OPINION/ORDER

Department of Licensing and Regulatory Affairs
Michigan Administrative Hearing System
Workers' Compensation Board of Magistrates
PO Box 30016, Lansing, MI 48909

OA

03131300 56

Plaintiff's Social Security Number: XXX-XX-2582 Plaintiff's Name(s): DEBBIE L. HARRIS

Defendants(s)/Carrier(s)

A. CHRYSLER GROUP, LLC f/k/a DAIMLERCHRYSLER CORP. / SELF-INSURED
B.
C.
D.

RECEIVED
MAR 18 2013
LACEY & JONES

Type of Claim (For statistical purposes only – not a part of this order)

A. ☒ General Disability B. ☐ Partial Wage Loss C. ☐ Specific Loss D. ☐ Permanent Total E. ☐ Death F. ☒ Misc.

Type of Award (For statistical purposes only – not a part of this order)

1. ☒ Granted Open 4. ☐ Medical Only 7. ☐ Stipulated Open 10. ☐ Dismissed 13. ☐ Granted Pet. to Stop 16. ☐ Voc. Rehab Review
2. ☐ Granted Closed 5. ☐ Voluntary Pay 8. ☐ Stipulated Closed 11. ☐ Granted Penalty 14. ☐ Denied Pet. to Stop 17. ☐ Atty. Fee Resolved
3. ☐ Denied 6. ☐ Voluntary Pay - 115 9. ☐ Withdrawn 12. ☐ Denied Penalty 15. ☐ Health Care Resolved 18. ☒ Other

Injury Date(s) Established	Average Weekly Wage	Discontinued Fringes	Date Discontinued
April 4, 2005	$1,307.80	$ 0.00	
	$	$	

IRS Filing Status: A. ☐ Single B. ☒ Single/Head of Household C. ☐ Married/Joint D. ☐ Married/Separate

Dependents - Date of Marriage/Birth

Name	Date	Name	Date	Name
Julian	11/29/90			

IT IS FOUND that the employee is disabled and compensation shall be paid as follows:

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WORKERS' COMPENSATION AGENCY
LANSING, MICHIGAN

Defendant/Carrier	At the weekly rate of	From	Through
A.	$689.00	April 5, 2005	December 4, 2006
A.	$454.57	February 3, 2009	December 31, 2009
*	$		

IT IS FURTHER FOUND that the employee is still disabled and therefore it is ordered that defendant/carrier A. shall pay compensation at the rate of $ 398.99 per week, until further order. Interest shall be paid in accordance with Section 801(6).

IT IS FURTHER ORDERED that defendant/carrier A. shall be responsible for medical expense(s) pursuant to Section 315 as follows:

Reasonable and necessary relating to plaintiff's low back and sequelea.

IT IS FURTHER ORDERED that the maximum authorized attorney fee shall not exceed 30 percent of the compensation accrued (subject to the provisions of Section 858 (418.858) and Rule 14, R408.44).

IT IS FURTHER ORDERED that: Plaintiff's Petition is GRANTED in part, and DENIED, in part. See attached Opinion/Order incorporated by reference herein.

*See attached periods and rates per Opinion/Order (p.18) incorporated by reference herein, thru February 27, 2013.

MAILED
MAR 13 2013

David H. Williams (253G), Magistrate

Signed on February 27, 2013 at Pontiac Michigan

WORKERS' COMPENSATION AGENCY
LANSING, MICHIGAN

Unless a Claim for Review is filed by either party within 30 days from the date stamped on this Opinion/Order as "Mailed Date," this order shall become final. The Claim for Review should be filed with the Michigan Compensation Appellate Commission, PO Box 30468, Lansing, MI 48909-7968.

LARA is an equal opportunity employer/program. Auxiliary aids, services and other reasonable accommodations are available upon request to individuals with disabilities.

Authority: Workers' Disability Compensation Act 418.847(2), R418.54(1)
Completion: Mandatory
Penalty: None

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARINGS SYSTEMS
WORKERS' COMPENSATION BOARD OF MAGISTRATES

DEBBIE L. HARRIS
SS# XXX-XX-2582

Plaintiff,

vs.

