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

Annie T. Bews, Employee/Claimant, vs. Eckerd Drugs, Employer, and AIG Claim Services, Inc., Carrier/Servicing Agent.	)	OJCC Case No. 03-026060JDO Accident date: 1/31/2001

FINAL ORDER

AFTER DUE NOTICE to the parties, a Final Hearing on this matter was held in Gainesville, Alachua County, Florida, on April 27, 2007. The parties were represented by counsel as indicated below. The undersigned judge of compensation claims has jurisdiction of the parties and the subject matter.

At the request of Deputy Chief Judge David Langham, this case was tried before Judge of Compensation Claims John J. Lazzara in place of Judge Jonathon D. Olhman, who was recently appointed to the Circuit Court in and for the Fifth Judicial District.

At the Final Hearing, the Claimant sought the following

benefits:

1. Compensation for temporary partial disability (TPD) benefits from January 18, 2004 to April 1, 2004;

2. Compensation for permanent total disability (PTD) benefits, together with PTD supplemental benefits; beginning April 15, 2005 and continuing;

3. Interest and penalties on all past due payments of compensation;

4. A reasonable attorney's fee for Claimant's counsel of record; and

5. The cost of these proceedings.

The Claim was defended on the following grounds:

1. Claimant voluntarily limited her income and therefore is not entitled to TPD benefits for the period requested;

2. The captioned work accident is not the major contributing cause of the Claimant's disability or loss of income;

3. That the Claimant did not suffer a catastrophic injury;

4. The Claimant did not suffer any injury for which she would be entitled or eligible to receive social security disability (SSD) benefits;

5. The Claimant has a substantial wage earning capacity;

6. Employer/Carrier denies Claimant's entitlement to penalties, interest, costs and attorney's fees at their expense.

The parties have entered into the following stipulations:

1. The Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this claim.

2. Venue properly lies in Levy County, Florida; however, at the request of the undersigned judge and with the consent of counsel for the parties, the case was heard in Gainesville, Alachua County, Florida.

3. Notice of Hearing and Notice of Injury were properly furnished and received as required by the Workers' Compensation Act.

4. On January 31, 2001, the Claimant was employed by the captioned Employer and on that date sustained an injury by accident arising out of and within the course and scope of said employment earning an average weekly wage of $241.97 per week yielding a compensation rate of $161.31 per week.

5. The following was also stipulated into evidence at trial:

a. The issue/claim for medical mileage as raised in the pending Petition for Benefits (PFB) was previously resolved; and

b. Should indemnity benefits be awarded in this

cause, parties agree that penalties and interest would be owed from the date same became due.

At the trial of this cause, the following Exhibits were admitted into evidence.

Claimant's Exhibits

1. Petition for Benefits filed on 7/10/2006.

2. The Final Order of October 14, 2004.

3. Deposition of Dr. Oscar DePaz, M.D., taken 12/11/2003.

4. Deposition of Dr. Oscar DePaz, M.D., taken 1/24/2007.

5. Deposition of David San Filippo, Ph.D., taken 4/12/2007.

Employer/Carrier's Exhibits

1. Deposition of Dr. Stephen Pyles, M.D., taken 3/19/2007.

2. Deposition of Annie T. Bews taken 9/22/2003.

3. Supplemental deposition of Annie T. Bews taken 4/4/2007.

4. Composite of the Claimant's Social Security Administration (SSA) file.

5. Vocational report of Gerrie Pannachio of 4/23/2007.

Joint Exhibits

1. Pretrial Stipulation and Order entered on 11/21/2006.

The following witnesses testified live before me:

1. Annie Mae Thompson, a/k/a Annie T. Bews, the Claimant.

2. Gerrie Pannachio, the Employer/Carrier's vocational expert witness.

After due consideration of this matter and after having the opportunity to review and consider the aforesaid exhibits which were admitted into evidence, and having observed and considered the candor and demeanor of the witnesses who appeared and testified before me, and having endeavored to resolve all conflicts of facts in the evidence presented herein, I hereby make the following findings of fact and conclusions of law:

1. The undersigned judge of compensation claims has jurisdiction of the parties and the subject matter of this claim;

2. The stipulations entered into by and between the parties herein are hereby approved and adopted as findings of fact and are incorporated herein by reference;

3. In my determination herein I have attempted to distill 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.

4. Any and all issues raised by way of the petition or petitions for benefits which are the subject matter of the final hearing, but which issues were not tried at the hearing are presumed resolved, or in the alternative, deemed abandoned by the employee/claimant and therefore **denied.** See Betancourt v. Sears Roebuck & Co., 693 So.2d 253 (Fla. 1st DCA 1997).

