

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
Administrative Hearings Division



(202) 671-2233-Voice
(202) 673-6938-Fax

IN THE MATTER OF,)

FLOYCE GARRETT,)

Claimant,)

v.)

WASHINGTON METROPOLITAN AREA)
TRANSIT AUTHORITY,)

and)

THE SCHAFFER COMPANY,)

Employer/Carrier.)

AHD No. 08-255
OWC No. 627448

Appearances

MICHAEL J. KITZMAN, ESQUIRE
For the Claimant

DONNA J. HENDERSON, ESQUIRE
For the Employer/Carrier

Before:

GERALD D. ROBERSON
Administrative Law Judge

COMPENSATION ORDER

STATEMENT OF THE CASE

This proceeding arises out of a claim for workers' compensation benefits filed pursuant to the provisions of the District of Columbia Workers' Compensation Act of 1979, D.C. Code Ann. §§32-1501 *et seq.* (2001) (hereinafter, the Act).

After timely notice, a full evidentiary hearing

was held on July 17, 2008, before Gerald D. Roberson, Administrative Law Judge. Floyce Garrett (hereinafter, Claimant) appeared in person and by counsel. Washington Metropolitan Area Transit Authority (hereinafter, Employer) appeared by counsel. Claimant testified on his own behalf. Employer did not present any witnesses. Claimant Exhibit (hereinafter, CE) Nos. 1-7 and Employer Exhibit (hereinafter, EE) Nos.

1-3, described in the Hearing Transcript (hereinafter, HT), were admitted into evidence. The record closed on August 1, 2008.

CLAIM FOR RELIEF

Claimant seeks an award under the Act for permanent partial disability compensation benefits, based upon the schedule, for a 31 percent impairment of the right hand.

ISSUE

1. Nature and extent of Claimant's disability, if any.

FINDINGS OF FACT

The parties have stipulated, and I accordingly find, there is an employer-employee relationship; jurisdiction is vested in the District of Columbia; Claimant sustained an accidental injury on April 18, 2006 that arose out of and in the course of his employment; notice of Claimant's injury was timely; and, a claim was timely filed. Claimant's average weekly wage for purposes of this claim is \$1853.62. Employer made voluntary payments of compensation from April 19, 2006 to May 21, 2006.

Claimant worked as a high voltage technician for Employer, and his duties entailed inspecting and repairing anything that is electrical in the subway stations. On April 18, 2006, Claimant went to the Eastern Market Metro Station to perform an inspection. While boarding the elevator, Claimant noticed a grate had fallen off a track bed light possibly obstructing the train. Claimant grabbed the top corner of the elevator door, and sustained lacerations to the fingers when the door

opened. The door had cut the top half of his middle finger and removed the nail of his ring finger.

Claimant received initial treatment at Providence Hospital on April 18, 2006. Claimant presented with complaint of right 3rd and 4th fingers with partial nail avulsion status post caught in elevator at work. The physician assistant administered a Tetanus shot. Examination revealed 3rd finger with partial nail avulsion with controlled bleeding and 4th finger nail intact with mild hematoma. The physician assistant cleaned the affected area with betadine with normal saline, and her diagnosis included laceration of right fingers. X-rays of the right middle finger did not reveal evidence of fracture, dislocation or other significant findings.

Dr. Mark Li, a family physician, provided follow-up treatment on April 20, 2006. He noted Claimant had an injury to the middle finger with a torn nail, and referred Claimant to Dr. Thong for surgery.

Dr. L. Thong, an orthopedic surgeon, examined Claimant on April 20, 2006 due to finger trauma at work. He advised Claimant would return in one week to check out the wound. On May 4, 2006, Dr. Thong stated Claimant could return to work on May 22, 2006. Dr. Thong completed an attorney form on August 6, 2006 indicating Claimant sustained a hematoma of the third finger when he smashed his finger in the elevator.

