

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In Case No. 2007-0834, Appeal of GPS Furniture International, Inc., the court on January 30, 2009, issued the following order:

The petitioner, GPS Furniture International, Inc. (GPS), appeals an order of the New Hampshire Compensation Appeals Board (CAB) finding the claimant, Becir Omanovic, entitled to workers' compensation benefits. We affirm.

The CAB found, or the record supports, the following facts. Since approximately 2000, the claimant has worked for GPS as a furniture assembler and delivery man. His job consisted of assembling furniture as pieces arrived at GPS, repacking assembled furniture for delivery, loading trucks, and delivering completed furniture. In January 2004, he began experiencing tingling and numbness in his hands. In February 2004, he first sought medical treatment for the symptoms. As a result of that visit, and numerous follow-up visits with various physicians, the claimant was diagnosed with a variety of afflictions, including carpal tunnel syndrome (CTS). At no time was the claimant placed on any work restrictions by his treating physicians, nor was his work load altered or diminished as a result of his CTS.

In July 2004, the claimant injured his finger in a manner requiring surgery. There is no argument that this injury had any impact on the claimant's CTS. In June 2005, for the first time, a workers' compensation form was completed relative to the CTS, which listed the claimant's injury date as June 1, 2003. That form was not signed by the claimant. At the end of August 2005, the claimant had surgery aimed at correcting his CTS. He returned to work approximately one month later. On September 15, 2005, an Employers' First Report of Injury regarding the claimant's CTS was completed, which also listed the injury date as June 1, 2003, and also was not signed by the claimant. At a doctor's visit in January 2006, the claimant indicated to his doctor that the June 1, 2003 date was incorrect and that it should be changed to January 2004.

In August 2006, a hearing was held at the department of labor to determine the claimant's eligibility for workers' compensation benefits relative to his CTS. The hearing officer denied the request, concluding that the claimant had not carried his burden to demonstrate that his injury was related to his employment. The hearing officer also concluded that the claimant had failed to meet the time requirements of RSA 281-A:19 (1999) because he was

injured in June 2003 and did not report the injury until September 2005, more than two years later.

The claimant appealed to the CAB, which held a hearing in September 2007. The CAB concluded that the claimant's date of injury was January 2004, and that he has been temporarily totally disabled since his surgery in August 2005. Also, the CAB found persuasive the opinion of Dr. Nicholas Horangic, who concluded that the claimant's injury was work-related. Therefore, the CAB ruled that the claimant was entitled to compensation benefits from August 2005 onward. Following a motion for rehearing, the CAB amended the claimant's injury date to February 25, 2004, but did not otherwise alter its decision. GPS now appeals.

On appeal, GPS' primary, interrelated contentions are that the CAB erred in establishing the claimant's date of injury as February 25, 2004, and, as a consequence, concluding that he had carried his burden to demonstrate a compensable work-related injury. According to GPS, since CTS is generally regarded as a cumulative trauma injury, the relevant inquiry for establishing the date of injury is that laid out in Appeal of CNA Insurance Co., 148 N.H. 317 (2002), and related cases. Under that analysis, the date of injury for a cumulative trauma injury occurs on the date the injured person experiences a diminished earning capacity. Id. at 320; see also Appeal of Wausau Ins. Co., 143 N.H. 478, 480 (1999). Thus, GPS argues, the claimant must show that, on the date of injury determined by his diminished earning capacity, the injury was causally related to the employment. According to GPS, the claimant did not prove a diminished earning capacity on any of the potential dates of injury appearing in the record – June 1, 2003, January 2004, and February 25, 2004 – and he did not show that the injury was work-related on the date of injury. Therefore, the claimant is not entitled to compensation benefits.