CHRYSLER GROUP, LLC
f/k/a DAIMLERCHRYSLER CORP.
/ SELF-INSURED,

Defendant.
_____/

OPINION ON THIRD REMAND

I. INTRODUCTION:

This matter has been remanded by the Appellate Commission to address the issue of "wage loss". The Appellate Commission did not retain jurisdiction, allowing additional proofs be taken sufficient to "issue an order that determines plaintiff's benefit rate in accordance with the current standard".

II. PROCEDURAL HISTORY:

This case was initially tried before Magistrate Melody A. Paige in October/November, 2007. Plaintiff's claim for benefits was stated to be that on or about April 4, 2005: "As a result of heavy and strenuous work, in particular pulling a varnishing machine, employee sustained severe and serious injury to her back." The lay testimony, evidence and expert/medical testimony presented at the time were as summarized in the January 31, 2008 decision (mailed 3/4/08) of Magistrate Paige (BWDC #030408008) at pages 3-8. After addressing an analysis of the testimony and evidence, including discussion of a variety of legal and factual issues presented, Magistrate Paige held in favor of plaintiff, granting benefits at the rate of $689.00 per week[1] from April 4, 2005 through the date of her decision and until further order.[2]

At the outset the parties agreed that plaintiff received alternative benefits, Sick and Accident ("S&A") and then Extended Disability ("EDB") beginning April

[1] The maximum rate for a 2005 date of injury.
[2] That date was based on a finding of 'disability' under WDCA Sec. 301(4) and *Sington v. Chrysler Corporation*, 467 Mich 144 648 NW2d 624 (2002) with an AWW of $1307.80, (without fringes).

4, 2005 which continued up to trial – with coordination of weekly workers' compensation benefits being applicable, but left it to the parties to "work out...in the event of an award of benefits [under the WDCA]."

Defendant's appeal of the afore stated decision of Magistrate Paige was decided by the Workers' Compensation Appellate Commission (WCAC)[3] December 5, 2008, *Harris v. DaimlerChrysler Tech Center*, 2008 ACO #268. It was held by all three Commissioners that plaintiff had sustained an injury arising out of and in the course of her employment with defendant which resulted in a "herniated disc". Id. (p.5) The majority[4] went on to further conclude that:

> "However, the magistrate must allow the parties the opportunity to present additional proofs to address *Stokes*. After the magistrate provides the opportunity to present additional proofs, she must apply the *Stokes* decision and determine whether plaintiff satisfied her burden of proof concerning her alleged disability.
>
> CONCLUSION
>
> Therefore, we affirm the magistrate's fact findings, but remand for additional disability proceedings. We retain jurisdiction. Because we retain jurisdiction, the magistrate should issue a supplemental opinion, but not a supplemental order". Id (pp 5-6)

As a result the case returned to the Magistrate who, in a hearing conducted on April 9, 2009 and after admitting additional testimony (depositions of plaintiff and defense vocational experts - Barbara Feldman, M.A., L.P.C., CCM and Sandy Pellini, MA), issued a "Remand Opinion" January 11, 2010 (BWDC #011110076). Following her summary of the additional expert testimony (pp 1-2) she then performed an "Analysis under Stokes" (pp 2-5) wherein it was ultimately concluded that:

> "Plaintiff has met her burden of proof regarding the issue of wage loss. Plaintiff is not currently working or collecting benefits from any other source. The claimant has proved that her work-related injury has caused a reduction of her maximum wage-earning capacity in work suitable to her qualifications and training." (p.4)

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[3] What eventually became the Michigan Compensation Appellate Commission ("MCAC") pursuant to Executive Order 2011-6 issued by Governor Rick Snyder on May 17, 2011.

[4] Commissioner Gasparovich concurring with the others on the work-injury causation issue, but disagreeing on application of the "wage loss" component of the then-existing standard of "disability".

