

2022 WL 17549463 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: VILLAGE OF GOSHEN MAYOR

Case No. G239 0676

Carrier ID No. VGOS-006-18 W848139

December 6, 2022

\*1 NY Municipal WC Alliance

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Date of Accident 12/7/2018

The Full Board, at its meeting on November 15, 2022, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed July 28, 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 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 August 22, 2022, arguing that the Board Panel decision should be reversed and the WCLJ's finding of an 80% LWEC should be reinstated based on the claimant's testimony and his lumbar spine impairment of J severity.

The self-insured employer (SIE) filed a rebuttal on September 20, 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 an occupational disease involving the back that was contracted while the claimant was working for the SIE as a police officer. The date of disablement was set at December 7, 2018, and the average weekly wage has been determined to be \$2, 017.53.

According to the medical record, the claimant underwent a [laminectomy](#), [discectomy](#), and lumbar fusion at L4-L5 on March 12, 2019.

The claimant was evaluated on behalf of the SIE on July 8, 2021, by independent medical examiner Dr. Soyer, who diagnosed the claimant with a causally related exacerbation of lumbar spine [spondylosis](#), status post L4-5 decompression and fusion. The doctor found the claimant to be at maximum medical improvement, and opined that he has a permanent medical impairment to the lumbar spine of Class 4, Severity Ranking F. Dr. Soyer filed a Form IME-4.3B as an addendum to his report on July 23, 2021. The doctor indicated that the claimant is capable of performing sedentary work.

The claimant was thereafter directed to produce medical evidence of permanency. Dr. Radna examined the claimant on October 12, 2021, and filed a Form C-4.3 (Doctor's Report of MMI/Permanent Impairment). Dr. Radna indicated in his narrative that the claimant's principal impairing diagnosis is musculo-skeletal/mechanical spinal pain. In his Form C-4.3, the doctor opined that the claimant has a permanent medical impairment to the back of Class 4, Severity Ranking J. With respect to the claimant's exertional ability, Dr. Radna opined that the claimant was only capable of less than sedentary work. Dr. Radna utilized the January 2012 version of Form C-4.3 that included the category of “Less than Sedentary Work”. Subsequent versions of the form no longer include that category.

\*2 Dr. Radna testified by deposition on February 1, 2022, that he began treating the claimant on November 2, 2020. At the October 12, 2021, examination, Dr. Radna found that the claimant had reached maximum medical improvement and has a medical impairment of J severity to the low back. The claimant had severe paravertebral spasm, which is an objective physical finding, as well as subjective complaints that are consistent with the objective finding. The claimant's imaging findings are consistent with the objective finding and are severe [degenerative arthritis](#), disk desiccation, vacuum disk phenomenon, [scoliosis](#), and persistent impingement of the lumbar spine and related nerve roots. The claimant's exertional capacity is less than sedentary work because his need for periods of bed rest is unpredictable due to his lumbar spasm, making him unemployable. On cross-examination, Dr. Radna testified that he saw the claimant three times, including the permanency evaluation, and that the claimant advised at the first examination that he drove himself to the exam. Dr. Radna did not know whether the claimant had driven himself to the other two examinations. He reviewed multiple medical records from other providers, which included a postsurgical x-ray dated September 10, 2019, that showed the L4 [laminotomy](#) on the left side and lateral recess stenosis at L4-5 on the left side. The claimant did not use any assistive devices to ambulate, and he had no severe neurological deficits.

Dr. Soyer testified by deposition on February 11, 2022, that he examined the claimant on October 8, 2020, and July 8, 2021. The claimant had been working as a police officer and developed back pain over a period of time. After having conservative treatment, the claimant had spine surgery, including L4-5 decompression and fusion on March 12, 2019. The claimant drove to the July 8, 2021, examination at which he was found to have reduced range of motion of the lumbar spine in extension and lateral bending on both sides. The claimant had no spasm in the lumbar spine, with minimal tenderness, normal strength testing, and decreased sensation over the bilateral medial legs and feet. Straight leg testing was negative. Atrophy was noted in the left thigh. The claimant's diagnosis was an exacerbation of lumbar spine [spondylosis](#) and status-post L4-5 decompression and fusion. The claimant reached maximum medical improvement and has a lumbar spine impairment of Class 4, Severity F under the 2012 Guidelines. Points were given for positive imaging findings, sensory changes, and atrophy. The claimant was found to be capable of sedentary work.

The claimant submitted VDF-1 (Loss of Wage Earning Capacity Vocational Data Form) forms on December 16, 2021, and February 24, 2022. The claimant indicated that he was a college graduate and had worked for the SIE as a police officer and

instructor (general topics and firearms) for 17 years. He had served in the U.S. military as a Marine, received specialized work training, and took numerous courses related to his police work. The claimant also indicated that he speaks, reads, and writes well in the English language.

