In the Matter of,	)	
	)	
HENRY SMITH,	)	
	)	
Claimant,	)	
	)	AHD No. 03-265A
v.	)	OWC No. 550686
	)	
HOWARD UNIVERSITY,	)	
	)	
AND	)	
	)	
SEDGWICK CLAIMS MANAGEMENT SERVICE,	)	
	)	
Self-Insured Employer/TPA.	)	

Appearances:

JESSICA G. BHAGAN, ESQUIRE
For the Claimant

JANEEN M. SCATURRO, ESQUIRE
For the Self-Insured Employer/TPA

Before:

HENRY W. MCCOY
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 full evidentiary hearing was convened on July 10, 2007, before Henry W. McCoy, Administrative Law Judge. Henry Smith (hereinafter, Claimant) appeared in person and by counsel. Howard University and Sedgwick Claims Management Service (hereinafter, Employer) appeared by counsel. Claimant testified on his own behalf. No one testified on behalf of Employer. Claimant Exhibit

(hereinafter, CE) Nos. 1 - 4, and Employer Exhibit (hereinafter, EE) Nos. 1 - 5 described in the Hearing Transcript (hereinafter, HT), were admitted into evidence. The record closed on July 24, 2007, upon receipt of the Hearing Transcript.

BACKGROUND

After working for Employer as a plumber for almost 27 years, Claimant developed bilateral carpal tunnel syndrome, initially more severe on the right than left. After release surgery on the right, Claimant returned to work with subsequent increasing pain on the left. Now retired, Claimant seeks an award of permanent partial disability to his left upper extremity. The parties disagree as to the percentage of disability.

CLAIM FOR RELIEF

Claimant seeks a schedule award under the Act of permanent partial disability of twenty-seven percent (27%) to the left upper extremity, causally related medical expenses, and interest.

ISSUE

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

FINDINGS OF FACT

The parties stipulated, and I accordingly so find, that jurisdiction over this case is vested in the District of Columbia; an employer/employee relationship exists; that Claimant sustained an accidental injury on December 23, 1999 that arose out and in the course of his employment and is medically causally related; that Claimant gave timely notice of the injury and filed a timely claim; that Employer controverted Claimant's claim for benefits in a timely fashion; and, that Claimant's average weekly wage was $641.01. I further find that Employer voluntarily paid temporary total disability benefits for the period January 13, 2000 to January 13, 2002.

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

I find Claimant is a 63 years old, right hand dominant man who worked as a plumber for Employer for almost 27 years. I find Claimant's duties consisted of repairing hot water heaters and broken pipes, unclogging drains, and other plumbing related activities. Claimant's job was physically demanding consisting of primary use of his hands requiring strong grip strength, lifting, carrying, walking, standing, twisting, bending, and climbing up stairs and ladders.

I find on December 23, 1999 Claimant was pulling on a pipe wrench when he felt his right wrist snap. Claimant reported the injury, went to employee health, and was referred to Dr. G. Hudson Drakes for treatment. After an EMG/nerve conduction study on January 13, 2000, Dr. Drakes diagnosed severe bilateral carpal tunnel syndrome, more severe on the right than on the left. A follow-up diagnostic study on January 17, 2001 found progressive carpal tunnel syndrome on the right. On April 25, 2001, Claimant underwent right side carpal tunnel release surgery. I find the surgery relieved the pain in his right shoulder but did not improve his grip strength.

I find after decompression of the right carpal tunnel, Claimant started experiencing more pronounced symptoms on his left side with numbness in the fingertips of his left hand and pain shooting up his left arm into his shoulder. This was confirmed by an August 29, 2001 EMG/nerve conduction study. I find Claimant rejected the recommendation of surgery to

decompress the left carpal tunnel and elected conservative treatment of physical therapy with hot wax, massage, and exercises.

I find on January 7, 2002 Claimant was released by Dr. Drakes to return to full duty on January 14, 2002. Claimant returned to his regular pre-injury job as a plumber with no change in his job duties or the hours worked. I find after returning to work Claimant continued to experience numbness in the fingers of his left hand. I find Claimant missed no time from work due to his left side carpal tunnel syndrome. I find Claimant continued to receive conservative treatment from Dr. Drakes until November 14, 2004. I find Claimant is no longer receiving treatment for the carpal tunnel syndrome on his left side and is taking no medications. I find Claimant retired in December 2005 when he was 62 years old.