Dr. Inder Chawla, a specialist in physical medicine and rehabilitation, examined Claimant on July 6, 2006. He noted Claimant sustained a laceration of the DIP joint of the middle and ring finger when an elevator caught his hand. Dr. Chawla reported

Claimant had surgical debridement and suturing of the DIP joints of the middle and ring fingers. Dr. Chawla noted ongoing impairment with respect to flexion of the PIP and DIP joints of the fingers with some weakness of grasp. Claimant also complained of mild elbow and wrist pain. Dr. Chawla found evidence of healing at the base of the nail bed of the DIP of the middles and ring finger with contractures seen of the MCP and PIP joint of the right middle finger. Dr. Chawla found evidence of sensory alteration in the plantar and dorsal aspect of the distal fingers with no evidence of atrophy. Dr. Chawla offered the assessment of status post traumatic injury with surgical repair of the right middle and ring finger with possible residual contracture and digital neuropathy. Dr. Chawla recommended occupational therapy, and EMG and NCV to rule out digital neuropathy.

EMG findings of July 18, 2006 revealed evidence of sensory peripheral neuritis affecting the right upper extremity with no evidence of traumatic digital neuropathy affecting the right middle finger.

Dr. Chawla completed an attorney form on August 31, 2006. He provided the diagnosis of digital neuropathy following crush injury where elevator caused laceration of right hand fingers. Dr. Chawla placed Claimant at maximum medical improvement, and noted he had returned to work.

On November 15, 2006, Dr. Richard Barth, an orthopedic surgeon, performed an independent medical evaluation at the request of Employer. Dr. Barth assigned a 5% impairment to the right ring finger for the Maryland factors stating Claimant has problems playing the guitar. Relying on Table 1, Dr. Barth indicated

a 5% impairment to the finger results in a 1% impairment of the hand. Dr. Barth indicated Claimant reached maximum medical improvement and did not require additional treatment.

On April 19, 2007, Dr. Chawla noted the pain in the dorsum of the PIP joint of the middle finger had improved, but Claimant complained of stiffness and minimal impairment of finger mobility. Dr. Chawla noted some numbness of the finger tip, but stated Claimant was able to work full time without any ill effects. Examination revealed minimal swelling at the PIP joint of the right hand, and no weakness to the grasp. Sensation to the finger tip is normal, and Dr. Chawla found no evidence of tenderness. Dr. Chawla placed Claimant at maximum medical improvement.

Dr. Jeffrey Phillips conducted an independent medical evaluation on the behalf of Claimant on July 5, 2007. Dr. Phillips provided a rating of 28% for the right upper extremity based on loss of strength, sensory loss, and loss of function and endurance. Dr. Phillips subsequently placed Claimant at maximum medical improvement, and stated his arm rating of 28% converted to a hand rating of 31%.

DISCUSSION

With respect to the issue of the nature and extent of Claimant's disability, if any, the Claimant is not entitled to a presumption regarding the nature and extent of disability. Rather, Claimant must present substantial credible evidence that he has a disability entitling him to the requested level of benefits. *Dunston v. D.C. Department of Employment Services*, 509 A.2d 109 (D.C.

App. 1986).

In order to meet his burden, Claimant testified he still has not gotten his strength back with the right hand indicating he used to play bass guitar and his middle finger is instrumental to playing. HT p. 30. Claimant recalled spending 10-12 hours playing the guitar per week or roughly two hours per day, but reported he is now unable to play for two hours straight. HT p. 32. Claimant explained he currently experiences pain about once or twice a month right down his middle finger down his hand, and the jolt of pain goes down one finger to the wrist lasting sometimes for 5-10 minutes. HT p. 31.

Claimant submitted an impairment rating from Dr. Phillips to support his claim for relief. Dr. Phillips reported Claimant complained of persistent pain and intermittent weakness in the right hand, and noted Claimant has problems strumming the guitar due to pain in his fingers. Examination revealed 70 pound grip strength on the right compared to 120 pounds on the left using a Jamar Dynamometer. Claimant had tenderness over the distal phalanx of the ring and middle fingers, and decreased sensation in the distal two thirds of the long finger. Dr. Phillips provided a rating of 20% for the right upper extremity based on Table 34 for a strength loss index of .41. Relying on Table 90, Dr. Phillips stated Claimant had an 18% longitudinal sensory loss of the finger which converted to 2% of the upper extremity. Dr. Phillips attributed a 6% permanent impairment to loss of function and loss of endurance for a total impairment of 28% for the right upper extremity. CE 2.

