STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
JACKSONVILLE DISTRICT OFFICE

Beth Jackson,
Employee/Claimant,

vs.

St. Johns County Welfare Federation/OptaComp,
Employer/Carrier/Servicing Agent.

/

OJCC Case No. 12-012768RJH

Accident date: 4/1/2010

Judge: Ralph J. Humphries

FINAL COMPENSATION ORDER

This Cause came on for a merits' hearing before the undersigned Judge of Compensation Claims on **February 27, 2015** in Jacksonville, Duval County, Florida. This subject matter of this hearing was a petition for benefits filed on August 8, 2014. A mediation conference on the petition was held on January 12, 2015. The claimant, **Beth Jackson**, was present and represented by Holley Akers, Esquire. The employer/carrier, **St. Johns County Welfare Federation/Comp Options**, hereinafter referred to as the "Employer" or as the "E/C" was represented by Lloyd Basso, Esquire. Live testimony was received from the claimant. Additional testimony was received by deposition.

The following stipulations have been reached between the parties:

1. The court has jurisdiction of the parties;
2. Venue properly lies in Duval County, Florida;
3. The date of accident is April 1, 2010;
4. There was an employer/employee relationship at the time of the accident;
5. Workers' compensation insurance coverage was in effect on the date of accident;
6. The accident or occupational disease was accepted as compensable and authorized care and treatment has been provided to the claimant;
7. Timely notice of the accident, injury, or occupational disease was given by the claimant on the date of accident or was not at issue;
8. Timely notice of the final hearing has been given;

9. Drs. Vincenty, New, McGrail, and Hill are or were authorized providers, who provided medical treatment to the claimant;
10. The AWW is $493.88; and
11. The pay ledger may be stipulated into evidence.

The substantive claims for determination at the current merits' hearing are the following:

1. Permanent total disability benefits plus supplements from April 1, 2012 to present and continuing; and
2. Penalties, interest, costs, and attorney's fees.

The defenses raised by the E/C were the following:

1. Claimant is not at MMI;
2. Claimant is capable of at least sedentary work within a 50 mile radius of her residence and is not permanently and totally disabled; and
3. Penalties, interest, costs, and attorney's fees are not due or owing.

The following documents were admitted into evidence at the current hearing:

Judge's Exhibits:

1. Petition for Benefits filed with DOAH on August 8, 2014;
2. Pretrial Questionnaire completed by the parties and filed with DOAH December 23, 2014;
3. Claimant's supplement to the pretrial stipulation filed January 14, 2015;
4. Claimant's 2nd supplement to the pretrial stipulation filed January 23, 2015;
5. E/C's amendment to the pretrial stipulation filed January 27, 2015;
6. Claimant's 3rd supplement to the pretrial stipulation filed January 29, 2015;
7. Claimant's Prehearing Statement admitted for purposes of argument only and not as evidence, filed with DOAH on *February 25, 2015;*
8. Employer/Carrier's Trial Memorandum admitted for purposes of argument only and not as evidence, filed with DOAH on February 25, 2015; and
9. Employer/Carrier's Notice of Objection to Claimant's Supplemental Pretrial Listing

Additional Documentary Evidence.

Claimant's Exhibit:

1. Deposition of Gil Spruance with attachments;
2. Work Search Documents-objection overruled.

Employer's Exhibits:

1. Dr. Gould's medical records-objection sustained;
2. Deposition of Melissa Tanner with attachments.

Joint Exhibits:

1. Medical composite filed at docket entry #125-128;
2. Deposition of Dr. McGrail with attachments;
3. Deposition of Dr. Hill with attachments;
4. Deposition of Dr. Vincenty with attachments.

In my determination herein I have attempted to distill all the testimony and salient facts together with the findings and conclusions necessary to the resolution of this matter. I have not necessarily attempted to summarize the substance of the claimant's testimony or the testimony of any live or deposition witness, nor have I attempted to state nonessential facts.

Because I have not done so should not be construed that I have failed to consider all of the evidence.