Continuing to analyze the balance of the *Stokes* criteria she went on to state:

> "The claimant must prove what jobs, if any, she is qualified and trained to perform within the same salary range as her maximum earning capacity at the time of injury. Plaintiff testified that she earned twenty-four dollars and ninety eight cents per hour when she last worked for the defendants. Ms. Feldman was of the opinion that the only way plaintiff could return to work at her maximum pre-injury rate of pay, would be for her to return to her former position. Other positions that were identified would not afford her the ability to earn her maximum pre-injury rate of pay. Based on the medical restrictions provided by both Dr. Lawley and Dr. Best of limited standing and walking, limited twisting and bending, lifting limited to either 15-25 pounds maximum on an occasional basis, no positions were identified within plaintiff's qualifications and training that paid anywhere near her maximum pre-injury rate of pay of $24.98 per hour. It was Ms. Feldman's opinion that plaintiff would be able to do entry level type work, where she would be trained quickly on the job and those jobs would pay her anywhere from minimum wage up to ten dollars per hour. Plaintiff has established that there are no jobs within her local geographical area, that she can do within her qualifications and training that would pay her even half what she made while working for the defendants.
>
> The claimant must show that her work-related injury prevents her from performing some or all of the jobs identified as within her qualifications and training that pay maximum wages, plaintiff has bet this burden.
>
> If the claimant is capable of performing any of the jobs identified, the claimant must show that she cannot obtain any of these jobs. The claimant must make a good-faith attempt to procure post-injury employment if there are jobs at the same salary or higher that she is qualified and trained to perform and the claimant's work-related injury does not preclude performance. Plaintiff has established that she is unable to secure a job she is able to perform and even if she did it would not be at the maximum wage earning level she enjoyed while working for Chrysler.
>
> Once the claimant has made a prima facie case of disability, which she has in this instance, the burden of production shifts to the employer to come forward with evidence to refute the claimant's showing. Defendants have failed in meeting this burden. I agree with plaintiff's analysis that *Stokes*

> has no requirement that claimant look for or accept a lesser paying job or [sic] prove disability. Plaintiff has proved disability by a preponderance of the evidence since she has shown a limitation of her wage earning capacity in work suitable to her qualifications and training caused by her work-related injury." Id. (pp 4-5)

Last, on the question of "partial disability" Magistrate Paige concluded as follows:

> "Regarding the issue of partial disability. If plaintiff were to be able to secure employment within her qualifications and training in this depressed work market, then it would be at a substantially less amount of money. The maximum wage that she would be able to earn would be between nine and twelve dollars per hour and at best for only part-time work. Expecting an individual to go into work for three hours per day, driving between thirty-eight and seventy miles per day is unreasonable." Id. (p.5)

The matter then returned to the Workers' Compensation Appellate Commission (WCAC) which issued a further decision, again remanding the case to the Magistrate for additional analysis of the disability component of plaintiff's claim. *Harris v. DaimlerChrysler Tech Center*, 2010 ACO #51. Specifically, after review the Magistrate's Remand Opinion and finding it deficient in certain respects, the WCAC majority[5] stated that:

> "We find no error in the magistrate's disability analysis. Although defendant correctly states that plaintiff's expert failed to include a sufficient survey of plaintiff's previous work, defendant's expert provided a compliant vocational assessment. And, defendant's expert concluded that no jobs exist that pay plaintiff's maximum wage. That testimony satisfies the *Stokes* requirements.
>
> However, the magistrate failed to follow the remand order and assess plaintiff's wage loss. We required that the magistrate evaluate the link between plaintiff's wage loss and her injury. That evaluation must assess plaintiff's job search efforts. The magistrate's failure necessitates another remand. On remand the magistrate must apply the *Haske* standard as explained in *Epson*." *Harris v. DaimlerChrysler Tech Center*, *supra*, p.7

In both its "Conclusion" and the accompanying "Order" the WCAC held that:

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[5] With Commissioner Gorchow concurring in part and dissenting in part, concluding that no further remand was necessary and would affirm the award outright. (p.4)

> "...the magistrate's opinion on remand is affirmed in part and remanded to the magistrate for additional wage loss analysis that includes an assessment of plaintiff's job seeking efforts. No additional proofs may be introduced. We retain jurisdiction. Because we retain jurisdiction, the magistrate should issue a supplemental opinion only, not an additional green sheet order." Id. (p.1)

