

2026 WL 1134494 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: SOUTHEAST TOWERS

Case No. G304 5110

Carrier ID No. 012353001995WC01 W227508

April 20, 2026

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Date of Accident 9/24/2021

The Full Board, at its meeting held on March 17, 2026, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed December 22, 2025.

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 has an 81.25% LWEC.

The unanimous Board Panel modified the WCLJ decision to find that the claimant has a 60% LWEC.

The claimant's attorney filed an application for Full Board Review on January 15, 2026, arguing that the record supports a finding that claimant has an 81.25% LWEC.

The carrier filed a rebuttal on February 13, 2026, requesting that the Board Panel decision be affirmed in its entirety.

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

This claim is established for injuries to the neck, back, and left shoulder that resulted from an accident on September 24, 2021. The claimant's average weekly wage has been set at \$1, 590.32.

On March 31, 2023, Dr. Khabie, the claimant's orthopedic surgeon, performed left shoulder arthroscopic manipulation, release, and decompressive surgery, with labral and rotator cuff [debridement](#).

On April 10, 2024, Dr. Jacobs, the claimant's neurosurgeon, examined the claimant for neck and back pain, diagnosed sciatica, low back pain, cervicalgia, and other muscle spasm, and found that the claimant had not yet reached maximum medical improvement (MMI).

On July 10, 2024, the Board received a Doctor's Report of MMI/Permanent Impairment (C-4.3) from Dr. Jacobs dated July 8, 2024, and on page 1 of the report, the date of the examination was listed as April 10, 2024. On page 2 of the report, Dr. Jacobs found that the claimant was not at MMI and stated that there was no permanent partial impairment. However, on page 4 of the report, Dr. Jacobs opined that the claimant had a cervical spine permanent impairment of D severity, and an impairment of E severity for an unspecified body part. In a letter dated July 10, 2024, the claimant's attorney sought clarification from Dr. Jacobs regarding inconsistencies in the report. In a letter dated August 5, 2024, Dr. Jacobs responded and explained that he believes the claimant has a permanent partial impairment but has not reached MMI since he has not undergone any injections (ECF Doc ID #421329142).

***2** On June 26, 2024, Dr. Loguidice, the carrier's orthopedic consultant, examined the claimant and in his Report of Independent Medical Examination (IME-4), Dr. Loguidice found that the claimant had reached MMI, and he had a 65% schedule loss of use (SLU) of the left arm, a permanent cervical spine impairment of Class 3, B severity, and a lumbar spine impairment of Class 2, A severity. Dr. Loguidice found that the claimant was capable of light work.

On July 23, 2024, Dr. Wong, the claimant's physiatrist, examined the claimant and found that he had reached MMI as of the date of the examination. In the C-4.3 report, Dr. Wong deferred to Dr. Khabie for the left shoulder, but opined that the claimant had permanent cervical and lumbar spine impairments of A severity. Dr. Wong found that the claimant was capable of light work.

On August 19, 2024, Dr. Khabie examined the claimant and submitted a C-4.3 report. Dr. Khabie found that the claimant had reached MMI as of the date of the examination, he had a 50% SLU of the left arm, and was capable of sedentary work.

On October 18, 2024, the claimant submitted a VDF-1, and reported that he has a high school diploma or GED; he has received some specialized training and had a CDL that is now expired; and he had previously worked for 11 years as a maintenance superintendent (onsite) where his duties were to “maintain facilities - plumbing, electrical, landscape, snow removal etc.” The claimant indicated that he speaks English well but that when reading and writing, he has difficulty with comprehension and spelling.

On November 12, 2024, Dr. Wong testified that on July 23, 2024, he performed his evaluation of the claimant in accordance with the Board's impairment guidelines. The doctor made no changes to his opinion that the claimant has cervical and lumbar impairments of severity rank A and is able to perform light work. Dr. Wong would not defer to Dr. Jacobs for his cervical and lumbar spine permanency opinion.

