

2024 WL 2105725 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: KING ED TAXI INC

Case No. G271 9303

Carrier ID No. OR400122 W106884

May 2, 2024

*1 Weiss, Wexler & Wornow, PC
Attorneys-At-Law
233 Broadway
Suite 2201
New York, NY 10279
Hereford Insurance Company
% Alicia Jackson
36-01 43rd Avenue
Long Island City, NY 11101
Cohen & Siegel, LLP
14 Mamaroneck Ave, Ste 401
White Plains, NY 10601
Stewart, Greenblatt, Manning and Baez
6800 Jericho Turnpike
Suite 100W
Syosset, NY 11791
Date of Accident 4/2/2020

The Full Board, at its meeting held on April 16, 2024, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed on August 24, 2023.

ISSUE

The issue presented for Mandatory Full Board Review is whether there is sufficient evidence of a permanent total disability and if not, whether the loss of wage earning capacity (LWEC) is higher than 80%.

The Workers' Compensation Law Judge (WCLJ) found that the claimant has a permanent partial disability, with an 80% LWEC; made awards for the period from June 25, 2021, to December 23, 2022, at the tentative rate of \$150.00 per week; and directed the carrier to continue payments at the permanent partial (statutory minimum) rate of \$150.00 per week.

The Board Panel majority affirmed, finding that the claimant does not have a permanent total disability, but rather has a permanent partial disability; and that the record supports an LWEC of 80%.

The dissenting Board Panel member would find that, based on the medical evidence, functional impairment and vocational factors, the record supports an LWEC of 87%.

The claimant filed an application for Mandatory Full Board Review arguing that based on the medical evidence, the Board Panel majority incorrectly found a partial disability. As such, the Full Board should find a permanent total disability, arguing that “[t]he evidence clearly establishes the claimant cannot work.” In the alternative, the claimant requests an 87% LWEC, agreeing with the dissenting Board Panel member.

In rebuttal, the carrier argues that the Board Panel majority's decision on the issues of LWEC and permanent impairment is supported by a preponderance of the credible record.

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

FACTS

This claim is established for injuries to the neck, back, right shoulder, right knee, and left shoulder, which resulted from a motor vehicle accident on April 2, 2020, while the claimant was working as a taxi driver. The average weekly wage was set at \$250.00, without prejudice. In a decision filed on February 27, 2024, the WCLJ indicated that the parties have resolved the average weekly wage by stipulation. However, the stipulation has not yet been filed with the Board. Awards have been made for lost time at varying benefit rates since April 10, 2020.

The claimant had [CT scans](#) to the cervical and lumbar spines on May 7, 2020; [CT scans](#) to the right knee and right shoulder on June 8, 2020; and [CT scans](#) to the left shoulder and head on June 26, 2020. The claimant also had several EMG/NCV studies on dates between May 8, 2020, and July 30, 2021; and a [cervical spine x-ray](#) on September 11, 2020.

*2 Dr. Kim, the carrier's consulting chiropractor, examined the claimant on September 10, 2021, and submitted a Practitioner's Report of Independent Medical Examination (IME-4) with his findings, noting the claimant's complaints of pain in the neck, back, bilateral shoulders, bilateral hips, and bilateral knees. Upon examination of the neck and back, Dr. Kim observed reduced range of motion, but noted suboptimal effort during the examination; and found no muscle spasm, normal strength, intact reflexes and sensations, and negative testing. Dr. Kim further noted that the claimant had reduced right L3 distribution due to lack of effort. The doctor diagnosed cervical, lumbar, and thoracic spine sprain/strain with reports of subjective complaints, and found that the claimant had reached maximum medical improvement. Dr. Kim opined that the claimant has a mild to moderate (33%) degree of disability, and is capable of returning to work with a restriction to avoid lifting over 30 pounds.

