

2023 WL 4713305 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: THE BROOKLYN HOSPITAL CENTER

Case No. G137 4081

Carrier ID No. 005225000047WC01 W204192

July 13, 2023

*1 Stonington Insurance Company
One General Drive
Sun Prarie, WI 53596
Bangel, Cohen & Falconetti LLP
Attorneys at Law
91-31 Queens Blvd., Ste 400
Elmhurst, NY 11373
Goldberg Segalla LLP
Attorneys at Law
P.O. Box 1057
Buffalo, NY 14201
Date of Accident 5/21/2015

The Full Board, at its meeting on June 13, 2023, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed January 23, 2023.

ISSUES

The issues presented for Mandatory Full Board Review are:

- (1) claimant's loss of wage earning capacity (LWEC); and
- (2) the appropriate attorney's fee.

The Workers' Compensation Law Judge (WCLJ) found that claimant has an 87.5% LWEC and directed an attorney's fee of \$5,300.00.

The unanimous Board Panel modified the WCLJ decision to find that the claimant has a 70% LWEC and to direct an attorney's fee of \$3,000.00.

The claimant's attorneys filed an application for Full Board Review on February 22, 2023, arguing that the record supports the WCLJ's finding that claimant has an 87.5% LWEC. Counsel also contends that pursuant to [WCL § 24\(2\)\(d\)](#), if the Full Board finds that claimant has an 87.5% LWEC, they are entitled to a fee of \$7,500.00, and that if the Full Board upholds the finding that claimant has a 70% LWEC, they are entitled to a fee of \$6,000.00.

The carrier filed a rebuttal on March 22, 2023, arguing that the Board Panel decision should be affirmed.

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

FACTS

On May 21, 2015, claimant, a nursing technician, was injured when she was struck in the face by a patient. This claim was initially established for injuries to claimant's head, neck, and back, and was later amended to include [post-concussion syndrome](#), [acute stress disorder](#), anxiety, depression, and a consequential right shoulder injury.

Claimant underwent a [lumbar discectomy](#) on April 24, 2019, and arthroscopic shoulder surgery on December 5, 2019.

On October 8, 2020, claimant was examined by the carrier's psychiatric and neurological consultant, Dr. Head. In the resulting IME-4 (Independent Examiner's Report of Independent Medical Examination), Dr. Head found no neurological impairment. Dr. Head found that claimant had a temporary, mild psychiatric disability due to depression, but found “no objective basis for neurological or psychiatric permanency” Dr. Head noted that claimant showed “signs of conscious exaggeration” during the neurological examination.

Claimant's treating psychologist, Dr. Kragness, filed a C-4.3 (Doctor's Report of MMI/Permanent Impairment) based on a March 23, 2021, examination, finding that claimant had reached maximum medical improvement. Dr. Kragness stated that claimant experienced “emotional and cognitive responses to long-term effects of injury” which impacted her “mental health and self reliance.” According to Dr. Kragness, claimant frequently experienced “intense anxiety and panic, which at times cause her to lose track of time (hours, not minutes) and experience visual hallucinations and out-of-body experiences.” Claimant also retained emotional associations with the facility where she was injured that made her afraid to enter any healthcare facility. Dr. Kragness found that claimant's “mental health status remains disabling with no sign of improvement.” Dr. Kragness concluded that claimant's “negative preoccupations and occasional out-of-control anxiety run deep enough to hinder her from performing as a care provider or team member in any sustained and helpful capacity.” Dr. Kragness believed that “only remarkable improvement in her physical status would help her overcome these limits.”

