

STATE OF NEW HAMPSHIRE

SUPREME COURT

NO. 2021-0369

APPEAL OF CAITLYN WITTENAUER

APPEAL FROM THE NEW HAMPSHIRE WORKERS'
COMPENSATION APPEAL BOARD

BRIEF OF CAITLYN WITTENAUER, APPELLANT

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QUESTIONS PRESENTED FOR REVIEW

1. Where workers' compensation Claimant asserts a recurrence of disability arising from an undisputed August, 2019 work injury, did the Workers' Compensation Appeal Board commit error by placing a burden upon the Claimant to demonstrate another work incident occurring between Claimant's return to work in May, 2020 and her second onset of disability in September, 2020? (Claimant's Motion for Rehearing and/or Reconsideration, ¶2 [See Appeal From Administrative Agency, p. 23]).
2. Did Workers' Compensation Appeals Board err in failing to analyze and make findings as to whether Claimant's disability in September, 2020 was due at least in part to the work injury that she suffered in August, 2019? (Claimant's Motion for Rehearing and/or Reconsideration, ¶6-11 [See Appeal From Administrative Agency, p. 24]).

APPLICABLE STATUTORY PROVISIONS

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.

- 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.

STATEMENT OF THE CASE AND FACTS

The Claimant, Caitlyn Wittenauer, is a 22-year-old high school graduate who worked full-time in the stockroom for Nike at the Merrimack Premium Outlet Mall. (Document 6B, pages 6-8). Her duties required frequent lifting of medium weights, constant climbing of ladders and some overhead reaching. (Document 6B, pages 9-10).

On August 15, 2019, Ms. Wittenauer suffered injuries after carrying two boxes weighing approximately 60 lbs. and then extending her arms outward to place the boxes on the floor. (Document 6B, pages 11-12). She experienced immediate onset of severe pain in her left shoulder and down her left upper extremity to her hand. (Document 6B, pages 11-12). After informing her manager, she immediately left work to seek medical attention at Convenient MD from which she was referred to the New Hampshire Orthopaedic Center. (Document 6B, pages 12-14; Document 5A, p. 158).

Ms. Wittenauer came under the care of Dr. Douglas Goumas (Document 5A, p. 115). Dr. Goumas performed left shoulder capsulorrhaphy surgery on the Claimant for left shoulder instability on December 17, 2019. (Document 5A, p. 453). In January, 2020, Ms. Wittenauer began extensive physical therapy treatments. (Document 5A, p. 418).

Ms. Wittenauer's workers' compensation claim was an accepted work injury. The Department of Labor's file indicates that the Claim Administrator, Corvel Corporation, paid indemnity benefits from the Date of Injury until May 3, 2020 at which time the insurance carrier unilaterally stopped benefits. (Document 12, p. 38). On April 21, 2020, Dr. Goumas

had provided the Claimant with a light duty work release with 5 lb. lifting limits, no overhead lifting and no repetitive movement of the left shoulder. (Document 5A, p. 66).

On July 10, 2020, Dr. Goumas completed a workers' compensation medical form that provided for a full duty work release and stated that the Claimant was at maximum medical improvement and had suffered a permanent impairment due to her work injury. (Document 5A, p. 51). Dr. Goumas' office note that date records that Ms. Wittenauer still had some stiffness in range of motion of the shoulder and she continued to have nerve pain that he believed would gradually get better over time. (Document 5A, pages 49-50). Less than two months later, Ms. Wittenauer returned to Dr. Goumas on September 3, 2020 reporting that she was having more pain in her shoulder as well as stiffness, particularly when she tried to do anything overhead. (Document 5A, p. 42). Dr. Goumas attributed these symptoms to residual instability of the shoulder. (Document 5A, p. 42). He recommended her ongoing physical therapy treatments aggressively work on strengthening her rotator cuff. (Document 5A, p. 43). Dr. Goumas issued a revised workers' compensation medical form limiting the Claimant to a 5-hour workday restriction as a result of her work injury. (Document 5A, p. 44).

Ms. Wittenauer next saw Dr. Goumas 3 weeks later on September 25, 2020 at which time he took her out of work completely. (Document 5A, pages 35-37). During this visit, Ms. Wittenauer reported that she was having a lot of pain that goes up to the side of her neck on the left side as well as around the paraspinal musculature. (Document 5A, p. 35). Dr. Goumas' office note states her symptoms are consistent with some

deconditioning and some mild instability but also appear to have a neurogenic component as well. (Document 5A, p. 36). Dr. Goumas' workers' compensation medical form this date states that the Claimant has no work capacity and her disability is related to her work injury. (Document 5A, p. 37).

When the insurance carrier did not voluntarily reinstate payment of disability benefits, the Claimant requested a hearing before the Department of Labor. (Document 11, p. 31). A Department of Labor Hearing Officer issued a Decision dated December 22, 2020 ruling that Claimant had failed to meet her burden of proof due to the lack of a narrative opinion from the treating physician. (Document 11, p. 35). Ms. Wittenauer appealed this Decision to the Workers' Compensation Appeals Board. (Document 10, p. 28). The Workers' Compensation Appeals Board, following a *de novo* hearing, issued a Decision dated June 11, 2021 ruling that no indemnity benefits were due Ms. Wittenauer as the disability claimed was deemed not causally related to a work injury. (Addendum to Appellant's Brief, p. 33).

SUMMARY OF ARGUMENT

The Claimant suffered an obvious and serious work injury in August, 2019 resulting in left shoulder surgery and an extended period of disability up through a full duty work release in July, 2020. Approximately eight weeks later, her treating surgeon, Dr. Goumas, reimposed work restrictions in September, 2020. The situation presented was a failed attempt to return to work resulting in a recurrence of disability since Ms. Wittenauer's left shoulder was still debilitating. The law is well established that once a work-connected injury has occurred, the subsequent progression of the condition remains compensable so long as a worsening is not shown to have been produced by an independent non-industrial cause. Nevertheless, the appealed Decision ruled that Claimant had failed to meet her burden of proof of a second work incident occurring during the time period following her return to work and the second onset of disability. The Decision erroneously required Ms. Wittenauer to establish a second workplace injury when a recurrence of disability claim has no such requirement.

