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

Denise Floyd, Employee/Claimant, vs. Gulf Coast Enterprises d/b/a Lakeview Center., Inc./U.S. Fire Insurance Company, Employer/ Carrier/Servicing Agent. _____	))))))))))	OJCC Case No. 09-009602NSW Accident date: 10/20/2008

COMPENSATION ORDER

THIS CAUSE came on to be heard in Pensacola, Escambia County, Florida on 10-12-09 upon Claimant's claim for temporary partial disability (TPD) benefits from 11-26-08 and continuing, penalties, interest, costs and attorney's fees. Petitions for Benefits were filed 04-14-09 and 06-30-09. Mediation was conducted 07-07-09, eighty-four (84) days after the initial petition was filed. The parties' pretrial compliance questionnaire was filed 07-29-09. The final hearing occurred one hundred eighty-one (181) days after the initial petition was filed and this Order was entered four (4) days thereafter. Michael Valen, Esq. was present in Pensacola on behalf of the Claimant. Julie Bixler, Esq. was present in Pensacola on behalf of the Employer/Carrier (hereafter "E/C").

Submitted into evidence at the Final Hearing were the following documents, each accepted, identified and placed into evidence without objection except where noted, as Judge's Exhibits, Joint Exhibits, Claimant's Exhibits, or E/C Exhibits, as follows:

JUDGE'S EXHIBITS MARKED FOR THE RECORD:

#1. The parties' Pre-Trial Stipulation filed 07-29-09.
#2. E/C Supplemental Witness List filed 09-11-09.
#3. Petition for Benefits filed 04-14-09.
#3. Petition for Benefits filed 06-30-09.

JOINT EXHIBITS:

#1. Deposition of Dr. William Marshall taken 09-24-09.
#2. Deposition of Dr. Ramon Ryan taken 09-10-09.

CLAIMANT'S EXHIBITS:

#1. Letter dated 03-03-09 from Employer To Whom It May Concern.

#2. Florida Dept. of Education undated letter to Injured Worker.

E/C's EXHIBITS:

#1. Wage Statement dated 11-13-08 and Payroll Records regarding Claimant.

#2. Deposition of Denise Floyd taken 06-24-09.

In making the determinations set forth below, I have attempted to distill the salient facts together with the findings and conclusions necessary to resolve this claim. I have not attempted to painstakingly summarize the substance of the parties' arguments, nor the support given to my conclusions by the various documents submitted and accepted into evidence; nor have I attempted to state nonessential facts. Because I have not done so does not mean that I have failed to consider all of the evidence. In making my findings of fact and conclusions of law in this claim, I have carefully considered and weighed all evidence submitted to me. I have considered arguments of counsel for the respective parties, and analyzed statutory and decisional law of Florida.

Based upon the parties' stipulations and the evidence and testimony presented, I find:

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

2. The parties' stipulations and agreements, set forth in the pretrial compliance questionnaire are accepted, adopted and made an order of the Office of the Judge of Compensation Claims. The parties stipulated at the outset of the hearing that the sole issues remaining for adjudication at this time are TPD, penalties, interest, costs and attorney fees.

3. Any and all issues raised by way of the Petitions for Benefits ("PFB"), but which issues were not dismissed or tried at the hearing, are presumed resolved, or in the alternative, deemed abandoned by the Claimant and, therefore, are Denied and Dismissed with prejudice. See, Scotty's Hardware v. Northcutt, 883 So.2d 859 (Fla. 1st DCA 2004).

