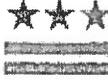


**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Department of Employment Services**  
**Office of the Director**

**Gregory P. Irish**  
**Director**



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|                                       |   |                            |
|---------------------------------------|---|----------------------------|
| <b>BABETH STANFORD,</b>               | ) |                            |
|                                       | ) |                            |
| <b>Claimant,</b>                      | ) |                            |
|                                       | ) |                            |
| <b>v.</b>                             | ) | <b>Dir. Dkt. No. 99-68</b> |
|                                       | ) | <b>OHA No. 99-144</b>      |
| <b>CAREY INTERNATIONAL, INC.,</b>     | ) | <b>OWC No. 533475</b>      |
|                                       | ) | <b>(Private Sector)</b>    |
| <b>and</b>                            | ) |                            |
|                                       | ) |                            |
| <b>ZURICH-AMERICAN INSURANCE CO.,</b> | ) |                            |
|                                       | ) |                            |
| <b>Employer/Carrier.</b>              | ) |                            |
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**Appeal of the Compensation Order of Jeffrey P. Russell**  
**Hearings and Appeals Examiner, Department of Employment Services**

**Andrew S. Kasmer, Esquire, for the Claimant**

**Kevin J. Campion, Esquire, for the Employer/Carrier**

***DECISION AND REMAND ORDER OF THE DIRECTOR***

**Jurisdiction**

The Employer files this appeal from the Compensation Order of Hearings and Appeals Examiner Jeffrey P. Russell awarding the Claimant benefits on her claim for workers' compensation benefits, pursuant to the provisions of the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Law 3-77, D.C. Code §§ 36-301-345 (1981) (Act).

**Background**

The Claimant was a telephone reservation clerk for the Employer. Due to the constant speaking, she developed nodules on her vocal chords. On September 3, 1998, the Claimant was medically advised to discontinue such work which she did. The Employer was made aware of the Claimant's work-related injury on the same day. From September 10, 1998 through October 9, 1998, the Claimant worked as a nursing assistant earning \$280.00 per week. On September 29, 1998, the Employer offered the Claimant a position as a filing

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clerk, which was within her physical restrictions, earning \$90.00 per week. She, however, declined the offer. On December 3, 1998, the Claimant began receiving unemployment compensation benefits for the period October 24, 1998 through April 17, 1999. The Claimant did not receive any benefits between October 10, 1998 and October 23, 1998 and after her unemployment compensation benefits ended. On April 18, 1999, the Employer paid the Claimant \$1,000.00 as a settlement of her unrelated employment discrimination claim. The Employer filed its Notice of Controversion on March 29, 1999.

On July 15, 1999, Hearing and Appeals Examiner Jeffrey P. Russell issued a Compensation Order awarding the Claimant temporary total disability benefits from September 3, 1998 through September 9, 1998, temporary partial disability benefits based upon a wage loss of \$80.00 per week from September 10, 1998 through October 9, 1998, temporary partial disability benefits based upon a wage earning capacity loss of \$270.00 per week from October 10, 1998 to the present and continuing, plus interest thereon. He also awarded the Claimant a 10% penalty on all benefits due up to and including March 23, 1999 and related medical expenses. On August 17, 1999, the Employer filed an Application for Review. The Claimant filed a Response on August 31, 1999.

**Analysis**

The issues on appeal, based upon the Employer's Application for Review, are whether the Claimant was entitled to temporary partial disability benefits from September 10, 1998 through October 9, 1998 at the rate of \$80.00 per week when she left that job for reasons unrelated to her disability, whether the Claimant was entitled to receive temporary partial disability benefits for the same period that she received unemployment compensation benefits and whether the Employer was entitled to receive credit for payments of unemployment compensation benefits and payments on an unrelated discrimination claim.

D.C. Code § 36-308 (5) provides:

In case of temporary partial disability, the compensation shall be 66 $\frac{2}{3}$ % of the injured employee's wage loss to be paid during the continuance of such disability, but shall not be paid for a period exceeding 5 years. Wage loss shall be the difference between the employee's average weekly wage before becoming disabled and the employee's actual wages after becoming disabled. 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.

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D.C. Code § 36-315(j) provides:

If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due. All payments prior to an award, to an employee who is injured in the course and scope of his employment, shall be considered advance payments of compensation.

The Director of the Department of Employment Services (Director) must affirm the Compensation Order under review if the findings of fact contained therein are supported by substantial evidence in the record considered as a whole and if the law has been properly applied. *See* D.C. Code § 36-322 (1981); 7 DCMR § 230 (1986). Substantial evidence is such relevant evidence as a reasonable mind might find as adequate to support a conclusion. *George Hyman Construction Company v. D.C. Department of Employment Services*, 498 A.2d 563, 566 (D.C. 1985).