Although the Claimant did have a burden to show a change in condition, the WCAB was misled by the insurance carrier attempting to change the condition for which the Claimant sought benefits. The insurance carrier attempted to recharacterize Ms. Wittenauer's claim as an onset of disability due to complaints of neck symptoms. The real and easily determined issue that was presented by this matter was whether Ms. Wittenauer's second onset of disability in September, 2020 was due at least in part to the left shoulder injury she suffered at work in August, 2019. It

was undisputed that the Claimant could not perform her prior stockroom duties following her return to work. There was no medical opinion or evidence that her left shoulder condition had ceased. The WCAB Panel found Ms. Wittenauer to be a credible witness, but the Decision misstates her testimony as to pain complaints as well as ignores evidence in the medical record. The medical record is clear that Ms. Wittenauer had ongoing instability in the shoulder along with shoulder weakness, loss of range of motion, loss of function and substantial pain.

The WCAB Decision appealed did not address the real issue that this Court should decide as a matter of law. Since the only reasonable conclusion from the record is that Ms. Wittenauer's recurrence of disability in September, 2020 was due at least in part to her work-related shoulder injury suffered in August, 2019, she is entitled to have her indemnity benefits reinstated.

ARGUMENT

Standard of Review

This Court will overturn a WCAB Decision only for errors of law, or if it finds by a clear preponderance of the evidence, that the Decision is unjust or unreasonable. Appeal of Kelly, 167 N.H. 489, 491 (2015); RSA 541:13. It reviews the factual findings of the WCAB deferentially and reviews its statutory interpretation *de novo*. Appeal of Phillips, 165 N.H. 226, 230 (2013). The interpretation of a WCAB Decision to determine whether the proper legal test was applied is a question of law which is reviewed *de novo*. Appeal of Estate of Dodier, 2021 N.H. Lexis 155 (Headnote #7) (October 14, 2021). If the record reveals that a reasonable fact finder necessarily would reach a certain conclusion, this Court may decide the issue as a matter of law. Estate of Dodier, *supra*, (Headnote #8). The Court construes the Workers' Compensation Law liberally to give the broadest reasonable effect to its remedial purpose. Kelly, *supra*, at 491; Phillips, *supra*, at 230.

I. **WHERE CLAIMANT MADE CLAIM FOR A RECURRENCE OF DISABILITY FROM AN UNDISPUTED AUGUST, 2019 WORK INJURY, THE WCAB ERRED BY IMPOSING UPON CLAIMANT A BURDEN TO DEMONSTRATE A SECOND WORK INCIDENT OCCURING BETWEEN CLAIMANT'S INITIAL POST-INJURY RETURN TO WORK IN MAY, 2020 AND CLAIMANT'S SECOND ONSET OF DISABILITY IN SEPTEMBER, 2020.**

The history of this claim presented a situation wherein the Claimant sought a resumption in payment of indemnity benefits due to, in essence, an unsuccessful attempt to return to work. Ms. Wittenauer had returned to

work with restrictions on or about Memorial Day, 2020 and had received a full duty work release on July 10, 2020; but within two months thereafter, her treating physician again placed her on restrictions on September 3, 2020. This Court's decisions have described this situation as a worsening or "recurrence" of disability in contrast to an "aggravation" of a stabilized condition, or a new work injury. Rumford Press v. Travelers Ins. Co., 125 N.H. 370, 374-375 (1984). A recurrence of disability does not require proof of a distinct, second work incident.

Once the work-connected character of an injury has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent non-industrial cause. Appeal of Cote, 139 N.H. 575, 579-580 (1995). In Hudson v. Wynott, this Court held that if a worker suffers from an ongoing debilitating condition, an "aggravation" of a prior injury must ordinarily be a distinct and extraordinary trauma-inducing event in order to qualify as an independent non-industrial cause. Hudson v. Wynott, 128 N.H. 478, 482 (1986). Disability in Wynott and similar cases is held to relate back to the earlier work-related incident because of the lack of an intervening traumatic event that would establish an independent cause of a new disability. Appeal of Briggs, 138 N.H. 623, 631 (1994). The corollary to this Court's holdings is no distinct, second work incident is necessary to establish a recurrence of a work injury.

The WCAB denied the claim on the basis that Claimant had failed to meet her burden of proof. (Addendum to Appellant's Brief, p. 33). Notwithstanding that the Claimant was asserting a recurrence of disability,

the Decision sets forth the basis for the Panel's reasoning in several statements as follows:

"The Panel here finds that Claimant's regular duties after her return to work on or shortly after Memorial Day, 2020. The Panel finds that while the original injury on 8/15/2019 arose from a moderately heavy lift, the evidence of recurrent pain complaints occurred when Claimant had stopped heavy lifting . . ." (Addendum to Appellant's Brief, p. 31);

"The notes from the office visits with Dr. Goumas have no narrative that describes the current work duties just prior to the 9/3/2020 office visit." (Addendum to Appellant's Brief, p. 31);

"The lack of another work incident just prior to the 9/3/2020 office visit with Dr. Goumas brings legal causation into issue." (Addendum to Appellant's Brief, p. 32);

"The Panel cannot find a sufficient medical foundation that assess left shoulder pain from lifting duties from July, 2020 onward to the 9/3/2020 report of symptoms to Dr. Goumas." (Addendum to Appellant's Brief, p. 32); and,

"The notes from the provider and Claimant's testimony provide no specific information of a new work injury or an aggravation of the surgically repaired left shoulder." (Addendum to Appellant's Brief, p. 33).

