New Hampshire cases 2012

1. Appeal of Margeson 162 N.H. 273 (2011)

The case is significant because it clarifies the proper risk analysis for work related injuries in New Hampshire. Under *Margeson*, the Appeal Board should first make a finding regarding the cause of the claimant's injury. That is, was the injury due to an employment related risk, a personal risk, a mixed risk or a neutral risk?

If the Appeals Board finds that the injury was caused by a neutral risk, the increased-risk test will apply:

> ... an employee may recover if his injury results from "a risk greater than that to which the general public is exposed." *Rio All Suite Hotel and Casino*, 240 P.3d at 7 (quotation and brackets omitted). Importantly, even if the risk faced by the employee "is not *qualitatively* peculiar to the employment, the injury may be compensable as long as [he] faces an increased *quantity* of a risk." *Id.* (quotations and ellipsis omitted).

If the Board finds that the injury resulted from a non-neutral risk, then the *Steinberg* line of cases applies:

> The claimant must prove both legal and medical causation. The test to be used for legal causation depends upon the previous health of the employee. *Steinberg I*, 119 N.H. at 231. If the employee suffers from a prior weakness, the employment-connected stress or strain must be greater than that encountered in normal non-employment life. *Id.* If there is no prior weakness, *any work-related stress or strain* connected with the injury as a matter of medical fact satisfies the legal causation test. *Id.*
>
> Medical causation requires that the claimant establish "that the work-related activities probably caused or contributed to his or her disabling injury as a matter of medical fact." *Kehoe*, 141 N.H. at 417 (quotation, emphasis, and brackets omitted). While "[m]edical causation is a matter properly within the province of medical experts," *Appeal of Demeritt*, 142 N.H. at 810, the CAB is not required to accept medical evidence or the opinions of medical experts that are premised upon information that is not credible.

Please see my attached analysis.

Margeson analysis

Type of Risk	Compensable	Examples	Slip, trip or fall	Arise out of?
Employment related risks obvious injuries "Typically think of"	Y	Explosives Fingers in gears Falling objects	Only if a defect or slippery floor, or an uneven floor	Always
Personal risks Clearly personal even if on job not compensable	N	Bad knee Epilepsy Multiple Sclerosis	---	Never
Mixed risks Not distinctly personal or work related but compined to create a work place risk	Y/N	Heart disease but dies from work related heart strain *Steinberg*	---	Maybe, even if the risk is personal the injury arises out of employment if there is a subtantial conbtributing factor that is related to work
Neutral risks Not distincly personal or employment related	Y/N	Hit by a bullet Struck by lightning Bitten by a poisonous insect Or an unknown cause	Unexplained fall is a neutral risk Descending stairs	Whether a neutral risk is compensable is a question of fact Test 1 Increased risk tests: was the workplace risk greater than that to which the general public is exposed Analysis of quality versus quantity of use Frequency of use; stair height Test 2 Actual risk tests: claimant may recover so long as employment exposes him to the risk Test 3 Positional risk: injury would not have occurred but for the conditions and obligation of the employment placed the employee where he was at the time of the injury --

2. Appeal of Letellier, (December 15, 2011)

This case is significant because it addresses whether mental condition resulting from disciplinary actions, work evaluations, job transfers, layoffs, demotion or termination taken in good faith by the employer is an "injury" under the New Hampshire workers' compensation statute.

The Court interpreted the statute to include the failure of Letellier's closely held business was similar to the articulated provisions in the statute and that since the statute was intended to be an exclusive list, the mental condition resulting from the stress of losing ones business did not result in a compensable work injury.

162 N.H. 273 (N.H. 2011)

27 A.3d 663

Appeal of James MARGESON (New Hampshire Compensation Appeals Board).

No. 2010-633.

Supreme Court of New Hampshire.

July 21, 2011

Argued: May 5, 2011.

[27 A.3d 664] [Copyrighted Material Omitted]

[27 A.3d 665] Kristin H. Sheppe and Michael C. Reynolds, of Concord, on the brief, and Mr. Reynolds orally, for the petitioner.

Sulloway & Hollis, P.L.L.C., of Concord (James E. Owers and Stacey P. Coughlin on the brief, and Mr. Owers orally), for the respondent.

DUGGAN, J.

The petitioner, James Margeson (employee), appeals a decision of the New Hampshire Compensation Appeals Board (CAB) denying him reimbursement for medical treatment and workers' compensation benefits. The parties dispute whether his injury arose out of his employment as **[27 A.3d 666]** required by RSA 281-A:2, XI (2010). We vacate and remand.

The CAB found or the record supports the following facts. The employee injured his right knee on April 18, 2009, while working for the respondent, the New Hampshire Department of Health and Human Services (employer), as a youth counselor at the John Sununu Youth Center (Youth Center). The employee was working the third shift and performing a routine bed check to ensure the residents were in bed at the required time. While conducting this bed check, he descended the stairs in one of the Youth Center's buildings, and his left foot landed awkwardly, causing him to lose his balance and twist his right knee. The stairs were in new condition and were not defective. Additionally, they were not wet or otherwise hazardous. While the employer alleged that the injury was precipitated by a pre-existing war wound to the employee's foot, the CAB rejected this as a cause of his injury. As a result of the knee injury, the employee sought treatment and incurred medical bills at four different medical centers and hospitals and missed work from April 19 to June 5.

The employee subsequently sought reimbursement for his medical expenses and disability and indemnity benefits. The employer denied his claim because it determined that his injury did not arise out of his employment. A department of labor hearings officer upheld the employer's denial of benefits and the employee appealed to the CAB. The CAB upheld the decision because the employee " did not encounter any greater risk of his employment than in his everyday life and the stairs were merely an incident or an occasion that accompanied the injury and the employment was not a contributory or additional risk in bringing his injury about." The CAB denied the employee's motion for reconsideration. This appeal followed.

We will not disturb the CAB's decision absent an error of law, or unless, by a clear preponderance of the evidence, we find it to be unjust or unreasonable. *Appeal of Belair,* 158 N.H. 273, 276, 965 A.2d 1006 (2009); RSA 541:13 (2007). The appealing party has the burden of demonstrating that the CAB's decision was erroneous. *Appeal of Belair,* 158 N.H. at 276, 965 A.2d 1006.

To make out a claim for workers' compensation, the employee had to show that his injuries arose " out of and in the course of his employment." RSA 281-A:2, XI. The phrase " in the course of" employment refers to whether the injury " occurred within the boundaries of time and space created by the terms of employment" and " occurred in the performance of an activity related to employment." *Murphy v. Town of Atkinson,* 128 N.H. 641, 645, 517 A.2d 1170 (1986). The phrase " arising out of" employment refers to the causal connection between the injury and risks of employment, and requires proof that the injury " resulted from a risk created by the employment." *Id.; see also Rio All Suite Hotel and Casino v. Phillips,* 240 P.3d 2, 4-5 (Nev.2010); *Odyssey/Americare of Oklahoma v. Worden,* 948 P.2d 309, 311 (Okla.1997); 1 A. Larson, *Larson's Workers' Compensation Law* § 3.01, at 3-4 (Matthew Bender ed. rev. 2011).

The parties agree that the employee was injured while at work, *i.e.,* " in the course of" employment. Instead, they dispute whether he suffered an injury " arising out of" his employment. Courts throughout the country have utilized three different tests, the increased-risk test, actual-risk test, and positional-risk test, to determine whether a claimant has met this requirement. We have yet to adopt any one of these tests, and the parties disagree regarding **[27 A.3d 667]** which standard should govern our inquiry. Accordingly, to provide guidance and clarity to the department of labor, the bench and the bar, we adopt a single test to determine whether the type of injury that occurred here arises out of employment.

To aid us in characterizing how the injury in this case should be analyzed, we begin by outlining four types of injury-causing risks commonly faced by an employee at work. These categories of injury-causing risks include: (1) risks directly associated with employment; (2) risks personal to the claimant; (3) mixed risks; and (4) neutral risks. 1 *Larson, supra* §§ 4.01-4.03, at 4-2 to 4-3.

Employment-related risks include " all the obvious kinds of injur[ies] that one thinks of at once as industrial injur[ies]" and are almost always compensable. *Id.* § 4.01, at 4-2. These risks include falling objects, explosives, and fingers being caught in gears. *Id.* Typically, a slip and fall is only attributable to an employment-related risk if it results from tripping on a defect or falling on an uneven or slippery surface on an employer's premises. *Rio All Suite Hotel and Casino,* 240 P.3d at 5. This category of risks always arises out of employment. 1 *Larson, supra* § 4.01, at 4-2.

The next category of risks, personal risks, are " so clearly personal that, even if they take effect while the employee is on the job, they could not possibly be attributed to the employment." *Id.* § 4.02, at 4-2. A fall caused solely by an employee's personal condition, such as a bad knee, epilepsy, or multiple sclerosis, falls into this category. *Rio All Suite Hotel and Casino,* 240 P.3d at 5. Injuries falling squarely into this category are never compensable. *Id.*

The third category of risks, mixed risks, involve a personal risk and an employment risk combining to produce injury. 1 *Larson, supra* § 4.04, at 4-3. A common example of a mixed-risk injury is when a person with heart disease dies because of employment-related strain on his heart. *Id.* While not all injuries resulting from mixed risks are compensable, the concurrence of a personal risk does not necessarily defeat compensability if the claimant's employment was also a substantial contributing factor to the injury. *Id.; see also New Hampshire Supply Co. v. Steinberg,* 119 N.H. 223, 231, 400 A.2d 1163 (1979)(*Steinberg I*).

