

**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  
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In the Matter of )  
 )  
JAMES SIMMONS, )  
 )  
Claimant, )  
 )  
v. )  
 )  
MALONE & MALONE CONSTRUCTION, )  
 )  
Employer. )

OHA No. 07-072B  
OWC No. 609360

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Appearances:

GEORGE E. SWEGMAN, ESQUIRE  
For the Claimant

WALTER MALONE, *PRO SE*  
For the Employer

Before:

DAVID L. BODDIE  
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, as amended, §§32-1501 *et seq.*, (hereinafter, the Act).

After timely notice, a full evidentiary hearing was held on December 18, 2007, before David L. Boddie, Administrative Law Judge. James Simmons (hereinafter, Claimant) appeared in person and by counsel. Malone and Malone Construction (hereinafter, Employer) appeared

through its representative. Claimant testified on his own behalf. James Malone testified on behalf of Employer. Claimant Exhibit (CE) Nos. 1-4, and Employer Exhibit (EE) No. 1, described in the Hearing Transcript, were admitted into evidence.<sup>1</sup> The record closed on January 18, 2008, upon receipt of the Employer's Exhibit No. 1, which they had been granted leave to file post-hearing.

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<sup>1</sup>The Employer's Exhibit is described in the Hearing Transcript as a prospective exhibit to be submitted post-hearing, without objection by the Claimant, and upon granting of motion, until January 18, 2008.

**BACKGROUND**

The Claimant was employed as a construction laborer by the Employer on February 19, 2005 when he fell from the roof of a home he was performing roof repair work. The Claimant suffered multiple injuries including fractured ribs, a punctured liver, broken right leg, and back injury.

The Claimant sought and received medical treatment and was unable to work for a period of time. The Claimant returned to work with the Employer in late 2006 on light duty for a couple of weeks but was laid off. Also, from August to December 2007 the Claimant worked intermittently as a construction laborer for another construction company.

**CLAIM FOR RELIEF**

The Claimant seeks an award under the Act of temporary total disability compensation benefits from February 20, 2005 to December 18, 2006, or in the alternative, payment of his average weekly wage from February 20, 2005 to December 18, 2006, based upon the Employer's bad faith delay or failure to pay workers' compensation benefits; a 40 per cent permanent partial disability award of the right leg; penalties pursuant to D.C. Code § 32-1515 for the Employer's failure to timely file a notice of controversion; causally related medical expenses; and interest on accrued benefits.

**ISSUES**

1. Nature and extent of disability, if any;
2. Determination of average weekly wage;
3. Whether the employer filed a timely controversion; and,

4. Whether the employer's delay or failure to pay workers' compensation benefits was in Bad Faith.

**FINDINGS OF FACT**

The parties have stipulated, and accordingly, I so find, at the time of the injury claimed herein: an employer/employee relationship existed under the Act; that the claim is within the jurisdiction of the Act; that an accidental injury occurred on February 19, 2005; that the injury arose out of and in the course of the employment; that timely notice of injury was given; and that the claim was timely filed.

In addition, I make the following findings of facts: I find, based upon wage records submitted into evidence by the Employer, representing the best evidence of the Claimant's average weekly wage of wages earned in the seven weeks preceding his injury that the Claimant's average weekly wage is \$388.93.

I find that the Employer had actual knowledge and was aware of the Claimant's work-related injury at the time it occurred. I find that after his work injury occurred the Claimant filed written notices of injury and claim forms for workers' compensation benefits regarding his work injury.

I find that the Employer was aware that the Claimant suffered injuries in that February 19, 2005 work accident that caused him to be unable to work and that he suffered a total wage loss as a result of those injuries. I find that the Employer received written notice that the Claimant had filed a claim for workers' compensation benefits related to his February 19, 2005 work injury.

I find that the Employer never filed any papers required to be filed under the Workers' Compensation Act for injuries which occur to their employees. I find that the Employer failed to file a notice of controversion.

I find that pursuant to D.C. Code § 32-1515 the Employer is liable for a 20 per cent penalty on benefits due and owing for failure to timely file a notice of controversion.

