

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F509574

TAMMY MORGAN, EMPLOYEE	CLAIMANT
CITY OF JONESBORO, SELF-INSURED EMPLOYER	RESPONDENT #1
MUNICIPAL LEAGUE WC TRUST, TPA	RESPONDENT #1
DEATH & PERMANENT DISABILITY TRUST FUND	RESPONDENT #2

OPINION FILED JANUARY 11, 2008

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on October 19, 2007, at Jonesboro, Craighead County, Arkansas.

Claimant represented by the HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondent #1 represented by the HONORABLE J. CHRIS BRADLEY, Attorney at Law, North Little Rock, Arkansas.

Respondent #2 represented by the HONORABLE JUDY W. RUDD, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above-style claim to determine the claimant's entitlement to additional workers' compensation benefits. On July 31, 2007, a pre-hearing conference was conducted in the claim, from which a Pre-hearing Order of the same date was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' contentions relative same. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1. Respondent #1 stipulated that the

claimant has been accepted for disability benefits by Police and Fire Retirement which presumes that she is not able to do police work.

The testimony of Tammy Morgan- the claimant, Thomas Morgan, and Suzanne Hackney, coupled with medical reports and other documents comprise the record in this claim.

DISCUSSION

Tammy Morgan, the claimant, with a date of birth of June 21, 1963, is a 1981 graduate of Terrell High School. Claimant also attended community college for a period while residing in West Virginia 1996. Between the time she graduate high school in 1981 and she attended community college in 1996, claimant's attended a six-week training program through her employment with Blue Cross and Blue Shield in Memphis, Tennessee, where she was employed for seven to eight years. Claimant also worked as a bartender for several years while employed at Blue Cross and Blue Shield.

The testimony of the claimant reflects that at one time she worked in restaurant of her former in-laws. Regarding the afore, the testimony of the claimant reflects:

They owned a little barbeque restaurant and they cooked barbeque and hamburgers and the sort, and I would actually fix the meal, wait on the people, take the money and then when my mother-in-law took ill, I actually took over the restaurant and was working it myself. (T. 31).

It was during the claimant's second marriage that she moved to West Virginia where she began attending community college. Claimant took courses in criminal justice, explaining:

At that point in time when I first started going I was taking criminal justice, and after the first semester I realized that the way that their programs worked - - because I had always wanted to be a police officer. That was like my total dream, and the way their police system worked up there I knew that that wouldn't do me basically

any good, so I changed to something where I could get a job. I went to the medical field as a medical laboratory tech. (T. 31-32).

Claimant did not complete the laboratory tech program. After her education was interrupted, due to family problems, when the claimant returned to the community college she decided to pursue a program that would not take as long to get a job, as such she went into surgical tech program, which was only a certificate program. Claimant divorced and moved back to Arkansas before getting a certificate in the surgical tech program. Claimant again worked as bartender to earn money to move back to Arkansas from West Virginia.

Claimant returned to Arkansas in 2000, at which time she signed up for college in West Memphis. Claimant was also working at FedEx at the time. In describing the physical/manual labor demands of her job duties at FedEx claimant testified:

Right. I worked in heavy weight and my job there was to - - as the packages come in on the forklifts then I was supposed to mark them so that the other forklift drivers could take them and sort them. Well, it was only a part-time job and I wasn't getting a lot of hours, so they offered other positions, so I would go in in the daytime and work unloading airplanes, and we would actually push the big crates with all the packages - - they were on rollers, but we would push them and slide them out of the plane. They would go on the car dolly and then I picked up another job later that was only - - each job was only like two or three hours, and I picked up another one where we would actually pop the strings off of it and unload the carts. (T. 34).

Claimant later secured employment as a police officer for the city of Hughes. Claimant explained that her work as a police officer for the city of Hughes was part-time. Claimant was employed as Hughes police officer when was hired by respondent #1.

Claimant commenced her employment with respondent #1 as a police officer on February 1, 2002. On December 29, 2003, claimant sustained the compensable injury which is the subject

of the present claim. In describing the mechanics of the injury, claimant testified:

