

2023 WL 2451206 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: P C RICHARD & SON INC

Case No. G250 8182

Carrier ID No. 188986693001 W036636

March 2, 2023

*1 American Zurich Insurance Co
PO Box 968044
Schaumburg, IL 60196-8044
Date of Accident 4/16/2019

The Full Board, at its meeting on February 14, 2023, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed November 14, 2022.

ISSUES

The issues presented for Mandatory Full Board Review are:

1. whether the application for Full Board Review should be denied based on improper completion of the Form RB-89.2 (Application for Reconsideration/Full Board Review);
2. the claimant's proper loss of wage earning capacity;
3. whether the claimant has a total industrial disability;
4. whether it was proper to direct development of the record with respect to the claimant's temporary disability from September 11, 2021, to April 28, 2022;
5. whether the carrier should be penalized for submitting false medical reports; and
6. whether the carrier should be directed to make a deposit into the ATF.

The Workers' Compensation Law Judge (WCLJ) found that the claimant is permanently partially disabled, has an 80% loss of wage earning capacity, and is totally industrially disabled. The WCLJ made an award from September 11, 2021, to April 28, 2022, at \$638.84 (temporary total disability) per week, and directed the carrier to continue payments at \$638.84 (total industrial disability) per week, and granted claimant's attorney a fee of \$6, 300.00.

The unanimous Board Panel modified the WCLJ decision to find that the claimant has a 70% loss of wage earning capacity and is not totally industrially disabled. The Board Panel rescinded the award from September 11, 2021, to April 28, 2022, directed the parties to litigate the claimant's degree of disability for that period, and declined to penalize the carrier for independent medical examiner Dr. Guttman's purported filing of false medical reports.

The claimant filed an application for Full Board Review on November 22, 2022, arguing that the Board Panel decision be reversed, with reinstatement of the WCLJ's findings of an 80% loss of wage earning capacity and total industrial disability, as well as reinstatement of the award at the temporary total disability rate from September 11, 2021, to April 28, 2022. The claimant also requests that the carrier be penalized for submitting false medical reports.

The carrier filed a rebuttal on December 22, 2022, requesting that claimant's application for Full Board Review be denied, because Item 14 on the Form RB-89.2 was not completed properly. The carrier also requests that the Board Panel decision be affirmed, as the findings are supported by the record.

Pursuant to [Workers' Compensation Law \(WCL\) § 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 [WCL § 35\(3\)](#).

*2 Upon review, the Full Board votes to adopt the following findings and conclusions.

FACTS

This claim is established for an April 16, 2019, back injury. A claim for a neck injury was disallowed. The average weekly wage was set at \$958.26, without prejudice. Awards have been made for lost time at varying benefit rates since April 19, 2019.

According to the medical record, the claimant underwent an [MRI of the lumbar spine](#) on April 20, 2019, and an EMG/NCV study on June 7, 2019.

Dr. Wilen began treating the claimant on May 7, 2019, and thereafter consistently opined that the claimant was totally disabled.

In an April 27, 2021, Notice of Decision, the WCLJ made an award from February 17, 2021, to April 22, 2021, at \$638.84 (temporary total disability) per week, with a direction to the carrier to continue payments at \$638.84, "Tentative Total," per week.

On June 15, 2021, the claimant was evaluated on behalf of the carrier by independent medical examiner Dr. Guttman. Dr. Guttman found that claimant had reached maximum medical improvement (MMI) and diagnosed the claimant as status post [lumbar strain](#). Under the heading "Disability," the doctor stated that the claimant had no degree of orthopedic disability, but then later stated that the claimant should follow up with a spine surgeon, and that the claimant was able to return to work only with restrictions including no lifting more than 10 pounds, no bending or twisting, and no pushing or pulling.

On August 18, 2021, Dr. Guttman filed an addendum (dated August 10, 2021) indicating that the claimant has a Class 3, Severity Ranking A permanent impairment of the lumbar spine. A Form IME-4.3B (Attachment for Report of Independent Medical Examination Non-Scheduled Permanent Partial Disability) was also filed, in which the doctor indicated that the claimant has a lumbar spine condition of "A, Class 3," and that the claimant could lift, push, pull, and carry 30 pounds constantly, and could never climb, kneel, bend, stoop, or squat. The doctor placed an "x" between Medium Work and Light Work in the Functional Capabilities/Exertional Abilities portion of the form.

Dr. Wilen saw the claimant on July 9, 2021, and continued to find a total disability.