Finally, neutral risks are " of neither distinctly employment nor distinctly personal character." 1 *Larson, supra* § 4.03, at 4-2. This middle-ground category is the most controversial in modern compensation law. Determining whether an injury resulting from a neutral risk arises out of employment is a question of fact to be decided in each case. *See Odyssey/Americare of Oklahoma,* 948 P.2d at 311. These risks include being hit by a stray bullet, being struck by lightning, or being bitten by a poisonous insect. 1 *Larson, supra* § 4.03, at 4-3. They also include cases in which " the cause itself, or the character of the cause, is simply unknown." *Id.* An unexplained fall is considered a neutral risk. *Mitchell v. Clark County Sch. Dist.,* 121 Nev. 179, 111 P.3d 1104, 1106 n. 7 (2005); *cf. Odyssey/Americare of Oklahoma,* 948 P.2d at 313 (explaining that wet and slippery grass because of rain is considered a neutral risk). Here, the employee slipped and was injured while descending a staircase that was free of defects, and the employer does not contend on appeal that a personal risk caused the employee's injury. Accordingly, we conclude that the employee's injury resulted from a neutral risk.

[27 A.3d 668] Injuries caused by neutral risks are by definition not clearly personal or employment-related in nature. Courts predominantly apply one of three tests to determine whether such an injury arises out of employment. 1 *Larson, supra* § 3.01, at 3-4; *Rio All Suite Hotel and Casino,* 240 P.3d at 6. The first is the increased-risk test, which is the most widely utilized of these tests. *See* 1 *Larson, supra* § 3.03, at 3-4.1. It " examines whether the employment exposed the claimant to a risk greater than that to which the general public was exposed." *Rio All Suite Hotel and Casino,* 240 P.3d at 6 (quotation omitted). The second, the actual-risk test, ignores whether the risk faced by the employee was also common to the public. 1 *Larson, supra* § 3.04, at 3-5. A claimant may recover so long as the employment subjects him to the actual risk that causes the injury. *Id.* The final test is the positional-risk test. In jurisdictions that have adopted this test, an injury arises out of employment " if it would not have occurred *but for* the fact that the conditions and obligations of the employment placed [the] claimant in the position where he was injured." *Id.* § 3.05, at 3-6. In other words, under the positional risk test, an injury arises out of employment so long as the obligations of employment place the employee in the particular place at the particular time that he suffers an injury. *Id.*

The employer, relying upon *Dustin v. Lewis,* 99 N.H. 404, 112 A.2d 54 (1955), and *Appeal of Lockheed Martin,* 147 N.H. 322, 786 A.2d 872 (2001), contends that New Hampshire has adopted the increased-risk test. The employee, however, points to our decisions in *Appeal of Redimix Cos.,* 158 N.H. 494, 969 A.2d 474 (2009), and *Appeal of Kehoe,* 141 N.H. 412, 686 A.2d 749 (1996), and argues that New Hampshire has adopted either the positional risk or actual risk test. While we recognize some support in our case law for each party's position, we have never before addressed the compensability of an injury caused by a neutral risk.

Our most recent line of cases addressing the " arising out of" requirement explained that a claimant must prove by a preponderance of the evidence that his work-related activities probably caused or contributed to his disability. *Appeal of Redimix,* 158 N.H. at 496, 969 A.2d 474. This entails meeting a two-part causation test, which requires proof of legal and medical causation. *Id.* Legal causation entails a showing that the claimant's injury is in some way work-related, while medical causation requires a showing that the injury was actually caused by the work-related event. *Id.*

In applying the legal causation portion of the test, we have explained that the test used depends upon the

prior health of the claimant. *Id.* " When a claimant has a pre-existing disease or condition, he must show by a preponderance of the evidence that his employment contributed something substantial to his medical condition by demonstrating that the work-related conditions presented greater risks than those encountered in his non-employment activities." *Id.* at 496-97, 969 A.2d 474 (quotation and brackets omitted). " When the claimant does not have a pre[-]existing condition, *any* work-related activity connected with the injury as a matter of medical fact is sufficient to show legal causation." *Id.* at 497, 969 A.2d 474.

Because the employee here did not have a pre-existing condition, he relies upon this final sentence of the legal causation test to assert he is entitled to compensation. Taken at face value, the employee's argument appears to have some merit. However, we originally adopted this test in the context of a compensation claim resulting **[27 A.3d 669]** from a heart attack. *See Cheshire Toyota/Volvo, Inc. v. O'Sullivan,* 129 N.H. 698, 700-01, 531 A.2d 714 (1987); *Steinberg I,* 119 N.H. at 230-31, 400 A.2d 1163. In *Steinberg I,* because of the difficulties associated with proving that work-related stress or anxiety can cause a heart attack in the legal sense, we explained that a heart attack is only compensable if a claimant proves that " the work-related stresses in the particular case at issue were a causal factor in the heart attack which ensued." *Steinberg I,* 119 N.H. at 230, 400 A.2d 1163 (quotation omitted).

In order to prove this causal connection, we adopted the contours of the test upon which the employee now relies. We determined that to establish work-related causation for the heart attack, a claimant had to prove both medical and legal causation. *Id.* We adopted Professor Larson's approach to proving causation in heart attack cases and explained:

The legal causation test defines the degree of exertion that is necessary to make the injury work-connected. The test to be used depends upon the previous health of the employee. Where there is a prior weakness in the form of a previously weakened or diseased heart, then the employment must contribute something substantial to the heart attack. That is, the employment-connected stress or strain must be greater than is encountered in normal non-employment life. Thus, heart attacks that actually result from work-related stress are distinguished from those that occur at work merely as a result of natural physiological process. If there is no prior weakness or disease of the heart, *any* exertion connected with the heart attack as a matter of medical fact is adequate to satisfy the legal test of causation so as to make the injury or death compensable.

Id. at 230-31, 400 A.2d 1163 (citations omitted). We later noted that differing tests for legal causation take " into account the ' personal risks' contributed by the worker and the ' employment risks' present in his work." *New Hampshire Supply Co. v. Steinberg,* 121 N.H. 506, 508, 433 A.2d 1247 (1981) (quotation omitted) (*Steinberg II*).

In the immediate aftermath of *Steinberg I,* we repeatedly emphasized that the test we had adopted should be limited to determining compensability for heart attacks and other heavy exertion or stress-related injuries. *See Bartlett Tree Experts Co. v. Johnson,* 129 N.H. 703, 708, 532 A.2d 1373 (1987) (explaining that *Steinberg I* " adopted Professor Larson's suggested analysis for the difficult problem of determining the compensability for heart attacks"); *Rogers v. Town of Newton,* 121 N.H. 702, 705, 433 A.2d 1303 (1981) (explaining that the *Steinberg I* test is applicable to all types of injuries resulting from stress or exertion); *O'Sullivan,* 129 N.H. at 700, 531 A.2d 714 (noting the adoption of Professor Larson's approach to allow recovery for injuries resulting from work-related stress).

However, since the original adoption of Professor Larson's causation test in *Steinberg I,* both the wording of the test and its application have gradually broadened. For example, in *Wheeler v. School Administrative Unit 21,* 130 N.H. 666, 550 A.2d 980 (1988), the plaintiff suffered from manic-depression, but was denied benefits because the trial court determined that he failed to meet his burden of proof under *Steinberg I . Wheeler,* 130 N.H. at 669-71, 550 A.2d 980. On appeal, we first noted that *Steinberg I* set forth " a two-part analysis for obtaining workers' compensation benefits in heart attack cases." *Id.* at 671, 550 A.2d 980. While the plaintiff's claimed injury was depression, and not a heart **[27 A.3d 670]** attack, we nonetheless applied the *Steinberg I* framework without explanation and stated that " [w]here there is no prior weakness, *any* exertion connected as a matter of medical fact is adequate to satisfy" the legal causation test. *Id.* (quotation and ellipsis omitted). Because the evidence supported the master's finding that the plaintiff previously suffered from depression, we concluded that the plaintiff had to prove that his employment contributed " something substantial" to his injury. *Id.* at 671, 550 A.2d 980 (quotation omitted); *see also Appeal of Cote,* 139 N.H. 575, 579, 660 A.2d 1090 (1995) (reversing board's denial of compensation for claimant's back injury where evidence established that employee had not suffered from back pain until his repeated exertion at work); *Averill v. Dreher-Holloway,* 134 N.H. 469, 472, 593 A.2d 1149 (1991) (applying same legal causation standard and determining that plaintiff proved causation where evidence showed he was not predisposed to depression).

