

2022 WL 18359883 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: MTA BUS COMPANY

Case No. G193 7948

Carrier ID No. 17-0031492-001 W838825

December 27, 2022

*1 MTA Bus Company
Attn: Ron Akbar
128-15 28th Avenue
Flushing, NY 11354
Date of Accident 5/20/2017

The Full Board, at its meeting held on December 20, 2022, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed on July 8, 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 was permanently partially disabled and has an 85% 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 August 5, 2022, arguing that the record supports a finding that he has an 85% LWEC based on his significant physical impairment and limiting vocational factors. 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\(3\)](#).

The self-insured employer (SIE) did not file a timely rebuttal.

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

FACTS

Claimant, a bus operator, sustained multiple injuries in a work-related accident on May 20, 2017. This claim is established for injuries to claimant's neck, back, left shoulder, and right elbow, and his average weekly wage was set at \$2, 628.43.

Claimant's treating physician, Dr. Bansal, submitted a C-4.3 (Doctor's Report of MMI/Permanent Impairment), based on an August 29, 2019, examination, finding that claimant had reached maximum medical improvement (MMI) and had a "10% loss of use to the left shoulder" and a "5% loss of use of the right elbow." In an attached narrative report, Dr. Bansal stated that he had "been primarily taking care of [claimant's] right elbow and left shoulder" and deferred to the physicians treating claimant's back and neck injuries with respect to permanency of those injuries.

In a C-4.3 based on a September 16, 2019, examination, claimant's treating physician, Dr. Marini, found that claimant had reached MMI, had a severity E permanent impairment of his cervical spine, and a severity F permanent impairment of his lumbar spine. Dr. Marini found that claimant was capable of doing sedentary work.

Claimant was examined by the carrier's consultant, Dr. Semble, on October 14, 2019. In the resulting IME-4 (Independent Examiner's Report of Independent Medical Examination), Dr. Semble found that claimant had a 20% schedule loss of use based on his left shoulder injury, no schedule loss of his right elbow injury, and permanent impairments of his cervical and lumbar spine of severity “2A.” Dr. Semble found that claimant could lift/carry/pull/push up to 10 pounds frequently and was capable of doing sedentary work.

*2 Dr. Semble was deposed on May 21, 2020, and testified that he examined claimant on four occasions. Claimant has not had any causally related surgeries and at the time of his most recent examination, on October 14, 2019, claimant was no longer receiving active treatment and had reached MMI. On cross-examination, Dr. Semble testified that claimant was not capable of returning to work as a bus operator. Dr. Semble testified that the findings reflected in an October 2017 MRI of claimant's neck, which included disc herniations at several levels and C5 nerve root impingement, preexisted his May 20, 2017, accident, and were not the source of his neck symptoms. Dr. Semble believed that the cause of claimant's neck symptoms was “musculoskeletal and musculoligamentous with no neurologic deficit” (Deposition, Dr. Semble, 5/21/20, p. 13). Dr. Semble testified:

The [cervical] MRI indicates nerve root impingement, yes. I am saying, clinically, there is no evidence of that. That's why I came up with a 2A.

2A is basically correlative findings. Every 65-year-old has a laundry list of findings. It is only when they correlate, does it impact on the ultimate impairment rating and, in my exam, there was no neurologic deficit or any evidence of nerve root impingement. (id.). Dr. Semble testified that the findings reflected in a November 2017 MRI of claimant's lumbar spine, which included [herniated discs](#) at multiple levels and impingement of the L3 nerve root, “are age-related and don't correlate with the physical exam” (p. 14). According to Dr. Semble, “[t]here is no correlation of those findings to his clinical exam and that's where I come up with a 2A” (id.).

Dr. Bansal was deposed on May 28, 2020, and testified that his treatment of claimant focused on his left shoulder and right elbow injuries. On cross-examination, Dr. Bansal testified that he based his findings on the passive range of motion of claimant's shoulder and elbow. Dr. Bansal would restrict claimant from lifting more than five to ten pounds based on his elbow and shoulder injuries, and believed that claimant was capable of performing sedentary work.