On July 8, 2008, Dr. Phillips provided a right hand rating. Dr. Phillips explained "as the

hand is 90% of the upper extremity, therefore 28% permanent partial impairment of the upper extremity as a whole converts to 31% permanent partial impairment of the right hand ..." CE 7.

In contrast, Employer argued Claimant sustained an injury to the ring finger and middle finger on his right hand, and his treatment included bandage for the fingers and physical therapy. Employer stated Claimant missed work for a month. Employer remarked Dr. Chawla subsequently discharged Claimant, and provided findings in his discharge summary consistent with the rating of Dr. Barth who performed an independent medical evaluation for Employer. Employer argued the findings of Dr. Phillips were not consistent with either physician. HT p. 14.

On behalf of Employer, Dr. Barth performed an independent medical examination on November 15, 2006. Dr. Barth found Claimant sustained a permanent impairment of 1% for the right hand. His examination revealed painless range of motion of the digits including the right ring finger. Claimant had a mild split in his nail bed distally. Sensation was intact to light touch, and Dr. Barth reported Claimant had excellent grip strength. Dr. Barth offered the impression of crush avulsion injury, right ring finger, and provided a rating according to the 4th edition. Dr. Barth found Claimant had a 1% impairment of the right hand. Dr. Barth reported Claimant had full range of motion, excellent strength and a normal neurovascular exam, and assigned a 5% impairment to the right ring finger for the Maryland factors stating Claimant has problems playing the guitar. He assigned a 5% impairment to the right middle finger

based on the five factors. Dr. Barth converted his rating of 5% for the finger to 1% for the hand.

It has generally become accepted under the District of Columbia's Workers' Compensation Act that there is a preference for the testimony of treating physicians over doctors retained for litigation purposes, *Canlas v. DOES*, 723 A.2d 1210 (D.C. 1999), and that in assessing the weight of competing medical testimony in worker compensation cases, attending physicians are ordinarily preferred as witnesses to those doctors who have been retained to examine the claimant solely for purposes of litigation. *Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992). However, it is equally recognized that "the hearing examiner nonetheless 'may choose to credit the testimony of a non-treating physician over a treating physician,' *Short v. DOES*, 723 A.2d 845 (D.C. 1998).....particularly is that so if the contradicting medical evidence from the employer was from a doctor who examined the claimant, and the hearing examiner explains his decision to credit the one opinion over the other. *Canlas, supra*, at 1212

In *Wormack v. Fishback & Moore Electric, Inc.*, CRB No. 03-159, AHD No.03-151, OWC No. 456205 (July 22, 2005) the CRB rejected prior Agency decisions insisting that an ALJ has no discretion to determine schedule award disability percentage ratings but is bound, by a physicians' impairment rating, holding instead that an ALJ has broad discretion to consider both medical and non-medical evidence in determining the nature and extent of a claimed permanent partial disability under the schedule award provisions of the Act, D.C. Official Code § 32-1508(3)(A)-(U-i).

In light of the D.C. Court of Appeals decision in *Negussie v. Dept. of Employment Services*, 915 A.2d 391 (D.C. 2007), there can be no doubt about the ALJ's authority to determine the degree of disability for claims of schedule loss under the Act, and the ALJ's inherent discretion in exercising that authority to consider both medical and non-medical evidence. There is nothing, the Court in *Negussie* concluded, either in the plain language of the statutory provisions governing the award of schedule benefits or in the legislative history, that suggests "explicitly, or even implicitly, that the determination of disability is the sole function of a medical doctor." 915 A.2d at 396.

Neither Dr. Phillips nor Dr. Barth were the treating physician, and therefore neither's opinion is entitled to any special deference under the Act. While Dr. Chawla, the treating physician, did not provide an impairment rating, his findings from the April 19, 2007 examination serve as guidance to determine the nature and extent of Claimant's disability.

