

State of New York  
Supreme Court, Appellate Division  
Third Judicial Department

Decided and Entered: June 1, 2017

524281

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In the Matter of the Claim of  
ROBERTO PEREZ,

Appellant,

v

MEMORANDUM AND ORDER

BRONX LEBANON HOSPITAL CENTER  
et al.,

Respondents.

WORKERS' COMPENSATION BOARD,  
Respondent.

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Calendar Date: May 3, 2017

Before: Garry, J.P., Lynch, Rose, Mulvey and Aarons, JJ.

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Grey & Grey, LLP, Farmingdale (Robert E. Grey of counsel),  
for appellant.

Vecchione, Vecchione, Connors & Cano, LLP, Garden City Park  
(Brian M. Anson of counsel), for Bronx Lebanon Hospital Center  
and another, respondents.

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Mulvey, J.

Appeal from a decision of the Workers' Compensation Board,  
filed August 15, 2016, which ruled, among other things, that  
claimant sustained a 10% loss of wage-earning capacity.

Claimant injured his back at work in 2012 and was awarded  
workers' compensation benefits. He returned to work in November  
2013. In 2016, a Workers' Compensation Law Judge found that  
claimant has a permanent partial disability and a loss of wage-

earning capacity of 10%. This determination was affirmed by the Workers' Compensation Board on administrative review and claimant now appeals.<sup>1</sup>

Claimant contends that, because he had returned to work at full wages, the Board erred in finding that he had a 10% loss of wage-earning capacity. We disagree. The loss of wage-earning capacity "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" (Matter of Till v Apex Rehabilitation, 144 AD3d 1231, 1233 [2016]; accord Matter of Barrett v New York City Dept. of Transp., 147 AD3d 1167, 1167-1168 [2017]). In comparison, wage-earning capacity is used to determine a claimant's weekly rate of compensation (see Workers' Compensation Law § 15 [5-a]). As this Court has recently explained, wage-earning capacity and loss of wage-earning capacity "are to be used for separate and distinct purposes" (Matter of Till v Apex Rehabilitation, 144 AD3d at 1233; accord Matter of Barrett v New York City Dept. of Transp., 147 AD3d at 1168). While wage-earning capacity "can fluctuate based on a claimant's employment status," the loss of wage-earning capacity remains fixed after the time of classification (Matter of Till v Apex Rehabilitation, 144 AD3d at 1233 n 2; see Matter of Barrett v New York City Dept. of Transp., 147 AD3d at 1168). In other words, "the determination of a claimant's loss of wage-earning capacity is designed to establish duration of benefits, a finding which is unrelated to the traditional purpose of Workers' Compensation Law § 15 (5-a), which is to calculate the weekly benefit rate" (Matter of Till v Apex Rehabilitation, 144 AD3d at 1233). Accordingly, despite the fact that claimant was working at full wages, the Board was entitled to establish the loss of wage-earning capacity, which sets a fixed durational limit on potential benefits in the event that claimant incurs a subsequent reduction of wages as the result of his work-related

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<sup>1</sup> While the employer now challenges the finding of a permanent partial disability, it did not appeal or cross-appeal the Board's determination, and, therefore, "it may not secure affirmative relief from this [C]ourt" (Matter of Hawes v Dime Sav. Bank of N.Y., 156 AD2d 892, 893 [1989]).

injuries (see Matter of Barrett v New York City Dept. of Transp., 147 AD3d at 1168). Claimant's remaining claims have been considered and found to be without merit.

Garry, J.P., Lynch, Rose and Aarons, JJ., concur.

ORDERED that the decision is affirmed, without costs.

ENTER:

A handwritten signature in black ink, reading "Robert D. Mayberger". The signature is written in a cursive, flowing style with a large, prominent "R" and "M".

Robert D. Mayberger  
Clerk of the Court