STATE OF NEW HAMPSHIRE

SUPREME COURT

2022 TERM

JULY SESSION

Appeal of Fran Rancourt

2021-0153

APPELLANT'S REPLY BRIEF

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

Counsel for Appellant,
DR. FRAN RANCOURT
Leslie H. Johnson, Esquire–NH Bar 5545
Law Office of Leslie H. Johnson, PLLC
PO Box 265
Center Sandwich, NH 03227
(603) 284-6600
leslie@lesliejohnsonlaw.com

TABLE OF CONTENTS

TABLE OF SUPPLEMENTAL CASES

INTRODUCTION AND REPLY TO SECTIONS BEFORE ARGUMENT

Dr. Rancourt, Appellant, files this reply brief to address any statements not already covered in her Brief, and offers this rebuttal of sections prior to the Carrier's argument section.[1]

Concise Statement of the Case: Rancourt received substantially more than a "scalp laceration"; as evidenced by her medical records demonstrating she suffered a concussion, constituting a mild traumatic brain injury with post-concussion syndrome. Br:9, 14-20.[2] Rancourt's symptoms did not "drastically change" as she had scheduled a follow up with her PCP and was going to stay out of work the day she was fired, but was called in to be fired. Rancourt's discrimination case is not pertinent to this appeal. The issue of loss of consciousness ("LOC") is a red herring because how does someone who has lost consciousness know it, particularly right after the injury? She has steadfastly reported that she fell, and when she looked up someone else was standing there, who had not been there when she fell. Dr. Lockard diagnosed that she had briefly lost consciousness. Tr.15:5-19, 17:9-16; Br:14, 11.22.17 Lockard, MD (160). The doctors go back and forth on whether she lost consciousness, and the IME doctor does not seem to care one way or the other, as he does not list it as a consideration in any of his reports. Therefore, there is no medical evidence that LOC has any relevance, and the Carrier accepted this injury and voluntarily paid benefits.

Standard of Review: Appellant adopts Appellee's stated Standard of Review in their brief at p. 9, and believes the Court will find the decision to be unjust or unreasonable, as well as rife with errors of law, as set forth in the arguments made in Rancourt's Brief.

---

[1] All references to Appellant's Brief will be entitled Brief or "Br:p#"; all references to Appellee's Brief will be entitled "Car.Br:p#"; all references to Appellant's Appendix will be entitled "Apx:#"; and all references to Appellee's Appendix will be entitled "Car.Apx:#".

[2] Appellant will use the same abbreviations as she did in her Brief. Also, when a page of either brief is cited the citations therein will not be repeated here.

REPLY TO SECTIONS IN APPELLEE'S ARGUMENT

I. The Compensation Appeals Board ("CAB") was **incorrect** in finding that the Appellee met its burden of proving a change in conditions warranting a reduction from temporary total disability (TTD) benefits to diminished earning capacity (DEC) benefits.

The Carrier did not meet its burden of proof on change in conditions as Dr. Glassman clearly was opining upon "physical capabilities" only, related to her leg/hamstring injury, and even if intending it to apply to her head injury, which he only attempted to clarify in the "addendum", it still did not address her non-exertional limitations. *See* argument in Br:22-32. Importantly, Glassman failed to take into account any of Rancourt's non-exertional limitations, even though he found upon objective examination at the last IME, blurry vision, nausea, and recall of only two out of three objects at 1 minute. This is not someone that could work on a computer for 30 minutes as he opined; his report is internally inconsistent. See Br:28-32. Her multiple treating physicians noted many non-exertional limitations over a long period of time, which they determined rendered her totally disabled from working. While the Court does not generally reweigh the evidence to make a wiser decision, here it has been shown that the CAB decision is patently unreasonable, and unsupported by cogent medical opinion.

The Carrier did not show that Rancourt had any ability to perform work that would support a conclusion she had regained close to her previous earning capacity of $2,412.97 per week. Apx:61-62, Memo of Payment. Rancourt's education and training absent, for example, the ability to regularly work on a computer, count past ten, or remember three items, usually suffering at least 7/10 headaches, her tendency to become nauseous with blurred vision, and have to rest during the day, demonstrate she has no work or earning capacity. Under the Carrier's argument if she had to lay down all day long and could never look at a computer, her education and training alone would render her as having a work or earning capacity, which is illogical. Her education does not take away the fact that her non-exertional limitations render her unable to work in any field at all. The finding to the contrary is patently unreasonable, by clear and convincing evidence.

