

STATE OF NEW HAMPSHIRE  
SUPREME COURT

CAITLYN WITTENAUER

v.

NIKE, INC.

Case No. 2021-0369

BRIEF OF NIKE, INC.

APPELLEE

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### **QUESTIONS PRESENTED**

1. Whether the Compensation Appeals Board improperly placed a burden on the appellant to demonstrate a second work incident occurring between the appellant's return to work and the second onset of alleged disability?
2. Whether the Compensation Appeals Board erred by applying competent medical evidence to determine that the appellant's disability in September, 2020 was not causally related to her original workplace injury?

### **STATEMENT OF THE CASE**

A First Report of Injury relative to the workplace injury which is the subject of this case was filed with the New Hampshire Department of Labor alleging an August 15, 2019 date of injury to the appellant's left shoulder. The appellee, through its insurance carrier, accepted the claim and began paying indemnity benefits. The appellant returned to work as of May 25, 2020 and received a full duty release to return to work from her treating physician on July 10, 2020. As such, the appellee ceased paying weekly indemnity benefits pursuant to New Hampshire workers' compensation law. As of September 25, 2020, the appellant's physician took her out of work, citing pain in the appellant's neck. Due to the new pain in a new body part, the appellee denied the appellant's claim on the basis that the appellant's new neck pain was not related to the original work injury to her left shoulder.

The appellee filed a Request for Hearing, for which the Department of Labor subsequently issued a decision dated December 22, 2020 in favor of the appellee. The appellant appealed that decision to the Compensation Appeals Board (CAB) in a timely manner. The CAB conducted a *de novo* Hearing, issuing a decision in favor of the appellee on June 11, 2021. The appellant filed a Motion for Rehearing, which the CAB denied. The appellant subsequently appealed to this Court in a timely manner.

### **STATEMENT OF THE FACTS**

The appellant, Caitlyn Wittenauer, worked for appellee Nike, Inc. when she injured her left shoulder in a work-related incident on August 15, 2019.<sup>1</sup> The appellant began work with the appellee part-time in 2017 and 2018, and full time in 2019. Those duties involved work in the stock room unloading boxes of shoes for the retail outlet for approximately three to four hours per day.<sup>2</sup> On the date of her injury, the appellant was carrying two boxes of sneakers weighing about 60 pounds.<sup>3</sup> She bent to place the box on the floor and felt immediate pain in her left shoulder upon extending her arms downward.<sup>4</sup> The appellant reported pain and numbness in her left hand.<sup>5</sup> The appellant initially treated with the “company

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<sup>1</sup> Decision at 2.

<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> Id.

nurse,” who referred the appellant to treat with an orthopedic specialist.<sup>6</sup> The appellant began treating with NH Orthopedics for her injury, and later came under the care of Dr. Goumas in that practice.<sup>7</sup>

The appellant underwent an X-ray and was released to return to work with restrictions but remained out of work.<sup>8</sup> The appellant’s August 28, 2019 note indicated that the appellant suffered right neck pain.<sup>9</sup> The appellant underwent an MRI on September 23, 2019, which revealed a left shoulder joint injury.<sup>10</sup> The appellant’s provider, Dr. Goumas, surgically repaired the appellant’s shoulder on December 17, 2019, following which the appellant treated with physical therapy.<sup>11</sup>

The appellee accepted the left shoulder injury and subsequently paid both medical and indemnity benefits relative to the appellant’s left shoulder until her treating physician released her to return to work.<sup>12</sup>

The appellant returned to work on May 25, 2020 in the stock room.<sup>13</sup> However, as she could not meet the physical requirements of that job, her employer reassigned her to light duty work on the cash register and limiting

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<sup>6</sup> Decision at 2.

<sup>7</sup> Id. at 1-2.

<sup>8</sup> Id. at 2.

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> Id. at 1.