When the case came on calendar on September 10, 2021, an award was made from April 22, 2021, to September 11, 2021, at \$638.84 (temporary total disability) per week, with a direction for continuing payments at the tentative rate of \$415.25 per week. The claimant was directed to produce medical evidence of permanency. These findings are reflected in the Notice of Decision filed on September 15, 2021.

Dr. Wilen filed a Form C-4.3 (Doctor's Report of MMI/Permanent Impairment) based on his January 28, 2022, examination, finding that claimant had reached MMI. Dr. Wilen found that claimant had a permanent impairment of the lumbar spine of

Severity Ranking H, and indicated that the claimant is able to lift, push, pull, and carry 10 pounds occasionally, and could occasionally walk, stand, sit, climb, kneel, bend/stoop/squat, perform simple grasping, reach overhead, reach at or below shoulder level, drive a vehicle, and operate machinery. The Form C-4.3 also indicates that the claimant is able to perform sedentary work.

*3 In a Form VDF-1 (Loss of Wage Earning Capacity Vocational Data Form) filed on February 28, 2022, the claimant indicated that his highest level of education was high school diploma or GED received in Sri Lanka, and that his work experience included manager at an electronics store for six years, chauffeur for four years, and, most recently, sales representative for four years at the employer of record. The claimant also noted that he speaks, reads, and writes well in English.

Dr. Wilen was deposed on March 31, 2022, and testified that he first treated the claimant on May 7, 2019, for the April 16, 2019, accident. An April 20, 2019, MRI revealed multiple bulging discs in the lower back. On physical examination, the claimant had significant restriction in motion in the lumbar spine with weakness in the lower extremities. An EMG performed on June 7, 2019, reflected that the claimant has an L4-L5 [radiculopathy](#). The claimant's diagnoses are multiple bulging discs, [lumbar radiculopathy](#), and [arthritis](#). The claimant's treatment has been physical therapy and anti-inflammatory medications. He recommended surgery as an option throughout the claimant's treatment, but the claimant does not want surgery. Dr. Wilen testified that he performed a permanency evaluation on January 28, 2022, and the claimant is not able to work because of his back injury. The claimant has an impairment of 4H based on "the limitations in motion, the multiple bulging discs, the [lumbar radiculopathy](#) shown on the EMG, [and] the weakness in the lower extremities" (Deposition, Dr. Wilen, 3/31/22, pp. 13-14). On cross-examination, Dr. Wilen agreed that the MRI did not show any evidence of disc herniation, and testified that the MRI showed only bulges. The doctor also testified that people can develop [arthritis](#) over the course of time regardless of whether they have experienced trauma. He does not think that the Board's Permanency Guidelines assign point values for loss of range of motion (of the spine). When asked how he concluded that claimant had an H severity impairment of the lumbar spine, Dr. Wilen responded that he based that conclusion on the EMG and the multiple bulging discs, but he could not state how many points he assigned for the EMG results or the disc bulges. With respect to his conclusion on the Form C-4.3B that the claimant is able to perform sedentary work, Dr. Wilen testified that he did not think there was a choice to go below that, but if there were, then he would have selected it. The doctor agreed that the claimant could lift, carry, push, and pull up to 10 pounds occasionally, as indicated in the C-4.3B. Dr. Wilen also agreed that the claimant could sit, stand, walk, climb, kneel, and perform all other activities on the C-4.3B on an occasional basis. When asked if the claimant could do some work in a sedentary capacity, Dr. Wilen testified, "I don't think he's going to be able to with his back" (id., p. 20). The doctor testified further that he was sure that the claimant drives, and he did not have any co-morbidities or other health issues listed for the claimant.

*4 Dr. Guttman testified by deposition on April 25, 2022, that he performed an independent medical examination of the claimant on June 15, 2021, focused on the lumbar spine. The claimant had difficulty getting on and off the examination table. The claimant's flexion was to 40 degrees, with extension to 10 degrees, and right and left rotation to 15 degrees. Muscle strength was decreased in the left foot in dorsiflexion and eversion; sensation was decreased in the lateral aspect of the left leg; reflexes were 2+ and symmetric; straight leg raise was negative in the supine and sitting positions; and Faber test was negative. With respect to the claimant's ability to return to work, Dr. Guttman testified that there was a mistake in his report where it says that the claimant could return to work at full duty, and that the claimant could actually return to work at light duty with restrictions of no lifting more than 10 pounds, and no pushing, pulling, bending, or twisting. Dr. Guttman also testified that the report should have indicated that the claimant has a marked degree of orthopedic disability, rather than no degree of disability. The doctor testified that he believed there was an addendum to his report of June 18, 2021, but he did not have the addendum before him at the time of his testimony. When asked about the conclusion in the addendum indicating a severity ranking A, class three impairment of the lumbar spine, Dr. Guttman testified, "I believe that's probably a mistake as there is no class 3 severity ranking A" (Deposition, Dr. Guttman, 4/25/22, p. 11). The doctor was unable to provide an opinion on the claimant's impairment ranking at the time of his testimony. On cross-examination, Dr. Guttman testified that, as per his June 2021 independent medical examination report, the claimant should follow up with a spine specialist to discuss possible surgery. Dr. Guttman confirmed that he corrected his report to indicate that the claimant has a marked disability, and he believes that a non-final report may have been sent out.