\*3 At the hearing held on February 28, 2022, the claimant testified that he was 58 years old. He is a college graduate with a bachelor's degree. He had been working for the SIE for the past 10 years as a police officer and instructor, the duties of which included responding to critical incidents, investigating, effecting arrests, and working as a firearms instructor for the police department. As of the date of his testimony, he was not able to work as either a police officer or firearms instructor due to his bone diseases, such as [spondylosis](#). He is capable of driving but sitting for prolonged periods of time causes him severe pain. He has a home computer and smartphone and he knows how to use both. At the completion of the testimony, the claimant's attorney asked for a finding of a permanent total disability or, in the alternative, a finding of an 85% LWEC. The SIE's representative argued that the opinion of independent medical examiner Dr. Soyer was the most credible and that the claimant should be found to have a 60% LWEC. The WCLJ found that claimant was permanently partially disabled and had an 80% LWEC, noting on the record that mitigating factors included the claimant's age of 58, his level of education, and his English proficiency. The WCLJ found the claimant's work experience to be both mitigating (transferrable skills from police work to other work) and aggravating (the claimant's inability to return to the job that he was trained to do and had done for most of his career). The WCLJ also found that the claimant's physical limitations, as testified to by both Dr. Radna and Dr. Soyer, are an aggravating factor. The WCLJ additionally found that the claimant has, at the least, average computer skills.

As memorialized in the March 3, 2022, Notice of Decision, the WCLJ found the claimant to have a permanent partial disability, with a permanent medical impairment to the lumbar spine of J severity, and also found him capable of performing sedentary work. The WCLJ set the LWEC at 80%, thereby entitling the claimant to wage loss benefits not to exceed 425 weeks. Awards were brought up to date from December 16, 2021, to February 28, 2022, at \$904.74 (temporary partial disability) per week, with a direction for continuing payments at \$904.74 (permanent partial disability) per week. Attorneys' fees totaling \$9,000.00 were approved as a lien on the awards: \$8,000.00 to the Roth Law Group and \$1,000.00 to Pasternack, Tilker, et al. No further action was directed.

A supplemental Notice of Decision was issued on March 23, 2022, releasing the \$9,000.00 attorneys' fees.

The SIE requested administrative review, arguing that the record supported a finding that claimant has a 70% LWEC.

In rebuttal, claimant's attorneys argued that the WCLJ's finding that claimant has an 80% LWEC should be affirmed, but that the attorney's fees should be increased to \$13,500.00

## 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]]).

\*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 SIE does not dispute the finding of a permanent impairment of the claimant's lumbar spine of class 4, Severity Ranking J. Moreover, although Dr. Radna testified that the claimant is not capable of even sedentary work, the WCLJ and the Board Panel found that the claimant is capable of performing sedentary work physical demands, and the claimant did not request review of that finding in either his Form RB-89.1 (Rebuttal of Application for Board Review) or Form RB-89.2 (Application for Reconsideration/Full Board Review).

As to the claimant's vocational factors, claimant was 58 years old at the time of classification. That he can no longer work as a police officer is an aggravating factor. However, his education and training, computer knowledge, and English proficiency are all 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%, and, pursuant to [WCL § 15\(3\)\(w\)](#), is entitled to permanent partial disability benefits not to exceed 375 weeks.

#### 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, 1209 [2016]).

Here, the claimant's medical impairment, functional capability and vocational factors set forth above support a finding that he has a 30% wage earning capacity. Therefore, the rate of compensation in a benefit week in which the claimant is not working is set at \$904.74, which is the maximum statutory benefit rate pursuant to [WCL § 15\(6\)](#), and the claimant is entitled to permanent partial disability benefits of \$904.74 per week, not to exceed 375 weeks.

#### Attorneys' fee

\*5 Pursuant to [Workers' Compensation Law § 24](#), “the Board has broad discretion in approving an award of counsel fees” (Matter of [Fernandez v Royal Coach Lines, Inc.](#), 146 AD3d 1220 [2017]). The fee approved by the Board shall be “in an amount commensurate with the services rendered and having due regard for the financial status of the claimant and whether the attorney or licensed representative engaged in dilatory tactics or failed to comply in a timely manner with board rules” (12 NYCRR 300.17[f]). The fee awarded shall not be solely based on the amount of compensation awarded (id.).

Upon review of the file, the Board Panel finds that the fee of \$8, 000.00 to the Roth Law Group is commensurate with the services rendered. The attorney's request for a fee equivalent to 15 weeks of benefits is based on a statutory change that has yet to take effect. The changes to [Workers' Compensation Law § 24](#) cited in the claimant's rebuttal do not go into effect until January 1, 2023.

Therefore, the Full Board finds that, upon review of the record and based upon a preponderance of the evidence, there is sufficient evidence to find that the claimant has a 70% loss of wage earning capacity. In addition, the attorney fee of \$8, 000.00 to the Roth Law Group is supported by the record.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed on March 3, 2022, is MODIFIED to find the claimant has an LWEC of 70%, entitling him to wage loss benefits not to exceed 375 weeks, and to direct continuing awards at the permanent partial disability rate of \$904.74 per week. No further action is planned by the Board at this time.

Chair - Clarissa Rodriguez

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