On July 8, 2008, Dr. Phillips attempted to clarify deficiencies in his July 5, 2007 report by converting his arm rating into a hand rating. Unfortunately Dr. Phillips did not offer individual ratings for loss of strength, sensation and loss of endurance and function to explain how he arrived at the rating of 31% for the right hand, and he did not refer to any tables in the AMA Guide 5th edition to support his rating for the right hand. Therefore, the fact finder cannot ascertain what percentage of the 31% rating relates to loss of strength, sensation and loss of endurance and function. Given these limitations, the fact finder will assign impairment ratings based on the findings of

the physicians involved and Claimant's testimony.

With respect to loss of strength, Drs. Chawla and Barth found no evidence to support an impairment rating. EE 1 and 2. In contrast, Dr. Phillips noted 70 pound grip strength on the right compared to 120 pounds on the left using a Jamar Dynamometer. Claimant credibly testified he continued to have grip strength problems, but indicated his hand was getting stronger. HT p. 36. Based on his testimony and the medical evidence, I find Claimant sustained a permanent impairment of 8% due to loss of strength.

Regarding sensation, Dr. Chawla acknowledged there is still some numbness on examination, but concluded sensation to the finger tip was normal. EE 2. Dr. Barth found sensation was intact to light touch, and stated Claimant did not complain of hypersensitivity, numbness or tingling. EE 1. Dr. Phillips stated Claimant had decreased sensation in the distal two thirds of the long finger compared to the other fingers. Dr. Phillips found Claimant had an 18% longitudinal sensory loss of the finger which converted to 2% of the upper extremity. At the hearing, Claimant stated he had problems picking up small objects due to numbness, especially the middle finger prior to physical therapy. Claimant testified he had physical therapy for six weeks, and received instructions for home exercises which involved picking up small objects with his two fingers and squeezing a putty ball. HT p. 28. Based his testimony and the medical evidence, Claimant has sustained a right hand permanent impairment of 3% due to loss of sensation. Therefore, Claimant has a total medical impairment of 11%.

With respect to the five factors found in

Section 32-1508(3)(U-i), Dr. Chawla noted the pain in the dorsum of the PIP joint of the middle finger had improved. EE 2. Dr. Barth did not provide any findings related to pain. While Claimant testified he experienced pain about once or twice a month right down his middle finger down his hand, and the pain lasted sometimes 5-10 minutes. HT p. 31. Drs. Chawla, Barth and Phillips have not provided an impairment rating based on Claimant's pain symptoms. Therefore, Claimant has not established entitlement to permanent partial disability benefits based on his pain.

Dr. Barth assigned a 5% impairment to the right ring finger for the Maryland factors noting Claimant has problems playing the guitar. EE 1. Similarly, Dr. Phillips reported *Claimant has problems strumming the guitar due to pain in his fingers*. CE 2. Claimant testified he has difficulty playing the bass guitar, and stated the middle finger is instrumental to playing. HT p. 30. Claimant indicated prior to the injury, he spent 10-12 hours playing the guitar per week, but now he is unable to play for two hours straight. HT p. 32. Based on Claimant's uncontradicted testimony and the medical evidence supporting a loss of function and endurance, Claimant has sustained an additional impairment of 5% for the right hand with respect to the Maryland factors.

Regarding the issue of industrial loss, the Compensation Review Board (CRB) has established Claimant may be entitled to an additional impairment beyond the medical impairment and the five factors. In *Wormack* the CRB held, contrary to the Director's prior decisions in *Amaya v. Ft. Myers Construction Co.*, Dir. Dkt. No. 03-15, OHA no. 01-80 (April 29, 2003), and *Deguzman v. Bell Atlantic*, Dir.

Dkt. No. 99-73, OHA No. 99-231 (May 31, 2002), that an ALJ may consider more than just the medical impairment ratings in determining the extent of an injured claimant's schedule disability.

In addressing what the CRB characterized as "the non-medical question of loss of industrial use," the CRB acknowledged the ALJ's "broad discretion . . . as the fact finder to consider the medical impairment, the Maryland Factors, and the effect of the work injury on [the claimant's] industrial capacity in arriving at a percentage of disability under the Act."