I find as of November 14, 2004 Claimant reached maximum medical improvement but continues to experience numbness and tingling in the fingers of his left hand. I find Claimant is unable to play sports as he did before his injury but is able to drive himself around and perform some household chores; but is unable to mow the lawn. I find Claimant's early retirement was based on his own assessment of his work abilities and performance and not based on any doctor's order or negative performance evaluation by Employer.

I find Claimant was able to satisfactorily carry out the duties and perform the physical requirements of his job as a plumber with only minor, occasional assistance from a co-worker. I find Claimant elected on his own to retire from his job. I find for the past two and one-half years Claimant has received no treatment for his bilateral carpal tunnel syndrome, especially the left side for which he was last regularly treated. Accordingly, I find that Claimant sustained a five percent (5%) permanent partial disability to his left upper extremity.

DISCUSSION

The evidence and arguments of the parties were reviewed and given equal consideration.[1] To the extent an argument is consistent with my findings and conclusions, it is accepted. To the extent an argument is inconsistent, it is rejected.

The sole issue for resolution is the nature and extent of Claimant's disability, if any, i.e., whether Claimant is entitled to the requested percentage schedule award under the Act. The Act does not provide Claimant with a presumption regarding the nature and extent of his present disability. Therefore, Claimant has the burden of proving by a preponderance of the evidence that he is entitled to the relief requested. See *Dunston v. D. C. Department of Employment Services*, 509 A2d 109 (D.C. App. 1986). In order to prevail on his claim, Claimant must demonstrate that (1) he has reached MMI, (2) he has retained a permanent impairment, and (3) the permanent impairment is to a scheduled member.

The applicable provisions of the Act governing schedule awards of permanent partial disability were amended effective April 16, 1999. D.C. Official Code, as amended, § 32-1508(c) was amended by adding consideration of the so-called "Maryland factors"[2] to the AMA Guides to the Evaluation of Permanent Impairment into the equation for determining the appropriate level of

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[1] While each of the parties' exhibits is not specifically referenced in this discussion, each was reviewed, considered, and weighed during the course of this deliberation.

[2] See Annotated Code of Maryland, Labor and Employment Article § 9-721.

disability impairment. The factors are: pain, weakness, atrophy, loss of endurance, and loss of function. The role of the fact finder is to weigh competing opinions of the evaluating physicians, together with other relevant evidence such as the Claimant's testimony, and to arrive at an independent determination on the question of the nature and extent of the scheduled loss. The determination can result in accepting one physician's rating over the other or in reaching a different conclusion altogether. The fact finder is not bound by the opinions of the evaluating physicians. See *James B. Bryant v. Powell, Goldstein, Frazier & Murphy*, OHA No. 98-37A, OWC No. 525425 (March 24, 2000); *Womack v. Fischbach & Moore Electric, Inc.*, CORB No. 03-159 (July 22, 2005); *Negussie v. D.C. Dept. of Employment Services*, DCCA No. 05-AA-852 (January 25, 2007).

The Court of Appeals also has held that the arbitrary level of compensation of a schedule award represents a legislative determination which balances the physical effects of an injury against its effect on a claimant's future wage earning prospects. *Smith v. Department of Employment Services*, 548 A.2d 95 (D.C. 1988).

In asserting his claim that he has sustained a twenty-seven percent (27%) impairment of his left upper extremity, Claimant relies upon the expert medical opinion of his own independent medical evaluation (IME) physician, Dr. Jeffrey H. Phillips, and his own testimony as to his present condition. In his November 14, 2006 IME report, Dr. Phillips notes Claimant's chief complaint is bilateral hand pain, gives a very brief medical history of the problem, and current symptoms. He notes the persistent problems with the right hand after surgery and the persistent weakness in the left hand, with numbness and tingling worse than in the right. He further notes that Claimant recently retired but that it was unrelated to his hand pain.

