The Full Board, at its meeting held on July 20, 2021, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed February 26, 2021.

 ISSUE

The issue presented for Mandatory Full Board Review is whether the record supports reduced earnings awards.

The Workers' Compensation Law Judge (WCLJ) made reduced earnings awards beginning October 25, 2019.

The Board Panel majority affirmed the reduced earnings awards.

The dissenting Board Panel member would rescind the awards.

The carrier filed an application for Mandatory Full Board Review on March 29, 2021, arguing that claimant is not entitled to reduced earnings awards because she has returned to her pre-injury job and her doctor had released her to perform full duty work with no restrictions.

The claimant filed a rebuttal on April 28, 2021, arguing that her reduced earnings are causally related to her work-related injury and that awards should be affirmed.

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

FACTS

Claimant was injured on February 3, 2017, when she fell while working as a licensed practical nurse (LPN). This claim is established for an injury to claimant's low back and her average weekly wage was set at $958.08. Claimant underwent a laminectomy and decompression at L4-5 and L5-S1 on July 18, 2018, performed by Dr. Simmons.
A July 25, 2019, note from Medical Care of Western New York at Buffalo, the practice of claimant's treating physician, Dr. Calabrese, indicated that claimant could return to part-time light-duty work on July 29, 2019.

A July 29, 2019, note from Dr. Simmons' practice indicates that claimant could return to work without restrictions.

By a decision filed August 22, 2019, the WCLJ held awards from July 30, 2019, forward in abeyance.

In an August 19, 2019, report, Dr. Calabrese found that claimant was moderately partially disabled and could return to part-time light-duty work, with restrictions of no lifting greater than 20 to 50 pounds occasionally, the ability to alternate sitting, standing, and walking as tolerated, no more than two to three days per week.

In an August 27, 2019, report, Dr. Calabrese noted that claimant had advised him that Dr. Simmons had “returned her to work full duty with lifting no more than 50 lbs which she has demonstrated to be able to tolerate.” Claimant advised that her job met the criteria for medium exertional ability and that she was “concerned she will lose her job if she is not released full duty without restrictions and she wants to continue working.” Dr. Calabrese released claimant to return to full duty work with lifting up to 50 pounds.

*2 A Functional Capacity Examination (FCE) performed September 9, 2019, at the request of Dr. Calabrese, indicates that claimant can stand and walk continuously, lift up to 50 pounds, static push up to 75 pounds and static pull up to 97 pounds. The FCE report concluded that claimant is able to perform the duties of her job as an LPN with the employer.

By a decision filed October 22, 2019, the WCLJ made reduced earnings awards from July 30, 2019, to August 27, 2019, at the rate of $151.81 per week, and found no compensable lost time from August 27, 2019, to October 18, 2019.

In an October 25, 2019, report, Dr. Calabrese stated that claimant continued to struggle with low back and leg pain, which she rates as eight out of ten in severity. Dr. Calabrese stated that claimant was continuing to work “with significant difficulty. She was forced to return to work for financial reason and continues to struggle. She is only able to work 2 1/2 days per week and must have a day off between to recover. She works approximately 6 hours on Tuesday, 6 hours on a Thursday and 4 hours on a Friday. She frequently asks to leave early if patients are gone due to her pain level.”

Claimant was examined by the carrier's consultant, Dr. Scott, on November 22, 2019. In his report, Dr. Scott found that claimant had reached maximum medical improvement (MMI) and had a class 4, severity ranking F permanent impairment of her lumbar spine.

Dr. Calabrese submitted a C-4.3 (Doctor's Report of MMI/Permanent Impairment) based on a December 2, 2019, examination, in which he found that claimant had reached MMI and had a class 4, severity ranking F permanent impairment of her lumbar spine. Dr. Calabrese imposed various restrictions and found that claimant could perform work of medium exertional capacity.

