

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,)

DENISE COLLYMORE,)

Claimant,)

v.)

ACTION TO REHABILITATE)
COMMUNITY HOUSING,)

and,)

THE HARTFORD INSURANCE COMPANY,)

Employer/Carrier.)

AHD No. 06-405A
OWC No. 619862

Appearances

MATTHEW PEFFER, ESQUIRE
For the Claimant

LISA ZELENAK, ESQUIRE
For the Employer/Carrier

Before:

KAREN R. CALMEISE
Administrative Law Judge

COMPENSATION ORDER

This proceeding arises out of a claim for workers' compensation benefits filed pursuant to the provisions of the District of Columbia Worker's 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 July 1, 2008, before Karen R. Calmeise, Administrative Law Judge. Denise

Collymore (hereinafter, Claimant) appeared in person and by counsel. Action to Rehabilitate Community Housing, (hereinafter, Employer) appeared by counsel. Claimant testified on her own behalf. Employer presented no witnesses to testify on its behalf. Claimant Exhibit (hereinafter, CE) Nos. 1-2 and Employer Exhibit (hereinafter, EE) Nos. 1-2, described in the Hearing Transcript (hereinafter, HT), were admitted into evidence. The record

closed on July 29, 2008 upon receipt of the Hearing Transcript.

BACKGROUND AND PROCEDURAL HISTORY

Claimant worked for Employer as an instructor preparing students for the high school equivalency tests. On August 5, 2005, Claimant injured her head, back, and neck, while working. Claimant was awarded payment for medical treatment.

CLAIM FOR RELIEF

Claimant seeks an award under the Act for permanent partial disability compensation benefits of 12% for the left upper extremity and 24% for the left lower extremity.

ISSUE

The nature and extent, if any, of claimant's disability.

FINDINGS OF FACT

The parties have stipulated, and I accordingly so find, the Claimant's employment is principally localized in the District of Columbia; there is an employer/employee relationship pursuant to the Act; there was an accidental injury on December 1, 1993 which was causally related to her work; there was timely notice of the injury, and timely filing of the claim for benefits; and the claimant's average weekly wage is \$ 807.69.

Based upon the record evidence, I find the following to be facts.

Claimant worked for employer as an educator

teaching students and preparing students to take the High School General Educational Development (GED) test.

Claimant has treated with Dr. Hampton Jackson, orthopedic surgeon, (hereinafter, treating physician) from December 2005 through the date of the Formal Hearing. I find Claimant continues to receive ongoing medical treatment from the treating physician for her work related symptoms.

Claimant was hit by an SUV automobile in March 16, 2007. Claimant was knocked to the ground and injured the right side of her body. She also suffered a loose tooth. Claimant received medical treatment and physical therapy for the injuries she received from the car accident. Claimant received follow-up medical care from the treating physician for her automobile accident injuries.

Claimant suffered a fracture of her right fibula and right knee sprain when she fell while walking on March 15, 2008. I find Claimant received medical treatment at Providence Hospital and George Washington Hospital. Claimant continued with medical treatment with the treating physician for her neck and low back complaints from the 8/5/05 work injury and her right knee and ankle complaints pertaining to her 3/15/08 slip and fall.

DISCUSSION

The arguments of both parties on the issues present for resolution were given equal consideration. 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, it is rejected.¹ In addressing this claim, I considered Claimant's and witness testimony and the Hearing record evidence in its entirety.

It is axiomatic that there is no presumption regarding the nature and extent of a claimant's disability. Specifically, "the presumption [of compensability] has no application to a determination of the nature and extent of [a claimant's] injury." *Dunston v. DOES*, 509 A.2d 109, 111 (D.C. 1986). Thus, Claimant has the affirmative duty to present substantial, credible evidence of the level of benefits sought.

Claimant has requested permanent partial disability benefits. § 32-1508(3) of the Act sets forth the method by which a "disability partial in character but permanent in quality" shall be compensated.² Furthermore, the Act defines a disability as "physical or mental incapacity because of injury which results in the loss of wages." See § 32-1501(8).