Appellee argues that in the year prior to the May 2020 hearing request Rancourt had only seen one doctor related to her head injury[3], other than her primary care doctor, as if that PCP does not count. Car.Br:14. In fact, Rancourt saw her PCP at Saco River 6 times in the one year previous to the hearing, which included treatment for her head injury at each visit; Dr. Pruszenski, the eye doctor specializing in treating people with concussions (the type Glassman recommended she see), 1 time; and Marla Browning, SLP 17 times (although not a doctor, another provider expert in treating concussions, as Glassman had recommended). She also consulted Dr. Chen about the relationship of her head injury and falling as relayed by Pruszenski. Br:33.

The Carrier also complains that Pruszenski did not explain in her workers' compensation form of 8/23/19 (Car.Apx:49), or her office note of same date, why Rancourt could not work. Car.Br:14. However, her office note states "NV therapeutic [sic] glasses are better than the DV…wearing the NV 5 min and still seeing the crescent moon shape when she removes them…can read with them, briefly. When she tries the DV glasses she is nausea [sic] immediately…she called me to tell me trouble with glasses and I told her to reduce the time wearing them. Not able to do the CP saccades as her eyes and brain are just not talking…left side is blurry and sees double…unstable on feet but not dizzy. Gets confused about what she is doing." Car.Apx:50. That amply shows part of the reason Pruszenski said Rancourt could not work. In addition, at Rancourt's next visit (6/24/20) with Pruszenski the office note states: "Struggling significantly with depth perception, light sensitivity, noise ('thunder in ear') and the ability to decipher what she is looking at, patient expressed she confused driftwood with an animal. Having balance issues, catches herself running into things. NV therapeutic specs are better (can read up to an hour!) still struggling to get used to DV – they make her nauseous. Patient states she fell again in September 2019, Andrew Chen (orthopedic who did leg surgery)

[3] Rancourt also saw several doctors and providers related to her hamstring injury during that year, for example Chen MD, PT, Memorial Hospital, Millinocket Hospital, and Dexter RN.

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." Car.Apx:60.

Rancourt gets confused about what she is doing, is unstable on her feet, has diplopia, convergence insufficiency, and vertical heterophoria, all of which affect her ability to see and balance. [4] Car.Apx:50, 52. Also, in multiple office notes, as well as in her expert report, Pruszenski clearly explained why Rancourt could not work, which would be obvious to even a lay person reading about the symptoms and condition. See Car.Apx:50, 52. See Br:18-19. In fact, Pruszenski explained in detail why Rancourt could not work in her expert report of 12/23/20; as did Dr. Eleftheriou in her 8/6/18 office note; and Marla Browning, SLP in many office notes, including 11/20/20.

11/20/20 SPEECH THERAPY – Pt needed re-instruction on controlling environment and reducing auditory distractions secondary to poor selective attention. …Pt has noted increased difficulty with groups or at home when she gets distracted by external stimulus. …Buy noise cancelling head phones to use at home to increase her ability to start and finish a task without being distracted. (S22) Browning

Whether or not Dr. Smith at times felt Rancourt was also disabled due to her hamstring injury does not take away from her steadfastly having Rancourt totally out of work over a long period of time. The Carrier seems critical that Rancourt reported increased symptoms in June, although that was after the DOL hearing date. Car.Br:15. The Carrier complains that allegedly Rancourt told DO Smith that she was seeing a neuro-ophthalmologist, "even though she had not seen Maine Medical Neurology in over 17 months." Clearly she meant her ophthalmologist, Pruszenski, not Maine Neurology, however she remains under Eleftheriou's (Maine Neurology's) care.

Appellee admits that Rancourt reported worsened symptoms after Glassman's 3/2/20 IME, Car.Br:15 (bottom), which supports a finding of TTD. Even he objectively

[4] See Exhibit 1 to Reply Brief.

found that his vision testing caused her nausea. Car.Br:17. There is not much a worker can do when head movement causes this symptom. A "modified" or "partial" work duty must mean something other than physical restrictions from working. When he said that his physical restrictions were for the head injury, he obviously was not referring to the non-exertional symptoms he found due to the head injury, which have nothing to do with lifting, etc. She might have been able to lift ten pounds, as that is not really impacted by her head injury, but she would have blurry vision, nausea, and still couldn't count past ten, or to ten, or remember three items for one minute. (responding to Car.Br:15-16).

With respect to Glassman, he continued to state the work restrictions as to "physical capabilities" and referred mostly to lifting and bending, not the non-exertional limitations. Car.Br:16-17. Glassman was purposefully only asked about her "physical capacity" not her non-exertional limitations, and referred mostly to lifting, kneeling, squatting and sitting. Apx:31, Glassman 3/2/20 IME. When asked by the Carrier to clarify, he referred to the same physical restrictions, and that they were "specifically for her post-concussion syndrome. They were not for any orthopaedic issues or diagnoses." Apx:64, Glassman 5/20/20 Addendum.