A second FCE was performed on January 2, 2020, at the request of Dr. Simmons. The FCE report states that claimant advised that she had “returned to work in July of 2019 and states she is currently working in a modified capacity as an LPN with no lifting, limited to two days per week. Patient states she has noted an increase in pain while working and is in the process of filing for SSD.” The FCE report concluded that claimant “failed to demonstrate the ability to perform the essential functions of her original position as an LPN, which was defined as SEDENTARY physical demand with occasional lifting up to 10 pounds and frequent sitting.” The report found that claimant “failed to perform any material handling or mobility tasks and therefore is rated at the LESS THAN SEDENTARY physical demand level.” The report found that claimant had “demonstrated multiple indications of self-limiting or sub-maximal effort,” and the results of the report “should be viewed as her minimum, not maximum capability.”
Dr. Simmons was deposed on March 13, 2020, and testified that he is board certified in orthopedic surgery. He first treated claimant on May 4, 2017. Claimant had lower back pain which radiated into both legs. He last treated claimant on January 3, 2020, and found that she had a total disability with regard to her regular work, and a marked partial disability with regard to any work. She should not work more than two days per week. Claimant had a “lurch” when she walked.

*3 At a hearing on April 2, 2020, testimony was taken of the claimant and an employer witness. Claimant testified that she graduated from high school and took a two-year college RN program. She has an LPN license. She is currently working for the employer in a pediatric primary care clinic and had been working there since July of 2019. Her job duties include registering patients, taking them to a triage room, and taking their vitals. She had previously worked in several different jobs for the employer, including in a long-term care facility with elderly patients and in a medical rehab unit. Claimant testified that at the time of her accident she was working in the pediatric primary care clinic and also “supplementing my time” at the long-term care facility (Hearing Transcript 4/2/20, p. 6). She worked Monday through Friday or Saturday. At the long-term care facility she took care of 18 to 20 patients, passing out medication and doing treatment. She has worked as an LPN since 2005 or 2006 and had previously worked for the employer as a housekeeper beginning in 1998. She worked for the employer as a housekeeper while going to nursing school and the employer helped with her tuition. She returned to work in July of 2019 following her surgery, working two-and-a-half days per week. She testified that working made her symptoms worse, “but I just try to get through it” (p. 11).

On cross-examination, claimant testified that she returned to work in July of 2019 to the same position in which she was employed when she was injured in 2017, in the pediatric primary care clinic. The pediatric primary care clinic was only open two-and-a-half days per week at the time of her injury. The pediatric primary care clinic is a “no lift facility” (p. 14). However, she would on occasion have to lift a child in her job. Prior to her accident she would also pick up hours at the employer's long-term care facility when available. She would apply for open shifts on the computer. She looked for additional shifts frequently to fill her schedule, and has always worked full-time, five or six days a week. Most of the additional shifts she picked up were in the employer's long-term care facility, where she might be required to lift patients and assist them in showering and using the bathroom. She was not required to pick up any extra shifts in addition to her regular two-and-a-half days per week at the pediatric primary care clinic. Claimant denied being advised that she would be terminated if she did not return to work in July of 2019. She had been advised by the employer that she could not return to work following her surgery if she had any restrictions. Since returning to work in July of 2019 she has not applied for any additional shifts.

A nurse manager for the employer testified that she is claimant's manager. She was notified that claimant was able to return to work full duty as of July 30, 2019. The most strenuous thing that claimant was required to perform in her job was drawing blood. The number of hours per week claimant worked when she returned to work on July 30, 2019, was the same as before her accident on February 3, 2017. Claimant makes less money now than she did before her accident because she chooses to not pick up additional shifts. The nurse manager was never advised that claimant was unable to work additional shifts and as her supervisor, that is the kind of thing she would know. Claimant had received a letter advising her that she would be terminated if she did not return to work.

*4 On cross-examination, the nurse manager testified that claimant never complained of back pain while at work. She confirmed that working at the long-term care facility was more physical than working at the pediatric primary care clinic.