The claimant submitted a VDF-1 (Loss of Wage Earning Capacity Vocational Data Form) on June 8, 2020, indicating that he had attended some college, had worked for over 18 years as a “bus operator/new operators line trainer,” and spoke, read, and wrote well in English.

Dr. Marini was deposed on June 18, 2020, and testified that he first examined claimant on April 12, 2018, and diagnosed causally related “[cervical disc disorder](#) with [radiculopathy](#) with occipital atlantoaxial disorder” and ““herniation of the lumbar spine” (Deposition, Dr. Marini, 6/18/20, p. 8). When asked whether the results of the MRIs of claimant's cervical and lumbar spine were consistent with his clinical finding, Dr. Marini responded: “Yeah, I think there is disc pathology at the neck and back. Based upon my examination, it did reveal an indication that there is nerve root dysfunction in the cervical and lumbar spine” (p. 10). An EMG of claimant's lower back performed in May 2018 “revealed a left L4/L5 [radiculopathy](#) and a prolonged H-reflex, which is suggestive of a S1 [radiculopathy](#)” (id.). On cross-examination, Dr. Marini testified that although it was not possible to tell which diagnostic test findings were degenerative, as opposed to traumatic, the EMG reflected “somewhat of an acute to chronic [radiculopathy](#)” (p. 15). Claimant has difficulty walking for long distances, and sitting or standing for long periods of time, due to his back pain and radicular pain.

*3 The carrier raised the issue of labor market attachment and in a decision filed July 14, 2020, the WCLJ directed claimant to produce evidence of his job search. Based on that direction, the claimant subsequently produced evidence documenting his job search.

At a hearing on January 11, 2022, claimant testified concerning his job search and the vocational factors relevant to his LWEC. Claimant testified that he has not worked since his May 20, 2017, accident. After hearing claimant's testimony and summations by the parties concerning claimant's job search efforts, the WCLJ found that claimant was not attached to the labor market.

With respect to his relevant vocational factors, claimant testified that he attended college at night for two years but stopped when his first child was born and did not graduate. He worked as a bus driver for over 20 years. Prior to that he worked as a receiving manager at a department store where he managed more than 100 employees. He uses a computer but is "not good with" it (Hearing Transcript, 1/11/22, p. 31). He uses a flip phone. He is 66 years old.

After hearing claimant's testimony regarding his vocational factors and summations by the parties with respect to his LWEC, the WCLJ found that claimant has an E severity permanent impairment of the neck and an F severity permanent impairment of the back based on the opinion of Dr. Marini, and a 20% schedule loss of use of the left shoulder (arm) and 0% loss of use of his right elbow (arm) based on the opinion of Dr. Semble. The WCLJ found that, based on claimant's physical impairment and vocational factors, he had an 85% LWEC, but made no awards because claimant was not attached to the labor market. The findings made at the January 11, 2022, hearing are reflected in a decision filed January 14, 2022.

The SIE requested administrative review, arguing that claimant should be found to have an LWEC of no more than 35%. In rebuttal, claimant argued that the WCLJ decision should be affirmed.

LEGAL ANALYSIS

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).

*4 Here, the Full Board finds that the record supports the WCLJ's finding that claimant has a permanent impairment of the neck of E severity, a permanent impairment of the back of F severity, and a permanent impairment of his left shoulder that constitutes a 20% schedule loss of use of the left arm. Claimant is capable of performing sedentary work. At the time of classification, claimant was 66 years old and had worked for 20 years as a bus operator, a job he can no longer perform due to his disability, which are aggravating factors. His limited computer proficiency is also an aggravating factor. However, claimant reads, writes, and speaks well in English, graduated from high school and attended two years of college, stopping for personal reasons, and has managerial experience, having supervised over 100 employees while working as a receiving manager at a department store, all of which are mitigating factors.

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 a finding that claimant has a 75% LWEC.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed on January 14, 2022, is MODIFIED to find that the claimant has a loss of wage earning capacity of 75%. The decision otherwise remains in effect. No further action is planned at this time.

Clarissa Rodriguez
Chair

2022 WL 18359883 (N.Y.Work.Comp.Bd.)

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.