In the Matter of,	)	
	)	
JAMIL F. MUHAMMAD,	)	
	)	
Claimant,	)	
	)	
v.	)	AHD NO. 03-035C
	)	OWC NO. 576531
EASTERN ELECTRIC,	)	
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY,	)	
	)	
Employer/Carrier.	)	

Appearances:

HEATHER C. LESLIE, ESQUIRE
For the Claimant

JAMIE L. DESISTO, ESQUIRE
For the Employer/Carrier

Before:

ANAND K. VERMA
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 formal hearing was held on December 12, 2006 and continued to January 9, 2007, before Anand K. Verma, Administrative Law Judge. Jamil F. Muhammad, appeared in person and through counsel (hereinafter, claimant). Eastern Electric/Zurich American Insurance Company. (hereinafter, employer) appeared by counsel. Claimant testified on his own behalf. Trudy Koslow testified on behalf of

employer. Claimant Exhibit (hereinafter, CE) No.1-5 and Employer Exhibit (hereinafter, EE) No.1-5 , described in the Hearing Transcript, (hereinafter, HT) were admitted into evidence. The record closed on February 9, 2007.

BACKGROUND

Claimant, a 59 years old laborer injured his lower back on March 1, 2002, while lifting and carrying cable wire at work. Although claimant resumed employment following his treatment, he did not hold a steady employment because he suffered from constant pain in his lower extremity. Claimant seeks permanent total disability benefits from March 1, 2006.

CLAIM FOR RELIEF

Claimant seeks an award under the Act of permanent total disability benefits from March 1, 2006 along with interest on accrued benefits and causally related medical expenses.

ISSUES

1. Whether claimant's psychiatric condition is medically causally related to the March 1, 2002 injury.

2. Nature and extent of claimant's disability, if any.

3. Whether claimant failed to cooperate with his vocational rehabilitation and voluntarily limited his income.

FINDINGS OF FACT

The parties have stipulated, and I accordingly so find, an employer/employee relationship is present under the Act; jurisdiction is vested in the District of Columbia; claimant sustained an accidental injury to his low back on March 1, 2002 that arose out of and in the course of employment; claimant provided timely notice of the injury; the claim was timely filed; and claimant's average weekly wage is $381.51.

Based on the review of the record as a whole, I make the following findings:

Claimant worked for employer on March 1, 2002 as a laborer when, while carrying cable and performing other lifting assignments, he felt low back strains. After receiving initial treatment at the workers' compensation clinic, claimant was referred to The Metropolitan Washington Orthopaedic Association where he was evaluated by William Dorn, III, M.D., an orthopaedic surgeon. On March 27, 2002, Dr. Dorn reviewed claimant's MRI scan and x-ray of his lower back and diagnosed him with lumbosacral strain with herniated disc, radiculopathy of the lower extremities and strains of the right shoulder. Recommending physical therapy and anti-inflammatory medications, Dr. Dorn referred claimant for evaluation by Hampton J. Jackson, M.D., an orthopaedic surgeon.[1]

On April 12, 2002, claimant was examined by Dr. Jackson who noted a ruptured disc at L4-5 and ordered an EMG /nerve conduction study as well as recommend absolute rest with medication and physical therapy. In the April 17, 2002 follow up, with essentially unchanged findings, Dr. Dorn referred him for an MRI scan of the right shoulder. The EMG/nerve conduction study of the lower extremities disclosed evidence of denervation[2] in the right leg distribution of L5-

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[1]Dr. Jackson is affiliated with The Metropolitan Washington Orthopaedic Association.

[2]Resection or removal of the nerves to an organ or part. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 29th Edition, p. 472 (2000).

S1 as well as in the C5-6.

With no new findings in the follow up of May 8, 2002, Dr. Dorn further extended claimant's inability to return to work. On May 29, 2002, analyzing the results of the MRI scans of claimant's cervical spine and right shoulder, Dr. Dorn noted bulging discs at C4-5 with slight flattening of the cervical cord and protrusions at C6-7. The right shoulder MRI showed a possible small tear of the rotator cuff as it inserted into the greater tuberosity as well as degenerative changes in the acromioclavicular[3] joint. In a subsequent follow up examination on May 31, 2002, Dr. Jackson noted significant complaints of claimant's low back symptoms and, therefore, continued his off-work status. On that examination, he felt an option of treating him with cervical collar and absolute rest, or intervene surgically, if the symptoms worsened.