The claimant subsequently provided testimony at the April 27, 2022, hearing. He had been a salesman for the employer of record on April 16, 2019, and had been there for 3 1/2 years. His duties were selling electronics and appliances, customer service, completing orders, and computer work. He had been a salesman all his life in Manhattan, and he managed stores and people. He had also worked as a chauffeur. His highest level of education was a high school diploma. On cross-examination, the claimant testified that he is 62 years old and has a commercial driver's license. He is able to use a computer and a smartphone, and can send and receive emails. When he worked in the store for the employer he did not have to carry or deliver items. His work experience includes doing paperwork, using a computer, and handling staff, staff issues, payroll, and banking. He can read, write, and speak English, and he also speaks Singhalese. On redirect examination, the claimant testified that he can sit for “three to four hours” with “the pill” and then after that he has to lay down (Hearing Transcript, 4/27/22, p. 11). In 2021, he had bladder cancer, had been hospitalized for almost three months, and had his bladder removed. The claimant testified that he still “[has] pain in there but [his] major pain is [his] back and [his] spine” and he “still cannot stand for long” (id., p. 15).

*5 After summations at the April 27, 2022, hearing, the WCLJ found that Dr. Guttman's opinion was not credible, as he changed his opinion during testimony. The WCLJ also found that Dr. Wilen was not able to provide the specific points he gave for his finding of Severity Ranking 4-H, but that his testimony was credible. After finding the claimant's vocational factors on the whole to be mostly aggravating, the WCLJ determined that the claimant has an 80% loss of wage earning capacity. The WCLJ also found that the claimant has a less than sedentary work capacity, noting Dr. Wilen's statement that, although the claimant could possibly do sedentary work, he could not think of anything that the claimant could do with his present restrictions. The WCLJ determined that the claimant has some pretty significant restrictions as indicated by his doctor, and that, based on those restrictions, the claimant effectively has a total industrial disability. For that reason, the WCLJ found that the claimant is entitled to benefits at the total disability rate from September 11, 2021, forward. The WCLJ noted that September 11, 2021, had been the last update to awards and that she would “be bringing that to date effectively as a [temporary total] award” because that had been the ongoing rate, and continuing payments would be at the total industrial disability rate (id., p. 26). The WCLJ additionally stated that she would not be directing an ATF deposit because she was finding a total industrial disability.

As memorialized in the WCLJ decision filed on May 2, 2022, the claimant was classified with a permanent partial disability with a lumbar spine (soft tissue) condition of Severity Ranking H, and he was found to be capable of performing less than sedentary work. After considering the vocational factors of age, education, English proficiency, and work experience, the WCLJ found the claimant to have an 80% loss of wage earning capacity. The WCLJ also found that the claimant is totally industrially disabled as a result of this work-related injury. An award was made from September 11, 2021, to April 28, 2022, at \$638.84 (temporary total disability) per week, and the carrier was directed to continue payments at \$638.84 (total industrial disability) per week. Dr. Wilen was awarded a deposition fee, and the claimant's attorney was granted a fee of \$6, 300.00, which was directed to be withheld pending the submission of a fee application.

A supplemental Notice of Decision was issued on May 18, 2022, in which the attorney fee was approved and released. No further action was directed.

The carrier requested administrative review, arguing that the record supports finding that claimant is not totally industrially disabled and has a 65% loss of wage earning capacity, to make awards from September 11, 2021, to April 28, 2022, at the temporary partial rate of \$479.13 per week, and from April 28, 2022, forward at the permanent partial disability rate of \$415.25. The carrier argued that “the testimony of both Dr. Wilen and Dr. Guttman supports a finding that claimant is capable of performing light work.”

*6 In rebuttal, claimant's attorneys argued that the WCLJ “decision should be affirmed and the employer and carrier should be penalized for having the temerity to appeal a decision based on the false medical reports the carrier submitted to the Board.”