Regarding the claim the Employer delayed or failed to make payments of workers' compensation benefits to the Claimant in bad faith, I find that the Employer failed to file a notice of controversion. I find that the Employer made some payments to the Claimant. I find that the payments made to the Claimant were sporadic, and not timely, periodic and in installments as is required under the Act.

I find that the Employer was aware that the Claimant was entitled to workers' compensation benefits, and despite its knowledge that he was disabled as a result of his work injury, delayed payments and failed to make payments to the Claimant in bad faith in violation of D.C. Code § 32-1528(b).

## **DISCUSSION**

The evidence and arguments of the parties were reviewed and considered. To the extent an argument of a party is inconsistent with the decision herein, the argument is rejected.

### *Nature and extent of disability*

The Claimant seeks an award of temporary total disability compensation benefits from February 20, 2005 to December 18, 2006. It is the claimant's burden to establish his entitlement to

the amount of benefits sought and the presumption of compensability pursuant to D.C. Code § 32-1521 has no application to determining the nature and extent of disability. *Dunston v. DOES*, 509 A.2d 109 (D.C. 1986).

In his job as a construction laborer with the Employer the Claimant stated that they performed all types of home improvement work, including hanging drywall and performing finishing jobs. The Claimant testified that on February 19, 2005 he was working on a roof with the Employer on Marion Street, off Rhode Island Avenue, near Georgia Avenue and seventh Street in the District of Columbia. He stated that they were hanging or putting rafters up in preparation for the roof to be installed when as he was laying over the edge of the roof a rafter came loose and caused him to fall head first to the ground from a height of about three stories high.. HT pp. 31-32.

The Claimant stated that he suffered injuries consisting of two broken ribs, a punctured liver, and a broken right leg. He testified that his Employer called an ambulance and he was taken to George Washington University Hospital where he was admitted for four and a half days before being discharged. When he was released the Claimant stated he received follow up treatment consisting of physical therapy at the Washington Hospital Center, and Greater Southeast Community Hospital (GSECH), because he did not have health insurance and he did not know whether the Employer had insurance. HT pp. 32-34.

Under the care of physicians the Washington Hospital Center the Claimant stated he received treatment that included placing him in a leg cast up to his hip which he remained in for about a year before it was removed and then he was

referred for further treatment at GSECH for approximately six to seven months. At the end of which time the Claimant testified the doctors advised him to try to do light duty work go out and see what work he was physically capable of doing. HT pp. 34-35.

The Claimant testified that he also recently he has returned to work in the construction trade with another construction company owned and operated by the Employer's son.

In support of his testimony regarding the nature and extent of his disability and claim seeking temporary total disability benefits from February 20, 2005 to December 18, 2006, the Claimant submitted into evidence medical reports from the physicians and health care providers who administered treatment to him for his injuries. CE 1-4.

The medical evidence in the record is generally consistent with the Claimant's testimony and reflects, as he testified, that he initially was treated at the George Washington University hospital, in the emergency room, where he was diagnosed with multiple injuries resulting from a fall of about thirty feet from a roof. Those medical records reflect that the Claimant was admitted and underwent surgery on his right leg for a fracture CE 1.

The medical reports of the GWUH reflect that the Claimant was admitted on February 19, 2005 and discharged on February 22, 2005 with a diagnosis of having suffered a tibia/fibula fracture of the right leg, fractures of the 10<sup>th</sup> and 11<sup>th</sup> ribs, and a lacerated liver. Surgery was performed on the Claimant's right leg fracture, from which it was reported he tolerated well. Over the remaining hospital course the Claimant was placed in a long leg cast, and was instructed in consultation by occupational and

physical therapy in the use of a crutch and weight bearing, and given follow up instructions for treatment with specialists. CE 1.

Following his discharge from the GWUH the medical evidence reflects that the Claimant began treatment at the Washington Hospital Center, Greater Southeast Community Hospital (GSCH) from March 8, 2005 through December 13, 2006. The medical reports submitted by the Claimant show that he received treatment under the care of Drs. Monte Herman, Rafik Muawwad, Christina Cervieri, and Bashir Zikria, orthopedists, and trauma specialists, who had him undergo numerous diagnostic tests, and prescribed several courses of physical therapy and medications. CE 2.

