

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

Cassandra Watson,	)	
Employee/Claimant,	)	
	)	
vs.	)	
	)	OJCC Case No. 07-028441NSW
Gulf Coast Enterprises, d/b/a Lakeview Center,	)	
Inc./United States Fire Insurance Company,	)	Accident date: 8/12/2007
Employer/ Carrier/ Servicing Agent.	)	
_____	)	

**FINAL COMPENSATION ORDER**

**THIS CAUSE** came on to be heard in Pensacola, Escambia County, Florida on 03-08-10 upon Claimant's claim for permanent total disability (PTD) benefits from 08-13-09 and continuing; supplemental permanent total disability (SPTD) benefits from 08-13-09 and continuing; penalties, interest, costs and attorney's fees. The Petition for Benefits was filed 08-26-09. Mediation was conducted 10-21-09, fifty-six (56) days after the Petition was filed. The parties' pretrial compliance questionnaire was filed 01-07-10. The Final Hearing occurred one hundred ninety-four (194) days after the Petition was filed and this Order was entered three (3) 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 01-07-10.
- #2. Claimant's Supplemental Pre-Trial Stipulations filed 02-08-10 (adding claim for temporary permanent total disability (TPTD) benefits from 08-13-09 and continuing - Withdrawn by Claimant at outset of Final Hearing).
- #3. E/C Supplemental Pre-Trial Stipulation filed 02-02-10.
- #4. Petition for Benefits filed 08-26-09.

**JOINT EXHIBITS:**

- #1. Deposition of Dr. Stewart Zweikoft taken 11-20-09.
- #2. Deposition of Dr. Stewart Zweikoft taken 02-26-10.

- #3. Deposition of Dr. Charles Wolff taken 10-22-09.
- #4. Deposition of Dr. Charles Wolff taken 01-28-10.

**CLAIMANT'S EXHIBITS:**

- #1. Independent Vocational Assessment of Leslie Gillespie dated 03-02-10.

**E/C's EXHIBITS:**

- #1. E/C Pay ledger dated 11-05-09.
- #2. 13 Week Wage Statement dated 08-28-07.

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. At the outset of the Final Hearing the parties stipulated Claimant attained statutory MMI 08-12-09; that Claimant has not attained medical MMI; and Claimant's average weekly wage (AWW) is \$203.62.
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. 1<sup>st</sup> DCA 2004).
4. Claimant was involved in a compensable industrial accident on 08-12-07 injuring her low back while taking

out trash while employed by the Employer performing custodial duties at Pensacola Airport. Claimant testified she has not worked since the date of the accident and has never been advised by anyone she has been released to work since her accident and has not looked for work. She underwent two (2) surgeries, the first on 10-01-08 and the second on 01-27-10.

5. Claimant testified she is 44 years of age, has a seventh grade education, can read and write and can handle money. She has previously worked in the fast food industry, eight (8) years for Hardees and a little over one (1) year for Burger King. She currently receives no monies from the E/C, but has received SSI benefits since the early 2000's due to a pre-existing mental condition unrelated to the industrial accident. She was hired by the Employer under a disability program as a result of her pre-existing mental condition.

6. Don Camacho is Risk Manager for the Employer. He testified the Employer has various contracts mandating the Employer hire otherwise unemployable individuals who suffer disabilities such as mental conditions, loss of hearing, sight or mobility. Claimant was hired pursuant to such contract to work part-time twenty-eight (28) hours per week as a custodian at the airport. He testified the Employer would be willing to accommodate whatever restrictions may ultimately be placed on Claimant as accommodating such restrictions is the very purpose of the Employer.

