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Supreme Court, Appellate Division, Third Department, New York

In the Matter of the Claim of LUIS ROSALES, Respondent,

v.

EUGENE J. FELICE LANDSCAPING et al., Appellants,

WORKERS' COMPENSATION BOARD, Respondent.

November 3, 2016

Facts: The claimant was injured working as a landscaper in 2010. Claimant had not worked since September 2010 and underwent back surgery in October 2010. Thereafter claimant filed for Workers' Compensation benefits and the claim was established with an average weekly wage of \$500.00. The WCLJ found the claimant suffered a permanent partial class 3, severity B impairment which indicates a level one medical impairment of a six-point scale, level six being total, according to New York State Workers Compensation Board's 2012 Permanent Impairment Guidelines. The WCLJ found the claimant sustained a permanent partial disability of 90% after considering various vocational factors as claimant testified through a translator he was 46 years old from El Salvador, with limited English skills, had only completed second grade and a work history comprised of manual labor. The WCLJ awarded benefits at a rate of \$300.00 per week fixing claimant's wage-earning capacity at 10%. In October 2015, the Workers' Compensation Board affirmed the WCLJ decision concluding vocational factors may be considered in calculating wage-earning capacity for a claimant with a permanent partial disability. Employer and carrier appeal.

Holding: *Affirmed.*

Discussion: When claimant is found to have permanent partial disability which is not amenable to a schedule award the Board is obligated to fix both the duration of the benefit and the weekly compensation rate (see Workers' Compensation Law Section 15[3][w]). Compensation is payable at a rate of "sixty-six and two thirds percent of the difference between injured employees average weekly wages and their wage-earning capacity.

Durational limits are based on a claimant's "loss of wage-earning capacity," a phrase added to Workers' Compensation Law Section 15(3) as part of a comprehensive reform in 2007 (see L 2007, ch 6; Matter of Canales v. Pinnacle Foods Group LLC, 117 AD3d 1271, 1273-1274 [2014]). Here, unlike Canales, claimant suffered a permanent partial disability, there is no expectation that he will ever return to his former or similar employment as a laborer, and the Board necessarily considered vocational factors when it established his loss of wage-earning capacity. Because the evidence established that claimant did not earn actual wages, the statute authorized the Board to "[fix] in the interest of justice... such wage[-]earning capacity as shall be reasonable... having due regard to the nature of his injury and his physical impairment" (Workers' Compensation Law Section 15[5-a]). With respect to permanent partial disability the Court did not read the "due regard to" clause as limiting the standard to an assessment of the physical disability alone, but rather to emphasize the significance of the injury in the calculus.

Stewart, Greenblatt, Manning & Poel