The medical reports also reflect that during the course of treatment the Claimant's cast was removed from his right leg in September 2005, and his fracture was reported as healed and he was placed in a walking boot in October 2005. In January 2006 it was reported that the Claimant was complaining of increased pain in his right leg at the site of the fracture and his knee that was worsened with stair climbing. The Claimant was noted to be still using a cane, exhibited an antalgic gait and evidence of atrophy of the right leg. CE 2.

The medical reports reflect that following a physical therapy discharge in July 2006 in August 2006 the Claimant was medically authorized to return to work in a light duty capacity. However, apparently in response to complaints of increased pain medical reports dated in October 2006 reflect that another course of physical therapy was prescribed for the Claimant. No significant changes were reported in the remainder of the medical records.

In addition, the Claimant submitted into evidence an independent medical evaluation (IME) by Dr. Jeffrey Phillips, an orthopedic surgeon. CE 4.

On March 28, 2007 Dr. Phillips reviewed the Claimant's history of injury and treatment, and performed a physical examination, before rendering his medical opinion regarding the extent of any physical impairment he may have retained from his February 19, 2005 work injuries. On examination Dr. Phillips noted the Claimant ambulated with a right antalgic gait, was unable to step off normally on his right side and that there was obvious deformity of the right distal tibia, evidence that his right leg was four centimeters shorter than the left, and that there was some evidence of limitations in range of motion of the right ankle.

Dr. Phillips then concluded that the Claimant had sustained a permanent injury to his right leg as a result of his work injury which he opined based on his physical examination represented a 40 per cent permanent partial disability of the right leg applying the American Medical Association Guides to Permanent Impairments. CE 4.

The Employer appearing as its own representative, did not submit any medical exhibits in opposition to the Claimant's claim. They did conduct a cross examination of the Claimant.

Finally, the Claimant submitted into evidence unpaid medical bills incurred as a result of his injuries and treatment received.

The Claimant seeks an award of temporary total disability compensation benefits dating from February 20, 2005 to December 18, 2006, and a permanent partial disability award of 40 per

cent of the right leg. The parties having stipulated the Claimant's injury arose out of and in the course of the employment, the statutory presumption pursuant to D.C. Code § 32-1521 has no application to the case and it is the Claimant's burden to establish by a preponderance of the evidence his entitlement to the benefits sought. *Dunston v. DOES*, 509 A.2d 109, 111 (D.C. 1986).

[A] claimant suffers from total disability if his injuries prevent him from engaging in the only type of gainful employment for which he is qualified. Total disability does not mean absolute helplessness, and the claimant need not show that he is no longer able to do any work at all. Instead, an employee who is so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist, may well be classified as totally disabled. *Logan v. DOES*, 805 A.2d 237, 241 (D.C. 2002).

The Claimant's testimony and medical evidence is essentially uncontested by the Employer. No exhibits representing the medical opinions of other physicians that may have examined on behalf of the Employer were submitted into evidence.

I therefore find that the Claimant was temporarily and totally disabled from February 20, 2005 to December 18, 2006.

Regarding the Claimant's claim seeking a permanent partial disability award of 40 per cent of the right leg based upon the medical opinion and impairment rating assessed by Dr. Jeffrey Phillips on March 28, 2007.

I shall next move to consider the Claimant's claim for a scheduled award pursuant to D.C.

Code § 32-1508 (3) (B) for permanent partial disability benefits based upon a 40 per cent impairment rating of the right leg.

A disability is permanent if it has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Smith v. DOES*, 548 A.2d 95, 98 n.. 7 (D.C. 1988). In other words “[p]ermanent means lasting the rest of the claimant’s life. A condition that, according to available medical opinion, will not improve during the claimant’s lifetime is deemed to be a permanent one.” *Logan v. DOES*, 805 A.2d 237, 241 (D.C. 2002), citing 4 ARTHUR LARSON, LARSON’S WORKERS’ COMPENSATION LAW § 80.04, at 80-13 (Matthew Bender ed. 2002).