Complicating the issue is the fact that effective August 14, 2005, the legislature amended RSA 281-A:16 (Supp. 2008). The previous statute did not provide a means for determining the date of injury for a cumulative trauma injury, thus necessitating recourse to the "diminished earning capacity" analysis referenced above. The amended statute, however, defines the date of injury for a cumulative trauma injury as "the date of first medical treatment." Id. GPS contends that the amendment does not apply here, and that since the claimant failed to show a decreased earning capacity in 2003 or 2004, the CAB erred in determining him eligible for compensation benefits.

Before addressing these issues, however, we first dispense with GPS' contention that because the claimant did not argue for the establishment of a particular date of injury, he is precluded from now making an argument relative to one. Regardless of whether the claimant argued for a specific date, he has raised arguments as to various dates that the CAB could have found

based upon the evidence. Thus, the issue of the date of injury has been a central issue in this matter upon which the claimant has made arguments. While the CAB's jurisdiction, and by extension ours, is limited to the issues raised in the department of labor, see Appeal of Rainville, 143 N.H. 624, 629 (1999), it is not limited to specific arguments raised. Thus, because the date of injury has been raised as an issue at every step of this case, the claimant is not precluded from arguing for the establishment of a particular date of injury.

Regarding the substantive issues, irrespective of whether the amendment to RSA 281-A:16 applies, we conclude that the claimant is entitled to compensation benefits. Presuming first that the amendment does not apply to the claimant's case and that the diminished earning capacity analysis applies, we conclude that he did demonstrate a diminished earning capacity. As noted by GPS: "The medical evidence and testimony revealed that the claimant did not have diminished earning capacity due to his alleged carpal tunnel injury until August 2005." Thus, even by GPS' analysis, the claimant had a diminished earning capacity in August 2005. He would thus be eligible for benefits from that time forward, subject to him producing proof that the injury leading to the diminished capacity was work-related.

While the CAB determined that the date of injury was February 25, 2004, it also ruled that the claimant was disabled, and therefore entitled to benefits, beginning in August 2005. Therefore, it is from that date onward that the claimant could collect benefits and the erroneous determination of an earlier date of injury is harmless in that it did not prejudice GPS. See Appeal of Chickering, 141 N.H. 794, 796 (1997).

Alternatively, if the amended statute applies to the claimant's injury, its straightforward application sets the date of injury at February 25, 2004. Under the amended statute, the date of injury is determined to be the date upon which the injured person first seeks medical treatment. RSA 281-A:16. GPS does not dispute that the claimant first sought medical treatment on February 25, 2004.

Thus, the CAB set the date of injury required by the statute, though it did not award him benefits until August 2005. Accordingly, regardless of whether the amended statute applies, there is no reversible error in the CAB's decision to set the claimant's date of injury at February 25, 2004, because such decision does not affect the date upon which the claimant actually became disabled in August 2005, or his ability to collect benefits from that time forward.

Finally, GPS argues that the CAB erred in relying upon the opinion of Dr. Horangic in finding that the claimant's injury was work-related. According to GPS, Dr. Horangic's opinion letter does not sufficiently link the claimant's

injury with his work, and does not adequately rebut the opinion offered by Dr. Stuart Glassman that the claimant's CTS is the result of some other cause.

"We will not disturb the board's factual findings or its decision, if supported by competent evidence in the record." Appeal of Cote, 146 N.H. 705, 709 (2001). "Further, we afford the board discretion to credit or discredit the testimony of the expert witnesses." Id. Here, the CAB concluded that Dr. Horangic had written a "comprehensive opinion letter" that adequately addressed the issues raised by Dr. Glassman. This letter is based upon Dr. Horangic's review of the claimant's history with various physicians from 2004 onward, including treatments from Dr. Horangic personally. We conclude that the CAB was free to credit Dr. Horangic's opinion over that of Dr. Glassman and that it did not err in relying upon the opinion letter in finding that the claimant's injury was work-related.

Affirmed.

DALIANIS, DUGGAN and HICKS, JJ., concurred.

**Eileen Fox,
Clerk**