

2023 WL 3055919 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: MB FOOD PROCESSING INC

Case No. G131 3530

Carrier ID No. 468-10-2732 W166250

April 14, 2023

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Date of Accident 5/3/2016

The Full Board, at its meeting held on March 21, 2023, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed November 21, 2022.

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 is permanently partially disabled and has an 80% LWEC.

The unanimous Board Panel modified the WCLJ decision to find that the claimant has a 60% LWEC.

The claimant's attorney filed an application for Full Board Review on December 20, 2022, arguing that the Board should not rely on the opinion of the carrier's consultant, Dr. Wiener, because the doctor failed to complete the IME-4 he submitted insofar as he declined to offer an opinion on claimant's functional abilities, and because he failed "to objectify 'symptom magnification' in any meaningful manner or measurement." Claimant's attorney asserts that "[t]he Board Panel was required to adopt and uphold the WCLJ's opinion on permanency and LWEC in light of the absence of any competent medical evidence to the contrary."

The carrier filed a rebuttal on January 12, 2023, arguing that the Board Panel decision should 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

Claimant was employed in a chicken processing facility and her job required repetitive use of her right hand and arm to cut chicken with a knife. By a WCLJ decision filed March 15, 2018, this claim was established for occupational injuries to claimant's right ring finger, right wrist, and for right [carpal tunnel syndrome](#), with a date of disablement of May 4, 2016; claimant's average weekly wage was set at \$443.59, and awards were made. By a WCLJ decision filed February 5, 2019, this claim was amended to include occupational injuries to claimant's neck and right arm.

On May 30, 2019, claimant underwent arthroscopic right wrist [synovectomy](#) and triangular fibrocartilage [debridement](#), and right middle and ring finger trigger release surgery, performed by Dr. Kirchhoff.

On October 18, 2021, claimant was examined by the carrier's consultant, Dr. Wiener, with the assistance of a translator. In the resulting IME-4 (Independent Examiner's Report of Independent Medical Examination), Dr. Wiener diagnosed cervicgia, right wrist arthralgia, “[i]ncidental finding of mild [carpal tunnel syndrome](#)[,]” surgically repaired right third and fourth [digit trigger](#) finger, and right shoulder arthralgia, but found that claimant “clearly demonstrates signs of symptom magnification.” Dr. Wiener noted that claimant reported that “she continues to have 10/10 pain involving her neck, right shoulder, right wrist, and right hand.” However, Dr. Wiener found that “[t]he fact that she has not had any relief of her symptoms despite 5.5 years of treatment is highly suspect.” Dr. Wiener found that claimant “appears” to have reached maximum medical improvement (MMI) orthopedically, and that based on her “essentially subjective complaints without correlative objective medical evidence, she demonstrates a marked (75%) temporary partial disability.” Dr. Wiener indicated that he could not assess claimant's work capacity due to her symptom magnification and suggested that she undergo a functional capacity evaluation.

*2 In an addendum report dated November 8, 2021, Dr. Wiener found that because claimant has persistent symptoms but no correlative imaging findings, and “no findings of [cervical radiculopathy](#)[,]” she has a class 2, severity A permanent impairment of the cervical spine. With respect to claimant's right upper extremity, Dr. Wiener found that: claimant had a 33.3% schedule loss of use (SLU) of her right ring finger; a 20% SLU of her right hand based on [carpal tunnel syndrome](#) and weakness and numbness in her wrist, although he found “no validity to her restrictions in range of motion to the right wrist”; and a 50% SLU of the right arm “based on restrictions in range of motion at the shoulder.” However, Dr. Wiener cautioned that claimant's “symptom magnification exaggerates all of these findings[,]” and again recommended that she undergo a “functional capacity evaluation to evaluate for both symptom magnification and what, if any, job activities can be performed.”

Claimant's treating physician, Dr. Izeougu, submitted a C-4.3 (Doctor's Report of MMI/Permanent Impairment) based on a January 27, 2022, examination, in which he found that claimant had reached MMI. According to Dr. Izeougu, claimant reported pain in her neck, right index finger and right hand that was “10 out of 10 by 10 being the worst.” She also complained of “paresthesias of the right hand.” Dr. Izeougu diagnosed “[c]ervical sprain with [radiculopathy](#)” and concluded that claimant had a severity ranking F permanent impairment of the cervical spine. With respect to claimant's right upper extremity, Dr. Izeougu diagnosed right index (sic) finger sprain, and right [carpal tunnel syndrome](#), and found that she had a 100% SLU of the right wrist, a 100% SLU of the right index (sic) finger, and a 50% SLU of the right arm. According to Dr. Izeougu, claimant has “[d]ifficulty using the right upper extremity and right hand.” Dr. Izeougu noted that an EMG/NCV revealed mild right [carpal tunnel syndrome](#).

By a decision filed February 25, 2022, the WCLJ directed the parties to depose Dr. Izeougu and Dr. Wiener, directed the claimant to produce a VDF-1 (Loss of Wage Earning Capacity Vocational Data Form), and continued the case to April 26, 2022.