Claimant's follow up of June 19, 2002 with Dr. Dorn was unchanged and claimant was informed Dr. Dorn was no longer associated with the Metropolitan Washington Orthopaedic Association. On June 28, 2002, claimant returned to Dr. Jackson when he continued his physical therapy in conjunction with the off-work status and explored the possibility of percutaneous[4] disc decompression by coblation nucleoplasty as a minimally invasive procedure. In the July 25, 2002 examination, Dr. Jackson noted persistent tenderness and spasm as well as positive straight leg raising test and explained to him the necessity of a minimally invasive procedure of percutaneous disc decompression. On August 22, 2002, claimant returned to Dr. Jackson with the complaints of neck pain and headache, greater than his lower back pain, as well as intermittent pain in the left leg. Observing no progressive neurological worsening, Dr. Jackson deferred any surgical intervention and recommended claimant continue the physical therapy, medications and stay off-work.

The September 19, 2002 follow up examination remained unchanged. On October 18, 2002, Dr. Jackson noted slight improvement in claimant's symptoms and felt surgery would be necessary if he did not improve by March 1, 2003. On November 22, 2002, Dr. Jackson confirmed claimant's rotator cuff injury of the right shoulder and discontinued physical therapy due to poor results therefrom. With no new findings in his December 20, 2002 and January 31, 2003 follow ups, Dr. Jackson continued claimant's home therapy and off-duty status until February 28, 2003.

On April 4, 2003, Dr. Jackson recommended a trial of percutaneous neuromuscular treatment before surgery. On May 9, 2003, Dr. Jackson noted claimant's complaints of continued symptoms to the cervical and lumbar spines coupled with radiculopathy in the upper and lower extremities, and right shoulder condition. Dr. Jackson contemplated his referral to a pain management specialist for epidural blocks. The June 6 and July 11, 2003 follow ups noted essentially same complaints in the cervical, dorsal and lumbar areas. In the August 15, 2003 follow up, claimant expressed his preference for a non-surgical treatment. Accordingly, on

[3]Pertaining to the acromion and clavicle, especially to the articulation between the acromion and clavicle. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 29th Edition, p. 21 (2000).

[4]Performed through the skin, as injection of radiopaque material in radiological examination, or removal of tissue for biopsy accomplished by a needle. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 29th Edition, p. 1350 (2000).

August 22, 2003, Dr. Jackson administered percutaneous neuromodulation[5] therapy, which he repeated on August 29, September 5 and September 19, 2003. On October 24, 2003, claimant was issued a prescription for an RS-4 device.

In a subsequent follow up on January 13, 2004, claimant admittedly felt improvement from afore-noted therapy and RS-4 device. Claimant sought no treatment for the next three months.

On March 23, 2004, at the behest of employer, claimant underwent an independent medical evaluation (IME) by Marc B. Danziger, M.D., an orthopaedic surgeon, who noted significantly more subjective symptomatology than found on objective examination. More specifically, other than a mild symptomatology from the L4-5 disc herniation, claimant did not have any symptoms from the neck degenerative disc disease or from the rotator cuff tear. Deeming any further treatment, including surgery, as absolutely unnecessary, Dr. Danziger opined claimant should return to light duty employment.

On April 20, 2004, he returned to Dr. Jackson with complaints of severe back pain coupled with pain in both legs, when plantar flexion weakness was noted. Thereafter, claimant followed up with Dr. Jackson on June 25, August 10, 2004 when claimant was placed on Medrol Dosepak in addition to his other medications. On October 12, 2004, Dr. Jackson prescribed Xanax .5 mg. and suggested epidural blocks should claimant not improve with the prescribed medication. On November 23, 2004, claimant's symptoms notably stabilized and he was prescribed analgesics and Bextra 20 mg. In addition to Tylenol #3.

