 and was CEO of a flooring company for about 20 years. Her position on the date of injury was Vice President of Academic Affairs.

The incident occurred when the claimant was going into the building at approximately 7:30 to 7:45 AM and she fell on ice. She fell directly on her head. She did not recall if she got up by herself or if she had assistance.

She was taken to the ER at Androscoggin Valley Hospital by a co-worker, Debbie. She was bleeding from her head and eventually had 11 staples placed. (Pg. 244) She testified that she did not lose consciousness. The ER record indicates that the claimant was leaving for a Florida vacation in 7 days, however the claimant stated that she changed her plans. The record of Dr. Wise on 11/20/17 states that the claimant and her husband requested "spine x-rays". Dr. Wise did not feel that they were necessary, however they were taken and x-rays of the "thoracic and cervical spine show degenerative changes, no acute injuries". (Pg. 234)

The claimant was given a Full-Duty/Full-Time work release as of 11/21/17, however the claimant did not return to work. She was called into work the next day by the President of the college and was given a letter of termination which she did not read immediately but stated that she saw the Suzanne Philips HR person who stated that she needed to sign the papers. She refused to sign them at that time.

The claimant followed-up with her PCP, Dr. Gretchen Lockard on 11/22/17 stating that her symptoms had increased. She was taken out of work for 10 days. (Pg 165)

Dr. Glassman performed an IME on February 28, 2018 and recommended partial duty modified work part-time, PT and that she see a concussion specialist.

She saw Dr. Elefthriou Evdokia, a concussion specialist, for auditory vision on May 11, 2018 who recommended a brain MRI. The MRI was "unremarkable".

The claimant saw Dr. Amy Pruszenski from Vision Source in Portsmouth, NH on 1/02/19 and recommended diet supplements and several books explaining activities to be done for 15-20 minutes, 4-5 times per week(Pg. 275) The claimant last saw Dr. Pruszenski on 6/24/20.

The claimant was visiting a friend, Jeff Schall, in Millinocket, ME on 7/30/19 and fell when stepping into a boat, "hyperextended leg, heard a pop and fell into water". (Pg.390) She injured her left hamstring and had surgery due to that injury. The claimant feels that the problem was depth perception due to the DOI when stepping into the boat.

Dr. Chen, treating the hamstring, saw the claimant on 5/26/20 noting that the claimant had a traumatic rupture of left hamstring tendon. He stated that the claimant "appears to be doing well, making gradual progress with her home program." He recommended physical therapy. (Pg 366) He further noted that the claimant was able to walk a mile on the treadmill.

The claimant did file a discrimination suit against the employer for being terminated, however the terms of that agreement were not released to the panel. The panel did have a copy of the original termination letter for the file.

On examination by the claimants' attorney Leslie Johnson, the claimant stated that she currently has a problem with falling. She has trouble with memory such as turning the stove off, making sure car is off, etc. She had originally had trouble doing laundry that that has gotten somewhat better. She has to control her environment as she has issues with depth perception. She claims her vision is an issue and she sees double when she relaxes her eyes. She cannot take a lot of movement when watching things and she gets nauseous. She gets irritated very quickly, "her headaches vary in pressure. Her memory is "very bad". She has undergone speech therapy and uses auditory earplugs and earphones. She works on relaxation techniques and has a hard time counting.

She has had problems with depth perception beginning about 3-4 months after the date of injury. She is able to drive short distances.

Suzanne Wasiliski – White Mt. Community College – Instructional Research for 6 ½ years. On the date of injury she went to the ER to see the claimant. She stayed until the claimant's husband arrived. Claimant was very distractible after the date of injury and did not want to be in large crowds which was different from prior to the injury. She has noticed balance and unsteadiness issues with the claimant.

On cross-examination she explained that she is a clinical psychologist and is good friends with the claimant.

Jeff Schall - He has been friends with the claimant for about 10 years. He taught at White Mt. As a Professor of Information Tech. The claimant was his supervisor. He had been at White Mt. for about 31 years. He would hike, fish and boat with both the claimant and her husband at his place in Millinocket, ME. Prior to the DOI the claimant was "meticulous". She is not articulate anymore and often loses her train of thought.

