

DISTRICT OF COLUMBIA, DEPARTMENT OF EMPLOYMENT SERVICES,  
COMPENSATION REVIEW BOARD

James A. Savoy,  
Claimant

v.

Evered Bardon and National Union Fire Insurance Company,  
Employer/Carrier

Dir. Dkt. No. 96-59; H&AS No. 93-377; OWC No. Unknown

April 24, 1997  
Appeal of the Compensation Order of Linda Jory  
Examiner

Benjamin T. Boscolo for the Claimant;  
Thomas G. Hagerty for the Employer/Carrier

F. Alexis H. Roberson, Director  
Decision of the Director

#### I. Preliminary Statement

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, as amended, D.C. Law 3-77, D. C. Code, § 36-301 et seq. (1981 Edition, as amended) (hereinafter, the "Act").

In an April 26, 1996 Compensation Order, the Hearing Examiner ordered the following:

- (1) that the employer pay to claimant temporary total disability benefits from the inception of the 1992 work injury through September 17, 1993; and,
- (2) that D.C. Code § 36-308(9) is not a bar to claimant's receipt of continuing benefits for temporary partial disability benefits from employer in combination with weekly earnings and union pension benefits.

The employer appeals this ruling in part as they argue that the Hearing Examiner committed error with respect to the first part of the Order. It is the employer's position that temporary partial [\*2] disability benefits are the appropriate award to claimant in this instance as opposed to temporary total. Hence, the employer's prayer for relief requests that the portion of the Compensation Order awarding temporary total disability benefits be vacated and/or reversed. Additionally, the employer requests that the Director consider remanding the case so that the Hearing Examiner can reassess the extent to which claimant sustained a partial loss of earning capacity.

#### II. Background

On November 17, 1992, claimant sustained a back injury in the course and scope of his employment as a cement truck driver for the employer. As a result of the injury, claimant was unable to resume work in his pre-injury capacity as cement truck driver. As a result thereof, the Hearing Examiner found claimant entitled to benefits based on a wage loss. The claimant was awarded temporary partial disability benefits for a wage loss of \$ 486.03 for September 17, 1993 through November 3, 1993 and for a wage loss of \$ 387.41 from November 3, 1993 through the present and continuing. Claimant was also awarded temporary total disability benefits from November 17, 1992 through September 17, 1993.

During [\*3] the fact finding phase of the evidentiary hearing, the Hearing Examiner found that claimant worked in a country and western bar prior to his work injury. The Hearing Examiner also found that claimant continued to work

irregularly at the bar after his work injury. Thus, the employer argues that since there exists uncontradicted evidence of claimant's continued employment subsequent to the work injury, the claimant should not have been awarded temporary total disability benefits from the date of the work injury through September 17, 1993 but rather, temporary partial disability benefits for that time period.

### III. Discussion

The Director of the Department of Employment Services (hereinafter, "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 whole and if the law has been properly applied. See, D. C. Code, § 36-301; 7 D.C.M.R. Employment Benefits § 230. Substantial evidence is such relevant evidence as a reasonable mind might find as adequate to support a conclusion. *George Hyman Construction Company v. Department of Employment Services*, 498 A.2d. 563,566 (D.C. 1985). [\*4]

In this jurisdiction, a claimant is found temporarily totally disabled when he is unable to work in his regular employment for a limited time as the result of an on the job injury. 1C Arthur Larson, *Larson's Workmen's Compensation Laws*, § 57 (1996); *Le v. Omni Shoreham Hotel*, H&AS No. 87-752, OWC No. 0094226.

The Hearing Examiner, after reviewing all medical evidence in conjunction with the nature and extent of claimant's disability, held that temporary total disability benefits for the time period in question are appropriate in this matter. The record evidence reveals that medical opinions of the treating physician and the independent medical examiner are similar. Both physicians, orthopedic surgeons, concur that claimant needed to work in an environment where physical exertion is at a minimum. The independent medical examiner further opined, "that claimant should be rehabilitated to a lighter duty job which does not require a lot of lifting and bending." Medical Report of Dr. Robert Collins, January 12, 1993, Employer's Exhibit # 2. The original job duties include, but were not limited to, the mixing of cement and transporting cement to various locations. These [\*5] duties involved constant bending, climbing and changing cement chutes. It was opined by the treating physician that post injury employment should involve a job where repetitive, continual bending and climbing is not required. The employer, however, was unable to find post injury employment commensurate with the medical restrictions.

Upon review of the record evidence, the Director is not persuaded by the employer's argument that the Hearing Examiner erred in awarding claimant temporary total disability benefits from November 17, 1992 through September 17, 1993. It is uncontested in the record that claimant is unable to work in his usual capacity as a cement truck driver. Medical documentation corroborates this finding. Moreover, the facts surrounding claimant's physical condition satisfies this jurisdiction's above referenced definition of a temporarily totally disabled person.

With respect to claimant's employment at the country and western bar after the work injury, the Director finds that this does not negate claimant's entitlement to temporary total disability. The record evidence shows that claimant merely "helped out" the owner of the bar periodically. H.T. at 42. Although [\*6] claimant's "helping out" was done prior to the injury, the record evidence strongly implies that claimant likewise helped out the owner subsequent to the injury. On three different occasions (December 18, 1992, December 19, 1992 and January 7, 1993), claimant was witnessed collecting cover charges upon entry to the dance floor of the bar, cooking, and sitting on a barstool. H.T. 50-59. The time claimant spent at the bar on each of the occasions totalled no more than three hours. A reasonable inference can be made that claimant's activities conform to the physical limitations resultant of the work injury. Moreover, the record is devoid of any indication that wages were paid to claimant in exchange for helping out the owner. The Director notes that temporary partial benefits are benefits awarded based on evidence of an actual wage loss. Thus, employer's argument that claimant's employment at the bar post injury was legally sufficient evidence to compel a Hearing Examiner's award of temporary partial disability benefits from the date of injury to the present is rejected herein.

Unlike the work at the bar, claimant received wages for employment he obtained on his own at a Denny's [\*7] Restaurant. Claimant conceded that his obtaining employment with Denny's meant a change in his disability status and, therefore sought temporary partial benefits effective his date of hire. Accordingly, the Hearing Examiner awarded claimant temporary partial benefits as direct evidence of a wage loss as reflected in the record.

The findings of fact and conclusion of law in this case comports with the substantial evidence contained in the record. Therefore, the Director affirms the Hearing Examiner's decision rendered in this case.

### IV. Disposition

Accordingly, for the reason set forth above, the Compensation Order of April 26, 1996, is hereby adopted, affirmed, and incorporated by reference herein.