

# THE STATE OF NEW HAMPSHIRE

## SUPREME COURT

**In Case No. 2007-0806, Appeal of Wayne Hammar, the court on August 28, 2008, issued the following order:**

The employee, Wayne Hammar, appeals an order of the compensation appeals board (board) reducing his benefits to the diminished earning capacity rate. See RSA 281-A:48 (1999). He argues that the board erred in failing to consider his prior functional limitations when it assessed his earning capacity. We vacate and remand.

We will affirm the board's decision absent an error of law or unless by a clear preponderance of the evidence, we conclude that it is unjust or unreasonable. Appeal of Fay, 150 N.H. 321, 324 (2003). We consider the board's factual findings to be *prima facie* lawful and reasonable. *Id.* The appealing party bears the burden of demonstrating that the board's decision was erroneous. *Id.*

In this case, it is undisputed that, during the course of his employment, the employee suffered injuries to both his right and left shoulders; he received a permanent impairment award for the right shoulder injury and eventually returned to work where he subsequently injured his left shoulder. He began receiving indemnity benefits for the left shoulder injury; in 2006, the carrier requested a hearing on the issue of extent of disability. See RSA 281-A:48. After a hearing, the board found that, in considering whether the employee had work and earning capacities, only the left shoulder injury should be considered. The board then found that the employee's condition had changed and that he now had both a work and earning capacity.

The employee argues that the board erred by considering only the left shoulder injury in determining whether he has work and earning capacities. The board relied upon Appeal of Hiscoe, 147 N.H. 223 (2001). In Hiscoe, we stated that if the medical evidence establishes that the employee's compensable work-related injury has ceased, a change in condition has occurred warranting termination of benefits, even if the employee is still disabled due to "causes unrelated to the on the job injury." Hiscoe, 147 N.H. at 230.

In this case, the employer concedes in its brief that there was no evidence that the claimant's right shoulder condition had resolved; indeed, the employer states that it "never argued that the [employee's] right shoulder condition . . . had medically resolved." Thus, even if the employee's left shoulder condition had resolved, he might still be disabled due to his work-related right shoulder

condition. In contrast, in *Hiscoe*, the claimant's continued disability was related to pre-existing, ~~non-work-related~~, degenerative disc disease. On the record before us, we conclude that the board erred by considering only the employee's left shoulder injury in determining his work and earning capacities.

In light of this legal error, we vacate the decision of the board and remand for further proceedings consistent with this order.

Vacated and remanded.

DALIANIS, GALWAY and HICKS, JJ., concurred.

**Eileen Fox,  
Clerk**