

2025 WL 818856 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: DOCCS CAPE VINCENT COR FACILIT

Case No. G255 0082

Carrier ID No. 72337926-085 W204002

March 6, 2025

*1 State Insurance Fund
PO Box 66699
Albany, NY 12206
Date of Accident 11/1/2019

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 November 15, 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 a 76% LWEC.

The unanimous Board Panel modified the WCLJ decision to find that the claimant has a 66.66% LWEC.

The claimant's attorney filed an application for Full Board Review on December 13, 2024, arguing that the record supports a finding that claimant has a 76% LWEC.

The State Insurance Fund (SIF) filed a rebuttal on January 10, 2025, requesting that the Board Panel decision be affirmed in its entirety.

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 low back injury that resulted from an accident on November 1, 2019. The claimant's average weekly wage has been set at \$1, 020.55.

Dr. Iorio, the claimant's treating orthopedist, submitted a Doctor's Report of MMI/Permanent Impairment (C-4.3) based on an evaluation on July 10, 2023. Dr. Iorio found that the claimant had reached maximum medical improvement, and opined that the claimant had a lumbar spine permanent impairment of 3B severity. The doctor found that the claimant was capable of work with restrictions of only occasional lifting up to ten pounds and occasional bending/stooping/squatting.

On August 29, 2023, Dr. Haher, SIF's consultant, examined the claimant, and in his Report of Independent Medical Examination (IME-4), Dr. Haher agreed that the claimant had a lumbar spine permanent impairment of 3B severity, and found that the claimant was capable of light work.

At the hearing held on December 11, 2023, the claimant testified that he is 68 years old, he is a high school graduate, and went to one semester of college. He last worked as a head cook at a prison. He had worked there for eight and a half years, first starting as a cook. His duties as a cook required cooking between 600 and 900 meals every day, and as a head cook, he had the same duties but also had to do a little bit of computer work. Prior to working for the prison as a cook, he worked at an army base doing the same type of work. At the prison, he had 10 cooks, so they did a lot of the lifting. Regarding the computer work he had to do, the claimant explained that he had to inventory the food that came in and input it into the prison's computer program. These computer skills were not something he could use outside of the prison, and although he took some computer classes, "most of it went right over [his] head" (Hearing Transcript, 12/11/23, p. 13). As part of his job, he had some managerial duties because he was in charge of 10 inmate cooks and 50 inmate food service workers. The claimant has a desktop computer at home, and he uses it "to look at the news ... check emails and weather reports and ... maybe go on YouTube every once in a while" (id., p. 16). The claimant testified that he does not know how to use Word or WordPerfect for word processing, and does not know how to use spreadsheets. The claimant has a smartphone and uses it to take pictures and talk to people and text. According to his doctors, the claimant can only sit and stand for a limited time. He cannot walk very far before the pain in his back requires him to stop. Because of these limitations, he would be unable to return to his prior work as a head cook, or as a cook. He explained that there is a lot of walking around and standing, and the kitchens are huge. If he were to attempt a return to work, he does not think he would last longer than a couple of days.

*2 Upon cross-examination, the claimant was asked if he created work schedules for the inmates he was overseeing at the job, and the claimant responded that his supervisor would tell him she wanted certain people for certain duties, and he was "sometimes" involved in the process of figuring where an inmate would work best in the kitchen. He trained some of the inmates, but it was not a hard job. Prior to working in the food service industry, he worked in construction as a laborer.

After the claimant's testimony, the WCLJ noted that both doctors seemed to agree on their assessment and then heard summations from the parties on the issue of LWEC. Thereafter, the WCLJ made a decision, finding that the claimant's age, lack of computer skills, and work experience were not a good match for his current work restrictions. The WCLJ found the claimant had a 76% loss of wage earning capacity; made awards for the period from June 9, 2022, to December 12, 2023, at the temporary partial rate of \$510.28 per week; directed SIF to continue payments at the permanent partial rate of \$517.08 per week; and approved an attorney fee of \$7,755.00. The findings made at the hearing on December 11, 2023, are reflected in a decision filed December 14, 2023.

SIF requested administrative review, arguing that the claimant has no more than a 66.66% LWEC.

In rebuttal, the claimant requested that the decision be affirmed because the record supports the finding of a 76% LWEC.

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 doctors agree that claimant has a severity B permanent impairment of the lumbar spine. The record further reflects that while the claimant's physical restrictions prevent him from returning to work as a cook or head cook at his prior employment, he is capable of performing light work based on Dr. Haaher's credible opinion.

*3 Claimant was 68 years old at the time of classification, is a high school graduate, is not able to use computer programs such as Word and Excel, and has a limited work history involving only physical work, which are aggravating factors. However, the claimant's testimony showed that he is able to communicate in English well, and he has some basic supervisory experience, which are mitigating factors.

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 66.66%.

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 33.33% wage earning capacity.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed December 14, 2023, is MODIFIED to find that the claimant has a 66.66% LWEC, which entitles the claimant to wage loss benefits not to exceed 375 weeks; to direct continuing awards at the permanent partial rate of \$453.58 per week; and to award an attorney fee of \$6, 803.70. No further action is planned by the Board at this time.

Clarissa Rodriguez

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