

2023 WL 6950324 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: SYSTEM ONE HOLDINGS LLC

Case No. G209 0078

Carrier ID No. 301812024320001 W154009

October 6, 2023

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Shawnee Mission, KS 66225
Aggregate Trust Fund
c/o State Insurance Fund
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Albany, NY 12206
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Date of Accident 10/3/2018

The Full Board, at its meeting held on September 19, 2023, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed May 10, 2023.

ISSUES

The issues presented for Mandatory Full Board Review are:

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

The Workers' Compensation Law Judge (WCLJ) found that the claimant is permanently partially disabled and has an 80% LWEC, and approved a fee of \$8, 900.00 to claimant's attorneys.

The unanimous Board Panel modified the WCLJ decision to find that the claimant has a 70% LWEC, and to reduce the attorney fee from \$8, 900.00 to \$6, 500.00.

The claimant filed an application for Full Board Review on June 9, 2023, arguing that the Board Panel decision should be modified to restore the WCLJ's finding of an 80% LWEC. Claimant's attorneys also argue that the decision should also be modified to restore the attorney fee of \$8, 900.00, as the Board Panel provided no factual nor legal basis for reducing the attorney fee to \$6, 500.00. The attorney contends that, prior to the change in the statute governing attorney fees, the rule was that the classification fee is 10 weeks of benefits, which in this case would be \$8, 945.70 based on an 80% LWEC, or \$7, 827.50 if the LWEC remains at 70%.

The carrier filed a rebuttal on July 10, 2023, arguing that, although it continues to maintain that the claimant has no more than a 50% LWEC, the Board Panel's findings should be affirmed.

Full Board Review is Mandatory pursuant to Workers' Compensation Law (WCL) § 23, because the Board Panel reduced the claimant's loss of wage earning capacity below the safety net threshold pursuant to WCL § 35(3).

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

FACTS

The claimant injured his back on October 3, 2018, while working as an Outside Plant Engineer for the employer of record. The case has been established for an injury involving the mid and low back, and the average weekly wage was set at \$1, 677.32. The claimant has received awards for lost time at varying benefit rates since October 5, 2018.

The claimant saw Dr. Gulati for a telemedicine visit on March 18, 2021. Dr. Gulati indicated in his office note that the claimant was requesting that a C-4.2 form be completed finding him to be 75-100% disabled. Dr. Gulati referred the claimant to Dr. Weiss for an in-person evaluation (Doc. ID# 362114952).

Dr. Weiss, a specialist in internal medicine and pulmonary medicine, saw the claimant for the first time on March 22, 2021, and continued to treat the claimant throughout 2021.

*2 The claimant has undergone several MRIs to the lumbar spine and thoracic spine. An October 13, 2021, [MRI of the thoracic spine](#) found multi-level degenerative disc and facet joint changes; disc bulges at T11-T12 with facet [arthropathy](#) and ligamentum flavum [hypertrophy](#) causing mild central canal stenosis and moderate right and severe left neural foraminal narrowing; and disc bulges and disc protrusions at multiple other levels without [spinal stenosis](#).

An October 13, 2021, [MRI of the lumbar spine](#) showed findings at each level between L1 and S1.

Dr. Weiss filed a Form C-4.3 (Doctor's Report of MMI/Permanent Impairment), based on a March 23, 2022, examination, in which he indicated that the claimant had a permanent partial impairment with ongoing weakness and numbness of the legs along with a poor gait/balance due to his mid and low back injury. The doctor did not complete Attachment B of the Form C-4.3 with respect to the Non-Schedule Permanent Partial Disability of the claimant's back, and noted permanent disabilities only of the claimant's right and left legs. Dr. Weiss indicated that the claimant is capable of performing sedentary work, and he can lift, carry, push, or pull 20 pounds on an occasional basis, seven pounds on a frequent basis, and five pounds on a constant basis. Dr. Weiss also indicated that the claimant could never climb or operate machinery, and that he could occasionally sit, stand, walk, kneel, bend, stoop, and drive.

The claimant was evaluated on behalf of the carrier on March 30, 2022, by independent medical examiner Dr. Loguidice, an orthopedic surgeon. In his report, Dr. Loguidice diagnosed the claimant with a causally related lumbar spine sprain with [radiculopathy](#) bilaterally/aggravation of [spinal stenosis](#) and opined that the claimant had reached maximum medical improvement. The doctor found a permanent medical impairment to the claimant's lumbar spine of Class 3, Severity Ranking B, found that the claimant could perform medium work, and opined that the claimant could occasionally lift, carry, push, or pull 25 pounds, occasionally bend/stoop/squat/twist, and could frequently sit, stand, walk, climb, kneel, drive, and operate machinery.