This does not make any sense. She could probably lift 10 pounds occasionally even if her vision was somewhat blurry, but she is having trouble seeing, balancing, remembering and counting, which are obviously executive functioning and physical requirements of her past work; probably any work. It seems "modified" duty he refers to must not include seeing well or looking at computers for very long, remembering more than two things at a time, or counting. In fact, those type of "restrictions" he mentions can fairly be read into his March 2020 report as applicable non-exertional limitations: cannot see clearly, nauseous, no lengthy time on a computer, etc.... Glassman really does not answer the questions regarding her brain injury. Comparing that to the detailed and multiple reports of treating providers, both justifies and requires a finding that Rancourt had no work or earning capacity and continued to be entitled to temporary total disability payments.

The CAB also mistakenly found that Glassman indicated she could return back to **her** work with restrictions, which is inaccurate. Br:44. He never said she could return to her job, but only some undefined "modified", "partial duty" work of some kind, without a real explanation.

Furthermore, greater weight is to be given to the treating physicians who are most familiar with her condition, particularly here where the IME doctor recommended Rancourt "further treatment which would include being seen by a concussion specialist, being referred for specific physical therapy, occupational therapy, speech and cognitive therapy for concussion" which is who Pruszenski, Eleftheiou and Marla Browning, CCC-SLP are. Apx:79, IME Glassman, 3/6/18. It is clearly unreasonable to accept Glassman's opinion over that of the very types of experts that he recommended (implicitly more qualified than himself to treat concussions), who have steadfastly opined Rancourt is totally disabled. In any event, Rancourt was demonstrably worse after the third Glassman IME, as pointed out by Appellee at Car.Br:16. The test is whether Rancourt has a full time work capacity in a job similar to that which she was injured in, and that there are sufficient jobs for which she could be hired to demonstrate an earning capacity; Rancourt has neither, and the Carrier has not met this burden of proof on these issues.

"If an employee cannot perform services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist, he may well be classified as totally disabled". *Servetas v. King Chevrolet-Oldsmobile Co., Inc.,* 117 N.H. 1061, 1064-65 (1977); *Xydias v. Davidson Rubber Co.,* 131 N.H. 721 (1989). In fact the CAB did not specifically rule that Rancourt had a "cork capacity" and an "earning capacity". Br:44-46.

II. The CAB's finding that the Appellant's alleged injuries lacked objective evidence was **not** supported by the medical records. The CAB **did** impose an "Objective Test" as argued by the Appellant, and the CAB's decision is **neither reasonable nor** lawful.

The Carrier argues that the word "objective" did not appear in the decision and that no objective test was received. Car.Br:18-19. While the word "objective" does not

appear in the decision, the Board clearly focused on objective tests, not only as to its ultimate decision, but illogically in a credibility determination, which compounds the error. The CAB stated that "[m]uch 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." Br:44. The CAB also stated that x-rays of her cervical and thoracic spine were normal, and noted two MRI's were normal, indicating somehow this lack of objective findings in her spine (not injured body part), has to do with extent of disability related to her head injury. Br:44-45.

Clearly the CAB, in wrongly concluding the history given by Rancourt to her providers was purely "subjective", and then noting there was no testing to support those claims of disability, was indicating an alleged lack of objective tests. Thrice the CAB indicated an alleged lack of test findings, thereby calling her reports subjective. Clearly, the CAB required objective tests, ignoring the multiple objective testing done by treating providers, and Glassman. (neurological issues Br:44).

For example, there were multiple objective vision and hearing tests. *See* Br:17-20; 32-33. Rancourt has demonstrated that the CAB committed an error of law, and that its findings are patently unreasonable by a clear preponderance of the evidence.

III.[5] The CAB **unreasonably** considered evidence of the Appellant's **alleged** recreational activities when determining: 1) the Appellant's work capacity and/or earning capacity; and 2) the reliability of the treating providers' opinions regarding work capacity.

As noted above, there was no on point evidence that contradicted the non-exertional limitations for which doctors rendered Rancourt totally disabled. As to the so-called "recreational" activities, are a red herring, whether boating a few (@2-3), or several (@4-8) times. Car.Br:20. In fact, Mr. Schall testified to a few times. Tr. 149:11-14. The CAB finding of boating "several occasions" is contrary to the record.

[5] This is covered in FR.Br:, issue III:34-36.

Furthermore, no witness testified that she went boating on choppy waters, a claim not ciated to the record.

Also obviously, treating providers knew she had been boating because asked about it, but not one opined it had any effect on her disability status. In addition, Glassman did not find boating pertinent to his disability determination. Therefore, reliance on boating a few times, or walking a brief walk to get some exercies, as relevant to work and earning capacity, where Rancourt has significant non-exertional limitations, is unreasonble and an error of law, particularly where no medical opinion relies on these facts in reaching diability conclusions. By doing so the CAB is inserting its own opinion in place of the medical opinions, and is drawing illogical and unsupportable conclusions.

