

2022 WL 739176 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: DELTA AIR LINES INC

Case No. G187 7341

Carrier ID No. 301776305140001 W112502

March 7, 2022

\*1 Indemnity Ins. of N America  
P.O. Box 5122  
Scranton, PA 18505-0554  
Severance, Burko, Spalter,  
Masone & Laurette PC  
16 Court Street, Suite 2400  
Brooklyn, NY 11241  
Aggregate Trust Fund  
c/o State Insurance Fund  
P.O. Box 66699  
Albany, NY 12206  
Jones Jones LLC  
5 Hanover Square, Suite 1001  
New York, NY 10004  
Date of Accident 3/31/2017

The Full Board, at its meeting held on February 15, 2022, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed November 8, 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 has an 80% LWEC.

The unanimous Board Panel modified the WCLJ decision to find that the claimant has a 70% LWEC.

The claimant filed an application for Full Board Review on December 5, 2021, arguing that the record supports a finding that she has an 80% LWEC and that the WCLJ's August 5, 2021, decision should be affirmed.

The carrier filed a rebuttal on December 30, 2021, arguing that the decision of the unanimous Board Panel should 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

On March 31, 2017, claimant was injured when she slipped and fell at work. This claim is established for injuries to claimant's neck and back and her average weekly wage was set at \$806.93.

Claimant underwent a cervical hemi vertebrectomy at C5 and C6 and a [cervical discectomy](#) at C5-6 on July 24, 2018, performed by Dr. Lattuga. On September 26, 2019, Dr. Lattuga performed a lumbar fusion and [discectomy](#) at L4-S1.

On February 17, 2021, claimant was examined by the carrier's orthopedic consultant, Dr. Glassman. In the resulting IME-4 (Independent Examiner's Report of Independent Medical Examination), Dr. Glassman found that claimant had reached maximum medical improvement (MMI) and had a class 3, severity B permanent impairment of the cervical spine and a class 4, severity F permanent impairment of her lumbar spine. Dr. Glassman found that claimant “is capable of working remotely from home and performing activities of daily living with restrictions and limitations of no lifting greater than 7.5 pounds, no repetitive bending at waist and no sitting, standing or walking greater than 20 minutes without a 5 minute rest period or change of position.”

Claimant's treating physician, Dr. Mikelis, submitted a C-4.3 (Doctor's Report of MMI/Permanent Impairment) based on a May 12, 2021, examination. Dr. Mikelis found that claimant had reached MMI and had a severity E permanent impairment of the cervical spine and a severity F permanent impairment of the lumbar spine. Dr. Mikelis noted numerous functional restrictions, including occasionally lifting or carrying up to four pounds, pulling or pushing up to eight pounds, and occasionally sitting, standing, walking, climbing, kneeling, bending/stooping/squatting, and reaching overhead.

\*2 The claimant submitted a VDF-1 (Loss of Wage Earning Capacity Vocational Data Form) on May 18, 2021, which indicated that she spoke, read and wrote well in English, had graduated from college, trained to be a licensed practical nurse, worked for 12 years as a 911 dispatcher, and worked for 10 years for Delta Airlines, where she was injured.

Dr. Mikelis was deposed on June 30, 2021, and testified that claimant was capable of performing less than sedentary work. According to Dr. Mikelis, claimant had some difficulty sleeping and had difficulty performing the activities of daily living, including cooking, cleaning, bathing, personal grooming and dressing, and required assistance to put on her shoes and socks. Dr. Mikelis further testified that claimant had difficulty sitting for more than 30 to 60 minutes, standing for more than 15 to 20 minutes, and walking more than one or two blocks with rest breaks. On cross-examination, Dr. Mikelis testified that claimant experienced some improvement as a result of her surgeries, “but continued to have some residual pain and symptoms consistent with the preoperative condition” (Deposition Transcript, 6/30/21, p. 15).

Dr. Glassman was deposed on July 15, 2021, and testified on cross-examination that claimant reported using a cane for assistance at all times and that she needed assistance with the activities of daily living. According to Dr. Glassman, claimant was capable of performing sedentary work.

At a hearing on August 2, 2021, the WCLJ initially found that claimant has a severity E permanent impairment of the cervical spine, a severity F permanent impairment of her lumbar spine, and was capable of doing less than sedentary work. Claimant was then sworn in and testified that she is 66 years old and was born in Guyana, where she completed college and was trained as a teacher. She moved to the United States permanently in 2001. After emigrating she briefly worked for American Express and then got a job as a 911 dispatcher, where she remained until retiring in 2012. She began working part time for Delta Airlines in 2011, in customer service, and eventually became a supervisor there. She is computer literate. Her job as a supervisor with Delta sometimes required her to lift baggage. On cross-examination, claimant testified that she completed the training to be a licensed practical nurse, but never worked as one because she went to work for Delta. While at Delta she would supervise more than 20 people.

After listening to claimant's testimony and summations by the parties, the WCLJ found that claimant has an 80% LWEC, brought awards up to date, directed the carrier to continue payments at the permanent partial disability rate of \$431.80 per week, and directed a fee of \$4,300.00 payable to claimant's attorneys. The findings and awards made at the August 2, 2021, hearing are reflected in a decision filed August 5, 2021.

The carrier requested administrative review, arguing that claimant should be found to have a sedentary work capacity and an LWEC of between 65% and 75%.

\*3 In rebuttal, claimant argued that the WCLJ decision should be affirmed.

## 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, the record reflects that claimant is permanently partially disabled, has a severity E permanent impairment of the cervical spine, a severity F permanent impairment of her lumbar spine, and retains some residual work capacity, subject to the physical restrictions credibly found by Dr. Glassman.

As for her vocational factors, claimant was 66 years old at the time of her classification, which is an aggravating factor. However, she has a college degree, is computer literate, speaks, reads and writes well in English, has experience as a 911 dispatcher, and has supervisory experience, all of 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 70%.

### 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]).

\*4 Here, claimant's medical impairment, functional capability, and vocational factors set forth above support a finding that claimant has a 30% wage earning capacity.

In addition, the Board Panel finds based on the above and the services provided on the claimant's behalf, that an attorney's fee in the amount of \$3, 700.00 is adequate and equitable for services provided on the claimant's behalf.

#### CONCLUSION

ACCORDINGLY, the WCLJ decision filed August 5, 2021, is MODIFIED to find that the claimant has a 70% LWEC, which entitles her to 375 weeks of post-classification lost wage benefits at a \$377.83 weekly rate, a 30% wage-earning capacity, and an attorney's fee of \$3, 700.00. The balance of the decision remains unchanged. No further action is planned at this time.

Clarissa Rodriguez  
Chair

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