

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: JEANIE E. SMITH) DOCKET NO. 13 16243
2)
3 CLAIM NO. Y-002152) PROPOSED DECISION AND ORDER
4

5 INDUSTRIAL APPEALS JUDGE: Tom M. Kalenius
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7 APPEARANCES:
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9 Claimant, Jeanie E. Smith, by
10 Williams, Wyckoff & Ostrander, PLLC, per
11 Douglas P. Wyckoff
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13 Employer, Fuller Market Basket, Inc.,
14 None
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16 Department of Labor and Industries, by
17 The Office of the Attorney General, per
18 Kaylynn What, Assistant
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21 The claimant, Jeanie E. Smith, filed an appeal with the Board of Industrial Insurance Appeals
22 on May 29, 2013, from an order of the Department of Labor and Industries dated April 23, 2013. In
23 this order, the Department ended time-loss compensation as paid through April 22, 2013, because
24 it determined the claimant was able to work. The Department order is **REVERSED AND**
25 **REMANDED.**
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28 PROCEDURAL AND EVIDENTIARY MATTERS
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30 On August 9, 2013, the parties agreed to include the Jurisdictional History in the Board's
31 record. That history establishes the Board's jurisdiction in this appeal.
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33 On January 31, 2014, the Department filed a Motion to Dismiss for Failure to Present a
34 Prima Facie Case and the motion was heard on February 6, 2014.¹ The Motion to Dismiss was
35 denied. The claimant moved for rebuttal but withdrew that request². All rulings and orders are
36 affirmed.
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39 The deposition of John O'Brien, PAC, taken on January 28, 2014, was published on receipt.
40 All objections were overruled, except for the objection at page 8, that is sustained. All motions are
41 denied, except for the motion at page 8, that is granted. The testimony on page 8, lines 2-3 is
42 stricken.
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46 ¹ 2/6/14 Tr. at 8

47 ² 2/6/14 Tr. at 25 and 103.
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ISSUE

Was the claimant a temporarily and totally disabled worker on April 23, 2013?

EVIDENCE

In support of her appeal, Jeanie E. Smith, the claimant, testified and presented the testimony of her husband, Jack Smith; an attending physician's assistant, John O'Brien; a vocational rehabilitation counselor, Michelle Barre; and a Lewis County restaurant employee familiar with the position of hostess, Sandy Wesen.

In response, the Department presented the testimony of Terrence P. Mertens, an occupational therapist, and Jessica Anderson, a vocational rehabilitation counselor.

From the evidence, the following chronology emerged:

Ms. Smith was born on April 18, 1963. Ms. Smith is right hand dominant and worked mainly as a grocery checker since 1980. From 1991 to 1992, Ms. Smith bartended. From 1992 to 1993, Ms. Smith waitressed. Ms. Smith attended Centralia College between 2003 and 2005 and earned a certificate as an office assistant but did not work in that career. Ms. Smith continued to work for Fuller Market Basket, Inc. until 2009.

In 2005, Ms. Smith developed an occupational disease of left shoulder rotator cuff syndrome that arose naturally and proximately out of distinctive conditions of her employment as a grocery checker. Ms. Smith's work pattern was 30 hours per week year round. After the onset of her left shoulder condition in 2005, Ms. Smith no longer worked as a checker as she worked in light-duty customer service positions.

Ms. Smith underwent surgical treatment to her left shoulder in December 2005, August 2006 and October 2007. Ms. Smith testified that the shoulder surgeries did not help her rotator cuff condition.

Ms. Smith underwent a neurosurgeon's evaluation for some neck surgery.³ Ms. Smith declined further surgery due to her perception of three failed prior surgeries and continued to seek conservative treatment.

Mr. O'Brien, a physician's assistant, treated Ms. Smith for her related left shoulder and cervical conditions between July 12, 2012, and March 2013. Mr. O'Brien testified that Ms. Smith also developed a cervical condition that was accepted by the Department in December 2012. An EMG depicted no evidence of cervical radiculopathy but a mild neuropathy at the left elbow.