On December 21, 2004, claimant underwent another IME by Dr. Danziger who noted resolved symptoms from the cervical strain, lumbar strain and right shoulder contusion with overuse tendinitis.[6] In his opinion, normal history from these injuries would be 6-8 weeks of treatment, not 2 ½ years. Finding claimant at maximum medical improvement (MMI), Dr. Danziger felt he could return to full duty work with the exception of heights and ladders.

On January 6, 2005, Dr. Jackson noted claimant had antalgic and distorted gait and walked with a cane and diagnosed him with a rigid back and subacute sciatica. On February 17, 2005, claimant was assigned a total impairment rating of 68% of the body as a whole by a Committee composed of Dr. Jackson as well as Rida N. Azer, M.D., an orthopaedic surgeon. In a follow up on March 29, 2005, however, Dr. Jackson noted, among other things, "I see no reason to change my total impairment rating of 6% to 8% impairment of the body as a whole." (CE 2 at 120). On June 24, 2005, Dr. Jackson apportioned 6% impairment to the cervical spine and 5% to the right shoulder, and confusingly stated that claimant's "impairment rating without his neck and shoulder is approximately 60% of the body as a whole." (CE 2 at 117).

On August 2, 2005, Dr. Jackson prescribed a collapsible ambulatory cane and felt he could

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[5]Electrical stimulation of a peripheral nerve, the spinal cord, or the brain for relief of pain; it may be done transcutaneously or with an implanted stimulator. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 29th Edition, p. 1211 (2000).

[6]Inflammation and calcification of the subcromial or subdeltoid bursa, resulting in pain, tenderness, and limitation of motion in the shoulder. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 29th Edition, p. 1797 (2000).

work in a sedentary duty employment. On September 13, 2005, claimant felt no improvement in his symptoms and Dr. Jackson continued the recommended sedentary duty employment for claimant's rehabilitation. With the diagnoses of stable non-malignant pain syndrome and stable lumbar pain syndrome in the October 18, 2005 follow up, Dr. Jackson continued his rest and medications and opined the jobs employer had identified were not suited to claimant since they "require him to travel to and fro, and involve[s] bending and twisting." (CE 2 at 112). Claimant did not seek any treatment for the next two and half months.

Claimant returned to Dr. Jackson on January 10, 2006 with the complaint of back pain radiating to the legs. The examination disclosed no worsening of his neurologic status, albeit with restriction of motion and spasm of the lower back. On February 2, 2006, Dr. Jackson noted claimant's attention and concentration were normal and he had no signs of cognitive dysfunction. Moreover, claimant's speech was notably clear, coherent, well articulated, logical and spontaneous without slurring, rambling or pressure. In the subsequent follow up on April 11, 2006 with significant complaints of pain, Dr. Hampton apportioned a combined rating of 72% impairment of the body as a whole for his neck and back symptoms consistent with *AMA Guides to the Evaluation of Permanent Impairments*, 5th Edition, pp. 604, 605. The last follow up note is dated June 20, 2006 when Dr. Jackson continued claimant's off -work status from June 20, 2006 to August 1, 2006.

Approximately four years after his March 1, 2002 work injury, claimant submitted to Kenneth R. Smothers, M.D., a psychiatrist, on September 6, 2006, for evaluation of his depression allegedly related to said injury. Dr. Smothers noted claimant's current symptoms as severely depressed mood, bouts of anxiety, "anger flare ups," impaired concentration, and social and vocational dysfunction. With diagnoses of mood disorder due to general medical condition and depression NOS (not otherwise specified), Dr. Smothers felt the diagnosed "symptoms was causally and temporally related to his workplace injury." (CE 4).

On October 18, 2006, as arranged by employer, claimant underwent an IME by Brian Shulman, M.D., an occupational psychiatrist. In his comprehensive report, Dr. Shulman pertinently noted claimant had features of an adjustment disorder with disturbance primarily in conduct. Claimant also exhibited symptom magnification and illness behaviors. His disorder is rooted in his limited coping skills and unwillingness to proceed with vocational restoration. Dr. Shulman opined claimant attained MMI as related to the psychiatric sequelae of the March 1, 2002 work injury.

