



Robert E. Beloten
Chair

ADMINISTRATIVE REVIEW DIVISION
WORKERS' COMPENSATION BOARD
20 PARK ST
ALBANY, NY 12207
www.wcb.state.ny.us

State of New York - Workers' Compensation Board
In regard to ~~XXXXXXXXXX~~, WCB Case #8070 3905

MEMORANDUM OF BOARD PANEL DECISION

keep for your records

Opinion By: Mona A. Bargnesi
Ellen O. Paprocki
Freida Foster-Tolbert

The claimant requests review of the Workers' Compensation Law Judge (WCLJ) decision filed February 18, 2009.
The carrier filed a rebuttal.

ISSUES

The issues presented for administrative review are:

- (1) whether the maximum benefit weeks provision of WCL § 15(3)(w) applies to the award for permanent partial disability (PPD), and
- (2) whether claimant has a 50% loss of wage earning capacity.

FACTS

On March 17, 2007, claimant, then a 33 year old driver for an auto repossessing company in Buffalo, injured his back when he slipped, fell, and hit the metal edge of the flatbed truck while unloading a car. He was diagnosed with an acute annular tear at L-4/L-5 with widening of the facet joints. He has been treated with exercise, physical therapy, and chiropractic treatment. Surgery has not been recommended.

The case was established for the low back. The average weekly wage was set at \$298.53.

Claimant's treating physician, Dr. Cowan, in a report dated January 2, 2008, opined that claimant has a moderate, permanent partial disability (PPD), and is unable to perform any heavy work but may be able to perform light duty work. He recommended him for job retraining with VESID.

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| Claimant - | XXXXXXXXXX | Employer - | Buffalo Auto Recovery Svd |
| Social Security No. - | | Carrier - | State Insurance Fund |
| WCB Case No. - | 8070 3905 | Carrier ID No. - | W204002 |
| Date of Accident - | 03/19/2007 | Carrier Case No. - | 62110838-081 |
| District Office - | Buffalo | Date of Filing of this Decision - | 11/12/2009 |

ATENCION:

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Dr. Galpin, the carrier's consultant, in a report dated April 15, 2008, agreed with Dr. Cowan's opinion. He notes Dr. Cowan's restrictions on lifting no more than ten pounds, and restrictions on bending and stooping.

By decision filed April 29, 2008, the WCLJ classified claimant with a moderate (50%) PPD and directed payments at the permanent partial rate of \$99.51 from April 25, 2008, onward. No party requested administrative review of that decision.

In January 2009, the carrier filed form RFA-2, requesting that the continuing payments be suspended as claimant had not produced evidence of a job search. The Board subsequently notified the parties of a hearing on the issue of wage earning capacity.

At the hearing on February 12, 2009, and in the resulting decision filed February 18, 2009, the WCLJ again classified claimant as having a PPD and found that claimant, based upon the opinions of Drs. Cowan and Galpin and the New York Impairment Guidelines (1996 Medical Guidelines), has an impairment of 50% which demonstrates a loss of earning capacity of 50% in the same employment or otherwise. Although claimant was not present at the hearing, claimant's counsel noted that claimant had returned to work on February 9, 2009, and thereupon the WCLJ held awards in abeyance after that date. The WCLJ additionally found that claimant was entitled to wage loss benefits not to exceed 300 weeks pursuant to WCL § 15(3)(w).

Legal counsel for the claimant filed an application for administrative review of the WCLJ's February 18, 2009, decision. He contends that it was premature to place a 300 week cap on claimant's ongoing benefits pursuant to WCL § 15(3)(w) as claimant was presently working, perhaps at wages equal to pre-injury wages. Additionally, he contends that no "Impairment Guidelines" have been issued by the Board and with no evidence of an issue of fact, the case should have remained closed.

In a rebuttal, the carrier contends that as claimant's accident occurred after March 13, 2007, the 2007 amendment to WCL § 15(3)(w) applies and the weekly benefits must be capped based upon claimant's loss of wage earning capacity, whether the Board has adopted "new medical impairment guidelines" or not.