<sup>13</sup> Id. at 3.

public access to the store due to COVID-19 restrictions.<sup>14</sup> Dr. Goumas released her to return to work full duty without restrictions on July 10, 2020, mentioning “nerve pain” in her shoulder that was expected to improve.<sup>15</sup> The appellant complained of achiness and pain.<sup>16</sup> Dr. Goumas took the appellant back out of work on September 25, 2020 after the appellant complained of pain on the left side of her neck.<sup>17</sup> On October 22, 2020, Dr. Goumas’ note described the pain source as from the neck and neck muscles, distinguishing it from her left shoulder.<sup>18</sup> On January 8, 2021, Dr. Goumas noted that the appellant had mild instability in her shoulder.<sup>19</sup> On March 30, 2021, Dr. Goumas causally identified the appellant’s neck symptoms, for the first time in the medical narrative, as a probable “brachial plexopathy”.<sup>20</sup>

A First Report of Injury specifying an August 15, 2019 date of injury was filed with the New Hampshire Department of Labor (DOL). The appellee did not dispute the claim at that time. However, the appellee did not voluntarily reinstate the appellant’s benefits as of the September 25, 2020 disability, arguing that the medical records indicated that the appellant’s neck, rather than shoulder, were at issue and, therefore, not related to the original shoulder claim.

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<sup>14</sup> Decision at 3.

<sup>15</sup> Id.

<sup>16</sup> Id.

<sup>17</sup> Id. at 3, 4.

<sup>18</sup> Id.

<sup>19</sup> Id. at 5-6.

<sup>20</sup> Id. at 6.

The appellant requested a Hearing before the Department of Labor, which occurred on December 9, 2020. Following the Hearing Officer's decision that the appellant did not meet her burden of proof, the appellant appealed to the Workers' Compensation Appeals Board (CAB). In a *de novo* hearing on May 13, 2021, the CAB Panel ruled that the appellant's alleged further disability was not causally related to her workplace injury of August 15, 2019.

### **SUMMARY OF THE ARGUMENT**

The Court should uphold the CAB decision as it was neither unjust nor unreasonable for the CAB Panel to find that the medical records credibly described the appellant's post-September 25, 2020 pain as relating to her neck and not the shoulder which was the basis for the original claim. The CAB Panel had both sufficient factual evidence on the record and a multitude of credible medical evidence on which to base its findings that the appellant's neck symptoms were not related to the original workplace injury to her shoulder.

The Court should also rule that the CAB did not err by finding that, based on the preponderance of the evidence presented, the appellant had not suffered a change in condition relative to her original left shoulder injury to justify a return to temporary total disability benefits.

The Court should finally find that the CAB did not impermissibly place a burden of proof on the appellant to prove a second workplace incident. The CAB



decision does not base its findings on a failure of the appellant to articulate a second workplace injury but on medical causality. The CAB Panel held the appellant to her burden of proof to prove a change in condition, which the appellant categorically failed to do.

### **ARGUMENT**

The Court will only overturn a decision from the CAB for errors of law or if the order is unjust or unreasonable by a preponderance of the evidence. Appeal of Kelly, 167 N.H. 489, 491 (2015); Appeal of Hooker, 142 N.H. 40, 47 (1997). The Court reviews statutory interpretation by the CAB *de novo*. Appeal of Hooker at 47. The Court will construe the workers' compensation law liberally to give the broadest reasonable effect to its remedial purpose and will resolve "all reasonable doubts in favor of the injured worker. Id. However, "that maxim applies to the construction of the statute involved, not to the task of weighing evidence." Appeal of Gamas, 138 N.H. 487, 491 (1994) (emphasis added) (see also Petition of Blackford, 138 N.H. 132, 135 (1993); Petition of Correia, 128 N.H. 717, 721-22 (1986).

The findings and rulings of the [Compensation Appeals] board must be upheld unless they lack evidentiary support or are tainted by legal error. Appeal of Gamas at 491. The Court considers the CAB's findings of fact *prima facie* reasonable. RSA 541:13. An appellant may only overcome this presumption by

showing that there was no competent evidence from which the CAB could conclude as it did. See Appeal of Bergeron, 144 N.H. 681, 683, (2000). “Moreover, in reviewing the CAB’s findings, “[the Court’s] task is not to determine whether [it] would have found differently than did the board, or to reweigh the evidence, but rather to determine whether the findings are supported by competent evidence in the record.” Appeal of Dean Foods, 158, N.H. 467, 474, (2009).