5. On January 31, 2001, the captioned Claimant, Annie T. Bews, now known as Annie May Thompson since her marriage subsequent to her date of accident, is 50 years of age and has a 10th grade education. On that date she was employed the Employer, Eckerd Drugs, now known as CVS, as a cashier clerk and on that date Claimant sustained and suffered a compensable injury by accident arising out of and within the course and scope of the Claimant's employment with said Employer when she fell backwards while lifting store doors. The Employer/Carrier has stipulated to the compensability of the accident and injuries sustained by the Claimant. The Claimant testified that within a week following the accident she had difficulty moving and claims that she injured her back, legs and pelvic area in the accident. Ms. Bews testified that she initially treated with a chiropractic physician, Dr. Craig Henderson, D.C., and was seen for 18 visits. She later treated with Dr. Lance

Chodosh and was subsequently referred to Dr. Oscar DePaz, M.D., a physiatrist.

6. Dr. DePaz began seeing the Claimant some time in May, 2001. He diagnosed the Claimant's injuries as consisting of myofascial cervical and thoracolumbar injuries as well as moderate degenerative disc disease at L4-5 with mild spondylosis of the lumbar spine and probable S1 dysfunction. He released the Claimant to light level activity status with no heavy lifting greater than 20-25 lbs. and no repetitive bending, stooping, squatting, or twisting. The Claimant was provided with physical therapy and eventually improved and was kept on light duty status. She underwent a functional capacity evaluation (FCE) on 11/27/2001, which showed that she was capable of work at sedentary to light physical demand for five hours per day and that she was unable to perform one of her job duties required of a cashier clerk, to wit: stocking shelves. On April 1, 2004, over three years following her work accident, Dr. DePaz found that the Claimant had reached maximum medical improvement (MMI) with a 9% permanent impairment rating (PIR). Dr. DePaz put her on sedentary/light work restrictions and further limited her work hours to only 20 hours per week. The restrictions also consisted of sit and stand as needed; avoid repetitive bending, stooping, and twisting. I found it

significant that in over six years of treating the Claimant, Dr. DePaz had actually seen the Claimant on two occasions, and that Ms. Bews' monthly visits with his office consisted of only seeing Dr. DePaz's staff. Moreover, the fact that the FCE is over five years old and that Dr. Depaz has only saw the Claimant twice in over six years, I find that much of his opinions concerning the Claimant's functional capacity and limitations are speculative at best and should be given little weight. Dr. DePaz provided little to no personal treatment or examination of the Claimant and most of her treatment with Dr. DePaz consists of medication therapy.

7. The Claimant testified that within several months following her work accident, she returned and remained employed with this Employer until April 15, 2005, when she resigned. She testified that initially her job and duties were modified to accommodate her work restrictions and that her hours changed from her pre-injury hours of 30 to 40 hours per week to 20 hours per week in accordance with the 2001 FCE. She claims that her only lifting task consists of lifting pill bottles. The Claimant testified that she suffered a re-injury sometime on May 22, 2003, when she twisted while serving a customer and experienced immediate back pain. There is no medical evidence to indicate that this was a new injury, but simply an

exacerbation of her preexisting low back injury. In Judge Ohlman's Final Order of January 14, 2004, he was not able to determine whether this re-injury constituted a temporary or permanent worsening of the Claimant's condition. At this latest hearing there is no medical evidence indicating that this second incident permanently worsened the Claimant's condition in view of the fact that she continued working at the same level and pace until her voluntary resignation on April 15, 2005, approximately two years following the incident. Ms. Bews testified that sometime in April, 2005, a new manager took away the stool which she was using and cut her hours to 10 hours per week which forced her to quit. When specifically asked by the undersigned judge why she tendered her resignation she stated it was because her hours has been cut to only 10 hours per week and because it took her approximately two to three hours to get ready and drive to work so it just did not appear to be economically feasible to continue working with this Employer. There is no indication that the reason for her voluntary resignation was due to her physical inability to perform her work task, but rather for economic reasons. Ms. Bews claims she looked for work following her resignation, but found no employment. It appears that many of the positions she looked for consisted of jobs that she reasonably should have known she

could not physically perform. She also admitted on cross-examination that she has not sought any employment for over one year. Ms. Bews has previously applied for SSD benefits, but has been rejected. She has filed for a reconsideration of the decision.