In the physical examination, Claimant exhibited grip strength on the right of 32 kg and on the left, 28 kg. The left hand also exhibited positive Tinel's[3] and Phalen's[4] tests. Bilateral hand x-rays showed no acute bony abnomalities and no arthritic changes. Dr. Phillips deemed Claimant to have a permanent injury caused by the December 23, 1999 accident. Using the 4th Edition of the AMA Guides to the Evaluation of Permanent Impairment, he gave Claimant a 17% impairment to the left upper extremity as a whole with an additional 10% for pain, loss of function, and loss of endurance for a total of 27% permanent partial impairment of the left upper extremity.[5]

On his on behalf, Claimant testified that it was not until six or seven months after experiencing pain in his right hand that he starting experiencing the same pain in his left hand. This was confirm by diagnostic testing on August 29, 2001. The discomfort he felt, numbness and tingling in the fingers with occasional shooting pain through the arm and into the left shoulder became more evident after he returned to work. Given his dissatisfaction with the result from the surgery on his right hand, Claimant elected to receive conservative treatment on his left hand, consisting of physical therapy, hot wax, massage,

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[3] Tinel's sign: A tingling sensation at the end of a limb produced by tapping the nerve at a site of compression or injury. J. E. Schmidt, M.D., *Attorneys' Dictionary of Medicine and Word Finder*, Vol. 6, p. T-141 (Dec. 2002)(hereinafter, *Schmidt's).*

[4] Phalen's test: A test for carpal tunnel syndrome. The patient flexes the wrist for one minute. Carpal tunnel syndrome is confirmed if the patient experiences a tingling sensation that radiates into the thumb, index finger, and the middle and lateral half of the ring finger. *Schmidt's*, Vol. 6, p. P-214.

[5] Dr. Phillips also rated Claimant's right upper extremity at 25%.

and exercise. When experiencing pain or discomfort at home or work, he would massage the hand until the pain subsided. Claimant further testified that he decided to retire at age 62 because he was dissatisfied with his on the job performance and not based on any doctors recommendation or assessment. Claimant also testified as to the recreational sports activities he was no longer able to participate in and the household and personal chores he was or was not capable of doing.

In contrast, Employer presented the series of IME reports from Dr. Robert A. Smith, an orthopedist, who saw Claimant four times; initially on December 10, 2002 and finally on February 13, 2007. At the initial evaluation, Dr. Smith accounted for Claimant's type of work, the work injury, and the surgery on the right hand before relating his physical examination findings. Specific to the left hand, he noted a slightly positive Tinel's sign and negative Phalen's sign; and, an average grip strength of 74 pounds of force, compared with 84 pounds of force in the right hand. Using the 4th Edition of the AMA Guides and taking into account the five factors, he gave each upper extremity a 5% permanent partial impairment. He particularly noted as to the left upper extremity there was no objective findings of atrophy or significant weakness in left hand regarding Claimant's carpal tunnel syndrome that would add to the rating. Dr. Smith maintains this rating in his subsequent evaluations on May 2, 2003, June 24, 2004, and February 13, 2007.

It is generally accepted in this jurisdiction that in weighing and evaluating the competing medical experts, the opinion of the treating physician is accorded preference over a doctor who was retained to examine the claimant solely for litigation purposes. *Stewart v. D.C. Dept. of Employment Services*, 606 A.2d 1350, 1353 (D.C. 1992). However, in the instant matter, the stated preference becomes inoperative insofar as Claimant's treating physician has not produced a permanency rating; rather, both parties have put forward the opinions of independent medical evaluators.

In weighing and assessing the reports of the parties' independent medical experts, the reports of Employer's IME, Dr. Smith, are deemed more persuasive in that he consistently evaluated Claimant over a period of four years and four physical examinations. In addition, he has established his credentials and expertise in the use and application of the AMA Guides by reference to the specific training he has taken.

In his reports, Dr. Smith sets forth a clear, rational explanation of how he arrived at his rating as correlated to Claimant's condition and objectively verifiable symptoms. This is especially evident in his addendum report of December 27, 2002 wherein he affirmatively endorses his initial December 10, 2002 rating and proceeds to explain why that rating is correct by referencing the AMA Guides table he used to categorize the residual level of carpal tunnel syndrome in each of Claimant's hands, the level he assigned to the each hand while accounting for the surgery on the right hand, and the reason for assigning that level and then translating that into a rating, especially as to the left upper extremity. Then, with each successive examination he substantiates his original rating based upon his then current physical examination findings. Dr. Smith's explanations as to how he continues to maintain the same rating over the years gives the undersigned greater confidence in his rating with regard to Claimant's left upper extremity as opposed to the inappropriately inflated rating of Dr. Phillips.