LEGAL ANALYSIS

As an initial matter, the Board Panel notes that the claim was reopened to address the issue of ongoing benefits, based upon the carrier's assertion that claimant had exhibited no labor market attachment. The propriety of that reopening was not questioned or addressed by the claimant at the hearing. Therefore, as that issue was not raised below, the Board will not consider the nature of the reopening.

Because the application raises issues concerning implementation of the 2007 reform legislation regarding WCL § 15(3)(w) and the benefits now available to claimants classified as having a PPD, it may be useful to review the history of PPD classifications and its accompanying statutes prior to focusing on the reform legislation itself.

I. WCL § 15(3)(w) Pre-Reform

A. PPDs

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As part of New York's statutory scheme, compensation as defined in WCL § 2(6), is confined to various schedules of disability outlined in WCL § 15: permanent total (WCL § 15[1]), temporary total (WCL § 15[2]), temporary partial (WCL § 15[5]), and permanent partial (WCL § 15[3]) (see *Matter of Landgrebe v County of Westchester*, 57 NY2d 1 [1982]).

In the area of permanent partial disabilities, the legislature has enacted two different schedules for the payment of compensation, depending on what body part was the source of the permanent partial disability.

For a serious facial disfigurement or for the loss of or loss of use of limbs, digits, toes, eyes, hearing, vision, WCL § 15(3)(a) through (v), defines a specified monetary award for a serious facial disfigurement or a specified number of weekly indemnity payments for the loss of or less of use of the injured body part calculated as follows:

"In the case of disability partial in character but permanent in quality the compensation shall be sixty-six and two-thirds per centum of the average weekly wages and *shall be paid to the employee for the period named in this subdivision....*"

Of this statutory scheme for the payment of what is now known as "schedules," the Court of Appeals wrote:

"The theory of the New York law is not indemnity for loss of a member or physical impairment as such but compensation for disability to work made on the basis of average weekly wages.... In case of statutory permanent partial disability, such as the loss of a hand, arm, foot, finger, etc., the compensation is paid for the period named in the schedule. The award is to compensate for *loss of earning power....* It, therefore, provides for *limited and certain, not full but uncertain*, compensation for the results of an injury.... Any loss of physical function detracts potentially from earning power, and the legislature is, therefore, justified in establishing a *fixed period of compensation* based on a specific injury, such as the loss of a finger. If the injury detracts more or less from the earning power than the period fixed by the statute, it may at least be said that *the rule is simple and the scale of compensation definite*. The word 'disability' in the law as we read it, therefore, means '*impairment of earning capacity*' and not 'loss of a member as such' (cites omitted) (*Matter of Marhoffer v Alexander Marhoffer*, 220 NY 543 [1917])."

Schedule loss of use awards compensate for loss of earning power and like all other compensation awards are intended to provide a limited but certain, not full but uncertain remedy, regardless of the fault of the employer (see *Matter of Ramroop v Flexo-Craft Print, Inc.*, 11 NY3d 160 [2008]).

In contrast, for all "other cases" of a permanent partial disability, the compensation payable to the injured worker as proscribed by WCL § 15(3)(w) provides:

"In all other cases in this class of disability the compensation shall be sixty-six and two-thirds per centum of the difference between his average weekly wages and his *wage-earning capacity* thereafter in the same employment or otherwise payable *during the continuance of such partial disability*, but subject to reconsideration of the degree of such impairment by the board on its own motion or upon application of any party in interest."

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This provision did not create a *limited but certain* compensation scheme for non-schedule PPD's. Rather, it provided for potentially unlimited or lifetime compensation after permanency with the post-permanency "wage earning capacity" of the claimant as its focal point.

B. WCL § 15(5-a)'s Definition of "Wage Earning Capacity"

In 1930, the legislature defined the term "wage earning capacity" relative to the above formula by adding WCL § 15(5-a) (L. 1930, ch. 316, § 2) which provides:

"The wage earning capacity of an injured employee in cases of partial disability shall be determined by his actual earnings, provided, however, that if he has *no such actual earnings* 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."