Okay. I was a backup officer. There was a call about some children being left in a vehicle on Bridge Street. I went over there, we got the children out of the vehicle, called Social Services. When we finally got the people to come to the door, some men came to the door and all of a sudden everyone was hollering, "She's running out the back." So, since I was the backup officer, I got in my vehicle, I went north on Bridge Street, turned the corner on Allen and saw the lady trying to crawl the fence. I jump out of my unit, chase after her. I couldn't get her to come off the fence but she wasn't going over it, and I heard dogs barking. I didn't know one was on the other side, so I crawl up on the fence, get a hold of her, and the next thing I know I could feel myself falling. I had taken several trainings at Jonesboro. Jonesboro was very good with our training. I knew if I laid down, she was a lot larger than me that, you know, she had control of me. I sat straight up. When I did, she fell on my chest and I didn't realize how hard I had hit the ground at that time. I went ahead, the adrenalin running, we got everything taken care of. I got back and I had told my sergeant, I said, "My back is killing me," and he was like, "Well, finish out your report and stuff," and when I got home I realized I had hit so hard that my skin had - - it was just ground, but my skin had mud on it. It had went through my pants, my underwear and everything, and I got back to - - I called him back and I didn't go back, I called him. I said, "Well, my back is killing me, and I'm going to go have it looked at." And he was, "All right." So, I went to the emergency room, they were getting me ready to take x-rays and stuff, and when they did, there was an accident and the emergency room got really busy, and they were like, "No." They said, "Well, we're going to give you this shot.. You go straight home." Because they knew how far a distance it was to my house. They said, "You go straight home and go to bed." I was like, "Okay." They gave me - - and come back tomorrow for x-rays. So, they gave me the shot, I went home, I went back - - Tom was home the next day, went back the next day, got the CAT scan done and they said, "You pulled some muscles in your back.." (T. 35-37).

The claimant's emergency treatment was had at St. Bernards Regional Medical Center. Claimant ultimately came under the care of Dr. Kent, respondent's designated medical provider, who was also her primary care physician. Dr. Kent later referred the claimant to Dr. Scott Schlesinger, a Little Rock neurosurgeon.

While under the care of Dr. Schlesinger claimant underwent fusion surgery on her back on January 31, 2006. Prior to her surgery, claimant testified she received physical therapy and epidural steroid injection. Claimant received similar medical treatment subsequent to the surgery as well. On November 15, 2006, Dr. Schlesinger released the claimant with a 12% permanent physical impairment. Dr. Schlesinger also referred the claimant to a rheumatologist for ongoing problems. Prior to the rheumatologist referral claimant was referred by Dr. Schlesinger for a Functional Capacity Assessment.

With respect to the medications that she takes in connection with the December 29, 2003, injury, the testimony of the claimant reflects that in addition to Celebrex, Ultram, Tylenol and Nexium she uses Lidocaine patches. Claimant also takes Crestor for her cholesterol. Claimant takes other medicines for non-injury-related complaints:

My other medications include Singulair for my sinuses and also I take Celexa. When my son went to Iraq, they put me on Lexapro. I was very upset because of that. He's a Marine, and they put me on Lexapro. The Lexapro to me got to where it made me down, you know, like lifeless and so I got off of it and they put me on the Celexa. (T. 40).

In describing her physical symptoms attributable to residuals of her back injury, claimant testified that some days she experiences a very sharp constant pain on the right side of her spine. Claimant noted that sometimes when she sit down wrong she feels a sensation of "electrical shocks shoot straight up my back". (T. 41). Claimant's testimony reflects, regarding the frequency of the sharp pain:

This sharp pain comes quite a bit. This is when - - I mean, I'm supposed to wear these Lidoderm patches for 12 hours and take it off for 12 hours, and sometimes I have to have two of them, you know, and then put the heating pad on, which kind of feels like it makes the medicine go in a little faster, and maybe even deeper. You know, I don't

know how far the medicine is supposed to go in, and with the two of them, after I'll say an hour, hour and a half or so, I start feeling where I can move around a little bit, but once I take them off, you give it an hour - - or if I take a bath, you give it an hour, two hours, it's like once you wash the medicine off, it starts hurting again. (T. 41).

Claimant testified that if she is not experiencing a sharp pain, then it is a dull throb. Claimant noted that she is able to function when she gets her pain down to a dull throb. (T. 41-42).

Claimant testified that she also experiences pain in her right leg, which she attributes to the December 29, 2003, injury:

The right leg is really kind of strange. I don't understand it. It will have a shooting pain down the back of my thigh to my knee, and that - - I don't know why it does that, just every once in a while it will, and then sometimes it will shoot down the front of my calf all the way down to my toe. So it's, you know, I don't know, like I said, I don't know any specific time that that happens, but there's different times that it does.

Well, this has been like this for a long time. I told Dr. Schlesinger and I've told every doctor, my right ankle feels like it's not there.

I have a lot of numbness in my right ankle. I actually struck it with a nail - - excuse me, I walked past a board and it kind of scraped my ankle and I never felt it. (T. 42).

Claimant estimates that she has fallen at least 10 times since the December 29, 2003, accident as a result of a sensation of her whole right leg being numb. Claimant noted that she occasionally use a walker that was provide to her following her back surgery.

