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Supreme Court, Appellate Division, Third Department, New York

In the Matter of the Claim of JANINE TILL, Appellant,

v.

APEX REHABILITATION et al., Respondents,

WORKERS' COMPENSATION BOARD, Respondent.

November 3, 2016

Facts: The claimant had an established back and left shoulder claim while working as a nursing assistant in 2012. In 2014, claimant was classified with 40% permanent partial disability and loss of wage earning capacity by the Workers' Compensation Law Judge. Upon administrative review, the Board modified claimant's loss of wage earning capacity to 15%. Claimant appeals arguing that Workers' Compensation Law Section 15[5-a] limited loss of wage earning capacity as a nonworking claimant to no more than 75% of her "former full time actual earnings," the Board was statutorily prohibited from determining that she had less than a 25% loss of wage-earning capacity under Workers' Compensation Law Section 15(3)(w). Claimant argues Workers' Compensation Law Section 15(3)(w)(xi) and (xii) conflict with Workers' Compensation Law Section 15(5-a), as such the Court must construe provisions apply to only claimants employed at time of classification.

Holding: *Affirmed.*

Discussion: It would be unreasonable to read into Workers' Compensation Law Section 15(3)(w) a minimum loss of wage-earning capacity of 25% for nonworking claimants simply because the rate-based definition of wage-earning capacity for nonworking claimants imposes a 75% cap. If the Board were to do that similarly situated claimant would be treated unequally solely based on whether they were employed at the time of classification.