LEGAL ANALYSIS

WCL § 23-a

Pursuant to [WCL § 23-a](#), a mistake, omission, defect and/or other irregularity in a cover sheet (Form RB-89.2) accompanying an application for Full Board Review shall not be grounds for denial of said application for Full Board Review. Such mistake, omission, defect and/or other irregularity shall be disregarded if a substantial right of either the party filing the application or the party filing the rebuttal is not prejudiced.

Here, as correctly pointed out by the carrier, the claimant's attorney failed to properly complete Item 14 on the Form RB-89.2, as the grounds for the appeal were not set forth in that section, as required. However, the claimant's attorney explained the grounds for appeal in the brief attached to the Form RB-89.2. As such, the carrier has not been prejudiced by the improper completion of the Form RB-89.2.

Therefore, the Full Board will consider the application for Full Board Review.

Loss of Wage Earning Capacity

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 loss of wage earning capacity 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 loss of wage earning capacity is a legal determination. While the impairment rating may coincidentally be the same percentage as the ultimate finding of loss of wage earning capacity, the medical impairment rating is not to be used as a direct translation to loss of wage earning capacity (see e.g. [Matter of Patchogue-Medford School Dist.](#), 2011 NY Wrk Comp 40803044).

Here, there is no longer a dispute that the claimant has a permanent medical impairment of Severity Ranking H. Although Dr. Wilen testified that the claimant's work capability is less than sedentary work, the doctor agreed that the claimant could lift, carry, push, and pull up to 10 pounds occasionally, and could sit, stand, walk, climb, kneel, and perform all other activities on the Form C-4.3B on an occasional basis. With respect to the vocational factors, the claimant was 62 years old at the time of classification, which is an aggravating factor. The claimant received a high school diploma in Sri Lanka, which is a neutral factor. The claimant testified that he had worked all his life in the sales field and has prior work experience supervising and managing employees, doing paperwork, using a computer, and handling staff, staff issues, payroll, and banking, he also has the ability to drive, and is able to read, write, and speak English well, all of which are mitigating factors. These mitigating factors suggest that the claimant would be able to learn the skills necessary to perform a sedentary job within his physical restrictions.

*7 Contrary to the claimant's assertions, the Board Panel did not “rehabilitate” and rely on Dr. Guttman's findings in making its determinations regarding work capability and loss of wage earning capacity, but instead relied on Dr. Wilen's concessions, the claimant's own testimony, and the information in the Form VDF-1.

Therefore, based on the claimant's medical impairment, functional impairment, and vocational factors, the Full Board finds that the preponderance of the evidence in the record supports a finding that the claimant has a loss of wage earning capacity of 70%, entitling him to permanent partial disability benefits not to exceed 375 weeks.

Wage Earning Capacity

Wage earning capacity (WEC) is used to calculate an injured worker's benefit rate. Where the non-scheduled permanent partial disability 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” (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, 1209 [2016]).

Here, the Full Board finds that claimant's medical impairment, functional capability, and vocational factors set forth above support a finding that he has a 30% wage earning capacity.

Therefore, the rate of compensation in a benefit week in which the claimant is not working is set at \$447.19, and the claimant was correctly found to be entitled to permanent partial disability benefits of \$447.19 per week, not to exceed 375 weeks.

Total industrial disability

To prove a claim for total industrial disability, a permanently partially disabled claimant must demonstrate how the disability combines with other factors to “render the claimant incapable of salaried employment” (Matter of [Guan v CPC Home Attendant Program, Inc.](#), 50 AD3d 1218 [2008]). These other factors may include claimant's limited educational background, functional limitations, age, language proficiency, training, and work experience (Matter of [Barsuk v Joseph Barsuk, Inc.](#), 24 AD3d 1118 [2005]; Matter of [Kowalchuk v Lupe Constr. Co.](#), 151 AD2d 927 [1989]; [Guan](#), 50 AD3d 1218 [2008]). In evaluating this issue, the Board may consider one or more of the following types of evidence: claimant's testimony regarding the factors enumerated above, and any efforts to secure employment; medical evidence showing that claimant is functionally incapable of working; and/or a report from claimant's vocational rehabilitation expert demonstrating claimant's unsuitability to general employment. Evidence that a claimant has made attempts to secure employment without success is not a prerequisite for a finding of total industrial disability (Matter of [Interstate Brands Corp.](#), 2013 NY Wrk Comp 20205906). “Whether a total industrial disability exists presents a question of fact for the Board to resolve and its determination will be upheld if supported by substantial evidence” (Matter of [Kucuk v Hickey Freeman Co., Inc.](#), 78 AD3d 1259 [2010] [internal citations omitted]).