The Employer argues that the Hearing Examiner erred in awarding the Claimant temporary partial disability benefits at the rate of \$80.00 per week from September 10, 1998 through October 9, 1998 during which time she worked as a Nursing Assistant because she was terminated from that position for reasons unrelated to her injury. As support for its position, the Employer cites *Wise v. District Management Corp.*, H&AS No. 83-42, OWC No. 2885 (September 28, 1984). The Employer maintains that the Claimant was only entitled to permanent partial disability benefits at the rate of \$53.33, the wage loss between her job with it and her job as a Nursing Assistant.<sup>1</sup>

Under the Act, it is appropriate to award temporary partial disability benefits when an injured employee returns to work, but because of the work injury, earns a wage less than the average weekly wage earned before the work injury. *See* D.C. Code § 36-308 (5). Here, the Claimant's average weekly wage was \$360.00 when she sustained her injury on September 3, 1998. She returned to work as a Nursing Assistant from September 10, 1998 through October 9, 1998 and, because of her injury, earned \$280.00 per week, an amount less than she earned at the time she was injured. Thus, the Hearing Examiner's finding that the Claimant is entitled to receive temporary partial disability benefits at rate of \$80.00 is in accordance with the law.

The Employer's reliance on *Wise, supra*, as support for its argument that the Claimant should have been paid at the rate of \$53.33 from September 10, 1998 through October 9, 1998 is misplaced. *Wise* held that an injured employee was not entitled to receive temporary

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<sup>1</sup> The Employer did not show how it arrived at the figure of \$53.33 and the Director is unable to discern the method.

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total disability benefits after the injured employee was laid off by a second employer for reasons unrelated to the work injury. If the holding of *Wise* were applied to this case, the Claimant would be precluded from receiving temporary total disability benefits *after* she stopped working as a Nursing Assistant, not while she worked as a Nursing Assistant.<sup>2</sup>

As to awarding permanent partial disability benefits, under the Act, permanent benefits, either total or partial, are not awardable until an injured employee's physical condition reaches "maximum medical improvement". See generally *Brown v. Blake Construction Company*, Dir. Dkt. No. 01-02, H&AS No. 93-116, OWC No. 059059 (April 20, 2001). Here, there is no evidence to support such a determination. Therefore, the Employer's argument on the type of benefits is rejected.

In his decision, the Hearing Examiner found that the Claimant voluntarily limited her income when she declined the Employer's September 29, 1998 offer of employment as a file clerk. In this position, the Claimant would have earned \$9.00 per hour for 2 hours of work per day for 5 day work week for a total wage of \$90.00 per week. He found that, except for the period through October 9, 1998,<sup>3</sup> the Claimant voluntarily limited her income by \$90.00 per week and awarded temporary partial disability benefits in the amount of \$270.00 (\$360.00 - \$90.00) from October 10, 1998 to the present and continuing. However, the Hearing Examiner's findings are erroneous as a matter of law.

Under D.C. Code §36-308 (5), an injured employee voluntarily limits his income when, after injured in his usual employment, he fails to accept or thwarts efforts to locate other available employment within his physical abilities, thereby increasing his post-injury wage loss. See generally *Powers v. National Geographic Society*, Dir. Dkt. No. 87-2, H&AS No. 86-405, OWC No. 0070490 (June 6, 1989).

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<sup>2</sup> The holding of *Wise, supra* was modified in *Morris v. DMI, Inc.*, Dir. Dkt. No. 87-49, H&AS No. 86-566, OWC No. 0058418 (October 26, 1988) which held that if a claimant's loss of employment and wages are due to a disability which occurred before a lay-off, a claimant is entitled to workers' compensation benefits after the lay-off and in *Davis v. George Washington University*, H&AS No. 84-534, OWC No. 0037947 (July 22, 1987) which held that if a claimant remains unable to work after a lay-off due to a disability which arose before the lay-off, a claimant is entitled to receive temporary total disability benefits.

<sup>3</sup> The Hearing Examiner did not state the beginning date for the time period. However, given the facts of this case, it is reasonable to assume that the beginning date is September 10, 1998.

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The evidence shows that at the time she declined the Employer's offer of employment, the Claimant was working and earning wages higher than the wages of the position offered. Under these circumstances, the Claimant did not "limit" her income and she is, not restricted to receiving only temporary partial disability benefits because of her action. Therefore, this matter must be remanded for findings of fact and conclusions of law on the type of workers' compensation benefits, if any, that the Claimant should receive after October 9, 1998, bearing in mind the law as set forth in Footnote 2 above.