**I. THE CAB HAD SUFFICIENT COMPETENT MEDICAL EVIDENCE TO FIND THAT THE APPELLANT FAILED TO MEET HER BURDEN OF PROOF TO SHOW THAT HER SUBSEQUENT CLAIMED PERIOD OF DISABILITY WAS CAUSALLY RELATED TO THE ACCEPTED LEFT SHOULDER INJURY**

The CAB correctly found that the appellant did not suffer a recurrence of her original left shoulder injury. The appellant argues that the CAB erred by not finding that the appellant’s shoulder symptoms constituted a recurrence by September 25, 2020 and suggests that any disability necessarily relates back to the earlier work-related incident because of the lack of an intervening traumatic event that would show an independent cause for the new disability. The appellant frames her post-September 25, 2020 symptoms as a recurrence of her original workplace injury. This claim is unsupported by the medical facts in evidence and by the law governing recurrence of compensable injuries.

All workers' compensation claims for a return to indemnity benefits must satisfy both legal and medical causation elements. See Appeal of Cote, 139 N.H. 575 (1995); Appeal of Briggs, 138 N.H. 623 (1994). In Briggs, the Court required the claimant prove that his work "probably caused or contributed to his disability under a two-pronged test." Appeal of Briggs at 659. "Under this test, the injured worker must prove legal causation, that is, that his injury is work-connected, and medical causation, that is, that his disability was actually caused by the work-related event." Appeal of Cote at 578-79.

The legal causation inquiry "defines the degree of exertion that is necessary to make the injury work-connected. Id. at 579. The test to be used depends upon the previous health of the employee." Id. "If the appellant does not have a preexisting condition, any work-related activity connected with the injury as a matter of medical fact is sufficient to show legal causation." In re Dodier, No. 2020-0185, (N.H. Oct. 14, 2021).

In addition to showing legal causation, the appellant must demonstrate medical causation. See Appeal of Briggs at 659. "The test for medical causation requires the claimant to establish, by a preponderance of the evidence, that the work-related activities 'probably cause[d] or contribute[d] to the employee's [disabling injury] as a matter of medical fact." Appeal of Kehoe, 141 N.H. 412 (1996); Appeal of Briggs at 659. Even where work-related activities do not directly cause or contribute to injury, it is sufficient to show that the activities

caused the activation of disabling symptoms. Appeal of Briggs at 659. "Medical causation 'is a matter properly within the province of medical experts, and the [CAB is] required to base its findings on this issue upon the medical evidence rather than solely upon its own lay opinion.' Appeal of Cote, 139 N.H. at 579-80. The CAB is, however, entitled to "rely upon underlying or competing medical records provided that the [CAB] is not required to use medical expertise to interpret them." Appeal of Demeritt, 142 N.H. 807 (1998).

The CAB had sufficient medical evidence on which to determine that the appellant's complaints were not a compensable recurrence of her original workplace injury. New Hampshire workers' compensation law draws a distinction between a recurrence and an aggravation of a workplace injury. "In reviewing cases involving injuries to the same anatomical area, other courts have asked whether a given incident constitutes an aggravation of a pre-existing condition that has stabilized or rather, a worsening or exacerbation of an existing condition." Rumford Press v. Travelers Ins. Co., 125 N.H. 370, 374 (1984). The Court will generally refer to symptoms caused by a new incident as "aggravation" and will otherwise reference a condition as deteriorating or recurring when there is no new incident. See Id. "In the former instance, the initial injury would have reached a medically stable condition, while in the latter the worker would still be suffering the symptoms of the first injury at the time of the second incident."

Rumford Press at 375 (See also Belton v. Carlson Transport, 658 P.2d 405 (Mont. 1983); Garner v. Atlantic Building Systems, Inc., 142 Ga. App. 517, 518 (1977).

