

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

Patricia Y. Moore,  
Employee/Claimant,

Judge: William Ray Holley

vs.

OJCC Case No. 11-017440WRH

St. Johns County School District/Florida  
School Boards Insurance Trust,  
Employer/ Carrier/ Servicing Agent.

Accident date: 2/22/2011

**FINAL MERITS HEARING ORDER**

**THIS CAUSE** came on for final merits hearing before the undersigned Judge of Compensation Claims on January 15, 2014.<sup>1</sup> The claimant, Patricia Y. Moore, was present and was represented by Matthew Carrillo, Esquire. The employer, St. Johns County School District, and the carrier/servicing agent, Florida School Boards Insurance Trust, were represented by Gregory B. Lower, Esquire. For purposes of this order, the employee will be referred to as "Employee" or "Claimant". The employer/carrier/servicing agent will be referred to as "Employer" or "Carrier" or "Employer/Carrier".

This Final Order resolves the petition for benefits ("PFB") e-filed August 29, 2013. All evidence was received and the record was closed on January 15, 2014.

**I. ISSUES:**

The Claimant sought the following benefits:

1. Permanent Total Disability benefits and Permanent Total Disability Supplemental benefits from August 29, 2013 to the present and continuing
2. Penalties, interest, costs of litigation or attorneys fees are due at the expense of the employer/carrier.

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<sup>1</sup> Although this Order refers to this Office as a "Court", the undersigned judge of compensation claims is aware and acknowledges that the Office of the Judges of Compensation Claims ("OJCC") is technically not a court, but rather an administrative hearing office. All references herein as to the term "Court" are to be construed in such a manner.

## **II. EMPLOYER/CARRIER'S DEFENSES**

The Employer/Carrier defended on the following grounds:

1. Employee not entitled to Permanent Total Disability and/or Permanent Total Supplemental benefits pursuant to Section 440.15.
2. No penalties, interest, costs of litigation or attorneys fees are due at the expense of the employer/carrier.

## **III. STIPULATIONS**

The parties have stipulated to the following:

1. The Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this claim.
2. Proper venue is St. Johns County, with the trial to be held in Jacksonville, Duval County, Florida.
3. There was an employee/employer relationship on the date of accident sufficient for this employee to be covered pursuant to Chapter 440 of the Florida Statutes.
4. Notice of the accident/injury was timely given (and accepted as compensable.) There was timely notice of the pre-trial conference and the trial.
5. Workers' compensation insurance was in effect on the date of accident.
6. If medical benefits are determined to be due or stipulated due herein, the parties agree that the exact amounts payable to health care providers will be handled administratively and medical bills need not be placed into evidence at trial.

If PTD and PTD supplemental benefits are awarded, the issues of, amount of said benefits along with any offsets, penalties and interest will be handled administratively by the parties. Jurisdiction is reserved in the event that parties are unable to resolve.

7. This case is not governed by a managed care arrangement.
8. The following doctors or medical providers are authorized doctors:  
Dr. Kevin Murphy, Heekin Orthopedic Specialists
9. The following body parts are deemed compensable: Left Shoulder

10. The petition for benefits and the response to that petition were filed as set forth in the Judge's Exhibits noted herein.
11. The AWW is \$834.75 per stipulation dated December 14, 2011, however this amount did not include fringe benefits as the Claimant was still employed at that time. The AWW inclusive of fringe benefits has been stipulated to be \$939.31.
12. The Claimant has advised that she is not pursuing PTD under the first category as found in Blake v. Merck and the parties agree that the following second and third categories are in dispute:

Whether the Claimant has permanent work-related physical restrictions and has performed an exhaustive but unsuccessful job search.

Whether she has permanent work-related physical restrictions and vocational limitations that prevent her from engaging in sedentary employment.

#### **IV. WITNESSES AT TRIAL**

The following Witnesses testified live:

Claimant.

Ms. Gerri Pennachio, Vocational Expert for Claimant.

Gayla Farmer, Adjuster, (by telephone).

Gil Spruance, Vocational Expert for Employer/Carrier.

#### **V. DOCUMENTARY EVIDENCE**

The following documents were offered into evidence:

##### **Judge's Exhibits:**

1. Petition for benefits e-filed August 29, 2013.
2. Response to petition for benefits e-filed September 12, 2013.
3. Notice of Resolution of Issues e-filed October 29, 2013.
4. Uniform Statewide Pretrial Stipulation e-filed November 15, 2013.