On November 13, 2024, Dr. Jacobs testified and confirmed that as of April 10, 2024, the claimant had not reached MMI because he had not had [injections for his neck](#) pain. The doctor also confirmed that on his C-4.3 report, he completed the section for permanent partial disability, and that he gave a severity of D for the cervical spine. Dr. Jacobs was unable to explain why the C-4.3 report also notes an impairment of E severity, and testified that he mainly treats the claimant for his cervical spine. Dr. Jacobs opined that the claimant could work with restrictions of no lifting over 20 pounds and no excessive bending or stooping. A [cervical spine MRI](#) done in December 2023, showed disc bulging at C4-5, and disc herniation at C5-6 with mild to moderate

stenosis. However, Dr. Jacobs did not think that the claimant was a surgical candidate as his most recent examinations were pretty benign and he had a normal neurological examination. Thus, Dr. Jacobs wanted to see what benefit he received from injections. The claimant's work restrictions were related only to the neck. On cross-examination, Dr. Jacobs confirmed that when he prepared the C-4.3 report, he had also examined the lumbar spine. He would not agree that he intended to find a lumbar spine impairment of E severity because his [lumbar spine MRI](#) is pretty much normal. The claimant's back was totally benign and the focus of treatment has been the neck. If the claimant refused injections, he would be at MMI and Dr. Jacob's severity rank D opinion would not change. When the doctor evaluated the claimant for permanency, he did not use an assistive device and had no difficulty getting on or off the examination table.

*3 On November 19, 2024, Dr. Loguidice testified and made no changes to his opinion that as of his examination on June 26, 2024, the claimant has a permanent cervical spine impairment of Class 3, B severity, a lumbar spine impairment of Class 2, A severity, and a 65% SLU for the left shoulder injury. In the lumbar spine, there was minimal tenderness, but the examination was neurologically normal. Upon examination of the left shoulder, Dr. Loguidice observed tenderness to palpation and [muscle atrophy](#), which is essentially a frozen shoulder condition. Dr. Loguidice had examined the claimant previously in December 2022 and August 2023, and when the doctor examined him again in June 2024, the claimant's left shoulder motion was significantly decreased from the prior examinations. However, his cervical spine motion had improved since the prior examinations. Dr. Loguidice agreed that in June 2024, the claimant's condition had worsened. Dr. Loguidice testified that the claimant would be unable to lift anything more than a cup of coffee with his left shoulder. The doctor's opinion that the claimant was capable of light work was in consideration of the back and neck only, not the left shoulder. However, Dr. Loguidice did not agree that the left shoulder would limit the claimant to less than light work because he could lift with his right arm.

On December 3, 2024, Dr. Khabie testified that he conducted a permanency evaluation on August 19, 2024, but could not recall if he used a [goniometer](#) to measure left shoulder range of motion. He measured range of motion visually, both passively and actively, and took each measurement three times. Dr. Khabie found a 50% left arm SLU, which was based on the deficits in flexion and adduction range of motion.

At the hearing held on January 13, 2025, the claimant testified that he was 57 years old, did not graduate from high school but got a GED, and had been incarcerated for several periods between the late 1990s until about 2002. His last employer was the employer of record and he worked for them as an onsite superintendent doing all types of maintenance from June 2010, until the accident on September 24, 2021. His duties involved physical work: plumbing, electrical, buffing and stripping floors, cutting the grass, weeding, cutting trees, removing snow, operating machinery, digging, cleaning, washing, installing HVAC units, and doing all necessary repairs on the buildings and grounds. The claimant was able to do electrical work such as outlets and could send a picture of his work to a licensed electrician who could verify his work without having to come out, which saved the employer from being charged by the electrician. The claimant was also able to climb into spaces underneath cabinets or sinks to solder pipes for plumbing jobs. He cannot do this type of physical work anymore. In his work, he had to be able to move or lift things that were over 100 pounds. He was very rarely sedentary at his job. He needed help with paperwork at his job because he has difficulty with comprehension, reading, writing, and spelling. The claimant also has difficulties with concentration, but he is better at learning things by doing them or being shown how to do them. The claimant's first language is English, and as a child, he spoke and understood Italian because he had a grandmother who spoke Italian. However, he cannot really speak Italian anymore. The claimant is not very skilled with technology. He owns a smartphone but does not really know how to use it. He uses his phone to text family and friends, and he has an application on the smartphone for his banking. He used social media for a while but no longer does. The claimant used to have a commercial driver's license but no longer has it.