Based upon the evidence, I make the following findings of fact and conclusions of law:

1. I have jurisdiction of the parties and the subject matter.
2. The stipulations of the parties are accepted and adopted by me as findings of fact.
3. The evidence closed in this matter on February 27, 2015 after which closing arguments were made by the parties.
4. The claimant suffered a compensable accident and injuries on April 1, 2010. The compensable injuries include the claimant's back, hip and leg.
5. At the time of the accident, the claimant was working in housekeeping when she was pulling on a box and fell backwards, injuring her back, hip and leg. She reported the

accident and received authorized treatment from Dr. Vincenty, Dr. New, Dr. McGrail and Dr. Hill.

6. **Beth Jackson:** the claimant is 54 years old and now resides in Delaware, Ohio. She was injured on April 1, 2010 while working for the employer in housekeeping. Her job duties included mopping, scrubbing floors, toilets and sinks, etc. She was injured while attempting to pull a box while standing on a pallet. Her foot got caught and she fell backwards. She hurt her spine, left hip and leg.
7. She began receiving treatment with Dr. Vincenty in 2010. Treatment included injections and physical therapy. She later was referred to Dr. New who performed fusion surgery on February 10, 2012. After recovery from the surgery, she returned for treatment with Dr. Vincenty. He prescribed muscle relaxers and a spinal cord stimulator. During a trial with the spinal cord stimulator, she developed a staph infection which resulted in an abscess. She had to have surgery to remove the stimulator and the later surgery to remove the abscess.
8. Following the fusion surgery she attempted to work with the employer as a CNA. In March 2012, she attempted to push a patient in a wheelchair but was unable to do so; she reports having been terminated as a result. She has not worked since that time. She last saw Dr. Vincenty in November 2012 and it was her understanding he told her not to work until she returned. Thereafter, she returned home to Ohio and has treated with Dr. McGrail and Dr. Hill. She understands her restrictions per Dr. Vincenty included lifting less than 5 pounds, no bending and twisting, sit for 15 minutes and stand for 15-20 minutes alternatively. I note, during the course of the hearing, she did sit and stand but not as frequently as her restrictions. Dr. Hill, in July 2013, reportedly restricted her to lifting less than 5 or 10 pounds, no bending, and no sitting for longer than 15-30 minutes, no walking. She was to squat instead of bending. She reports not being able to drive longer than 30 minutes at a time.
9. The claimant is a high school graduate and also has certificates from a truck driving school and CNA school. She has no college education. Her work experience includes driving a taxi, working as a cashier, farming, truck driver and machinist. She has not used a computer in a work and does not have any understanding of the use of Word or Excel. She hunts and pecks with one finger on a keyboard. She does not own a computer and uses her phone for that type of function. Her son helps her with a computer as needed which has included much of her job search efforts.

10. She reports her checks from the carrier stopped on August 4, 2014 and that is when she began looking for work. Based upon her testimony, I admitted her job search report into evidence. She described looking for work doing things she thought she was able to do. The list includes such jobs as cashier, bartender, door greeter, sub sandwich maker, dishwasher, sales person and "anything." Most of the applications were made on the computer although, if she saw a help wanted sign, she would stop and apply. She also followed up on job leads given her by Gil Spruance. She has not received any type of assistance or job leads from the carrier. She has not had any interviews or offers as a result of her job search efforts.
11. During her cross-examination, it was determined she took a CNA course lasting 5-6 weeks and she was able to complete that. She also reports her high school grades were good. She is able to surf the Internet with her son's help and uses her smartphone for emails. She can read and write.
12. She testified she moved to Ohio in 2013 and did not begin looking for employment until August 2014. She reports doing so then because her checks from the carrier had stopped. She initially lived in a camper with her fiancé on 30 acres of land but he has since passed away and she has left that location. She moved her location to be near her son and is living on a campground.
13. The physicians in Ohio have not told her she is incapable of working. Dr. Hill has restricted her sitting, standing and walking. She spends much for time watching her 8-year-old grandson. Her son has children ages 8, 2 and 6 months but she is unable to lift any of them.
14. I found the claimant to be a sincere and credible witness. I accept her testimony as truthful.
15. **Kent C. New, M.D.:** The records of Dr. New were reviewed. He placed her at MMI on August 6, 2012 with a 9% impairment rating. His records confirm the surgical treatment in February 2012. He released her to light duty work in March 2012. Ultimately, he returned her care to Dr. Vincenty.
16. **John W. McGrail, MD:** Dr. McGrail is an orthopedic surgeon in Ohio. He only saw the claimant on one occasion and performed a limited examination. He found her to be stable with an irritable neck and lower back. He referred her for pain management. He had no opinions regarding her restrictions. He also was not disagreeing with any MMI dates that may have been opined by her prior physicians.