5. Pretrial Order entered November 18, 2013.
6. Claimant's Notice of Filing e-filed December 13, 2013; Witness and Exhibit List e-filed December 13, 2013.
7. Employer/Carrier's Final Witness and Trial Exhibit List e-filed December 18, 2013
8. Claimant's Trial Summary (for argument only) e-filed January 13, 2014.
9. Employer/Carrier's Pre-Hearing Memorandum (for argument only) e-filed January 13, 2014.

**Joint Exhibits:**

1. Deposition transcript of Kevin Murphy, M.D., taken December 30, 2013 with attachments. This exhibit also includes medical records attached to Employer/Carrier's Notice of Filing e-filed January 9, 2014.

**Claimant's Exhibits:**

1. Composite Work Search efforts x 2 e-filed on January 13, 2014; Work search efforts e-filed December 13, 2013.
2. Gerri Pennachio's deposition transcript and exhibits taken December 19, 2013 and e-filed December 30, 2013.
3. Deposition of Claimant Patricia Moore taken October 21, 2013 and e-filed December 13, 2013.

**Employer/Carrier's Exhibits:**

1. Adam Rainwater, Occupational Therapist ("OTR/L"), deposition transcript and attachments taken on January 6, 2014 and e-filed on January 13, 2014, including Functional Capacity Evaluation report.

Claimant objected to the FCE report that was attached to the deposition as hearsay and not authenticated. There was a further objection to the deposition testimony as the witness did not have an independent recollection and was not an expert witness. Finally Claimant objected to his record and or opinion as coming in as a medical opinion due to the FCE provider not being being an authorized physician.

Employer/Carrier argued that the witness used the report to refresh his

recollection which was certainly permitted. The Employer/Carrier agreed that the FCE record was not a medical opinion per se but that it was relevant as to the credibility of the Claimant in showing that the Claimant did not consistently perform the evaluation and therefore her credibility was at issue.

The undersigned is admitting the deposition transcript. The Employer/Carrier has shown sufficiently that Mr. Rainwater is an expert witness but his opinion is not being considered as a medical opinion. As Mr. Rainwater testified about making this report, the FCE report was sufficiently authenticated and therefore admitted as well but not as medical opinion testimony. His lack of recollection however was considered in evaluating the weight of his testimony.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

In making the findings of fact and the conclusions of law in this claim, the undersigned Judge of Compensation Claims (hereinafter "JCC" or "undersigned") has carefully considered and weighed all the evidence presented. The undersigned has observed the candor and demeanor of the witnesses and has attempted to resolve all conflicts in the testimony and evidence presented. Although the undersigned may not have referenced every piece of evidence presented by the parties, the undersigned has fully considered all the factual evidence in arriving at the following conclusions of law.

1. The undersigned JCC has jurisdiction of the subject matter and the parties of this claim. The stipulations of the parties are adopted and shall become part of the findings of facts herein. The documentary exhibits offered by the parties are admitted into evidence and shall become a part of the record herein.
2. The Employee is a 49 year-old female who resides in San Mateo, Florida (Putnam County) which is south of Palatka. She is right hand dominant. The Claimant is a high school graduate and attended St. Johns Vocational Technical School in St. Augustine for six months, completing 336 hours to be certified as a Corrections Officer in 1987. This certification has expired since that time. The Claimant can read and write in English and perform simple math functions. The Claimant has a regular drivers' license and in the past had a commercial drivers' license. She lost her CDL license because she could not pass the DOT physical in light of her restrictions from the industrial accident discussed herein. Her past work history demonstrates

that the Claimant worked as an Assistant Manager at a Handyway from 1989 to 1993 and from 1987 to 1988, the Claimant worked at the Palatka Mall as a Night Shift Security Guard. She did not ever work as a correctional officer despite obtaining her certification.

3. On February 22, 2011, while employed as a bus driver for the St. Johns County School District, the Employee injured her left shoulder assisting a student.

4. The Employee came under the care of Dr. Kevin Murphy in Jacksonville. The Claimant was initially seen by Dr. Murphy on March 14, 2011. Dr. Murphy diagnosed a labral and rotator cuff tear of the left shoulder. Dr. Murphy performed a rotator cuff and labral repair on July 5, 2011. Dr. Murphy placed the Claimant at MMI on November 21, 2011. Dr. Murphy assigned a 2% Whole Body Permanent Impairment Rating for the left shoulder injury. Dr. Murphy assigned permanent work restrictions of no lifting, pushing, pulling greater than 20 pounds and no overhead work with the left upper extremity. According to Dr. Murphy, the Employee is able to perform continuous activities within those restrictions for an 8-hour work day. Dr. Murphy's office continued to treat the Claimant and has maintained the restrictions to the present.