Thus, although Ms. Wittenauer already had suffered a traumatic, work-related injury after which she had underwent surgery and for which there had been a substantial period of disability and still ongoing rehabilitation therapy, the Panel focused upon her work duties after her eventual return to work. The claim for benefits was denied because Claimant had not demonstrated that she was experiencing symptoms and disability as a result of lifting or other work activities performed following

her return to work in the summer of 2020. The Decision, in effect, required Claimant establish a second work injury. The Panel's analysis was legally erroneous and the Decision must be reversed.

The Claimant's only burden of proof was to show a change in her condition affecting her earning capacity. RSA 281-A:48; Appeal of Dean Foods, 158 N.H. 467, 472 (2009); Appeal of Elliot, 140 N.H. 607, 610 (1996). Ms. Wittenauer satisfied this burden by demonstrating that her symptoms had worsened and her treating physician had issued new work restrictions rendering her unable to earn as much as she did prior to her work injury. (Document 5A, pgs. 42-44; pgs. 35-37; Document 6B, pgs. 19-21). The pain that Ms. Wittenauer was experiencing whenever she tried to do anything overhead as reported to Dr. Goumas on September 3, 2020 (Document 5A, p. 42) could have been brushing her hair or reaching for a cupboard at home. Wynott, supra, at 481-482; quoting A. Larson, The Law of Workmen's Compensation, §13.11(a) (1985) (triggering episode for a recurrence of disability can be a nonemployment exertion such as sneezing, sleeping, raising a window or hanging up a suit). The WCAB Decision is erroneous as a matter of law in stating otherwise. (Addendum to Appellant's Brief, pgs. 31, 32, 33).

The insurance carrier argued in Appellee's Motion for Summary Disposition of Appellant's Appeal that the Decision did not require Claimant to demonstrate a second workplace injury. (Appellee's Motion, p. 10). The several quotes above setting forth the WCAB's analysis makes plain otherwise. The combined interpretation of the WCAB's initial Decision and Decision following Claimant's Motion for Rehearing and/or Reconsideration is a question of law that this Court reviews *de novo*.

Estate of Dodier, *supra*, (Headnote #7). The insurance carrier's argument is an implicit acknowledgement that a recurrence does not require a second work event and that the Decision is flawed by legal error.

The insurance carrier also argues that the WCAB, in seeking a second workplace injury, did so only in the context of determining sources for legal causation. (Appellee's Motion for Summary Disposition of Appellant's Appeal, p. 9). However, the Decision clearly states "the original injury on 8/15/2019 arose from a moderately heavy lift" and "Dr. Goumas' narrative certainly described the initial injury and treatment with a strong medical foundation." (Addendum to Appellant's Brief, pgs. 31, 32). Causation of Ms. Wittenauer's August 2019 work injury was not contested and never in dispute. Moreover, the fact that Ms. Wittenauer's claim was accepted and benefits were paid for several months constitutes an acknowledgement that causation of the 2019 work injury was not contested for purposes of a review hearing under RSA 281-A:48. Elliot, *supra*, at 610.

The insurance carrier did not assert and presented no evidence that the Claimant had suffered an independent non-industrial cause. Instead, the insurance carrier attempted to recast Ms. Wittenauer's claim for disability benefits as due to neck symptoms or neck complaints, rather than a recurrence of her clear work-related injury. After the Claimant requested that her disability benefits be reinstated, the insurance carrier issued a Memo of Denial that provides:

"9/25/2020 medical – Neck is not compensable to our injury. Treatment for the neck is denied. Ongoing disability is denied for neck." (Document 12, p. 51).

Thus, the insurance carrier sought to change the medical condition for which Ms. Wittenauer sought benefits from an undisputed left shoulder injury to an unexplained neck injury or neck symptoms in this 22-year-old Claimant. Defense counsel argued that Ms. Wittenauer's shoulder injury had "resolved". (Document 6B, pg. 42-43).

The insurance carrier, in recasting a straightforward claim of a recurrence of disability from a failed attempt to return to work into a new claim for disability based upon neck complaints, mislead the WCAB to the wrong issue. The Decision states that the Claimant's "neck pain arose well after the surgery on 12/17/2019, and well after a period of no work, to the time of work duties that did not involve any lifting." (Addendum to Appellant's Brief, p. 32). The Panel's analysis was mistaken not only in imposing an improper burden upon Claimant to demonstrate a second work event, but in failing to consider and address the real and easily determined issue presented by this matter – i.e., whether Ms. Wittenauer's second period of disability in September, 2020 was due at least in part to the traumatic work injury in August, 2019. Appeal of Redimix Company, Inc., 158 N.H. 494, 496 (2009).

The insurance carrier presented no medical opinion that Ms. Wittenauer's left shoulder injury had ceased. If the medical evidence establishes that the petitioner's compensable work-related injury has ceased, a change in condition has occurred, warranting termination of benefits. Appeal of Dean Foods, supra, at 472; quoting Appeal of Hiscoe, 147 N.H. 223, 230 (2001). The medical records review opinion of Dr. Glassman obtained by the insurance carrier offered only that "any neck complaints and neck treatment . . . is not directly causally related to the

injury date of August 15, 2019.” (Document 5A, p. 422). The Decision ignores the fact that when Dr. Goumas reinstated work restrictions on September 3, 2020, the corresponding office note is devoid of any neck complaints or symptoms and instead references “residual instability” in Ms. Wittenauer’s shoulder. (Document 5A, pgs. 42-44). When Dr. Goumas took her completely out of work, Ms. Wittenauer was experiencing a lot of pain trying to do both her ongoing physical therapy treatments combined with her return-to-work activities. (Document 5A pgs. 35, 37). The neck symptoms were described as a “radiating pain” consistent with “deconditioning” and “instability” as well as appearing to have a “neurogenic component.” (Document 5A, pgs. 35-36). Ms. Wittenauer had complained of neck pain shortly after the August, 2019 work injury (Document 5A, pgs. 137, 143, 152, 158), and she had complained of nerve pain since her shoulder surgery. (Document 5A, pgs. 50, 56, 64, 71, 78, 84).

