THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2021-0153

APPEAL OF FRAN RANCOURT

APPELLEE'S BRIEF

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Date: June 14, 2022

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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.

RSA 281-A:48 (Review of Eligibility for Compensation)

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. This section shall not apply to requests for extensions of medical and hospital benefits, or other remedial care, which shall be governed solely by those sections of this chapter relating thereto. This section shall not apply to lump sum agreements, except upon the grounds of fraud, undue influence, or coercion.

I-a. Any party at interest with regard to an injury occurring after January 1, 2016, where medical treatment for that injury is purposefully and intentionally postponed for medical reasons beyond the fourth anniversary of the date of denial or the last payment of compensation, may petition the commissioner to review such denial or award of compensation made pursuant to RSA 281-A:40 by filing a petition with the commissioner no later than 180 days after the date of the postponed treatment. A written acknowledgment by the employee and notification to the workers' compensation carrier shall be included in the worker's medical record including the medical reason for postponing the medical procedure. Any award or denial of indemnity payments made under this paragraph shall not extend the time frame under paragraph I.

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; or

(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.

IV. A review under this section shall not affect an award with respect to money already paid.

V. Any party at interest who is dissatisfied with the decision of the commissioner under this section may appeal to the compensation appeals board, established under RSA 281-A:42-a, in the same manner as provided in RSA 281-A:43.

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

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

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CONCISE STATEMENT OF THE CASE AND MATERIAL FACTS

On November 20, 2017, while in the course of her employment with Community College System of N.H., the Appellant fell on ice in the employer's parking lot. As a result, she sustained a scalp laceration, for which she received 11 staples at the Androscoggin Valley Hospital emergency room. Appendix to Appellee's Brief, pp. 18-35. She was discharged from the emergency room with a full-duty work release. Id. at p. 18. This claim was accepted by AIM Mutual, the employer's workers' compensation carrier.

On November 21, 2017, the Appellant was terminated from Community College System of N.H. for reasons unrelated to the work injury. Appendix to Appellee's Brief, p. 81. Immediately following her termination, the Appellant's symptoms allegedly and drastically changed.

On November 22, 2017, the Appellant saw her primary care physician and provided a story about the work injury that differed from the story presented at the emergency room. Appendix to Appellee's Brief, pp. 36-41. For example, the Appellant informed her PCP that she had lost consciousness after the fall. Id. at p. 37. The emergency room records, however, indicate that the Appellant denied loss of consciousness. Appendix to Appellee's Brief, p. 19.

On May 25, 2018, the Appellant underwent a brain MRI. Appendix to Appellee's Brief, pp. 42-43. This was subsequently interpreted by the Appellant's neurologist as being unremarkable. Appendix to Appellee's Brief, p. 44. The Appellant's PCP only indicated that the MRI revealed age-related changes. Appendix to Appellee's Brief, p. 48.

Ultimately, the Appellant attended three independent medical examinations ("IME"s) with Dr. Glassman, the Appellee's medical expert. Following his most recent IME, on March 2, 2020, Dr. Glassman opined that the Appellant could return to work full-time with various restrictions. Appendix to Appellant's Brief, pp. 25-34.

On May 14, 2020, the Appellee requested a hearing with the Department of Labor ("DOL") on the issue of RSA 281-A:48 (Review of Eligibility for Compensation, Extent of Disability). Appendix to Appellant's Brief, pp. 23-24. Consequently, a hearing was held on July 21, 2020.

On August 19, 2020, the DOL issued a decision. Appendix to Appellee's Brief, pp. 1-9. Through its decision, the DOL "determined that the [Appellee] has met its burden of proof, by a preponderance of the evidence, to show that [Appellant] has had a change in her condition sufficient to reduce indemnity benefits to the diminished earning capacity rate." Id. The Appellant filed a timely appeal of the DOL decision.

On January 6, 2021, the parties attended the CAB hearing.

On February 5, 2021, the CAB issued a decision. Appendix to Appellee's Brief, pp. 10-17. Through its decision, the CAB found that the Appellee "met their burden of proof that there has been a change in the [Appellant's] condition that would warrant the reduction of the indemnity benefits to the Diminished Earning Capacity rate." Id. at p. 16. The Appellant has filed a timely appeal of the CAB decision to this Court.