The Court specifically addressed the question of a workplace injury recurring in Appeal of Cote. There, the claimant injured his back in 1985 while reaching under an industrial machine to clear an obstruction. Appeal of Cote, 139 N.H. at 576. Five years later, the claimant was taken out of work several times due to significant back pain, during which times he received temporary total disability benefits. Id. The claimant sought spinal reconstructive surgery in 1992, two years later, which the carrier denied. Id. at 577. The Court addressed the causal nature of the claimant's 1990 back condition and his 1985 injury. Id. at 581 (“we must therefore examine the causality between the original, 1985 work-related injury and the claimant's back condition in 1990.”). While the Court did hold that “once the work-connected character of an injury is established, any subsequent progression remains compensable so long as the worsening is not shown to be produced by an independent, non-industrial cause,” the Court based this finding on the record available to the CAB and determined that no less than five different doctors noted that the claimant's back condition was most likely triggered by the 1985 injury. Id. at 581.

Conversely, the Court addressed a similar legal issue with a different outcome in Appeal of Hooker: There, the claimant suffered a serious burn when adding wood to a woodstove, causing it to spray flames into his face. Appeal of

Hooker, 142 N.H. 40, 42 (1997). The claimant suffered inhalation injuries which were complicated by his prior history of respiratory problems. Id. at 42-43. At the time of the appeal, the claimant was seeking workers' compensation coverage for bronchodilators, pain medication, and a lung transplant. Id. The Court determined that while ordinarily the progression of a condition remains compensable so long as the worsening does not stem from a nonindustrial cause, the claimant nonetheless bears the burden of proving the causal connection between the condition and the work injury. Appeal of Hooker at 46, (citing Appeal of Cote, 138 N.H. at 581.) The Court considered that the CAB Panel heard conflicting testimony about the causality of the claimant's condition from three different doctors. Applying Appeal of Newcomb, the Court held that the board was free to accept or disregard conflicting testimony in whole or in part and held that the CAB's decision was not erroneous or unreasonable. Id. at 47 (citing Appeal of Newcomb, 141 NH 664, 669 (1997)).

The Court in both Appeal of Cote and Appeal of Hooker focused their analysis on the competent medical evidence available to the CAB. In Appeal of Cote, the Court's opinion on medical causality turned on the CAB's rejection of medical opinion of no less than five doctors affirming medical causality. In Appeal of Hooker, the Court upheld the discretion of the CAB to credit certain medical evidence over conflicting medical evidence. This, taken with the CAB's broad discretion with regard to questions of fact shows that the CAB's discretion

to interpret medical fact on the record when evaluating medical and legal causality is extremely broad.

The CAB had sufficient competent medical evidence here to determine that the appellant's original workplace injury was not the cause of her alleged second period of disability. The CAB panel focused on Dr. Goumas' own treatment records, which indicate that the original workplace injury was to the appellant's left shoulder requiring surgical correction, beginning on August 15, 2019 and being treated surgically on December 17, 2019.<sup>21</sup> Dr. Goumas returned the appellant to full duty as of July 10, 2020.<sup>22</sup> While Dr. Goumas did note that, on September 3, 2020, the appellant had "achiness in her shoulder" from "overcompensation from some residual instability," he did not take her out of work at that time.<sup>23</sup> When he does take the appellant out of work on September 25, 2020, Dr. Goumas cited left neck pain around the paraspinal musculature, despite the original workplace injury being bicipital tendinitis of the left shoulder.<sup>24</sup> Dr. Goumas doubled down on this separation between the neck and shoulder by stating outright on October 22, 2020 that "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."<sup>25</sup> Even accepting the

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<sup>21</sup> Decision, 1-2.

<sup>22</sup> Id. at 3.

<sup>23</sup> Id. at 3.

<sup>24</sup> Id. at 3-4.