Regarding the side effects of any of her medication claimant testified that she does not drive while taking her medication. As a consequence of the afore she refrains from taking her prescription medication when driving. Claimant resides in Rector and will drive to Paragould. Claimant explained that she does not venture, driving-wise, beyond Paragould:

I wouldn't try any further. By the time I get to Paragould I've already taken four Tylenol. I have to walk around a little bit, sit, stretch, stand. I usually pick up my stepson at A.J.'s and we usually go in and have a snack or something, you know. That way I can move around before we head back. (T. 44).

Claimant testified that she experiences good and bad days. Out of a thirty (30) period claimant's testimony reflects that she experiences at least five (5) bad days. In describing a bad day claimant testified:

That would be a day that I can't get out of bed. I just - - you know, our bed is really high, so it's kind of iffy. If I roll over on my left side and kind of swing my legs over, I can either fall to my knees and push myself up, or I can straighten myself up pulling on the chest of drawers, and that's about how I get out of bed. There's some days that I go to roll over, and it hurts so bad that I'll just lay there. You know, I'll lay on one side, then I'll roll to the other, then I'll roll to my back and lay on the front, and I'll actually lay there for several hours before I even get up.

Well, with those days, if I can get in there and, you know, the patches, Tom kind of helps me with those, because I can't reach back thereto put my patches on, but I'll sit in the chair on the heating pad, and there's days that I haven't got out of my chair. You know, I have a big recliner, and there's just days that Tom and Chris have waited on me hand and foot because I can't get out of the chair, and if I have to get up to go to the restroom, then they have to help me. (T. 44-45).

The testimony of the claimant reflects that she is unable to predict when she will experience one of her bad days, and as such could not be a dependable employee if employment was secured.

In describing the number of good days that she experiences during a thirty (30) period claimant's testimony reflects:

Oh, usually like I said, a good day is when I get all the pain down to a dull throb. I can wake up maybe 10, 11, 12 days a month and feel like, okay, I feel pretty good. Everything seems like it's working. Roll out of bed, go take my medicines. Okay, I'm good, I'm good, a couple of hours went by and still not in deep pain, and then the first thing I do will

set off, and it's unpredictable to what I do. If it sit in the chair wrong, if I walk around the room wrong, if I - - I have a certain way that I can squat down which is very unusual. I have to have something to help myself squat down and pick stuff up with, and if I squat down and pick something up, then my day is over with and it starts hurting. (T. 46).

Claimant also described the difficulty she has sleeping as a result of the injury. (T. 47).

The testimony of the claimant reflects that the physical tasks of bending, lifting, stooping, pushing, pulling, being on her feet, pursuing suspects and the ability to get in and out of a vehicle rapidly were all required to perform her job as a police officer. Claimant concedes that she had some discussion with Ms. Hackney about some potential alternative employment with the City of Jonesboro, respondent #1. Claimant denies that she was offered an advertising position but rather maintains that she was shown the jobs that the city had available.

Of the list of jobs identified by respondent #1 claimant acknowledged her discussion with Ms. Hackney regarding same. Specifically, claimant noted that she did not have the minimum qualifications of two years experience in a related field of advertising with respect to the Advertising/Marketing Tech position. Claimant testified that she has no computer skills and that her residence in Rector is approximately 35 miles from Jonesboro. Claimant's testimony reflects regarding the Advertising/Marketing Tech position:

Well, to my understanding for that job was that whichever thing is computerized and I guess I'm behind, but that you had to go to other companies and talk them into paying for advertisement that goes on the buses. (T. 51).

Claimant asserts that she is not qualified to do the Advertising/Marketing Tech job.

Another job identified by respondent #1 was that of Transit Bus Cap, a bus driver position. Claimant testified that she has never been a bus driver nor does she have a CDL. The

testimony of the claimant reflects that she physically unable to assist the elderly and disabled persons in boarding and leaving the bus, as provided in the job description. Claimant added, regarding the Transit Bus Cap position:

And if you drove you'd have to sit a long time. You know, you couldn't get up when you wanted to, and that's why I felt like - - that was another reason I felt like I couldn't do that job. (T. 52).

The Animal Control Office position was identified by respondent #1. Claimant explained that she had dealt with Animal Control a lot, and in her opinion the Animal Control Officers performed the same duties as a police officer but with animals instead of humans. Claimant offered:

So, since they said I couldn't work as a police officer, then I felt there was no way I could work as an animal control officer. (T. 53).

The physical demands of the job, as reflected in the job description included standing, walking, bending, crouching, stooping and lifting heavy objects.

The street service position, which was identified by respondent #1, involved mowing and weedeating as well as some masonry duties, activities which claimant maintains she cannot physically perform. The job also included the physical demands of sitting, standing, walking, bending, crouching or stooping, and lifting of heavy objects. Claimant also noted that she is unable to operate a roller or front-end loader.