STANDARD OF REVIEW

RSA 541:13 requires that "…all findings of the commission upon all questions of fact properly before it shall be deemed to be *prima facie* lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable." This Court will "…review factual findings of the CAB deferentially." Appeal of Phillips, 165 N.H. 226, 230 (2013). See also, Appeal of Kelly, 167 N.H. 489, 491 (2015). This Court "…will not disturb the CAB's decision absent an error of law, or unless, by a clear preponderance of the evidence we find it to be unjust or unreasonable." Appeal of Kelly, 167 N.H. at 491 (2015). In the course of reviewing findings made by the CAB, this Court's "…task is not to determine whether we would have found differently than did the [CAB], or to reweigh the evidence, but rather to determine whether the findings are supported by competent evidence in the record." Appeal of Phillips, 165 N.H. at 235 (citing Appeal of Dean Foods, 158 N.H. 467, 474 (2009)). "The [CAB's] findings of fact will not be disturbed if they are supported by competent evidence in the record, upon which the CAB's decision reasonably could have been made." Id.

ARGUMENT

I. The Compensation Appeals Board ("CAB") was correct 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.

First, the Appellant argues that she has "no work or earning capacity under the law" and that there "is no medical evidence that [the Appellant] could return to any employment." This argument is simply not supported by the applicable law or by the evidence presented to the CAB.

On March 2, 2020, the Appellant attended an IME with Dr. Glassman. This was the third time Dr. Glassman had seen the Appellant. Following his March 2020 examination, Dr. Glassman provided the following opinion relative to the Appellant's work capacity:

"As far as her physical capabilities, it is felt that based upon her examination today, she has the ability to lift 20 pounds occasionally, 10 pounds frequently during the course of an eight-hour work day, five days a week. Bending, kneeling, squatting, and climbing can be done occasionally. Sitting can be done frequently. Standing can be done occasionally. Walking can be done occasionally and driving can be done occasionally. Reaching below waist level can be done occasionally. Reaching at waist level can be done frequently and reaching above waist level can be done occasionally. Fine motor activities of fingers, handling, grasping can be done without limitations bilaterally for the upper extremities." Appendix to Appellant's Brief, p. 31.

At the CAB hearing, the Appellant testified that she has a doctorate in education. Appendix to Appellee's Brief, p. 79. The Appellant testified that she was hired by Community College System in 2007, initially as an adjunct faculty member and then worked her way up to Vice President of Academic and Community Affairs. Id. at p. 77-78. The Appellant testified that she has also held adjunct faculty positions at DeVry College and Plymouth State University. Id. at p. 78-79. With respect to prior employment, the Appellant testified that she had owned and operated "several businesses," including and air purification business and a sports store. Id. Finally, the Appellant testified that she had "started off as an assistant" and then worked her way up to CEO of a floor-covering company. Id. at p. 80.

The Appellee's request to reduce the Appellant's indemnity benefits is governed by RSA 281-A:48, which in pertinent part provides as follows:

"I. Any party at interest ... may petition the commissioner to review ... an award of compensation ... 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....

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."

The Appellant relies on Appeal of Carnahan, 160 N.H. 73 (2010). In Carnahan, the Court found that, "The initial test for determining whether a claimant is entitled to compensation 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." Id. at 79. "In other words, to terminate a claimant's benefits based upon his or her ability to perform work, a carrier or employer must show that the claimant has regained his or her previous 'earning capacity.'" In re Malo, 169 N.H. 661, 667 (2017).

"'Earning capacity' refers to a claimant's ability to compete in the labor market. It is 'an objective measure of a worker's ability to earn wages.' Determining a claimant's earning capacity requires considering 'the worker's overall value in the marketplace, taking into account such variables as his age, education and job training.'" Id. (citing Appeal of Woodmansee, 150 N.H. 63 (2003)).