Dr. Xethalis, the carrier's orthopedic consultant, examined the claimant on March 10, 2022, and submitted a form IME-4 with his findings, noting the claimant's complaints of pain in the neck, back, both shoulders and the right knee. Dr. Xethalis noted that the claimant ambulates with a normal gait, uses no assistive devices, and sits comfortably. Dr. Xethalis further noted that the claimant has had no surgery related to this accident. Upon examination of the neck and back, the doctor observed a mild spasm in the neck but no spasm in the thoracic or lumbar spine; reduced range of motion in the neck and lumbar spine; no atrophy; and normal strength, intact reflexes and sensations, and negative testing. Upon examination of the bilateral shoulders and right knee, the doctor observed no swelling, reduced range of motion, and negative objective testing. Dr. Xethalis diagnosed resolved cervical, thoracic, lumbar, bilateral shoulder and right [knee sprains/strains](#), and found that the claimant had reached maximum medical improvement. The doctor opined the claimant had no causally related permanency to either shoulder, a 10% schedule loss of use to the right knee, and Class 2 Severity Ranking “A” impairments to the cervical and lumbar spine, with no work restrictions.

Dr. Kim submitted an IME-4 report of another examination on March 17, 2022, and attached an IME-4.3B report of non-scheduled permanent partial disability. In the IME-4.3B report, the doctor opined that the claimant has Class 2 Severity Ranking “A” impairments to the cervical and lumbar spine. The functional capabilities section of the IME-4.3B report indicates restrictions of only occasional lifting/carrying and pulling/pushing but the amount of weight is illegible, and the category of claimant's exertional ability is not complete. In the attached narrative report, Dr. Kim specified that the claimant is capable of

working with restrictions to avoid lifting, carrying, pulling, or pushing greater than 40 pounds. It is noted that the findings upon examination of the neck and back are similar to those noted by Dr. Kim during his prior examination.

*3 Dr. Hall, the claimant's chiropractor, evaluated the claimant for permanency on June 15, 2022, and submitted a Doctor's Report of MMI/Permanent Impairment (C-4.3), in which he found the claimant had reached maximum medical improvement relative to the neck and back. The doctor opined that the claimant has a Class 4 Severity Ranking "F" impairment to the cervical spine, and a Class 4 Severity Ranking "G" impairment to the lumbar spine. Dr. Hall found the claimant's functional capability/exertion ability was less than sedentary work, and opined that the claimant should not do any work that involves kneeling, climbing, bending, stooping, squatting, reaching overhead, driving, operating machinery, or exposure to temperature extremes. Dr. Hall opined that the claimant was able to do occasional lifting/carrying and pulling/pushing to two pounds, occasional sitting, standing and walking, occasional simple grasping and fine manipulation, and occasional reaching at/below shoulder level.

Dr. Faierman, the claimant's treating orthopedist, evaluated the claimant for permanency on May 16, 2022, and submitted a C-4.3 report, in which he found the claimant had reached maximum medical improvement relative to the bilateral shoulders and the right knee. Upon examination, the doctor observed reduced range of motion, a positive impingement sign in the left shoulder, and a positive [McMurray test](#) in the right knee. Dr. Faierman diagnosed cervical and lumbar spine strain, right [knee internal derangement](#)/sprain, and bilateral shoulder internal derangement/sprain; and opined that the claimant has a 25% schedule loss of use of the left shoulder, a 10% schedule loss of use of the right shoulder, and a 20% schedule loss of use of the right knee.

On October 24, 2022, Dr. Kim testified and on cross-examination, the doctor noted the claimant's condition required the use of Table 11.1 of the Impairment Guidelines. Dr. Kim testified that claimant had no objective clinical findings consistent with a spinal pathology, and that the physical findings made during the claimant's examination did not correlate with any evidence of [cervical radiculopathy](#) that was noted in the EMG study. At the time of the first examination, Dr. Kim gave restrictions of no lifting over 30 pounds and no prolonged sitting. There were no major differences between the findings made during Dr. Kim's first and second examinations of the claimant.

On November 2, 2022, Dr. Hall testified that he first examined the claimant on April 10, 2020, and found him to be at maximum medical improvement on June 15, 2022. On cross-examination, the doctor stated that he used the Impairment Guidelines to find that based on the positive diagnostic testing, and clinical findings, the claimant had Severity Ranking of "F" to the cervical spine and Severity Ranking of "G" to the lumbar spine. Dr. Hall stated the claimant could return to some type of work that could fit his restrictions, but the doctor did not "believe he could participate in any realistic gainful employment" (Deposition, Dr. Hall, 11/2/22, p. 10).