In *Negussie v. DOES*, 915 A.2d 391 (D.C. 2007) in reaching a determination of making a permanent partial disability award in workers’ compensation cases the Court noted that

Under D.C. Code § 32-1508, a claimant may be entitled to ‘compensation for disability;’ ‘[d]isability means physical or mental incapacity because of injury which results in the loss of wages.’ D.C. Code § 32-1501 (8). An award may be paid for permanent partial loss or loss of use of a member may be for proportionate loss of loss of use of the member.’ D.C. Code § 32-150(3) (S). Furthermore, ‘[i]n determining disability pursuant to [§ 32-1508 (3) (A) through (S) .., the most recent edition of the American Medical Association Guides to the Evaluation of Permanent Impairment may be utilized, along with ‘the Maryland factors of pain, weakness, atrophy, loss of endurance,

and loss of function.’ There is nothing in the plain words of these statutory provisions stating explicitly, or even implicitly, that the determination of disability of disability is the sole function of a medical doctor. And, the legislative history of this code provision cautions against the notion that only doctors may determine disability, as defined in the statute. *Id.*, 915 A.2d at 396-397.

And in doing so the Court observed and favorably quoted the Maryland court’s approach to determining permanent partial awards expressed in a recent case:

The *AMA Guides* themselves warn that the impairment ratings derived from the *AMA Guides* are not substitutes for the legal determination of disability. “As used in the *Guides* ‘impairment’ means an alteration of an individual’s health, status that is *assessed by medical means*, ‘disability,’ which is *assessed by nonmedical means*, means an alteration of an individual’s capacity to meet personal, social, or occupational demands or to meet statutory or regulatory requirements,” (Emphasis in original). *Id.*, 915 A.2d at 397.

The Court went on to state:

“it is significant that D.C. Code § 32-1501 (8) uses the language, ‘compensation for disability,’ and that disability as defined in terms of ‘injury which results in the loss of wages.’ In that regard, our cases, like Maryland workers’ compensation cases, repeatedly have emphasized that ‘[d]isability ... is an economic concept

rather than a medical condition.’ (Disability is an economic and not a medical concept and any injury that does not result in a loss of wage-earning capacity cannot be the foundation for a finding of disability.’); (‘A schedule award is intended to compensate for only for economic not physical impairment.’). Disability, as defined in our statute, ultimately requires a legal determination.” (internal citations omitted). *Id.*

Dr. Phillips having assessed the Claimant’s permanent partial impairment to be 40 per cent, of the right leg, an impairment rating that is medically uncontested by the Employer, I shall now move to consider the Claimant’s disability rating.

In doing so I will consider the impact the Claimant’s injury has had upon his capacity or ability and whether it has altered his capacity to meet personal, social, or occupational demands, and any statutory or regulatory requirements. Or as the District court quoted the Maryland court, “[t]he Commission must assess the extent of the loss of use by considering how the injury has affected the employee’s ability to do his or her job. An evaluating physician provided the Commission with an assessment of medical impairment, the finder of fact, however, must determine the degree of disability.” *Neguissie, supra*, 915 A.2d at 397.

The Claimant, 64 years old at the time of the formal hearing, testified that prior to working for the Employer he had worked as a locksmith for 25 years at the Navy Warfare Center in White Oak, Maryland. The Claimant testified he stopped performing that work because the base closed leaving him out of work, and that it was then that he went out and sought work in

the construction field. HT pp. 26-28.

The Claimant stated that currently he continues to experience problems from his work injuries of February 19, 2005 consisting of controlling his balance and equilibrium being affected, possibly from the fact that one leg is an inch shorter than the other as a result of his accident. He testified that he also has pain 85 per cent of the time, particularly when he overworks or places too much stress on it, which may occur once or twice a month. HT pp. 37-38.

The Claimant testified that he did return to work for a period of time of about three months between February 20, 2005 and December of 2006 performing home improvement work for the Employer’s son, who also owns a construction business. The Claimant stated that he returned to work performing regular construction work doing painting, and hanging drywall, but that he was only able to work for short periods of time, a week or two weeks, without experiencing aches and pains, because he was no longer capable of handling the stress and strain of doing heavy work everyday as he was able to do before his work injury. HT pp. 35-39.

