

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,)
)
CARL A. COLSTON,)
)
 Claimant,)
)
 v.)
)
ATLANTIC SERVICES GROUP,)
)
 And)
)
TRAVELER'S INSURANCE,)
)
 Employer/Carrier.)

AHD No. 07-407A
OWC No. 623614

Appearances

JESSICA BHAGAN, ESQUIRE
For the Claimant

AMY L. EPSTEIN, ESQUIRE
For the Employer

Before:

BELVA D. NEWSOME
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 April 28, 2008, before Belva D. Newsome, Administrative Law Judge. Carl A. Colston (hereinafter, Claimant) appeared in person and by counsel. Claimant testified on his behalf. Atlantic Services Group, Inc. and Traveler's Insurance (hereinafter collectively, Employer) appeared by counsel. Christopher Maulden testified on behalf of Employer. Claimant Exhibit (hereinafter, CE) Nos. 1-2, and Employer Exhibit (hereinafter, EE) Nos. 1-4 described in the Hearing Transcript (hereinafter, HT), were admitted into evidence. The record closed on May 13, 2008.

BACKGROUND

Claimant suffered a work-related injury on January 13, 2006, when working for Employer as a valet driver, the vehicle he was driving was struck by an 18-wheeler truck on the driver's side. Claimant was taken by ambulance from the scene to Howard University Hospital (hereinafter, HUH) where he was found to have suffered injuries to his neck, back, and left shoulder.

CLAIM FOR RELIEF

Claimant seeks temporary total disability from January 13, 2006 until March 24, 2006; causally related medicals; and, accrued interest.

ISSUE

1. Nature and extent of disability, if any.
2. Voluntary limitation of income.

FINDINGS OF FACT

The parties have stipulated, and I accordingly find, that an employee/employer relationship existed; that the claim is within the jurisdiction of the Act; that an accidental injury occurred on January 13, 2006; causal relationship arising out of and in the course of employment; medical causal relationship; timely notice of injury; and, timely notice of claim. The average weekly wage is \$140.00.

Based upon the record evidence, I make the following findings of fact:

I find Claimant to be a credible witness, and his testimony is consistent with and supported by the evidence in the record.

Claimant suffered a work-related injury on January 13, 2006, when working for Employer as a valet driver, the vehicle he was driving was struck by an 18-wheeler truck on the driver's side.

Claimant was taken by ambulance from the scene to Howard University Hospital where he was found to have suffered injuries to his neck, back, and left shoulder.

Claimant was advised to stay off work for two days and follow-up with his primary care or private doctor before seeing the referral by HUH. Claimant saw Dr. John B. Cohen, an orthopaedic surgeon, recommended by the Employer.

Dr. Cohen initially examined Claimant on January 25, 2006, and found impingement syndrome, must rule out a rotator cuff tear; must rule out free fragment from a fracture spur; and, lumbosacral spine sprain. Claimant was prescribed Daypro at 600 mg twice daily as an anti-inflammatory, and scheduled an MRI. Dr. Cohen placed Claimant on light duty status with no driving and no use of his left upper extremity.

Claimant gave Employer the light duty restrictions by going to his scheduling manager, Tony Barnes. Employer contacted Claimant about the flagger position at Whole Foods on Duke Street in Virginia. The position was to direct traffic and point customers into parking spaces. Claimant was to show up in uniform and report to the site manager or supervisor for assignment.

Claimant was given two sticks by the person in charge and told to do what everyone else was doing. Employees were yelling back and forth about the location of parking spaces and counting the spaces to determine if the lot was full, or if it was empty, how many spaces were available. Claimant's job was to direct the customers down around the various levels of the parking lot to where the parking spaces were.

Daypro states on the prescription bottle not to take the medication while operating a motor vehicle, that it may cause dizziness, that it is not to be taken without food; and not to exceed the dosage. Claimant became drowsy on the medication, and did not take it before reporting to Whole Foods.

The traffic was very heavy, and the customers ignored the flaggers if they saw someone coming out of a parking space. Claimant had to use both arms because customers were coming from both directions. Claimant decided that he could not perform the duties of a flagger when his left arm began to hurt with pain that shot all the way up to his neck. At that point, he found the site manager and explained that he needed to take his pain medication that would make him sleepy. At that point, Claimant left the job site and did not perform any further light duty for Employer.

