

2022 WL 2388880 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: LOWE'S HOME CENTERS INC

Case No. G064 5647

Carrier ID No. 301211351940001 W515506

June 23, 2022

\*1 Sedgwick Claims Management Services, Inc.

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Date of Accident 11/12/2012

The Full Board, at its meeting on June 14, 2022, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed February 17, 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 the claimant is permanently partially disabled, has a 90.00% LWEC, and is totally industrially disabled.

The unanimous Board Panel modified the WCLJ decision to find that the claimant has a 75.00% LWEC, and that she is not totally industrially disabled, without prejudice.

The claimant filed an application for Full Board Review on March 1, 2022, arguing that the Board Panel decision should be modified to find that she has a 90.00% LWEC.

The self-insured employer (SIE) filed a rebuttal on March 24, 2022, arguing that the Board Panel's findings are supported by the record and should be affirmed.

Pursuant to [Workers' Compensation Law \(WCL\) § 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 [WCL § 35\(3\)](#).

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

#### FACTS

The present case is established for a November 12, 2012, injury to the low back, and a right hip condition, that occurred when the claimant was loading merchandise into a customer's car. The average weekly wage is set at \$355.42, and the claimant has been receiving awards for lost time since the date of the accident.

The claimant underwent multiple surgeries to her back, including a lumbar fusion involving L4-L5, L5-S1, and bilateral [hip surgery](#). A [spinal cord stimulator](#) was implanted in 2019 and subsequently revised in March 2021.

When the case came on calendar on April 6, 2020, the WCLJ directed both sides to produce medical evidence of permanency. This direction is reflected in the Notice of Decision filed on April 9, 2020, and it was affirmed by the Memorandum of Decision filed on June 15, 2020.

The claimant was evaluated on August 24, 2020, on behalf of the SIE by independent medical examiner Dr. Wiener, who opined that the claimant has a class 4 permanent impairment of the lumbar spine, with a G severity ranking, as well as a 7.50% schedule loss of use (SLU) of the right leg based on the right hip condition. Dr. Wiener found that the claimant has a capacity for sedentary work, at least on a part-time basis for 12 hours a week, and he noted that the claimant is, "too young and functional to be considered totally disabled on a permanent basis," (Form IME-4.3.B, Dr. Wiener, p. 2). The doctor recommended a functional capacity evaluation.

\*2 The SIE thereafter filed a Form RFA-2 (Request for Further Action by Carrier/Employer) requesting further action on the ground that the claimant's disability was now permanent.

In a Notice of Decision filed on December 21, 2020, the claimant was again directed to produce medical evidence of permanency for all sites utilizing Form C-4.3 (Doctor's Report of MMI/Permanent Impairment) by March 1, 2021.

The claimant's treating physician, Dr. Siegfried, subsequently filed a Form C-4.3 based on a December 19, 2020, examination and found a permanent impairment of the lumbar spine of G severity ranking. With regard to the claimant's work activities, the doctor stated, "I know of no employment/employer that would accommodate the restrictions that would be required" (Form C-4.3, Dr. Siegfried, p. 5). Dr. Siegfried listed the claimant's functional capabilities/exertion abilities as follows: may frequently lift/carry and pull/push 10 pounds, engage in simple grasping and fine manipulation, and reach at or below shoulder level; may occasionally sit, stand, walk, reach overhead, and drive a vehicle; and may never climb, kneel, bend, stoop, squat, nor operate machinery.

The claimant filed a Form VDF-1 (Loss of Wage Earning Capacity Vocational Data Form) on March 5, 2021, in which she noted that she had received some college education in the United States; that she reads, writes, and speaks English well; and that her work experience was as a cashier for the SIE.

As per the WCLJ decision filed on April 8, 2021, the claimant was given a final opportunity to produce permanency evidence with respect to the right hip by June 6, 2021.

The June 24, 2021, WCLJ decision found that no further adjournment would be granted for the claimant to produce additional medical evidence of permanency, and the parties were directed to depose Drs. Siegfried and Wiener.

Dr. Siegfried, who specializes in pain medicine, was deposed on August 12, 2021, and testified that the claimant could not work in any capacity, because she does not have the capability to stand, sit, or walk for any meaningful length of time that any reasonable employer would be able to accommodate due to her back injury. The doctor testified that the claimant did not complain of an inability to feed, bathe, or dress herself, nor did she complain of bladder or [bowel dysfunction](#). The doctor explained that the claimant could not perform sedentary work, because she cannot sit for any extended period of time. He agreed that the claimant would need to alternate between sitting and standing every 15 minutes. Dr. Siegfried testified that, theoretically, the claimant would be able to work a job within her many restrictions, but practically speaking, no employer would put up with those accommodations.

At his August 16, 2021, deposition, Dr. Wiener testified that the claimant is able to work at least four hours per day in a sedentary position, three days per week, with periods of rest and recovery throughout the time she was required to sit. The doctor explained that he recommended a functional capacity evaluation in order to determine the full extent of the claimant's limitations.

**\*3** The matter returned to the calendar on September 1, 2021. The claimant's attorney requested a finding of a permanent total disability, in accordance with Dr. Siegfried's opinion that the claimant is not able to meet the requirements of sedentary work because she cannot sit for most of the day. The SIE's representative maintained that the claimant's restrictions, while significant, do not prevent her from working in all capacities, and that Dr. Siegfried agreed that the claimant could work if her restrictions were accommodated. The WCLJ found that Dr. Siegfried had conceded to the claimant's minimal wage earning capacity with restrictions, and that precluded a finding of a permanent total disability.