The Claimant also testified that he returned to work for a short time with the Employer in late 2006. He stated that at that time he approached the Employer and asked if he could return or attempt to return to work, and that he did try, but that it did not work out after a couple of weeks. The Claimant stated that he has not attempted to find other light duty work outside of the construction trade. HT pp. 38-41.

And while the Claimant testified of a brief period of time following his February 2005 work injury and prior to December 2006, the end period of his claim for temporary total

disability benefits, his testimony describing the difficulties he experienced in attempting to perform the duties of a construction laborer that he had done before demonstrate the unlikelihood that he will ever be capable of returning to work in that capacity leaving him in a totally disabled work capacity for work that he was previously qualified.

The Claimant stated that currently he lives off of the assistance of his family and children and attempts to work whenever he is able to find a job. He further testified that he has applied for and has been receiving social security benefits in the amount of \$627 per month since July 2006. Finally, he stated that prior to February 19, 2005 he had never injured his right leg or suffered any medical problems that prevented him from performing his work with the Employer. HT pp. 41-42.

This testimony is totally uncontested by the Employer. I find that it reflects the Claimant's work injury has in fact had an impact upon him altering his individual capacity to meet his personal, social, and occupational demands. I further find that due to the impact Claimant's work injury has had upon those areas of his life that his permanent partial disability should be assessed 15 per cent higher upon the 40 per cent permanent partial impairment attributed by Dr. Phillips for a total 55 per cent permanent partial disability of the right leg.

*Average weekly wage*

The Claimant testified that he had been employed by the Employer for approximately eight years or since 1992 or 1995 as a laborer performing home improvement construction jobs at a rate of pay of \$11.00 per hour.

The Claimant testified that he generally worked

a 40 hour week approximately eighty per cent of the time, particularly if the weather was good, and occasionally would work more than 40 hours. He further testified that the Employer, with the exception of a three month period, always paid employees in cash, rather than with a paycheck. HT pp. 29-30.

In opposition to the Claimant's testimony, Walter Malone, principal owner, and appearing as it's representative, testified on behalf of the Employer. Mr. Malone testified that the Claimant was paid at a rate of \$11.00 per hour and based upon a 40 hour week would have earned approximately \$440 per week. However, he further stated that, during the six month period preceding the Claimant's February 19, 2005 work injury, there were many weeks when they may have only worked about 16 hours, and others when the Claimant only earned pay for eight hours, due to factors such as the weather, whether a job was ready to start, and occasional periods when no work was available. Therefore, he stated, it was his estimation that during the six months preceding the Claimant's work injury he probably earned or averaged \$440 or \$400 per week for approximately four months of that period. HT pp. 53-54.

Mr. Malone concurred with the Claimant's testimony that he generally paid him in cash and only occasionally with checks, but stated he believed he could produce payment or payroll records of payments reflecting the Claimant's weekly pay. HT pp. 55-57.

Finally, on cross examination, Mr. Malone testified that he believed the Claimant's average weekly wage is less than the Claimant asserts, and that he would produce pay records demonstrating that, as well as reflecting the total of pay given, as advance payments of

compensation following the work injury. The Claimant, in response to the Employer's testimony regarding the production of records, motioned to allow time for their production, and that motion was granted. HT pp. 85-89.

On January 15, 2008 the Employer filed as an exhibit correspondence describing wages paid to the Claimant from August 2005 up to the date of injury in February 2005. EE 1.

D.C. Code § 32-1511 provides in relevant part:

**(a) Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:**

**(1) If at the time of the injury the wages are fixed by the week, the amount so fixed shall be the average weekly wage; ...**

**(4) If at the time of the injury wages are fixed by the day, hour, or by the output of the employee, the average weekly wage shall be computed by dividing by 26 the total wages the employee earned in the employ of the employer in the 26 consecutive calendar weeks immediately preceding the injury. If the employee has been in the employ of the employer less than 26 weeks, the total wages referred to in paragraph (3) ... shall be the amount the employee would have earned had the employee ben employed by the employer for the full 26 calendar weeks immediately preceding the injury and had worked...**

Following the Employer's filing on January 15, 2008, the Claimant filed his written closing argument as the parties were invited to do at the close of the formal hearing. In it the Claimant acknowledged the Employer's filing and that he accepted as accurate the figures reflected as wages earned by himself in the period preceding the work injury as reflecting what his actual wages were to be computed as his average weekly wage.

