

2022 WL 1057844 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: LOOMIS ARMORED US LLC

Case No. G071 7033

Carrier ID No. C494C3241139 W019004

April 4, 2022

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Date of Accident 2/20/2013

The Full Board, at its meeting on March 15, 2022, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed November 12, 2021.

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 was permanently partially disabled and had a 91% LWEC.

The unanimous Board Panel modified the WCLJ decision to find that the claimant has a 75% LWEC.

The claimant filed an application for Full Board Review on December 13, 2021, arguing that based on her age and significant permanent disability which severely limits her ability to walk and prevents her from performing her prior employment, the record supports a finding that she has a 91% LWEC.

The carrier filed a rebuttal on December 29, 2021, requesting that the decision of the Board Panel be affirmed.

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 injured on February 20, 2013, when she jumped down from a truck. The claim was initially established for an injury to claimant's right foot and was subsequently amended to include consequential injuries to her back and right hip. The average weekly wage was set at \$884.62. Claimant underwent a lumbar [laminectomy](#) in October 2017.

Claimant was examined by the carrier's consultant, Dr. Perry, on December 4, 2019. In the resulting IME-4 (Independent Examiner's Report of Independent Medical Examination), Dr. Perry found that claimant had a 40% schedule loss of use (SLU) of the right ankle, no SLU of the right hip, and a permanent impairment of the lumbar spine of severity E. Dr. Perry found that claimant was capable of performing sedentary work.

Dr. Stabile, a podiatrist, submitted a C-4.3 (Doctor's Report of MMI/Permanent Impairment) based on a January 16, 2020, examination. Dr. Stabile found that claimant had reached maximum medical improvement (MMI), had a 33.3% SLU of the right foot, and was capable of sedentary work.

Dr. Basra submitted a C-4.3 based on a January 23, 2020, examination. Dr. Basra found that claimant had reached MMI, had a G severity permanent impairment of the lumbar spine, and was capable of sedentary work.

Dr. Simonsen submitted a C-4.3 based on an August 12, 2020, examination. Dr. Simonsen found that claimant had reached MMI and had a 52.5% SLU of the right leg. Dr. Simonsen stated that claimant "has very limited ability to do any work with only short times sitting due to the back injury that required surgical attention. She cannot lift push or pull at all."

*2 By a decision filed November 16, 2020, the WCLJ directed that medical depositions on the issue of permanency be completed within 120 days.

Dr. Perry was deposed on January 28, 2021, and testified that based on his December 4, 2019, examination, he found that claimant had reached MMI and had permanent impairments of her lumbar spine and ankle, as reflected in his report. At the time of the examination, claimant was using a cane and braces for her back and ankle. On cross-examination, when asked to explain how he had concluded that claimant had a severity E permanent impairment of the lumbar spine, Dr. Perry responded:

it does not appear that she had a [radiculopathy](#). According to the EMG she had some axonal lesion in the right sural nerve. So given that and given that the MRI showed contralateral involvement, E was the appropriate level based on her gait, her assistive devices, her physical examination findings.

(Deposition Transcript, 1/28/21, p. 11). Dr. Perry agreed that claimant's ankle exhibited instability and possible weakness.

Dr. Stabile was deposed on March 3, 2021, and testified that he is claimant's treating podiatrist. Claimant has undergone multiple right foot surgeries and Dr. Stabile performed a partial sural [neurectomy](#) of claimant's right foot in November 2016. Dr. Stabile found that claimant has a permanent impairment of her right foot that equates to a 33.3% SLU of the foot, and is capable of sedentary work involving "pretty much sitting" (Deposition Transcript, 3/3/21, p. 13). Based on claimant's difficulty ambulating, Dr. Stabile believed that claimant's impairment was more appropriately classified as a permanent partial disability, rather than an SLU. On cross-examination, Dr. Stabile testified that claimant is "not safe to be walking freely around a job site or job that would require her to be standing and walking for periods of time" (p. 20).

Dr. Basra was deposed on March 8, 2021, and testified that he is an orthopedic surgeon with a subspecialty in spine surgery. He began treating claimant in 2014 for her back injury. Based on his January 23, 2020, examination, he found claimant to have "a total permanent injury" (Deposition Transcript, 3/8/21, p. 8). Dr. Basra gave claimant a G severity rating of the lumbar spine pursuant to Table 11.2 of the Board's Impairment Guidelines. Dr. Basra testified that "we did complete a list of functional capabilities and exertional abilities and felt that she would qualify for the lowest level listed on that category, which was sedentary work, exerting up to 10 pounds of force occasionally" (p. 9). When asked to clarify whether claimant can perform sedentary work, Dr. Basra responded:

As it's defined there, no, just because she has a difficult time maintaining prolonged positions more than half an hour. She has to constantly change positions. She is on medications. Patient would require multiple breaks, et cetera, which is not clearly defined on that particular sedentary work categorization.