On the day of the boating incident, he stated that the water is usually choppy. When she fell, he saw her standing in the water and was able to help her out. He took her to the ER as her husband was not available. He had seen her fall several times after the date of injury.

On cross-examination Mr. Schall stated that he did not see the actual fall from the dock. He further explained that the claimant has done some short walks on the hiking trail with him and always used a walking stick. She does not use a cane at other times although he had seen her use one previously.

Paul Chandler -- husband of the claimant -- testified that they have been married for 18 years and she was very active prior to the DOI -- she was always "with it" and she would help people. After the DOI it was the total opposite. He helped her get through the end of the year work for the college assignments and grades so she could get the grades out on time. He read the papers and did the copier work, etc. This went on for 4-5 weeks after the DOI. He has to watch when she cooks to make sure she shuts things off. She has continually had headaches since DOI. She has difficulty concentrating on things for any length of time. She can misjudge when she sits down.

On cross-examination it was noted that the claimant had applied and received FMLA at one time in order to take care of her disabled husband.

She was able to drive both cars and went on walks in the neighborhood. She can drive 5-10 miles at this time and he goes to the grocery store with her.

On re-direct from Attorney Johnson to the claimant it was stated that she would walk out back on a small trail with her dog or with someone else. The trail is flat.

The hearing was concluded and written closings were to be submitted to the panel by 5 PM January 19, 2021.

DISCUSSION AND CONCLUSIONS:

The panel has reviewed the medical records as well as the testimony presented by all parties at the hearing.

It is the carriers' burden of proof to show that the claimant has had a change in condition that would warrant a termination or reduction of benefits related to the date of injury in this matter.

The panel finds that the testimony provided by the claimant was not credible as there were many inconsistencies in her testimony with regard to the medical records and testimony provided by other participants.

The medical information provided by the treating providers and the testimony presented by the claimant, are inconsistent, at best. The claimant indicates that she is unable to perform simple duties around the house and is totally unable to work. The claimant was, however, able to go up to Millinocket, Me to go out boating on several occasions.

The records of the initial ER visit note that the claimant did not lose consciousness, however, in a record shortly after her termination at work was received, she indicated that she did lose consciousness. Much of the history that the claimant gave to individual treating facilities was subjective and did not appear to have any test results to support her claims of disability to the extent that she has stated.

The opinion of Dr. Glassman, after having performed three IME's on the claimant are persuasive in this matter. Dr. Glassman does find that the claimant is capable of returning back to her work with restrictions. The claimant had indicated that she was 60% improved as of the release to return to work on March 2, 2020. Dr. Glassman does agree that her neurological issues are related to her date of injury; however, he does not feel that there is a causal relationship between the November 20, 2017 injury and the left leg injury that was caused by the fall in the boat. (Page 558)

The medical records further note that the x-rays of the cervical and thoracic spine were normal and it was further noted that these x-rays were taken at the request of the claimant and not necessarily ordered by the treating physician at that time although due to the request, they did take the x-rays. (Page 249-250)

The August 8, 2016 MRI was noted as “unremarkable” as explained by the neurologist. (Page 105.) There was another MRI of the cervical area of July 6, 2018 that did not indicate any “acute injury” (Page 218)

The testimony provided by the claimant regarding the boating incident that caused her hamstring injury was inconsistent with the owner of the boats’ testimony and therefore it is difficult to find that the boating incident was related to the symptoms of her injury of November 20, 2017.

With regard to the combined average weekly wage – RSA 281-A:15 – there was information presented that the claimant was employed by Community College System of NH as well as DeVry University and Plymouth State at the same time. There was a gap in pay stubs from DeVry University from October 2017 until February, 2018, however **RSA 281-A:15 I a,b & c** does note the manner in which the average weekly wage can be established and it notes that the computing method used shall “yield the result more favorable to the injured employee”. The pay stubs would indicate that the claimant was working for Community College System of NH as well as DeVry during the same period even though there appeared to be a few weeks that the claimant was not doing actual work for DeVry but was still employed through at least February 2018.