Claimant testified that it was her understanding that it was her understanding that the Grant Assistant position identified by respondent #1 was a temporary job of six (6) weeks duration which entailed helping to gather information. Additionally, the testimony of the claimant reflects that she does not have knowledge of federal regulations pertaining to grants, is

not proficient in the use of Microsoft Office, and does not have a Bachelor's Degree, all requirements of the job. Further the claimant testified that she is physically perform the job duties of either a part-time community center attendant, a seasonal park worker, or a lifeguard. (T. 55).

Claimant is presently enrolled in school with a goal of obtaining her Associates of Arts degree. Claimant explained that her plans are to get into the nursing field, however not the actual RN field but rather the business administration part of it. Regarding her capability to perform such a job with a degree, claimant testified:

Well, at this point I don't think - - I guess I'm dreaming big. I'm thinking that if I get on a list where they call people as they need them, then maybe they can catch me on a day that I feel good and I can work. (T. 56).

Claimant explained that with the degree she hoped to work one or two days a week.

During cross-examination, claimant acknowledged that she had supervisory experience as a result of running the family restaurant. Claimant also has past work experience working in the insurance field as a claims adjuster, having worked for several years for Blue Cross and Blue Shield as well as one of its competitors. Further, claimant acknowledged that her work at Blue Cross and Blue Shield did include use of a computer.

While claimant acknowledged meeting with Ms. Hackney and discussing the advertising tech job, regarding an offer of the job by respondent, claimant testified:

Okay. I had a total misunderstanding. I, myself, thought that when I was told about the job, when I was described - - when the jobs were described to me, that I would actually, if I was qualified, be placed in a job. I did not know that those were - - and that's why I answered the way I did. I did not know that she was actually just telling me which jobs the City had available that I could apply for and then they would,

you know, decide whether or not that they wanted me in that position. (T. 71-72).

In summary, claimant asserts that at the time of her meeting with Ms. Hackney she was under the impression that she was being offered the job, however she later learned that Ms. Hackney was just conveying the jobs available at respondent #1 for which she could apply. (T. 73-74).

Claimant denies telling Ms. Hackney that she wanted to work on her new house.

Thomas Vernon Morgan, Jr., the claimant's husband of six (6) years, works for the hospital in Paragould and is based at the ambulance base in Rector. Mr. Morgan has worked as a paramedic for ten years. Mr. Morgan testified that he had known the claimant for approximately one and one-half (1 ½) years before they were married. The testimony of Mr. Morgan reflects regarding his observations of the claimant prior to the December 29, 2003, compensable injury:

She was very active, very active in sports, played with the kids constantly. We were talking on the way down here that five years ago, I believe it was five years ago last weekend, we were mountain climbing in North Carolina. You know, we used to run every day, probably a mile and a half or so around where we live, every day that I was home anyway. She was constantly playing with the kids, you know, all the time playing ball outside with them, everything else, real active outside keeping the yard looking with the flower beds and all that stuff. (T. 11).

Mr. Morgan contrasted the claimant's activity level since the December 29, 2003, work-related injury:

It's significantly different. You know, there's - - like I mention that we used to mountain climb. Now it gets to the point that several times that I have to help her get out of the car. I have a pickup that sits up - - it's a regular pickup, it's not jacked up. She can't hardly get in and out of it at all. She can't - -

* * *

Yeah, sure did. She couldn't get up - - you know, I pull up to the

curb and she couldn't get up out of the car, I had to help her with that. She can't pick the kids up. She has a hard time bending over to do anything, laundry or dishwashing or anything like that. She has a hard time putting the dishes in the dishwasher. It's just a lot different than it used to be. (T. 12-13).

Mr. Morgan noted that the claimant is no longer able to work outside in the yard. At the time of the accident claimant resided in Jonesboro. It was at the Jonesboro address that the claimant performed the outside yard work on her flower gardening.

Mr. Morgan testified that he and the claimant have five children together and five grandchildren. The testimony of Mr. Morgan reflects regarding the impact of the claimant's injury on the interaction with the children:

. . . The children are nervous around her, the grandchildren are. You know, everybody is always telling them to be careful and not jump on her and stuff like that, so they're real cautious around her. Usually the way that she holds the small ones is she'll sit in a chair and I'll pick them up and put them in her lap. You know, anything bending over she has a hard time with. (T. 14).

Mr. Morgan noted that activities involving the claimant such as shopping are limited and modified due to the claimant's physical capability, observing the use of a shopping cart as a walker or a motorized cart by the claimant.

Regarding his observations of the claimant evidencing pain since the December 29, 2003, injury, the testimony of Mr. Morgan reflects:

She shakes. Sh grabs a hold of things. I mean, I usually - - whenever we walk anywhere, she hangs on to my arm and I can tell, you know, if she takes a misstep or something I can feel her tighten on my arm. I can hear her breathing. You know, she'll hold her breath for a second and she'll tense. You know, I mean, I know even times at night she'll get out of bed, and I've actually seen her crying in her sleep before. (T. 15).