Under this provision, which has been applied to both temporary and permanent partial disabilities, the Court of Appeals has held that "where actual earnings during the period of the disability are established, wage earning capacity must be determined *exclusively* by the actual earnings of the injured employee without evidence of capacity to earn more or less during such disability period" (*Matter of Matise v Murro Waterproofing Co.*, 293 NY 496 [1944]). For the purpose of compensation, "earnings actually received by a claimant are the statutory measure of wage earning capacity after disability" (*Matter of Croce v Ford Motor Co.*, 307 NY 125 [1954]), as long as there is a "causal connection between the disability and the reduction, or loss, of wages" (*Matter of Roberts v General Electric Co.*, 6 AD2d 43 [1958]).

As can be seen, a distinction has been made in WCL § 15(5-a) between a claimant who is working and one who is not working. If a claimant is working, his/her actual earnings determine the wage earning capacity and hence the weekly compensation rate (*see Matter of Calise v Hillside Carting, Inc.*, 38 AD3d 968 [2007]). However, if the claimant is not working, then the Board may set the "wage earning capacity" as shall be reasonable based upon such factors as the injury and physical impairment, but such wage earning capacity may not exceed 75% of his/her "former full time actual earnings" (*Matter of Weinhart v Motors Holding*, 245 AD2d 577 [1997] [Board considered nature and degree of claimant's disability, vocational opportunities and corresponding salaries available to claimant in fixing wage earning capacity at 66 2/3 %]).

Thus, a determination that a claimant has a non-schedule PPD does not entitle him/her to weekly compensation benefits over his/her life or over a set period. To be entitled to continuing PPD compensation payments after classification, a non-schedule PPD claimant "has an ongoing obligation to demonstrate his continued attachment to the labor market and how much he actually earns" (*Matter of Burns v Varriale*, 9 NY3d 207 [2007]), and weekly benefit payments fluctuate accordingly (*Id.*).

C. Calculation of PPD Benefits Pre-Reform

As to the calculation of weekly compensation payable for non-schedule PPDs pre-reform, WCL § 15(3)(w) provides an arithmetic formula that utilizes "wage earning capacity" as its subtrahend:

"compensation shall be sixty-six and two-thirds per centum of the difference between his

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*average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise payable during the continuance of such partial disability....**

average weekly wage (minuend)
 - wage earning capacity (subtrahend)
 = difference
 2/3 of the difference = weekly compensation rate.

Based upon the working/non-working distinction in WCL § 15(5-a), a non-schedule PPD claimant pre-reform would be entitled to the following weekly compensation benefits.

Example # 1 - Working Claimant

Example #1 Claimant suffered an injury to the low back. His pre-injury average weekly wage is \$600. At the time of classification, he has returned to limited light duty earning \$400 per week.

Based upon the formula in WCL § 15(3)(w), he is entitled to the following weekly compensation payments.

\$600 AWW
 - 400 wage earning capacity (his actual earnings)
 \$200
 2/3 of 200 = \$133.33 per week.

Periodic adjustments to the compensation benefit of \$133.33 per week would be made for the lifetime duration of the PPD if the claimant's post-classification earnings vary; the claimant detaches or reattaches to the labor market; or the claimant voluntarily retires.

Example #2 - Non-Working Claimant

Example #2 Claimant suffered an injury to the low back. His pre-injury average weekly wage is \$600. At the time of classification, he had not returned to work and the WCLJ fixed his wage earning capacity at WCL § 15(5-a)'s statutory maximum of 75% of his former full time actual earnings having due regard to the nature of his injury and his physical impairment (75% of \$600 = \$450).

Based upon the formula in WCL § 15(3)(w), he is entitled to the following weekly compensation payments.

\$600 AWW
 - 450 wage earning capacity (75% of \$600 = \$450)
 \$150
 2/3 of 150 = \$100 per week.

If claimant never returned to work, he would continue to receive \$100 a week as long as he maintained an attachment to the labor market by looking for work within his restrictions.