Application of this test was further broadened in *Appeal of Briggs,* 138 N.H. 623, 645 A.2d 655 (1994), in which the plaintiff conceded a pre-existing injury to his knee, but sought coverage for exacerbation of that injury suffered while at work. *Appeal of Briggs,* 138 N.H. at 628, 645 A.2d 655. We again applied a variation of the *Steinberg I* test and stated that the employee had the burden to prove that " the cumulative work-related stress

to the [employee]'s knees probably caused or contributed to his disability under a two-pronged test." *Id.* With regard to the legal causation portion of the test, we reversed the board's denial of benefits because the employee proved that his " work-related activities required more exertion than his non-work-related activities." *Id.*

More recently, in *Appeal of Kehoe,* the *Steinberg I* test was reduced to its current formulation. The employee in *Appeal of Kehoe* was repeatedly exposed to chemicals while performing her job and, for the first time, suffered from headaches and respiratory problems. *Appeal of Kehoe,* 141 N.H. at 414, 686 A.2d 749. We stated that an employee with no pre-existing condition could prove legal causation by establishing " *any work-related activity* connected with the injury as a matter of medical fact." *Id.* at 416, 686 A.2d 749 (emphasis added). Prior to this decision, as explained above, the test had focused upon the employee's degree of stress or exertion because it was intended to apply only to heart attacks and other stress-related injuries. *See Averill,* 134 N.H. at 472, 593 A.2d 1149 (" Where no prior weakness is found, *any exertion* connected as a matter of medical fact is adequate ...." (quotations and ellipsis omitted; emphasis added)). However, in *Appeal of Kehoe,* the test was expanded to apply to " *any work-related activity.* " *Appeal of Kehoe,* 141 N.H. at 416, 686 A.2d 749 (emphasis added). It is this altered language, which represents a significant expansion of our workers' compensation law, upon which the employee here now relies.

We have never before been confronted with applying the *Steinberg I* test to the type of injury at issue here: an unexplained fall that is not attributable to either the employer or employee. As noted, we originally adopted this test to resolve one of the most difficult issues in workers' compensation law: the compensability of heart attacks. *See Steinberg II,* 121 N.H. at 509, 433 A.2d 1247 (explaining the difficulty of adjudicating heart attack cases because of the " ambiguous relationship of emotional stress and physical exertion to the development and aggravation of coronary heart disease"). Although initially intended only for heart attack injuries, the test's application was logically extended to those injuries likely to be caused by a pre-

[27 A.3d 671] existing condition because of the similar difficulty in determining whether such injuries result from an employment-related risk or some other cause. *See Appeal of Briand,* 138 N.H. 555, 560, 644 A.2d 47 (1994) (explaining that legal and medical causation tests apply in cases involving pre-existing conditions).

Such difficulty does not arise with regard to neutral risk injuries. Moreover, our case law and the workers' compensation statute do not support further extension of *Steinberg I* or the adoption of the actual or positional risk theories. While we construe the Workers' Compensation Law liberally in favor of the injured employee, *Appeal of N.H. Dep't of Health and Human Servs.,* 145 N.H. 211, 213, 761 A.2d 431 (2000), we cannot expand the law beyond the legislature's intent. *See Dustin,* 99 N.H. at 408, 112 A.2d 54 (" Compensation acts have not been designed to place the entire burden of employees' losses upon industry and the right of the workman is no greater than the Legislature has provided it shall be." (quotation and brackets omitted)).

We thus conclude that further extension of the *Steinberg I* test to the injury at issue here, which resulted from a neutral risk attributable neither to the employer nor employee, would have the effect of eliminating the statutory " arising out of" requirement, would be contrary to our prior workers' compensation case law, and would be tantamount to strict liability.

We first reject the further extension of the *Steinberg I* test because doing so would directly contravene the workers' compensation statute, which requires both an injury " arising out of and in the course of employment." RSA 281-A:2, XI. Allowing recovery for an injury simply because it occurred at work would read the " arising out of" requirement out of the statute because a claimant could recover without proving that the injury " resulted from a risk created by the employment." *Murphy,* 128 N.H. at 645, 517 A.2d 1170; *see also Rio All Suite Hotel and Casino,* 240 P.3d at 6. Stated differently, such a reading of the statute would effectively reduce two separate and distinct statutory requirements— an injury " arising out of" and " in the course of" employment— to one, contrary to our long-standing interpretation of the workers' compensation statute. *See Murphy,* 128 N.H. at 645, 517 A.2d 1170; *see also Odyssey/Americare of Oklahoma,* 948 P.2d at 311 (emphasizing that " arising out of" and " in the course of" are two distinct and not synonymous statutory requirements).

Additionally, our case law emphasizes a more stringent causal nexus than would be required if the second prong of the *Steinberg I* legal causation test were applied to injuries caused by a neutral risk. Not every person suffering an injury at work is entitled to compensation. *Dustin,* 99 N.H. at 408, 112 A.2d 54. Instead, the claimant must prove that the injury actually resulted from a hazard of the employment. *Heinz v. Concord Union School Dist.,* 117 N.H. 214, 218, 371 A.2d 1161 (1977). Moreover, an " injury must result from the conditions and obligations of the employment and not merely from the bare existence of the employment" to be compensable. *Appeal of Lockheed Martin,* 147 N.H. at 325-26, 786 A.2d 872 (quotation omitted). The *Steinberg I* test, when applied to non-neutral risk injuries, is entirely consistent with these principles. Indeed, when applied to non-neutral risk injuries, the test ensures that an injury is caused by an actual hazard of employment rather than some risk that is personal to the employee.

We therefore conclude that both the workers'

compensation statute and our prior case law support the adoption of the **[27 A.3d 672]** increased-risk test when the claimant's injury results from a neutral risk. Because neutral risk injuries result from some unexplained cause not directly attributable to either the employee or employer, this test strikes an important balance between the employee's right to receive compensation and the employer's right not to be held liable for every injury that occurs in the workplace. *See Dustin,* 99 N.H. at 408, 112 A.2d 54; *Rio All Suite Hotel and Casino,* 240 P.3d at 7.

Under the increased-risk test, an employee may recover if his injury results from " a risk greater than that to which the general public is exposed." *Rio All Suite Hotel and Casino,* 240 P.3d at 7 (quotation and brackets omitted). Importantly, even if the risk faced by the employee " is not *qualitatively* peculiar to the employment, the injury may be compensable as long as [he] faces an increased *quantity* of a risk." *Id.* (quotations and ellipsis omitted). The act of descending a staircase is an everyday, commonplace activity, which most people must undertake on a daily basis, whether at home, work, or in a shopping mall. Accordingly, we cannot say that the act of descending a staircase at work presents a greater risk than that faced by the general public. *Id.; see also Nascote Industries v. Industrial Com'n,* 353 Ill.App.3d 1056, 289 Ill.Dec. 755, 820 N.E.2d 531, 535 (2004); *Southside Va. Training Center v. Shell,* 20 Va.App. 199, 455 S.E.2d 761, 763 (1995).

However, while the act of descending stairs in and of itself does not warrant compensation under the increased-risk test, the employee may still be entitled to compensation under certain circumstances. For example, an employee who must use stairs more frequently than a member of the general public as part of his job faces an increased risk of injury. *Rio All Suite Hotel and Casino,* 240 P.3d at 7 (determining that claimant's injury arose out of her employment under the increased-risk test because her frequent use of the stairs subjected her to a significantly greater risk than the general public). Additionally, stairs of an unusual height or the manner in which an employee is required to perform his job may also increase the risk of injury. *Id.*

Here, the CAB found that the employee " had to ascend and descend stairs on a regular basis during his work day," but also determined that his use of the stairs did not cause him to encounter any greater risk of injury than he incurred in his everyday life. The employee also testified that he used the stairs four times per hour at various times during his shift. Because today we adopt the increased-risk test for the first time and because the CAB did not make explicit findings regarding whether the employee used the stairs more frequently than a member of the general public, we remand to the CAB to make factual findings and apply the increased-risk test to those facts.

We emphasize that our adoption of the increased-risk test applies only to those injuries attributable to neutral risks such as the unexplained fall at issue here. While the original formulation of the *Steinberg I* test was intended to be used only in heart attack or stress and exertion cases, that test, because of its long-standing application and continued workability in non-neutral risk cases, should continue to be used for determining compensability for non-neutral risk injuries. *Cf. Kalil v. Town of Dummer Zoning Bd. of Adjustment,* 159 N.H. 725, 731, 992 A.2d 725 (2010) (explaining that the stability of the law calls for " settlement of principle and consistency of ruling when due consideration has been given and error is not clearly apparent" (quotation omitted)).