4. Claimant is 45 years of age, right hand dominate and has an eighth grade education. She testified she has difficulty reading, but has worked in the past as a housekeeper, cashier, prep cook and cook. At the time of her 10-20-08 industrial accident she was working as a cook for the Employer at the Naval Air Station. She began working for the employer approximately five (5) years prior in either 2003 or 2004. On 10-20-08, she tripped and fell injuring her left knee, hip and shoulder. She obtained medical care following such injury at Sacred Heart and then with the workers'

compensation doctor, Dr. Ryan. She returned to work with the Employer lite duty on 10-23-08 performing various tasks including filling condiment bottles and napkin holders, placing cookies on saucers and serving food on the service line. Claimant testified at final hearing she could do these jobs but they caused her pain and discomfort and she reported such to Dr. Ryan who would change her work restrictions. On 11-26-08, Claimant was assigned the task of rinsing dishes prior to the same being placed in the washer by other personnel. Within the first hour, Claimant testified she advised her manager, Dennis Pendergrass, the repetitious lifting of dishes caused pain in her left shoulder. Mr. Pendergrass told her he had no other work for her and she was to go home. She called Don Camacho who was in charge of workers' compensation for the employer and told him what had occurred. Mr. Camacho placed her on Family Medical Leave and advised her being on FMLA would keep her job open for ninety (90) days. On 03-03-09 Claimant testified to receiving a letter from the Employer advising she would be terminated if she could not return to work. She went to the Employer's office and was advised there was no work unless she could return full duty.

5. Claimant testified she has not worked since 11-26-08 nor has she looked for work since such date. She did apply for unemployment but was denied. Her appeal was also unsuccessful. In April 2009 she contacted the Florida Department of Education as she understood they may be able to help her with re-employment. She attended orientation, was assigned a case manager, has done what she has been told to do, and understands they are trying to put her back to work. She testified if they find anything for her, she will return to work.

6. Dennis Pendergrass was Claimant's supervisor. He testified she returned to work after her accident and was always assigned duties within her restrictions. This included filling condiment bottles; shining brass though she complained the smell made her sick; cutting cakes; filing recipe cards; and making sandwiches though she complained the 70 degree room made her hip hurt. Mr. Pendergrass testified Claimant was ultimately assigned the task of rinsing dishes on a conveyor and placing them with her right hand on a table for someone else to load into the dishwasher. According to Mr. Pendergrass, Claimant worked at this task for approximately five (5) minutes before complaining to him the smell was making her sick and was effecting her allergies. According to Mr. Pendergrass, Mr. Camacho made the decision to send Claimant home at this time.

7. Donald Camacho is Director of Workers' Compensation and is also Safety Manager for the Employer. Mr. Camacho testified the contract for the job site where Claimant worked required that 70% of all employees have a disability; that the Employer' very existence and purpose is to return disabled individuals to the workforce; and as a result there was no reason for the Employer not to accommodate Claimant's restrictions. However, no matter the task assigned Claimant, she complained to her doctor the same caused her pain and discomfort and additional restrictions would be placed on her. Each time the doctor changed her restrictions, the Employer would accommodate her with new tasks. Despite such efforts, she was sent home 11-16-08 not because there was no work, but according to Mr. Camacho, for whatever reason she could not function in the workplace. She was placed on FMLA initially and later terminated.

8. Dr Ramon Ryan is board certified in industrial medicine. He initially saw Claimant the day after her industrial accident. Pertinent portions of his office notes indicate the following:

10-21-08 – Claimant seen complaining of left knee pain and abrasion and left hip pain. She is released to return to work with no pushing, pulling or lifting over 10 pounds; limited walking and standing. Was to return 10-28-08.

10-21-08 – Claimant returns early (that afternoon) stating she also felt discomfort in her left shoulder and neck and requested a sling. Restrictions were increased to include no lifting or pulling with outstretched arms; no work over shoulder height; no kneeling, squatting, crawling or climbing; seated work; no repetitive grasping with left arm; activity limited secondary to sling. She was to return 10-28-08.

10-27-08 – Claimant returns complaining of left knee pain and discomfort in left upper arm. Restrictions continued and she was to return in one week.