Accordingly, the magistrate subsequently issued a "Supplemental Opinion on Second Remand" October 6, 2011, (BWDC #100611003). After further commenting on the lack of evidence in the record with respect to any job search efforts on the part of the plaintiff (p.1), and then again citing pertinent aspects of the testimony of both plaintiff and defense vocational experts (pp. 1-2), Magistrate Rochau[6] arrived at the following conclusion on the wage loss issue:

> "Considering the available information, the only position that is tangible that supports a conclusion as to what plaintiff was capable of earning, is the part time job as a CSR/Dispatcher, paying plaintiff $180.00 per week. While this particular position apparently falls within the criteria that plaintiff would be able to earn, there is an additional factor that could bear upon plaintiff's ability to secure said position, namely, that plaintiff apparently has a prior felony conviction. This factor may have a bearing upon "plaintiff's ability to earn within her qualifications and training". This job was identified as being 19 miles one way from plaintiff's residence and that it was a 5 day/20 hour per week part time position.
>
> There is no showing that plaintiff has made any "good faith effort" to find suitable employment within her physical restrictions, qualifications, training and experience per *Stokes v. Chrysler LLC*, 481 Mich 266, 750 NW2d 129 (2008).
>
> Having said that, I must rely upon the best evidence provided to ascertain what residual wage earning capacity plaintiff maintained post-injury. The only position set forth by the vocational experts which provides a quantifiable figure, is the position as a CSR/Dispatcher, which would have paid plaintiff $180.00 per week, working at the job for "Mr. Rooter", earning $9.00 per hour, 20 hours per week. As a final observation, I do not find it unreasonable that plaintiff did not seek to obtain the

[6] At this point Magistrate Paige had left the Bench and the task of performing this additional analysis landed in the lap of Magistrate Kim C. Rochau who has also since also left the bench, his term ending January 26, 2013.

> position for Mr. Rooter for a job that pays $180.00 per week, when taking into consideration that plaintiff would have been required to drive 38 miles per day to engage in this position." *Supplemental Opinion on Second Remand*, BWDC #100611003, p.2.

The case then made its way back to what is now the MCAC for further review, jurisdiction having been retained over the case by its predecessor administrative appellate body, the WCAC. Following additional briefing by the parties the MCAC issued the latest appellate pronouncement on the matter in *Harris v. DaimlerChrysler Tech Center*, 2012 ACO #16. After briefly reciting the evolution of the "disability" analysis under *Sington* and *Stokes, supra*, including subsequent cases which maintained that wage loss also be part and parcel of any analysis, at least insofar as it relates to determination of a weekly compensation rate in cases involving partial disability, *Harder v. Castle Bluff Apartments*, 2010 ACO #77, later upheld by the Supreme Court Order, 489 Mich 951 NW2d 26 (2011), which effectively elevated that Courts' earlier Order in *Lofton v. AutoZone, Inc.*, 482 Mich 1005, 756 NW2d 885 (2008) to the status of binding precedent,[7] the MCAC found fault with the latest magistrate opinion dealing with that issue. In particular, the MCAC referenced WDCA Sections 361(1), and 371, MCL 418.361(1) and 418.361(1), as it relates to rate calculations and partial disability, Id. (p.5). Then, with that said, it went on to outline a framework for further analysis in order to determine the wage loss component of the disability equation, explaining:

> "With that understanding, we look to *Stokes* for guidance as we attempt to establish a method for determining the wage earning capacity in all employments that are suitable to plaintiff's qualifications and training. Following the *Stokes* multi-step process allows each party to present evidence that meets the approval of the Court. This, presumably, would also reduce remands because the Court has endorsed this method for establishing post-injury wage earning capacity. Therefore, we endorse the *Stokes* process to determine wage earning capacity to calculate wage loss.
>
> When an injured employee retains a wage earning capacity, but has not actually worked in the job, MCL 418.371(5) directs that the average weekly wage for that job is determined by the usual wage for similar services. Again the *Stokes* proofs normally would provide that information.
>
> Finally, MCL 418.361(1) contains the actual calculation formula, as informed by MCL 418.313. Section 361(1) requires

[7] See also: *DeFrain v. State Farm Mutual Auto Ins. Co.*, 491 Mich 359, 369; 817 NW2d 504 (2012).

