

STEWART, GREENBLATT, MANNING & BAEZ

ATTORNEYS AT LAW

6800 JERICHO TURNPIKE

SUITE 100W

SYOSSET, NY 11791

516-433-6677

FAX 516-433-4342

DONALD R. STEWART (RET.)
MADGE E. GREENBLATT
ROBERT W. MANNING
RICARDO A. BAEZ
DAVID J. GOLDSMITH
PETER MICHAEL DeCURTIS
LAURETTA L. CONNORS
JOHN K. HAMBERGER

LISA LEVINE
ANDREA L. De SALVIO
KRISTY L. BEHR
DAVID S. FOODEN
LUKE R. TARANTINO
THOMAS A. LUMPKIN
JILLIAN A. SMITH
JONATHAN SO

KAFI WILFORD (2003-2010)
MICHAEL H. RUINA (1992-2016)

RAYMOND J. SULLIVAN
MONICA M. O'BRIEN
MARY ELLEN O'CONNOR
OF COUNSEL

Supreme Court, Appellate Division, Third Department, New York

Matter of FRANK DE RUGGIERO, Respondent

v

CITY OF NY DEPT OF CITYWIDE ADMIN SVCS, Appellant

and

WORKERS' COMPENSATION BOARD

Decided May 18, 2017

Facts: Claimant sustained injuries, lost time from work, and ultimately returned to work at his pre-accident wages. A WCLJ found a 50% loss of wage earning capacity. Upon appeal by the employer, this finding modified by the Board to a 35% loss of wage earning capacity. The employer appealed.

Holding: *Affirmed*

Discussion: The employer argued that because claimant had returned to work full time at his pre-accident wages, claimant's wage earning capacity at the time of classification was 100%, and thus, the Board's finding of a 35% loss of wage earning capacity was in error. The Court noted that "wage earning capacity" and "loss of wage earning capacity" are to be used for separate and distinct purposes. Wage earning capacity is used to determine a claimant's weekly rate of compensation, whereas LWEC is used at the time of classification to set the maximum number of weeks over which a claimant with a permanent partial disability is entitled to receive benefits. Unlike wage earning capacity, which can fluctuate based on a claimant's employment status, LWEC is intended to remain fixed. The durational limits imposed by WCL §15(3)(w) do not distinguish between claimants who are employed at the time of classification and those who are not. Regarding the specific finding of a 35% LWEC, the Board's decision is supported by substantial evidence and should be affirmed.