In Carnahan, the Court also drew a distinction between "gainful employment" and "work capacity," and explained the distinction as follows:

"... 'gainful employment' is defined in RSA 281-A:2, X-a (Supp.2009) as '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.' We have treated 'gainful employment' as 'work capacity,' or the claimant's ability to 'perform some kind of work,' and while it may be relevant to earning capacity, it is not dispositive....Thus, while these two definitions overlap by considering the claimant's 'age, education, and job training,' ***the terms are distinct***...'Gainful employment' does not require a finding that the claimant is able to earn as much as he or she earned at the time of injury, as Carnahan asserts." Id. at 80. (Emphasis added.)

Therefore, to reduce a claimant's indemnity benefits, the carrier or employer does not have to prove that the claimant is able to earn, in suitable work under normal employment conditions, as much as he or she earned at the time of injury. Appeal of Carnahan, 160 N.H. at 80; In re Malo, 169 N.H. at 667.

In the case at bar, it would have been lawful to terminate the Appellant's indemnity benefits. Therefore, the CAB's decision to merely reduce her indemnity benefits was clearly lawful. A termination of benefits would have been supported by Dr. Glassman's medical opinion (evidencing work capacity) and the Appellant's testimony regarding her education and employment background (evidencing earning capacity). The reduction of benefits granted by the CAB was also supported by Dr. Glassman's medical opinion and the Appellant's testimony.

Second, the Appellant argues that "there was no evidence of earning or work capacity related to her head injury" and that her "persistent symptoms" were supported by the evidence. Again, this argument is inconsistent with the evidence presented to the CAB.

In the 12 months preceding the Appellee's May 2020 hearing request, the Appellant had only seen one doctor, other than primary care providers at Saco River Medical Group, for treatment related to her head injury. Specifically, in August 2019, the Appellant was seen by Dr. Pruszenski, an eye doctor. Appendix to Appellee's Brief, pp. 49-53. During this visit, the Appellant reported difficultly with therapeutic glasses. Id. at p. 50. However, she also reported that her light sensitivity was improving, her headaches were responding well to medication, and that she was unstable on her feet but not dizzy. Id. Through her corresponding Workers' Compensation Medical Form ("WCMF"), Dr. Pruszenski opined that the Appellant had no work capacity. Id. at p. 49. Neither the medical record nor the WCMF explain why, in Dr. Pruszenski's opinion, the Appellant could not perform any work whatsoever.

On February 3, 2020, the Appellant saw DO Smith at Saco River Medical Group. Appendix to Appellee's Brief, pp. 54-58. Through her corresponding WCMF, DO Smith opined that the Appellant had no work capacity. Id. at p. 54. However, the WCMF references the Appellant's hamstring tear and head injury, and so it is unclear whether DO Smith was of the opinion that the Appellant was totally disabled due to her head injury, due to her hamstring injury, or due to some combination thereof. What is clear is that the Appellant only reported "some vertigo/nausea with head motion." Id. at p. 55. The Appellant also told DO Smith that she was seeing a neuro-ophthalmologist, even though she had not seen Maine Medical Neurology in over 17 months.

On March 2, 2020, the Appellant attended an IME with Dr. Glassman, a physiatrist. As previously noted, this was Dr. Glassman's third IME. Dr. Glassman opined that the Appellant had a full-time work capacity with various restrictions. Appendix to Appellant's Brief, p. 31. Contrary to the Appellant's assertion, Dr. Glassman's IME report was evidence of a work capacity.

Subsequent to Dr. Glassman's March 2020 IME and the Appellee's May 2020 hearing request, the Appellant reported increased symptoms. For example, on June 24, 2020, the Appellant followed-up with Dr. Pruszenski and reported, "Struggling significantly with depth perception, light sensitivity, noise...and the ability to decifer [sic] what she is looking at." Appendix to Appellee's Brief, p. 60.

Faced with competing medical opinions regarding the Appellant's physical capabilities and work capacity, the CAB was well within its rights to adopt the opinions of Dr. Glassman. See Appeal of Rockingham County Sheriff's Dept., 144 N.H. 194 (1999) (It is the board's task to consider each expert opinion and where such testimony conflicts, the board is free to disregard or accept, in whole or in part, the expert's testimony). The CAB was also well within its rights to reject the opinions of the Appellant's primary care physician and eye doctor. Again, this Court's task is not to determine whether it would have found differently than the CAB or to reweigh the evidence, but rather to determine whether the findings are supported by competent evidence in the record. Appeal of Phillips, 165 N.H. at 230.