> computation of 80% of the after tax average weekly wage for both the injury job and the jobs that the claimant retains an earning capacity. However, the director of the Agency, according to Section 313, must publish tables annually that conclusively establish those numbers based on average weekly wages. Using the numbers from the table, the benefit rate equals the number for the injury job less the number for the post-injury jobs where plaintiff retains an earning capacity." Id (p.5)

It then concluded that the magistrate's latest Opinion was again lacking, holding:

> "The magistrate's analysis does not address the *Lofton* and *Harder* cases that establish the current standard for plaintiff to prove wage loss. Therefore, another remand is necessary. On remand, the magistrate must allow the parties an opportunity to address the current standard to determine plaintiff's benefit rate." Id. (p.6)

With respect to that further remand, the MCAC specifically indicated that on this occasion it did not retain jurisdiction. Accordingly, in its conclusion and the accompanying Order, stated that:

> "...the magistrate shall issue an order that determines plaintiff's benefit rate in accordance with the current standard." Id. (p.6)

III. CURRENT POSTURE:

Following that latest appellate decision it again fell upon Magistrate Rochau to conduct whatever "additional proceedings" were contemplated by the MCAC and/or expected by the litigants and then, once completed, issue what amounted to be a new "decision" (Opinion and Order) determining both the period(s) and measure of weekly benefits due plaintiff Harris.

To that end it appears from review of the file and record of proceedings maintained by the Board of Magistrates that a formal hearing was conducted by Magistrate Rochau on December 5, 2012. No live witnesses testified at said hearing. However, depositions of the vocational experts were offered and admitted. Same consisted of additional testimony from Barbara Feldman, M.A., L.P.C., CCM, taken November 30, 2012 (Plaintiff Exhibit 1) and Guy Hostetler, MA, CCM, taken November 30, 2012 (Defendant Exhibit A). Supplemental briefs of both parties were also submitted, along with some limited oral argument. And, what amounts to be the functional equivalent of, but not rising to that level, a stipulation by plaintiff as to the correct current "partial disability rate", assuming plaintiff were not found entitled to ongoing weekly benefits at the full/total disability rate.

To confirm that there were neither additional proofs nor any other evidence/testimony either party wished to present prior to undertaking the task of issuing such a decision,[8] a conference was held on February 13, 2013. At that point both counsel confirmed that the record had been completed as of December 5, 2012, no further proofs were offered and the matter submitted for consideration and a decision.

A. ADDITIONAL PROOFS:

Pursuant to the Remand Order of the MCAC issued February 16, 2012, *Harris v. DaimlerChrysler Tech Center*,[9] *supra*, testimony from vocational specialists, Barbara Feldman (updated deposition) and Guy Hostetler were submitted. The salient aspects of their deposition testimony are set forth below.

Ms. Feldman's vocational assessment was updated in November, 2012. A labor market survey located three suitable positions: "products assembler, earning $9.00 per hour, and two quality control inspecting jobs, which paid $8.00 and $9.00 per hour respectively. As of her November 12, 2012 assessment, she would conclude that plaintiff had a wage-earning capacity (WEC) of $8.00-$9.00 per hour. Nevertheless, in reference to her prior testimony as to a wage-earning capacity of $10.00-$12.00 per hour at the time of her 2009 evaluation, she conceded that she would "stand by" those findings. Pursuant to the latest WEC, Ms. Feldman indicated that she searched for suitable jobs over a span of three days. She acknowledged the possibility that there were other suitable job listings on other dates she did not search. And, if other suitable jobs were available, such as the quality control and assembly positions she located, they would be appropriate for plaintiff.

Guy Hostetler, MA, CRC, CDMS, ABDA, DABFC, LPC, performed a vocational assessment on defendant's behalf in October of 2012. Mr. Hostetler's labor market survey disclosed five jobs that were within plaintiff's qualifications, training and restrictions: four assembly jobs and one quality control job, paying $9.00-$12.00 per hour. Additionally, there were two security guard jobs identified with similar wages. As to the discrepancy between Ms. Feldman's prior and current wage-earning capacity assessment, Mr. Hostetler found that inexplicable; the labor market being worse in 2009 than 2012. He further opined that he would not expect a wage-earning capacity of $12.00 per hour in 2009 to be less today; if anything, it would be more.