II. The Reform Legislation of 2007: Compensation for PPDs

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Chapter 6 of the Laws of 2007 enacted comprehensive workers' compensation reform. The reform legislation, containing 82 sections, was the result of years of negotiations by the Governor's Office, the Legislature, the Board, and representatives of business and labor. The legislation was designed, through a series of trade-offs, to benefit both labor and business and improve the overall system of workers' compensation in New York State. The reform was designed to reduce costs, increase benefits, and speed up the process of resolving claims.

Governor Spitzer, upon signing the legislation into law, wrote:

"The statute that I have signed today raised benefits for injured workers and indexes maximum benefits to the state's average weekly wage. It sets into motion significant 'return to work' programs to help workers return to gainful employment....And it injects financial responsibility into the system by providing a maximum number of years that the small population of permanent partially disabled claimants may receive cash payments, while providing a safety net for severely disabled workers who demonstrate extreme hardship" (March 13, 2007 Letter from Governor Spitzer).

Indeed, one of the most significant changes resulting from the reform legislation concerned the benefit structure for PPD claimants as seen in the modifications to WCL § 15(3)(w).

The modification to WCL § 15(3)(w), effective for accidents and dates of disablements which occur on or after March 13, 2007, limits the "number of maximum benefit weeks" payable to injured workers with a resulting non-schedule permanent partial disability, depending upon the percentage of the "loss of wage-earning capacity" an injured worker experiences because of the permanent partial disability. The section now reads in part:

"In all other cases of *permanent partial* disability, the compensation shall be sixty-six and two-thirds percent of the difference between *the injured employee's* average weekly wages and his or her wage-earning capacity thereafter in the same employment or otherwise. *Compensation under this paragraph shall be payable during the continuance of such permanent partial disability but subject to reconsideration of the degree of such impairment by the board on its own motion or upon application of any party in interest however, all compensation payable under this paragraph shall not exceed (i) five hundred twenty-five weeks in cases in which the loss of wage-earning capacity is greater than ninety-five percent ... and (xii) two hundred twenty-five weeks in cases in which the loss of wage-earning capacity is fifteen percent or less...*" (new words in italics).

The Board, a few days prior to the signing of the reform legislation, wrote the Governor's counsel and stated it "strongly supports the bill" and commented specifically about WCL § 15(3)(w):

"The board notes that the number of weeks a claimant with a permanent partial disability will receive indemnity benefits under this bill is based upon the claimant's 'loss of wage-earning capacity.' This term is not defined in the Workers' Compensation Law ("WCL"). However, the term 'wage earning capacity' is defined in WCL § 15(5-a) as the injured employee 'actual earnings or if he/she has no earnings, an amount determined by the Board. If the actual earnings of an injured employee classified with a permanent partial

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disability were used to determine the duration of benefits, the number of weeks would fluctuate as the earnings increased or decreased. Such a result would require the Board to continually redetermine the duration of benefits and could cause a claimant to suffer a decrease in the number of weeks merely because of a cost of living increase in his/her earnings. The Board understands that it is not the intent of this provision for the number of weeks benefits are received to fluctuate and therefore, there is no intent to use the definition of wage earning capacity for this purpose.

Rather, the intent of this provision is for the Board to determine the claimant's loss of wage earning capacity based upon his/her physical and/or mental impairment or impairments and other factors so the duration of benefits is fixed at the time a claimant is classified as permanently partially disabled. To clarify this issue, the Board will adopt regulations to define the term "loss of wage-earning capacity" and how it will be determined." (Bill Jacket, L. 2007, ch. 6)."

III. Interpretation of WCL 15(3)(w)

A. Statutory Analysis

When an application for review involves an issue of statutory interpretation, the Board must give effect to the Legislature's intent by looking first to the language itself as the clearest indicator of its intent (*Matter of Ramroop v Flexo-Craft Printing, Inc.*, 11 NY3d 160 [2008]; see *Fleming v Graham*, 10 NY3d 296 [2008]). The Board must construe and harmonize all parts of the Act together (McKinney's Cons Laws of NY, Book 1, Statutes § 231).