Those figures reflect an average weekly wage of \$389.93 per week for the seven weeks preceding the Claimant's work injury, which is less than the \$400.00 per week he testified he earned based upon an hourly rate of pay of \$11.00, but the Claimant stated he was willing to accept and stipulate to that amount as his average weekly wage.<sup>2</sup>

There being no objection to the Employer's exhibit filed reflecting the actual wages the Claimant earned during the seven weeks prior to his work injury, and this being the only and best information available, I find that the Claimant's average weekly wage is \$389.93.

*Timely controversion*

D.C. Code § 32-1515 ent itled "Payment of compensation" provides in relevant part:

**(a) Compensation shall be paid periodically, promptly, and directly**

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<sup>2</sup>In his filing of January 24, 2008 wherein the Claimant stated he was willing to accept and stipulate to the average weekly wage reflected in the Employer's exhibit filed on January 15, 2008, rather than his testimony that he was earning \$10.00 per hour based upon a 40 hour work week. While the Claimant's acceptance of those calculations as the most reliable and accurate, it is noted that both the Claimant and Employer testified that his hourly rate was \$11.00.

to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

(b) The 1<sup>st</sup> installment of compensation shall become due on the 14<sup>th</sup> day after the employer has knowledge of the job-related injury..., on which date all compensation due shall be paid. Thereafter compensation shall be paid in installments, biweekly, ...

(d) If the employer controverts the right to compensation he shall file with the Mayor, on or before the 14<sup>th</sup> day after he has knowledge of the alleged injury ... and its relationship to the employment, a notice in accordance with a form prescribed by the Mayor stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of injury... and the grounds upon which the right to compensation is controverted.

The Claimant testified that he received some payments from the Employer following his work injury of February 19, 2005. He did not state when he received these payments in terms of how soon after his injury or whether they were made following his filing of workers' compensation forms such as a notice of injury and claim form.

On the other hand, Mr. Malone testified on behalf of the Employer that following the Claimant's injury he learned that he had filed a workers' compensation claim. He stated that when he first received a letter from the Claimant's attorney, and again some time later

when some persons from the compensation board came to his home approximately six months after the Claimant's accident. Mr. Malone further testified that he actually saw the claim filed by the Claimant, and that despite seeing it he did not file any papers in response to that claim, specifically a notice of controversion. HT pp. 69-72.

It has generally been held that once the claimant raises the issue of penalties, he has an affirmative duty to present the case on the issue. The claimant is required to make a *prima facie* showing that he was entitled to penalties. Where the claimant fails to produce some form of evidence from which the fact finder can reasonably draw the inference that the employer failed to properly file a notice of controversion, the employer is not required to forward with any evidence on the issue. *Stone v. WMATA*, Dir. Dkt. No. 88-17, H&AS No. 87-296, OWC No. 0107702 (Director's Decision, May 11, 1989).

However, in this case the Employer acknowledged that they did not file a notice of controversion, although they were aware of his injury at the time it occurred, and subsequently received written notices of the Claimant's injury and filing of a workers' compensation claim.

Nevertheless, the Employer never filed a notice of controversion as is required by D.C. Code § 32-1515. And notwithstanding the fact the Employer made some payments to the Claimant following his injury, those payments were not consistent with the language and requirements of § 32-1515 in that they were not paid in biweekly installments, periodically and promptly to the Claimant.

I therefore find that the Employer is liable for

20 per cent penalties on compensation benefits due and owing, and with the exception of the initial payment made to the Claimant made on February 25, 2005, and appears to represent pay for the time worked prior to the injury occurring, is entitled to a credit for those payments made to the Claimant.

