Robert E. Beloten
Chair

ADMINISTRATIVE REVIEW DIVISION
WORKERS' COMPENSATION BOARD
328 STATE STREET
SCHENECTADY, NY 12305
www.wcb.ny.gov

State of New York - Workers' Compensation Board

In regard to [redacted], WCB Case [redacted]

MEMORANDUM OF BOARD PANEL DECISION

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Opinion By: Loren D. Lobban
Candace K. Finnegan
Linda Hull

The carrier and the claimant each request review of the Workers' Compensation Law Judge (WCLJ) decision filed on February 26, 2013. No rebuttal has been filed to either application for review.

ISSUES

The issues presented for administrative review are:

(1) whether the claimant has a causally related disability, and

(2) whether the claimant is entitled to a reduced earnings award.

FACTS

The claimant worked as a bartender at a German Biergarten since 2003. The claimant had been working regularly three to four nine-to-twelve-hour shifts each week. By Notice of Decision filed on September 16, 2011, the case was established for right carpal tunnel syndrome, with a date of injury of February 11, 2011 and an average weekly wage of $847.83.

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Claimant -	[redacted]	Employer -	[redacted]
Social Security No. -		Carrier -	Phoenix Insurance Company
WCB Case No. -	[redacted]	Carrier ID No. -	W177000
Date of Accident -	10/01/2003	Carrier Case No. -	EQD2244
District Office -	NYC	Date of Filing of this Decision–	02/05/2014

ATENCION:

Puede llamar a la oficina de la Junta de Compensacion Obrera, en su area correspondiente, cuyo numero de telefono aparece al principio de la pagina y pida informacion acerca de su reclamacion(caso).

By Notice of Proposed Decision filed on April 6, 2012, which became final on May 11, 2012, the established case was amended to include the left wrist, due to left flexor tenosynovitis.

The claimant's surgeon, Dr. Glickel, testified that he first examined the claimant on March 30, 2011. He was familiar with the claimant's work location, work hours, and duties as a bartender. He examined the claimant about 20 times total, the last examination being on January 16, 2013. At the first examination, the claimant complained of persistent pain, numbness, and tingling in her right hand. Dr. Glickel performed right carpal tunnel surgery on April 1, 2011. The claimant was cleared to return to work at light duty on June 22, 2011. Even with the surgery, the claimant could safely lift no more than two pounds with her right hand. The claimant also developed carpal tunnel syndrome on the left side.

He suggested surgery for the left side, but the claimant wanted to try more conservative treatment. Because of the claimant's ongoing complaints after she returned to work, he told the claimant to restrict the number of days she was working and then recommended to the claimant that she stop working as a bartender altogether and change her occupation. The claimant's bartending work was exacerbating her symptoms. When she was not working, her symptoms subsided. In terms of loss of wage-earning capacity, the claimant has a moderate disability, which appears to be permanent.

The carrier's IME, Dr. Isani, first examined the claimant on August 29, 2011, after her surgery. The claimant had a full range of motion and no tingling or numbness. Her grip was weaker on the right side than on the left. The carpal tunnel syndrome was causally related to work, although she had no remaining disability. He next saw her on February 21, 2012. The claimant was complaining of tingling and numbness on the left side at that time. The left carpal tunnel was also causally related. The claimant still had no disability and could continue working as a bartender. The most recent examination was on November 28, 2012. The claimant had shown significant improvement. The claimant's grip strength was reduced in both hands from the test at the first visit. The claimant had bilateral carpal tunnel syndrom, although no disability.

At a hearing held on December 13, 2012 the claimant testified that her duties as a bartender included stocking the bar, filling up ice bins, and serving beer to up to 400 customers a night, among other things. The Biergarten serves "big steins of beer like liter mugs; it is not like regular bartending." After the surgery, she did not return to work for three months, in part because the employer had replaced her. She then went to one shift a week, followed by twice a week, but never more than that. At first, the claimant wanted to work more shifts, but they were given to her replacement. After working for around two months, the claimant realized she could not physically tolerate more than two shifts each week. In the first half of 2012, the claimant

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turned down some shifts because her hands had declined. The claimant's doctor told her she should stop bartending entirely. The claimant also worked for three weeks in 2011 as an opera singer.

She stopped bartending in July 2012 because "my hands couldn't do it anymore. I wanted to avoid to get surgery again and my hands declined drastically. I had injections, cortisone injections done in hope that it would better it and maybe I could actually work because this job was the perfect job for me, you know, as I wanted to continue it but I just realized that I couldn't." The claimant discussed surgery on her left wrist with her physician, but she was trying to avoid it. There was no other reason she stopped working; it was just because of her hands. After that, she did some freelance work as a German "diction coach." The claimant was teaching approximately two lessons a week.

