

2025 WL 818849 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: NASSAU REGIONAL OFF-TRACK BETT

Case No. G081 3802

Carrier ID No. 030129017133WC01 W098008

March 6, 2025

*1 Granite State Insurance Co
PO Box 25991
Shawnee Mission, KS 66225
Aggregate Trust Fund
c/o State Insurance Fund
P.O. Box 66699
Albany, NY 12206
Date of Accident 3/13/2014

The Full Board, at its meeting held on February 11, 2025, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed October 9, 2024.

ISSUE

The issue presented for Mandatory Full Board Review is the claimant's loss of wage earning capacity (LWEC).

The Workers' Compensation Law Judge (WCLJ) found that claimant has an 80% LWEC.

The unanimous Board Panel modified the WCLJ decision to find that the claimant has a 65% LWEC.

The claimant's attorney filed an application for Full Board Review on November 8, 2024, arguing that the record supports a finding that claimant has an 80% LWEC.

No rebuttal was filed.

Pursuant to Workers' Compensation Law § 23, Full Board Review is Mandatory because the Board Panel reduced the claimant's loss of wage earning capacity below the safety net threshold pursuant to Workers' Compensation Law § 35(3). Upon review, the Full Board votes to adopt the following findings and conclusions.

FACTS

This claim is established for a back injury that resulted from an accident on March 13, 2014. The claimant's average weekly wage has been set at \$952.88.

On August 17, 2023, Dr. Harper, the carrier's consultant, examined the claimant, and in his Report of Independent Medical Examination (IME-4), Dr. Harper found that the claimant had a permanent lumbar spine impairment of B severity and is capable of medium work.

On November 2, 2023, the Board received a Doctor's Report of MMI/Permanent Impairment (C-4.3) in which Dr. Petrizzo found that the claimant was at maximum medical improvement as of September 7, 2023. Dr. Petrizzo opined that the claimant had a lumbar spine permanent impairment of F severity and was capable of sedentary work.

In a decision filed November 24, 2023, as amended by the decision filed on December 6, 2023, the WCLJ directed the carrier to continue payments at the \$635.25 tentative rate; and directed the claimant to produce evidence of attachment to the labor market five days prior to the next hearing on January 4, 2024.

On December 27, 2023, the Board received the Claimant's Record of Job Search Efforts/Contacts (C-258) that listed her work with ACCES-VR from December 7, 2023, to December 8, 2023. Documentation of the claimant's independent work search was attached, and included a list of job applications, and copies of confirmation emails. There was also a copy of a letter dated December 21, 2023, from ACCES-VR advising the claimant that her case was being closed because her disabling condition will prevent her from participating with their services.

At the hearing held on January 4, 2024, the claimant testified that she started looking for work on December 5, 2023. She is used to doing physical work, but after getting hurt she cannot do that any longer. She has been applying for jobs that she can sit down to perform. The jobs included work at a kennel/pet hotel, a bus company and Carvel. The claimant recited the places/positions she applied for that were listed on her C-258.1 forms. She applied for jobs that were within her physical restrictions and used Indeed.com. The claimant was not sure of all the job requirements but provided a resume with information on what she could and could not do. She also reached out to ACCES-VR. She was sent a letter that she was not qualified because of her, "back. My stomach. I had a bypass and 2 [hernia](#) operations recently" (Hearing Transcript, 1/4/24, p. 11). At the time of the hearing, the claimant was 64 years old, and she last worked in 2015. She had to retire. She last worked in a supply storeroom. The claimant has a high school degree and does not own a computer. Her husband helped her with her job search on her iPhone. She can drive short distances. The claimant would accept a job if it was offered to her after she heals from her [hernia](#) surgery, which was done in September.