[27 A.3d 673] Accordingly, in determining the appropriate test in future cases, the CAB should first make a finding regarding the cause of the claimant's injury. If the CAB finds that the injury was caused by a neutral risk, the increased-risk test will apply. However, should the CAB find that the injury resulted from a non-neutral risk, the claimant must prove both legal and medical causation and the test to be used for legal causation depends upon the previous health of the employee. *Steinberg I,* 119 N.H. at 231, 400 A.2d 1163. If the employee suffers from a prior weakness, the employment-connected stress or strain must be greater than that encountered in normal non-employment life. *Id.* If there is no prior weakness, *any work-related stress or strain* connected with the injury as a matter of medical fact satisfies the legal causation test. *Id.*

As noted above, the application of the increased-risk test to injuries caused by neutral risks and the use of *Steinberg I* for adjudicating all other injuries will ensure that a claimant receives compensation only for an injury " arising out of employment." In other words, the injury must actually result from the hazards of employment and " not merely from the bare existence of employment." *Heinz,* 117 N.H. at 217, 371 A.2d 1161 (quotations omitted); *Appeal of Lockheed Martin,* 147 N.H. at 325-26, 786 A.2d 872.

Vacated and remanded.

DALIANIS, C.J., and HICKS, CONBOY and LYNN, JJ., concurred.

163 N.H. 24 (N.H. 2011)

35 A.3d 629

Appeal of Raymond LETELLIER (New Hampshire Compensation Appeals Board).

No. 2010-795.

Supreme Court of New Hampshire.

December 15, 2011

Argued: Sept. 22, 2011.

[35 A.3d 630] Richard J. Walsh, III, P.A., of Manchester (Richard J. Walsh, III on the brief and orally), for the petitioner.

Trombley Kfoury, P.A., of Manchester (Paul R. Kfoury, Jr. on the brief and orally), for the respondents.

DUGGAN, J.

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The petitioner, Raymond Letellier, appeals an award of the New Hampshire Compensation Appeals Board (CAB) that granted reimbursement for medical bills and expenses, but did not grant indemnity benefits. The respondents, Steelelements, Inc. and its insurance carrier, Chartis Insurance (together, the carrier), cross-appeal arguing that the CAB erred in finding that Letellier suffered a compensable work-related injury. Because we conclude that Letellier's injury is excluded from the statutory definition of the term " injury," we affirm the denial of indemnity benefits and reverse the award for medical bills and expenses.

The CAB found, or the parties do not dispute, the following facts. Letellier was the co-founder of Steelelements, Inc., a business that produced steel materials. He also served as the manager of plant operations for the business, and oversaw sales, transportation, engineering and customer relations. In March 2007, a fire destroyed the manufacturing plant and production was temporarily relocated while the facility was rebuilt. The final cost of rebuilding the facility far exceeded budget projections, and the business floundered. The business was closed in October 2009. Letellier then filed for personal and business bankruptcy.

During the summer of 2009, before the business closed, Letellier saw a nurse at Concord Psychiatric Associates due to stress. Letellier was not

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admitted, but the nurse recommended he follow up with outpatient counseling. During the ensuing months, Letellier developed hypertension and major depression, and several doctors attributed his ailments to the failure of his business, as well as other life stresses. Letellier filed a workers' compensation claim with the carrier, citing mental stress and severe depression. The carrier denied the claim.

Letellier requested a hearing before the department of labor. A hearing officer denied Letellier's claim, finding that he " failed to show that he suffered an injury which arose out of and in the course of his employment." The officer determined that Letellier was merely " the victim of an economic reality which is far outside the realm of the Workers' Compensation Statute." Letellier appealed to the CAB. The CAB found that Letellier established both medical and legal causation, and that stress and depression qualify as compensable occupational injuries within the meaning of the statute. It overturned the hearing officer's denial, and ordered the carrier to pay all medical and psychological treatment expenses associated with the claim.

The carrier filed a motion for rehearing, arguing that Letellier's alleged condition falls outside the scope of the workers' compensation statute. Letellier filed a motion for clarification of the order, requesting that the order include indemnity benefits in addition to the cost of medical expenses. The CAB denied both motions, and both parties appealed.

On appeal, Letellier argues that he should have been awarded indemnity benefits. In its cross-appeal, the carrier argues that the CAB should have denied Letellier's claim for three reasons: (1) the injury did not result from a risk created by employment; (2) the injury is excluded from the statutory definition of the term " injury" ; and (3) Letellier did not prove **[35 A.3d 631]** that his employment substantially contributed to his mental injury. Because it is dispositive, we first address the argument that Letellier's injury was excluded from the statutory definition.

We will overturn the CAB's decision only for errors of law, or if we are satisfied by a clear preponderance of the evidence that the decision is unjust or unreasonable. *Appeal of Langenfeld,* 160 N.H. 85, 89, 993 A.2d 232 (2010); RSA 541:13 (2007). The appealing party bears the burden of demonstrating that the CAB's decision was erroneous. *Appeal of Belair,* 158 N.H. 273, 276, 965 A.2d 1006 (2009).

An injury is compensable under the Workers' Compensation Law if it is an " accidental injury ... or

occupational disease ... arising out of and in the course of employment...." RSA 281-A:2, XI (2010). Mental injuries, including major depression caused by work-related stress, may qualify as compensable injuries. RSA 281-A:2, XI. However, the statute does not permit compensation for any " mental injury" caused by " any disciplinary

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action, work evaluation, job transfer, layoff, demotion, termination, or any similar action, taken in good faith by an employer." *Id.*

Resolution of this case requires us to interpret RSA 281-A:2, XI. We are the final arbiter of the meaning of the workers' compensation statute. *Appeal of Hartford Ins. Co.,* 162 N.H. 91, 93, 27 A.3d 838 (2011). In interpreting a statute, we first examine the language of the statute itself, and, where possible, construe that language according to its plain and ordinary meaning. *Kenison v. Dubois,* 152 N.H. 448, 451, 879 A.2d 1161 (2005). Whether a condition is excluded from the definition of the term " injury" is " governed by the express statutory language and that which can be fairly implied therefrom." *Rooney v. Fireman's Fund Ins. Co.,* 138 N.H. 637, 638-39, 645 A.2d 52 (1994) (quotation omitted). We must determine whether major depression caused by the stress of business failure comes within the statutory exclusion and thus does not constitute a compensable injury.

We begin by construing the plain meaning of the phrase " any disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or any similar action." RSA 281-A:2, XI. Layoffs, demotions, terminations, or similar actions may be precipitated by a number of factors, including poor performance, insubordination, or economic conditions. Such circumstances are explicitly excluded from the definition of the term " injury" because they are " normal and expected conditions of employment life." *Skidis v. Industrial Com'n,* 309 Ill.App.3d 720, 243 Ill.Dec. 94, 722 N.E.2d 1163, 1166 (1999) (quotation omitted); *see also Kemp v. W.C.A.B.* (*Elkland Elec. Co.*), 121 Pa.Cmwlth. 23, 549 A.2d 1365, 1367 (1988) (" [B]eing laid off because of modernization is, in fact, a normal working condition.").

Although a business failure is not among the specifically enumerated exclusions, the legislature made clear that the list was not exclusive by including the words " any similar action." *Garand v. Town of Exeter,* 159 N.H. 136, 141, 977 A.2d 540 (2009) (" The legislature is not presumed to waste words ... and whenever possible, every word of a statute should be given effect.") (quotation omitted). We must consider the meaning of the term " any similar action" in the context of the specifically enumerated exclusions. *State v. Beauchemin,* 161 N.H. 654, 658, 20 A.3d 936 (2011) (explaining that where general words follow specific words in a statute, the general words are construed to embrace objects similar in nature to those enumerated by the specific words). Like the listed exclusions, the possibility of a business failure is **[35 A.3d 632]** a normal condition of employment. *See Ziv v. Industrial Com'n of Ariz.,* 160 Ariz. 330, 773 P.2d 228, 231-32 (Ariz.Ct.App.1989) (agreeing that business failure " is not necessarily unexpected, extraordinary, or unusual" and injury from such stress is not covered by the workers' compensation act). It, too, is often

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precipitated by poor company performance or general economic conditions. A business failure is indistinguishable from the specifically enumerated exclusions. Viewing the plain meaning of the phrase " any similar action" in light of this fact compels us to conclude that the phrase encompasses a business failure.

Letellier argues that the exclusion does not apply in this case because the business failure was not an action taken by the employer. However, business failure necessarily implies some action by the employer; a business has not " failed" until the employer shuts the business down. Just as an employer's decision to lay off employees due to economic conditions may result in mental injury, so too an employer's choice to shut down a business due to economic conditions may result in mental injury. *See Lapare v. Industrial Com'n of Ariz.,* 154 Ariz. 318, 742 P.2d 819, 822 (Ariz.Ct.App.1987) (" In summary, threatened economic hardship, including such naturally traumatic events as lay offs and plant closures, may indeed set the stage for varying degrees of emotional distress.... Their remedy, however, does not lie with workers' compensation benefits. Other remedies ... must be pursued.").

Moreover, interpreting the phrase " any similar action" not to include business failure would lead to the absurd result that employees who are laid off due to business failure, and thus are expressly excluded from the coverage for mental injury, would be precluded from receiving benefits, while the owner of the failed business would be eligible for benefits. We decline to adopt such an illogical interpretation. *Favazza v. Braley,* 160 N.H. 349, 351, 999 A.2d 1088 (2010). We thus conclude that a business failure constitutes " any similar action" within the meaning of the statute.