Mr. Morgan testified that the claimant does get consistent sleep every night.

Mr. Morgan noted that prior to the December 29, 2003, accident the claimant worked more than one job several times. Mr. Morgan also offered that if the claimant was capable of working she would be doing so:

I see how upset she is that she's not able to anymore. You know, we've discussed it several times and I told her if I had the opportunity to be retired I would jump at it with both feet, but she's been very upset that she's not able to be a police officer especially anymore. (T. 16).

Mr. Morgan testified that the move from Jonesboro to Rector was prompted by a cheaper cost of living and the fact that he worked in Rector and was driving 35 miles one-way when he lived in Jonesboro versus a half mile or less from home to work now. Mr. Morgan also noted that housing is much cheaper in Rector. The claimant and her husband are in the process of purchasing their Rector residence, which is an older frame house situated on two city lots and needs some work.

In terms of fix-up projects on the house, Mr. Morgan testified that he did a little painting on the porch during the summer. The testimony of Mr. Morgan further reflects:

Well, we have started putting a chain link fence around the back. I built a shed in the backyard, replaced a few boards on the porch already. It's kind of a big porch. It cost me more than I intended for it to. I did it a little bit at a time.

She's [claimant] been out there with me a lot. She does very limited things to help me, like on the chain link fence - - I mean, I go out and dig the post holes, set the post in, mix the concrete, get the post level and she'll hold it level for me while I pour the concrete around it. (T. 18).

Mr. Morgan testified that the claimant's driving vehicle is limited to the family car, and distance-wise, no further than between Rector and Paragould, 20 miles. Regarding the impact of

the 20-mile trip/drive on the claimant, the testimony of Mr. Morgan reflects:

She get a lot of pain in her back. She has a lot of numbness in her legs if she sits for a long period of time. It makes her nervous how pressure she's applying to the pedals. I don't know that anyone has actually limited her, you know, as to driving 20 miles, but that's all she feels comfortable with.

No. We've taken a couple of trips with her riding in the car, and usually, you know, 30 or 40 miles we have to stop and let her get out for a while.

Walk around some, you know, just trying to stretch and get everything back in place. A lot of times she'll get in the backseat and lay down for a little while and then the next time we stop she'll get back up front. (T. 22).

With respect to the claimant's morning medication routine, the testimony of Mr. Morgan reflects:

She has a few medical problems, high cholesterol and stuff like that, takes those medicines. Usually she has a Lidocaine or Lidodern patch that have Lidocaine in them. I usually help her with those to put one or two on her injury. She does have some pain medications that she takes if she needs them.

I don't know if she takes them every day. I know she takes them pretty frequently. (T. 24).

Mr. Morgan also testified regarding episodes of breakout pain by the claimant:

Actually I've taken her to the emergency room a couple of times, giving her - - well, basically all they did was give her a good pain shot to put her to sleep and take her home. I don't know that there's ever been anything that they corrected other than symptoms. (T. 25).

Regarding any triggering activity or event which produced the claimant breakout pain, Mr.

Morgan offered:

Not that I'm aware of. The one I'm think of in particular, I was at work and brought the ambulance over to the house to check on her

and actually - - she wouldn't go in the ambulance. I took off work and went and got her and put her in the care and took her down there that way. (T. 25).

Suzanne Hackney, who was Director of Human Resources for the City of Jonesboro until her retirement on June 1, 2007, testified that her job entailed overseeing hiring; all the benefit programs; and oversight of the workers' compensation. Ms. Hackney offered, regarding pay raises provided by respondent #1 to its employees:

I'm the one that recommends the raise, and then it goes to the Finance Committee, and from there to the Full Council. (T. 79-80).

Ms. Hackney continued regarding any pay raises that could have impacted the claimant:

Okay. In '06 the Council passed a budget which gave a two and a half percent raise which is one step on the pay plan. Then they also passed a one and a half percent which was a cost of living which upgraded the pay grid, stayed on there permanently, so in '06 and '07 both, there was a total of four percent increase each year. (T. 80).

Ms. Hackney testified that in her capacity as Director of Human Resources for the City of Jonesboro she met with the claimant in February 2007, by which time claimant had reached maximum medical improvement and received final restrictions relative to the December 29, 2003, compensable injury. Ms. Hackney explained that she asked the claimant to come in to go over with her some jobs that were available within the City. Ms. Hackney's testimony reflects that the job listing included all jobs that were open. Before presenting the job listing to the claimant Ms. Hackney did not screen based on the claimant's qualifications or medical restrictions.

Of the jobs contained on the list Ms. Hackney identified two (2) that she thought were within the claimant's physical restrictions and capabilities; a temporary job involving grants and

the advertising tech job, which was a new position that was being developed. Ms. Hackney acknowledged that the Grant Assistant job referenced a Bachelor's Degree, with preference for a Master's Degree, and did not have any benefits associated with it.