*2 On March 17, 2021, claimant was examined by the carrier's orthopedic consultant, Dr. Wert. In the resulting IME-4, Dr. Wert found that claimant had a severity D permanent impairment of the cervical spine, a severity F permanent impairment of the lumbar spine, and a permanent impairment of her right shoulder warranting a 10% schedule loss of use (SLU) of the right arm. In the IME-4, Dr. Wert indicated that claimant could perform medium duty work, but in an attached narrative report, stated:

The claimant is capable of working in a light duty [capacity] limiting her lifting, carrying, pushing and pulling to fifteen pounds or less and avoiding climbing, bending, stooping and squatting and limiting her standing, walking, kneeling and overhead reaching to an occasional frequency.

In a C-4.3 based on a March 22, 2021, examination, claimant's treating physician, Dr. Hedrych, found that claimant had a severity H permanent impairment of the cervical spine, a severity D permanent impairment of the thoracic spine, a severity J permanent impairment of the lumbar spine, and a permanent impairment of the right shoulder warranting a 35% SLU of the right arm. Dr. Hedrych indicated that claimant could perform less than sedentary work and imposed restrictions of no standing, walking, climbing, kneeling, bending, stooping, squatting, reaching overhead, driving, or operating machinery, occasional lifting, carrying, pushing, and pulling up to five pounds, and occasional simple grasping, fine manipulation, and reaching at or below shoulder level.

Dr. Kragness was deposed on September 14, 2021, and testified that she began seeing claimant in January 2017. When asked what the focus of her treatment of the claimant was, Dr. Kragness responded:

Listening to her complain. I don't mean that to be unkind, but she does walk in with a lot of complaints starting with how she feels about the receptionist in the office and then how she feels she's treated by workers comp and then how hard it is to live with pain and then what difficulty she has dealing with her psychological issues.

(Deposition, Dr. Kragness, 9/14/21, pp. 5-6). According to Dr. Kragness, claimant had an “ocular vestibular disorder” which required treatment, as well as psychiatric issues that needed to be addressed (p. 7). However, claimant never received treatment for ocular vestibular disorder, and although Dr. Kragness had referred claimant to a psychiatrist, she was ““unsuccessful in seeing him” (id.). She did not believe claimant would be able to successfully work in a medical team and therefore “her mental health status was also an obstacle to returning to work” (p. 8). Claimant was inclined to ““catastrophize” and “seems to exaggerate her symptoms to some extent, but she's not faking it” (p. 9). Dr. Kragness did not believe that claimant's condition would improve without “psychiatric treatment, some psychotropic drugs and a psychiatrist to supervise her behavior as well” (pp. 9-10). Dr. Kragness believed that claimant's condition was causally related to her work accident, as there was no evidence that claimant was not able to function at her job prior to the accident.

*3 On cross-examination, Dr. Kragness testified that claimant wanted to receive psychiatric treatment, but “[t]here are very few psychiatrists available who accept workers' comp” and that Dr. Kragness had “referred her to one at least who refused to see her” (p. 14). Dr. Kragness did not document any concentration or memory issues at the time of her permanency examination. When asked whether claimant could return to any sort of work, Dr. Kragness responded, “You know, the last time I saw her I thought that she was just too disoriented” (p. 15). Dr. Kragness explained that claimant would awaken and not know what time of day, or what day of the week it was, and reported experiencing “hallucinatory kinds of nightmares” (p. 16). However, claimant was able to keep track of her schedule and kept her appointments with Dr. Kragness. Although claimant wakes up confused, she does not remain confused. When asked what prevented claimant from performing even a sedentary job, Dr. Kragness responded:

You know, it would either be the physical pain that she talked about a great deal and I'm not the one to evaluate that as a work-limiting factor or it would just be her - the attitude that she would bring to work, the tendency to complain and yet that should be tested.

(p. 24). According to Dr. Kragness, it “seemed as though [claimant] had set up her own emotional blot (sic) to the idea that she could do something in the workplace” (p. 25). Claimant lives alone and is able to “handle her own activities of daily living” (id.).