17. **Claudio Vincenty, MD:** Dr. Vincenty is an anesthesiologist with a subspecialty in pain management. He first saw the claimant on November 24, 2010 following which he provided conservative care. He later saw the claimant after her surgery on February 28, 2012. His role at that time was to resume her pain management. After attempting medication therapy for several months, it was decided to attempt a spinal cord stimulator. The process to implant that device occurred on August 23, 2012. Unfortunately, the claimant developed an infection and she required surgery to remove the device. As a result of the spinal cord stimulator, and the complications from that device, Dr. Vincenty had placed the claimant in a no work status and that status continued through his last visit with her on November 12, 2012.
18. Dr. Vincenty reviewed the medical records from Dr. Hill and Dr. McGrail, the physicians who have evaluated and/or treated the claimant in Ohio. Based upon his review of those records, he was of the opinion the claimant was unable to work. It was also his opinion that the claimant would have reached maximum medical improvement by the time she saw Dr. McGrail on January 15, 2013.
19. **John W. Hill, M.D.:** Dr. Hill is an anesthesiologist and pain management specialist in Ohio. He has been practicing for 30 years, the last 15 in anesthesia and pain management. He first saw the claimant on June 19, 2013. His evaluation of the claimant revealed she had a previous failed back surgery of her lumbar spine. A spinal cord stimulator trial was attempted but an infection resulted and the claimant had additional surgery to remove the abscess and perform a laminectomy of the thoracic spine. She had complaints in her mid and low back as well as leg pain. He prescribed medications. His diagnosis for the claimant included failed back syndrome, lumbar post-laminectomy syndrome, and thoracic post-laminectomy syndrome. He also diagnosed degenerative disc disease of her lumbar spine, spondylosis of her lumbar spine and radicular pain down her legs.
20. His initial restrictions limited her to lifting no greater than 10 pounds, not standing for greater than an hour, no significant walking, bending and twisting at the waist would be limited. He considered her condition to be stable from date of date in week to week. His last visit with the claimant was an August 27, 2014. While her pain levels might fluctuate, her condition remained pretty much the same. As of that last visit, he placed her limitations at 10 pounds of lifting, restricting her from bending to the floor and lifting overhead or reaching overhead. She could push and pull 10 pounds. She could sit for

15-30 minutes or stand for 30 minutes, and walk for 30 minutes as long as she had the ability to take breaks. He further stated she would need to be able to sit or stand at will. He agreed she would have unscheduled unplanned absences from work due to exacerbations of her pain. He also agreed her difficulties with sleeping could affect her ability to concentrate at work.

21. Dr. Hill was of the opinion the claimant was physically capable of working but agreed she would be unable to go back and do anything outside her restrictions. He thought she might be physically able to perform a receptionist or secretarial job.
22. Dr. Hill considered the claimant to have been at maximum medical improvement as identified in the records provided him from previous physicians. He would not dispute whatever MMI date may have been assigned by her prior treating physicians.
23. **Gil Spruance:** Spruance is a vocational rehabilitation expert who has been engaged in his profession for more than 35 years. I accept him as an expert in the field of vocational rehabilitation.
24. Spruance was retained by the claimant to provide a vocational assessment. In doing so, he reviewed the claimant's medical records, interviewed the claimant, performed a labor market survey and prepared his report. His review of her educational and work experience as obtained during the interview was consistent with her trial testimony. She has not worked since her termination by the employer. Her computer skills, according to Spruance, were also consistent with her trial testimony. The claimant told Spruance she could sit for about 30 minutes but needs to get up and move around. She can stand 15-20 minutes. She lifts less than 10 pounds but is unable to drive more than 30 minutes.
25. Spruance reviewed the DWC-25 reports completed by Dr. Hill. The last of those, from June 2014, indicate the claimant is unable to bend. She can carry 10 pounds but is unable to lift any weight from floor to waist or from waist overhead. She cannot climb. Dr. Hill limits her sitting to 10-15 minutes with standing for 10 minutes and walking for 10-15 minutes. She is unable to squat. Her limitations are greater than sedentary. Spruance testified to some of the difficulties for potential employment these restrictions might cause.
26. Spruance reviewed the claimant's job history and concluded all of her jobs would be classified as semiskilled. Those jobs also would be classified as light to medium duty. In Spruance's opinion, the claimant does not have any transferable skills to a sedentary category of work. As a result, he does not consider her competitive for a skilled