³ O'Brien Dep. at 9.

1 Mr. O'Brien found pain and restricted range of motion in both the left shoulder and the neck.
2 Mr. O'Brien testified that the left shoulder condition continued to be the primary limitation with
3 regard to Ms. Smith returning to work.⁴ Mr. O'Brien referred Ms. Smith to Mr. Mertens for
4 occupational and physical therapy.
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7 Terence Mertens, an occupational therapist, administered three weeks of occupational and
8 physical therapy and Ms. Smith fully cooperated.⁵ Following that therapy, Ms. Smith lifted and
9 carried trays to simulate the duties demanded of restaurant hostesses during the work hardening
10 program.
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13 Mr. Mertens recommended Ms. Smith lift and carry trays with both hands and not one
14 handed. Mr. Mertens recommended that Ms. Smith only lift and carry below chest height.
15 Mr. Mertens recommended that Ms. Smith never carry a tray overhead.⁶ Despite these
16 recommendations, Mr. Mertens found Ms. Smith could perform light to light-medium level of work
17 with the only stated limitation of lifting from shoulder to overhead level was at a sedentary level of
18 exertion. Mr. Mertens also reported that Ms. Smith could lift 15 pounds from floor to waist level and
19 from waist to shoulder level. Mr. Mertens testified Ms. Smith could lift from shoulder level to
20 overhead 5 pounds frequently and 10 pounds occasionally. However, this was inconsistent with the
21 limitation on only lifting and carrying below chest height.
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24 Mr. O'Brien testified that he reviewed the estimates of physical capacities contained in the
25 work hardening discharge summary and approved them. However, Mr. O'Brien testified the ability
26 to lift from shoulder to overhead was 5 pounds occasionally (not frequently) and 10 pounds on a
27 seldom (not occasional) basis.
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30 Mr. O'Brien restricted Ms. Smith from lifting or reaching above the level of her left shoulder or
31 moving her hand away from her body.⁷ Mr. O'Brien explained that these actions loaded the left arm
32 and if the left arm was more than 12 to 18 inches in front of the body, the forces multiplied by a
33 factor of more than 5 to 10. Mr. O'Brien enunciated specific reservations about releasing Ms. Smith
34 to perform the duties of a hostess on an unrestricted basis.
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37 Mr. O'Brien explained that his earlier statement that Ms. Smith could perform light level of
38 exertion was based on an incorrect assumption. Mr. O'Brien had incorrectly assumed that
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45 ⁴ O'Brien Dep. at 12.

46 ⁵ O'Brien Dep. at 11.

47 ⁶ 2/6/14 Tr. at 86

48 ⁷ O'Brien Dep. at 15.

1 hostesses greeted and seated customers, handed them menus and only performed light bussing of
2 the tables when the customers left. Mr. O'Brien was informed that hostesses at Spiffy's restaurant
3 were required to lift cleaning supplies weighing 2 pounds above the level of the shoulder on a
4 seldom basis. Hostesses at Country Cousins restaurant lifted and carried tubs of silverware
5 weighing up to 30 pounds.
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8 Mr. O'Brien agreed with Mr. Mertens' recommendation that lifting and carrying trays with two
9 hands was a job modification.⁸ Ms. Smith was never to carry or lift above her head and could only
10 carry and lift trays with 2 hands below chest height.⁹
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12 Mr. O'Brien expressed reservations about releasing Ms. Smith to a hostess position on an
13 unrestricted basis despite his prior approval of a job analysis and his prior opinion that Ms. Smith
14 was capable of performing the duties of a hostess. Mr. O'Brien testified that the job analysis and his
15 prior opinion were only used to establish return to work goals.
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18 The testimony of Mr. Mertens and Mr. O'Brien was persuasive that Ms. Smith could lift and
19 carry a tray with two hands only and never overhead. Ms. Smith could lift 15 pounds from floor to
20 waist and from waist to shoulder level. Ms. Smith could push 30 pounds occasionally and
21 20 pounds frequently. Ms. Smith could pull 25 pounds occasionally and 15 pounds frequently.
22 Ms. Smith could not lift up or reach above her left shoulder.
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25 Jessica Anderson, a vocational rehabilitation counselor, was assigned by the Department to
26 assess Ms. Smith's ability to work in August 2012. Ms. Anderson reviewed the claimant's vocational
27 profile after additional treatment had been provided to increase Ms. Smith's physical capacities.
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30 The job analyses for the positions of check cashier, movie theater attendant, receptionist,
31 general office clerk and hostess were admitted as Exhibit Nos. 5-9. Ms. Anderson explained that
32 following work hardening, the job analyses were submitted to Mr. O'Brien and Mr. Mertens to
33 establish the return to work goals.
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36 The positions of restaurant hostess, check cashier and movie theater attendant were
37 approved without limitation. The positions of receptionist and general office clerk were approved
38 with limitations on keyboarding and the physical work space. Ms. Smith could not keyboard
39 basically more than 30 minutes or no more than occasionally in a work day. Ergonomic
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46 ⁸ O'Brien Dep. at 31.