More than "merely adopt[ing] medical evaluations of anatomical impairment" is required, the extent of loss of use must be assessed "by considering how the injury has affected the employee's ability to do his or her job." 915 A.2d at 397 (quoting *Getson v. WM Bancorp*, 346 Md. 48, 61-62, 694 A.2d 961 (1997) and the AMA Guides). "[F]rom a disability standpoint . . . the purpose and function of the legislative measure is to compensate for loss of use rather than merely for an injury to a scheduled member." *Negussie*, 915 A.2d 398 (quoting *Tubaya v. Tam Joines*, 69 Md. App. 607, 519 A.2d 215, 218 (Md 1987)).

In this case, the Act does not entitle Claimant to an additional impairment beyond the medical impairment and five factors discussed above. Claimant returned to his pre-injury employment on May 22, 2006, and performed his normal work duties without modification. HT p. 29. Dr. Thong released him to full duty without medical restrictions on May 22, 2006. CE 4. While Dr. Chawla noted some numbness of the finger tip, he stated Claimant was able to work full time without any ill effects. EE 2. Claimant continued to

work in that capacity at the time of the July 17, 2008 hearing. The evidence does not establish Claimant unable to perform pre-injury or future employment due to the work incident. Therefore, Claimant has not established entitlement to a higher rating based on an industrial loss.

CONCLUSION OF LAW

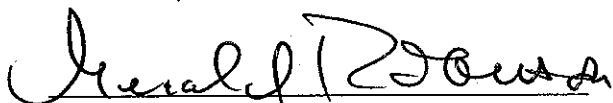
I hereby find and conclude Claimant has sustained a 16% permanent partial disability to the right hand as a result of the April 18, 2006.

FLOYCE GARRETT

PAGE 8

ORDER

It is hereby **ORDERED** Claimant's claim for relief be, and hereby is, **GRANTED IN PART, AND CLAIMANT IS AWARDED A 16% PERMANENT PARTIAL DISABILITY TO THE RIGHT HAND.**



GERALD D. ROBERSON
ADMINISTRATIVE LAW JUDGE

August 13, 2008

Date

RE: *Floyce Garrett v. Washington Metropolitan Area Transit Authority and The Schaffer Company*, OWC No.627448, AHD No. 08-255.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent this 13th day of August, 2008 to the following:

Mohammad R. Sheikh, Acting Assistant Director
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LINDA F. JORY, CHIEF ALJ
ADMINISTRATIVE HEARING DIVISION

RE: *Floyce Garrett v. Washington Metropolitan Area Transit Authority and The Schaffer Company*, OWC No.627448, AHD No. 08-255.

APPEAL RIGHTS

This order is effective upon filing with the Mayor pursuant to Section 21 of the D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code § 32-1520. See D.C. Official Code § 32-1522(a). Any party aggrieved by this Order may file an Application for Review with the Chief Administrative Appeals Judge, Compensation Review Board, Labor Standards Bureau, Department of Employment Services.

Send Application for Review to:

**Compensation Review Board
Attn: Chief Administrative Appeals Judge
Department of Employment Services
64 New York Avenue, N.E., Third Floor
Washington, D.C. 20002**

The Application for Review must be filed with the Compensation Review Board (CRB) within 30 calendar days of the date of the filing of this Order with the Mayor as provided in §23a(a) of the Act, D.C. Official Code § 32-1522(b)(2A)(A). Pursuant to 7 DCMR §§ 258.2, 258.3, 258.4 and 258.6, an Application for Review is perfected by filing with the CRB the following:

1. An original and three (3) copies of an Application for Review;
2. An original and three (3) copies of a Memorandum of Points and Authorities in support of the Application for Review;
3. An original and three (3) copies of the Compensation Order or final decision appealed; and
4. Certification that copies of the Application and Memorandum have been served by mail or delivery upon the opposing party(ies) and the Administrative Hearings Division (AHD).

For a copy of the CRB Rules of Practice and Procedure, go to the DOES website at www.does.dc.gov/does.

Once at the website, click on the link "Worker Protection", then link "Compensation Review Board", then link "Notice of Final Rulemaking".