Third, the Appellant argues that Dr. Glassman's IME reports support her contention that she has no work capacity. The Appellant further argues that Dr. Glassman failed "to explain what 'modified' or 'partial' duty work was," and that Dr. Glassman "primarily opined on" the Appellant's physical limitations rather than her TBI-related limitations. The Appellant's arguments do not accurately portray Dr. Glassman's reports, opinions, or the record before the CAB.

Through his May 2020 IME report, Dr. Glassman explicitly opines that the Appellant has the ability to work full-time with restrictions. Appendix to Appellant's Brief, p. 32. Therefore, Dr. Glassman's IME report does not support the Appellant's contention that she has no work capacity.

Dr. Glassman's May 2020 IME report contains a detailed breakdown as to the Appellant's physical capabilities. Appendix to Appellant's Brief, p. 31. The Appellant argues that this Court should draw a distinction between "physical capabilities" and "mental capabilities" and find that Dr. Glassman failed to discuss the Appellant's restrictions relative to her head injury. This argument is also not supported by the evidence.

Dr. Glassman's May 2020 IME report contains a detailed "Physical Examination" section. Appendix to Appellant's Brief, pp. 28-29. It is readily apparent that Dr. Glassman performed convergence testing and a Mini-Mental Status exam. Id. Despite the Appellant's *ad hominem* characterizations of Dr. Glassman as a "hired gun" with "expected results," Dr. Glassman actually agreed that the Appellant had post-concussion syndrome causally related to the November 2017 work injury. Id. at p. 30. Dr. Glassman further documented that convergence testing "was positive at 10 inches for blurred vision," noted that head maneuvers and eye movements resulted in "some slight nausea," and noted that the Appellant struggled with "object recall." Id. at p. 29. Therefore, when Dr. Glassman offered an opinion relative to the Appellant's work capacity, it is evident he was taking these findings into consideration. Furthermore, and to the extent the Appellant argues that there is any ambiguity, Dr. Glassman was specifically asked whether his given restrictions "are for the concussion, orthopedic, or both." Appendix to Appellant's Brief, p. 64. Through an addendum, dated May 20, 2020, Dr. Glassman clarified that "the restrictions that I documented in my [March 2020 IME] report were specifically for her post-concussion syndrome." Id.

Therefore, the Appellant's contention that Dr. Glassman "primarily opined on" her physical limitations rather than her TBI-related limitations is entirely without merit and is contradicted by the evidence in the record.

II. The CAB's finding that the Appellant's alleged injuries lacked objective evidence was supported by the medical records. The CAB did not impose an "Objective Test" as argued by the Appellant, and the CAB's decision is reasonable and lawful.

Through her appeal, the Appellant argues that the CAB "erred in requiring objective evidence" and also failed "to recognize the multiple examples of same." This argument misstates the CAB's decision and lacks merit.

The CAB did not impose an "objective test." In reviewing the CAB's decision, the term "objective test" does not appear once. Appendix to Appellee's Brief, pp. 10-17. In fact, the word "objective" never appears in the CAB's decision. Id. Instead, the CAB simply, and correctly, noted that the Appellant's August 2016 brain MRI was interpreted by the neurologist as being "unremarkable." Id. at p. 12. The CAB provided this detail after explaining the "many inconsistencies" in the Appellant's testimony, resulting in a determination that the Appellant's testimony "was not credible." Id. at p. 15.

The CAB clearly recognized the Appellant's testimony relative to her current symptoms. Specifically, the CAB wrote, "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.... 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.... Her memory is 'very bad'.... She works on relaxation techniques and has a hard time counting." Appendix to Appellee's Brief, p. 13. So, it is inaccurate to say that the CAB failed to recognize the Appellant's reported symptoms because it explicitly did so in its decision. The CAB ultimately did not find the Appellant's testimony credible. Despite the Appellant's reported symptoms, the CAB noted that she is able to drive vehicles, go on walks, care for her disabled husband, and "go out boating on several occasions." Id. at p. 15. See Appeal of Lalime, 141 N.H. 534 (1996) (The Court will not overturn a determination of the fact finder who is in the best position to weigh conflicting testimony and competing evidence).