Dr. Loguidice re-examined the claimant on July 13, 2022, and diagnosed him with causally related lumbar spine sprain/bilateral [radiculopathy](#)/aggravation of [spinal stenosis](#). The doctor again found a permanent medical impairment to the lumbar spine of Class 3, Severity Ranking B, but this time found the claimant only capable of sedentary work, with restrictions of occasional lifting, carrying, pushing, or pulling 10 pounds, and occasional bending/stooping/squatting/twisting and operating machinery. The doctor again opined that the claimant could frequently sit, stand, walk, climb, kneel, and drive.

In a July 29, 2022, Notice of Decision, the WCLJ made an award from December 16, 2021, to July 27, 2022, at a tentative rate of \$838.66 per week, as a modification of a prior award; directed the carrier to continue payments at the tentative rate of \$838.66 per week; and directed the parties to depose Drs. Weiss and Loguidice. The claimant's attorney was granted a fee of \$200.00.

***3** Dr. Loguidice testified by deposition on September 6, 2022, that he had overrated the claimant's abilities at the examination on March 30, 2022, and that, as per the report based on the July 13, 2022, examination, the claimant could perform sedentary work on a full-time basis, and has an overall 67.5% moderate-to-marked permanent partial disability. Dr. Loguidice testified that the claimant could only lift two pounds on a frequent basis, he could sit only for half-hour intervals, and he could not stand for more than a half-hour to 40 minutes at a time. Dr. Loguidice did not know what the claimant's job was at the time he was injured.

Dr. Weiss testified by deposition on September 9, 2022, that he first examined the claimant on March 22, 2021, and last examined him on May 24, 2022. A permanency evaluation was performed on March 23, 2022. The claimant was unable to perform his usual job as an outdoor telephone person that required steady legs, but could perform a desk job as long as he could get up every 10 to 15 minutes to stretch his legs. The claimant has weakened leg muscles on examination and his observed gait is unsteady and slow. The claimant could stand for about 10-15 minutes before needing to rest. Dr. Weiss also testified that the claimant has an overall 75% permanent partial disability from all types of employment.

At a hearing on October 13, 2022, the claimant testified that he is 61 years old, he has an associate degree in green building maintenance and management, and he has certifications and building professional analyst. Prior to his injury, his job duties included taking field notes, driving to work areas, taking measurements between telephone facilities and all other utilities on the pole, and doing the required work to install a new cable, or replace a pole. He had performed that job for approximately 18 years. Before that, he worked for Verizon for about 9 years as an outside plant technician. The claimant testified that he last worked on the date of the accident and had been looking for employment through Indeed.com. He is able to drive, has a computer at home, has a smartphone on which he is able to access his email and use the internet, and has the ability to read, write, and speak well in English. The claimant lives alone in a multi-level house and is able to perform household chores to the best of his ability, including cooking, cleaning, laundry, and grocery shopping. At the completion of the testimony, the parties gave summations. The WCLJ found that claimant had a 75% medical impairment and an 80% LWEC based on his analysis of the vocational factors: the claimant's age of 61 was found to be an aggravating factor; his level of education was found to be a mitigating factor; proficiency in the English language was neutral; and the claimant's work knowledge was useful, but he was not able to perform his usual work activities.

As memorialized in the Notice of Decision filed on October 19, 2022, the WCLJ found that the claimant has a permanent impairment of the lumbar spine (soft tissue) of Severity Ranking B, is capable of performing sedentary work, and has an 80% LWEC, thereby entitling him to wage loss benefits not to exceed 425 weeks. Awards were made from July 27, 2022, to October 14, 2022, at a temporary partial disability rate of \$838.66 per week, and the carrier was directed to continue payments at the permanent partial disability rate of \$894.57 per week. An attorney fee was granted in the amount of \$8,900.00, payable at \$30.00 per week in multiples of \$300.00. Dr. Weiss was awarded a deposition fee. The WCLJ directed the carrier to make a deposit into the Aggregate Trust Fund pursuant to WCL § 27 and noted that a supplemental decision indicating the amount of the deposit would follow. The claimant was found to be attached to the labor market, and all prior tentative rates were made permanent.

LEGAL ANALYSIS

LWEC

***4** 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).

Although the claimant's attorney maintains that a sedentary work capacity is considered the equivalent of a 75% degree of disability and a baseline before considering the vocational factors, there is no merit to this assertion. Medical impairment is determined by opinions provided by physicians/medical professionals based on severity rankings that are set forth in the 2012 Impairment Guidelines. The medical professional also determines the claimant's functional and exertional abilities and how they contribute to the claimant's overall functional loss. There is no baseline created by a finding of a sedentary work capacity, and a permanent disability determination in each case is determined by its facts.