47 ⁹ 2/6/14 Tr. at 86

1 accommodations were required, including an adjustable work station to maintain a neutral head
2 position and a chair with lumbar support and an adjustable seat.
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4 Neither Mr. O'Brien nor Mr. Mertens modified the position of hostess formally but their
5 testimony was persuasive that Ms. Smith must only carry trays with two hands, below chest height
6 and never above her head. Ms. Smith could not lift up or reach above her left shoulder level. If
7 Ms. Smith exceeded these limits, she may reinjure or aggravate her left shoulder and neck
8 conditions.
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11 Ms. Anderson did not provide a vocational opinion on Ms. Smith's employability as a check
12 cashier, movie theater attendant, general office clerk and receptionist. Ms. Anderson submitted a
13 job analysis of the check cashier position but did not order the labor market research for that
14 position and abandoned the check cashier position as the employability determination.
15 Ms. Anderson testified that she did not order a labor market survey of the positions of office clerk
16 and receptionist because Ms. Smith was not employable in either occupation. Ms. Anderson
17 explained that without a labor market survey, she could not provide a definitive answer on whether
18 Ms. Smith was employable in a specific occupation. There was no labor market survey of the
19 position of movie theater attendant.
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22 Ms. Anderson explained that once the job analysis of a hostess was approved, she
23 instructed her intern to survey the Lewis County labor market to ensure the job analyses were
24 accurate as to the physical demands and skills required. Ms. Anderson was informed by her intern
25 that hostess positions were available in Lewis County for 30 hours per week year round.¹⁰
26 Ms. Anderson offered an opinion of Ms. Smith's ability to obtain the position of hostess only
27 because the labor market had been surveyed for the hostess position only. Ms. Anderson agreed
28 that Ms. Smith's work pattern was 30 hours per week with no reduction in hours for a winter slump.
29 Both vocational counselors agreed that if no hostess positions were available in Lewis County for
30 30 hours per week year round, then Ms. Smith could not obtain gainful employment on a
31 reasonably continuous basis.¹¹
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34 After April 22, 2013, Ms. Smith applied for and received unemployment benefits. Ms. Smith
35 applied for hostess, movie theater attendant and check cashier positions by responding to postings
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46 ¹⁰ 2/6/14 Tr. at 32