<sup>25</sup> Id.

appellant's allegations of pain in her shoulder, the CAB found insufficient medical evidence connecting this to her alleged second period of disability, explicitly stated that "the medical notes do not reflect a recurrence or aggravation condition to the left shoulder that was surgically repaired."<sup>26</sup>

Thus, the CAB Panel had more than ample medical evidence from the appellant's own treating physician to determine that the shoulder complaints, which were the basis of the original workplace injury, were not disabling as of the CAB Hearing. The CAB found the appellant's testimony of experiencing "lots of pain" trying to do the regular work and her changing duties credible. However, the facts indicate, and the CAB clearly agreed based on the medical evidence before it at the Hearing, that any alleged disability after the appellant returned to work was not related to the original left shoulder injury. The CAB had sufficient medical evidence from the treating physician to determine that the shoulder was not the cause of the appellant's alleged disability and, thus, that the appellant's original workplace injury did not prevent her from returning to work in a full time, full duty capacity. As the CAB was able to base this distinction on credible medical evidence, the CAB did not err or act unreasonably to so find in their decision.

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<sup>26</sup> Decision at 6.



**II. THE CAB HAD SUFFICIENT COMPETENT MEDICAL EVIDENCE TO FIND THAT THE APPELLANT'S ALLEGED NECK SYMPTOMS WERE DISTINCT AND SEPARATE FROM HER ACCEPTED LEFT SHOULDER INJURY**

The CAB Panel correctly found that the appellant failed to meet her burden of proof to show that the period of disability from her neck symptoms were related to her original injury as the CAB, applying competent medical evidence, rightfully found that the appellant did not establish medical or factual causation for the alleged neck symptoms under New Hampshire workers' compensation law.

As previously noted, all workers' compensation claims for a return to indemnity benefits must satisfy both legal and medical causation elements. See Appeal of Cote, 139 N.H. at 578-79; Appeal of Briggs, 138 N.H. at 659. "To show causation the petitioner bore the burden of proving that the cumulative work-related stress to the petitioner's knees probably caused or contributed to his disability under a two-pronged test." Id. "Under this test, the injured worker must prove legal causation, that is, that his injury is work-connected, and medical causation, that is, that his disability was actually caused by the work-related event.'..." Appeal of Cote at 578-79. The medical causation prong requires that "the claimant to establish, by a preponderance of the evidence, that the work-related activities 'probably cause[d] or contribute[d] to the employee's [disabling

injury] as a matter of medical fact." Appeal of Kehoe, 141 N.H. at 412; Appeal of Briggs at 659 (emphasis added).

The legal causation inquiry "defines the degree of exertion that is necessary to make the injury work-connected. Appeal of Briggs at 659. The test to be used depends upon the previous health of the employee." Id. "If the claimant does not have a preexisting condition, any work-related activity connected with the injury as a matter of medical fact is sufficient to show legal causation." In re Dodier, No. 2020-0185, (N.H. Oct. 14, 2021). Essential in both prongs is the requirement of medical facts sufficient to show disability. Despite the appellant's arguments to the contrary, the CAB had credible medical evidence on which to find that the appellant's neck symptoms were not related to the shoulder incident as a matter of medical fact.

The CAB noted that Dr. Goumas' narrative on March 30, 2021 mentioned an injury to the cervical spine as a "probable brachial plexopathy" that was not present at prior points in the medical narrative.<sup>27</sup> The CAB further noted that the prior office note on January 8, 2021 lists the appellant's pain as in her shoulder, not her neck.<sup>28</sup> Conversely, Dr. Goumas had maintained a careful medical narrative of the appellant's shoulder injury dating back to before the appellant's surgery in December 2019.<sup>29</sup> While it is true that the appellant's providers noted

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<sup>27</sup> Decision at 6.

<sup>28</sup> Id. at 5-6.

<sup>29</sup> Id. at 6.

right neck pain from the appellant once, on August 21, 2019, there were no such references of left neck pain until September 25, 2020, long after the original injury and in an area unrelated to the original left shoulder injury.<sup>30</sup> Further complicating this is the CAB's focus on Dr. Goumas' own statement that, as of October 22, 2020, "Most of the problem really appears to be in her neck and around the periscapular and trapezial musculature. At this point the shoulder does not seem too bad."<sup>31</sup> At every stage, the CAB Panel had sufficient medical evidence to track the appellant's shoulder complaints, to the point of being able to note when there was a distinct lack of narrative explaining the neck pain. The CAB used that evidence to determine that there was a distinction between the appellant's left shoulder symptoms and the unexplained neck symptoms and based its decision on the lack of medical fact and the work-connected character, or lack thereof, of the alleged neck symptoms.