Dr. Shulman believes had claimant's chronic pain contributed to his depression, Dr. Jackson would have referred him for a psychiatric evaluation much earlier than the summer of 2006. Dr. Shulman also felt that "the fire in Mr. Muhammad was ignited by anybody disagreeing with his perception of himself as being totally disabled." EE 6 at 32). Dr. Shulman further held that claimant reacted quite vehemently to anyone that challenges his perception and an ordinary person in claimant's position would not behave in this way. (EE 6 at 33-35).

Claimant's testimony as it concerns his continued low back pain, its antecedents and consequences to be exaggerated and incredible. Moreover, claimant's demeanor and appearance mitigated

against a wholesale acceptance of his testimony as credible.

On July 11, 2005, an initial vocational assessment was made at claimant's counsel's office by the Vocational Case Manager (hereinafter, VCM) and vocational testing was scheduled on July 27, 2005 at PG County Library. On August 5, 2005, a rehabilitation planning meeting was scheduled for August 10, 2005, when claimant stated he was interested in the employment opportunities. In a subsequent rehabilitation meeting at the PG County Library on September 9, 2005, claimant during the course of the meeting became agitated and stormed out of the meeting shouting profanities at VCM and calling him "snake in the grass," As a consequence, the meeting was halted.

In a subsequent meeting on September 28, 2005, claimant agreed with VCM to cooperate with the employment search and not be verbally abusive in the future meetings. On October 4, 2005, six job opportunities consistent with his physical limitations were identified. Thereafter, claimant participated in a job development meeting on October 13, 2005 when he submitted 25 job search contacts to VCM. In the next job development meeting on November 2, 2005, claimant reported he continued to have pain in his lower back which had affected his driving ability. Accompanied by his sister, claimant met with VCM on November 17, 2005, when he frequently utilized racial epithets and other vulgar language directed at VCM. Claimant declined to consider the three employment leads that were identified by VCM. After claimant's inability to attend a meeting on November 22, 2005, another meeting was scheduled on December 7, 2005, when he reported that although he received calls from several employers, none was productive.

On November 7, 2005, claimant sent an application for employment to The Washington Court Hotel. Between December 3, 2005 and January 4, 2006, claimant contacted Pin Point Theatre for employment and he also contacted the Hilton Hotel in old town Alexandria on December 15, 2005, without success. On February 20, 2006, VCM received a letter from Hyatt Regency Bethesda regarding the possible receipt of claimant's employment application. On February 27, 2006, Holiday Inn, College Park acknowledged receiving claimant's employment application, however, the position had been filled. On March 14, 2006, claimant appeared for a job interview at the Palm Restaurant for a host position, but failed a written test. On March 30, 3006, VCM received a letter from Embassy Suites Convention Center verifying claimant's employment application in that month. On April 5, 2006, VCM received another verification from Holiday Inn Select regarding claimant's March 22, 2006 inquiry for room attendant position.

On December 13 and 14, 2005, VCM sent letters to various employers ascertaining whether claimant had applied for a position. Employers, including Renaissance Washington Hotel, Key Bridge Marriott, Lombardy Hotel, Hyatt Arlington, Choral Arts Society of Washington, Doggett Enterprises, Inc., Washington Marriott, Omni Shoreham Hotel. Atlantic Services Group, Living Stage Company, Hospitality Temps, Embassy Suites Hotel-Washington Convention Center, Aramark, USNM, Castle Wholesalers, Four Seasons Hotel, and Best Western Georgetown Suites, responded they had received no job inquiries from claimant.

DISCUSSION

I have reviewed the arguments of counsel with respect to the issue presented herein. To the extent an argument is consistent with the findings

and conclusions, it is accepted; to the extent an argument is inconsistent therewith, it is rejected.

Whether claimant's psychiatric condition is medically causally related to the March 1, 2002 injury.

With respect to whether a claimant sustained an accidental injury arising out of and in the course of her employment, the Act mandates that it be presumed, in the absence of evidence to the contrary, that a claim comes within the purview of the Act. D.C. Code §32-1521(1) (2001)(as amended)); *Ferreira v. District of Columbia Department of Employment Services,* 531 A.2d 651, 655 (D.C. 1987). The presumption is designed to effectuate the important humanitarian purposes of the statute and reflects a "strong legislative policy favoring awards in arguable cases." *Ferreira, supra*, at 655. To invoke this presumption, claimant must make some "initial demonstration" of (1) an injury; and (2) a work related event, activity, or requirement which has the potential of resulting in or contributing to the injury. *Id*. Thus, to establish a right to compensation, claimant must introduce evidence of both an injury and a relationship between that injury and the employment. See, e.g., *Whittaker v. District of Columbia Department of Employment Services,* 668 A.2d 844 (D.C. 1995).