47 ¹¹ 2/6/14 Tr. at 51

1 on the Internet at various websites. Ms. Smith applied for employment to restaurants in Lewis
2 County for a hostess position but did not obtain employment.
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4 Ms. Anderson reviewed the information she ordered from her assistant who had surveyed
5 the labor market in Lewis County. There were four part-time positions for hostesses at restaurants
6 surveyed. The survey was positive because there had been hiring at all four of the employers within
7 the last year and they anticipated filling positions as they became available through attrition.
8 Ms. Anderson found there was not a current opening available but there were jobs that existed
9 within Ms. Smith's work pattern. Ms. Anderson reviewed the logs of nearly 100 positions Ms. Smith
10 had attempted to obtain. Ms. Anderson testified the logs suggested there were openings in hostess
11 positions that Ms. Smith applied for but apparently did not obtain.
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16 Michelle Barre, a vocational rehabilitation counselor, conducted a labor market survey of the
17 same employers regarding Ms. Smith's ability to obtain employment as a hostess. Ms. Anderson's
18 intern conducted a labor market survey on April 1, 2013. Mr. Barre contacted the same employers
19 in September 2013 and January 2014. Ramblin Jack's Rib Eye restaurant reported that hostesses
20 worked significantly less than 15-20 hours. Both vocational counselors considered this labor market
21 contact negative and not supportive of employment. Spiffy's restaurant reported in both surveys
22 that it only hired hostesses for three days per week. Ms. Barre testified that hostesses were
23 assigned no more than 14 hours per week. Ms. Anderson's intern reported 28 to 32 hours per week
24 were available at Spiffy's restaurant and at three other restaurants in Lewis County: Country
25 Cousins, The Olympic Club, and Applebees.
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31 Sandy Wesen, a long time employee of Country Cousins, testified that hostesses lifted more
32 than 15 pounds when they lifted tubs of silverware weighing about 30 pounds and slid tables
33 together weighing 30 pounds. The labor market survey relied on by Ms. Anderson described the
34 lifting and carrying demand as 15 pounds from floor to waist to transfer buckets of silverware.
35 Ms. Anderson suggested the buckets could be lightened by removing silverware but there was no
36 employer interviewed that described this option. The hostess work pattern at Country Cousins
37 Restaurant was described by Ms. Wesen as 20 to 25 hours per week during the winter and up to
38 40 hours in the summer. The Olympic Club was surveyed by Ms. Barre as not employing
39 hostesses. Applebees Restaurant in Lewis County reported to Ms. Barre that it hired hostesses for
40 15 to 20 hours per week.
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1 Ms. Barre testified Ms. Smith was unable to obtain gainful employment on a reasonably
2 continuous basis as of April 23, 2013, due to the residuals of the occupational disease and taking
3 into account the claimant's age, education, work history, and preexisting conditions because
4 Ms. Smith could not obtain reasonably continuous gainful employment as a hostess or any position
5 at a similar work pattern.
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8 DECISION