sedentary job. He considers her a sedentary entry level worker or unskilled sedentary worker. These jobs comprise less than one percent of the labor market. He also considers her lack of computer skills a significant limiting factor to her employment.

27. In terms of her employability, Spruance notes that the claimant has a good work history with a high school diploma, factors he considers to be favorable. On the other hand, she has pain limitations as well as an inability to sleep. She also has not worked in more than 3 years which he considers to be a huge impediment to her employability. He was not critical of her job search efforts since she was looking for job similar to what she has done in the past but acknowledges they are jobs she is physically incapable of doing.
28. Spruance refers to the claimant's efforts at looking for work as finding a "needle in the haystack job." While her odds of finding a job are not good, they would be improved with professional assistance had the employer/carrier provided it. This would include providing appropriate job leads, resume preparation, interview preparation, etc. He performed a labor market survey for the area of the claimant's residence and found very few jobs. Many required skills that she does not have such as computer skills.
29. Ultimately, it was opinion the claimant would not be able to engage in at least sedentary employment within a 50 mile radius of her home. He does not think there is any employment available within her functional capacity.
30. **Melissa Tanner:** Tanner was retained by the employer/carrier to serve as their vocational expert. She has been a vocational counselor since 1987. She performs reemployment assessment as well as performing vocational evaluations in making recommendations for training or job placement. She also is a vocational expert for Social Security disability hearings.
31. Tanner interviewed the claimant and prepared her vocational report in February of this year. Like Spruance, she obtained a work history from the claimant as well as information regarding her medical condition. Included was a discussion of her sleep pattern. The claimant describes that as sleeping for 20 minutes and then being awake for 2 hours typically all day and all night. She attributes this to her absence of medications as result of difficulties in securing physicians in Ohio. When she had a physician, and was taking regular medications, she was sleeping 6 hours through the night.
32. In Tanner's opinion, the claimant could perform a "light companion job" which would involve her transferable skills. Unskilled or semi-skilled positions available to the

claimant included information clerk, survey worker, fundraiser, cashier, ticket seller, office helper, courier service, telephone solicitor, document prepare, telephone quotation clerk and surveillance system monitor. These jobs were premised on Dr. Hill's restrictions of no bending, climbing, kneeling, lifting items from the floor to waste level, lifting items from the waist level to overhead, squatting or twisting. Dr. Hill's restrictions allow the claimant to grasp, push, pull and carry up to 10 pounds. He also limits her sitting, standing and walking to 15-30 minutes at a time. Her understanding of these restrictions came solely from a review of Dr. Hill's records and not deposition testimony.