In analyzing the competing positions of the parties, the undersigned is mindful of the language in case law setting forth compensation

theory in this jurisdiction that

> **"...the degree of disability...cannot be measured by physical condition alone.... Even a relatively minor injury must lead to a finding of total disability if it prevents the employee from engaging in...gainful employment... Conversely, a continuing injury that does not result in any loss of wage-earning capacity cannot be the foundation for a finding of disability."**

The Washington Post v. Dept. of Employment Services, 675 A.2d 37, 41 (D.C. App. 1996) citing, *American Mutual Insurance Company v. Jones*, 426 F.2d 1263, 1266 (1970). However, in determining the extent of a schedule loss, the undersigned must consider the physical effects of the injury in terms of Claimant's future capacity to earn wages. See *Smith v. D.C. Dept. of Employment Services*, 548 A.2d 95 (D.C. App. 1988).

Thus, accepting the rating of Dr. Smith over that of Dr. Phillips, does not end the analysis in this matter. While Dr. Smith has provided an acceptable assessment of Claimant's medical impairment, it is still left to the undersigned to determine the degree of disability. *See Negussie, supra*. For as the D.C. Court of Appeals stated in *Negussie*, "disability" is an economic and legal concept which should not be confounded with a medical condition. The Court states clearly that the Act authorizes the undersigned to consider Claimant's "pain, weakness, atrophy, loss of endurance, and loss of function." *See also Muhammad v. D.C. Dept. of Employment Services*, 774 A.2d 1107 (D.C. 2001).

Claimant testified that he continues to experience discomfort in the form of numbness and tingling in the fingers of his left hand with occasional shooting pain in his left arm. He testified to being able to perform various household chores, including cleaning, cooking, and laundry. He states that he is unable to mow the lawn but is able to drive. He currently takes no prescribed medications for his left hand numbness and occasional shooting pain and last saw Dr. Drakes on November 14, 2004. He further testified that he decided in December 2005 to retire given his own personal assessment that he was unable to perform his job at his pre-injury level. This contrasts with the statement in the IME report of Dr. Phillips.

In considering the vocational aspects, the evidentiary record demonstrates that after his injury and right hand surgery, Claimant returned to full duty work with the only restriction being to avoid power grip activities and continued working for three years before he elected on his own volition to retire early at age 62 and thus incurring a penalty in the amount of his social security payment. There is nothing in the record to indicate that Employer expressed any dissatisfaction with Claimant's job performance. In addition, his own IME physician, Dr. Phillips, stated that his retirement was not related to his condition.

Having carefully reviewed and weighed Claimant's testimony with appropriate consideration given to the ratings concerning the nature and extent of Claimant's permanent impairment, and accepting the Employer's IME rating as the correct numerical evaluation of Claimant's current disability, it is the conclusion of the undersigned that Claimant has sustained a five percent (5%) permanent partial disability to

his left upper extremity.[6]

CONCLUSIONS OF LAW

Based upon a review of the record evidence and the foregoing discussion, I find and conclude that Claimant has reached maximum medical improvement, and has experienced a 5% permanent partial disability to his left upper extremity.

[6] A schedule award is available where a disability to a schedule member results from an injury in an anatomical situs other than and not including the schedule member. *Morrison v. D.C. Dept. of Employment Services*, 736 A.2d 223 (1999); see also, *Sullivan v. Boatman & Magnani*, et al., CRB No. 03-74, OHA No. 90-597E, OWC No. 088187 (August 31, 2005).

ORDER

It is **ORDERED** that Claimant's claim for relief is hereby **GRANTED IN PART** and **DENIED IN PART:** Claimant is hereby awarded benefits for a five percent (5%) permanent partial disability to his left upper extremity.

HENRY W. MCCOY
ADMINISTRATIVE LAW JUDGE

November 2, 2007
Date