When the preliminary evidence has satisfied this threshold requirement, the burden of production shifts to the employer to present substantial evidence which is "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event." *Parodi v. District of Columbia Department of Employment Services*, 560 A.2d 524, 526 (D.C. 1989). Absent such evidence, the claim will be deemed to fall within the scope of the Act, *Id*. at 526, and a causal relationship will also be presumed. *Ferreira, supra*, at 655. When evidence is presented that is sufficient to sever the injury from the work and overcome the presumption that a claimant's injury stems from any work-related event, activity or requirement, the presumption falls from consideration and all evidence submitted must be weighed without recourse to the presumption. Conversely, where employer fails to rebut the prima facie case, the presumption of compensability supplies the legally sufficient nexus between claimant's condition and her injury as well as the causal relationship between the injury and her employment. *Parodi, supra*, at 526.

The first stage of the analysis is whether an "initial demonstration" was made that was sufficient to invoke the Act's presumption of compensability of the claim. Claimant's job as an electrician's helper unarguably entailed physical rigors causing claimant's low back symptoms in the work injury of March 1, 2002. Claimant, however, asserts he sustained psychiatric problems directly stemming from that injury in that his constant pain from the low back injury has contributed to his psychiatric injury. Notwithstanding the foregoing general rule of causation in workers' compensation cases, in *Dailey v. 3M Company*, H&AS No. 85-259, OWC No. 066512, 1988 DC Wrk. Comp. LEXIS 1 (May 19, 1988), the Director established a special standard for invoking the Act's presumption of compensability applicable to emotional and/or psychological injury claims attributable to job-related stress. *Dailey* established an objective standard, based on actual working conditions, for invoking the presumption of compensability for claims of psychological injury attributable to job-related stress.

In order for a claimant to establish that a psychological injury arises out of the mental stress or mental stimulus of employment, the claimant must show that actual conditions of employment, as determined by an objective standard and not merely the claimant's subjective perception of his working conditions, were the cause of his psychological injury. The objective standard is satisfied where the claimant shows that the actual working conditions could have caused similar psychological injury in a person who was not significantly predisposed to such injury. See *Dailey*, 1988 DC Wrk. Comp. LEXIS 1, at 7-8. n7.[7]

The psychiatric evaluation by Dr. Smothers on September 6, 2006, reflecting claimant's depression as "causally and temporally related to the workplace injury," satisfies claimant's burden of making an initial demonstration under the Act. Now the burden of production shifts to employer to offer evidence in rebuttal of the presumed nexus.

Employer's IME physician, Dr. Shulman who performed claimant's psychiatric evaluation on October 18, 2006 pertinently found that the back pain that he developed subsequent to the March 1, 2002 work incident was associated with a mental disorder. In reviewing claimant's medical records, Dr. Shulman further noted that his marked adjustment difficulties, with evidence of impulsivity, excessive anger, and mood instability were not manifest until after his release to light duty. In further clarifying his diagnosis and its relationship with the original work injury, Dr. Shulman noted claimant's Depressive Disorder (NOS) was likely caused by his inability to cope with the various stressors associated with his vocational restoration as well as his limited ability to cope with a return to work. (EE 5).

On claimant's mental examination, Dr. Shulman observed he was suspicious and referential, but not frankly paranoid. He had persecutory anxiety and felt extremely vulnerable to any insinuation or accusation that he was perhaps exaggerating or malingering his symptoms. He was aggressively defensive. He was not delusional. No hallucinations were reported or observed. On the Hamilton Psychiatric Rating Scale for Depression, claimant's anxiety was was mildly to moderately elevated. On the Brief Psychiatric Rating Scale (BPRS), his general measure of psychopathology was mildly elevated.