DECISION:

The panel, after a review of all the information provided at the hearing as well as the written closings finds that the carrier has, by a preponderance of the evidence, met their burden of proof that there has been a change in the claimants’ condition that would warrant the reduction of the indemnity benefits to the Diminished Earning Capacity rate and therefore, the panel finds that the DEC rate is appropriate in this case.

With regard to **RSA 281-A:15, Average Weekly Wage**, the panel finds that the claimant is entitled to the rate of compensation applicable when combining the wages of her employment at Community College System of N.H. and her employment at DeVry University. This may not actually affect the amount of indemnity compensation as it may be that the claimant is already at the maximum compensation rate, however this can be determined by the pay stubs submitted.

This was a unanimous decision of the panel.

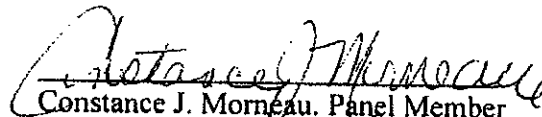
Payment of weekly compensation by AIM Mutual to comply with this decision shall begin and/or continue as soon as possible after this decision's effective date, but no later than five workdays thereafter, and shall not be terminated except in accordance with the terms of this decision. A Memo of Payment and the checks shall be issued simultaneously.

Upon failure to comply with the decision, the Commissioner shall assess a penalty not to exceed one hundred dollars (\$100.00) for each day of non-compliance. This letter will serve as notification of this assessment commencing on the seventh day following the date of this decision.

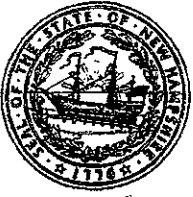
In order to avoid application of this penalty, the Memo of payment shall be mailed to the Department of Labor no later than the seventh day following the date of this decision, indicating payments have been made in accordance with this decision. If payments are continuing, a Memo must be filed to indicate this.

Legal counsel for claimant shall, within sixty (60) days of the date of this decision, submit for approval all fees charged for professional legal services rendered in connection with this appeal pursuant to RSA 281-A:44 and Lab 07.02.

Respectfully submitted,


Constance J. Morneau, Panel Member
Compensation Appeals Board

CJM/cjm



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March 18, 2021

DECISION OF THE WORKERS' COMPENSATION APPEALS BOARD

FRAN RANCOURT

VS

COMMUNITY COLLEGE SYSTEM OF NEW HAMPSHIRE

DOCKET #: 2021-L-0076

ORDER REGARDING CLAIMANT, FRAN RANCOURT'S, REQUEST FOR RECONSIDERATION OR REHEARING

The panel has considered the claimants' Motion for Reconsideration and/or Rehearing filed on March 8, 2021, the carriers' March 12, 2021 Objection, and reviewed its' original decision in this matter regarding the Workers' Compensation Appeals hearing held on January 6, 2021.

The Motion for Rehearing is respectfully denied for the reasons stated in the Objection, the panels' original decision and further reasons noted below.

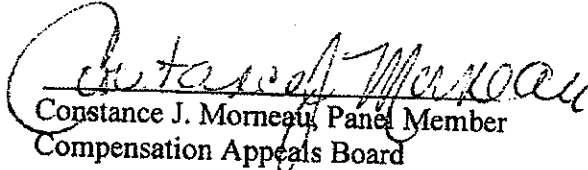
Based on a review of the complete medical record and testimony presented, the Board finds that a rehearing would be a re-hashing of evidence already presented and decided upon.

The panel finds no evidence presented within the Motion for Reconsideration/Rehearing which would change its' decision; no demonstration the panel was in error concerning the interpretation or application of the applicable statute or administrative rule: and no demonstration the decision is contrary to controlling law a required by Lab 206.04.

Accordingly, the Motion for Reconsideration/Rehearing in the above-captioned matter is respectfully denied.

This was a unanimous decision of the panel.

Respectfully submitted,


Constance J. Morneau, Panel Member
Compensation Appeals Board

CJM/cjm

Cc: Leslie Johnson, Esq.
Kevin Stuart, Esq.