8. At the hearing, Claimant presented with a cane. When asked who prescribed said cane she stated that no one prescribed the cane, but uses it because she has arthritis in both knees and uses the cane to walk and for stability. I do not find the cane is connected to her work-related injuries since the Claimant did not describe any leg pain at the Final Hearing. She says that she experiences a burning sensation of her low back, aching sensation in her tailbone and a stretching sensation in her pelvic area. She also claims that she has limited intermittent neck movement and that while she was employed she felt "horrible" after a five hour work shift; although, she did not experience discomfort while at work. Expectedly, she testified that she does not feel that she can be gainfully employed at this time.

9. On February 14, 2005, the Claimant underwent an Employer/Carrier's requested independent medical examination (IME) with Dr. Stephen Pyles, M.D., an anesthesiologist specializing in pain management. In his depositional testimony

of March 19, 2005, Dr. Pyles stated that the Claimant provided a history of having an initial work-related injury on 1/31/2002, after which time she recovered significantly and than had a re-injury. Dr. Pyles reviewed the Claimant's lumbar MRIs of 8/16/2001 and 8/6/2003. The MRIs showed degenerative disc disease in the lumbar spine as well as an anular tear at L4-5 level. He testified that he reviewed some of Dr. DePaz's records and found that Dr. DePaz had provided the Claimant with physical therapy, medication and home exercise. Dr. Pyles stated that his clinical examination was unremarkable except for mild tenderness in the sacroiliac joints region. He found no significant limitation of flexion/extension or abduction of the lower back. The Claimant's primary complaint was pain in the pelvic area, yet she pointed to her sacrum when describing the pain. He testified that the Claimant did not describe any problems in the neck, thoracic spine, or her shoulders. His clinical impression was that the Claimant had suffered an exacerbation of her preexisting injury resulting in an increase pain in the sacral area following her re-injury in May, 2005. He found her condition consistent with sacroiliac irritation.

Dr. Pyles opined that the Claimant was not a surgical candidate although she had lumbar disc disease. He found that the Claimant has previously reached MMI from an interventional

pain standpoint; certainly, by the date of his evaluation. He deferred any opinion as to the Claimant's PIR since he says he does not generally assign PIRs as a matter of practice and is not familiar with the rating guides. He testified that the Claimant informed him that she previously worked and did not have significant problems even while working. It was only after work in the late afternoon and evenings that she began to experience some discomfort. When pressed, he stated that the Claimant's work restriction consisted of lifting no more than 20 lbs. and that she could bend, climb, crawl, squat and reach repetitively after time to rest in between those activities. He could not opine as to what percentage of the Claimant's problems is related to her degenerative condition. I found it somewhat surprising that Dr. Pyles said that the degenerative findings and abnormalities could be from industrial accident of October, 2001, but couldn't say so within a reasonable degree of medical certainty. At the time he evaluated the Claimant he says that he did not give the Claimant any work restrictions and limitations because she didn't indicate that she had any problems working. He stated that the Claimant needed no interventional treatment because her pain was intermittent. He deferred to Dr. DePaz for the Claimant's current work restrictions and limitations, however, as I stated above since

Dr. DePaz has really only seen the Claimant twice in approximately six years, I have little confidence in the accuracy of his work restrictions. Moreover, he seems to be relying on an FCE that was performed in 2001, over five years ago, and before the Claimant's continued employment with this employer until her voluntary resignation in April, 2005. It appears that Dr. Pyles defers to Dr. Depaz essentially because he seems to assume that Dr. DePaz has been personally seeing the Claimant on a regular basis, which is not accurate.

10. Since the Claimant filed a claim for PTD benefits, in addition to TPD benefits, both of the parties submitted vocational testimony. Testifying on behalf of the Claimant was Dr. David San Filippo, Ph.D., a vocational consultant. Dr. San Filippo saw the Claimant on December 15, 2006, and reviewed certain medical reports and FCEs. He found that the Claimant's work experience for the last 15 years consisted of sales clerk, stock clerk, house painter, food service worker. He stated that the exertional level of the Claimant's past work experience was heavy to light work. The light work consisted of work as a sales clerk and in food service where the Claimant had to lift up to 20 lbs. with frequent or prolonged walking and standing. He described the sales clerk position as semi-skilled and that her food service experience was skilled work. He stated that