Although not cited by either party, we also conclude that this case is distinguishable from our most recent interpretation of RSA 281-A:2, XI in *Petition of Dunn,* 160 N.H. 613, 7 A.3d 1135 (2010). The petitioner in *Dunn* was the chief of police for the Town of Jaffrey. *Id.* at 614, 7 A.3d 1135. In that capacity, he " faced a number of stressors beginning in 2004 and continuing through his final day of work in July 2006." *Id.* at 615, 7 A.3d 1135. The stressors included: " a letter on NAACP stationery

threatening to sue him" ; internet attacks by the letter's author; a budget dispute with Jaffrey selectmen; staffing shortages; department in-fighting; a labor grievance against him; the conducting of an investigation of the town manager, requiring a referral to the county attorney and the United States Attorney; his own suspension and reinstatement; and an email from a Jaffrey selectman containing derogatory statements and questioning his sanity. *Id.* at 615, 7 A.3d 1135.

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After being terminated, the chief applied for accidental disability retirement benefits from the New Hampshire Retirement System. *Id.* at 616-17, 7 A.3d 1135. The exclusion provision in RSA 281-A:2, XI applies to retirement benefits. *Id.* at 620-21, 7 A.3d 1135. The hearings examiner denied the claim and " apparently made a distinction between ' work-related' and ' personnel-related' psychological injur[ies]." *Id.* at 624, 7 A.3d 1135. On appeal, we held that RSA 281-A:2, XI " does not exclude all stress-based injury that is personnel-related." *Id.* We noted that the chief's duties specifically included personnel responsibilities, and that an injury is compensable when the exercise of **[35 A.3d 633]** such personnel-related activities, rather than a good faith personnel action taken against the employee, causes the injury. *See id.*

Here, there is no contention that Letellier's injury was caused by personnel actions comparable to those in *Dunn.* Letellier's injuries did not arise from the performance of personnel duties that were part of his job. As the CAB explained, " [T]he failure of the claimant's business caused the stress that resulted in his severe and disabling depression." Without a transcript of the CAB hearing, we assume the evidence was sufficient to support this finding. *See Atwood v. Owens,* 142 N.H. 396, 396-97, 702 A.2d 333 (1997). Based upon this finding, the business failure that caused the injury falls squarely within the exclusion for " any similar action" in RSA 281-A:2, XI.

Although we have determined that business failure comes within the statutory exclusion, the exclusion applies only to " any similar action, *taken in good faith* by an employer." RSA 281-A:2, XI (emphasis added). There is nothing to suggest that the failure of the business in this case involved bad faith. The CAB found that " the business floundered" largely due to the cost of reconstruction after a fire that caused substantial losses in 2007. It also specifically found that Letellier's depression resulted from the ultimate economic failure of his business. " The medical care providers all [agreed] on this chain of events and the insurer did not dispute it." Further, neither party alleges any bad faith on the part of Steelelements, Inc. We thus find that the failure of the business was " any similar action ... taken in good faith by the employer." Accordingly, Letellier's depression was excluded from the statutory definition of the term " mental injury" and was not compensable.

Because of our disposition of the cross-appeal, we need not address the parties' additional arguments.

Affirmed in part and reversed in part.

CONBOY and LYNN, JJ., concurred; DALIANIS, C.J., with whom HICKS, J., joined, dissented.

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DALIANIS, C.J., dissenting.

The majority holds that the cumulative occupational stress and depression suffered by the petitioner, Raymond Letellier (claimant), constitutes a " mental injury" that is not compensable because it results from a personnel action " taken in good faith" against the claimant " by an employer." RSA 281-A:2, XI (2010). Because I disagree with this conclusion, I, respectfully, dissent.

The following facts appear in the record. The claimant, who has a history of depression, is the co-founder and former operations officer of respondent Steelelements, Inc. (Steelelements). I will refer to Steelelements and its insurer, respondent Chartis Insurance, collectively, as " the insurer."

In March 2007, a fire destroyed Steelelements's building in Gorham. In 2007 and 2008, the company rebuilt the building, but because the claimant's business partner did not establish cost controls, rebuilding costs exceeded budget projections, causing the company to " flounder[ ]." The March 2007 fire started " [a] slow decline" in the claimant's business.

The claimant first sought medical care for his work-related injuries in the summer of 2009, when he visited a psychiatric nurse practitioner. He was not hospitalized at that time, but was urged to engage in outpatient counseling. At that time, he was managing plant operations, and overseeing sales, transportation, engineering and customer relations. Because his commute **[35 A.3d 634]** was 100 miles long, he often stayed in a room at the company, where he was lonely. He developed hypertension, which the psychiatric nurse practitioner attributed to his work. She deemed him unable to work on September 8, 2009, because of depression and an inability to concentrate. Even so, he continued to work until October 9, 2009, a few days before the business closed, when he turned the keys and assets over to the company's lender. He filed for both personal and business bankruptcy. In 2010, the claimant sought psychiatric services from another provider, who attributed his stress and resulting depression to his employment.

The claimant submitted a claim for work-related injury, asserting that his injury occurred when the nurse practitioner took him out of work on September 8, 2009.

The insurer denied the claim on the ground that his condition was not work-related. The claimant appealed to the department of labor, arguing that his injury was " cumulative emotional trauma, developing since the 2007 fire, the 2008 reconstruction, and the downhill slide of the company's business position." A department of labor hearing officer agreed with the insurer, finding that the claimant's condition was caused by " an economic reality ... far outside the realm of the Workers' Compensation Statute." The claimant then appealed to the CAB, which reversed the hearing officer's decision.

The CAB found that the claimant demonstrated that his work caused his " disabling major depression" as a medical fact because all of the providers

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agreed that it was caused by " cumulative occupational stress," which, in turn, was caused by " the failure of [his] ... business." The CAB found that the claimant satisfied his burden of establishing legal causation by demonstrating that " [j]ob stress" was " the substantial contributing factor" to his depression, and that the stress from his job " posed a greater risk than encountered outside of work." *See Appeal of Margeson,* 162 N.H. 273, 280, 285, 27 A.3d 663 (2011).

Our standard of review is statutory:

[A]ll findings of the [CAB] upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable.

RSA 541:13 (2007). Thus, we review the CAB's factual findings deferentially. *Appeal of Hartford Ins. Co.,* 162 N.H. 91, 93, 27 A.3d 838 (2011). We review its statutory interpretation *de novo. Id.*

Our review of the CAB's factual findings in this case is especially deferential because neither the claimant nor the insurer has provided us with a copy of the hearing transcript. *See Sup.Ct. R.* 10(2) (in appeal brought pursuant to RSA chapter 541 unless moving party requests transcript to be prepared, no transcript will be prepared for inclusion in record). Absent a transcript, we must assume that the evidence supports the CAB's factual findings. *See Bean v. Red Oak Prop. Mgmt.,* 151 N.H. 248, 250, 855 A.2d 564 (2004); *see also Sup.Ct. R.* 10(2).

The nature and extent of compensation is governed by the express statutory language and that which can be fairly implied therefrom. *Appeal of Gamas,* 158 N.H. 646, 648, 972 A.2d 1025 (2009). On questions of statutory interpretation, we are the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole. *Id.* We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that **[35 A.3d 635]** the legislature did not see fit to include. *Id.* We construe the Workers' Compensation Law liberally to give the broadest reasonable effect to its remedial purpose. *Id.* Thus, when construing it, we resolve all reasonable doubts in favor of the injured worker. *Id.*

RSA 281-A:2, XI defines an " injury" for the purposes of the Workers' Compensation Law as an " accidental injury or death arising out of and in the course of employment." This part of the definition of the word " injury" is not at issue in this appeal. Rather, this appeal concerns a statutory exclusion, which provides that " a mental injury" is not an " injury" for the

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purposes of the Workers' Compensation Law " if it results from any disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or any similar action, taken in good faith by an employer." RSA 281-A:2, XI.

Here, the CAB did not find that the claimant's occupational stress and resulting depression were due to *any action* taken in good faith by the employer. The CAB found *only* that " the failure of the claimant's business caused the stress that resulted in his severe and disabling depression."

The plain language of the statutory provision at issue does not bar recovery for a mental injury, here, cumulative occupational stress and depression, caused by the failure of a business. Rather, the statute excludes from the definition of " injury" only those mental injuries that result from good faith personnel action. *See Petition of Dunn,* 160 N.H. 613, 624, 7 A.3d 1135 (2010).

Even if the majority is correct that the legislature did not intend to allow recovery for mental injuries such as the claimant's, " we must honor the expressed intent of the legislature as expressed in the statute itself." *Union Leader Corp. v. Fenniman,* 136 N.H. 624, 627, 620 A.2d 1039 (1993). Moreover, I believe that because of our obligation to construe the Workers' Compensation Law liberally to give the broadest reasonable effect to its remedial purpose, *Appeal of Gamas,* 158 N.H. at 648, 972 A.2d 1025, we must interpret the statutory exclusion at issue narrowly. *Cf. Hampton Police Assoc. v. Town of Hampton,* 162 N.H. 7, 11, 20 A.3d 994 (2011) (Because we resolve questions regarding the Right-to-Know law with a view to providing the utmost information to best effectuate the statutory and constitutional objective of facilitating access to all public documents, we construe provisions favoring disclosure broadly, while construing exemptions narrowly.). Thus, I would hold that the claimant's cumulative occupational stress and resulting depression, caused by the failure of his business, do not fall within the statutory exclusion from the definition of " injury."