Ms. Hackney discussed the advertising tech position with the claimant:

I can't remember exactly what kind of detail. I do know that we went over the fact that she would be calling on prospective customers, some of it might be in person, some of it might be on the telephone. We went over the fact that, yes, there would be computer work associated with this. We just talked in general about - - and also that there could be preparing some ads. (T. 83).

Ms. Hackney concedes that the claimant did express concerns about using computers noting that she was afraid of the computer and did not think she had the computer skills. Further, Ms. Hackney testified that the claimant expressed concerns about never having done anything in advertising. In further description of the advertising tech position, Ms. Hackney testified that the job was "pretty sedentary", did not involve heavy lifting, and entailed working in an office setting as well as going out and talking to prospective advertisers and convincing them to spend their advertising dollars on the buses and the stand. While the advertising tech job description recommended two years experience in a related field Ms. Hackney's testimony reflects that respondent would accommodate the claimant:

I can just tell you what I told Ms. Morgan.

That she could come into that job and learn it, they would teach her. It was a new job and she could come in from the beginning. (T. 86).

The testimony of Ms. Hackney reflects that she offered all of the jobs on the list to the claimant and that they went through what she could and could not do. In discussing the advertising tech job Ms. Hackney testified that the claimant did not raise concerns regarding her

physical limitations but rather it was the lack of qualification. When advised that the City would work with her and train her Ms. Hackney testified that regarding the claimant's response:

Well, at one point Ms. Morgan said, "Oh, I don't know what to do." And I remember telling Tammy, "I can't tell you what to do, Tammy. I'm telling you what is available for you. It's your decision. The job is there. It's your decision," and she said that she would rather - - she thought she would rather continue going to school taking classes and that they had bought a - - and I kind of understood it to be a really old house that they were going to be restoring and she wanted to be able to work with that. (T. 87).

During cross-examination Ms. Hackney testified that in her dealings with the claimant she has found her to be honest and straightforward. Further, bases on her observation of the claimant both within and outside the confines of the courtroom Ms. Hackney noted that claimant "appears to have difficulty getting up and down" and "grimace when she starts to get up". (T. 89).

Ms. Hackney concedes that the claimant was qualified for the advertising tech position as reflected in the written job description:

She was not qualified for what was written in the job description, but there are numerous times that we have to take less than what we have wanted and trained people. It happens very frequently. (T. 91).

Ms. Hackney acknowledged that the job description reflects the minimum qualification for the job. Ms. Hackney offered, "we have had to take less than the minimum qualification in many cases". (T. 92). Ms. Hackney insist that accommodations would have been made on behalf of the claimant to place her in the advertising tech position. Ms. Hackney testified that she had informed Mr. Joel Gardner, the coordinator who was in charge of the advertising marketing tech position, that the job would be discussed with the claimant. Ms. Hackney testified that the

advertising tech position was one requiring daily attendance at work.

The meeting between the claimant and Ms. Hackney took place in February 2007.

During cross-examination, Ms. Hackney again confirmed that she told the claimant “that all those jobs were available to her”. (T. 96). Ms. Hackney did not commit the offer of the jobs to the claimant in a written letter to the claimant:

No, I offered it verbally. It was all done verbally, and then when she said that she did not want the advertising tech job, the others she said that she didn't want the temporary job, the others she said that with her restrictions she just could not do them, I handed her a sheet of paper and it said that she had been offered these jobs, and she signed that she declined them. (T. 96-97).

The signed document/sheet of paper cited by Ms. Hackney is not a part of the evidence in the hearing record. Ms. Hackney acknowledged that she was aware that the claimant was represented by an attorney at the time of the February 2007 meeting. The testimony of Ms. Hackney reflects that she did not convey to the claimant's attorney the availability/offer of a job by respondent to the claimant prior to the February 2007 meeting. (T. 97-98).

The medical in the record reflects that after a period of conservative treatment and diagnostic studies pursuant to the directions of her primary care physician, Dr. William C. Kent, the claimant underwent a neurological consultation on September 14, 2005, by Dr. Scott M. Schlesinger, a Little Rock neurosurgeon, relative to her December 29, 2003, compensable injury. (CX #1, p. 8). The claimant was seen in follow-up by Dr. Schlesinger on January 13, 2006. The medical report generated in conjunction with the afore visit reflects, in pertinent part:

Medical Decision Making & Plan:

_____ I have read the myelogram/post -myelogram CT scan independent of the radiologist. I have also compared this to the radiologist's interpretation. This study confirms a spondylolysis of L5 and Grade I spondylolisthesis at

L5-S1. There is a foraminal disc protrusion on the right at L5-S1.