IV.[6] The CAB **neither** properly weighed the evidence, **nor is its decision** reasonable and lawful.

In her original brief, and above, Rancourt has argued the misinterpretation of Glassman's report and his failure to address non-exertional limitations along with his lifting restrictions, or that his March 2020 report lists restrictions such as blurry vision and balance issues, and limited computer use that should be considered as limitations, which together with the multiple treating physicians consistently placing her out of work and to be given substantial, i.e. more, weight, mandates finding Rancourt is entitled to TTD benefits. Obviously, "substantial weight" means something more than usual weight, as distinguishing their worth over other evidence, such IMEs by those with less familiarity with the medical records, and the patient's condition over time "Competing evidence" cannot reasonably consist of limited recreational activities (@3 boat rides over 3-4 years, and a couple of strolls), which have no connection to non-exertional restrictions, nor which any provider, including Glassman, opined upon as being relevant. The CAB's decision was unsupported by the record and unreasonable, with errors of law.

[6] This pertains to Issue V in FR.Br:36.

V. The CAB's finding that the Appellant's hamstring injury was not causally related to the underlying work injury **was neither reasonable nor** supported by the evidence.

This is covered in FR:Br:37-8, Issue VI. Whether or not the boat moved a little does not preclude the fall was due to Rancourt's balance and depth perception issues, as supported by her multiple treating providers. There is no evidence Rancourt ever fell getting into a boat before she suffered her head injury; the new element being the head injury and resulting vision and balance issues. There was no misinforming Pruszenski by saying the boat was securely tied and could not pull away from the dock, which was borne out by testimony at hearing. Rancourt testified the boat was not moving away from the dock when she stepped in, but it went down when she stepped in. Tr: 48:12-49:15. Mr. Schall did not see the fall, so her testimony could did not conflict with his. Tr:150:8-18. Also, Mr. Schall testified that if it had been really rough they would not have gone out. Tr:152:3-20.

Even if the boat had been moving a little bit, which is disputed, her fall was still related to her dizziness and depth perception issues as supported by multiple providers. For the reasons argued in Rancourt's brief, pp. 37-38, with citation to multiple medical doctors finding a causal relationship of the hamstring injury to her head injury, we ask the Court to reverse the CAB decision on same.

CONCLUSION

Rancourt relies on her previous brief and this reply, and requests that the CAB decision be reversed on all issues.

STATEMENT OF COMPLIANCE – WORD LIMITATION

I hereby certify that this brief is in compliance with the 3,000-word limitation as set forth in Supreme Court Rule 16(11), with allowed exclusions. This brief contains approximately 2,900 countable words with allowed exclusions including headings within the Brief.

Respectfully submitted,
FRAN RANCOURT, Claimant/Appellant
By Her Attorney,

Dated: July 20, 2022

/s/ LESLIE H. JOHNSON

Leslie H. Johnson, Esquire, NH Bar #5545
LAW OFFICE OF LESLIE H. JOHNSON, PLLC
PO Box 265
Center Sandwich NH 03227
(603) 284-6600
leslie@lesliejohnsonlaw.com

CERTIFICATION

I hereby certify on this date that I am sending a copy of this Reply Brief as required by the rules of Court. I am electronically sending this document through the court's electronic filing system this date to all attorneys and to all other parties who have entered electronic service contacts (email addresses) in this case, and mailing one copy to the Compensation Appeals Board by next business day, July 21, 2022.

/s/ LESLIE H. JOHNSON

EXHIBIT 1

Vertical heterophoria (VH) is a type of binocular vision disorder that occurs when the eyes are misaligned and can lead to a number of symptoms you may not immediately connect with your eyes. This misalignment, which can be very small, leads to the straining and overuse of the eye muscles. This leads to the symptoms of BVD such as headaches and dizziness. Patients are often misdiagnosed as having vertigo and migraine disorder. https://www.optometrists.org/general-practice-optometry/guide-to-binocular-visual-dysfunction/what-is-vertical-heterophoria-signs-and-treatment/#:~:text=Vertical%20heterophoria%20(VH)%20is%20a,resulting%20in%20serious%20vision%20problems.

Diplopia: Diplopia is when you see two images of the same thing. You might know it as double vision. You might have diplopia in one eye or both. Generally, double vision in both eyes is more serious than if you have it in just one. https://www.webmd.com/eye-health/double-vision-diplopia-causes-symptoms-diagnosis-treatment

Convergence insufficiency is a condition in which your eyes are unable to work together when looking at nearby objects. This condition causes one eye to turn outward instead of inward with the other eye creating double or blurred vision. https://www.mayoclinic.org/diseases-conditions/convergence-insufficiency/symptoms-causes/syc-20352735