***2** After the claimant's testimony, the parties placed summations on the record, and the WCLJ made a decision. The WCLJ reviewed the medical evidence and noted that Dr. Petrizzo's report was negative for [radiculopathy](#). There were some reflex issues that were not severe, and there was good range of motion of the hip. Therefore, the doctor's severity ranking was not supported by the examination findings. The WCLJ relied on the opinion of Dr. Harper to find that the claimant has a permanent impairment of B severity, with a capacity for medium work. The WCLJ then considered vocational factors, and concluded, based on all of the evidence, that the claimant has an 80% LWEC. The WCLJ further found that the claimant was attached to the labor market. The WCLJ modified prior awards, brought awards up to date, directed the carrier to continue payments at the \$508.20 permanent partial disability rate, and approved an attorney fee of \$8,000.00. The findings made at the hearing on January 4, 2024, are reflected in a decision filed January 9, 2024.

The carrier requested administrative review, arguing that the claimant has no more than a 60% LWEC, and that the claimant is not attached to the labor market.

In rebuttal, the claimant requested that the decision be affirmed because the record supports the findings of an 80% LWEC and attachment to the labor market.

LEGAL ANALYSIS

LWEC

In claims with a date of accident/disablement on or after March 13, 2007, where "a claimant sustains a permanent partial disability that is not amenable to a schedule award, the Board must determine the claimant's loss of wage-earning capacity in

order to fix the duration of benefits. In determining a claimant's loss of wage-earning capacity, the Board must consider several factors, including the nature and degree of work-related permanent impairment and the claimant's functional capabilities, as well as vocational issues - including the claimant's education, training, skills, age and proficiency in the English language” ([Matter of Varrone v Coastal Env't. Group](#), 166 AD3d 1269 [2018] [internal quotation marks and citations omitted]; WCL § 15[3][w]).

Any determination as to LWEC must be consistent with the provisions of the Workers' Compensation Law. There is a distinction between impairment and disability. Impairment is a medical determination while a claimant's disability or LWEC is a legal determination. While the impairment rating may coincidentally be the same percentage as the ultimate finding of LWEC, the medical impairment rating is not to be used as a direct translation to LWEC (see e.g. [Matter of Patchogue-Medford School Dist.](#), 2011 NY Wrk Comp 40803044).

Here, the record reflects that claimant has a severity B permanent impairment of the lumbar spine. The record further reflects that while the claimant's physical restrictions prevent her from performing the frequent lifting that was required in her prior employment, she is capable of performing medium work based on Dr. Harper's credible opinion.

*3 Claimant was 64 years old at the time of classification, and is a high school graduate, which are aggravating factors. However, it is clear from claimant's testimony that she is proficient in English, which is a mitigating factor.

Based on the claimant's medical impairment, functional impairment and vocational factors, the preponderance of the evidence in the record supports a finding that the claimant has an LWEC of 65%.

Wage Earning Capacity

Wage earning capacity (WEC) is used to calculate an injured worker's benefit rate. Where the non-scheduled permanently partially disabled claimant is not working, “the Board may in the interest of justice fix such wage earning capacity as shall be reasonable, but not in excess of seventy-five per centum of his former full time actual earnings, having due regard to the nature of his injury and his physical impairment” (WCL § 15[5-a]) and with consideration of “other factors that inform an evaluation of what reasonably reflects claimant's capacity to secure work and earn wages at the time of classification” ([Matter of WJ Bokus Industries, Inc.](#), 2015 NY Wrk Comp G0393087), including “functional limitations and vocational impediments” ([Matter of Rosales v Eugene J. Felice Landscaping](#), 144 AD3d 1206 [2016]).

Here, claimant's medical impairment, functional capability and vocational factors set forth above support a finding that claimant has a 35% wage earning capacity.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed January 9, 2024, is MODIFIED to find that the claimant has a 65% LWEC, which entitles the claimant to wage loss benefits not to exceed 375 weeks; to direct continuing awards at the permanent partial rate of \$412.91 per week; and to award an attorney fee of \$6, 513.22. No further action is planned by the Board at this time.

Clarissa Rodriguez

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