Predicated on his comprehensive psychiatric examination, Dr. Shulman diagnosed him with depressive disorder (NOS), personality disorder (NOS), as well as psychological and environmental problems, and concluded that claimant's adjustment disorder was manifest primarily by a disturbance of conduct, i.e., acting out in an aggressive and threatening manner. Also, claimant exhibited symptoms magnification and illness behaviors. In Dr. Shulman's opinion, claimant's complained of psychiatric sequelae was not related to the occupational injury of March 1, 2002. He attributed claimant's limited coping response to the challenges posed by vocational rehabilitation as a cause to his adjustment and behavioral disorders. Dr. Shulman's well articulated psychiatric examination corroborated with relevant tests, thus, specifically rebuts any connection between claimant's March 1, 2002 work injury to his low back and subsequently complained of psychological symptoms.

[7]This special standard, the Court of Appeals has recognized, is consistent with similar special standards that have been established by the Director for certain types of claimed psychological injuries. See *Spartin v. District of Columbia Department of Employment Services*, 584 A. 2d 564, 568 (D.C. 1990).

Accordingly, the statutory presumption drops out of the case entirely. The burden then reverts to claimant to prove by a preponderance of the evidence, without the aid of the presumption, that his work-related low back injury caused or contributed to his complained of psychological disability. See *Washington Post v. District of Columbia Department of Employment Services*, 852 A. 2d 909 (D.C. 2004).

The medical reports from claimant's treating physician, Dr. Jackson whose palliative treatment extended form March 27, 2002 to June 20, 2006, disclose no pertinent diagnosis relative to the claimed psychiatric injury. In fact, in his February 21, 2006 follow up, Dr. Jackson specifically noted:

> The patient appeared punctually, casually and neatly dressed and groomed, and fully awake and alert with no signs of agitation, affective lability, irritability, depression, drowsiness or intoxication. Attention and concentration were normal with no signs of cognitive dysfunction. Speech was clear, coherent, well articulated, logical and spontaneous without slurring, rambling or pressure. Gait was stooped, but steady without staggering or swaying. Posture was somewhat rigid, but good eye contact, well-modulated facial expression, good coordination and no adventitious movements.

(CE 2 at 109).

Furthermore, in none of his subsequent follow up notes through June 20, 2006, did Dr. Jackson reference claimant's alleged psychiatric symptomatology. In fact, the very first revelation of claimant's mood disorder and depression, not otherwise specified (NOS), was made by Dr. Smothers in his independent medical evaluation (IME) on September 6, 2006. In finding a temporary causal connection between claimant's depression and mood disorder and the workplace injury of March 1, 2002, Dr. Smothers primarily relied upon claimant's subjective and demonstrative expressions. In particular, Dr. Smothers noted claimant "displayed a facial grimace related to his discomfort sitting." "Mood varied from depressed, angry, frustrated, anxious and tearful. His affect was often intense. His speech was logical and coherent with sometimes loud and halting delivery." (CE 4). Dr. Smothers performed no objective psychiatric tests in assessing claimant's psychological symptoms and referenced no mood or depression disorders prior to August/September 2006.

Upon weighing the competing opinions of two IME physicians, the undersigned rejects the opinion of Dr. Smothers as lacking in any objective findings and credits the findings of Dr. Shulman with significant weight. A review of the deposition testimony of Dr. Shulman revealed that until the initiation of vocational rehabilitation, claimant complained of no psychological symptoms, including depression in the "most recently weeks, months, even years after the original injury."and in his protracted treatment of over three years, Dr. Jackson never noted claimant's psychiatric disorder. Dr. Shulman unequivocally testified that claimant's behavioral or mood disorder "was most dramatically amplified by vocational rehabilitation efforts." (EE 6 at 33-38).

Further in response to a question whether a

person with ordinary sensibilities would have suffered the same depressive disorder, Dr. Shulman, answering in the negative, characterized claimant's reaction as abnormal. Thus, the evidence of record proffered by claimant does not support the proposition that his psychiatric symptoms to the aftereffects of his physical injury (i.e., his low back pain) on March 1, 2002 was typical to that of the average, emotionally non-predisposed individual. Dr. Shulman's deposition testimony reveals the reasons that triggered and escalated his complaints of depression and mood disorder. (EE 6).