5. The Claimant underwent a Functional Capacity Evaluation on December 9, 2011 performed by Adam Rainwater, OTR/L. According to Mr. Rainwater, the Claimant did not give a consistent effort, did not show a competitive test performance and demonstrated exaggerated and inappropriate pain behaviors during the evaluation. The FCE provider also opined that the Claimant displayed self-limiting efforts with the left shoulder and bilateral inconsistencies. Based on the evaluation, the Claimant was able to perform a minimum of light work which is lifting up to 20 pounds and sitting/standing for continuous intervals. Mr. Rainwater did not remember performing the exam on the Claimant (or the Claimant herself) but instead relied solely upon his report and or his notes. He was unable to remember how long the examination lasted and was not sure what medical records he reviewed beforehand.<sup>2</sup>

6. Following the February 22, 2011 work accident, the Employee returned back to light duty with the Employer from February, 2011 to June, 2011 working with a pre-kindergarten unit and

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<sup>2</sup> Dr. Kevin Murphy did not review or rely upon the FCE in making his opinion regarding work restrictions.

later as the in-school suspension class monitor/school clerk for Pedro Menendez High School from August, 2011 to June 6, 2012. After that time, the Employer no longer had work available for her and the Claimant was not reassigned to a job at the end of the school year. The Claimant did not find out about this until the following school year had started. At that point, she filed for unemployment benefits. The Claimant drew unemployment compensation from November, 2012 to August, 2013. She has applied twice unsuccessfully for Social Security benefits.

The Claimant immediately began searching for work once she was informed that her contract with the school board was not going to be renewed. She indicated that she first started searching for a job in October of 2012 and continued to look for work until the present. Her job search primarily involved phone and internet contacts due to her not having a vehicle. However, she did walk into employers' locations attempting to obtain employment when she had access to transportation. Claimant has undergone phone interviews as well as in person interviews but has not had any luck finding work. She testified that she asked around constantly with friends, members at her church, and newspaper. She stated that she has worked since she was 15 years until this recent set of circumstances. She sincerely and credibly testified that she would rather be working and was remorseful that she was on government assistance for the first time in her life.

Additionally, she utilized WorkSource in Palatka (with the unemployment office). She attended a four-hour training class via WorkSource which taught her how to look for jobs via computer, go on interviews, what to wear, and what not to say etc. Even after she stopped receiving unemployment, the Claimant continued to utilize WorkSource to look for work. She indicated that she was able to access WorkSource online with her son's laptop was available. She was not able to use the laptop when he was not around or when he was using it to attend school online. She did get e-mails from WorkSource when a position became available and had a case worker that would call and advise as to job openings as well. The Claimant on her own also utilized other private websites such as "Job Junction" and taught herself with the help of her son how to use his computer.<sup>3</sup>

The search log shows she made over 450 entries/contacts looking for work. Most of these positions were in the area of cashier and day-care worker positions. The Claimant indicated that she was focusing on jobs that were in her work history. Although some of the

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<sup>3</sup> She eventually was able to purchase a tablet with the help of her son which helped her with her online job search.

jobs were not within her work restrictions, her efforts nonetheless are credited as trying to do whatever she could to find work. She conducted her job search close to home but also looked in more remote areas such as St. Augustine, Jacksonville, Palm Coast and Gainesville. The Claimant wanted to pursue jobs as a security guard and researched what it would take to obtain her license/certification. She did not however have the \$232.00 to take the security guard exchange training course that was needed to work in the field. She also did not have transportation to attend the 40 hour class. She indicated that she was willing to try to find work in this field. The Claimant has followed up on many of the contacts she thought might bear fruit, especially the ones she interviewed for. Claimant adjusted her search based upon the evaluations of the vocational experts. She quickly followed up on the two job leads provided by the Employer/Carrier's vocational expert Mr. Gill Spruance without success.

7. Gayla Farmer, adjuster, testified that the Carrier was in the process of making available another updated FCE, re-employment counseling and services, labor market survey, job placement. These services were authorized on Jan 10, 2014 but had not been provided or made available at the time of the final hearing.