33. Tanner reviewed a labor market survey which showed jobs within a 50 mile radius of the claimant's residence to include a fitting room attendant, cashier, service associate, receptionist, customer service representative and surveillance agent. Reportedly, all but the fitting room attendant had positions available at the time of her deposition. Tanner agreed the claimant does not have the computer skills sufficient to perform office work.
34. Tanner agreed she had not provided a reemployment plan, vocational counseling, and assistance with job-seeking skills or interviewing skills. Her role was limited to providing a reemployment assessment.
35. As to the claimant possibly working as a companion, Tanner agreed she would be unable to do that if required pushing a patient in a wheelchair. She agreed that having to take breaks during the day could be a problem depending on the employer. Unscheduled absences might also be a problem if they exceeded an allowed number. She also agreed that any absence during any probationary period could costs the claimant any job she had obtained She also agreed that the various jobs she identified is within the claimant's restrictions were based on generic guidelines from the Dictionary of Occupational Titles and are not necessarily jobs available within a 50 mile radius of the claimant's residence.
36. Tanner was asked to review jobs that were included in labor market survey. While I agree with the claimant the document represents unauthenticated hearsay, I'm going to allow the document and the questions asked relative thereto. Tanner agreed there was no Wal-Mart position as listed. She also agreed the Sears job listed as a cashier was a light-duty job which would exceed the claimant's restrictions. There were unanswered concerns regarding the job with Ace Cash Express. The job with Parking Solutions is a light-duty job. The job with Brookdale Senior Living requires typing general office correspondence and/or entering information. The job with Buckeye Community Health

Plan appears to require computer experience. The job as a surveillance agent with Penn National Gaming would not be appropriate if she had to take breaks outside of her regularly scheduled breaks.

37. **Permanent total disability:** Under the authority of *Blake v. Merck & Co., Inc., 43 So.3d 882 (Fla. 1st DCA 2010)*, a claimant can establish entitlement to permanent total disability benefits by establishing medical evidence he/she is unable to engage in at least sedentary employment within a 50 mile radius of his home due to his physical limitations; evidence of permanent work-related restrictions coupled with an exhaustive job search or evidence of permanent physical work restrictions which, while not alone disabling, when coupled with vocational factors preclude the claimant from working in at least a sedentary level position on an uninterrupted basis.

38. I conclude the claimant has failed to establish by the greater weight of the evidence medical evidence that she is unable to engage in at least sedentary employment within a 50 mile radius of her home due to her physical limitations. While Dr. Vincenty testified that based upon a review of the records of Dr. McGrail and Dr. Hill, the claimant is unable to work; the opinions of Dr. McGrail and Dr. Hill were to the contrary. Furthermore, Dr. Vincenty had not seen the claimant in quite some time and I conclude his opinion is not sufficient to establish the claimant is permanently and totally disabled. I also reject the claimant's argument that since Dr. Vincenty placed the claimant on a no work status until she returned, she should be considered permanently and totally disabled. It is clear to me Dr. Vincenty wanted to review the claimant's status before releasing her with restrictions. Since the claimant had moved to Ohio, that was not possible. However, the claimant saw physicians in Ohio who performed examinations, reviewed records and determined she was capable of employment with restrictions. Thus I find the claimant has failed to meet the criteria for permanent total disability benefits based solely on medical evidence.

39. It is also my finding the claimant has failed to establish through an exhaustive job search in the presence of physical restrictions imposed by her physicians that she is unable to secure or at least sedentary employment within a 50 mile radius of her home. While I find the claimant's job search to be substantial, it is not exhaustive since it took place over but a few months time. Furthermore, while the claimant contacted numerous potential employers, most had positions outside her restrictions. This should not be construed as critical of the effort the claimant made. The E/C provided the claimant with

no assistance whatsoever and the claimant made an effort to secure employment with the limited search skills she has. I find, however, despite her good faith efforts, those efforts are not sufficient to allow me to award permanent and total disability benefits based upon an exhaustive job search in the presence of physical restrictions.

40. Notwithstanding the foregoing, I find the claimant has permanent physical restrictions which, while not alone are totally disabling, when coupled with vocational factors preclude the claimant from working at least a sedentary level position on an uninterrupted basis. In this regard, I accept the testimony of Gil Spruance over that of Melissa Tanner to the extent there is any disagreement in their testimony. I find the testimony of Mr. Spruance comports more with logic and reason than that of Ms. Tanner. Furthermore, Mr. Spruance had a better understanding of the claimant's restrictions. In that regard, I accept the testimony of the claimant and Dr. Hill that she has days when she would be unable to work due to her pain. I accept the testimony that she would require unscheduled breaks from her employment due to pain. I accept the testimony the claimant has to change positions frequently. I accept the testimony the claimant is unable to perform such tasks as pushing a wheelchair. Reduced to its essence, Tanner's testimony identifies only one position that has any practical application to the claimant's condition and restrictions, i.e., a light companion job. I reject any notion the claimant could perform that job on an uninterrupted basis. It is clear to me, and I find, such a position would require the claimant to be available to provide assistance as needed. If the claimant was sitting to relieve her pain and immediate attention was required, I question the claimant's ability to regularly and consistently provide that service. I also find she would have to take unscheduled breaks and there would be unscheduled days claimant would be unavailable to work. Ultimately, considering the claimant's restrictions and based upon my observation of her during the course of the hearing, I accept the opinions of Spruance that the claimant would not be able to engage in at least sedentary employment within a 50 mile radius of her home. I also accept his opinion that there is not any employment available within her functional capacity within a 50 mile radius of her home. Therefore, I find the claimant is permanently and totally disabled.