At a hearing held on February 21, 2013, the claimant testified that the last day she worked as a bartender was July 13, 2012. She had been working once or twice a week for several months before that. Her reduced schedule was because her doctor told her to limit her work. The claimant also turned down one shift because she was working as a singer, which conflicted. The claimant turned down some shifts at the employer's Brooklyn location because the beer taps were higher, thereby making it more difficult for the claimant physically, given her wrist condition, than it was at the Manhattan location. The claimant also worked as a party manager at the employer's Brooklyn location, but she declined future offers for that position because "there was too much drug activity and no security ... they was, like, doing lines on the table in the garden and I was not in for that." The Brooklyn location was subsequently closed. In addition to her work as a diction coach and singer, the claimant also was working at a temporary job as an executive assistant and was doing some work as a translator. She was working as much as she could.

The employer's manager testified that the Brooklyn location closed on October 21, 2012. After the claimant's surgery, she returned to work at the end of June 2011. Prior to her surgery, she worked exclusively at the Manhattan location. When the claimant went out for her surgery, her position was filled and she was replaced. The claimant wanted her old job back, but it was not available. The claimant was given one shift a week at each location. The claimant was offered a full-time position as a bartender in Brooklyn, but she declined. The taps at the Brooklyn bar are higher, so a bartender needs to hold the beer mugs as the beer is being poured. The claimant was sometimes offered additional shifts on short notice, but she usually turned them down because she had other work. The whole time he was there he knew the claimant also worked in opera. The claimant also told him she could not work more because of her hands. In June 2012, right before the claimant left, she was offered additional shifts as a floor manager in

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Brooklyn, but she declined saying she did not feel comfortable there. The claimant last worked around July 17, 2012.

By notice of decision filed on February 26, 2013, the WCLJ found the claimant mildly disabled due to her wrist injuries, and therefore entitled to awards at the mild disability rate of $141.31 from July 17, 2012, and continuing. The claimant was also found to be attached to the labor market. However, because the claimant was not working as much as she could and voluntarily limited her work, she was not entitled to a reduced earnings award.

LEGAL ANALYSIS

The claimant's attorney asserts that the claimant is entitled to a reduced earnings award based on the income actually earned by the claimant. The claimant was physically unable to return to her former work, despite her efforts to do so, as corroborated by the claimant's manager and the claimant's surgeon. The claimant works at other jobs within her restrictions. The finding that the claimant is voluntarily limiting her earnings is not supported by the evidence. The law is clear that the wage-earning capacity of an injured employee in cases of partial disability is determined by actual earnings. The claimant's reduced earnings are caused by her inability to return to her former job and the restrictions imposed by her disability. The claimant is working three different jobs and is entitled to be compensated for her reduced income.

The carrier argues, on appeal and in rebuttal, that the claimant has no further causally related disability. The WCLJ should have credited Dr. Isani's testimony over that of the claimant's surgeon. The claimant has also voluntary withdrawn from the labor market, given that she has turned down offers of work. The WCLJ correctly found that the claimant voluntarily reduced her earnings by not seeking additional work as an executive assistant or by working more at the employer's Brooklyn location. The claimant declined further work for the employer for personal reasons. The claimant failed to establish that her lost earnings are attributable to her disability. Dr. Asani's testimony establishes that the claimant is able to work as a bartender without difficulty. The claimant is therefore not entitled to benefits.

In *Matter of Kot v Beth Ameth Home Attendant*, 70 AD3d 1114 (2010), the court noted: "The resolution of conflicting medical opinions is within the province of the Board, particularly where the conflict concerns the issue of causation" (citing *Matter of Ciafone v Consolidated Edison of N.Y.*, 54 AD3d 1135 [2008] and *Matter of Mazayoff v A.C.V.L. Cos., Inc.*, 53 AD3d 890 [2008]).

The courts have indicated that the Board is entitled to weigh the medical evidence and to draw

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appropriate inferences therefrom in order to resolve conflicting testimony (*see Matter of Chad Cool v TP Brake & Muffler*, 305 AD2d 886 [2003]; *Matter of Raffiani v Allied Systems, Ltd.*, 27 AD3d 983 [2006]).

"While the guidelines provide useful criteria to be used in assessing a claimant's degree of disability, the ultimate determination rests with the Board and must be upheld if it is supported by substantial evidence (*see Matter of VanDermark v Frontier Ins. Co.*, 60 AD3d 1171 [2009]; *Matter of Hare v Champion Intl.*, 50 AD3d 1254 [2008], *lv denied* 11 NY3d 863 [2008])" (*Matter of Soluri v Superformula Prods., Inc.*, 96 AD3d 1292 [2012]; *see also Matter of Haight v Con Edison*, 78 AD3d 1468 [2010]).

