

STATE OF NEW HAMPSHIRE

SUPREME COURT

NO. 2021-0369

APPEAL OF CAITLYN WITTENAUER

APPEAL FROM THE NEW HAMPSHIRE WORKERS'
COMPENSATION APPEAL BOARD

REPLY BRIEF OF CAITLYN WITTENAUER, APPELLANT

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ARGUMENT

I. **WHETHER OR NOT THIS COURT SHOULD DEFER TO A WCAB DETERMINATION THAT THE APPELLEE CLAIMS WAS A FINDING THAT CLAIMANT'S NECK PAIN WAS SEPARATE, DISTINCT AND NOT CAUSALLY RELATED TO THE UNDISPUTED WORK-RELATED SHOULDER INJURY OF AUGUST, 2019 IS THE WRONG LEGAL QUESTION WHEN THE RECORD EVIDENCE IS ABUNDANTLY CLEAR THAT THE CLAIMANT'S SHOULDER INJURY HAD NOT CEASED IN SEPTEMBER 2020 WHEN THE CLAIMANT SUFFERED A RECURRENCE OF DISABILITY DUE AT LEAST IN PART TO HER SHOULDER SYMPTOMS.**

The Appellee's Brief cites to Appeal of Dean Foods with regard to the Court's standard of review; however, this Court's holding in that case is controlling in this case with regard to the real issue that should have been addressed by the WCAB. Appeal of Dean Foods, 158, N.H. 467 (2009). Dean Foods concerned a review hearing pursuant to RSA 281-A:48 in which conflicting medical evidence was presented as to whether a claimant's accepted work-related low back injury in November, 2003 was the cause of claimant's disability in April, 2007. Id., at 468-469. The insurance carrier's medical expert opined that the claimant had preexisting non-work-related degenerative disc disease and spondylolisthesis; that claimant's work-related condition had resolved and that his current symptoms were related to the preexisting conditions. Id., at 469. The claimant's medical experts agreed with the carrier's expert that the claimant had the preexisting non-work-related conditions, but opined that claimant's then symptoms remained causally linked to the work injury. Id., at 469-470.

The Court's opinion discussed the history of decisions interpreting and applying RSA 281-A:48. Id., at 471-473. This Court ruled that there was sufficient evidence to support the WCAB's decision that at least some of the claimant's current symptoms were from the work-related injury. Id., at 474. The Court held that since at least some of the claimant's symptoms were related to the work injury, the claimant's condition had not ceased and thereby the claimant was entitled to ongoing disability benefits. Id., at 473-474.

Dean Foods also stands for the proposition that evidence that the Claimant has suffered a permanent impairment from a work injury is supportive of a determination that the Claimant's condition remains partially work-related at a later date. Id., at 469, 472-473. The facts of this claim are that Dr. Goumas assessed Ms. Wittenauer as having suffered permanent work-related injuries less than two months before she suffered a loss of earning capacity when Dr. Goumas again imposed work restrictions. (Document 5A, pgs. 44, 50, 51). As in Dean Foods, the insurance carrier argued that Ms. Wittenauer's left shoulder injury had resolved. (Document 6A, pgs. 42-43). Unlike Dean Foods, the record here is devoid of any competing medical opinion that Ms. Wittenauer's shoulder injury had ceased. Since the evidence in the record is clear that Ms. Wittenauer's shoulder injury had not ceased in September, 2020, she was entitled to indemnity benefits. Id., at 473, 474.

The Appellee's 30-page Brief makes only one citation to the evidence that was presented to the WCAB. (Appellee's Brief, page 19). The readily discernable reason is that the actual evidence of record is overwhelmingly clear that Claimant's loss of earning capacity was due at

least in part to her shoulder injury. (See Appellant’s Brief, pages 18-22). The Appellee’s Brief claims that Dr. Goumas distinguishes and separates the neck pain from the left shoulder injury. (Appellee’s Brief, pages 7, 15, 21). This claim again is entirely unsupported by the evidence in the record. (See Appellant’s Brief, pages 18-22; Document 5A, pages 37, 44 - “Diagnosis/Prognosis: . . . Bicipital tendinitis, left shoulder . . . Other instability, left shoulder, Left shoulder”). The Appellee’s Brief does make many footnote references to the WCAB Decision, but the role of this Court is to review the entire evidentiary record. A complete and detailed review of the record is particularly necessary when the Decision overlooks and/or misstates the medical record and the Claimant’s testimony. (See Appellant’s Brief, pages 21-22).

The Appellee contends that the Decision under review is a ruling that Claimant failed to prove medical causation that Claimant’s neck symptoms were causally related to the 2019 work injury. (Appellee’s Brief, pages 11, 13-14, 17-18). Appellant asserts that any determination that the Claimant’s neck pain is unrelated to the traumatic work injury suffered by this 22-year-old Claimant is not supported by the evidence in the record. Nevertheless, there was no reason for the WCAB to have to decide this question as it was not the dispositive issue. Dean Foods, *supra*, at 476. Neither the insurance carrier nor the WCAB had the authority to change the condition (i.e. shoulder) for which the Claimant sought benefits.

Appellee’s Brief argues that the WCAB properly applied the law of Appeal of Cote, Appeal of Briggs and Appeal of Hooker. (Appellee’s Brief, pages 11, 13-14, 17-18). None of these Decisions relied upon by the Appellee concerned proceedings brought pursuant to RSA 281-A: 48.

Appeal of Cote, 139 N.H. 575, 576 (1995); Appeal of Briggs, 138 N.H. 623, 625-626 (1984); Appeal of Hooker, 142 N.H., 40, 43, 47 (1997). The causation of Claimant's left shoulder injury was never disputed and beyond question as the WCAB so found. (Addendum to Appellant's Brief, page 32). The Claimant's only burden of proof was to show a change in her condition affecting her earning capacity. Dean Foods, *supra*, at 472; Appeal of Elliot, 140 N.H. 607, 610 (1996).

The interpretation of a WCAB Decision as to whether an improper burden of proof was imposed or the proper legal test was applied is a question of law that this Court reviews *de novo*. Appeal of Estate of Dodier, 2021 N.H. LEXIS 155, *13. Since this Court has the same documentary record that was available to the WCAB, a purely legal question is presented as to whether a rationale factfinder would conclude that Ms. Wittenauer's shoulder condition contributed at least in part to her loss of earning capacity. *Id.*, at *13-14; Cote, *supra* at 580; Appeal of Redimix Company, Inc., 158 N.H. 494, 496 (2009). The evidence in the record clearly demonstrates that Ms. Wittenauer's left shoulder injury had not ceased as of September 3, 2020, and that she was entitled to a resumption in the payment of indemnity benefits.

CONCLUSION

The record demonstrates that Ms. Wittenauer experienced a recurrence of disability after a failed attempt to return to work. This Court should rule as a matter of law that the Decision under review did not apply the proper legal test, and that the only reasonable conclusion from the evidence is that Claimant’s disability in September, 2020 was due at least in part to the 2019 work injury. Remand may be made for 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: March 14, 2022

/s/ James F. Lafrance _____

STATEMENT OF COMPLIANCE – WORD LIMITATION

I hereby certify that this Brief complies with the 3,000-word limitation under Supreme Court Rule 16(11). This Brief contains 1567 words.

Dated: March 14, 2022

/s/ James F. Lafrance _____

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that one copy of Appellant's Reply 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: March 14, 2022