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10 Mr. O'Brien's opinions were given special consideration. Mr. O'Brien attended Ms. Smith's
11 related conditions and was well informed of the left shoulder and cervical conditions because he
12 physically examined Ms. Smith multiple times. Mr. O'Brien's multiple examinations provided a
13 foundation based on all material facts. Mr. O'Brien was familiar with the pain in Ms. Smith's neck
14 and left upper extremity that intermittently aggravated, especially when lifting and carrying.
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17 Mr. O'Brien rated Ms. Smith's compliance level as high when evaluating her actions to return
18 to work. The physical limitations imposed by the left shoulder rotator cuff and cervical occupational
19 disease and the post-operative effects of three surgeries limited Ms. Smith to lifting and carrying a
20 tray with two hands below chest level and never overhead. Ms. Smith could not lift up or reach
21 above her left shoulder level. She could lift up to 15 pounds from floor to waist and from waist to
22 shoulder level. She could push 30 pounds occasionally and 20 pounds frequently. Ms. Smith could
23 pull 25 pounds occasionally and 15 pounds frequently.
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28 The preponderance of the evidence was persuasive that Ms. Smith was incapable of
29 performing any gainful employment on a reasonably continuous basis, including as a hostess, as of
30 April 23, 2013.
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32 The vocational testimony was consistent that Ms. Smith was incapable of employment at her
33 job of injury or as a check cashier, movie theater attendant, general office clerk and receptionist.
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35 Ms. Barre testified that the positions described in the approved job analyses were
36 transferable skills jobs. Therefore, a labor market survey must show that the job existed in the labor
37 market, the claimant's skills and qualifications rendered the claimant employable, the physical
38 requirements were similar to the approved job analysis and that the work pattern was similar to the
39 work pattern at the time of the occupational disease.
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43 Ms. Barre disagreed with Ms. Anderson's conclusion that all employers but Ramblin Jack's
44 Rib Eye restaurant offered a similar work pattern as that worked by Ms. Smith before her
45 occupational disease (30 hours per week year round). Ms. Barre testified employers employ
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1 hostesses in Lewis County less than 30 hours per week year round. Ms. Barre based her testimony
2 on her interviews of employers. Ms. Anderson relied on the notes provided from her intern, who did
3 not testify. Ms. Anderson was not familiar with the labor market in Lewis County.¹²
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5 Ms. Barre's vocational opinion was persuasive because she was well informed of the labor
6 market. First, Ms. Barre personally performed the labor market survey in a time frame close to
7 April 23, 2013, (September 2013 and January 2014). Second, Ms. Barre was subject to cross
8 examination and her opinions were tested by that process. Third, Ms. Barre testified from her first
9 hand knowledge of the interviews with employers.
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13 The preponderance of the evidence was persuasive that the position of hostess was not
14 available to Ms. Smith on April 23, 2013, in her relevant labor market at a similar work pattern. The
15 vocational expert testimony of Ms. Barre was persuasive because she was well informed due to her
16 interview of the employers.
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19 The Department order dated April 23, 2013, that ended time-loss compensation as paid
20 through April 22, 2013, because it determined the claimant was able to work was incorrect and
21 should be reversed. The matter should be remanded to the Department with directions to pay
22 time-loss compensation as of April 23, 2013, because Ms. Smith was incapable of gainful
23 employment on a reasonably continuous basis.
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26 FINDINGS OF FACT

- 27 1. On August 9, 2013, an industrial appeals judge certified that the parties
28 agreed to include the Jurisdictional History in the Board record solely for
29 jurisdictional purposes.
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- 31 2. On July 25, 2005, Ms. Smith developed an occupational disease of left
32 shoulder rotator cuff syndrome and a cervical condition that arose
33 naturally and proximately out of distinctive conditions of her employment
34 as a grocery checker/cashier, with Fuller Market Basket, Incorporated
35 for which she underwent three left shoulder surgeries.
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- 37 3. Ms. Smith was born on April 18, 1963, graduated from high school and
38 earned a certificate from Centralia College as an office assistant.
39 Ms. Smith waitressed and bartended in the early 1990's. Ms. Smith's
40 work history was mainly as a grocery checker and customer service
41 attendant until 2009.
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- 43 4. Ms. Smith worked as a grocery checker and in customer service for
44 30 hours per week year round at the time of her occupational disease
45 onset on July 25, 2005.
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47 ¹² 2/6/14 Tr. at 51
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5. As of April 23, 2013, Ms. Smith could lift and carry a tray with two hands only below chest height and never overhead. Ms. Smith could lift 15 pounds from floor to waist and from waist to shoulder level. Ms. Smith could push 30 pounds occasionally and 20 pounds frequently. Ms. Smith could pull 25 pounds occasionally and 15 pounds frequently. Ms. Smith could not lift up or reach above left shoulder level.
 6. Ms. Smith was unable to perform and obtain gainful employment on a reasonably continuous basis as of April 23, 2013, due to the residuals of the occupational disease and taking into account the claimant's age, education, work history, and preexisting conditions.

CONCLUSIONS OF LAW

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1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter of this appeal.
 2. Ms. Smith was a temporarily totally disabled worker within the meaning of RCW 51.32.090 as of April 23, 2013.
 3. The Department order dated April 23, 2013, is incorrect and is reversed. This matter is remanded to the Department to pay time-loss compensation benefits as of April 23, 2013.

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DATED: MAY 13 2014



Tom M. Kalenius
Industrial Appeals Judge
Board of Industrial Insurance Appeals