

2025 WL 818855 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: FOJP SERVICE CORPORATION

Case No. G240 6989

Carrier ID No. 0619 WC 19 0004958 W204002

March 6, 2025

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Date of Accident 12/24/2018

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 18, 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 50% LWEC.

The claimant's attorney filed an application for Full Board Review on December 18, 2024, arguing that they never received the State Insurance Fund's Application for Board Review (RB-89), and that the proof of service on the RB-89 appears to indicate an incorrect address for the claimant's attorneys. Turning to the merits, the claimant's attorneys argue that the record supports a finding that claimant has an 80% LWEC, or in the alternative, a 70% LWEC might be appropriate.

The State Insurance Fund (SIF) filed a rebuttal on January 15, 2025, requesting that the Board Panel decision be affirmed in its entirety.

Initially, there is no merit to the claimant's attorney's argument that SIF did not provide proper proof of service of its application for review on the claimant's attorneys. Specifically, while the Proof of Service section of the scanned copy of the RB-89 is difficult to read, the claimant's attorney is clearly listed as a party who was served by mail, and the address listed appears to be

the same address listed on the “cc” list that is included on SIF's brief (ECF Doc ID #412506632) and on the WCLJ decision that was appealed by SIF.

Turning to the merits of the issue presented, 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

On December 24, 2018, claimant, a secretary, was injured when she slipped and fell. This claim is established for injuries to the back, bilateral knees, and right foot. The claimant's average weekly wage has been set at \$882.98.

On October 3, 2023, Dr. Heitman evaluated the claimant's knees for permanency, but in the Doctor's Report of MMI/Permanent Impairment (C-4.3), Dr. Heitman found that the claimant was not at maximum medical improvement (MMI), noting that she has continued pain and discomfort and requires continued treatment, including recommended surgical intervention.

*2 On October 3, 2023, Dr. Mandil evaluated the claimant's right ankle for permanency, and in the C-4.3 report, found that the claimant was at MMI, and that she has a 32.5% schedule loss of use (SLU) of the right ankle. The doctor noted that there were no special considerations, and that the SLU opinion was based on range of motion findings of the right foot with a comparison to the contralateral side (ECF Doc ID #4004062476, p. 3). The claimant can do light work.

On October 4, 2023, Dr. Nipper, SIF's consultant, evaluated the claimant's back, bilateral knees, and right foot for permanency, and in his Report of Independent Medical Examination (IME-4), Dr. Nipper found that the claimant has reached MMI and has no need for any further orthopedic treatment, including physical therapy, prescription medications, diagnostic studies, and surgery. Dr. Nipper opined that the claimant has a permanent lumbar spine impairment of B severity, a 5% SLU of the left knee, a 5% SLU of the right knee, and a 17.5% SLU of the right ankle. Dr. Nipper opined that the claimant is capable of light work.

On October 6, 2023, Dr. Simhaee evaluated the claimant's cervical and lumbar spine for permanency, but in the C-4.3 report, Dr. Simhaee found that the claimant was not at MMI, noting that she requires physical therapy and an updated MRI.

On January 2, 2024, Dr. Simhaee testified that while the claimant has not reached MMI, he gave a permanency rating on October 6, 2023, in case the Board does find that she is at MMI. Dr. Simhaee found a lumbar spine impairment of F severity with a sedentary work capacity. However, the doctor is not ready to clear her to return to work because he wants to see if recent injections offer any relief, and he would like an updated MRI to see if there are any changes since the last MRI was done in 2021.

On January 10, 2024, Dr. Heitman testified in accordance with the findings of his examination of the claimant on October 3, 2023. Dr. Heitman examined the claimant's knees, and found that the claimant was not at MMI. However, for “judicial convenience” the doctor provided a SLU opinion, finding a 7.5% SLU for the left knee and a 10% SLU for the right knee, based on the range of motion findings as applied to the 2018 Impairment Guidelines. At the time of Dr. Heitman's evaluation, the claimant was totally temporarily disabled.

On January 16, 2024, Dr. Nipper testified that he examined the claimant a total of six times, including at the IME on October 4, 2023. The doctor indicated no changes to the opinions set forth in that IME report. Dr. Nipper found that claimant was at MMI because at the time of his evaluation, it was over a year post op.

On February 7, 2024, Dr. Mandil testified in accordance with his permanency exam of the claimant on October 6, 2023 [sic - October 3, 2023]. Dr. Mandil's opinion that the claimant can do light duty work is relative to her right ankle only.

At the hearing on February 8, 2024, the claimant testified that she was 47 years old, and has a 10th grade education. She has no GED, did not do any apprenticeships, and has no certifications. She is unable to return to her prior work because she is unable to stand for long periods of time. She is fluent in English, can read and write well, and has work experience with computers. She does not have a computer at home but she has a smartphone, and she uses her phone to look for work. She can travel independently but has no driver's license. She completes her activities of daily living independently. The only job experience she has is the job she had with the employer of record. At the time of the injury, she worked as a medical secretary in a lab. Claimant testified that she had been searching for work as a secretary or a clerk.

*3 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 relied on Dr. Nipper's opinion to find that the claimant has a permanent impairment of the lumbar spine of B severity, with a capacity for light work. The WCLJ also considered the findings of the providers regarding the claimant's knees and right foot, as well as vocational factors, and concluded, based on all of the evidence, that the claimant has an 80% LWEC. The WCLJ brought awards up to date, directed SIF to continue payments at the \$470.92 permanent partial disability rate, and approved an attorney fee of \$4, 500.00. The findings made at the hearing on February 8, 2024, are reflected in a decision filed February 13, 2024.

SIF requested administrative review, arguing that the claimant has a 50% LWEC.

No rebuttal was filed.

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 credible opinion of Dr. Nipper, the only doctor that examined all established sites of injury and found the claimant to be at MMI, supports a finding that claimant has a severity B permanent impairment of the lumbar spine, as well as permanent physical impairments of both knees and the right ankle. The record further reflects that while the claimant's physical restrictions prevent her from returning to her prior work because she is unable to stand for long periods of time, she is capable of performing light work based on Dr. Nipper's credible opinion.

Claimant is not a high school graduate, which is an aggravating factor. However, the claimant was only 47 years old at the time of classification, she is proficient in English, she has experience working with computers in an office setting, and she is able to travel and complete activities of daily living independently, which are mitigating factors.

*4 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 50%.

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 50% wage earning capacity.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed February 13, 2024, is MODIFIED to find that the claimant has a 50% LWEC, which entitles the claimant to wage loss benefits not to exceed 300 weeks; to direct continuing awards at the permanent partial rate of \$294.33 per week; and to award an attorney fee of \$4, 414.95. No further action is planned by the Board at this time.

Clarissa Rodriguez

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