Accordingly, it cannot be concluded that claimant has proffered substantial evidence to benefit from the statutory presumption of compensability for a claim of psychological injury alleged to be the consequence or medical sequelae of an employment-related physical injury on March 1, 2002. Inasmuch as claimant's alleged psychological symptoms have been determined to be unrelated to the original work injury, the discussion of the nature and extent of any disability stemming therefrom is rendered moot.

Notwithstanding the clearly obviated need to scrutinize the nature and extent of his disability, the undersigned will, however, entertain only a brief discussion of claimant's evidence regarding the extent of his complained of disability, the alleged non-cooperation with the vocational efforts and his voluntary limitation of income.

Nature and extent of claimant's disability, if any.

The Act does not afford claimant with a presumption of compensability regarding the nature and extent of his disability, rather, he must prove it by substantial evidence. See *Landesberg v. District of Columbia Department of Employment Services*, 794 A. 2d 607 (D.C. 2002). In this case, claimant seeks an award of permanent total disability benefits from March 1, 2006. D.C. Code §32-1508(1) provides in relevant part: "permanent total disability shall be determined only if, as a result of the injury, the employee is unable to earn any wages in the same or other employment."

"The degree of disability in any case cannot be considered by physical condition alone, but there must [also] be taken into consideration the injured [persons's] age, his industrial history, and the availability of the type of work which he can do." *Logan v. District of Columbia Department of Employment Services*, 805 A. 2d 237 (D.C. 2002)(quoting *Washington Post v. District of Columbia Department of Employment Services*, 675 A. 2d 40-41 (D.C. 1996)).

In order to be found disabled, claimant must present evidence of his inability to perform his usual work. Once claimant has [8]made this showing, the burden shifts to employer to establish suitable alternate employment opportunities available to claimant. If employer meets that evidentiary burden by identifying the available suitable alternate employment opportunities, claimant may challenge the legitimacy of employer's evidence of available employment or by demonstrating diligence, but lack of success, in obtaining other employment - thereby sustaining a finding of total disability. See *Logan, supra (*quoting *Director, Office of Workers' Compensation Programs v.*

[8]The September 9, 2005 meeting had to be discontinued because of claimant's misconduct at the meeting. As disclosed by VCM's September 15, 2005 report, the suggestion of job search for a sedentary position somehow triggered claimant's anger prompting him to shout profanities at VCM. (EE 3).

Berkstresser, 287 U.S. App. D.C. 266, 272, 921 F. 2d 306, 312 (1991)).

A Labor Market Survey dated August 31, 2006 identified ten (10) available sedentary job opportunities and communicated to claimant by certified mail. The available jobs were of sedentary and light duty nature, consisting of cashier, PM Turndown Attendant, host/cashier, public lobby attendant and order taker at the various hotels, valet attendant, usher/coat checker and host/greeter at other local businesses. In rebutting the legitimacy of the available suitable jobs identified by employer, claimant offered no credible evidence demonstrating an earnest pursuit and lack of success. (EE 4).

On August 2, 2005 Dr. Jackson recommended sedentary work involving no lifting, pushing/pulling and bending/twisting. (CE 2 at 114). However, in his October 18, 2005 follow up, characterizing that identified jobs involved pushing and pulling, Dr. Jackson placed claimant in an off-work status until February 21, 2006. In claimant's follow up examination on April 11 2006, Dr. Jackson continued the disability through May 16, 2006 and likewise his disability was further extended through June 20, 2006 in the follow up of May 16, 2006. In the last follow up, a disability slip dated June 20, 2006 again extended claimant's disability status through August 1, 2006.