B. "Loss of Wage Earning Capacity"

Similar to the focus on "impairment of wage earning capacity" for schedules of 50% or more in WCL § 15(3)(v) and "the percentage of loss of earning capacity" for permanently partially disabled volunteer firefighters and volunteer ambulance workers (VEBL § 10[1][g]; VAWBL § 10[1][g]), the legislature by its amendment now focuses WCL § 15(3)(w) awards on "loss of wage earning capacity" for non-schedule PPDs. In doing so, it juxtaposes two key phrases: "loss of wage earning capacity" and "wage earning capacity," thereby commanding a definition of each as a complement to the other for purposes of awarding a now limited compensation benefit for a non-schedule permanent partial disability.

While "wage earning capacity" has been defined in WCL § 15(5-a) for nearly eighty years in relationship to actual reduced earnings for working claimants with partial disabilities, "loss of wage earning capacity" appears for the first time in the amended WCL § 15(3)(w) and is not defined. However, looking to the plain meaning of the words and the intent of the legislation, the definition of "loss of wage earning capacity" distills to a determination at the time of classification of the decrease in earning power that an injured claimant has experienced due to the permanent impairments suffered. The inverse of "loss of wage earning capacity" logically is the "wage earning capacity" the claimant retains despite his permanent impairments.

C. Board's 1996 Medical Guidelines

Twenty-four years before the 2007 reform legislation, in 1983, the legislature established a temporary commission

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to study and evaluate the systems of the Workers' Compensation Board. In its final report in 1986, the temporary commission recommended, among other things, "uniform medical guidelines for the evaluation of functional impairments" which would result in "a more uniform evaluation process and greater consistency among providers in making functional impairment determinations...." (State of New York, Workers' Compensation Board, Medical Guidelines 1996, pg. 1).

In June 1996, the Board, in response to the temporary commission's recommendation, published its Medical Guidelines. On the subject of the classification of a claimant as having a non-schedule PPD, the Board wrote:

"A distinction is made between disability and impairment. Permanent *impairment is a purely medical condition* and is defined as any anatomic or functional abnormality or loss remaining after maximal medical rehabilitation has been achieved and which the claimant's health provider considers stable or nonprogressive at the time evaluation is made.... There must be residual impairments which are the *basis for the conclusion of a ... permanent partial disability*. Some other factors considered for classification may be age, ability to work, mental attitude and motivation. A *classification is a legal decision* made by the Workers' Compensation Law Judge in his/her final determination of a claimant's disability."
 * (Id., pgs. 5-6).

In order to determine the percentage of "loss of wage earning capacity," as indicated in its 1996 Medical Guidelines, the Board must consider evidence in the record, including but not limited to medical evidence concerning the nature and degree of the work-related permanent physical and/or mental impairment, work restrictions, claimant's age, and any other relevant factors (*see also* VFBL § 3[8] board to determine "reasonable earning capacity" with due regard for "work he reasonably could be expected to obtain and for which he is qualified by age, education, training and experience"). As the 1996 Guidelines demonstrate, impairment does not equal loss of wage earning capacity.

Governor Spitzer, upon signing the 2007 reform legislation, appointed an advisory committee under the auspices of the Superintendent of Insurance to develop new medical guidelines for the Board to consider prior to the promulgation of regulations in this area. The charge of the committee was to develop treatment and impairment guidelines to assist in the determination of permanent impairment and ultimately the Board's determination of disability. It was anticipated that the advisory committee's recommendations would be submitted prior to the need to interpret the amendment to WCL § 15(3)(w). As those recommendations have not yet been submitted for Board consideration, the Board has not modified its 1996 Medical Guidelines nor has it completed the process of adopting regulations concerning the application of WCL § 15(3)(w). However, as an application for review has been submitted, this Board Panel is constrained to both interpret and apply the provisions of WCL § 15(3)(w) utilizing the existing medical guidelines.

D. Calculation of Post-Reform PPD Benefits

In that the legislature did not amend WCL § 15(5-a)'s definition of "wage earning capacity" for working and non-working claimants, the Board is forced to harmonize the amended provisions of WCL § 15(3)(w) with it, maintaining the distinctions between working and non-working claimants in the calculation of post-reform PPD benefits at the same time as incorporating the new definition of "loss of wage earning capacity." In the end, the sum of the percentages still cannot logically exceed 100%.