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[8] This Magistrate did not assume the position until February 4, 2013 such that the only means of identifying what was offered and/or admitted in the latest "proceedings" was by listening to what was recorded on that date and the additional file material mentioned *infra*.

[9] Now captioned as "DamlierChrysler Group, LLC".

Plaintiff was not called by either party to provide supplemental testimony as to any matters pertaining to the issue of disability, such as job search efforts, since either the initial trial before Magistrate Paige in the fall of 2007, or contemporaneous with the original vocational testimony admitted following one of the prior Commission remands, such being proceedings conducted in April 2009. Nevertheless, defendant while not conceding the point (preserving the issue for later appeal) does not appear to argue that, given the scope of the instant remand, the absence of any such testimony on this score is fatal to plaintiff's *prima facia* claim and a finding of "disability", only that it goes to whether she can establish that all of her wage loss is attributable to the work-related impairment.[10]

B. PRIOR DETERMINATIONS, FINDINGS AND CONCLUSIONS TO DATE:

At present there are a number of findings and conclusions which have already been determined and are not subject to change pursuant to the scope of the February 11, 2012 Remand Order of the MCAC. Such determinations were as a result of either stipulation, findings by one or both of the Magistrates who had previously issued a decision (Opinion and Order) and/or only an "Opinion" which was not challenged on appeal, thereby waived, and lastly the ultimate conclusions of both the WCAC and MCAC in their respective decisions. Those salient to and bearing upon the issue of disability are as follows:

1. Plaintiff sustained an injury arising out of and in the course of her employment with Defendant on April 4, 2005.

2. At the time of the aforestated injury, plaintiff had an average weekly wage ("AWW") of $1,307.80, exclusive of fringe benefits. (which at that point continued).

3. Plaintiff's hourly rate of pay was $24.98.

4. Plaintiff's injury involved her low back, specifically including a disc herniation at L5-S1, with radiculopathy. BWDC #030408008 and 2008 ACO #268, pp. 5, 8.

5. The job(s) and employment with Defendant constituted plaintiff's maximal earning capacity.

6. The consensus of medical opinion, based upon deposition testimony of both Doctors Todd T. Best, M.D. and Jeffrey E. Lawley, D.O., concluded that plaintiff required physical restrictions of one degree or another. Dr. Best (whose testimony was accepted

[10] Defendant's Brief on Remand dated December 4, 2012, pp.13-14, further citing the 12/20/10 MCAC decision at pp. 6,7.

by Magistrate Paige) placing limitations of: No lifting, pushing, pulling or carrying more than 20 pounds, 10 pounds frequently, with a sit/stand option. BWDC #030408008, p.9, and Dr. Lawley's restrictions precluding her from returning to her prior position, Id.

7. While surgery had been recommended by Doctors Rapp and Best, it had not been undertaken.

8. Plaintiff has a limited education and her prior work experience before employment with Defendant, including certification as a nursing assistant, had expired and, in any event, her current physical restrictions would have precluded returning to that type of physically demanding work. Id. (p.9).

9. At the time of injury and trial plaintiff was single, with one minor dependent (DOB 11/29/90) and had a tax-filing status of Head of Household.

10. The initial expert vocational testimony admitted in the first remand proceedings conducted before Magistrate Paige in 2009 resulted in a finding and conclusion that post-injury plaintiff's wage earning capacity (WEC) was limited by virtue of her education, training, skills and the physical restrictions imposed by the medical experts. In essence, per the 2009 testimony of Ms. Barbara Feldman and Sandy Pelini, plaintiff had a then-existing WEC of between minimum wage and up to $10.00 per hour, with the only actual potential job(s) being identified as of March 23, 2009 (Ms. Pelini's Labor Market Survey) consisting of part-time work (16-20 hours/week) paying $9.00 per hour, with a maximal capacity of $12.00 per hour.