In a reserved decision filed September 1, 2020, the WCLJ classified the claimant permanently partially disabled, found that she had a 35% loss of wage earning capacity and was capable of light duty work, and that her reduced earnings were due, at least in part, to her causally related disability. The WCLJ made reduced earnings awards at the rate of $279.81 per week from October 25, 2019, to March 14, 2020, and at the tentative rate of $200.00 per week from March 14, 2020, forward.

The carrier requested administrative review, arguing that claimant was capable of performing greater than light duty work, that her loss of wage earning capacity was 10%, and that she was not entitled to reduced earnings awards.
In rebuttal, claimant argued that the WCLJ decision should be affirmed.

LEGAL ANALYSIS

To be entitled to awards, a permanently partially disabled claimant who is working must show that any reduced earnings are causally related to his or her disability (Matter of Florentino v Mount Sinai Med. Ctr., 126 AD3d 1279 [[2015], citing Matter of Launer v Euro Brokers, 115 AD3d 1130 [2014]]. “It is well settled that “a reduced earnings award may be denied where the reduction in earning capacity results from age, economic conditions or other factors unrelated to the disability”” (Matter of Turetzky-Santaniello v Vassar Bros. Hosp., 302 AD2d 706 [2003], quoting Matter of La Pietra v County of Suffolk, 294 AD2d 794 [2002]; see Matter of Ennist v Texaco, 280 AD2d 773 [2001])” (Matter of Millner v Cablevision, 2 AD3d 1146 [2003]).

Workers' Compensation Law (WCL) § 15(5-a) provides, in pertinent part, that “the wage earning capacity of an injured employee in cases of partial disability shall be determined by his actual earnings ....” In making a reduced earnings award, it is improper to consider medical evidence of the claimant's degree of disability (Matter of Gioia v Cattaraugus County Nursing Home, 122 AD3d 970 [2014]). Absent a complete and voluntary withdrawal from the labor market, under WCL § 15(5-a), the Board must measure reduced earnings as two-thirds of the difference between the post-injury earnings and the pre-injury average weekly wage. “[T]he Court of Appeals has repeatedly explained that, for claimants who have demonstrated that they remained attached to the labor market, ‘where actual earnings during the period of the disability are established, wage earning capacity must be determined exclusively by the actual earnings of the injured employee without evidence of capacity to earn more or less during such disability period’” (Gioia, 122 AD3d 970 [2014] [[citations omitted]].

Here, prior to her February 3, 2017, accident, claimant worked two-and-half days per week as an LPN at a pediatric primary care clinic and testified that prior to her accident, she supplemented her income by picking up shifts at other facilities run by the employer, primarily a long-term care facility with elderly patients and a medical rehab unit. The wage information for the period prior to the accident confirms claimant's testimony and indicates that she typically worked four or five days per week. After undergoing a laminectomy and decompression at L4-5 and L5-S1 on July 18, 2018, claimant returned to work at the pediatric primary care clinic on July 30, 2019, again working two-and-half days per week. Claimant credibly testified that after returning to work, she was no longer able to pick up additional shifts at other facilities due to her disability. She testified that her job duties at the long-term care facility, where she had previously worked additional shifts when they were available, were more strenuous than those at her regular position in the pediatric primary care clinic, and required her to lift patients and assist them in showering and using the bathroom. Claimant's supervisor confirmed during her testimony that working at the long-term care facility was more physical than working at the pediatric primary care clinic. Claimant's treating physician, Dr. Calabrese, found that claimant's permanent impairment limited her to performing medium duty work for two-and-a-half days per week, which would effectively preclude her from picking up any additional shifts, as she had done before her accident.

Therefore, the preponderance of the credible evidence in the record supports a finding that claimant's reduced earnings are due, at least in part, to her permanent partial disability, and that she is therefore entitled to reduced earnings awards beginning October 25, 2019.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed September 1, 2020, is MODIFIED to find that claimant is capable of medium duty work but is affirmed in all other respects. No further action is planned by the Board at this time.

Chair - Clarissa Rodriguez

2021 WL 3610673 (N.Y.Work.Comp.Bd.)