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Supreme Court, Appellate Division, Third Department, New York

In the Matter of the Claim of DANIEL MARTONE, Appellant,  
v.

NIAGARA FRONTIER TRANSPORTATION AUTHORITY-METRO et al, Respondents,

WORKERS' COMPENSATION BOARD, Respondent.

January 19, 2017

**Facts:** The claimant worked as a bus driver and received workers' compensation benefits for a work-related injury to his neck and back in 2005. In 2007, claimant established a second work-related claim to his low back and his disability was apportioned 75% to the 2005 accident and 25% to the 2007 accident. In 2014, following claimant's 2010 spine surgery a hearing was held on the issue of the degree of permanency and loss of wage earning capacity due to claimant's continued pain. The WCLJ ruled that claimant was totally disabled. The Board modified that decision and found that claimant has a permanent partial disability and a 75% loss of wage-earning capacity. Claimant appeals from the Board's ruling.

**Holding:** *Affirmed.*

**Discussion:** The Court found claimant was not totally disabled and outlined the facts that supported the Board's finding. The claimant exhibited submaximal efforts in regards to his recovery and specifically highlighted that claimant's physician noted claimant "needed to move beyond his level of pain and focus on getting back function and increased activity." The Court deferred to the Board's credibility assessments and found no basis to disturb the Board's finding that claimant has a loss of wage-earning capacity of 75%.