41. **Maximum medical improvement date**: The parties were in agreement that two possible dates of maximum medical improvement were options if I determined the claimant is permanently and totally disabled as I do. The first alternative is the date of maximum medical improvement of August 6, 2012 as opined by Dr. New. I reject that

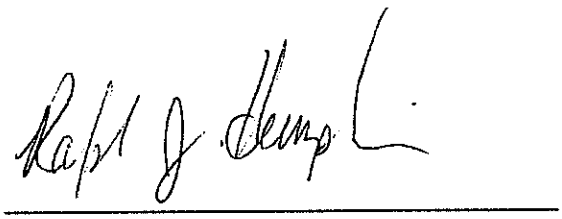
date. It is clear to me the claimant was not at overall maximum medical improvement as of that date since she had not been cleared from a pain management perspective. Indeed, she was treating with Dr. Vincenty at that time. Significantly compounding the problem was the aborted attempt at a spinal cord stimulator that resulted in an abscess and additional surgical procedures. For a time, the claimant was in a temporary total disability status per the opinions of Dr. Vincenty. I therefore find the claimant was not at overall maximum medical improvement on August 6, 2012.

42. The other date proposed was what is commonly referred to as statutory MMI. The parties stipulated that 104 weeks of temporary benefits had been paid as of February 9, 2014 and, therefore, the claimant reached statutory MMI as of that date. Under the authority of *Westphal v. City of St. Petersburg, 123 So.3d 440 (Fla. 1st DCA 2013)*, commonly referred to as Westphal II, I find the claimant is entitled to permanent total disability benefits as of February 9, 2014 and continuing. As stated in Westphal, "... A worker who is totally disabled as a result of a workplace accident and remains totally disabled by the end of her eligibility for temporary total disability benefits is deemed to be at maximum medical improvement by operation of law and is therefore eligible to assert a claim for permanent and total disability benefits." *Westphal* at p. 442.
43. I add, however, I find the claimant to be medically at overall maximum medical improvement based upon the totality of the medical evidence presented and reject the E/C's position to the contrary. I find Dr. Hill has provided nothing more than palliative care. Nevertheless, the record does not support a finding of an appropriate date of maximum medical improvement outside of those proposed by the parties. Thus I find the date of maximum medical improvement is the date of statutory MMI, to wit February 9, 2014.
44. I find that the claimant's attorney has performed a valuable service and is entitled to an award of an attorney's fee and taxable costs against the employer for securing the benefits awarded by this Order.
45. Any and all issues raised by way of the petition for benefits, but which issues were not dismissed or tried at the hearing, or which were ripe, due and owing but not raised at the hearing, are presumed resolved, or in the alternative, deemed abandoned by the claimant, and therefore, are denied and dismissed with prejudice.

Wherefore, It Is CONSIDERED, ORDERED, and ADJUDGED as follows:

1. The claim for permanent total disability benefits plus supplements from February 9, 2014 to present and continuing is hereby granted. The employer/carrier shall pay the claimant permanent total disability benefits and supplements as well as penalties and interest on past-due benefits for the time and in the manner provided by law.
2. The E/C shall pay an attorney's fee and taxable costs to the claimant's attorney for securing the benefits being awarded by this Compensation Order. Jurisdiction is hereby reserved to determine the amount thereof if the parties are unable to amicably resolve this issue.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida on this 18th day of March, 2015.



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