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Supreme Court, Appellate Division, Third Department, New York

In the Matter of GEANNINE MADDOX, Appellant,

v.

BAUMANN SONS BUSES et al., Respondents.

WORKERS' COMPENSATION BOARD, Respondent.

November 17, 2016

**Facts:** In June of 2009 claimant injured back while working as a driver and her subsequent claim for Workers' Compensation benefits was established. A WCLJ found claimant sustained a permanent partial disability and after taking into consideration vocational factors found that the claimant had a loss of wage earning capacity of 80%. The WCLJ modified prior temporary partial disability awards for multiple periods. The Workers' Compensation Board agreed claimant sustained permanent partial disability but found a loss of wage earning capacity of 40%. The Board also rescinded the WCLJ modification of the prior awards and claimant now appeals.

**Holding:** *Affirmed in part and reversed in part and remitted to the Board for further proceedings.*

**Discussion:** In order to fix the duration of benefits in a permanent partial disability case that is not amenable to a schedule award the Board is obliged to determine a claimant's loss of wage earning capacity. In so doing, the Board relies upon various factors in making that determination including the nature and degree of the work-related permanent physical and/or mental impairment, work restrictions and claimant's age. Claimant's surgeon's report indicated claimant's functional capabilities at work included being able to occasionally sit, stand, walk, kneel and bend. The report also indicated claimant could drive a vehicle frequently however, the surgeon's testimony contradicted his report by testifying a sedentary job may be appropriate for the claimant. The Board credited the medical opinion that claimant could drive frequently and claimant could perform sedentary work and when determining loss of wage earning capacity noted the claimant was 37 years old with a high school degree, proficiency in the English language and past

work experience as a driver for an ambulance and bus company. Accordingly, 40% loss of wage earning capacity was credible. The Court reversed the decision of the Board to rescind the WCLJ's decision to modify prior awards as the Board indicated the modification of awards was based upon the loss of wage earning capacity found by the WCLJ, however this was not correct as the loss of wage earning capacity finding was 80% while the awards were modified to a 75% rate. The Court reversed the decision and remitted the claim to the Board for further proceedings.

*Stewart, Greenblatt, Manning & Báez*