It is noted that in his Conclusions of Law, Hearing Examiner Russell indicates that the Claimant is entitled to temporary partial disability benefits continuing from October 10, 1998 based upon a "wage loss", yet in his Order, he awarded temporary partial disability benefits based upon a "wage earning capacity loss". However, it is well-settled that the Act is a wage loss statute, not a loss of wage earning capacity statute. *See Mauti v. Pro Football, Incorporated*, Dir. Dkt. No. 87-57, H&AS No. 86-433, OWC No. 0071338 (March 4, 1994). Therefore, the award in this case needs to be clarified.

The Employer also argues that the Hearing Examiner erred in awarding workers' compensation benefits for the same period that she received unemployment compensation benefits. The Employer maintains that awarding the two types of benefits require an employee to meet inconsistent requirements: physical inability due to a work injury to receive workers' compensation benefits and physically able to work to receive unemployment benefits. Further, the Employer asserts that such an award allows for a double recovery and the Act contains numerous provisions reflecting a legislative intent to prevent multiple recoveries of compensation.<sup>4</sup> The Employer maintains that the unemployment benefits the Claimant received were an advance payment of compensation pursuant to D.C. Code § 36-316 (j) and that it should receive a credit equaling the amount of those payments. It cites several agency decisions in support of its argument.<sup>5</sup> Finally, the Employer asserts that the \$1,000.00 paid to the Claimant in settlement of her employment discrimination claim, which was filed after her injury claim, was also an advance payment of compensation warranting a credit. Other than the plain language of the Act, the Employer cites no authority for this assertion.

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<sup>4</sup> The Employer cites to D.C. Code § 36-303 (a)(1) (compensation received from another state), D.C. Code § 36-304 (b) (compensation is the exclusive remedy against employer) and D.C. Code § 36-308 (9) (set-off for the receipt of social security and other retirement benefits).

<sup>5</sup> *Brooks v. Tyler Construction Co.*, H&AS No. 91-17, OWC No. 108866 (May 6, 1991); *Reeder v. Associated Sulpicians*, H&AS No. 91-124, OWC No. 0195198; *Stewart v. H&E Management Association*, H&AS No. 85-303, OWC No. 0060394 (June 11, 1986).

In order for monies to be considered an "advance payment of compensation" within the meaning of D.C. Code § 36-315 (j), the monies must be paid by the employer during a period of disability to replace income lost by virtue of the injury. In this jurisdiction, it is well settled that that an employer is entitled to a credit for unemployment compensation benefits received by an injured employee at the same time the employee is receiving workers' compensation benefits. See *Flanagan v. Auger Enterprises*, Dir. Dkt. No. 94-65; H&AS No. 92-714; OWC No. 198453 (May 11, 1995). The rationale behind this holding, however, is not because the unemployment benefits qualify as an advance payment of compensation, but to prevent the injured employee from receiving a double recovery of monies from the employer.

The evidence shows that the Claimant did not receive workers' compensation benefits after October 10, 1998, but did receive unemployment compensation benefits for the period October 24, 1998 through April 17, 1999. In the Compensation Order, however, the Claimant received, via an award, workers' compensation benefits from October 10, 1998 to the present and continuing. Accordingly, based upon the law in this jurisdiction, the Employer is entitled to a credit for the unemployment benefits paid from October 24, 1998 through April 17, 1999. With respect to \$1,000.00 payment, this money was paid to the Claimant to settle a discrimination claim against the Employer. It is not tied to her work injury and is not an entitlement earned by the Claimant by virtue of her employment. Thus, the Hearing Examiner's determination not to grant a credit for this payment is in accordance with law.

### **Conclusion**

The Claimant is entitled to receive temporary partial disability benefits from September 10, 1998 through October 9, 1998 at the rate of \$80.00 per week while working for a second employer although she left that employment for reasons unrelated to her disability, and the Employer is entitled to receive a credit for payments of unemployment compensation benefits paid at the same time that the Claimant is receiving workers' compensation benefits, but not for payments based upon a settlement of an unrelated discrimination claim.

**Decision**

For the reasons set forth above, the Compensation Order of July 15, 1999 is hereby affirmed in part and remanded in part. This matter is remanded to the Office of Hearings and Adjudication for findings of fact and conclusions of law consistent with the above discussion on the type of workers' compensation benefits, if any, that the Claimant should receive after October 9, 1998 and for any needed clarification of the award of benefits. All other aspects of the Compensation Order are affirmed.

  
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Gregory P. Irish  
Director

**APR 30 2002**

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Date