

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

Decided and Entered: January 18, 2018

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In the Matter of the Claim of  
OLGA OYOLA,  
  Claimant,  
  v

NEW YORK CITY DEPARTMENT OF  
SCHOOL FOOD & NUTRITION  
SERVICES,  
  Appellant.

MEMORANDUM AND ORDER

WORKERS' COMPENSATION BOARD,  
  Respondent.

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Calendar Date: December 14, 2017

Before: McCarthy, J.P., Egan Jr., Devine, Mulvey and Rumsey, JJ.

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Zachary W. Carter, Corporation Counsel, New York City (John E. Schemitsch of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York City (Donya Fernandez of counsel), for respondent.

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Devine, J.

Appeal from a decision of the Workers' Compensation Board, filed April 18, 2016, which ruled that claimant sustained a 70% loss of wage-earning capacity.

Claimant, a cafeteria worker, tripped and fell while at work, and the ensuing workers' compensation claim was established for injuries to her back, left elbow, left knee and left

shoulder. Following a hearing, a Workers' Compensation Law Judge (hereinafter WCLJ) classified claimant with a permanent partial disability and found that she had a 70% loss of wage-earning capacity and would be entitled to wage loss benefits for 375 weeks should she stop working (see generally Workers' Compensation Law § 15 [3] [w] [vii]). The employer appealed from the decision and argued that claimant could not be found to have a loss of wage-earning capacity given that she had returned to work and was earning her preaccident wages. The Workers' Compensation Board disagreed and affirmed, prompting this appeal.

We affirm. Loss of wage-earning capacity is set at the time of classification and refers to "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], lv denied 29 NY3d 909 [2017]; see Workers' Compensation Law § 15 [3] [w]). As such, "despite the fact that [a] claimant [is] working at full wages, the Board [is] entitled to establish . . . loss of wage-earning capacity, which sets a fixed durational limit on potential benefits in the event that [a] claimant incurs a subsequent reduction of wages as the result of his [or her] work-related injuries" (Matter of Perez v Bronx Lebanon Hosp. Ctr., 151 AD3d 1159, 1160 [2017]). The Board's decision falls squarely within this rule, and the employer's argument that this Court has left any ambiguity on the issue is without merit (see Matter of Perez v Bronx Lebanon Hosp. Ctr., 151 AD3d at 1160; Matter of De Ruggiero v City of N.Y. Dept. of Citywide Admin. Servs., 150 AD3d 1493, 1494 [2017]; Matter of Barrett v New York City Dept. of Transp., 147 AD3d 1167, 1167-1168 [2017]). Accordingly, we will not disturb the Board's decision.

McCarthy, J.P., Egan Jr., Mulvey and Rumsey, JJ., concur.

ORDERED that the decision is affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger  
Clerk of the Court