The WCAB Panel sought proof of a second work event when no such event was necessary to reinstate Claimant’s disability benefits. The Panel only needed to consider whether Ms. Wittenauer’s disability in September, 2020 was due at least in part to the work injury that she had suffered in August, 2019. The evidence in the record was abundantly clear that Ms. Wittenauer’s work injury had not ceased and remained debilitating.

II. THE CLAIMANT IS ENTITLED TO REINSTATEMENT OF INDEMNITY BENEFITS BECAUSE IT IS READILY APPARENT FROM THE RECORD THAT HER SECOND ONSET OF DISABILITY IN SEPTEMBER, 2020 WAS DUE AT LEAST IN PART TO HER WORK-RELATED SHOULDER INJURY IN AUGUST, 2019.

In order to be entitled to indemnity benefits, Ms. Wittenauer had to show by a preponderance of the evidence that her work-related injuries in August, 2019 probably caused or contributed to her disability in September, 2020. *Redimix, supra*, at 496; *Appeal of Kehoe*, 141 N.H. 412, 417 (1996). If at least part of the Claimant's disabling symptoms in September, 2020 were due to the prior year's work injury, then the work-related condition had not ceased and benefits were payable. *Dean Foods, supra*, at 474. Additionally, if the work-related injury resulted in a permanent impairment, such permanent injury was some evidence that the Claimant's ongoing symptoms were partially resulting from that work injury. *Id.*

When Ms. Wittenauer was provided a full duty work release on July 10, 2020, Dr. Goumas noted that she still had shoulder stiffness at the end ranges of internal and external rotation; that he believed her ongoing neurogenic pain would gradually get better over time and that the work injury had caused a permanent impairment. (Document 5A, pages 49-51). Also at this time, Ms. Wittenauer had ongoing physical therapy treatments (Document 5A, pages 263-272) with the plan to "continue with Current Rehabilitation Program" and "[A]dvance as tolerated," (Document 5A, pages 265, 268, 272), since she was still demonstrating loss of range of motion, weakness, mild tightness and moderate guarding upon objective examination of her shoulder. (Document 5A, pages 263-264, 266-267,

270-271). The WCAB Decision incorrectly states that the “uncontested facts are that Claimant returned to full-time, full duty work for a period of time in June, 2020, without further medical attention to the left shoulder.” (Addendum to Appellant’s Brief, p. 33). Ms. Wittenauer actually had six physical therapy treatments for her shoulder in June, 2020, (Document 5A, pages 273-297), and Dr. Goumas’ full duty work release was not issued until July, 2020. (Document 5A, pages 51, 58). During these June physical therapy treatments, Ms. Wittenauer reported that she was “tolerating 4 hours of work without lifting or repetitive tasks” but 8-hour shifts exacerbated her symptoms to a 7/10 pain level. (Document 5A, p. 287). These reports to the physical therapist were consistent with Ms. Wittenauer’s testimony that she tried but could not perform her stockroom duties, and that she was using her accrued paid time off benefits to reduce the length of her work shifts when performing sales, cashier or other duties. (Document 6B, pages 17-20). The Claimant’s shoulder injury clearly remained debilitating.

The physical therapy records during the time period between Dr. Goumas’ initial 5-hour work shift limitation (Document 5A, p. 44) and his subsequent no work restriction (Document 5A, p. 37) indicate that Ms. Wittenauer required aggressive rotator cuff strengthening due to reduced active range of motion and weakness in the shoulder, increased shoulder pain, neck/shoulder musculature restrictions and mild symptoms in her hand worsened with reaching. (Document 5A, p. 246). She experienced a significant increase in shoulder pain following increased activity at work. (Document 5A, p. 241). Dr. Goumas eventually referred Ms. Wittenauer to a new physical therapist for treatment of anterior shoulder instability.

(Document 5A, p. 28). The new physical therapist conducted an initial evaluation of the Claimant on October 15, 2020. (Document 5A, p. 222). The physical therapist's assessment was Ms. Wittenauer had a loss of functional range of motion of the left shoulder and had a very limited tolerance for use of the left shoulder for self-care and activities of daily living. (Document 5A, p. 224).

The WCAB Decision mistakenly states that the "record of testimony by Claimant does not contain shoulder pain complaints after the operation and physical therapy." (Addendum to Appellant's Brief, p. 32). Ms. Wittenauer testified on cross-examination that at the time Dr. Goumas took her completely out of work, her whole left shoulder hurt as well as her shoulder blade and neck and she had occasional nerve pain from her shoulder down to her elbow and into her hand. (Document 6B, pages 25, 29-30). At the time of the hearing in May, 2021, Ms. Wittenauer described her current symptoms as her shoulder "throbs" and she gets the nerve pain from her shoulder down her arm three to four times per week. (Document 6B, p. 30). The panel found the Claimant to be a credible witness and accurate historian. (Addendum to Appellant's Brief, pages 31, 32).

There is no reading of the Claimant's testimony and the corresponding medical record from which one could conclude that Ms. Wittenauer's second onset of disability in September, 2020 was not due, at least in part, to symptoms and limitations resulting from her work-related shoulder injury. It is abundantly clear that, regardless of the cause of any neck symptoms, Ms. Wittenauer's left shoulder injury had not ceased and did contribute to cause her disability in September, 2020. Moreover, no determination needed to be made with regard to whether her neck

symptoms also were causally related to the work injury. Dean Foods, *supra*, at 475-476. The Claimant simply had experienced a recurrence of disability within a short time after attempting to return to work from her clear work-related shoulder injury.