Further cutting against the appellant on this question is the sufficiency, rather than necessity, requirement of medical fact. As noted above, it is sufficient for a CAB Panel to find, as a medical fact, that a work-related activity caused a claimant's disabling condition to satisfy legal causation. See In re Dodier, No. 2020-0185, (N.H. Oct. 14, 2021). Here, the CAB had the discretion, based on the body of medical evidence available, to determine whether the medical evidence

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<sup>30</sup> Document 5A, p. 26, 49.

<sup>31</sup> Decision at 6.

articulated by the appellant's doctors was sufficiently connected to the appellant's work.

The Court considers the CAB's findings of fact *prima facie* reasonable. RSA 541:13. An appellant may only overcome this presumption by proving that there was no competent evidence from which the CAB could conclude as it did. See Appeal of Bergeron, 144 N.H. at 683. "Moreover, in reviewing the CAB's findings, "[the Court's] task is not to determine whether [it] would have found differently than did the board, or to reweigh the evidence, but rather to determine whether the findings are supported by competent evidence in the record." Appeal of Dean Foods, 158 N.H. at 474. "Because a claimant's treating physicians have great familiarity with [her] condition, their reports must be accorded substantial weight." Appeal of Kehoe, 141 N.H. at 417.

Here, the CAB relied on the credible medical evidence provided by Dr. Goumas, the appellant's treating physician. The CAB noted that, while the appellant did complain of "achiness" and some "residual instability" in her shoulder, there was essentially no documentation of any left-sided neck symptoms until after the appellant had returned to work for over a month and with different physical duties.<sup>32</sup> What narrative evidence there was of the neck did not connect it in character to the left shoulder injury: The CAB noted that the first significant

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<sup>32</sup> Decision at 6.

mention of the neck by Dr. Goumas was reported on October 22, 2020, where Dr. Goumas stated “most of the problem really appears to be in her neck and around the periscapular and trapezial musculature.”<sup>33</sup> The CAB explicitly stated that “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 “probably brachial plexopathy when neither had been part of the medical record before the 3/30/2021 narrative.”<sup>34</sup> Despite the appellant’s contentions that the appellee has “recast” the appellant’s neck complaints as a separate injury, the medical facts clearly show that the neck complaints, per the appellant’s own treating doctor’s reports, were separate and apart from the original workplace injury. Thus, the CAB was unable to find sufficient medical fact connecting the alleged neck symptoms with the original workplace injury to the appellant’s left shoulder, and rightfully determined that there was insufficient medical fact to demonstrate disability or any work-connected character of the neck symptoms.

The CAB made findings of medical fact based on the evidence articulated by the appellant’s treating doctor regarding a distinction between the appellant’s neck symptoms and the original workplace injury. The CAB supported those findings by competent evidence in the record and found that the appellant failed

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<sup>33</sup> Decision at 5-6.

<sup>34</sup> Id. at 6.

to meet her burden of proof to show that the neck symptoms arose out of her original workplace injury and that they lacked a work-connected character. There was no “misdirection” or confusion, merely a competent trier of fact making factual determinations, for which they receive great deference, on medical fact based on evidence on the record. The CAB used those medical facts to find that the appellant did not satisfy the factual or medical causation prongs relative to her allegedly disabling left neck pain. As the CAB receives significant deference on factual findings supported by medical evidence on the record, the Court should find that the CAB did not err by finding that the appellant failed to meet her burden of proof relative to the alleged neck symptoms.

### **III. THE CAB DID NOT IMPOSE A BURDEN ON THE APPELLANT TO DEMONSTRATE A SECOND WORK INCIDENT**

At no point did the CAB require that the appellant prove a second workplace incident in its analysis but instead based its reasoning on the lack of medical evidence supporting the appellant’s argument. The appellant argues that the CAB unreasonably placed a burden on the appellant to show that another work incident occurred between her return to work in May of 2020 and the second onset of her alleged disability in September of 2020. Neither the facts of the case or the CAB decision supports this claim.