Dr. Wert was deposed on September 23, 2021, and testified that when he examined claimant on March 17, 2021, claimant complained of constant severe pain in her cervical spine (with numbness radiating into her arms and back), right shoulder, and low back (with numbness radiating down her legs). Dr. Wert testified that claimant ambulated with the use of a cane and “presented as someone unable to get on the exam table unless she was helped by one of my staff” (Deposition, Dr. Wert, 9/23/21, amended transcript [Doc. ID #4000668479], p. 8). Dr. Wert stated that based on his examination, claimant would not be able to live on her own. Dr. Wert clarified that his examination findings supported a finding that claimant had a 32.5% SLU of the right arm. Dr. Wert testified that claimant “could do at the most medium work” (p. 16).

Dr. Hedrych was deposed on September 28, 2021, and testified that claimant has significant limitations with respect to activities of daily living. Claimant's adult daughter does laundry, shopping, and cooking for the claimant, and helps her wash and get dressed. Dr. Hedrych believed that claimant lived with her adult daughter but was not 100 percent sure. If claimant lived alone, then her adult daughter came over often to help her. Dr. Hedrych explained in detail the basis of the permanency findings reflected in his report. Dr. Hedrych believed that claimant was not capable of even sedentary work and was permanently totally disabled. He explained that claimant was capable of standing, walking, climbing, kneeling, bending, stooping, and squatting, but that he indicated in his permanency report that she should never perform those activities because “given the choice between occasionally or never on the C-4.3 form, never is a much better choice ‘cause it's much closer to never than it is to occasionally when it's defined as being the ability to perform that activity up to one-third of the time” (Deposition, Dr. Hedrych, 9/28/21, p. 16).

*4 Dr. Head was deposed on October 19, 2021, and testified that he examined claimant on April 26, 2016, December 1, 2016, and October 8, 2020. Dr. Head testified that there was no evidence that claimant sustained a [brain injury](#) and there was no evidence that she was experiencing hallucinations. Claimant exhibited symptom magnification during her examinations. Dr. Head did not find any evidence that claimant suffered from “neurological permanency beyond her having had the surgeries on her low back” (Deposition, Dr. Head, 10/19/21, p. 26). He also found “no basis for permanency psychiatrically either” (id.). Her back surgery does limit her work capacity.

In a decision filed January 28, 2022, the WCLJ found that claimant had a severity D permanent impairment of the cervical spine, and a severity F permanent impairment of the lumbar spine and that she was capable of performing sedentary work. The WCLJ also found that claimant had a psychiatric restriction of not being able to return to her prior employment, and that she was partially, not totally disabled, “within the 75% range of disability” The WCLJ directed the claimant to produce evidence of her work search within 120 days and continued the case.

At a hearing on May 24, 2022, the WCLJ found that claimant's work capacity was somewhere between light duty and sedentary, and that she had a marked (75%) disability. Claimant then testified that she was 53 years old and had graduated from high school. After high school she received certificates in phlebotomy, EKG, medical, and dental. English is her first language. She started working for the employer as a technician in 2007. Following her accident in 2015, she was in and out of work until January 2018, and has not worked since that time. Prior to working for the employer, she had performed other jobs in the health care field. She had also previously worked in sedentary employment. She would rate her computer competency as an eight on a scale of one to ten. She uses a smartphone. She does not have a driver's license. She takes the bus, but it is difficult for her physically.

Following claimant's testimony, the WCLJ found that claimant had an 87.5% LWEC and continued the case for further development of the record on the question of labor market attachment. The carrier took an exception, arguing that claimant's LWEC is lower than 87.5%. Claimant also noted an exception, arguing that she should be found to be totally industrially disabled. The WCLJ then advised that the issue of whether claimant was totally industrially disabled could not be decided at that time and would be considered in approximately six months. The findings made at the May 24, 2022, hearing are reflected in a decision filed May 27, 2022.

The carrier requested administrative review, arguing that claimant should be found to have a 50% LWEC.

In rebuttal, claimant's attorneys argued that the finding that she has an 87.5% LWEC should be affirmed.