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Accordingly, the following examples illustrate the calculation of PPD benefits post-reform.

Example #1 - Working Claimant Post-Reform

Example Claimant #1 Post Reform suffered an injury to the low back. His pre-injury average weekly wage is \$600. At the time of classification, he has returned to limited light duty earning \$400 per week.

Based upon the formula in WCL § 15(3)(w), he is entitled to the following weekly compensation payments.

\$600 AWW
 - 400 wage earning capacity (his actual earnings)
 \$200
 2/3 of 200 = \$133.33 per week.

Because he is earning \$400 a week (67% of his former AWW), his "loss of earning capacity" must be the inverse or 33% (100% - 67% = 33%). A 33% loss of wage earning capacity entitles him to a maximum of 275 weeks of benefits ("two hundred seventy-five weeks in cases in which the loss of wage earning capacity is greater than thirty percent but not more than forty percent"). As the amendment specifically sets forth twelve numerated weeks (525, 500, 475, 400, 425, 400, 375, 350, 300, 275, 250, and 225) as the maximum weeks available for a particular percentage range representing the loss of earning capacity, no further adjustment to the maximum weeks is required.

However, periodic adjustments to the compensation benefit of \$133.33 per week would be made for the duration of the 275 benefit weeks available if claimant's post-classification earnings vary; the claimant detaches or reattaches to the labor market; or the claimant voluntarily retires. Nonetheless, as the intent of the legislation was not to have the benefit weeks fluctuate based upon actual earnings, the 275 maximum benefit weeks available, determined at the time of classification, would not change and, as the amendment provides, shall not be exceeded. The 275 benefit weeks available are used when a claimant is receiving full or reduced compensation benefits, but are held in reserve when a claimant has post-injury earnings equal to or greater than his/her pre-injury average weekly wage.

Example #2 - Not Working Claimant-Post Reform

Example Claimant #2 Post Reform suffered an injury to the low back. His pre-injury average weekly wage is \$600. At the time of classification, he had not returned to work, and the WCLJ fixed his loss of wage earning capacity at 15%.

Based upon the durational limits set by the amendment, claimant would be entitled to the maximum of 225 benefit weeks of compensation as the percentage of the "loss of earning capacity" is "fifteen percent or less."

Next, using the arithmetic formula in WCL § 15(3)(w), he is entitled to the following weekly compensation payments.

\$600 AWW
 -510 wage earning capacity of 85% (85% of \$600 = \$510)

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\$ 90

2/3 of \$90 = \$60 per week.

If claimant never returned to work, he would continue to receive \$60 a week (or \$100 per week if the injury occurred on or after July 1, 2007, pursuant to the statutory minimum of WCL § 15(6)(a)) for 225 weeks as long as he maintained an attachment to the labor market by looking for work within his restrictions.

Should claimant return to work, the weekly benefit rate would be recalculated as indicated in example one based upon his actual earnings; nonetheless, as the intent of the legislation was not to have the benefit weeks fluctuate based upon actual earnings, the 225 weeks determined at the time of classification would not change.

Again, because the legislature did not amend WCL § 15(5-a)'s definition of "wage earning capacity," as to a PPD claimant, the distinction between a working claimant and a non-working claimant at the time of classification remains. Consequently, for a working claimant at the time of classification, the "loss of wage earning capacity" for the purpose of awarding WCL § 15(3)(w)'s benefit weeks must be extrapolated from his/her actual earnings, with the weekly rate and the duration of benefits based solely upon the actual earnings.

On the other hand, for a non-working claimant at the time of classification, the "loss of wage earning capacity" must first be determined upon a preponderance of the evidence in the record concerning the nature and degree of the work-related permanent physical and/or mental impairment, work restrictions, claimant's age, and any other relevant factors, with the "wage earning capacity" as its inverse. The "loss of earning capacity" will determine the maximum number of benefit weeks available pursuant to WCL § 15(3)(w), and its inverse, the "wage earning capacity" will be used to calculate the weekly rate.