I think we should plan on proceeding with right L5-S1 transforaminal decompression and foraminal discectomy and lumbar fusion. . . .

The work injury did not cause the lytic defect to develop or the spondyloisthesis, but it brought about the onset of a disc herniation at the right L5-S1 neuroforamen and the onset of her symptoms from her lytic defect and spondylolisthesis. She says she had no problems prior to the work injury. Because the work related injury is what caused the onset of her symptoms, I would state with a high degree of medical certainty that it was in fact work related and has ultimately led to the surgery. Again, while the spondylolisthesis and spondylolysis were present before the injury, she was asymptomatic from it until the injury caused the disc herniation. Unfortunately to treat this right L5-S1 disc herniation adequately, we must stabilize the segment. I therefore state with a high degree of medical certainty that the entire treatment plan is related to the work injury. (CX #1, p. 15-16).

On January 31, 2006, claimant was admitted to St. Vincent Infirmary Medical Center and underwent a lumbar right L5-S1 transforaminal decompression and TLIF fusion for spondylolithesis and neuroforamen disc herniation at L5-S1 under the care of Dr. Schlesinger. (CX #1, p. 17-19).

Claimant was seen in follow-up by Dr. Schlesinger following her surgery. Between April 14, 2006, and June 7, 2006, claimant underwent three epidural steroid injections under the care of Dr. Schlesinger at Rivercrest Special Surgery Center. (CX. #1, p. 24-29).

Pursuant to a referral of Dr. Schlesinger on November 10, 2006, the claimant underwent a Functional Capacity Evaluation. The November 14, 2006, report relative to the afore evaluation reflects, in pertinent part:

Overall, Ms. Morgan demonstrated the ability to perform work in the LIGHT work classification according to the US Department of Labor guidelines. She did exhibit several characteristics of Medium level work due to her decreased general mobility and decreased standing/walking

abilities, she is best suited for Light work as defined below. (CX. #1, p. 36).

The claimant was seen in follow-up by Dr. Schlesinger on November 15, 2006. After noting the results of the functional capacity evaluation, the afore report reflects, in pertinent part:

She continues to complain of pain. Despite all that we have attempted to do, she still hurts in her back and some into her leg without any benefit from all the postoperative injections as well as the CT-guided SI injection. She is still tender in her SI area on the right, but seems more muscular.

* * *

I think she has reached maximum medical improvement and give her a permanent partial disability rating, in accordance with the 'American Medical Association Guides to the Evaluation of Permanent Impairment, 4th Edition', of 12%. Her FCE has determined her limitations to be light duty only and she did give a reliable effort. (CX. #1, p. 1).

After a thorough consideration of all of the evidence in this record, to include the testimony of the witnesses, review of the medical reports and other documentary evidence, application of the appropriate statutory provisions and case law, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On December 29, 2003, the relationship of employee-employer existed between the parties when the claimant sustained an injury to her back arising out of and in the course of her employment.
3. On December 29, 2003, the claimant earned an average weekly wage of \$557.54, which yield a weekly compensation benefit rate of \$372.00/\$279.00, for total/permanent partial disability.
4. Respondent #1 has paid all appropriate temporary total disability and medical

benefits in connection with the claimant's December 29, 2003, compensable injury.

5. The claimant reached the end of her healing period on November 15, 2005, with a residual 12% whole body anatomical impairment as a result of the compensable injury.

6. When the claimant's age, education, work experience, permanent limitations and restrictions and other matters reasonably expected to affect her future earning capacity, the evidence preponderates that the claimant has suffered a loss of earning capacity in the amount of 55% over and above her anatomical impairment.

7. Respondent #1 has controverted the payment of permanent partial disability benefits in excess of the claimant's 12% anatomical impairment, to include all wage loss disability benefits.

CONCLUSIONS

The claimant sustained a compensable injury to her back on December 29, 2003, which ultimately resulted in surgery and a corresponding 12% permanent physical impairment. Appropriated medical, temporary total and indemnity benefits to correspond with the anatomical impairment have been paid by respondent #1. Claimant asserts entitlement to permanent total disability benefits, or alternatively that she has sustained wage loss disability in excess of the anatomical impairment as a result of the compensable injury.

Respondent #1 takes the position that the claimant has not been rendered permanently totally disabled relative to the December 29, 2003, compensable injury. Respondent #1 maintains that suitable employment within the claimant's limitations was offered to the claimant and she declined same.

The present claim is one governed by the provisions of Act 786 of 1993, in that the

claimant asserts entitlement to workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provision.

Neither the compensability of the claimant's December 29, 2003, low back injury, nor the residual 12% permanent physical impairment as a result of same is disputed. Claimant was employed by respondent #1 as a police officer at time of the compensable injury. The claimant has been accepted for disability benefits by Police and Fire Department, which presumes that she is not able to do police work.