Through her appeal, the Appellant is once again asking this Court to reweigh the evidence by overturning the CAB's findings as to her credibility. This, of course, would be improper.

III. The CAB reasonably considered evidence of the Appellant's 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.

Through her appeal, the Appellant again misstates the facts by arguing, "In this case, there was no on point and conflicting expert testimony on extent of disability." It is undisputed that the CAB was provided with Dr. Glassman's March 2020 IME report, through which he explicitly opined that the Appellant has a work capacity. Appendix to Appellant's Brief, p. 31.

The Appellant further misstates the facts by arguing that the CAB was "factually incorrect" in finding that she was "able to go up to Millinocket, Me [sic] to go out boating on several occasions." Through her appeal, the Appellant actually agrees that one of her own witnesses testified to the fact that she went on a boat after the work injury "a few times." The Appellant argues that her recreational activities are "of no import," but this could not be farther from the truth. A claimant's recreational activities are absolutely probative of their physical capabilities. In the case at bar, the Appellant's ability to ride in a boat, on choppy waters, was reasonably considered by the CAB when it: 1) weighed the Appellant's credibility; and 2) weighed the credibility of the medical opinions regarding work capacity. See Appeal of Lalime, 141 N.H. 534 (1996) (The Court will not overturn a determination of the fact finder who is in the best position to weigh conflicting testimony and competing evidence).

IV. The CAB properly weighed the evidence, and its decision is reasonable and lawful.

Through her appeal, the Appellant argues that the CAB should have given more weight to the opinions of her treating providers, rather than to the opinions of Dr. Glassman. In Appeal of Morin, the Court did find that treating physicians have great familiarity with their patients' conditions, and so "their reports must be accorded substantial weight." Appeal of Morin, 140 N.H. 515, 519 (1995). However, the Court did not find, nor has it ever found, that the opinions of treating physicians must be accorded more weight than the opinions of non-treating physicians. In fact, in Town of Hudson v. Wynott, the Court found that even uncontroverted medical opinions may be discounted by the CAB so long as "the competing evidence or the considerations supporting" the CAB's decision are identified. Town of Hudson v. Wynott, 128 N.H. 478, 484-485 (1986).

However, in the case at bar, there were competing medical opinions, and Dr. Glassman controverted the treating providers. The CAB identified the conflicting evidence relative to the Appellant's work capacity and relied upon Dr. Glassman. This competing evidence also included the Appellant's own activities, the Appellant's conflicting testimony, and the testimony of the Appellant's witnesses. Faced with competing medical opinions, the CAB was well within its rights to find the opinions of Dr. Glassman more persuasive. See Appeal of Rockingham County Sheriff's Dept., 144 N.H. 194 (1999) (It is the board's task to consider each expert opinion and where such testimony conflicts, the board is free to disregard or accept, in whole or in part, the expert's testimony).

The Appellant argues that "the opinions of the treating providers are not directly disputed by [Dr.] Glassman." Again, this representation is factually incorrect. For the reasons already set forth above, it is evident and obvious that Dr. Glassman disputed the treating providers' opinions relative to the Appellant's work capacity, and the CAB was well within its rights to choose between competing medical opinions.

V. The CAB's finding that the Appellant's hamstring injury was not causally related to the underlying work injury was reasonable and supported by the evidence.

The Appellant argues that her left hamstring injury, sustained on July 30, 2019, is causally related to the November 2017 work injury because the hamstring injury was caused by "dizziness and balance issues." The Appellant further argues that "the boat was in fact not moving, and was securely tied on both ends." The Appellant's arguments are not supported by the evidence, and the CAB had ample evidence to support its denial of the hamstring injury.