7. Dr. Charles Wolff is a board certified neurosurgeon who first saw Claimant 09-27-07 complaining of low back and bilateral leg pain as the result of an industrial accident of 08-12-07. An MRI revealed a disk injury at L5-S1 with modic changes surrounding the end plates. In was Dr. Wolff's opinion at that time that surgery would improve Claimant's condition. On 10-01-08 surgery was performed, a fusion at L4-5 and L5-S1. Claimant did not report improvement in her condition following surgery. Claimant underwent pain management with Dr. Zweikoft. As stated in Dr. Wolff's office note of 03-16-09, a CT scan revealed the surgical bone graft had failed. Claimant reported however that her condition was not bad enough to warrant additional surgery so Dr. Wolff ordered an FCE to determine her physical capabilities. Claimant returned on 05-04-09 following the FCE and advised the doctor she now did wish to proceed with a second surgery. Dr. Wolff performed such revision, an L5-S1 anterior lumbar inter-body fusion, on 01-27-10. Dr. Wolff testified the day following such surgery that he thinks there is a very good chance of significant improvement in her pain and unless there are complications from surgery, Claimant's 6% impairment following her first surgery will not change. He anticipates Claimant will not be released to return to work for three (3) to six (6) months post surgery and testified he has never released Claimant to return to work during the course of his treatment. He was clear Claimant is not currently at medical MMI and once she is an FCE will be ordered to determine her physical capabilities and limitations.

8. Dr. Stewart Zweikoft is board certified in pain management and first saw Claimant on 01-15-09 following Dr. Wolff's surgery of 10-01-08. Initial examination revealed Claimant walked with an antalgic gait and had a restricted range of motion. She was diagnosed with lumbar facet syndrome, lumbar degenerative disc disease and lumbar radiculopathy, was prescribed pain medications and lumbar neuro-foraminal injections at L4-5. Injections were

performed 02-19-09. On 03-25-09 she reported Dr. Wolff had advised her there was a defect requiring additional surgery. She did not return to Dr. Zweikoft until 10-07-09 and additional injections were performed 10-13-09, 10-27-09 and 11-12-09. While some of these injections provided significant relief and others were less effective, all benefits were only temporary. At his last visit with Claimant on 11-25-09 Dr. Zweikoft was of the opinion she had attained MMI from a pain management perspective and while she had a permanent impairment, he deferred to Dr. Wolff as to assignment of such, particularly in light of her having undergone a second surgery on 01-27-10. According to Dr. Zweikoft, Claimant was on a no work status during the entirety of his treatment.

### **PERMANENT TOTAL DISABILITY**

9. Claimant contends she is not required to prove she has a total disability which is permanent but simply that she has sustained a permanent impairment that is totally disabling. The First DCA disagrees. In *City of Pensacola Firefighters v. Oswald*, 710 So.2d 95, (Fla. 1<sup>st</sup> DCA 1998) citing Ch. 440.15(1)(a), F.S., the DCA specifically stated “the Workers’ Compensation Law authorizes permanent total disability benefits ‘only in case of total disability adjudged to be permanent.’ ”

10. Considering Claimant’s PTD claim from a different perspective she contends she is entitled to be adjudicated PTD on the same basis as was Mr. Piercy in *Emanuel v. David Piercy Plumbing*, 765 So.2d 761 (Fla. 1<sup>st</sup> DCA 2000). Claimant is not claiming entitlement to temporary PTD and in fact withdrew such claim at the outset of the final hearing. Rather, she claims as she has been totally disabled since she reached statutory MMI on 08-12-09 with a 6% permanent impairment and is entitled to PTD benefits until such time as she recovers from her second surgery and is released by Dr. Wolff as medically MMI and capable of returning to work.

11. The facts of Piercy and the instant case are similar. Both claimant’s underwent surgery; both attained MMI - Mr. Piercy a medical MMI with a 14% rating and Claimant here statutory MMI with a 6% rating; following such MMI both were totally disabled - Mr. Piercy as determined by the JCC from undisclosed facts and Claimant as no physician has ever released her to return to work; the condition of both deteriorated requiring additional surgery; followed by a period of recovery; and thereafter a doctor’s determination whether either can return to work.