The modified duty position provided by the Employer was not commensurate with Claimant's physical limitation, i.e., no use of his left upper extremity.

Claimant informed Dr. Cohen at his February 23, 2006 visit of the problems that he had with the flagger position. Dr. Cohen had received the results of Claimant's MRI that had found a 3.5 cm cyst in the superior aspect of the labrum which was either paralabral or a ganglion cyst. Dr. Cohen allowed Claimant to perform light duty if Employer had light duty.

In response to a February 28, 2006 facsimile from Employer, Dr. Cohen stated that the cause of the cyst was the accident; that Claimant should continue physical therapy; that

Claimant could return to his valet driver job within two weeks; and, that he would see Claimant again in two weeks.

DISCUSSION

Following a thorough review of the parties' arguments, I have determined, to the extent an argument is consistent with the findings and conclusions herein, the argument is accepted; to the extent an argument is inconsistent therewith, it is rejected.¹

A. Nature and Extent of Claimant's Disability.

Employer challenges the nature and extent of Claimant's disability.

The Courts in interpreting the Act have found, and it is widely acknowledged, that there is no presumption of the nature and extent of a claimant's disability. A claimant has the affirmative duty to present substantial evidence of the level of benefits sought. See, *Dunston v. District of Columbia Department of Employment Services*, 509 A.2d 109 (D.C. 1986). "[T]he presumption [of the compensability of a claim] has no application to a determination of the nature and extent of [a claimant's] injury. [Claimant] is entitled to a presumption that his claim is compensable, i.e., that his injury 'arises out of' employment. He is not entitled to a presumption that his injury has left him totally and permanently disabled." *Id.* at 111. In cases of conflicting medical opinions, the fact-finder can draw any reasonable inference from the evidence presented. *George Hyman Construction Company v. Department of Employment Services*, 498 A.2d 563, 566 (D.C. 1985).

Thus, claimant must affirmatively show the "nature and extent" of his disability. *Logan v. District of Columbia Dept. of Employment Services*, 805 A.2d 237 (D.C. App. 2002), (hereinafter *Logan*), citing *Dunston, supra*. The Court in *Logan*, however utilized a burden shifting device as an aid to evaluating the evidence regarding the "extent" of claimant's disability. Citing the District of Columbia Circuit Court in *Crum v. General Adjustment Bureau*, 238 U.S. App. D.C. 80, 738 F.2d 474 (1984), the Court held "Once the claimant demonstrates an inability to perform his/her usual job, a prima facie case of total disability is established, which the employer may then seek to rebut by establishing the availability of other jobs which the claimant could perform. *Logan, id.* at 240. Where employer meets this evidentiary burden, claimant, in order to sustain a disability finding, must either successfully challenge the legitimacy of the employer's evidence of available employment, or demonstrate diligence, but lack of success, in obtaining other employment. *Logan, supra* at 243. Employer can also rebut claimant's case by presenting opposing medical evidence as to the extent of claimant's disability.

Employer has not presented any evidence that Claimant could perform his pre-injury position as valet driver. All of the disability slips submitted by Dr. Cohen state that

¹While each documentary exhibit received in evidence is not specifically referenced in the discussion, all evidence of record was reviewed as part of this deliberation.

Claimant could not drive. (CE 1, pp. 5, 8, 9, 10 & 15; EE 2, pp. 3). Dr. Cohen responded to Employer's request on February 28, 2006 for when Claimant could return to his pre-injury position, within two weeks. (EE 2, p. 8). However, Dr. Cohen did not release Claimant to full-duty status until March 20, 2006, Claimant returned to work as valet driver on March 25, 2008. (EE 2, p. 10).

Since Employer provided Claimant with his doctor, Employer does not have any opposing medical evidence to rebut Claimant's medical evidence that he could not drive, and could not use his left upper extremity. I find Claimant was temporary totally disabled for the January 14, 2006 until March 24, 2006.