*Bad faith*

D.C. Code § 32-1528(b) entitled “penalty for unreasonable delay in payment of compensation” provides:

**If the Mayor or court determines that an employer or carrier has delayed the payment of any installment of compensation to an employee in bad faith, the employer shall pay to the injured employee, for the duration of the delay, the actual weekly wage of the employee for the period that the employee is eligible to receive workers’ compensation benefits under this chapter. The penalty shall be in addition to any amount paid pursuant to § 32-1515.**

The claimant testified that while he was off work between February 2005 and December 2006 the Employer did pay him some workers’ compensation benefits. He stated that in late 2005, while he was still in a cast, the Employer made several payments in increments of \$500, about \$1500 in all, to him. But after that he did not receive any further payments or an explanation why he was not receiving anything more. HT pp. 39-40.

In opposition to the Claimant’s testimony, Mr. Malone on behalf of the Employer testified that following the Claimant’s discharge from the hospital, he came by his home on three to four

occasions and gave him payments ranging from \$200 to \$500 totaling an amount of approximately \$2200, for which he stated he had records and 30 days leave was granted for him to produce those records until on or about January 15, 2008.

On January 15, 2008 the Employer timely filed correspondence with attachments of checks made out to the Claimant representing disability compensation payments made to the Claimant. EE 1.

In *Bivens v. Chemed/Rotorooter Plumbing Services*, CRB No. 05-215, AHD No. 01-002B OWC No. 560668 (Decision and Order, April 28, 2005), the Board stated that in cases of bad faith,

We hold that to establish a *prima facie* showing of bad faith in contravention of the Act, the claimant must show (1) entitlement to a benefit, (2) knowledge by the employer of a claim to the entitlement, and (3) failure to provide the benefit or to controvert within a reasonable time. Once the claimant has made this showing, the burden shifts to the employer to produce evidence indicating a good faith basis for not paying the benefits. Upon such production by the employer, the claimant has the additional burden of proving that said evidence is pretextual.

In cases where a controversion is filed, the claimant has the additional burden to establish that the controversion was filed in bad faith. Absent a controversion, bad faith may be inferred from a showing of entitlement, knowledge by the employer of the

entitlement, and failure to pay or unreasonable delay in paying, since employer, by failing to controvert, has offered no explanation whatsoever for its failure to pay, and where the Act requires such an explanation, (as it does by requiring that controversion notice be filed), it is fair to infer that no good reason exists in the absence thereof.

Where a controversion has been filed, the employer has asserted a reason for the termination, and the burden remains on the claimant to demonstrate that the asserted reason in the controversion was pretextual, and not based upon existing law, or a good faith argument for expansion, extension or modification of existing law.

*Id.* at 5.

In this case the evidence reflects that some payments were made by the Employer to the Claimant. The Employer's post-hearing exhibit reflects wages paid to the Claimant prior to his injury of February 19, 2005, and the dates and amounts of monies paid to the Claimant after his injury. This has been accepted by the Claimant as accurately reflecting the amounts paid to him by the Employer post injury. EE 1.

However, although the payments made by the Employer may be seen as "voluntary" payments of compensation, worker's compensation payments under the Act, in order to be in compliance with D.C. Code § 32-1515, and avoid application of the bad faith provisions of § 32-1528(b), are required to be made regularly

and biweekly, in installments, and directly to the claimant. The Employer's exhibit reflecting payments made by it to the Claimant following his injury, in addition to varying as to the amount paid to the Claimant, were neither in installments, made biweekly, nor in installments.

The evidence reflecting that the Employer having failed to file a notice of controversion, and there being no explanation or evidence indicating why payments of workers' compensation were delayed and not paid to the Claimant, I find the Employer's failure to timely pay workers' compensation benefits to the Claimant was in bad faith pursuant to D.C. Code § 32-1528(b) and that the Claimant is therefore entitled to be paid at the rate of his average weekly wage for the period that he was disabled.<sup>3</sup>

#### CONCLUSIONS OF LAW

Based upon a review of the evidence in the record as a whole, I conclude that the Claimant was temporarily and totally disabled from February 20, 2005 to December 18, 2006; that the Claimant has a permanent partial disability of 55 per cent of the right leg; that the Claimant's average weekly wage is \$389.93; that the Employer failed to file a notice of controversion; and, that the Employer's delay and failure to timely pay workers' compensation benefits to the Claimant was in bad faith.