Here, only independent medical examiner Dr. Loguidice provided a permanent medical impairment opinion that is in accordance with the 2012 Impairment Guidelines. The claimant is properly found to have a permanent impairment of the lumbar spine of Class 3, Severity Ranking B, as per Dr. Loguidice's credible opinion. Both Dr. Weiss and Dr. Loguidice have found the claimant to be capable of performing sedentary work. Dr. Weiss found the claimant to be capable of lifting, carrying, pushing, or pulling a greater weight than did Dr. Loguidice (20 pounds occasionally versus 10 pounds), but while Dr. Loguidice found the claimant to be capable of frequently sitting, standing, walking, kneeling, and driving, Dr. Weiss opined that the claimant could only do these things occasionally. Moreover, while Dr. Loguidice found the claimant to be capable of frequently performing simple grasping, fine manipulation, reaching overhead, and reaching at or below shoulder level, Dr. Weiss opined that the claimant could only do these things occasionally. Although the Board Panel found the claimant to be capable of sedentary work with a lifting restriction of approximately 10 to 20 pounds on an occasional basis, the Full Board finds that Dr. Loguidice provided the more credible opinion regarding the claimant's overall functional capabilities.

***5** With respect to the claimant's vocational factors, the Board Panel found that the claimant's age of 61 is a neutral factor. The Full Board finds, however, that this is an aggravating factor, as found by the WCLJ, since typically most of a person's working life is behind him at that age and it may be harder for a 61-year-old to be hired when competing with someone who is much younger. Another aggravating factor is the claimant's inability to return to his former work as an Outside Plant Engineer which appears to have been mainly outdoor work. However, these aggravating factors are outweighed by multiple mitigating factors: education and certifications, skills and knowledge from his former work, proficiency in English, ability to use a computer and smartphone, and ability to drive. These mitigating factors suggest that the claimant would be able to learn the skills necessary to perform a sedentary job within his physical restrictions.

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 the finding that the claimant has a 70% LWEC, and, pursuant to WCL § 15(3)(w), is entitled 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 [2016]).

Here, the 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 \$782.75, and the claimant was correctly found to be entitled to permanent partial disability benefits of \$782.75 per week, not to exceed 375 weeks.

Attorney fee

The attorney fee at issue here was granted in the WCLJ decision of October 19, 2022, which is prior to the January 1, 2023, effective date of the statutory changes regarding the award of attorney fees.

When considering a request for an attorney fee that is made prior to January 1, 2023, the Board has discretion to approve a fee, “in an amount commensurate with the services rendered and having due regard for the financial status of the claimant and whether the attorney or licensed representative engaged in dilatory tactics or failed to comply in a timely manner with board rules” (12 NYCRR 300.17[f]).

*6 Board Subject No. 046-548 dated May 28, 2013, states that:

“Classification is a milestone moment in the life of a claim, and [an attorney's fee awarded upon classification] represents the legal efforts made towards securing a just result for the claimant regarding permanency... The fee represents not only the present moment of classification, but entails an obligation for future representation on issues that may arise, such as third-party actions, medical care, and allegations of change in classification or entitlement to benefits.”

However, “there is no such thing as a ‘classification fee’ or a ‘schedule fee’” (Matter of CCA Civil Inc, 2016 NY Wrk Comp G1104799), and when awarding a fee in such a case, the Board considers the factors set forth in [12 NYCRR 300.17\(f\)](#).

Although the claimant's attorney asserts that the rule prior to January 1, 2023, was that the classification fee is 10 weeks of benefits, this assertion is without merit. The amount of the awards is certainly a factor to consider, however there was no rule for a standard attorney fee in a classification situation.

Here, the Board Panel reduced the claimant's LWEC from 80% to 70% and found that the fee granted to the claimant's attorney should also be reduced from \$8,900.00 to \$6,500.00 based on the Form OC-400.1 (Application for a Fee by Claimant's Attorney or Licensed Representative), the work performed, results obtained, and prior fees awarded.

As per the Form OC-400.1 filed on October 18, 2022, the claimant's attorney requested a fee of \$8,900.00. The attorney previously received fees in the case totaling \$5,150.00 over a four-year period. The fee application indicates the tasks/services performed on the claimant's behalf between October 2018, when the attorney was retained, and October 2022, and the time spent on each task. It is noted that the last attorney fee was awarded in the July 29, 2022, Notice of Decision. As such, the fee application should have only included tasks/services performed after that date. Based on the services performed on the claimant's behalf and taking into account the preceding, an overall fee of \$6,500.00 is reasonable and commensurate with the services rendered and the results achieved.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed on October 19, 2022, is MODIFIED to indicate that the claimant is classified with a permanent partial disability under WCL § 15(3)(w) with a 70% loss of wage earning capacity, which entitles him to loss of wage earning capacity benefits not to exceed 375 weeks, as reduced by the number of weeks of temporary partial disability that

the carrier paid in excess of 130 weeks; the carrier is directed to continue payments subsequent to the hearing held on October 13, 2022, at the permanent partial disability rate of \$782.75 per week; and an attorney's fee is granted in the amount of \$6,500.00, payable at \$25.00 per week in multiples of \$250.00. The balance of the decision remains unchanged. No further action is planned by the Board at this time.

*7 Chair - Clarissa Rodriguez

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