8 Gerri Pennachio, Vocational Expert for the Claimant, testified at deposition and at the final hearing. It was her belief that the Claimant had performed a good faith job search especially given her limited abilities and transportation issues. Mrs. Pennachio advised that the job search was the best the Claimant would have been able to perform. Mrs. Pennachio was of the opinion that the Claimant would not be able to return to work as a bus driver and had no transferable skills. She also found it significant that the Claimant had been out of work for 18 months, lived in an rural area where there is not a great labor market and that most jobs require a good use of bilateral upper extremities which the Claimant is unable to do. Pennachio also focused on Claimant's transportation problems as a substantial challenge or obstacle for the Claimant to find and keep a job. As to employability or "placability", Mrs Pennachio indicated that on paper it would seem that the Claimant should be employable with the restrictions given by Dr. Murphy even in some unskilled jobs. However, she indicated that Claimant's placability and ability to sustain a job was another story. Due to the many challenges facing Claimant including work restrictions, transportation, pain level, problems with her left arm, rural labor



market and lack of transferable skills, it was Mrs. Pennachio's opinion that the Claimant was going to remain unemployed. Mrs. Pennachio did believe that the Claimant might be able to work as an unarmed security guard if she somehow could qualify to perform such work.

9. Gill Spruance, Vocational Expert for the Employer/Carrier testified at final hearing. He met with Claimant in November 2013 and generated a report dated December 18, 2013, which was not introduced into evidence. He reviewed the documentation of the Claimant's job search. In the first batch of job searches which constituted 392 notations entered from October 2012 to November 2013, Mr. Spruance noted that these positions were mostly within 20 miles of her residence in San Mateo which is a little south of Palatka. He also indicated 119 job applications were done (versus just contacts) out of the first batch. He also reviewed the second batch of jobs from Nov 18, 2013 to present constituting about 72 contacts. It was his ultimate opinion that the quality of her job search could certainly have been better. He felt that the bulk of the labor market would have been in the 20-50 miles radius which was not fully utilized by Claimant in her search. Mr. Spruance recommended that a new FCE be performed and re-employment counseling and re-employment services be provided. He felt like she would certainly benefit with training on how to address difficult questions at interviews. As to employability, he opined that the Claimant would be able to find work albeit at a lower hourly rate than what she was making. He admitted however that the Claimant would have a reduced access to the labor market due to her physical restrictions. Yet, he testified that the light duty restrictions open up a number of opportunities where the Claimant would be able to do some unskilled and or semi-skilled positions. Spruane agreed that the Claimant would not be able to return to work as a bus driver and did not have transferable skills due to her past relevant work experience. He did find that her ability to hold a job for many years to be an asset.

10. The law which governs claimant's entitlement to PTD benefits is the law which is in effect on the date of accident. Houck v. Lee County Bd. County Comrs, 995 So. 2d 1102 (Fla. 1st DCA 2008). Thus, the law in effect is the 2011 Florida Statutes pursuant to Section 440.15(1)(b). Accordingly, the Claimant is required to establish entitlement to PTD by presenting evidence of one of the following: (1) permanent medical incapacity to engage in at least

sedentary employment within a 50-mile radius of his home, due to his physical limitations; (2) permanent work-related physical restrictions coupled with an exhaustive but unsuccessful job search; or (3) permanent work-related physical restrictions that, while alone not totally disabling, preclude a claimant from engaging in at least sedentary employment when combined with vocational factors. See Blake v. Merck & Co., 43 So. 3d 882 (Fla. 1st DCA 2010). However, Claimant is not arguing the first category but instead asserts that she falls into the second or third category and should be awarded PTD and PTD supplemental benefits.

In HDV Construction Systems, Inc. and Gallagher Bassett Services, Inc. v. Aragon, 66 So. 3d 331 (Fla. 1st DCA 2011), the First District Court of Appeal held that the legal question presented "[was] not merely whether the employee is physically capable of performing at least sedentary employment, but whether the employee (the individual seeking benefits, not a hypothetical individual) can reasonably secure or obtain - 'engage in' - at least sedentary employment within a fifty-mile radius of his residence, considering his physical and vocational limitations." See also Garcia v. Fence Masters, Inc., 16 So. 3d 200 (Fla. 1st DCA 2009).