The claimant then gave her testimony with respect to vocational factors. The claimant testified that her date of birth is November 28, 1983. She completed high school and attended community college for a year and a half, as an English major, but did not earn a degree. At the time of the accident, her position with the SIE included work as a cashier, stocking shelves, and assisting customers with carrying out their merchandise. The claimant testified that she is unable to return to her usual job because she is not able to stand still due to pain. She previously worked for Modell's, as an apparel manager, but she could not go back to that type of position because it required heavy lifting, moving displays, and climbing on ladders. She also worked at Staples, as a front-end manager, responsible for settling the cash, performing customer service, and helping with scheduling. She could no longer perform those tasks, due to her inability to stand and sit for more than five minutes before she needs to change positions. The claimant had a functional capacity evaluation more than four years ago, but she did not undergo a [work-hardening](#) program. She testified that she was able to, "get by," with her activities of daily living (Hearing Transcript, 9/1/21, p. 12). The claimant also testified that she can use email and Twitter, but she lacks proficiency in office programs, such as Excel, although she could learn those skills if she was provided training. The claimant drives short distances and can shop using a cart to support herself. She is able to care for her eight-year-old child. The claimant is proficient in reading, writing, and speaking in the English language.

The parties gave their summations following the claimant's testimony, and the WCLJ then found the claimant to have a lumbar spine condition of G severity and, "a significant SLU of the hip," with a less than sedentary exertional ability (id., p. 21). In terms of vocational factors, the WCLJ found mitigating factors based on the claimant's age, English proficiency, and ability to care for her young child. Education was neutral-to-mitigating because she did not receive a degree. The lack of computer skills was neutral. The claimant's work experience was both limiting, because she could not perform any physical work, including standing, but was also mitigating, in that she had some management experience. A further limiting factor was the claimant's inability "to really perform a lot of activities of daily living" (id., p. 22). A significant limiting factor was that the claimant's physical impairment and restrictions render her unemployable, based upon Dr. Siegfried's testimony. The WCLJ set the claimant's LWEC at 90.00% and also found that she has a total industrial disability. An award was made from June 21, 2021, to September 1, 2021, at \$207.33 (temporary partial disability) per week, with a direction for continuing payments at \$236.95 (total industrial disability) per week. The claimant's attorney was granted a fee of \$2, 400.00, Dr. Siegfried was awarded a deposition fee, and it was determined that no Aggregate Trust Fund deposit was required. The Notice of Decision filed on September 7, 2021, memorialized the WCLJ's findings.

## 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).

Here, there is no dispute that the claimant has a permanent impairment of the lumbar spine of class 4, Severity Ranking G, as well as a right hip condition. Independent medical examiner Dr. Wiener opines that the claimant can perform sedentary work on at least a part-time basis. Dr. Siegfried concedes that the claimant can theoretically perform a job within her many restrictions, particularly if her need to alternate between sitting and standing every 15 minutes is accommodated. Dr. Wiener and Dr. Siegfried found similar functional capabilities/exertion abilities, with Dr. Siegfried finding that the claimant could frequently lift/carry/pull/push 10 pounds, and Dr. Wiener finding that the claimant could perform these tasks occasionally. Dr. Wiener found that the claimant may frequently sit, while Dr. Siegfried found that she could do so only occasionally. Both doctors agree that the claimant may frequently perform simple grasping, fine manipulation, and reaching at or below the shoulder level, and both agree that the claimant may occasionally drive. Based on the record, there is sufficient evidence to find that the claimant is capable of sedentary work activities.

As to the claimant's vocational factors, the claimant's aggravating factor (her inability to perform her prior work that involved standing for long periods of time and lifting) is outweighed by her many mitigating factors (young age, level of education, English proficiency, management/supervisory experience, the claimant's testimony that she could likely be trained in additional computer skills, and her ability to drive short distances).

Therefore, based on the claimant's medical impairment, functional impairment and vocational factors, the preponderance of the evidence in the record supports the finding that the claimant has an LWEC of 75.00%, and, pursuant to [WCL § 15\(3\)\(w\)](#), is entitled to permanent partial disability benefits not to exceed 400 weeks.

## Wage Earning Capacity

\*5 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 she has a 25.00% wage earning capacity. Therefore, the rate of compensation in a benefit week in which the claimant is not

working is set at \$177.71, and the claimant is entitled to permanent partial disability benefits of \$177.71 per week, not to exceed 400 weeks.

#### CONCLUSION

ACCORDINGLY, the WCLJ decision filed on September 7, 2021, is MODIFIED to find the claimant is capable of sedentary work; to find claimant has an LWEC of 75.00% and is entitled to wage loss benefits not to exceed 400 weeks. At the time of classification, claimant is not working and is entitled to continuing payments of \$177.71 per week. The SIE is directed to continue payments at the \$177.71 permanent partial disability rate. The award of the attorney's fee is reduced to \$1,600.00. The finding that claimant is totally industrially disabled as a result of this work-related injury is RESCINDED, without prejudice. The decision is otherwise AFFIRMED. No further action is planned by the Board at this time.

Chair - Clarissa Rodriguez

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