10-28-08 – Claimant returns the following day stating she went to work and "was having to fill up saltshakers, etc., and stand quite a bit more, which was causing her pain in the left hip and knee." Restrictions changed to require more seated work with limited standing or walking. She was to return in one week

10-29-08 – Claimant returns the following day. "It should be noted that she has... been back in the last three days basically complaining of activities at work that she thinks makes her hip worse... She indicates at work she is doing mainly sitting but she has to stand, walk to a table, sit, change out salt and pepper shakers, stand again, and walk to the next table. She feels this is aggravating especially her hip. I did ask her what seemed to cause her the greatest amount of pain. It seems that the standing up and sitting down is the most problematic and this is followed by prolonged sitting. We had extensive discussions and had difficulty communicating exactly what was bothering her. Her story did seem to change several times during the discussion. Initially neither standing nor lying down nor sitting made any significant increase in her symptoms... Then when I asked her if the primary problem was sitting and standing she initially indicated yes... By the end of the discussion, I believe her primary problem is that of repeated sitting and standing and prolonged standing or walking." Her restrictions were changed to limited walking and standing, primarily sitting duties; should not be required to stand more than every 30 minutes and not to be on her feet for longer than 5 minutes during that period of time. Return in one week.

11-03-08 – Claimant returns early stating her left knee seems to be worse and her right knee has begun to ache. MRI of the left knee and hip ordered and she is to return after the MRI or p.r.n. Restrictions unchanged.

11-06-08 – Claimant returns not having had her MRI's yet and complaining she has "to place some saucers on some aluminum trays. She indicates she places 12 fairly small saucers on a tray and then has to put two cookies into each of the saucers and then she puts these trays on a shelf. She indicates after she does this for a while that her shoulders and neck begin to hurt... It is quite evident that she is having trouble at work. It sounds like work is getting frustrated as well trying to come up with jobs for her. Each time they do, this seems to cause her pain and she indicates she is unable to do any of the jobs they have given her." Additional restriction of no lifting with arms outstretched added. Claimant to return p.r.n.

11-12-08 – "She says she has gone back to work. They have asked her to work in a cold room. When she works in his (sic) cold room, her knees begin to ache. She also indicates they sometimes have her working on a stool where she has to get up on the stool and her feet hang down to a bar for support, but this creates more discomfort for her. She does continue with dialog throughout the entire evaluation of being upset with her employer. It does appear the employer continues to try to do different activities for her at work to fall within the restrictions, but every time these are changed, it seems to cause another symptom or worsening of her previous symptoms. She feels the company just is not working with her... PLAN... suggest we could use a knee sleeve for her knee, especially if she is going to be in a cold room to help keep the knee warm. She immediately indicated then that also her low back and shoulder would begin to hurt if she was in a cold room, which she had not mentioned earlier. With this being the case, we will write her a restriction for her being in a cold room. We have also written restrictions for her not to be in a stool or seat where her legs would dangle or have to hang down." Return p.r.n.

11-26-08 – Claimant "comes in stating she is still having a lot of problems with her employer. Again, they asked her to wash some dishes which increased the pain in her left shoulder as she had to do repetitive motion with the shoulder, also reaching for baked goods and putting them on a tray repetitively seemed to increase the pain in her left shoulder." Restrictions placed on avoiding repetitive motion of the shoulders, especially reaching or pulling.

12-11-08 – Claimant seen complaining of left knee pain and requests the knee sleeve for pressure and warmth discussed previously. Can return to work with no outstretched arms; alternate sitting and standing; avoid standing longer than 10 minutes at a time; avoid cold environments; avoid repetitive motions, especially reaching and pulling with upper extremities; primarily seated work. She is referred to an orthopedist for her hip and knee and is to return p.r.n.

12-29-08 – Claimant seen with complaints of pain in the left knee, hip, thigh, shoulder, low back and neck. She is referred to pain management for her back and neck, an orthopedic referral previously made for other conditions.

9. Dr. William Marshall is an orthopedic surgeon who saw Claimant 03-02-09 with complaints of left knee, hip and shoulder pain as well as low back pain. Review of previous MRI reports indicated Claimant had bilateral knee chondromalacia; a torn meniscus of the left knee; cervical degenerative changes with narrowing at C3-4 and C4-5 which may contribute to her left shoulder complaints; degenerative changes of the lumbar spine; and a left hip contusion with a partial tear of the piriformis. Believing causation was certainly debatable, he recommended a total body scan. He also advised that Claimant needed a physician closer to her home than he and recommended she see both a physiatrist and orthopedic surgeon. It was his opinion she was capable of sedentary work at the time of his visit, she was advised of this and indicated she understood.