The majority reasons that although business failure is not among the specifically enumerated exceptions to the word " injury," it constitutes " any similar action" because the possibility of business failure is a " normal condition of employment." I believe that this reasoning reads out of the exclusion the requirement that the injury be caused by an action of the employer taken in good faith against the employee. As we made clear in *Petition of Dunn,* 160 N.H. at 624, 7 A.3d 1135, the statute " excludes from the definition of ' injury' stress-related disability resulting from good faith personnel *action.* " It does not exclude stress-related disability resulting from " normal condition[s] of employment." It excludes only those stress-related injuries that result from disciplinary actions, work evaluations, job transfers, layoffs, demotions, terminations, or other similar personnel actions against an employee " *taken in good faith by an employer.* "

[35 A.3d 636] RSA 281- A:2, XI

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(emphasis added). In this case, the CAB did not find that the claimant's occupational stress and depression were due to actions taken in good faith by the employer, and, particularly without a transcript, we cannot make such a finding in the first instance.

The majority asserts that the failure of a business " necessarily implies some action by the employer" because " a business has not ' failed' until the employer shuts [it] down." This assertion ignores the nature of the claimant's injury. Here, the claimant suffered from a cumulative stress injury, which began with the March 2007 fire, and ultimately resulted in depression. *See Petition of Dunn,* 160 N.H. at 622-24, 7 A.3d 1135; *see also Appeal of N.H. Dep't of Health and Human Servs.,* 145 N.H. 211, 214, 761 A.2d 431 (2000) (" Disability caused by cumulative work-related stress is compensable under the Workers' Compensation Law."). Although the CAB used the phrase " business failure," in effect, it found that the claimant's cumulative occupational stress was caused by the fact that his business was *failing,* not by its ultimate *failure.*

The majority posits that to interpret the statutory exclusion not to apply to the claimant's cumulative occupational stress and depression caused by his failing business leads to an absurd result. I disagree. Just as the statute does not exclude from the definition of " injury" a mental injury suffered by an employee caused by the fact that the company for which he works is failing economically, it does not exclude a mental injury suffered by the owner of a business caused by the same set of circumstances. This is not to say that any such mental injury would necessarily meet all of the *other* statutory prerequisites for compensation under the Workers' Compensation Law, such as the requirement that the injury arise out of and in the course of employment. It is only to point out that the exclusion at issue does not apply to mental injuries caused by business failure.

HICKS, J., joins in the dissent.

RECENT LEGISLATION
ENACTED/ PENDING/ FAILED

Enacted

1.) HB271/2010 Laws Ch.84	Amends RSA 281-A:23V regarding requests for medical records Effective: 7/1/2010
2.) HB1371/2010 Laws Ch.227	Amends RSA 281-A:38 regarding Independent Medical Examinations Effective: 1/1/2011
3.) HB216 /2010 Laws Ch.10	Amends RSA 281-A: 44VI regarding attorney's fees/expenses pertaining to medical bill hearings
4.) SB62/2011 Laws Ch.82	Amends RSA 282-A regarding injuries under workers' compensation benefits pertaining to return to work programs administered by DES (RSA 282-A)

Pending

1.) HB236	Regarding workers' compensation benefits available to illegal aliens
2.) HB420	Regarding definition of employee (RSA 281-A:2VI)
3.) HB1587	Regarding employer safety programs (RSA 281-A:64)

Failed

1.) HB1315	Regarding workers' compensation liens on third-party recovery (RSA 281-A:24)
2.) HB499	Regarding workers' compensation liens on third-party recovery (RSA 281-A:13)
3.) SB71	Regarding fee schedule for medical expenses in workers' compensation claims (RSA 281-A:24)
4.) SB77	Regarding Second Injury Fun (RSA 281-A:54
5.) SB191	Regarding registration of independent contractors for workers' compensation matters (RSA 281-A:2VI)
6.) HB1283	Workers to repeal RSA 281-A:6 regarding workers' compensation coverage for "domestics" under homeowner's insurance policies
7.) HB1661	To repeal statutes and regulations regarding employer safety programs (RSA 281-A:60&64)

New Hampshire General Court - Bill Status System

Docket of HB271

Docket Abbreviations

Bill Title: relative to relevant information in a workers' compensation claim.

Official Docket of **HB271**:

Date	Body	Description
1/8/2009	H	Introduced and Referred to Labor, Industrial and Rehabilitative Services; **HJ 12**, PG.221
1/14/2009	H	Public Hearing: 1/29/2009 11:15 AM LOB 307
2/3/2009	H	Subcommittee Work Session: 2/11/2009 9:30 AM LOB 307
2/4/2009	H	==CANCELLED== Executive Session: 2/11/2009 11:30 AM LOB 307
2/17/2009	H	Subcommittee Work Session: 2/19/2009 9:00 AM LOB 307
2/17/2009	H	Executive Session: 2/19/2009 11:30 AM LOB 307
2/26/2009	H	Retained in Committee
9/14/2009	H	Retained Bill - Subcommittee Work Session: 9/22/2009 9:00 AM LOB 307
9/30/2009	H	Retained Bill - Subcommittee Work Session: 10/13/2009 9:30 AM LOB 303
10/27/2009	H	Retained Bill - Subcommittee Work Session: 11/3/2009 9:00 AM LOB 307
11/3/2009	H	Retained Bill - Subcommittee Work Session: 11/10/2009 9:15 AM LOB 307
11/4/2009	H	==CANCELLED== Retained Bill - Executive Session: 11/10/2009 11:00 AM LOB 307
11/10/2009	H	Retained Bill - Subcommittee Work Session: 11/17/2009 9:00 AM LOB 307
11/17/2009	H	Retained Bill - Executive Session: 11/24/2009 1:00 PM LOB 307
11/25/2009	H	Committee Report: Ought to Pass with AM #2527h for Jan 6 RC (vote 11-6); **HC 4**, PG.134
11/25/2009	H	Proposed Committee Amendment #2527h; **HC 1**, PG.9
1/6/2010	H	Special Ordered to Next Session Date in Regular Calendar Order; **HJ 6**, PG.310
1/13/2010	H	Amendment #2527h Adopted, DIV 195-123; **HJ 9**, PG.414-415
1/13/2010	H	Ought to Pass with AM #2527h: MA DIV 180-141; **HJ 9**, PG.414-415
1/13/2010	H	Referred to Ways and Means; **HJ 9**, PG.415
1/26/2010	H	Public Hearing: 2/2/2010 11:00 AM LOB 202
3/10/2010	H	Executive Session: 3/16/2010 10:00 AM LOB 202 (Continued 3/17/10 9:00 AM LOB 202 If Necessary)
3/18/2010	H	Corrected Committee Report: Ought to Pass for March 24 (Vote 10-3; RC); **HC 22**B, PG.1
3/24/2010	H	Ought to Pass: MA VV; **HJ 30**, PG.1483
3/24/2010	S	Introduced and Referred to Commerce, Labor and Consumer Protection; **SJ 11**, Pg.259
4/6/2010	S	Hearing: April 20, 2010, Room 102, LOB, 8:30 a.m.; **SC15**
4/20/2010	S	Committee Report: Ought to Pass 4/28/10; **SC17**
4/28/2010	S	Ought to Pass, MA, VV; OT3rdg; **SJ 16**, Pg.344

4/28/2010	S	Passed by Third Reading Resolution; **SJ 16**, Pg.353
5/5/2010	H	Enrolled Bill Amendment #1812 Adopted; **HJ 38**, PG.1915
5/5/2010	S	Enrolled Bill Amendment #1812 Adopted; **SJ 17**, Pg.405
5/12/2010	H	Enrolled; **HJ 41**, PG.2097
5/12/2010	S	Enrolled; **SJ 18**, Pg.504
5/26/2010	H	Signed by the Governor 05/25/2010; Effective 07/01/2010; Chapter 0084

NH House	NH Senate

CHAPTER 84

HB 271 – FINAL VERSION

13Jan2010... 2009-2527h

05May2010... 1812eba

2010 SESSION

09-0546

01/04

HOUSE BILL *271*

AN ACT relative to relevant information in a workers' compensation claim.

SPONSORS: Rep. Reardon, Merr 11

COMMITTEE: Labor, Industrial and Rehabilitative Services

AMENDED ANALYSIS

This bill establishes a notice requirement for persons requesting medical records in a workers' compensation case.

- -

Explanation: Matter added to current law appears in ***bold italics.***

Matter removed from current law appears [~~in brackets and struckthrough.~~]

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

13Jan2010... 2009-2527h

05May2010... 1812eba

09-0546

01/04

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Ten

AN ACT relative to relevant information in a workers' compensation claim.