11. Neither the original trial transcript nor other evidence admitted up until Magistrate Rochau's "Supplemental Opinion on Second Remand" issued October 6, 2011 contained any information about plaintiff's job search efforts after her departure from the Defendants. BWDC #100611003, p.1. Therefore, a finding/conclusion was reached that up to that point in time: "There is no showing that Plaintiff has made any 'good faith effort' to find suitable employment within her physical restrictions, qualifications, training and experience per *Stokes*,"

12. The third remand decision issued by the MCAC requires that a specific determination be made as to relationship of any "wage loss" suffered by plaintiff and her work related impairment (i.e. ability to engage in only restricted employment) with reference to and consideration of her post injury job searching efforts – and thus

a determination of wage loss under the *Lofton* and *Harder*, *supra* standard, 2012 ACO #16, pp. 5-6.

C. ADDITIONAL FINDINGS AND CONCLUSIONS FOLLOWING THIRD REMAND:

The proofs offered by the parties after the latest MCAC remand consisted of the supplemental deposition testimony of plaintiff's vocational expert, Ms. Barbara Feldman and deposition testimony of an additional vocational expert retained by defendant, being Mr. Guy Hostetler. A summary of their respective testimony and opinion was set forth on p.8, *supra*. The only further details of significance which bear mention here are contained within the testimony (including report) of vocational expert Feldman, who in 2012 elicited historical information from plaintiff describing some additional prior experience of working in a laundry, washing linens at Beaumont Hospital, shortly after high school and a brief stint as a hostess at Chi-Chi's restaurant (F 2, p.6) and Mr. Hostetler recording that plaintiff had only completed 10th grade, but had a GED (H 14), some cosmetology and interior design courses at Paul Mitchell Beauty School in 2011 and in the '90's at Baker College, respectively. Further, Mr. Hostetler did address the specific question as far as pay ranges and extent of any job-searching efforts in which plaintiff had engaged since last working (H 19-20). She had only started looking in January, 2012, been to Michigan Works, posted a resume, sent out approximately 8 and applied for about 6 positions (H 19-20), but had not been as active lately, being more "focused on getting back in Chrysler" (H 21).

In summary, the additional evidence offered by the parties following the latest remand demonstrates that plaintiff may have somewhat greater training and experience than previously thought to exist and has engaged in job seeking efforts, but only since 2012, not finding anything or was otherwise unsuccessful in securing a position. [11] Nevertheless, the fact remains that regardless of the nature, extent or lack of success in actually obtaining work following her April 4, 2005 back injury, she has at all times been limited in terms of what she is physically capable of doing, or in other words, only able to perform work tasks within the confines of the previously mentioned medical restrictions. Such restrictions render her unable to perform the job(s) she had previously performed at Chrysler (paying $24.98/hour or as measured by the AWW - $1,307.80) or for that matter, any of the other unrestricted employment within her qualifications, training and experience which garner wages anywhere approaching her pre-injury earning capacity. Hence, as has already been determined, plaintiff met the criteria under WDCA Sec. 301(4), *supra* as defined by *Sington*, *Stokes*, etc. to establish that she has suffered a loss of (maximum) wage earning capacity in work suitable to her qualifications and training. The only further determination necessary, and for which the case was remanded, is to make the finding(s) of

[11] It is Mr. Hostetler's conclusion that such limited effort over an 8 month period was not, however, "conducive of an individual returning to work." (H 21)

just how much wage loss is attributable to plaintiff's post-injury physical impairment over the course of time since April 2005 to date, and then, given what is deemed such quantifiable measure of what could be termed a "retained earning capacity,"[12] the proper "partial disability" rate as calculated under WDCA Sec. 361(1), MCL 418.361(1) and Lofton, et al, supra.

In this case, even had plaintiff engaged in a good faith effort to secure subsequent work suitable to her qualifications and training and within her physical restrictions from the outset, based upon the proofs presented, including those of defendant's experts, Ms. Pelini and Mr. Hostetler, the only conclusion which can be reasonably made is that her earnings would have been significantly less than what she made while working for the defendant. Further, the retained earning capacity has some degree of variance over time as general economic circumstances may dictate. Therefore, I find that although plaintiff is entitled to weekly benefits as a result of her April 4, 2005 work-related back injury, for a significant period of time thereafter benefits are due only for partial disability as calculated under WDCA Sec. 361(1), *supra*. This is as measured by comparing her pre-injury earning capacity (i.e. AWW and/or hourly rate) to various positions, both those actually available based upon a labor market survey and/or general labor market data as applicable, utilized by the vocational experts in rendering their opinions. This should serve to satisfy both the directive of the Michigan Supreme Court in Lofton v. Autozone, and Harder v. Castle Bluffs Apartments, *supra*, as well as being in accordance with the instructions of the MCAC as set forth in its latest decision, 2012 ACO #16, pp. 5-6.