10. Ch. 440.02(11), F.S. defines disability as the "incapacity because of the injury to earn in the same or any other employment the wages which the employee was receiving at the time of the injury." Consequently, an employee must prove a causal connection between a work-related injury and a resulting wage loss to recover TPD benefits. See e.g. Betancourt v. Sears Roebuck & Co., 693 So.2d 680 (Fla. 1st DCA 1997). Vencor Hospital v. Ahles, 727 So.2d 968 (Fla. 1st DCA 1998). The burden to show causation "may be met by proof which encompasses medical evidence or evidence of a good-faith work search." Arnold v. Florida's Blood Centers, Inc., 949 So.2d 242 (Fla. 1st DCA 2007). "[A] good faith job search may serve as important proof that the employee is unable thereafter to find suitable employment on account of the disability. Coupled with medical restrictions, a good faith job search is not infrequently more than adequate proof of eligibility for temporary disability benefits." Id. When an injured employee has returned to work but is subsequently laid off, fired or resigns, proving the necessary causal connection may be difficult as the post-injury earnings "are the strongest evidence of non-impairment of wage earning capacity. Such earnings are, however, only one of several factors to be considered in determining whether a claimant has suffered a diminution of his wage earning capacity." Miami v. Garrido, 402 So.2d 564, 565 (Fla. 1st DCA 1981) citing Walker v. Electronic Products & Engineering Co., 248 So.2d 161 (Fla. 1971) (superseded on other grounds by statutory amendment). "To determine whether an injury and a subsequent wage loss are causally connected, a JCC is to consider the totality of the circumstances." Interim Servs. v. Levy, 843 So.2d 915, 916 (Fla. 1st DCA 2003) and Arnold. "[O]nce a claimant has satisfied the initial burden of demonstrating a causal connection between the compensable injury and the subsequent loss of income, the burden shifts to the E/C to prove the claimant refused to work or voluntarily limited... (his)... income". Delchamps v. Page, 659 So.2d 341 (Fla. 1st DCA 1995). The employer must show that at least one job opening existed within claimant's physical limitations. Id.

11. In the instant matter, Claimant seeks TPD benefits from 11-26-08 and continuing. To be entitled to such benefits, Claimant must present competent substantial evidence establishing (1) she is under work restrictions; (2) there is a causal connection between her work related injury and the alleged resulting wage loss; and (3) that the resulting wage loss resulted in post-accident earnings which are less than 80% of the AWW. See, Vencor Hospital v. Ahles, 727 So.2d 968 (Fla. 1st DCA 1998); City of Clermont v. Rumph, 450 So.2d 573 (Fl. 1st DCA 1984);

12. As to Claimant's first burden, she is not yet at MMI and Dr. Ryan and Dr. Marshall have assigned work

restrictions. Claimant has thus satisfied this burden.

13. As to her second burden, Claimant must prove a causal connection between her compensable injuries and her alleged wage loss. In other words, Claimant must prove that her injuries and the resulting disability, restrictions or limitations are an element in a causal chain resulting in or contributing to the wage loss. Vencor Hospital, 727 So.2d at 970; STC/Documation v. Burns, 521 So.2d 197, 198 (Fla. 1st DCA 1988); and Rumph, 450 So.2d at 576. Claimant is not required to prove that the injury and resulting disability, restriction or limitation are the sole cause of the wage loss. However, the evidence must prove that her loss of earnings is because of her restrictions and limitations and not due to some other unrelated cause. While a work search to demonstrate that a loss of earnings is related to the injury has not been required since the 1994 amendments to the Act, it remains one method a claimant may utilize to demonstrate the work injury is an element in the causal chain resulting in or contributing to the wage loss. Vocational testimony is another method a claimant may utilize to demonstrate the work injury is an element in the causal chain resulting in or contributing to the wage loss. Additionally, evidence a claimant worked less hours because of her injuries or that the employer could not accommodate her limitations may suffice.