*4 On November 3, 2022, Dr. Faierman testified that his opinion of permanency is based on limited range of motion and positive diagnostic imaging studies, noting the right shoulder and right knee [CT scans](#) on June 8, 2020, and the left shoulder [CT scan](#) done on June 26, 2020. On cross-examination, Dr. Faierman stated that his permanency opinion is limited to the shoulders and right knee only, but he did examine the cervical and lumbar spines. He saw the claimant on five occasions. When Dr. Faierman was asked to comment on whether the claimant could return to work, he stated that regarding the shoulders and the knee, the claimant would be unable to walk more than 200 feet per hour, and he is unable to perform any overhead reaching or lifting. The doctor was not commenting on the neck or back limitations but with respect to the shoulders and knee, the claimant had no restrictions that would restrict desk work as long as there is no overhead work.

On November 28, 2022, Dr. Xethalis testified that he found a 0% schedule loss of use for the shoulder because although there was some loss of range of motion, the job of a taxi driver does not require such motion. He opined a 10% schedule loss of use of the right knee due to limitation in flexion range of motion. When not taking his taxi driver job into consideration, the range of motion deficit in the shoulders is not important because it is his age and lifestyle that are causing the loss in motion. On cross-examination, the doctor noted the claimant had complaints of pain which could match with the EMG study results. However, the doctor noted that while the claimant refused to provide any information about prior injuries that were clear in x-ray studies, some of the positive EMG findings are probably due to the prior injuries seen in the x-rays. Dr. Xethalis measured

all ranges of motion three times with a [goniometer](#) although he only listed one measurement. The doctor conceded that his report does not confirm that he measured the left knee for comparison to the right knee. He also conceded that he did not inquire how the claimant spends his day relative to his ability to perform activities of daily living. However, Dr. Xethalis explained that the claimant was not very helpful because he refused to complete any questionnaires. When questioned about his decision to consider the claimant's job as a taxi driver when determining the amount of the schedule loss of use, Dr. Xethalis stated that the guidelines allow him to use his discretion and judgment.

On December 21, 2022, the claimant filed a Loss of Wage Earning Capacity Data Form (VDF-1) stating that he was born in 1947; he graduated high school in his native country of Jamaica; he received specialized training as an automobile mechanic; he did not serve in any military; he worked eight years as a taxi driver and nine years as a food service worker in a public school system; and that he reads, writes, and speaks English well.

Written summations were filed by the claimant and the carrier.

***5** At the hearing on December 22, 2022, the claimant testified that he is 75 years old. He received training to be an auto mechanic. Before he was injured, he had worked as a taxi driver for about 24 years. Before that, he was a cafeteria worker for about ten years. He has never supervised other employees. He does not own or operate a computer. He has an email address, but he does not use it. He cannot return to work as a mechanic, a food service worker, or a taxi driver due to his inability to lift and sit for a long time. When asked how he spends a typical day, the claimant stated that he attends physical therapy three times a week, and he practices putting (golf) intermittently six hours a day in his apartment. He confirmed that he has a smart phone with internet.

After the claimant's testimony, the parties gave their summations. The claimant requested a finding of permanent total disability or at least an 85% LWEC, and the carrier argued that the opinions of Drs. Kim and Xethalis were credible and that findings should be made in accordance with their testimony. The WCLJ noted the claimant's age, level of education, work experience, inability to return to work as an auto mechanic and food service worker, inability to sit for a prolonged period as required for a cab driver, and his inability to use a computer. The WCLJ noted the medical evidence and found the opinions of Dr. Xethalis and Dr. Kim to be lacking in credibility. The WCLJ found that based on the opinions of Drs. Hall and Fairman, the claimant has a Class 4 Severity Ranking of "G" to the lumbar spine and a Class 4 Severity Ranking of "F" to the cervical spine, and permanent injuries to both shoulders and the right knee. The WCLJ considered the medical impairment, along with the claimant's age, his limited education, and inability to return to his previous employment, and found that the claimant is capable of performing less than sedentary work, and that he has an 80% LWEC, entitling him to permanent partial disability benefits not to exceed 425 weeks. The WCLJ brought awards up to date at the tentative rate of \$150.00 per week, and directed continuing awards at the permanent partial rate of \$150.00 per week, subject to modification of the average weekly wage. Both parties noted objections to the LWEC finding. These findings and awards were memorialized in a decision filed December 28, 2022, and the claimant filed an application for review.

