



ANDREW WILLIAMS,)
)
Claimant)
)
v.) Dir. Dkt. No. 95-68
)
STEEL CONTRACTORS) H&AS No. 91-965
)
and) OWC No. 177546
)
LUMBERMAN'S MUTUAL)
CASUALTY CO.,)
)
Employer/Carrier)
)

Appeal from the Compensation Order of
Gail L. Davis, Hearing Examiner

David M. Schloss, Esquire
for the Claimant

Steven J. Price, Esquire
for the Employer/ Carrier

REMAND DECISION

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").

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The Hearing Examiner issued a Compensation Order on July 13, 1995, which granted Claimant's relief in part and denied Claimant's relief in part. The Hearing Examiner denied Claimant permanent partial disability benefits based upon a ten percent (10%) permanent impairment to his right eye and granted Claimant's claim for payment of causally related medical expenses.

Claimant filed an Application for Review on August 11, 1995. Employer filed an opposition.

II. BACKGROUND

Claimant worked as an iron worker at one of Employer's sites in the District of Columbia. Claimant sustained an injury to his right eye on August 23, 1988 when metallic debris fell from some newly soldered iron rods. Claimant sought and received immediate medical attention. Claimant underwent several eye surgeries to correct not only a conjunctival laceration but surgery to remove two eyelashes which had become imbedded in the initial wound.

Employer made voluntary payments of disability compensation for the period of September 7, 1988 through October 11, 1988. Thereafter, Claimant and Employer entered into a stipulation which was approved by the Office of Workers' Compensation wherein Employer paid Claimant temporary total disability for the period of November 2, 1988 through March 5, 1989.

Subsequent to the approved stipulation, Claimant's treating physician assessed a ten percent (10 %) permanent partial disability to the right eye. The Hearing Examiner found that this assessment was based upon Claimant's complaints of pain. The Hearing Examiner also concluded that although Claimant did not suffer any loss associated with his binocular vision, Claimant would require future medical treatment. The Hearing Examiner based this conclusion upon the medical evidence presented by Claimant which indicated that he suffered from not only recurrent corneal erosion syndrome, but intermittent conjunctivitis, keratitis and chronic blepharitis.

At the hearing, Employer argued that Claimant was barred from receiving additional compensation benefits pursuant to Section 36-324 of the Act. D.C. Code §36-324 (D.C. Code 1981). Employer also argued that Claimant's request for a schedule award was barred pursuant to Section 36-308 of the Act.

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Claimant argued that Section 36-324 of the Act which governed modification of awards was not applicable in this matter because he was seeking a level of disability which had not been previously adjudicated.

The Hearing Examiner concluded that Section 36-324 was not applicable because Claimant had filed a timely claim and last received compensation on March 29, 1989 pursuant to a stipulation between the parties. The Hearing Examiner determined that in light of the fact that there was no formal order awarding compensation Section 36-324 regarding modifications was not applicable.

The Hearing Examiner also determined that Claimant's current condition was causally related to the August 23, 1988 job accident based upon the medical opinions of the treating physicians whose opinions were found cogent and consistent with the objective medical evidence.

The Hearing Examiner concluded that Claimant was not entitled to a schedule award pursuant to Section 36-308 (3) (P) as he had failed to show that he had suffered a loss or loss of use of the right eye. The Hearing Examiner stated that Claimant's reliance on Dr. Rubinfeld's assessment of a ten percent physical impairment was misplaced as this assessment was based upon Claimant's complaints of pain were not compensable as they related to schedule awards.

The Hearing Examiner concluded that Claimant did not fail in proving that he was entitled to medical benefits. The Hearing Examiner determined that the medical evidence indicated that Claimant would continue to suffer from residuals of the job injury requiring medical attention. Thus, the Hearing Examiner awarded Claimant causally related medical expenses.

III. DISCUSSION

On appeal, Claimant argues that the Hearing Examiner misinterpreted the Act as it relates to a permanent partial disability to the eye. Claimant maintains that Section 36-308 (3) (P) of the Act detailing that compensation for loss of binocular vision and an eighty percent or more loss of vision must read in conjunction with Section 36-308 (3) (E) of the Act. Claimant states that Section 36-308 (3) (P) is not applicable. Section 36-308 (3) (E), as noted by Claimant, controls instances such as this one where there is a permanent partial loss.

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Claimant also rejects the conclusion made by the Hearing Examiner that Section 36-308 of the Act does not include pain and suffering as factors of disability. Claimant states that compensation was sought at the hearing for actual wage loss which sooner or later would occur from the recurrent erosions and punctate keratopathy diagnosed by Dr. Rubinfeld.

The Director of the Department 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 a whole and if the law has been properly applied. See, D.C. Code, §36-322; 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. D.C. Department of Employment Services, 498 A.2d 563, 566 (D.C. App. 1985).

After a review of the applicable law, and consideration of the arguments of both parties, the Director cannot conclude that this matter is in a posture for final adjudication. The Hearing Examiner concluded that Dr. Rubinfeld indicated in his report that Claimant had a ten percent permanent partial disability based upon pain alone. However, a review of the record, particularly the doctor's reports, indicate that Claimant had ongoing problems with his eye that were not associated with pain alone. Notably, Dr. Rubinfeld in his October 5, 1992 report, stated that Claimant suffered from recurrent erosions and keratopathy which may recur at any time. Based upon this report as well as the doctor's previous ones, one could not conclude as the Hearing Examiner that the doctor's rating was based upon pain alone. Therefore, the Director must reject the Hearing Examiner's conclusion that the rating was based upon pain alone as this determination is not based upon substantial evidence in the record.

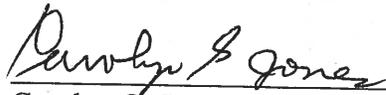
Notwithstanding the fact that the latter conclusion is not based upon substantial evidence in the record, the Director cannot determine from the decision of the Hearing Examiner that Claimant would be entitled to a permanent award of compensation. The Director has generally held that a schedule award or an award of compensation based upon a permanent disability, a claimant must have reached maximum medical improvement. Lenaerts v. D.C. Department of Employment Services, 545 A. 2d 1234 (D.C. 1988). Herein, the Hearing Examiner has failed to make any findings with regard to whether Claimant has reached maximum medical improvement. Without a finding on this issue, the Director again cannot determine whether this case can be reviewed at this level.

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IV. DISPOSITION

Accordingly, for the reasons more fully set forth above, the Compensation Order of July 13, 1995 is reversed and this matter is remanded for findings of fact and conclusions of law consistent with the foregoing opinion.



Carolyn G. Jones
Interim Director

5/29/98
Dated