the Claimant owned a restaurant and bar and supervised people in that business for approximately five years. He claims that the way she performed it the work was semi-skilled. He testified that the Claimant is 56 years old and for social security purposes considered of advanced age. He says that the Claimant would have to have been able to perform past relevant work otherwise she would be considered disabled. He claims that the Claimant had limited education and did not complete high school, which is a disadvantage. His review of the medical records revealed that she injured her back, had torn ligament in her left leg, displaced her pelvis and injured her tailbone. He believes that her injuries qualify or meet a listed impairment for social security purposes. I find this opinion to be beyond his expertise since calls for a medical opinion and there is no medical evidence of the same. Even Claimant's counsel concedes this point. Although, the Claimant's impairment is considered severe, based upon Dr. DePaz's work restriction of sedentary work level, based on her age and her inability to do past relevant work he found that the Claimant has no transferrable skills to sedentary employment and that she would qualify for disability status under section 201.02 of 20 CFR, Part 404, subpart P, Appendix 2, the medical-vocation guidelines used by the SSA, otherwise known as the "GRIDS."

11. Testifying on behalf of the Employer/Carrier was Gerrie Pennachio, a certified Vocational Evaluator and Disability Management Specialist. Ms. Pennachio personally interviewed the Claimant on April 17, 2007, and reviewed the various depositions of the Claimant and medical providers, some of which were not introduced into evidence in this cause. Ms. Pannachio found that the Claimant had sustained a work related injury on 1/31/2001 and a re-injury in May, 2003. She found that the Claimant had worked for the captioned Employer in a modified duty capacity until her voluntary resignation in April, 2005. Ms. Pennachio felt that the Claimant had transferrable skills consisting of small business knowledge and skills, an outgoing personality, good customer service skills, and experience in supervising people. According to the Dictionary of Occupational Titles (DOT), Ms. Pennachio found that the Claimant's past work experience was in the light, medium and heavy physically demanding jobs of a semi-skilled to skilled nature. The Claimant during her interview informed her that she could not remember when she last looked for work.

Ms. Pennachio reviewed Dr. San Filippo's Vocational Report and found various inconsistencies. She said that Dr. San Filippo did not have the correct information concerning the Claimant's supervisory duties and ownership responsibilities of

restaurant/bar proprietor. Dr. San Filippo found that the Claimant was not outgoing which was contrary to Claimant's testimony at the Final Hearing and her discussion with Ms. Pinnachio. Moreover, he did not correctly assess the Claimant's business skills during the five years that she owned and operated the restaurant/bar. The expert witness found that Dr. San Filippo's opinions concerning the Claimant's mental health was beyond his expertise as do I. Finally, Dr. San Filippo's medical opinions regarding whether or not the Claimant meets a listed impairment is rejected as being beyond his expertise, since he is not physician. Ms. Pinnachio's ultimate opinion was that the Claimant still has a demonstrated earning capacity. In fact, Claimant has evinced the ability to work following her industrial accident and did, in fact, work for a period of five years following her accident and re-injury, albeit, on a part-time basis. Ms. Pinnachio also performed a labor market survey and found that there were available jobs in the locale where the Claimant resides that were within her restrictions and limitations and that there were sufficient jobs in the national economy. Ms. Pinnachio relied primarily on the restrictions and limitations imposed on the Claimant of sedentary work by Dr. DePaz, which limitations I find suspect having only seen the Claimant twice in approximately six years. I believe that the

Claimant's physical restrictions and limitations are more consistent with the light duty restriction opinions of Dr. Pyles rather than those of Dr. DePaz. I will state however, that I found the medical evidence submitted in this cause consisting of the opinions of Dr. DePaz and Dr. Pyles to be somewhat lacking in persuasiveness for the reasons stated above. However, in and attempt to extract and accept the medical opinions I found most logical and consistent with the remainder of the testimony and evidence presented in this cause, I accept the opinions of Dr. Pyles over those of Dr. DePaz..

12. If the Claimant is capable of light duty level employment she would not be considered disabled under section 202.03, of the GRIDS. I found the Claimant to be an articulate woman with considerable practical experience and skills in operating a small business. I find that the evidence here supports the vocational opinions of Ms. Pinnachio regarding the Claimant's demonstrated ability to engage in past work and does indeed have a wage earning capacity. In fact, the Claimant has been worked for this Employer since her FCE of 2001, until her voluntary resignation in April, 2005, a period of almost four years. Moreover, there is scant evidence presented of any physically disabling injury. Claimant does not have any disc herniation, nor is there any radicular component to any of her

injuries. The Claimant's use of the cane is non-prescribed and serves only to embellish her perceived limitations. Moreover, there does not appear to be any significant adverse changes in her condition, which have worsened her impairment.