The WCAB failed to decide the easily answered question as to whether Ms. Wittenauer's second onset of disability was due at least in part to her work injury. When a lower tribunal has not addressed a factual issue, but the record reveals that a reasonable fact finder necessarily would reach a certain conclusion, this Court may decide the issue as a matter of law. Estate of Dodier, *supra*, (Headnote #8); Cote, *supra*, at 582. Where, as here, there was no expert medical testimony at the hearing below, a "purely legal question" is presented. Estate of Dodier, *supra*, (Headnote #8). Since the record evidence makes clear that there can be no other reasonable conclusion but that Ms. Wittenauer's disability in September, 2020 was due at least in part to her August, 2019 work injury, the Claimant met her burden of proof and was entitled to a resumption of payment of indemnity benefits.

CONCLUSION

The WCAB Decision denying disability benefits on the grounds that the Claimant had not met her burden of proof must be reversed. The Claimant suffered a recurrence of disability due at least in part to her August, 2019 work injury. Remand to the WCAB is warranted only for purposes of entry of an award of Temporary Partial Disability benefits commencing September 4, 2020 (Document 5A, p. 44) followed by an award of ongoing Temporary Total Disability benefits commencing September 26, 2020. (Document 5A, p. 37).

REQUEST FOR ORAL ARGUMENT

The Appellant requests oral argument limited to not more than 15 minutes to be presented by James F. Lafrance, Esq.

Dated: January 28, 2022

/s/ James F. Lafrance

CERTIFICATION OF APPENDED WRITTEN DECISION

I hereby certify, pursuant to Rule 16(3)(i), that each appealed Decision that is in writing is being submitted in the attached Addendum To Appellant's Brief containing the WCAB Decision dated June 11, 2021 with attached Claimant's Requests For Rulings Of Law and the WCAB Decision On Claimant's Motion For Rehearing And/Or Reconsideration dated July 15, 2021.

Respectfully submitted,

CAITLYN WITTENAUER
By Her Attorneys,
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CERTIFICATE OF SERVICE

I hereby certify that one copy of Appellant's Brief has this date been electronically served upon Craig A. Russo, Esq., crusso@m2esq.com, Mullen & McGourty, P.C., 264 North Broadway, Suite 204A, Salem, NH 03079 and the State of New Hampshire Attorney General. One copy has been conventionally served upon the N.H. Department of Labor, Workers' Compensation Appeal Board, State Office Park South, 95 Pleasant Street, Concord, NH 03301.

/s/ James F. Lafrance

Date: January 28, 2022

ADDENDUM TO APPELLANT’S BRIEF

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State of New Hampshire

COMPENSATION APPEALS BOARD

June 11, 2021

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DECISION OF THE WORKERS COMPENSATION APPEALS BOARD

CAITLYN WITTENAUER

v.

NIKE, INC.

DOCKET # 2021-L-0222

APPEARANCES: Claimant appeared represented by Attorney James Lafrance. Employer and Corvel Corporation, TPA for Employer, were represented by Attorney Craig Russo.

WITNESSES: Claimant was the only witness.

ISSUES: RSA 281-A: 48: Review of Eligibility for Compensation, Extent of Disability.

DATE OF INJURY: August 15, 2019.

HEARING: A de novo hearing was held at the Department of Labor, Concord NH on May 13, 2021.

PANEL: The panel was comprised of David Siff, Chair. Susan Jeffery and Daniel Manning.

BACKGROUND

This de novo hearing involves a work injury that occurred on August 15, 2019. The injury was accepted and all costs and indemnity paid until 9/4/2020. Employer accepted an injury related to Claimant's left shoulder and denies a work relationship of cervical symptoms related to the accepted work injury. The parties agreed that

Claimant's current appeal is requesting a returned to temporary partial disability benefits for the period 9/4/2020 to 9/25/2020 and a return to temporary total disability from 9/26/2020 and ongoing. The parties agree it is Claimant's burden of proof on this issue. Claimant submitted requests for rulings of law and Employer posed no objection to any of those legal requests.

Claimant testified she is currently living in Derry and is 22 years old. Claimant started with Employer part time in 2017 and 2018. Claimant began full time with Employer in 2019. Claimant's initial full-time duties were in the stock room. The duties included unloading boxes of shoes for the retail outlet in the Merrimack Premium Outlet mall. The boxes would arrive by truck 2-3 times per week and the boxes were unloaded and unboxed for pricing and movement onto the retail sales floor. The unloading duties took about 3-4 hours per day. Claimant testified to lifting large boxes of sneakers weighing about 60 pounds on a regular basis. Some duties involved climbing a ladder to reach storage shelves and some overhead lifting. On the date of injury, 8/15/2019, Claimant was carrying two boxes of sneakers weighing about 60 pounds. On bending to put the box on the floor, and on extending her arms downward, Claimant felt "instant pain" in her left shoulder, with numbness into her left hand. Claimant moved to the break room and the "Company Nurse" was called and Claimant was sent to Convenient MD for medical attention. Claimant described an x-ray being taken and she was given Ibuprophen for the pain. Claimant described returning to work and being told to go home with work restrictions could be reviewed by staff. Claimant described being referred to New Hampshire Orthopedics in Bedford. Claimant remained out of work.

Claimant saw Dr. Lynn on 8/21/2019 and an MRI was ordered. Claimant testified after Dr. Lynn reviewed the MRI she was referred for a second opinion and she saw Dr. Goumas about two weeks later. Claimant's understanding of the MRI was that it showed her left shoulder was dislocated, with the ball joint out of place. Dr. Goumas recommended surgery and that was performed on 12/17/2019, and her left shoulder was "put back in." Exhibits page 453. Claimant described months of physical therapy starting January 1, 2020 with "slow progress." Dr. Goumas recommended another MRI to review the possible reasons for the slow progress. Claimant testified the Carrier denied coverage for the repeat MRI. Claimant testified she was given a return to work

slip dated April __, 2020, but the store was not open due to Covid issues. The store reopened on Memorial Day, 2020 and Claimant was assigned again to the stock room. Claimant testified to "lots of pain" trying to do the regular work. Claimant was reassigned to cash register duty and monitoring the front door to limit the number of customers in the store at one time (due to Covid restrictions). Claimant described her pain levels gradually increased and her work hours were reduced from full time to 5 hours per work day. Exhibits page 44. Claimant saw Dr. Goumas on 9/25/2020 and she was ordered out of work. Exhibits page 37. Claimant testified she has not been cleared to return to any work as of the hearing date. Claimant testified she used St. Joseph's Hospital as her primary care provider since she was in first grade and never dislocated either shoulder in the past.