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<sup>3</sup>The Employer shall be granted a credit against payments made.

**ORDER**

It is **ORDERED** Claimant's claim for relief be, and hereby is **granted**, the Employer shall pay to the Claimant temporary total disability compensation benefits for the period from February 20, 2005 to December 18, 2007, at the rate of his average weekly wage based upon their bad faith failure or delay in payments, with a credit for payments made, and pay the Claimant for a 55 per cent permanent partial disability of the right leg, with a 20 per cent penalty on temporary total disability benefits.



DAVID L. BODDIE  
ADMINISTRATIVE LAW JUDGE

June 24, 2008

Date

RE: *James Simmons v. Malone & Malone Construction,*  
OWC No. 609360, AHD No. 07-072B

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was sent this 24<sup>th</sup> day of June,  
2008 to the following:

Mohammad R. Sheikh, Acting Assistant Director  
Labor Standards Bureau  
Department of Employment Services  
64 New York Ave., N.E., Suite 3923  
Washington, D.C. 20002

**Hand Delivery**

Charles Green, Associate Director  
Department of Employment Services  
64 New York Ave., N.E., Second Floor  
Washington, D.C. 20002

**Hand Delivery**

Claimant's Counsel, Esquire  
Ashcraft & Gerel  
2000 L Street, N.W., Suite 400  
Washington, D.C. 20036

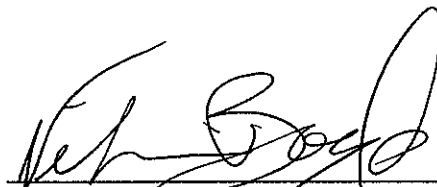
**Certified**

Walter Malone, *Pro Se*  
1606 A Street, S.E.  
Washington, D.C. 2003

**Certified**

James Simmons  
114 Wayne Place, S.E., Apt. 211  
Washington, D.C. 20032

**Certified**



LINDA F. JORY, CHIEF ALJ  
ADMINISTRATIVE HEARING DIVISION

RE: ***James Simmons v. Malone & Malone Construction,***  
**OWC No. 609360, AHD No. 07-072B**

This order is effective upon filing with the Mayor pursuant to §21 of the Act, D.C. Code, as amended, §32-1520. 7 DCMR §230.12; §23a of the Act, D.C. Code, as amended, 2001, §32-1522a. Any party aggrieved by this Order may file an application for review with the Chief Judge Compensation Order Review Board<sup>4</sup>, Labor Standards Bureau, Department of Employment Services.

**Send Application for Review to:**

**Compensation Review Board/Chief Judge  
Department of Employment Services  
Labor Standards Bureau  
64 New York Ave., N.E.  
Third Floor  
Washington, D.C. 20002**

The Application for Review must be filed within 30 days of the date of the filing of this Order with the Mayor as provided in §23a(a) of the Act, D.C. Code, as amended, §32-1522a(a). An Application for Review is perfected by filing with the Chief Judge, Compensation Review Board, Labor Standards Bureau,

1. one (1) original and three (3) copies of an Application for Review,
2. one (1) original and three (3) copies of a Memorandum of Points and Authorities in support of the Application, and
3. certification that copies of the Application and Memorandum have been served by mail or delivery

7 DCMR §§230.1, 230.2; §23a of the Act, D.C. Code, 2001, §32-1522a. A complete copy of the foregoing documents should be filed with the Office of Hearings and Adjudication Administrative Hearings Division at 64 New York Avenue, N.E., Second Floor, Washington, D.C. 20002.

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<sup>4</sup>D.C. Code Ann. § 32-1521.01 (2001) and Title 7 of the District of Columbia Municipal Regulations, Chapter 1, section 118, and Chapter 2, sections 250 *et seq.*, established a Compensation Order Review Board and set forth the authority and responsibilities thereof. The letterhead used for decisions and orders refer to the entity as the "Compensation Review Board", which is the shorter-form designation the Director of the Department of Employment Services used in Administrative Policy Issuance No. 05-01 (February 5, 2005).