*5 At a hearing on June 24, 2022, the claimant testified concerning her efforts to search for work and in a decision filed June 29, 2022, the WCLJ found that claimant had demonstrated that she was attached to the labor market, made awards from May 24, 2022, forward at the permanent partial disability rate of \$500.34 per week, and approved a fee of \$5, 300.00 to claimant's attorneys, pending the submission of a fee application.

Claimant's attorneys submitted a fee application on June 27, 2022, indicating that they had previously received fees totaling \$2, 730.00 and requested an additional fee of \$5, 300.00.

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 D permanent impairment of the cervical spine, a severity F permanent impairment of the lumbar spine, and a permanent impairment of the right shoulder. The credible medical evidence in the record supports a finding that the other conditions for which this claim is established ([post-concussion syndrome](#), [acute stress disorder](#), anxiety, and depression) did not result in permanent impairments. The record reflects that claimant's physical restrictions prevent her from performing her prior employment as a nursing technician, but that she is capable of performing at least sedentary work.

Claimant was 53 years old at the time of classification and is a high school graduate. In addition, it is clear from claimant's testimony that she is proficient in English and the use of computers, and has previously performed sedentary work, all of which are mitigating factors.

Therefore, 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 70%.

Wage Earning Capacity

*6 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 (2016).

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

Attorney's Fee

Claimant's attorneys argue that their fee should be increased pursuant to [WCL § 24\(2\)\(d\)](#), which became effective on January 1, 2023, (L 2022, ch 27), and which states:

A written fee application on a form prescribed by the board shall be filed for all legal fees in excess of one thousand dollars (\$1, 000.00.) In the fee application the attorney shall set forth the calculation used to determine the fee and certify that the amount is in accordance with the following provisions. The form prescribed by the board shall not require a description of the services rendered or time records in conjunction with such written application. The attorney shall set forth on the record the same calculation and certification in all oral fee applications of one thousand dollars (\$1, 000.00) or less. The board shall approve such written and submitted fee application in an amount commensurate with the services rendered and the amount of compensation awarded, having due regard for the financial state of the claimant in accordance with each applicable provision of the following schedule:

(d) When an award is made for permanent total disability pursuant to subdivision one of section fifteen of this article or permanent partial disability pursuant to paragraph w of subdivision three of section fifteen of this article, the attorney's fee shall be equivalent to fifteen percent of the compensation due in excess of the employer or carrier's previous payments, plus a sum equivalent to fifteen weeks of compensation at the rate fixed by the board.

Here, claimant's attorneys made an application for a fee on the awards in question at the hearing on June 24, 2022, and submitted a written fee application on June 27, 2022, indicating that they had previously received fees totaling \$2, 730.00 and requesting an additional fee of \$5, 300.00. Because the fee application was made well before the effective date of [WCL § 24\(2\)\(d\)](#), that provision does not apply, and the Board Panel correctly approved a fee to claimant's attorneys pursuant to the language of [WCL § 24](#) in effect at the time the fee application was initially made, and pursuant to which the Board has broad discretion in approving counsel fees. The Full Board further finds that, for the reasons stated in the Board Panel's January 23, 2023, decision, a fee of \$3, 000.00 should be awarded.

CONCLUSION

*7 ACCORDINGLY, the WCLJ decision filed on May 27, 2022, is MODIFIED, to find that the claimant has a 70% LWEC and a 30% WEC, entitling her to 375 weeks of benefits. The June 29, 2022, decision is MODIFIED, to award benefits at the rate of \$400.28 per week from May 24, 2022, forward. The law firm of Bangel, Cohen, and Falconetti, LLP, is awarded a fee of \$3, 000.00, which shall be payable at \$50.00 per week in increments of \$300.00. The decisions otherwise remain in effect. No further action is planned at this time.

Clarissa Rodriguez
Chair

2023 WL 4713305 (N.Y.Work.Comp.Bd.)