RSA 281-A:48 provides, in relevant part, that a party must show a “change in condition” to challenge denial of payment of workers’ compensation

benefits. "Typically, '[t]he `change in condition' which justifies reopening and [termination of disability benefits] is ordinarily a change, for better or worse, in claimant's physical condition. In re Hiscoe, 786 A.2d 96, 101 (N.H. 2001). This change may take such forms as progression, deterioration, or aggravation of the compensable condition..." In re Hiscoe at 101. Lab 203.10 further provides that the party asserting a proposition, in this case that a change of condition warrants reinstatement of benefits, bears the burden of proof. Here, the appellee does not dispute that the appellant bore the burden of proof to show a change in condition to warrant reinstatement of indemnity benefits.

The appellant contends that the CAB improperly applied a burden of proof by inquiring into the existence of a new workplace incident when determining legal causation for her injury.

As previously noted, legal causation inquiry "defines the degree of exertion that is necessary to make the injury work-connected. Appeal of Cote, 139 N.H. at 579. "If the claimant does not have a preexisting condition, any work-related activity connected with the injury as a matter of medical fact is sufficient to show legal causation." In re Dodier (N.H. 2021).

The CAB found the following facts undisputed: On July 10, 2020, Dr. Goumas released the appellant to full time, full duty work.<sup>35</sup> The appellant had

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<sup>35</sup> Decision at 5.

returned to work on May 25, 2020, despite not having a full duty medical release to do so.<sup>36</sup> The appellant initially returned to work in the stock room, but experienced pain trying to do her regular duties.<sup>37</sup> She was reassigned to the cash register, where her duties involved cashier work and limiting customer entrance to the store.<sup>38</sup> The first medical record of pain from Dr. Goumas since the full duty work release was September 3, 2020, which was when the appellant was reduced to a 5-hour workday.<sup>39</sup> On September 25, 2020, Dr. Goumas took the appellant out of work entirely and, on October 22, 2020, explicitly relates the pain to the neck and not the appellant's shoulder.<sup>40</sup>

The appellant argues that several quotes from the CAB decision prove that the CAB denied the appellant's claim for further indemnity benefits because she did not prove a second work injury, and points to inquiries into the appellant's work duties after her return to work in 2020 as evidence of a shifted burden. This is not accurate.

The appellee does not dispute that the CAB inquired into the appellant's work duties following her return to work in 2020. There, the appellant had returned to a cashier position, which the CAB could infer did not involve any lifting or overhead work. Despite the apparent reduction in physical duties, the

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<sup>36</sup> Decision at 3.

<sup>37</sup> Id. at 3.

<sup>38</sup> Id. at 3.

<sup>39</sup> Id. at 5.

<sup>40</sup> Id.



appellant alleges an onset of neck symptoms.<sup>41</sup> The CAB inquired into these work duties and found no medical narrative or testimony indicating that the appellant suffered a change in condition warranting resumption of benefits.<sup>42</sup> Indeed, the CAB found no factual explanation for the appellant's alleged disability indicating compensability. Despite their inquiry, the CAB did not require the appellant to prove such an incident. By inquiring into these relevant areas of testimony and medical evidence, the CAB explored the record available before it in an attempt to make sense of conflicting claims between the appellant's medical evidence and the testimony provided. Indeed, the CAB concluded that the lack of medical causation was the basis for their finding of no further compensability.<sup>43</sup> The inquiry was, therefore, an appropriate exploration of the record and not an imposed burden to demonstrate a second work injury.

Further, the CAB did not err by merely questioning the lack of an intervening work injury. The appellant considers that the CAB's inquiry into her physical duties after a return to work constituted an improper burden to prove an intervening work injury. Despite that, the appellant asserts that she suffered a recurrence of her original injury. Of note, the cases the appellant relies upon to show a recurrence all involve inquiry into secondary work incidents. See Appeal of Cote, 139 N.H. at 576-77 (wherein a claimant suffered a compensable injury to

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<sup>41</sup> Decision at 5.

<sup>42</sup> Id. at 6.