11 In reviewing the facts herein, the undersigned finds that Claimant has sufficiently performed a good faith exhaustive job search. See generally, Martinez v. Lake Park Auto Brokers, Inc., 60 So. 3d 533 (Fla. 1<sup>st</sup> DCA 2011). This conclusion is based upon the totality of the following reasons: 1) Claimant's sincerity and credibility as to her job search efforts; 2) her documented extensive job search of at least 450 entries; 3) the extended length of time that she conducted her search; and 4) her availing herself of every opportunity known and or presented to her. In reaching this decision, it is acknowledged that the Employer/Carrier has authorized additional vocational services but these services have not yet been provided or made available to the Claimant at the time of the final hearing. Moreover, in comparing the testimony on this specific issue between the expert witnesses, the undersigned finds Mrs. Penachio's ultimate opinion regarding this category to be more credible and persuasive. Based upon the foregoing and the totality of the evidence, the Claimant has established she should be awarded PTD benefits as a result of her permanent work-related physical restrictions coupled with an exhaustive but unsuccessful job search.

The Employer/Carrier has argued that Claimant's job search may have been lengthy but not "exhaustive" and argues that the quality of her search could be improved. They further argue

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that most of the jobs applications were done within a 20-30 mile radius and that the full 50 mile radius should have been utilized. It is noted however that the Claimant did search for jobs outside of 20 to 30 miles radius but understandably due to her transportation issues spent most of efforts looking closer to home. While it is always possible to improve upon or to perform a more sophisticated job search, the Claimant sufficiently performed an exhaustive search to the best of her ability with the resources she had available. Hence, the undersigned respectfully disagrees with the above Employer/Carrier's arguments that the Claimant has failed to establish this second category.

12. As to the third category, the undersigned finds that it is a much closer decision as to whether the Claimant has established permanent total disability. Although the Claimant lives in a rural area, has no transferable skills and cannot return to her relevant work, it was evident that she has the desire, motivation, energy and potential to look for work. It was also worthy to note that the Claimant did return to work following her injury with the Employer until the job no longer existed. Her age and high school education were not deemed to be negative vocational factors. In fact, Claimant's expert indicated that "on paper" it would seem that the Claimant should be employable with the restrictions given by Dr. Murphy even in some unskilled jobs. Although Mrs. Pennachio's ultimate conclusion was that Claimant would not be able to sustain a job, her primary focus appeared to be based upon the Claimant's lack of transportation. While Claimant's lack of transportation certainly constitutes a substantial obstacle, it is not a "vocational factor" that can or should be considered. Both experts believed that the Claimant would benefit from additional vocational services and or assistance in developing skills that would make the Claimant more employable. However such services were not provided to the Claimant in time for the final hearing. In comparing the testimony by and between the expert witnesses, the undersigned finds Mr. Spruance's ultimate opinion on employability to be more credible and persuasive. Moreover, the Claimant did not sufficiently establish through the evidence that she met the criteria for this category.<sup>4</sup>

13. In accordance with the conclusions of law above, the undersigned holds that the claims

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<sup>4</sup> Nonetheless, the Claimant only had to establish one of the three categories which was accomplished.

for penalties and interest are granted. The parties agreed that if PTD and PTD supplemental benefits were awarded, the issues of the amount of said benefits along with any offsets, penalties and interest would be handled administratively by the parties. Jurisdiction is reserved in the event that parties are unable to resolve. The claim for attorney's fees and costs at the expense of the Employer is also hereby granted. The Employer shall pay a reasonable attorney's fee and taxable costs to the claimant's attorney for the permanent indemnity benefits, penalties and interest 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.

**WHEREFORE, it is CONSIDERED, ORDERED and ADJUDGED** that:

1. The claims for PTD and PTD Supplemental Benefits from August 29, 2013 to the present and continuing are hereby **GRANTED**.
2. The claims for penalties and interest are **GRANTED**. The parties agreed that if PTD and PTD supplemental benefits were awarded, the issues of, amount of said benefits along with any offsets, penalties and interest will be handled administratively by the parties. Jurisdiction is reserved in the event that parties are unable to resolve.
3. The claim for attorney's fees and costs at the expense of the Employer is hereby granted. The Employer shall pay a reasonable attorney's fee and taxable costs to the Claimant's attorney for the permanent indemnity benefits, penalties and interest 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 E-MAILED** this 14th day of February, 2014, in Jacksonville, Duval County, Florida.



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