On March 7, 2022, claimant underwent a functional capacity examination (FCE) at the carrier's request, performed by Joseph Lazaro, a physical therapist. In his report, PT Lazaro stated that during his testing of the claimant, she exhibited “low levels of physical effort” and “symptom magnification during some activities.” According to PT Lazaro, claimant demonstrated sedentary to light work capacity, but reported her perceived ability as less than sedentary, and that the “[o]verall test findings, in

combination with the clinical observations, suggest that considerable question should be drawn to the reliability and accuracy of [claimant's] reports of pain and disability.”

*3 The claimant submitted a VDF-1 on April 2, 2022, in which she indicated that she graduated from high school and college in Honduras, received training in stenography, and had previously worked: for Formaggio (sic) Cheese; for Deal Snack, where her job duty was “packing,” and performing house cleaning. Claimant indicated that she did not speak, read, or write at all in English.

Dr. Izeougu was deposed on March 31, 2022, and testified that claimant was able to do sedentary work, but could not perform the work she was doing at the time she was injured. When asked on cross-examination whether claimant's assertion that she could not move her right wrist or right index finger at all was “out of proportion to the objective findings” (Deposition, Dr. Izeougu, 3/31/22, p. 9), Dr. Izeougu responded, “Could be, yes” (p. 10). However, he did not consider the possibility of symptom magnification. Dr. Izeougu testified that he did not document how he calculated that claimant had an F severity impairment of her cervical spine.

Claimant waived the right to cross-examine Dr. Wiener.

At a hearing on April 26, 2022, claimant testified via an interpreter. Claimant confirmed the information in her VDF-1 and testified that she had studied to be a secretary in Honduras. According to claimant, the prior employment listed on her VDF-1 involved manual labor. On cross-examination, claimant testified that she had earned a college degree in 1997 and that while living in Honduras, had worked in the registry department at City Hall. She moved to the United States in 2005 and from 2005 to 2010 worked in a family's home performing childcare, cooking, and cleaning. She subsequently worked “at the cheese place,” for Ideal Snacks, and performed cleaning work “a little bit in between” (Hearing Transcript, 4/26/22, p. 7). The family she worked for from 2005 to 2010 spoke only English. She worked at the chicken processing plant for approximately nine months before she stopped working in May 2016, and has not worked since that time. She is not able to drive. Her English is very limited. She has not taken any classes, undertaken any retraining, or applied for any jobs since she stopped working in May of 2016.

Following claimant's testimony, counsel for the claimant and the carrier provided summations. When counsel for the carrier alluded to the FCE performed by PT Lazaro, claimant's attorney noted an “objection to testimony about his FCE. Dr. Wiener was not provided with it” (p. 12). Claimant's attorney argued that the carrier never provided Dr. Wiener with the FCE and that PT Lazaro “is not entitled to his own opinion” on the question of symptom magnification, and that his opinion “can't be referred to in any shape, manner, or form,” because the WCLJ had already directed the parties to depose Dr. Wiener and Dr. Izeougu before PT Lazaro performed his FCE (p. 14). Claimant's attorney argued that PT Lazaro “cannot issue an opinion as a physical therapist” (id.). The carrier's attorney argued that he was only citing the FCE insofar as it corroborated Dr. Wiener's observation of symptom magnification. Claimant's attorney asserted, incorrectly, that PT Lazaro's FCE report had been submitted “after the record had been closed” (p. 15). The WCLJ did not preclude PT Lazaro's FCE report but indicated that he did not consider the report and directed carrier's counsel to “just not make further reference to it” (id.).

*4 Following summations, the WCLJ classified claimant permanently partially disabled, found that she has an 80% LWEC, directed continuing payments at the rate of \$236.58 per week, and approved a fee of \$4, 000.00 to claimant's attorney. The findings and awards made at the April 26, 2022, hearing are reflected in a decision filed May 2, 2022.

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

In rebuttal, claimant's attorney argued that “the carrier's Application is totally without merit and must be denied.” Claimant's attorney argued that the record supported a finding that claimant was permanently totally disabled.

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, Dr. Wiener credibly found that claimant had a severity ranking A permanent impairment of her cervical spine, and permanent physical impairments involving her right arm, wrist, and ring finger. However, Dr. Wiener cautioned that claimant's “symptom magnification exaggerates all of these findings.” Dr. Izeougu testified that claimant was able to do sedentary work but could not perform the work she was performing at the time she was injured. When asked whether claimant's purported symptoms were out of proportion to the objective findings, Dr. Izeougu responded, “Could be, yes.”

Claimant was 49 years old at the time of classification, which is a neutral factor. Her education and that she performed an office job in Honduras are both mitigating factors. Her history of performing jobs involving physical labor since moving to the United States and limited English proficiency are both aggravating 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 a 60% LWEC.

Wage Earning Capacity

*5 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 40% wage earning capacity.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed May 2, 2022, is MODIFIED as follows: claimant has a 60% LWEC; awards are directed from February 23, 2022, to April 27, 2022, at a rate of \$221.80 per week, temporary partial disability, and from April 27, 2022, and continuing, for up to 350 weeks, at a rate of \$178.23 per week; and an attorney fee of \$3, 000.00 is approved. No further action is planned by the Board at this time.

Chair - Clarissa Rodriguez

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