The best evidence of what happened on July 30, 2019, are the emergency room records that immediately followed the Appellant's boating accident. In pertinent part, the emergency room nurse's record reads as follows: "[Patient] was stepping into a boat when it moved away from dock, [patient] hyper extended leg, heard a pop and fell into water." Appendix to Appellee's Brief, p. 64. The emergency room physician's record reads as follows: "Patient extended her left leg to pull a boat that was drifting off the dog [sic] back in when she did this, she felt something snap in her left buttock and she fell into the lake." Id. at p. 66. There is no

evidence in the emergency room records that the Appellant's hamstring injury was caused by a dizziness or balance issue.

The CAB heard testimony from Jeff Schall, the Appellant's friend who was with her at the time of the hamstring injury. Mr. Schall admitted that he did not see the Appellant fall into the lake. Appendix to Appellee's Brief, p. 85. Mr. Schall also admitted that the boat, although tied to the dock, was most likely moving. Id. at p. 151-153. Therefore, Mr. Schall's testimony is consistent with the accident descriptions contained within the emergency room records.

The Appellant argues that her treating providers causally related her hamstring injury to her head-related symptoms. However, the treating providers did not have an accurate description of the boating incident, and so their opinions rightfully carried very little weight. For example, Dr. Pruszenski openly admitted to having "[f]ew details regarding her hamstring injury while stepping into a boat on 7/20/19." Appendix to Appellee's Brief, p. 70.

In December 2020, Dr. Pruszenski was asked by Appellant's counsel to provide an opinion relative to the hamstring injury. Instead of providing Dr. Pruszenski with the emergency room records, Appellant's counsel summarized the July 2019 medical records as follows: "7/30/2019 left hamstring injury while attempting to get into a boat." Appendix to Appellee's Brief, p. 74. The actual medical records read, "patient was stepping into a boat when it moved away from dock, [patient] hyperextended leg, heard a pop and fell into water," and "...Patient extended her left leg to pull a boat that was drifting." Appendix to Appellee's Brief, pp. 64, 66. Appellant's counsel further misinformed Dr.

Pruszenski by writing, "both [Appellant] and her witness, Mr. Schall, testified that the boat [Appellant] was stepping into on 7/30/2019 was securely fastened to the dock at the bow and stern and, therefore, the boat could not pull away from the dock." Appendix to Appellee's Brief, p. 73. In actuality, Mr. Schall testified that there is a space between the dock and boat, even when the boat is fastened. Appendix to Appellee's Brief, p. 151-153. Mr. Schall further conceded that the boat could pull away from the dock on the leeward side, even when the boat is fastened. Id. Dr. Pruszenski's opinion relative to the causal relationship between the Appellant's head-related symptoms and the boat incident is substantially undermined by this misinformation, and the CAB was free to discount her opinion.

Finally, the CAB made the following finding with respect to the boat incident: "The testimony provided by the claimant regarding the boating incident that caused her hamstring injury was inconsistent with [Mr. Schall's] testimony." Based on this inconsistency, the CAB was free to discount the Appellant's testimony as to what caused her to fall from the boat. The Appellant has not shown that the CAB's decision was unsupported by the evidence. The Appellant, once again, is asking this Court to reweigh the evidence and make its own determination.

CONCLUSION

CAB decisions will be overturned "...only for errors of law, or if we are satisfied by a preponderance of the evidence before us that the order is unjust or unreasonable." Appeal of Newcomb, 114 N.H. 664, 666 (1997). The Appellate "bears the burden of demonstrating that the Board's decision

was erroneous." Appeal of Staniels, 142 N.H. 794, 796 (1998) (citing RSA 541:13).

The CAB's finding that the Appellee met its burden of providing a change in condition was supported by the evidence. The CAB's finding that the Appellant is entitled to indemnity benefits at the DEC rate was supported by the evidence.

The CAB's decision contains no errors of law and is just and reasonable. There is no reasonable basis presented for this Court to re-weigh or otherwise disturb the CAB's findings.

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). This brief contains 5,651 words.

Respectfully submitted,

AIM Mutual – NH Employers Ins. Co.,
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is being timely provided through the electronic filing system's electronic service to Leslie H. Johnson, Esq., leslie.lesliejohnsonlaw@gmail.com and to the Solicitor General at Solicitor.General@doj.nh.gov for the Attorney General Office.

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