

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2005-0088, Appeal of I.C. Reed & Sons, Inc., the court on February 27, 2006, issued the following order:

The employer, I.C. Reed & Sons, Inc., appeals a decision of the compensation appeals board (board) finding that the employee, Hoot Manouk, suffered a cumulative trauma injury to his shoulders on September 29, 1999. The employer argues that the board erred in finding: (1) that the employee suffered a cumulative trauma injury rather than a recurrence of an ongoing unstable injury; (2) that the disability was related to the employee's employment with I.C. Reed & Sons, Inc.; (3) that the employer is liable even though the employee had terminated his employment with the employer and was unemployed due to a separate disability; (4) that the employee had suffered a diminished earning capacity when the employee was already deemed totally disabled for a separate and distinct injury; and (5) that the date of disability was September 29, 1999. We affirm.

We will reverse the board's decision only for errors of law or if we find by a clear preponderance of the evidence that the order is unjust or unreasonable. See RSA 541:13 (1997); Appeal of Hypertherm, 152 N.H. 21, 23 (2005). If competent evidence supports the board's decision, we will affirm its determination even if other evidence would lead to a contrary result. See Appeal of Hooker, 142 N.H. 40, 47 (1997).

In this case, the parties agree that the employee suffered a bilateral cumulative trauma injury in 1989. The board found that the employee's subsequent work activities so aggravated his previous shoulder conditions as to serve as an intervening cause of his disability beginning on September 29, 1999. The crucial inquiry in reaching this conclusion is whether the second incident constitutes an aggravation of a pre-existing condition that has stabilized or a worsening or exacerbation of an existing condition. See Appeal of Bergeron, 144 N.H. 681, 685 (2000). The board found that the employee's return to full-time employment as a lineman for eight years following his 1989 injury established that his condition had stabilized; these findings are supported by the record.

The appropriate date of injury in a claim involving cumulative trauma is the date that the employee's injury causes a diminished earning capacity. The board found that the employee's date of injury was September 1999 based upon medical evidence that he could no longer perform the duties of a lineman. The board also found that his last exposure to cumulative trauma was in October 1997. These findings are also supported by the record. In October 1997, the employer was I.C. Reed & Sons, Inc. That the employee subsequently terminated his employment does not affect the continuing duty of the employer to pay for treatment related to the employee's 1999 injury absent an independent, intervening cause. *Id.* at 684.

Nor are we persuaded by the employer's argument that the employee's diminished earning capacity because he was totally disabled due to a separate and distinct injury prevented the board from finding that he had suffered a diminished earning capacity due to his shoulder injury. A determination of whether an employee's earning capacity has been diminished is made with reference to the employee's value in the marketplace, independent of the subjective measure of his actual earnings. Appeal of CNA Ins. Co., 148 N.H. 317, 321 (2002). In this case, the board found that September 29, 1999, was the date by which the employee was unable to return to employment on account of his shoulders, thus resulting in a loss of earning capacity due to his shoulder injuries.

In its final claim of error, the employer argues that Chapter 128, Laws of 2005 governs the date of disability in this case. "It has been repeatedly held that the rights and liabilities between the parties in a workers' compensation case are determined by the law in effect on the date of the accident." Appeal of Cote, 144 N.H. 126, 128 (1999) (quotation and brackets omitted). We therefore find no merit in this argument.

Affirmed.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.

Eileen Fox
Clerk