Recovery of permanent partial disability benefits requires evidence to support a finding claimant's condition has (1) reached maximum medical improvement (hereinafter MMI), (2)

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.

²D.C. Code Ann. § 32-1508(3) provides

In the case of disability partial in character but permanent in quality, the compensation shall be 66 2/3 of the employee's average weekly wages... and shall be paid as follows:
 (A) Arm lost, 312 weeks' compensation,
 (B) Leg lost, 288 weeks' compensation [.]

the schedule member in question has sustained a scheduled ratable physical impairment and; (3) the permanent physical impairment has impacted claimant's ability to earn wages. *Michael R. Cather v. U.S. Elevator*, AHD No. 96-395C, OWC No. 253603 (November 21, 2005). Determining the appropriate impairment level of a disability requires the application of relevant *American Medical Association Guidelines to The Evaluation of Permanent Impairment*, 5th Edition (hereinafter AMA Guides), as well as utilization of five provisional factors as enumerated in the Act. See D.C. Code § 32-1508 (3)(U-i).

Claimant relies on evidentiary medical documentation from treating physician, Dr. Jackson, and on an independent medical evaluation of a permanency disability rating to her left lower extremity. (CE 1) On October 23, 2007, Claimant underwent an examination by Joel D. Fechter, M.D., orthopedic surgeon, for the sole purpose of rendering an opinion as to the degree of any medical impairment the injury has caused on a permanent basis. Dr. Fechter, citing the AMA Guides, assigned a 12% permanent partial impairment rating to the left upper extremity and 24% impairment to the left lower extremity.

Against this evidence, Employer contests the partial permanency rating. Employer relies upon the expert medical opinion and rating of employer's independent medical examiner (hereinafter IME) to support its position of a lesser impairment rating. (EE 1) Employer's IME, Louis Levitt, M.D., orthopedic surgeon, reviewed Claimant's medical records, test results and on February 12, 2008, evaluated the Claimant. Citing the AMA Guides, Dr. Levitt ascribed a 0% permanent impairment

rating to claimant's left arm and left leg as it relates to the 8/5/05 accident.

Upon review of the evidence I find Claimant's has not proven the first requirement under the Act to be considered eligible for permanent partial disability benefits.

First, Claimant's evidence fails to meet the requirements under the Act in that the medical evidence and Claimant's testimony does not establish that Claimant's condition has reached MMI. A finding of MMI is a prerequisite to a Claimant's eligibility for permanent partial disability benefits. See *Smith v. District of Columbia Department of Employment Services*, 548 A.2d 95, 98 (D.C. 1988).³ Claimant's IME opines, in the October 27, 2007 IME report that Claimant continues with significant complaints and findings pertaining to her 8/5/05 injury to her neck and low back. However, the report fails to state an opinion that Claimant has reached MMI. Although it is noted on the Stipulation Form, Claim For Relief section, that the Maximum Medical Improvement date is October 23, 2007 which happens to be the date of the Claimant's IME report, nowhere in

the IME report or Claimant's medical evidence is it opined, by a medical practitioner, that Claimant has reached stabilization with regards to her physical condition. Also, the IME report notes,

"With treatment there was some improvement" [pertaining to Claimant's subjective complaints of radicular symptoms] (CE No.1) (emphasis added).

The absence of an MMI opinion in the permanent partial disability rating report may not be determinative in that the undersigned may find, by review of testimony and other medical evidence that Claimant has reached MMI by adducing other evidence from the Formal Hearing record thereby satisfying the initial requirement under the Act. It has previously been held, 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.⁴ However, I find the medical evidence and her testimony provide no support for a finding that Claimant has reached MMI with regard to her neck and low back injury or her left leg and arm symptoms stemming from the 8/5/05 work incident.