On cross-examination Claimant testified she is right hand dominant. Claimant agreed that on her return to work in May 2020, she was initially assigned to the stock room. Claimant described her pain complaints in May 2020 as originating on the left side of her neck up to her left ear. Claimant thought she described this pain to Dr. Goumas. Claimant agreed that the neck pain was addressed in physical therapy. In September 2020, after she returned to work and when the neck pain was strong, she described it as occasional nerve pain from the left shoulder to the left elbow and left shoulder pain in the front and back. Claimant testified the left shoulder would "throb" by the end of the work day and occasionally her left hand would get numb when she tried to do her activities of daily living. Currently Claimant testified she has a 5 pound lifting limit for her left arm.

Employer argued that Claimant had an injury to the left shoulder that was accepted. The initial report of injury to Dr. Lynn on 8/21/2019 indicated began developing neck pain about 2-3 days after the injury date. Exhibits page 158. Dr. Goumas saw Claimant on 8/28/2019 and no notation of neck pain was made. Exhibits pages 148-9. After the surgery on 12/17/2019, Claimant began the typical physical therapy progression. By 7/10/2020, Dr. Goumas returned Claimant to full time, full duty work and found Claimant was at maximum medical improvement. Exhibits page 50-51. There was no mention of neck pain in that report and her "nerve pain" was listed as going to get better. Claimant was working and by the 9/3/2020 office visit with Dr. Goumas, pain was reported when she "... tries to do anything." Exhibit page 42. Dr. Goumas put

her on 5 hours per work day with no lifting restrictions. Exhibits page 44. At the office visit on 9/25/2020, Claimant was describing pain "... go(ing) up to the side of her neck on the left side...." Exhibits page 35. At the 10/22/2020 office visit Dr. Goumas described the pain source as from the neck and various other neck muscles. Exhibits page 20. Employer argued that Claimant's condition related to the left shoulder is not the source of the current pain complaints. Employer relies on both Dr. Goumas and Dr. Glassman who describe the neck pain as not related, even though Dr. Goumas in his more recent letter says it is related. Employer argued that Claimant has not met her burden of proof that the neck pain complaints are causally related to the accepted left shoulder injury and the request for additional indemnity benefits should be denied.

Claimant argued that this was an accepted claim for injury to the left shoulder. Claimant did work to a return to work status after left shoulder surgery (Exhibits page 51), but pain returned to limit her activities, from full time to part time, five hours work per day on 9/3/2020. Exhibits page 44. Following another office visit with Dr. Goumas, Claimant was ordered out of work on 9/25/2020. Exhibits page 37. Claimant relies on the office notes dated 9/3/2020, with Dr. Goumas, that found Claimant was "... now having pain when she tries to do anything overhead." Exhibits page 42. Claimant argued that the report from Dr. Goumas dated 9/25/2020 indicates the pain occurs after physical therapy sessions and when she then goes to work. Claimant faults the IME and Records Review by Dr. Glassman (Exhibits pages 421-422) that found Claimant did not complain of neck pain until around September 2020. Claimant cites the references to neck pain at Exhibits pages 158, 143 & 137. In additional support of the errors by Dr. Glassman, Claimant cites the error reporting a prior shoulder separation, that was denied by Claimant. Claimant argued that she had no problem working until the 8/15/2019 work injury and now she has residual pain from the operation/treatment and physical therapy. Claimant argued that the presumption is that the treating physicians' opinions are entitled to greater weight and Dr. Goumas has found the neck pain related to the original left shoulder injury. Exhibits pages 1-2. Claimant asks for a finding that the requested indemnity benefits listed above be ordered as causally related to the injury of 8/15/2019 and ongoing.

DISCUSSION

The uncontested facts are that Claimant was working for Employer on 8/15/2019 on a job that required intermittent lifting. The uncontested facts are that Claimant was lifting boxes at work and separated her left shoulder on lowering a box to the floor. The uncontested facts are that Claimant's treatment for the left shoulder separation was a surgical procedure that resulted in a return to work order, full time, full duty, dated 7/10/2020. Exhibits page 51. The uncontested facts are that Claimant sought additional medical attention on 9/3/2020 for pain that Dr. Goumas first listed as: "Aching in her shoulder which to me appears like an overcompensation from some residual instability." Exhibits page 42. Dr. Goumas, the treating physician, on 9/25/2020 saw Claimant again and listed the complaint as: "Since she has been doing therapy in the morning and then going to work she has been having a lot of pain that goes up to the side of her neck on the left side as well as around the paraspinal musculature." Exhibits page 35. Dr. Goumas listed the diagnosis on the Workers Compensation form dated 9/25/2020 as: "Bicipital tendinitis, left shoulder ... Other instability, left shoulder, Left Shoulder." Exhibits page 37. Dr. Goumas does check the "Causal Relationship" box on the form that says the current treatment is related to the 8/15/2019 work injury. The Panel found Claimant to be a credible witness.

The successful workers compensation claimant will satisfy both legal and medical causation elements by a preponderance of the evidence. APPEAL OF BRIGGS, 138 N.H. 623 (1994) and APPEAL OF COTE, 139 N.H. 575 (1995). Legal causation will address the extent that work has contributed to or aggravated a work-disabling condition. The Panel here finds that Claimant's regular duties after her return to work on or shortly after Memorial Day, 2020. The Panel finds that while the original injury on 8/15/2019 arose from a moderately heavy lift, the evidence of recurrent pain complaints occurred when Claimant had stopped heavy lifting, by her testimony. Claimant described her duties on return to full time, full duty work in the summer of 2020, as at the cash register and greeting new customers. The notes from the office visits with Dr. Goumas have no narrative that describes the current work duties just prior to the 9/3/2020 office visit. At the office visit on 10/22/2020, Dr. Goumas recorded: "Most of the problem really appears

to be in her neck and around the periscapular and trapezial musculature. At this point, the shoulder itself does not seem too bad.” Exhibits page 20. The lack of another work incident just prior to the 9/3/2020 office visit with Dr. Goumas brings legal causation into issue. The medical notes do not reflect a recurrence or aggravation condition to the left shoulder that was surgically repaired.