The claimant, whose date of birth is March 21, 1963, is a high school graduate. Claimant attended community college in West Virginia and took courses in the criminal justice program and surgical tech program, although she did not complete either. Claimant is currently enrolled in college in hopes of ultimately becoming a RN and working in an administrative setting.

In addition to her employment as a police officer, claimant's employment history includes working as a claims adjuster, bartender, and working in a family-owned restaurant. At the time of the afore employments claimant did not have any physical limitation or restrictions. Claimant has very limited computer skills.

The claimant is unable to work as police officer as a result of the residuals of her December 29, 2003, compensable injury. In addition to valid result of the functional capacity evaluation restricting the claimant to performing work in the light work classification, the evidence preponderates that the claimant takes medications in an attempt to address her constant pain. Successful is measured when the pain relief efforts achieve a dull throb over the sharp pain. Claimant is limited in the amount of weights she can lift, prolonged standing, sitting, walking, bending, stooping, squatting, pushing or pulling.

The evidence preponderates that while respondent #1 provided the claimant with a total list of job openings within the City of Jonesboro it did not extend a job offer to the claimant. Of the total jobs identified the testimony of Ms. Suzanne Hackney, the Director of Human Resources for respondent during the pertinent time, reflect that only two (2) were within the claimant's physical restrictions/limitations. The evidence discloses that both positions, on their faces, required educational and experience which the claimant did not possess. Further of the two position one was a temporary position with no benefits. At the time of her injury the claimant's annual salary in the employment of respondent #1 was approximately \$28,964.00.

Claimant asserts that she is permanently totally disabled. Permanent total disability means inability due to a compensable injury or occupational disease to earn any meaningful wage in the same or other employment. Ark. Code Ann. §11-9-519 (e) (1) & (2). While the evidence preponderates that the claimant is unable to earn meaningful wages as a police officer as a result of the December 29, 2003, compensable injury and permanent physical restrictions and limitations in connection with same, she has not been foreclosed from earning meaningful wages in other employments. Claimant is a high school graduate with post secondary education and is current enrolled in college with a goal of obtaining an Associates of Arts degree. The claimant has failed to sustain her burden of proof by a preponderance of the evidence that she has been rendered permanently and totally disabled as a result of the December 29, 2003, compensable injury.

The wage-loss factor is the extent to which a compensable injury has affected a claimant's ability to earn a living. *Sapp v. Phelps Trucking, Inc.*, 64 Ark. App. 221, 984 S.W.2d 817 (1998). When the claimant's age, education, work experience, and other matters

reasonably expected to affect her earning capacity are considered the evidence preponderates that the claimant has sustained a substantial wage loss disability. Although the claimant is pursuing her education in hopes of ultimately obtaining an RN certificate and obtaining work in a setting with minimum physical labor in terms of lifting and moving patients, she does not anticipate being able to work more than one to two days per week. Claimant takes medication on a daily basis to address the residual pain attributable to the December 29, 2003, compensable injury. The functional capacity evaluation places the claimant in the light work classification.

Claimant is restricted in her lifting capacity, sitting, standing, walking, bending, stooping, squatting and pushing/pulling. The afore limits the claimant's driving. Further, the credible evidence in the record reflects that because the claimant frequently experiences days where activity level, due to residuals of her injury, is such that she remains in bed and requires assistance from her husband. Accordingly, in her present physical state the claimant could not be a consistently reliable and dependent employee in terms of reporting to work daily. The claimant was not offered a suitable employment position with respondent #1, but rather informed of all open jobs with the City.

The claimant has sustained her burden of proof by a preponderance of the evidence that she has incurred a loss of earning capacity or wage loss disability in the amount of 55% in excess of her 12% anatomical impairment. Respondent #1 has controverted the claimant's entitlement to wage loss disability in excess of the 12% anatomical impairment.

AWARD

Respondent #1 is herein ordered and directed to pay to the claimant permanent partial disability benefits at the weekly compensation benefit rate of \$372.00, to correspond with the

claimant's 67% permanent partial disability growing out of the December 29, 2003, compensable injury. Said sums accrued shall be paid in lump without discount. Respondent #1 may claim credit for sums heretofore paid toward the afore obligation.

Respondent #1 is further ordered and directed to pay all reasonable and necessary medical, hospital and other apparatus expenses growing out of the claimant's December 29, 2003, compensable injury, to include medical related travel.

Maximum attorney fees are herein awarded to the claimant's attorney on the controverted indemnity benefits herein awarded, pursuant to Ark. Code Ann. §11-9-715.

This award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809, until paid.

Matters not addressed herein are expressly reserved.

IT IS SO ORDERED.

Andrew L. Blood, ADMINISTRATIVE LAW JUDGE