*8 Here, there is insufficient credible evidence that the claimant's disability, combined with his educational and work experience, render him incapable of salaried employment. Dr. Wilen agreed in his testimony that the claimant could lift, carry, push, and pull up to 10 pounds occasionally, and could sit, stand, walk, climb, kneel, and perform all other activities on the Form C-4.3B on an occasional basis. The claimant testified that he could sit for three-to-four hours at a time. The claimant is able to speak, read, and write English well and, while some of the claimant's work experience involved physical duties, the claimant confirmed that he has experience with payroll and banking tasks, customer service, computer-related work, and also had managerial duties. This experience and skill set would allow the claimant to be retrained or obtain sedentary work within his restrictions and capabilities.

Therefore, the Full Board finds that the record does not support a finding that the claimant has a total industrial disability.

Award from September 11, 2021, to April 28, 2022

In the September 15, 2021, Notice of Decision, continuing payments were directed after September 11, 2021, at the tentative rate of \$415.25 per week. At that time, Dr. Wilen was continuing to find the claimant to be totally disabled, but the record was not developed as to degree of disability after September 11, 2021. At the April 27, 2022, hearing, the WCLJ mistakenly believed that awards had previously been continued after September 11, 2021, at the temporary total disability rate and so she made an award from September 11, 2021, to April 28, 2022, at \$638.84 (temporary total disability) per week. The carrier's representative noted her exception to that award.

Even considering that the WCLJ found the opinion of Dr. Guttman to be wholly incredible with respect to the claimant's degree of disability, the carrier is still entitled to litigate the period for which a tentative rate had been previously awarded, and the WCLJ did not afford that opportunity.

Therefore, awards at the temporary total disability rate from September 11, 2021, to April 28, 2022 are rescinded and the matter returned to the trial calendar for development of the record on the issue of degree of disability and awards during that period.

Claimant's assertion of false medical reports

Contrary to the claimant's assertions, the carrier relied on the testimony of both Dr. Wilen and Dr. Guttman in making its arguments in its application for administrative review. Moreover, the claimant's attorney did not assert before the WCLJ at the April 27, 2022, hearing that Dr. Guttman had submitted false medical reports or that the carrier should be penalized for submitting false reports. The attorney asked only that the WCLJ not consider Dr. Guttman's reports and testimony.

Therefore, the claimant's allegation that the carrier should be penalized for submitting false medical reports will not be considered because it was not raised before the WCLJ.

ATF deposit

*9 As part of the Reform Legislation of 2007, the legislature amended [WCL § 27\(2\)](#) to provide, in relevant part:

“if any such award made on or after July first, two thousand seven requires payment for permanent partial disability under paragraph w of subdivision three of section fifteen of this article by an insurance carrier which is a stock corporation or mutual association, which for the purposes of this section shall be known as mandatory type cases, the board shall immediately compute the present value thereof and require payment of such amount into the aggregate trust fund, together with such additional sum as the board may deem necessary for a proportionate payment of expenses of administering such trust fund including the cost of the actuarial computation by or on behalf of the board of the present value of the award ...”

Any case in which a [WCL § 15\(3\)\(w\)](#) non-scheduled permanent partial disability award is made on or after July 1, 2007, against an insurance company that is a stock corporation or mutual corporation is a “mandatory type” case under [WCL § 27\(2\)](#). That is, the insurance carrier must make a deposit into the ATF. This provision applies to all permanent partial disability awards made on or after July 1, 2007, regardless of the date of accident.

Based on the preceding, the carrier is hereby directed to make a deposit into the ATF. The case should be referred to the ATF for an actuarial computation of the deposit amount. A supplemental decision should then be issued by the WCLJ that provides the amount of the deposit.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed May 2, 2022, is MODIFIED to find; that claimant can perform sedentary work; that claimant has a 70% loss of wage earning capacity entitling him to wage loss benefits not to exceed 375 weeks; continuing awards are at the rate of \$447.19; that the record does not support a total industrial disability; that awards from September 11, 2021, to April 28, 2022, are rescinded and the case is returned to the hearing calendar for the parties to litigate claimant's degree of disability and awards for the aforementioned period, and; to direct the carrier to make a deposit into the ATF. The case is continued.

Clarissa Rodriguez
Chair

2023 WL 2451206 (N.Y.Work.Comp.Bd.)

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.