The Board notes that WCL § 15(5-a) limitation of a non-working claimant's earning capacity to no more than 75% of his former full time actual earnings and conversely the non-rebuttable presumption that he has at least experienced a 25% loss of wage earning capacity has now been replaced by WCL § 15(3)(w)'s provision that a claimant's loss of wage earning capacity can be 15% or less and conversely retains a wage earning capacity of 85% or more (see McKinney's Cons Laws of NY, Book 1, Statutes § 398 [Where two statutes are in irreconcilable conflict with each other the later constitutional enactment will prevail]; *NOW v Metropolitan Life Ins. Co.*, 131 AD2d 356 [1987], *lv dismissed* 70 NY2d 939 [1988]; *Matter of Constantine v White*, 166 AD2d 59 [1991]).

E. Findings

Based upon the above, the Board finds the following.

First, as a matter of law, the amendment of WCL § 15(3)(w) applies to all PPD claims with a date of accident or disablement on or after March 13, 2007.

Second, medical opinions on the degree of permanent impairment experienced by the permanently injured claimant and any determination by a WCLJ as to the resulting disability classification must be in accordance with the 1996 Board's Medical Guidelines pending publication and adoption of any new guidelines the Board implements.

Third, for a claimant who is working at the time of classification, the "loss of earning capacity" for the purpose of awarding WCL § 15(3)(w)'s benefit weeks must be extrapolated from his/her actual earnings, with the weekly rate

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|-----------------------|-------------------------|-----------------------------------|---------------------------|
| Claimant - | XXXXXXXXXXXX | Employer - | Buffalo Auto Recovery Svd |
| Social Security No. - | | Carrier - | State Insurance Fund |
| WCB Case No. - | 8070 3905 | Carrier ID No. - | W204002 |
| Date of Accident - | 03/19/2007 | Carrier Case No. - | 62110838-081 |
| District Office - | Buffalo | Date of Filing of this Decision - | 11/12/2009 |

ATENCION:

Puede llamar a la oficina de la Junta de Compensacion Obrera, en su area correspondiente, cuyo numero de telefono aparece al principio de la pagina y pida informacion acerca de su reclamacion(caso).

and the duration of benefits based solely upon the actual earnings.

Finally, for a claimant who is not working at the time of classification, the "loss of wage earning capacity" must first be determined upon a preponderance of the evidence in the record concerning the nature and degree of the work-related permanent physical and/or mental impairment, work restrictions, claimant's age, and any other relevant factors, with the "wage earning capacity" as its inverse. The "loss of wage earning capacity" will determine the maximum number of benefit weeks available pursuant to WCL § 15(3)(w), and its inverse, the "wage earning capacity" will be used to calculate the weekly rate.

IV. Application to the Instant Claim

In the instant claim, the Board Panel finds claimant was not working at the time of his classification at the hearing on April 24, 2008 (decision filed April 29, 2008).

Based upon a preponderance of the evidence in the record, the Board further finds that claimant has a 50% *permanent physical impairment* to his low back pursuant to the Board's 1996 Medical Guidelines and consistent with the opinion of Drs. Coward and Galpin, and that the PPD classification is subject to the amended provisions of WCL § 15(3)(w) as the accident occurred on March 19, 2007.

However, the record is not clear what factors the WCLJ considered in determining that claimant has a 50% loss of wage earning capacity entitling him to a maximum of 300 weeks of benefits. Significantly, the percentage of loss of wage earning capacity cannot be based solely upon the degree of permanent impairment, but upon consideration of other relevant factors that impacted claimant's ability to work.

CONCLUSION

Accordingly, the WCLJ's decision filed February 18, 2009, is MODIFIED, rescinding that portion of the decision which finds that claimant demonstrates a loss of wage earning capacity of 50%, is entitled to 300 weeks of benefits, and awards \$99.51 per week from April 25, 2008, to February 9, 2009. The case is restored to the calendar for the WCLJ to articulate the factors considered in determining the percentage of a loss of wage earning capacity and to make awards from April 25, 2008, consistent with this decision.

All concur.


Mona A. Bargnesi


Ellen O. Paprocki


Freida Foster-Tolbert

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