Be it Enacted by the Senate and House of Representatives in General Court convened:

84:1 Workers' Compensation; Medical Information. Amend RSA 281-A:23, V(a) to read as follows:

V.(a)***(1)*** The act of the worker in applying for workers' compensation benefits constitutes authorization to any physician, hospital, chiropractor, or other medical vendor to supply all relevant information regarding the worker's occupational injury or illness to the insurer, the insurer's representative, the worker's employer, the worker's representative, the worker's employer's representative, and the department. Medical information relevant to a claim includes a past history of complaints of, or treatment of, a condition similar to that presented in the claim. ***Any party authorized to request medical information under this subparagraph shall include the following notice in their request for medical records in bold print in a font size at least 2 points larger than that used in the request:***

"This request is strictly limited to medical information relevant to the occupational injury or illness that underlies the patient's workers' compensation claim, including any past history of complaints of, or treatment of, a condition similar to that presented in the claim."

(2) Any person who supplies information in accordance with this [~~subparagraph~~] ***paragraph*** and with rules adopted by the commissioner shall be immune from any liability, civil or criminal, that might otherwise be incurred for such action. The physician may require evidence from the workers' representative in his or her representative capacity. This authorization shall be valid for the duration of the work-related injury or illness.

(3) The commissioner may assess a civil penalty of up to $2,500 on any insurance carrier, self-insurer, or payor acting on behalf of such insurance carrier or self-

insurer if any recipient of medical records receives a medical record which is clearly irrelevant to the workers' compensation claim and sends such record, or a copy of it, to another party not authorized to receive such record.

84:2 Effective Date. This act shall take effect July 1, 2010.

Approved: May 25, 2010

Effective Date: July 1, 2010

New Hampshire General Court - Bill Status System

Docket of HB1371

Docket Abbreviations

Bill Title: (New Title) allowing an injured employee to have a witness present at the examination by health care providers performing independent medical examinations and establishing a committee to study certain aspects of independent medical examinations.

Official Docket of **HB1371**:

Date	Body	Description
12/10/2009	H	Introduced 1/6/2010 and Referred to Labor, Industrial and Rehabilitative Services; **HJ 6**, PG.237
1/7/2010	H	Public Hearing: 1/21/2010 1:00 PM LOB 307
1/25/2010	H	Full Committee Work Session: 2/2/2010 11:00 AM LOB 307
2/10/2010	H	Executive Session: 2/18/2010 9:30 AM LOB 307
2/18/2010	H	Committee Report: Ought to Pass with Amendment #0804h for Mar 10 (Vote 10-1; RC); **HC 19**, PG.1034
2/18/2010	H	Proposed Committee Amendment #0804h; **HC 19**, PG.1049
3/10/2010	H	Special Ordered to Regular Place on Mar 11 Calendar, Without Objection; **HJ 23**, PG.1294
3/11/2010	H	Amendment #0804h Failed, VV; **HJ 24**, PG.1349
3/11/2010	H	Floor Amendment #0942h (Rep Goley) Adopted, VV; **HJ 24**, PG.1349
3/11/2010	H	Ought to Pass with Amendment #0942h: MA DIV 241-32; **HJ 24**, PG.1349
3/24/2010	S	Introduced and Referred to Commerce, Labor and Consumer Protection; **SJ 11**, Pg.262
4/6/2010	S	Hearing: May 4, 2010, Room 102, LOB, 9:15 a.m.; **SC15**
4/9/2010	S	Hearing: === TIME CHANGE === May 4, 2010, Room 102, LOB, 9:30 a.m.; **SC16**
5/11/2010	S	Committee Report: Ought to Pass with Amendment 2011s, NT, 5/12/10; **SC19A**
5/12/2010	S	Committee Amendment 2011s, NT, AA, VV; **SJ 18**, Pg.421
5/12/2010	S	Ought to Pass with Amendment 2011s, NT, MA, VV; OT3rdg; **SJ 18**, Pg.421
5/12/2010	S	Passed by Third Reading Resolution; **SJ 18**, Pg.497
5/19/2010	H	House Concurs with Senate AM #2011s(NT) (Rep Goley): MA VV; **HJ 46**, PG.2227
6/2/2010	H	Enrolled; **HJ 51**, PG.2321
6/2/2010	S	Enrolled; **SJ 21**, Pg.777
6/29/2010	H	Signed by the Governor 06/28/2010; Chapter 0227
6/29/2010	H	I. Section 1 Effective 01/01/2011
6/29/2010	H	II. Remainder Effective 06/28/2010

NH House NH Senate

CHAPTER 227

HB 1371 – FINAL VERSION

11Mar2010... 0942h

5/12/10 2011s

2010 SESSION

10-2435

01/04

HOUSE BILL *1371*

AN ACT allowing an injured employee to have a witness present at the examination by health care providers performing independent medical examinations and establishing a committee to study certain aspects of independent medical examinations.

SPONSORS: Rep. Long, Hills 10

COMMITTEE: Labor, Industrial and Rehabilitative Services

AMENDED ANALYSIS

This bill allows an injured employee to have a witness present during the independent medical examinations required under workers' compensation.

This bill also establishes a committee to study certain aspects of independent medical examinations.

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Explanation: Matter added to current law appears in ***bold italics.***

Matter removed from current law appears [~~in brackets and struckthrough.~~]

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

11Mar2010... 0942h

5/12/10 2011s

10-2435

01/04

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Ten

AN ACT allowing an injured employee to have a witness present at the examination by health care providers performing independent medical examinations and establishing a committee to study certain aspects of independent medical examinations.

Be it Enacted by the Senate and House of Representatives in General Court convened:

227:1 Workers' Compensation; Independent Medical Examinations. Amend RSA 281-A:38, II to read as follows:

II. Any health care provider conducting independent medical examinations under this chapter shall be certified by the appropriate specialty board as recognized by the American Board of Medical Specialties or obtain the approval of the commissioner for those specialties not recognized by such board. The health care provider shall maintain a current practice in that area of specialty. The independent medical examination shall take place within a 50-mile radius of the residence of the injured employee, unless, within the discretion of the commissioner, examination outside the 50-mile radius is necessary to obtain the services of a provider who specializes in the evaluation and treatment specific to the nature and extent of the employee's injury. The injured employee shall not be required to submit to more than 2 independent medical examinations per year, unless within the discretion of the commissioner, more than 2 examinations are necessary. ***An injured employee shall have the right to have a witness present during such examination. In the event that a witness is present, including but not limited to a witness taking notes or observing, on behalf of the injured employee, the witness shall not interfere in the examination in any way. The injured employee shall be required to sign an authorization, as prepared by the commissioner, to the effect that he or she understands that his or her medical history and condition or conditions will be discussed during said examination and that he or she waives any right to privacy that he or she may have under the circumstances of voluntarily allowing a witness to be present on his or her behalf.***

227:2 Committee Established. There is established a committee to study whether allowing an injured employee to record the independent medical examination is feasible and whether independent medical examination practitioners should be required to file a report with the insurance department.

227:3 Membership and Compensation.

I. The members of the committee shall be as follows:

(a) One member of the senate, appointed by the president of the senate.

(b) Three members of the house of representatives, appointed by the speaker of the house of representatives.

II. Members of the committee shall receive mileage at the legislative rate when attending to the duties of the committee.

227:4 Duties. The committee shall study whether allowing an injured employee to record the independent medical examination required by workers' compensation is feasible and whether independent medical examination practitioners who perform 10 or more examinations in a calendar year should be required to file an annual report with the insurance department.

227:5 Chairperson; Quorum. The members of the study committee shall elect a chairperson from among the members. The first meeting of the committee shall be called by the first-named senate member. The first meeting of the committee shall be held within 45 days of the effective date of this section. Three members of the committee shall constitute a quorum.

227:6 Report. The committee shall report its findings and any recommendations for proposed legislation to the president of the senate, the speaker of the house of representatives, the senate clerk, the house clerk, the governor, and the state library on or before November 1, 2010.

227:7 Effective Date.

I. Section 1 of this act shall take effect January 1, 2011.

II. The remainder of this act shall take effect upon its passage.

Approved: June 28, 2010

Effective Date: I. Section 1 shall take effect January 1, 2011.

II. Remainder shall take effect June 28, 2010.

New Hampshire General Court - Bill Status System

Docket of HB216

Docket Abbreviations

Bill Title: relative to fees for legal services rendered to workers' compensation claimants.