13. An injured worker must still prove every element of her/his claim, including the element of a causal connection between his/her compensable injury and the inability to earn which would entitle him/her to receive SSD benefits. Bob Wilson v. Mohammad, 629 So. 2d 287 (Fla. 1st DCA 1997). Moreover, according to section 440.15(1)(b), Florida Statutes, the Claimant is only entitled to PTD benefits "in the absence of conclusive proof of a substantial earning capacity." This a defense asserted by the Employer/Carrier. I also find that even with Dr. DePaz's restrictions based upon a 2001 FCE restricting the Claimant to only part-time work (20 hours per week), this does not solely render the Claimant PTD. School District of Escambia County v. Cooper, 686 So. 2d 613 (Fla. 1st DCA 1996)[Claimant capable of part-time sedentary work not entitled to PTD benefits.] As stated above, the FCE of 2001, is stale. The evidence here shows that the Claimant here has not worked for two years and has done little to look for any employment within her restrictions and limitations. Even her limited work search was for positions she knew or should have known she could

not perform.

14. I find the most significant factor here was the fact the Claimant demonstrated the ability to work for approximately four years following her industrial accident. Her reason for resigning was primarily for economic reasons and not the result of the injuries or impairment she suffered in her industrial accident. Moreover, she has not sufficiently tested the labor market. Although, I find that the Employer here should have continued to accommodate the Claimant's restrictions and limitations and should not have removed her stool[1], simply awarding PTD benefits as a penalty is warranted. Based on the totality of the evidence , I find the Employer/Carrier here presented sufficient conclusive proof that the Claimant has a substantial earning capacity despite her impairment. Therefore, PTD benefits should be denied.

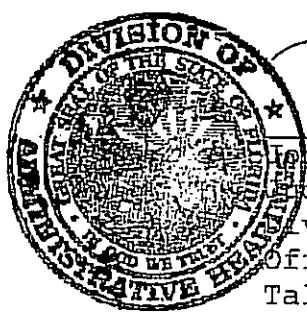
16. The Claimant also filed a claim for TPD benefit from 1/18/2004 to 4/1/2004. Unfortunately, no evidence was presented that the Claimant earned less than 80% of her average weekly wage. "An injured employee can recover TPD benefits only if a disability caused by work-related injury results in a reduction in the employee's earning capacity below the level set by section 440.15(4)(a), Florida Statutes (1994). Vancor Hospital

[1] Ms. Pinnachio testified that she was certain the Employer/Carrier would now accommodate that request.

v. Ahles, 727 So. 2d 968 (Fla. 1st DCA 1998). Moreover, no TPD benefits are due from the Carrier until the Carrier receives an employee's completed Form DWC-19 (Employee's Earnings Report). Jack Feagin Electric, Inc. v. Hallmark, 894 So. 2d 1083 (Fla. 1st DCA 2005). No such reports were filed or received in evidence in this cause. Therefore, based on Hallmark such benefits are not due and owing as of the date of the Final Hearing and the claim for TPD benefits must be denied accordingly.

WHEREFORE, it is **ORDERED** that the claims of the Employee, Annie T. Bews, for temporary partial and permanent total disability benefits, together with penalties, interest, costs and attorney's fees through the date of the Final Hearing, based upon her injury by accident arising out of and within the course and scope of employment on January 31, 2001, are hereby **DENIED**.

DONE AND ORDERED in chambers in Tallahassee, Leon County, Florida.



John J. Lazzara
Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims
Tallahassee District Office
P.O. Box 6400
Tallahassee, Florida 32314-6400
(850)488-2110
www.jcc.state.fl.us

Certificate of Service

I **HEREBY CERTIFY** that the foregoing Order was entered and a true copy furnished by regular mail on this 12th day of June, 2007 to the captioned parties, or their attorneys if represented, at the following addresses:

Secretary to
Judge of Compensation Claims

Annie T. Bews
5791 Northeast 139 Terrace
Williston, Florida 32696

CVS, f/k/a Eckerd Drugs
435 East Noble Avenue
Williston, Florida 32696

AIG Claim Services, Inc.
Post Office Box 25477
Tampa, Florida 33622

Mark Tipton, Esquire
Daniel L. Hightower, P.A.
Attorneys for Employee
7 East Silver Springs Boulevard Suite 300
Ocala, Florida 34470

W. Rogers Turner, Jr., Esquire
Hurley, Rogner, Miller, Cox, Waranch & Westcott, P.A.
Attorneys for Employer/Carrier
1560 Orange Avenue, Suite 500
Winter Park, Florida 32789