B. Voluntary Limitation of Income

D.C. Official Code § 32-1508(5) provides in pertinent part:

If the employee voluntarily limits his income or fails to accept employment commensurate with his abilities, then his wages after becoming disabled shall be deemed to be the amount he would earn if he did not voluntarily limit his income or did accept employment commensurate with his abilities.

Claimant notified Employer of the work restrictions imposed upon him by Dr. Cohen. (HT, p. 25). He was notified of a position as flagger at the Whole Foods on Duke Street in Virginia. In February 2006, Claimant went to the job site to perform the duties of flagger, but instead of being given one flag to use in his right hand, he was given two flags requiring the use of both of his arms. His restrictions from Dr. Cohen restricted the use of his left upper extremity. Claimant attempted to perform the duties of flagger for about two hours or two-and-a half hours without taking his medication. He informed the site manager that he needed to take his pain medication that would make him sleepy, and left Whole Foods. (HT, pp. 26-30). Claimant did not return to the position of flagger.

Employer had Christopher Maulden, Director of Human Resources, testify. Mr. Maulden has held that position since October 25, 2005, and had actually hired Claimant. (HT, p. 43). Mr. Maulden's responsibilities include all the hiring, all the training and development initiatives, benefits administration, hiring, workers' compensation, and working with operations and any other tasks under human resources. Mr. Maulden described the methodology for determining that Claimant could perform the flagger position. After meeting with Alain Ikombo, Vice President for Atlantic Valet, and having had other employees restricted to the use of one arm work as flagger, Mr. Maulden offered the position to Claimant though Tony Barnes.

When Claimant did not perform the flagger position, Employer did not offer him any other light duty position because management determined that the position could be performed with one arm. (HT, p. 59) Mr. Maulden had only been to the Whole Foods job site since he was new to his position when Claimant attempted to perform the flagger position, and there was not actually a supervisor on site the day that Claimant reported to the job site. (HT, pp. 52-54).

Employer bases its argument that Claimant voluntarily limited his income by not performing work commensurate with his abilities on one site visit by a new director of human resources, and after the fact completion of the duties of other employees with restrictions against the use of one arm performing the position of flagger. No supervisor was present on the day that Claimant attempted the position so that no one in management can state whether flaggers were normally given one or two flags. If the flagger position only entailed one flag, then certainly Claimant could have performed the position of flagger. Claimant testified, and Employer has not rebutted, that he was given two flags when he found the site supervisor and that the and the other workers used to flags because traffic came at them from both directions. (HT, pp. 28-30).

Employer has not shown that Claimant failed to accept employment commensurate with his abilities. I find that Claimant did not voluntarily limit his income.

CONCLUSION OF LAW

I hereby conclude that Claimant's is entitled to temporary total disability from January 14, 2006 through March 24, 2006; related medicals; and accrued interest.

ORDER

It is hereby **ORDERED** claimant's claim for relief be, and hereby is, **GRANTED**.

BELVA D. NEWSOME
ADMINISTRATIVE LAW JUDGE

Date

RE: *Carl A. Colston v. Atlantic Services Group and Traveler's Insurance,*
OWC No. 623614, AHD No. 07-407A.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent this 29th day of May, 2008 to the following:

Mohammad R. Sheikh, Acting Assistant Director
Labor Standards
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

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Jessica Bhagan, Esquire
7852 Walker Drive, Suite 300
Greenbelt, MD 20770

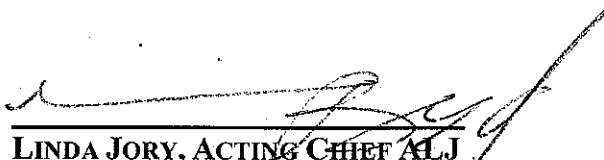
Certified

Amy L. Epstein, Esquire
14008 Park East Circle
Chantilly, VA 20151

Certified

Carl A. Colston
4507 Rena Road #103
Suitland, MD 20746

Certified


LINDA JORY, ACTING CHIEF ALJ
ADMINISTRATIVE HEARING DIVISION

RE: *Carl A. Colston v. Atlantic Services Group and Traveler's Insurance,,*
OWC No. 623614, AHD No. 07-407A.

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**".