As an initial matter, we concur with the findings of the claimant's surgeon that the claimant is disabled to a moderate degree over the opinion of the IME that the claimant has no causally related disability or the conclusion of the WCLJ that the claimant has a mild disability. Dr. Glickel examined the claimant on a regular basis over a two-year period, including times when she was still working as a bartender, and he observed that her symptoms became worse during periods of work and would subside when she was not working. Dr. Glickel was also thoroughly familiar with the claimant's job duties and the frequency of the claimant's shifts as a bartender, further establishing his detailed knowledge of the claimant's case. Given his opinion that the claimant is unable to work in her chosen long-time profession as a bartender, as well as the severe restriction on lifting due to bilateral carpal tunnel syndrome, we concur with his conclusion that the claimant has a moderate disability. Notably, the claimant attempted to return to work after the surgery, but it exacerbated her symptoms. That experience provides further evidence supporting Dr. Glickel's opinion as to disability over that of the IME, who inexplicably found no disability despite finding a reduced grip strength and a confirmed diagnosis of bilateral carpal tunnel syndrome.

WCL § 15(5-a) provides, in pertinent part, that "the wage earning capacity of an injured employee in cases of partial disability shall be determined by his actual earnings. ..." Additionally, a finding of a permanent partial disability permits the application of the rebuttable inference that there has been a loss of wage-earning capacity (*see Mazziotto v Brookfield Constr. Co.*, 40 AD2d 245 [1972]).

In making a reduced earnings award, it is improper to impose a degree of disability or to factor in a reduction in participation in the labor market. Absent a complete and voluntary withdrawal from the labor market, under WCL § 15(5-a), the Board must measure reduced earnings as two-thirds of the difference between the post-injury earnings and the pre-injury average weekly wage. No evidence of the ability to earn more or less may be considered (*see Matter of Meisner*

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v United Parcel Serv., 243 AD2d 128 [1998], *lv dismissed* 93 NY2d 848 [1999], *lv denied* 94 NY2d 757 [1999]; *cf. Matter of Smith v Consolidated Edison Co. of N.Y., Inc.*, 68 AD3d 1299 [2009]).

We concur with the claimant's argument that she is entitled to a reduced earnings award. The evidence establishes that the claimant was earning money after her surgery when she continued working for the employer and in her other jobs. After the claimant stopped working for the employer at the urging of Dr. Glickel, she continued working as a diction coach, a translator, and an executive assistant. Accordingly, the carrier's argument that the claimant's actions are tantamount to a voluntary withdrawal from the labor market is without merit. The claimant is still attached to the labor market and is looking for work.

We are not persuaded that the claimant has voluntarily limited her work. Initially, we note that, but for the claimant's carpal tunnel injury, she would likely still be working full time as a bartender. Therefore, the claimant's disability was clearly the cause of the initial decline in earnings. The evidence further establishes that, although the claimant turned down one assignment as a bartender, it was because she was working as a singer at that same time. It is evident that a person cannot work jobs in different locations at the same time. Therefore, the claimant's turning down of a shift as a bartender due to other work does not support the WCLJ's finding that the claimant voluntarily limited her work. Furthermore, the claimant sufficiently explained that she turned down additional bartending assignments because they aggravated her injuries. The claimant position is corroborated by both Dr. Glickel and her manager on this point. The claimant also explained that she turned down assignments as a manager in the Brooklyn location because she witnessed illegal drug activity. The employer did not rebut this testimony. Notably, the Brooklyn location closed shortly after the claimant was offered shifts as a manager there, which indicates that the amount of time she could have worked there was minimal. Accordingly, the claimant is entitled to a reduced earnings award.

Therefore, the Board Panel finds, upon review of the record and based on a preponderance of the evidence, (1) that the claimant had a moderate degree of disability (2) that she did not restrict her work, and (3) that she is entitled to a reduced earnings award. The case is restored to the hearing calendar for the calculation of the claimant's reduced earnings award.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed on February 26, 2013 is MODIFIED to find that the claimant was disabled to a moderate degree and is entitled to an award for reduced earnings.

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The claimant did not voluntarily restrict her work. The case is restored to the hearing calendar for calculation of the reduced earnings award. The case is continued.

All concur.

Loren D. Lobban

Candace K. Finnegan

Linda Hull

Interest is due to the claimant on the unpaid portion of the award, if any, pursuant to WCL section 20 or DBL section 221. However, interest is not due on any portion of the award rendered as a credit or reimbursement to an employer for compensation already paid, unless the claimant's leave credits have value and have not been fully restored pursuant to a collective bargaining agreement.

Pursuant to the provisions of § 142(5) of the Workers' Compensation Law, Phoenix Insurance Company is assessed the sum of $150.00.

Payment of assessment must be made within 30 days. Make check payable to: ""Chair, Workers' Compensation Board"" and forward with a copy of this notice to the Workers' Compensation Board, Attention: Finance Unit, 328 State Street, Schenectady NY 12305-2318. If an appeal is taken to the Appellate Division of the Supreme Court, send a copy of the appeal to the Finance Unit. Please include the reference number 20360837 with your payment to ensure proper credit.

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