The evidence relative to medical causation include Dr. Goumas’ narrative dated 3/30/2021 that states: “The (original) injury resulted in shoulder instability, however, the injury also resulted in an injury to her cervical spine in addition to resulting in a probable brachial plexopathy as a traction type injury that has resulted in (Claimant’s) ongoing neurogenic type pain.” Exhibits page 2. While Dr. Goumas’ narrative certainly described the initial injury and treatment with a strong medical foundation, he has not provided any medical explanation for the new mention of a “neck injury” and related “probable brachial plexopathy” when neither had been part of the medical record before the 3/30/2021 narrative. Additionally, the office note dated 1/8/2021 lists Claimant’s pain as “... continuing to have pain in her shoulder consistent with some mild residual instability as well as some overall diffused neurogenic type pain into the trapezius and down to the arm as well.” The record of testimony by Claimant does not contain shoulder pain complaints after the operation and physical therapy. In accord with this fact, the office note from 7/10/2020 states: “She continues to have some neurogenic pain that she had for quite a long time prior to her surgery.” Exhibits page 49. The office note from 9/3/2020 lists shoulder pain from overhead lifting (Exhibits page 42), but Claimant’s testimony indicated on return to work, her duties were not in the stock room, but at the cash register and front door. And, also, the office note of 9/25/2020 lists pain that: “... goes up to the side of her neck on the left side as well as around the paraspinal musculature.” Exhibits page 35. The Panel cannot find a sufficient medical foundation that assess left shoulder pain from lifting duties from July 2020 onward to the 9/3/2020 report of symptoms to Dr. Goumas. The Panel found Claimant credible and had accurately reported her symptoms as they arose. The neck pain arose well after the surgery on 12/17/2019, and well after a period of no work, to the time of work duties that did not involve any lifting.

The medical causation element of this workers compensation case has not been met, by a preponderance of the medical evidence. The uncontested facts are that Claimant returned to full time, full duty work for a period of time in June 2020, without further medical attention to the left shoulder. The notes from the provider and Claimant's testimony provide no specific information of a new work injury or an aggravation of the surgically repaired left shoulder. Worker's compensation panels are cautioned to leave complex medical issues to the competent medical personnel. "Expert testimony is required whenever the matter to be determined is so distinctly related to some science, profession, business or occupation as to be beyond the ken of the average layman." LEMAY V BURNETT, 139 N.H. 633, 635 (1995). A sound medical opinion will be based on the adequate facts from the record that, would here allow a connection from the first injury and treatments to the second, similar painful treated area. Here, there is no adequate connection between the two conditions. Having found that Claimant has not met her initial burden of proof, the Panel looks to the medical evidence from Dr. Glassman. The IME and Records Review from Dr. Glassman is not helpful to Claimant's case.

REQUESTS FOR RULINGS OF LAW

Claimant submitted requests for rulings of law. Employer's Attorney specifically stated he had no objection to any of the requests for rulings of law as each such request stated existing law. The Panel grants all Claimant's requested rulings of law to be appropriately applied to the facts of this case.

DECISION

Claimant has not met her burden of proof by a preponderance of the evidence that the medical treatments starting on 9/3/2020 and out of work order by Dr. Goumas is medically causally related to the work injury on 8/15/2019. No indemnity benefits are awarded as the disability claimed is deemed not causally related to a work injury.

In all respects this is a unanimous decision of the Panel.

Caitlyn Wittenauer V Nike Inc.
Docket# 2021-L-0222
Page# 8

Respectfully submitted.

A handwritten signature in black ink, appearing to read "David Siff". The signature is written in a cursive style with a large, stylized "S" at the end.

David Siff, Esq., Panel Chair
Compensation Appeals Board



State of New Hampshire

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June 11, 2021

James Lafrance, Esq.
Normandin, Cheney & O'Neil
PO Box 575
Laconia NH 03247-0575

Re: Caitlyn Wittenauer V Nike Inc.
Docket # 2021-L-0222


Dear Attorney Lafrance:

Enclosed is a copy of the decision rendered by the Compensation Appeals Board in the above-captioned matter.

Any party to the proceeding aggrieved by an order or decision of the Panel may appeal same to the Supreme Court pursuant to RSA 541:6 Appeal. - *Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal the petition to the Supreme Court.*

Should either party wish to utilize an audio recording of the hearing, it will be held for six months from the date of the decision. After that time, it will be destroyed in accordance with our retention policy. The digital recording is available through the Department of Labor for a fee of \$20.00.

Respectfully submitted,



David Siff, Esq., Panel Chair
Compensation Appeals Board

Cc: Craig Russo, Esq.

**THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
COMPENSATION APPEALS BOARD**

Caitlyn Wittenauer

v.

Nike, Inc.