*3 (id.). Claimant underwent a lumbar fusion at L4 to S1 on October 13, 2017, performed by Dr. Basra. On cross-examination, Dr. Basra was unable to explain the scores he assigned to each category when determining that claimant had a G severity rating of the lumbar spine. Claimant would be able to perform a sedentary job that allowed her to take necessary breaks, change positions as necessary, and take medication as prescribed by her pain management specialist. Claimant is able to drive for up to 30 minutes.

Dr. Simonsen was not deposed by the deadline set by the WCLJ.

The claimant submitted a VDF-1 (Loss of Wage Earning Capacity Vocational Data Form) on June 10, 2021, which indicated that she had graduated from high school and had specialized training in cosmetology. Claimant indicated that she had worked for the employer of record for three years as a vault supervisor, and had previously worked as a customer service manager for 15 years, supervising more than 25 employees. She also indicated that she spoke, read and wrote well in English.

At a hearing on July 13, 2021, claimant testified that her job as a vault supervisor for the employer involved getting routes ready for drivers to deliver money, lifting heavy money bags and coins bags, supervising the vault, and ensuring that the required deliveries were made. She was required to stand most of the time at her job. She is 61 years old. She had been a hairdresser for 40 years but cannot do that work any longer because it involves too much standing. She has a "bus license" and had formerly driven a school bus but cannot do that work any longer due to her foot injury, and because bumps in the road cause too much stress on her back. On cross-examination, claimant testified that in her job as a vault supervisor, she supervised four or five employees and trained new employees. She did employee evaluations and was involved in the hiring, promotion and firing of employees. She had previously worked in a call center supervising 25 or more employees. She has a smartphone and uses email. She used a computer in her job as a vault supervisor.

After listening to claimant's testimony and summations by the parties, the WCLJ classified claimant permanently partially disabled, found that she had a 91% LWEC, brought awards up to date, directed continuing payments at the permanent partial disability rate of \$536.67 per week, and approved a fee of \$5,700.00 to claimant's attorneys pending the submission of a written fee application. Counsel for the carrier noted an exception on the record. The findings and awards made at the July 13, 2021, hearing are reflected in a decision filed July 16, 2021.

The carrier requested administrative review, arguing that claimant should be found to have a 51% LWEC.

In rebuttal, claimant argued that the 91% LWEC found by the WCLJ is supported by the evidence in the record.

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 Emt. Group](#), 166 AD3d 1269 [2018] [internal quotation marks and citations omitted]; WCL § 15[3][[w]]).

*4 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 credible medical evidence in the record supports a finding that claimant has a permanent impairment of the lumbar spine of E severity, a permanent impairment of her right foot, and is capable of performing sedentary work.

At the time of classification, claimant was 61 years old. Due to her disability, claimant can no longer perform her prior jobs as a vault manager, school bus driver, or hairdresser, which are aggravating factors. Claimant has a high school degree, has significant supervisory experience, has computer experience, and can read, write, and speak well in English, 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 75%.

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, claimant's medical impairment, functional capability, and vocational factors set forth above support a finding that claimant has a 25% wage earning capacity. Therefore, the rate of compensation in a benefit week in which this claimant is not working is set at \$442.31.

Therefore, the Full Board finds that the preponderance of the credible evidence in the record supports a finding that claimant has a 75% loss of wage earning capacity, a 25% wage earning capacity, and having due regard for the status of the claimant and the work performed, that claimant's attorneys should be awarded a fee of \$4, 500.00.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed July 16, 2021, is MODIFIED to find that claimant has a permanent lumbar spine impairment of E severity. The claimant is capable of performing work involving sedentary physical demands. The claimant has a loss of wage earning capacity of 75% in the same employment or otherwise. ACCORDINGLY, the claimant is entitled to wage loss benefits not to exceed 400 weeks. At the time of classification, the claimant is not working and is entitled to continuing payments of \$442.31 per week. The carrier is directed to continue payments at the \$442.31 permanent partial disability rate. An attorney's fee of \$4, 500.00 is approved as a lien on the awards. No further action is planned by the Board at this time.

*5 Clarissa Rodriguez
Chair

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