Claimant testified that her left leg symptoms

³ With regard to the remaining "permanent" element claimant needs to establish her entitlement to an award of permanent total disability benefits, this agency has adopted the standard promulgated by Arthur Larson, *The Law of Workers' Compensation* §57.12(b)(1998), to determine if a disability is permanent in nature. In *Smith v. District of Columbia Dep't of Employment Services*, 548 A.2d 95, 98 (1988), the Court of appeals cited Larson in describing a claimant as permanently disabled when "her injury had healed as much as it was going to and she had reached what is referred to as maximum medical improvement (hereafter MMI), i.e. a point at which the healing period has ended and stabilization has been reached. See *Elizabeth Scott v. District of Columbia DOES*, A.2d (February 5, 1997)(citing Smith).

⁴ 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)

have continued, unabated since the 8/5/05 work injury. (HT pg. 21 and 22) However, my review of the treating physician's medical reports submitted by the Claimant from 12/2005 through 6/2007 reflect repeated notes of treatment for her complaints of neck and back symptoms (1/23/06, 4/3/07, 6/4/07), bi-lateral knee pain ((4/30/07), and disorientation feeling in the legs ((6/4/07). (CE No. 2) Although the treating physician notes her complaints of weakening in her "leg", or "legs", the reports do not specify which leg the symptoms pertain to thereby lending no support for Claimant's claim that her left leg has had continued symptoms since the 8/5/05 work incident.

With regard to her left arm, Claimant testified at the instant Formal Hearing that she experienced weakness in her left arm since the 8/5/05 work injury.

Q. The symptoms that you just described with your left arm, have you experienced those since August 5, 2005?

A. Yes, I have...

(HT. pg. 23)

However, the treating physician's reports dated 12/5/05 through 1/8/08 make no reference to her complaints of radiculopathy or pain in her left arm. (CE No. 2, generally)

Claimant has received ongoing treatment for complaints of various symptoms since the 8/5/2005 work incident. However, intervening accidents since the 2005 work incident have caused additional physical injuries. Claimant was hit by a SUV

automobile in March 2006 which threw her to the ground and loosened a tooth. She also suffered a fracture of her right fibula and ankle from a fall in March 2008. The treating physician in his reports, attributes her physical injuries from the March 2008 non-work related accident as being related to the 8/2005 work injury. (See CE No. 1, pg 8) and Claimant attributed being hit by the automobile to the 8/2005 work injury. (HT pg. 37-38)

Claimant testified that she continues to receive medical treatment and examinations by the treating physician as recently as one (1) week prior to the Formal Hearing.(HT pg. 38) I cannot find that Claimant has reached MMI for the 8/5/05 work related accidental injury because of her continued medical treatment from the subsequent non-work related accidents. The treating physician's medical reports failed to specifically identify what treatment was initiated for which injury or complaint during the treatment period from January 2006 through March 2008 (prior to the Formal Hearing) I find it impossible to discern when and whether the ongoing corrective medical treatment for the non-work related injuries ceased and when the treatment may have become palliative with regards to her alleged left leg and arm and complaints.

CONCLUSION OF LAW

Based upon a review of the record evidence as a whole, I conclude Claimant has not reached MMI and is not eligible for an award of permanent partial disability benefits for her left upper and lower extremity condition.

DENISE COLLYMORE

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ORDER

It is hereby **ORDERED** Employer's claim for relief be, and hereby is, DENIED.

Karen R Calmeise

KAREN R. CALMEISE
ADMINISTRATIVE LAW JUDGE

September 12, 2008

Date

RE: **DENISE COLLYMORE V. ACTION TO REHABILITATE COMMUNITY HOUSING,**
OWC No. 619862, AHD No. 06-405A.

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**".

RE: DENISE COLLYMORE V. ACTION TO REHABILITATE COMMUNITY HOUSING,
OWC No. 619862, AHD No. 06-405A.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent this 12th day of September, 2008 to the following:

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LINDA J. JORY, CHIEF ALJ
ADMINISTRATIVE HEARING DIVISION