14. Claimant admits she has performed no work search since 11-26-08 which she may offer as proof of the necessary causal connection. While vocational testimony could have been offered to demonstrate the work injury is an element in the causal chain, no such evidence was presented. Claimant did testify she has contacted the Department of Education, attended orientation, was assigned a case manager, has done what she has been told to do, and understands they are trying to put her back to work which she will do if they find anything for her. No evidence was presented however, to establish just what it is that the Department of Education is doing for Claimant or what it was that they have told her to do that she has done. Even if the Department of Education is somehow assisting Claimant in locating employment and answering her questions and concerns regarding reemployment services available to her, it is clear from Claimant's own testimony she is taking no action on her own to obtain employment. Instead, as she testified, she understands *they* are trying to put her back to work which she will do if *they* find anything for her. Waiting for the Department of Education to call is not proof of a causal connection between her injury and her alleged wage loss.

15. Nor did Claimant present evidence she worked less hours because of her injuries. Nor do I find the Employer could not accommodate her restrictions as assigned by Dr. Ryan. In fact, the evidence presented is to the contrary. The quoted entries from Dr. Ryan's records of 10-28-08; 10-29-08; 11-06-08; 11-12-08 and 11-26-08 clearly indicate no matter what task Claimant was assigned she complained to the Employer and the doctor the same adversely affected her condition and no matter what accommodation the Employer would attempt, the same was always insufficient. I find this particularly true with the last task assigned Claimant, rinsing dishes. Claimant was to rinse particles off dishes which arrived at her seated location via conveyor. Using her right hand, she was to hold the dish and run it through a fountain of water and then set it down for another employee to handle. Claimant testified she was unable within the first hour of doing this to continue as it required her to rotate her left shoulder. Even if all of

the food particles did not always rinse off, as Claimant testified, and she had to wipe the dish with her left hand, wiping a dish with the left hand may require rotation of the wrist. It would not require rotation of the left shoulder as she testified and as she reported to Dr. Ryan. While this exemplifies what I find to be Claimant's efforts (exaggerations) to avoid cooperating with the Employer in an effort to return to work, I accept Mr. Pendergrass' testimony that Claimant reported to him she could not continue rinsing dishes due to the smell and her allergies. In any event, even if it were true the Employer was unable to accommodate Claimant's restrictions, which one could certainly argue as she was eventually sent home on 11-26-08, I find such inability to accommodate not sufficient to establish the necessary causal connection to entitle Claimant to TPD benefits. In some cases, an employer's inability to accommodate work restrictions may suffice to establish the necessary causal connection while in other cases it may not. There are employers, particularly those dealing with heavy labor, who may be unable to accommodate lite duty work restrictions. It is not enough for an injured worker of such an employer to simply prove an injury and un-accommodated restrictions to establish entitlement to TPD benefits. Such argument ignores the very language of the statute which requires proof of "incapacity because of the injury to earn *in the same or any other employment* the wages which the employee was receiving at the time of the injury" (emphasis added).

16. Claimant contends as she was injured, was assigned work restrictions, returned to work within those restrictions initially, and as the employer was unable to continue to accommodate her restrictions, she has presented a prima facie case of entitlement to TPD benefits. Were there no other evidence to consider, Claimant's direct testimony may have been sufficient to establish a prima facie case. Prima facie simply means something so obvious or evident without proof or reasoning as to be legally sufficient to establish a fact unless disproved. The evidence presented in this matter consisted not only of Claimant's direct testimony, but her cross examination, the testimony of other witnesses and medical records, the totality of which I find disproves Claimant's alleged loss of earning capacity was the result of her injury. As a result, Claimant has failed to satisfy her burden of establishing a causal connection between her injury and alleged wage loss from 11-26-08 to the date of the final hearing.

It is therefore,

ORDERED AND ADJUDGED that:

1. Claimant's claim for a temporary partial disability (TPD) benefits from 11-16-08 to the date of the Final Hearing is **DENIED**. As to such claims the E/C shall go hence without day.

DONE AND ELECTRONICALLY MAILED this 16th day of October, 2009, in Pensacola, Escambia County, Florida.

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