*4 After the claimant's testimony, the parties placed summations on the record. The claimant's attorney requested a finding of permanent total disability based on the medical evidence in the record. Alternatively, the claimant's attorney requested a 99% loss of wage earning capacity, arguing that the claimant has a significant loss of wage earning capacity because of his age, education level, prior incarcerations, limited computer skills, difficulty with writing and spelling, and work history that is limited to physical work that he is no longer able to do. The carrier requested a finding of permanent partial disability, with a 50% loss of wage earning capacity.

The WCLJ then made a decision, noting that all of the doctors agree with a light work capacity, and crediting Dr. Wong's impairment opinion of severity ranking A. The WCLJ also considered vocational factors and found that the claimant's age was a neutral factor and that he is proficient in English but that his education and work experience are aggravating factors. The WCLJ concluded that the claimant has an 81.25% LWEC. The WCLJ findings made at the hearing on January 13, 2025, are reflected in a decision filed January 16, 2025, in which the WCLJ brought awards up to date, found that the claimant is entitled to wage loss benefits not to exceed 450 weeks, directed the carrier to continue awards at the permanent partial rate of \$861.42 per week, and awarded a fee in the total amount of \$12, 900.00 to the claimant's attorneys (\$750.00 to the prior attorney and \$12, 150.00 to the current attorney).

The carrier requested administrative review, arguing that the claimant has no more than a 50% LWEC.

In rebuttal, the claimant requested that the decision be affirmed because the record supports the finding of an 81.25% LWEC.

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).

*5 Here, Dr. Wong opined that the claimant has cervical and lumbar impairments of severity rank A, and Dr. Loguidice opined that the claimant has a 65% SLU of the left arm. Both Dr. Wong and Dr. Loguidice found that the claimant is able to perform light work. Dr. Wong is more credible than Dr. Jacobs because Dr. Jacobs reported and testified that he did not believe that the claimant was at MMI. Further, Dr. Loguidice is more credible than Dr. Khabie regarding the amount of the left arm SLU because Dr. Khabie testified that he did not use a [goniometer](#) during his permanency evaluation.

Claimant was 57 years old at the time of classification, and has a GED, which are neutral to mitigating factors. He has a limited work history involving only physical work that he can no longer perform due to his injury, he was removed from the labor market for several years, and he has difficulty with concentration, and comprehension, reading, writing, and spelling in English, which are all aggravating factors. However, the claimant's VDF-1 and his testimony show that he is able to speak English well, and while he does not have strong computer skills, he testified that he is able to use his smartphone to do some tasks, and he has knowledge relative to various construction fields such as plumbing and electrical work, which are mitigating factors.

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 60%.

Wage Earning Capacity

Wage earning capacity (WEC) is used to calculate an injured worker's benefit rate. Where the non-scheduled permanently partially disabled 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” (Matter of 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 40% wage earning capacity.

Attorney fee

Based on the reduced LWEC amount, the attorney fee awarded by the WCLJ must also be reduced.

Pursuant to [WCL § 24\(2\)\(d\)](#), the attorney fee is 15% of the compensation due in excess of the employer or carrier's previous payments for permanent total or permanent partial disabilities, plus a sum equivalent to 15 weeks of compensation at the rate fixed by the Board.

*6 A 60% LWEC results in a weekly rate of awards of \$636.13. As such, the attorney fee is reduced to \$9, 541.95 (15 times \$636.13), pursuant to [WCL § 24\(2\)\(d\)](#). Based upon the apportionment of the fee set by the WCLJ at the hearing on January 13, 2025, the fee is payable \$553.43 to the prior attorney and \$8, 988.52 to the current attorney.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed January 16, 2025, is MODIFIED to find that the claimant has a 60% LWEC, which entitles the claimant to wage loss benefits not to exceed 350 weeks; to direct continuing awards at the permanent partial rate of \$636.13 per week; and to award an attorney fee of \$9, 541.95 (\$553.43 to the prior attorney and \$8, 988.52 to the current attorney). No further action is planned by the Board at this time.

Freida Foster
Chair

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