CAB Docket No. 2021-L-0222
Date of Injury: 8/15/2019
Appeal Hearing Date: May 13, 2021

CLAIMANT'S REQUESTS FOR RULINGS OF LAW

NOW COMES the Claimant, Caitlyn Wittenauer, by and through her attorneys, Normandin, Cheney & O'Neil, PLLC, and respectfully submits Claimant's Requests for Rulings of Law, as follows:

1. To establish causation, the Claimant need not show that her work-related injury is the sole cause of her condition. Claimant need only show, by a preponderance of the evidence, that the work injury probably caused or contributed to cause her condition. Appeal of Redimix Companies, Inc., 158 N.H. 494, 496 (2009); Appeal of Kehoe, 141 N.H. 412 (1996); Appeal of Briand, 138 N.H., 555-560 (1994).
2. The requirement that an injury be causally related to employment is to be construed liberally in order to give the broadest reasonable effect to the remedial purposes of workers' compensation law. Appeal of Estate of Balamotis, 141 N.H. 456, 458 (1996); Appeal of Griffin, 140 N.H. 650, 654 (1996).
3. Once the work-connected character of an injury has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent non-industrial cause. Appeal of Hooker, 142 N.H. 40, 46 (1997); Appeal of Cote, 139 N.H. 575, 579-580 (1995).
4. RSA 281-A:48 authorizes terminating workers' compensation benefits in either of two scenarios: (1) where the claimant's compensable work-related injury has ceased, or (2) where the claimant is capable of performing some type of work and is now able to earn, in suitable work under normal employment conditions, as much as he or she earned at the time of injury. Appeal of Dean Foods, 158 N.H. 467, 473 (2009).
5. If there is sufficient evidence that at least some of the claimant's ongoing symptoms are partially resulting from the original work injury, then the work-related injury has not ceased. Id.



State of New Hampshire

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July 15, 2021

DECISION OF THE COMPENSATION APPEALS BOARD

CAITLYN WITTENAUER

V.

NIKE, INC.

DOCKET # 2021-L-0222

DECISION ON CLAIMANT'S MOTION FOR REHEARING AND/OR RECONSIDERATION

The Compensation Appeals Board issued a decision dated 6/11/2021. Claimant filed Claimant's Motion for Rehearing and/or Reconsideration, dated 6/28/2021. The motion alleges that the Panel "... erroneously placed a burden of proof upon the Claimant to demonstrate that she had suffered a second lifting or other work incident during the time period following her return to work and just prior to Dr. Gomas again placing the Claimant on work restrictions on September 3, 2020." (Motion at paragraph 2, citing to the DECISION at pages 5 & 6.)

The Motion also argues that: "The Claimant has never claimed a distinct, second work incident. She actually claimed otherwise. The Claimant's claim is that she has suffered a recurrence of disability; and therefore, is entitled to have indemnity benefits reinstated." Motion at paragraph 3. The Motion argues that: "No second or distinct work incident is required in order to establish a recurrence of a work injury." Motion at paragraph 4. The Motion argues also that once the work relationship of an injury has been established (or accepted), the subsequent progression of that condition is compensable as long as the worsening is not from a different (non-work) cause. Motion at paragraph 5.

The Motion argues that the issue for the Panel in the first instance was whether the “new period of disability” is causally related to the original accepted injury. The Motion next argues that if the new disability period is related to the original accepted injury, then the new disability period should follow. The Motion argues certain facts stated in the Motion prove the two disability periods are related. Motion at paragraphs 8-11. The Motion alleges that Dr. Goumas reported “... she still had shoulder stiffness at the end ranges on internal and external rotation; that he believed neurogenic pain would gradually get better, and that she had suffered a permanent impairment.” Motion at paragraph 10. The Motion argues that the Panel should rehear and/or reconsider the Decision and order payment of specified indemnity benefits starting on 9/26/2020.

Employer/Carrier filed CARRIER’S OPPOSITION TO CLAIMANT’S MOTION FOR REHEARING/RECONSIDERATION, dated 7/1/2021. The OPPOSITION cites the Lab rule on rehearing/reconsideration and argues there is no allegation of error as required by the Lab rule for such action. The OPPOSITION argues that the Motion failed to allege how the Decision is contrary to the cited cases. The OPPOSITION argues that there is no contention that evidence is available now that was not available at the time of the hearing as a further ground to deny the Motion. The OPPOSITION argues that the Motion for rehearing and/or reconsideration should be denied.

Requests for rehearing are governed by Lab Rule 206.02. The rule allows rehearing requests and that the request must specify the grounds for such motion. Here, Claimant requests rehearing on re-argument of hearing issues and the same cases that were presented at hearing. There is nothing new alleged or misunderstood in the Motion on which to base a rehearing or reconsideration. The Motion reargues the same points argued at hearing. The Decision clearly outlined the differences found by the Panel in the appeal hearing. The original injury involved a relatively light lift/movement of a box and a movement of the box to the floor. The specific injury treated was a left shoulder “separation” treated in August 2019 by a surgical procedure to replace the left arm to its proper placement. The next treatment in issue was done based on findings by Dr. Goumas on 9/25/2020 involving pain in Claimant’s neck and “... paraspinal musculature.” Decision at page 5.

The Decision clearly found that: “The medical notes do not reflect a recurrence or aggravation condition to the left shoulder.” Decision at page 6. The Panel considered that Dr. Goumas wrote on 3/30/2021: “The (original) injury resulted in shoulder instability, however, the injury also resulted in an injury to her cervical spine in addition to resulting in a probable brachial plexopathy as a traction type injury that has resulted in (Claimant’s) ongoing neurogenic type pain.” The Panel clearly considered this statement from the treating physician and found that Claimant in testimony did not indicate a history of “shoulder pain” after the injury or in physical therapy. Decision at page 6. The Panel found there was a lack of sufficient medical foundation for Dr. Goumas’ opinion on the case presented. The Motion presents no new evidence of a sufficient mistake that would be a reasonable basis for rehearing/reconsideration.

The Board finds no basis to rehear or reconsider this matter because there is no mistake of legal ground alleged that could be corrected by a rehearing, and no mistake alleged that the Board finds sufficiently reasonable to cause a rehearing under these facts. The Panel denies CLAIMANT’S MOTION FOR REHEARING AND/OR RECONSIDERATION dated 6/28/2021.

Respectfully submitted,



David Siff, Panel Chair
Compensation Appeals Board

Cc: James F. Lafrance, Esq.
Craig A. Russo, Esq.