Interestingly, none of Dr. Jackson's follow up reports contained a comprehensive narrative of what actually ailed claimant and how that infirmity interfered with his ability to perform the sedentary jobs as identified by employer.[9] Absent said evidence, Dr. Jackson's one line finding of disability is entitled to no deference. There is nothing in the plain words of the statutory provisions stating explicitly, or even implicitly, that the determination of disability is the sole function of a medical doctor. Disability, as defined in our statute, ultimately requires a legal determination. An examining physician provides an assessment of the medical impairment; the finder of fact, however, must determine the degree of disability See *Negussie v. District of Columbia Department of Employment Services*, 915 A. 2d 391 (D.C. 2007). Thus, Dr. Jackson's disability findings on October 18, 2005 and thereafter, uncorroborated by a narrative pertinent to claimant's physical limitations, are undeserving of any significant weight. Accordingly, the undersigned is not persuaded that claimant has satisfied his burden under *Logan*, *supra.*

Whether claimant failed to cooperate with his vocational rehabilitation and voluntarily limited his income.

D.C. Code §32-1507(d) relevantly provides:

> **If at any time during such period the employee unreasonably refuses . . . . to accept vocational rehabilitation the Mayor shall, by order, suspend the payment of further compensation, medical payments, and health insurance coverage during such period, unless the circumstances justified the refusal.**

The evidence adduced at the hearing includes a history of vocational rehabilitation efforts to help

[9]Dr. Jackson merely filled in the dates when claimant was "disabled from performing his duties." He specified no physical limitations that beset claimant. (CE 2 at 100).

claimant secure a sedentary position consistent with the physical limitations imposed by Dr. Jackson. The vocational assessment was initiated with claimant on July 11, 2005 at his attorney's office and follow up rehabilitation planning/job readiness meetings were convened in August and September 2005. Claimant properly attended those meetings. He further participated in a job development meeting with VCM on October 13, 2005, however, he did not attend a similar meeting as scheduled for November 22, 2005. Again, claimant participated in a job development meeting on December 7, 2005 and December 28, 2005 to discuss and review the job search and interviewing techniques.

Claimant next attended a similar meeting on January 20, 2006, wherein he discussed his independent job search with VCM and complained of continued pain. Claimant further participated in the scheduled job development meetings on February 1, 28, March 14, 29, and April 12, 2006. Thereafter, VCM received a letter from claimant's wife on May 24, 2006, claiming therein that at the cost of his health and safety, her husband could no longer continue to cooperate with the job search inasmuch as all of the job leads were in the medium physical demand level. Unarguably, claimant occasionally displayed egregious conduct, often causing apprehension of bodily harm to VCM with his combative tone and facial expressions, however, there is nothing in VCM's cumulative reports to suggest he failed to reasonably cooperate with the vocational efforts. In fact, with the exception of an isolated lapse, claimant always kept his meeting appointments with VCM. Therefore, a finding of claimant's non-cooperation with vocational rehabilitation cannot be sustained.

However, notwithstanding claimant's good faith efforts to cooperate with VCM in his efforts to offer suitable employment prospects to claimant, he did not demonstrate due diligence in pursuing the proffered leads. The evidence in the record overwhelmingly confirms claimant failed to contact Renaissance Washington Hotel, Key Bridge Marriott, Lombardy Hotel, Hyatt Arlington, Choral Arts Society of Washington, Doggett Enterprises, Inc., Washington Marriott, Omni Shoreham Hotel. Atlantic Services Group, Living Stage Company, Hospitality Temps, Embassy Suites Hotel-Washington Convention Center, Aramark, USNM, Castle Wholesalers, Four Seasons Hotel, and Best Western Georgetown Suites for the available suitable sedentary positions that he could perform. When inquired whether claimant had made any application or otherwise contacted them, they supplied a negative response. Accordingly, it cannot be concluded claimant was reasonably diligent in attempting to secure a job "within the compass of employment opportunities shown by the employer to be reasonably attainable and available." See *Palumbo v. Director, Office of Workers' Compensation Programs*, 937 F. 2d 70, 73 (2d Cir. 1991).[10]

CONCLUSIONS OF LAW

Based upon a review of the record evidence as a whole, I find and conclude claimant's complained of psychiatric injury is not medically causally related to the March 1, 2002 work injury. I also find and conclude claimant has not offered substantial evidence in meeting his burden of proving his entitlement to the claimed award for permanent total disability benefits.

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[10]In *Logan*, *supra*, the District of Columbia Court of Appeals adopted the principle enunciated in *Palumbo*, *supra* as consistent with its own decisions.

ORDER

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

ANAND K. VERMA
Administrative Law Judge

November 30, 2007
Date