<sup>43</sup> Id. at 7.

his back while clearing an obstruction in a machine in 1982 and suffered sudden pain in his back in 1990 during a long shift); Appeal of Briggs, 138 N.H. at 623 (wherein a claimant suffered a series of compensable injuries to his knees from 1969, 1981, and 1987 and the CAB addressed a reinjury after his knee gave out in 1988); Town of Hudson v. Wynott, 128 N.H. 478, 479-80 (1986) (wherein a claimant suffered a compensable injury to his back in 1976 while closing the tailgate of a dump truck and reinjured his back in 1983 lifting a bucket of bait); and Rumford Press, 125 N.H. at 163 (wherein a claimant injured his back after a compensable slip and fall in February of 1980 and reinjured his back while lifting a cover in December of 1980). It is entirely unsurprising that, when the body of law governing recurrences and aggravations is based on fact patterns questioning the existence of a discrete second workplace incident, the CAB would necessarily comment upon a discrete second workplace incident or lack thereof. Despite implying skepticism regarding satisfaction of legal causation, the CAB did not indicate in its decision that this was dispositive.

The CAB, faced with a medical narrative that mentioned only once before September 2020 any pain in the appellant's neck, used its discretion, based on credible testimony, to find that the appellant's alleged pain bore no connection to the accepted shoulder injury. The CAB went on to note that Dr. Goumas' reports lacked sufficient medical foundation to connect the neck symptoms to the original

injury.<sup>44</sup> The CAB found that “the medical notes do not reflect a recurrence or aggravation condition to the left shoulder that was surgically repaired.”<sup>45</sup> This was well within the CAB’s sound discretion to evaluate the factual evidence and draw conclusions from it accordingly and does not rise to the level of imputing a burden of proof to show an intervening injury.

The CAB decision contains no evidence of improper burden shifting of any kind. At all times during the Hearing, the appellant bore the burden of proof. In analyzing the evidence presented, the CAB explicitly stated that they found insufficient medical causation connecting the new neck pain and claimed disability to the original incident.<sup>46</sup> Further, the CAB explicitly stated that the evidence before them did not satisfy medical causation relative to the appellant’s argument that she suffered a recurrence of her left shoulder injury.<sup>47</sup> The appellee did not recast the appellant’s left shoulder injury at the CAB Hearing, despite the appellant’s arguments otherwise; the appellee merely pointed to the wealth of medical evidence available for the CAB to find as it did.

The appellant is correct that her only burden of proof was to show a change in condition affecting her earning capacity. However, the appellant is not correct that she satisfied this burden of proof, as the CAB applied credible

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<sup>44</sup> Decision at 7.

<sup>45</sup> Id.

<sup>46</sup> Id. at 6.

<sup>47</sup> Id.

medical and factual evidence and determined otherwise. The CAB acted within its discretion to evaluate the facts and apply them to the case before it and did not impute any burden of proof other than that required of demonstrating a change in condition. As such, the Court should uphold the CAB's decision accordingly.

### **CONCLUSION**

The Court should uphold the CAB decision and find that the appellant is not entitled to workers' compensation further indemnity benefits relative to her August 15, 2019 injury. The CAB was within its discretion based on the evidence to find that the appellant's shoulder injury suffered no recurrence and that the appellant's neck injury is not related to the original workplace injury. Finally, the Court should find that the CAB did not impermissibly shift the burden of proof onto the appellant to show a second workplace injury by merely exploring the factual record.

### **STATEMENT REGARDING ORAL ARGUMENT**

The Appellee requests 15 minutes of oral argument and designates Matthew J. Solomon, Esq. as the attorney to be heard.

**STATEMENT OF COMPLIANCE – WORD LIMITATION**

I hereby certify that this brief complies with the 9,500-word limitation under Supreme Court Rule 16 (11). This brief contains 6,224 words.

Respectfully submitted,  
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Dated: February 25, 2022

**CERTIFICATE OF SERVICE**

I hereby certify that on February 25, 2022, a copy of the forgoing is being timely provided through the electronic filing system's electronic service to James Lafrance and the NH Attorney General.

/s/ 

Matthew Solomon, Esq.