The claimant's attorney requested that the WCLJ decision be modified to find a permanent total disability because "when the claimant's medi[c]al restrictions are combined with his vocational restrictions, he clearly cannot work." The claimant argued that based on Dr. Hall's credible opinion, the claimant is unable to perform even sedentary work. Further, unlike Dr. Xethalis and Dr. Kim, Dr. Hall did not disregard the objective diagnostic studies, and Dr. Hall's exam findings are consistent with those diagnostic studies. The claimant also asserted that, based on concessions and contradictions made during the testimony of Dr. Xethalis and Dr. Kim, the opinions of those doctors are not credible.

***6** In rebuttal, the carrier requested that the WCLJ decision on the issue of LWEC be affirmed because it is based on the credible medical evidence and testimony in the record. The carrier argued that the record contains no evidence that the claimant has either a 100% impairment or any industrial disability. The carrier conceded that the claimant's advanced age is a limiting factor in his ability to find work but noted that neither his age nor any other circumstance prevented him from working before the accident. As such, the WCLJ properly found an 80% LWEC.

LEGAL ANALYSIS

Permanent total disability

“[A] permanent total disability is established where the medical proof shows that a claimant ‘is totally disabled and unable to engage in any gainful employment’ (Matter of [VanDermark v Frontier Ins. Co.](#), 60 AD3d 1171 [2009]; see [WCL] § 15 [1])” (Matter of [Williams v Preferred Meal Sys.](#), 126 AD3d 1259 [2015]).

Here, Dr. Hall opined that the claimant was capable of less than sedentary work, and restricted the claimant from any kneeling, climbing, bending, stooping, squatting, reaching overhead, driving, operating machinery, or exposure to temperature extremes. Dr. Hall also provided work restrictions that included occasional lifting/carrying, and pulling/pushing to two pounds, occasional sitting, standing and walking, occasional simple grasping and fine manipulation, and occasional reaching at/below shoulder level. Dr. Hall did not provide any opinion of total disability on his C-4.3 report, and testified that while it may be unrealistic, the claimant could return to some type of work if he was able to find something within his restrictions. Dr. Faierman reported and testified that based on the claimant's shoulder and knee conditions, he would be unable to walk very far but could perform desk work as long as there is no overhead work. Further, no health provider provided an opinion of permanent total disability or testified to the claimant's complete inability to engage in any gainful employment.

Therefore, the Full Board finds that the claimant does not have a permanent total disability.

LWEC

Turning to the issue of the proper amount of 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]).

*7 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 Full Board agrees that the WCLJ properly found that claimant has a Class 4 Severity Ranking of “G” to the lumbar spine and a Class 4 Severity Ranking of “F” to the cervical spine, and permanent injuries to both shoulders and the right knee. Based on the medical opinions in the record, the claimant's physical restrictions prevent him from returning to his prior employment as a taxi driver. However, based on Dr. Hall's opinion of functional capability/exertion ability, the claimant would be capable of performing sedentary work, only if he was able to find work that accommodates his several restrictions.

Claimant was 75 years old at the time of classification, he is unable to use a computer, he is capable of less than sedentary work, and has work experience that is limited to physically strenuous occupations with no supervisory skills, which are aggravating factors. However, he is a high school graduate, and is proficient in English, 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 the claimant has an LWEC of 87%, entitling him to permanent partial disability benefits not to exceed 475 weeks.

Wage Earning Capacity

Wage earning capacity 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 Full Board finds that claimant's medical impairment, functional capability and vocational factors set forth above support a finding that he has a 13% wage earning capacity.

Therefore, the rate of compensation in a benefit week in which the claimant is not working is set at the statutory minimum rate of \$150.00, and the claimant is entitled to permanent partial disability benefits of \$150.00 per week, not to exceed 475 weeks.

CONCLUSION

***8** ACCORDINGLY, the WCLJ decision filed December 28, 2022, is MODIFIED to find that claimant has an 87% loss of wage earning capacity, entitling him to wage loss benefits not to exceed 475 weeks. The rest of the WCLJ decision remains in effect. No further action is planned at this time.

Clarissa Rodriguez
Chair

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