12. The distinction between Mr. Piercy and Claimant is Mr. Piercy’s 07-11-97 MMI was a medical MMI by a physician as the date upon which his condition had improved as much as was reasonably expected under then available and recommended remedial treatment at that time. Claimant’s 08-12-09 MMI was statutory, not medical and Dr. Wolff’s records clearly indicated that prior thereto on 05-04-09 he had recommended and Claimant had agreed to proceed with a second surgery to replace the defective bone graft and hopefully improve her condition.

13. Dr. Wolff testified: (1) he has every reason to expect the second surgery performed 01-27-10 will result in substantial improvement in Claimant’s condition; (2) he will be unable to determine if she can return to work for three

(3) to six (6) months following such surgery; (3) Claimant is not currently at medical MMI; and (4) once she attains medical MMI, she will be referred for a Functional Capacity Evaluation (FCE) to address her physical capabilities and limitations. If Dr. Wolff were of the opinion Claimant will be totally disabled following recovery from her second surgery, he would have no reason to state he will be ordering an FCE to determine her physical capabilities. While he also testified her impairment rating will remain at 6% unless increased due to complications, Claimant has failed to prove upon attaining medical MMI from her second surgery that she will remain totally disabled.

14. Maximum medical improvement is the date after which further recovery from, or lasting improvement to, an injury can no longer reasonably be anticipated, based upon reasonable medical probability. See, Ch. 440.02(10), F.S. As stated in *City of Pensacola Firefighters v. Oswald*, 710 So.2d 95, 98(Fla. 1st DCA 1998):

“to be eligible for permanent total disability benefits, an employee whose temporary benefits have run out—or are expected to do so imminently – must be able to show not only total disability upon the cessation of temporary benefits but also that total disability will be ‘existing after the date of maximum medical improvement.’”

15. As was the case in *Oswald*, Claimant here has failed to present evidence based upon medical probability that she will be totally disabled after recovery from her recent surgery. As the Court stated in *Rivendell of Ft. Walton v. Petway*, 833 So.2d 292, 296 (Fla. 1<sup>st</sup> DCA 2002):

“In *Emanuel v. David Piercy Plumbing*, 765 So.2d 761 (Fla. 1st DCA 2000), this court stated that a claimant can be considered at ‘statutory’ MMI and, thus, entitled to permanent benefits for continuing disability ‘once a claimant’s medical condition has improved as much as is reasonably expected under available and recommended remedial treatments.’ *Id.* at 762. This represents another means of establishing MMI, aside from the more obvious one where a qualified professional opines that a claimant has reached ‘medical’ MMI. Because Claimant has not yet submitted to the available, remedial authorized psychiatric treatment and care, a finding of entitlement to PTD is premature.”

16. While Claimant has submitted to recommended remedial treatment and has undergone a second surgery, whether she is now or will remain PTD after attaining MMI is premature. As also stated in *Petway*, 833 So.2d at 296, “any determination that Claimant is entitled to PTD benefits now—before the effects of... treatment and care are known—is premature.” It is therefore,

**ORDERED AND ADJUDGED** that:

1. Claimant’s claims for permanent total disability (PTD) benefits and supplemental

permanent total disability (SPTD) benefits from 08-13-09 and continuing are **DENIED**.

**DONE AND ELECTRONICALLY MAILED** this 11th day of March, 2010, in Pensacola, Escambia County, Florida.



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Nolan S. Wimm  
Judge of Compensation Claims  
Division of Administrative Hearings  
Office of the Judges of Compensation Claims  
Pensacola District Office  
700 South Palafox Street, Suite 305  
Pensacola, Florida 32502  
(850)595-6310  
[www.jcc.state.fl.us](http://www.jcc.state.fl.us)

Thomas J. Ueberschaer, Esquire  
[info@ueberschaerlaw.com](mailto:info@ueberschaerlaw.com)

Julie C. Bixler, Esquire  
[jbixler@hrmcw.com](mailto:jbixler@hrmcw.com)  
[cwheeler@hrmcw.com](mailto:cwheeler@hrmcw.com)