Official Docket of **HB216**:

Date	Body	Description
1/7/2009	H	Introduced 1/7/2009 and Referred to Labor, Industrial and Rehabilitative Services; **HJ 8**, PG.125
1/14/2009	H	Public Hearing: 1/29/2009 10:30 AM LOB 307
2/4/2009	H	Executive Session: 2/11/2009 11:30 AM LOB 307
2/12/2009	H	Committee Report: Ought to Pass with AM #0192h for Feb 18 CC (vote 19-0); **HC 14**, PG.265
2/12/2009	H	Proposed Amendment #0192h; **HC 14**, PG.299
2/18/2009	H	Amendment #0192h Adopted, VV; **HJ 18**, PG.449
2/18/2009	H	Ought to Pass with Amendment #0192h: MA VV; **HJ 18**, PG.449
3/18/2009	S	Introduced and Referred to Commerce, Labor and Consumer Protection; **SJ 8**, pg. 133
4/9/2009	S	Hearing; April 14, 2009, Room 102, LOB, 8:30 a.m.; **SC19**
5/26/2009	S	Committee Report; Rereferred to Committee 06/03/09; **SC26**
6/3/2009	S	Rereferred to Committee, MA, VV, **SJ 18**, Pg.524
1/19/2010	S	Committee Report; Ought to Pass with Amendment 0178s, 1/21/10; **SC3A**, Pg.3
1/21/2010	S	Committee Amendment 0178s, AA, VV, **SJ 3**, Pg.33
1/21/2010	S	Ought to Pass with Amendment 0178s, MA, VV; OT3rdg, **SJ 3**, Pg.34
1/21/2010	S	Passed By Third Reading Resolution, **SJ 3**, Pg.44
4/14/2010	H	House Concurs with Senate AM #0178s (Rep Goley): MA VV; **HJ 32**, PG.1587
4/21/2010	S	Enrolled; **SJ 15**, Pg.331
4/21/2010	H	Enrolled; **HJ 35**, PG.1671
5/10/2010	H	Signed By the Governor 05/07/2010; Effective 01/01/2011; Chapter 0010

NH House	NH Senate

CHAPTER 10

HB 216-FN – FINAL VERSION

18Feb2009... 0192h

01/21/10 0178s

2010 SESSION

09-0655

01/05

HOUSE BILL ***216-FN***

AN ACT relative to fees for legal services rendered to workers' compensation claimants.

SPONSORS: Rep. Nixon, Hills. 17

COMMITTEE: Labor, Industrial and Rehabilitative Services

ANALYSIS

This bill clarifies the fees for legal services rendered to workers' compensation claimants.

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Explanation: Matter added to current law appears in ***bold italics.***

Matter removed from current law appears [~~in brackets and struckthrough.~~]

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

18Feb2009... 0192h

01/21/10 0178s

09-0655

01/05

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Ten

AN ACT relative to fees for legal services rendered to workers' compensation claimants.

Be it Enacted by the Senate and House of Representatives in General Court convened:

10:1 Workers' Compensation; Awards of Fees and Interest. Amend RSA 281-A:44, VI to read as follows:

VI. No attorney representing a claimant shall contract for, charge for, or collect a fee for legal service rendered to the claimant at the department level unless the fee has been approved by the commissioner. In determining the amount of the allowable fee, the commissioner shall consider, among other things, the nature, length and complexity of the service performed, the usual and customary charge for work of the like kind and the benefit accruing to the claimant as a result of the legal service performed; provided, however, that when an insurance carrier, self insurer, or payor acting on behalf of such carrier or self insurer disputes the causal relationship of a medical bill to the claimant's injury, or whether a medical bill was required by the nature of the injury, and denies payment of such bill, is after a hearing, ordered to pay or reimburse the bill by the commissioner, the claimant shall be entitled to reimbursement of reasonable counsel fees and costs as approved by the commissioner. The claimant shall be entitled to reasonable fees and costs pending appeal. ***In the event that the medical bill is voluntarily accepted less than 7 business days prior to the date of the scheduled hearing, the claimant shall be entitled to reasonable counsel fees and costs as approved by the commissioner unless the carrier can prove a justifiable reason for the delay in accepting the bill.***

10:2 Effective Date. This act shall take effect January 1, 2011.

Approved: May 7, 2010

Effective Date: January 1, 2011

New Hampshire General Court - Bill Status System

Docket of SB62

Docket Abbreviations

Bill Title: relative to persons participating in the return to work program.

Official Docket of **SB62**:

Date	Body	Description
1/19/2011	S	Introduced and Referred to Commerce, **SJ 3**, Pg.34
2/2/2011	S	Hearing: 2/8/2011, Room 102, LOB, 9:45 a.m.; **SC10**
2/9/2011	S	Committee Report: Ought to Pass, 2/16/2011; **SC11**
2/16/2011	S	Ought to Pass, MA, VV; OT3rdg, **SJ 6**, Pg.53
2/16/2011	S	Passed by Third Reading Resolution, **SJ 6**, Pg.61
2/16/2011	H	Introduced and Referred to Commerce and Consumer Affairs; **HJ 19**, Pg. 438
3/22/2011	H	Public Hearing: 4/12/2011 1:15 PM LOB 302 ==Work Session May Follow==
4/12/2011	H	Subcommittee Work Session: 4/21/2011 10:00 AM LOB 302 Banking/Business Div
4/12/2011	H	Executive Session: 4/21/2011 1:15 PM LOB 302
4/21/2011	H	Committee Report: Ought to Pass for April 27 (Vote 17-0; CC); **HC 33**, PG.1066
4/27/2011	H	Ought to Pass: MA VV; **HJ 40**, PG.1352
5/4/2011	H	Enrolled; **HJ 42**, PG.1490
5/4/2011	S	Enrolled; **SJ 16**, Pg.318
5/19/2011	S	Signed by the Governor on 05/16/2011; Effective 07/1/2011; Chapter 0082

NH House	NH Senate

CHAPTER 82

SB 62 – FINAL VERSION

2011 SESSION

11-0455

08/03

SENATE BILL ***62***

AN ACT relative to persons participating in the return to work program.

SPONSORS: Sen. Stiles, Dist 24; Rep. Infantine, Hills 13; Rep. Nevins, Rock 15; Rep. K. Sullivan, Rock 15; Rep. Schlachman, Rock 13

COMMITTEE: Commerce

ANALYSIS

This bill exempts all individuals who participate in the New Hampshire return to work program from the definition of employment.

This bill is a request of the department of employment security.

Explanation: Matter added to current law appears in ***bold italics.***

Matter removed from current law appears [~~in brackets and struckthrough.~~]

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

11-0455

08/03

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Eleven

AN ACT relative to persons participating in the return to work program.

Be it Enacted by the Senate and House of Representatives in General Court convened:

82:1 Participation in Return to Work Program. Amend RSA 282-A:9, IV(x) to read as follows:

(x) Participation in the New Hampshire return to work program in the department of employment security which provides a structured, supervised training opportunity to [~~claimants~~] ***individuals*** through a designated employer/training partner. [~~Claimants~~] ***Individuals*** participate on a voluntary basis and ***claimants*** continue to receive unemployment compensation during the training period as long as they remain otherwise eligible. ***All participants in the training program shall be at least 18 years old and registered with the department to receive employment services.*** The training program duration is a maximum of 6 weeks and a maximum of 24 hours per week.

82:2 Participation in Return to Work Program. Amend RSA 282-A:26-a to read as follows:

282-A:26-a Return to Work Program Participants; Workers' Compensation Eligibility.

I. A participant in the department of employment security's return to work program shall be entitled to certain benefits under RSA 281-A. In the event that it is determined that a return to work program participant has been subject to an injury or occupational disease producing a disability arising out of and in the course of participation in the return to work program, the department of employment security shall not provide compensation pursuant to RSA 281-A:28, 281-A:28-a, 281-A:31, and 281-A:31-a[~~,~~]. [~~but~~] ***However,*** [~~the~~] ***a*** participant***, who has been deemed eligible for unemployment compensation*** shall receive [~~unemployment compensation~~] ***such*** benefits while otherwise eligible under RSA 282-A, or compensation equivalent to 90 percent of [~~those benefits~~] ***his or her weekly unemployment compensation benefit amount*** if the disability causes the participant to become ineligible for benefits under RSA 282-A.

II. When determining the amount of compensation provided pursuant to RSA 281-A:32 for a scheduled permanent impairment award, the amount of compensation shall be calculated by using the minimum wage at the time of injury multiplied by the average number of hours in training per week.

[~~II.~~] ***III.*** For a participant in the return to work program, RSA 281-A:8, I and II shall not apply and the following provisions shall apply:

(a) A participant in the return to work program shall be conclusively presumed to have accepted the provisions of this chapter and, on behalf of the participant or the

participant's personal or legal representatives, to have waived all rights of action whether at common law or by statute or provided under the laws of any other state or otherwise:

(1) Against the employer/training partner, or the employer/training partner's insurance carrier, or an association or group providing self-insurance to a number of employers, or the department and the return to work program; and

(2) Except for intentional torts, against any officer, director, agent, servant, or employee acting on behalf of the entities named in subparagraph (a)(1).

(b) The spouse of a return to work program participant entitled to benefits under this chapter, or any other person who might otherwise be entitled to recover damages on account of the participant's personal injury or death, shall have no direct action, either at common law or by statute or otherwise, to recover for such damages against any person identified in this paragraph.

[~~III.~~] *IV.* The department of employment security may provide this benefit by appropriate means including purchasing and serving as the master policyholder for any insurance, by self-insurance, or by administrative services contract.

[~~IV.~~] *V.* Except as otherwise provided in this section, all other provisions of RSA 281-A shall apply.

82:3 Effective Date. This act shall take effect July 1, 2011.

Approved: May 16, 2011

Effective Date: July 1, 2011