1. From April 5, 2005[13] - December 4, 2006:

Dr. Todd Best had been treating plaintiff since June 2, 2005 following referral from a Dr. Halat (B 4). The MRI of April 7, 2005 showed the herniated disc at L5-S1. (B 6-7, Best Dep. Ex.#2). As of the date of his deposition (February 22, 2007), he had last seen her on December 7, 2006.[14] Up to that point he stated that she had "...not returned to her work." (B 11, line 23) because he did not believe there was any such thing as a "sedentary" janitor (B 11-12). However, when he returns her to work it will be with restrictions as previously mentioned, being: "no lifting, pushing, pulling or carrying more than 20 pounds maximum, ten pounds frequently, sit/stand option. No repetitive bending or twisting at the waist." (B 12, lines 5-8).

The balance of the medical records admitted covering the period from the date of injury to plaintiff's office visit with Dr. Best, December 5, 2006, are largely silent or inconclusive as to restrictions. (i.e. partial vs. total disability status). Dr. Lawley first saw her November 3, 2005 (L 9, Line 20). In part because he opined that her low back condition was degenerative, not traumatic in origin, Dr. Lawley

[12] Originally coined residual earning capacity by the Court in Sobtka v. Chrysler Corporation, 447 Mich 1; 523 NM2d 454 (1994).
[13] Benefits start the day after the date of injury under WDCA Sec. 311 "from the date of injury".
[14] Erroneously noted as 2005 by Magistrate Paige in her original decision. p.3

at that time did not feel it had progressed to the point requiring work restrictions (L 15-16). Dr. Lawley subsequently re-evaluated plaintiff on February 8, 2007 (L 17). The interim history was of a brief but unsuccessful attempt at returning to restricted work for defendant in August 2006 (L 10, lines 20-25). Thereafter, she underwent additional conservative treatment, including injections (L 19). As of Dr. Lawley's February 2007 evaluation he would have allowed a return to work, but at this time with restrictions, specifically: "...allowing her to stand and walk to her tolerance, limited bending and twisting and no lifting more than 15 pounds" (L 23, lines 14-17) (L 30, lines 9-13).

Based upon the totality of expert medical testimony and evidence, I give more credence to the opinions of the treating physician Dr. Best, over that of Dr. Lawley as far as the existence of an impairment due to the work-related back pathology (disc herniation) which basically resulted in total disability from April 5, 2005 up until December 5, 2006. At that point he more precisely placed certain restrictions on her which were fairly consistent with those later imposed by Dr. Lawley in February, 2007. Accordingly, regardless of the lack of any effort on the part of plaintiff to seek work from April 5, 2005 until December 2006, except as it involved the unsuccessful effort to return with restrictions for a few weeks in August, 2006, she is entitled to weekly benefits at the full rate per WDCA Sec. 351(1), MCL 418.351(1) beginning April 5, 2005 to December 4, 2006. The rate, based upon her AWW, is $689.00 per week, capped at the applicable maximum for a 2005 date of injury.

at all times

2. December 5, 2006 –February 2, 2009:

As of December 5, 2006, corroborated by Dr. Lawley's February 2007 exam, Plaintiff was capable of working in a restricted capacity. However, from December 5, 2006 it was not until following WCAC's initial decision which remanded the case to Magistrate Paige for "additional disability proceedings" that any evidence of a vocational evaluation was obtained by either party. Furthermore, at the subsequent proceedings conducted before that Magistrate on April 9, 2009 the only additional proofs offered by the parties consisted of deposition testimony from two vocational experts, Ms. Barbara Feldman for Plaintiff (Px. #2) and Ms. Sandra Pelini for Defendant (Dx. E) (4/9/09 hearing transcript, pp 6-7). And, although plaintiff Harris appears to have been personally present at that hearing (4/9/09 hearing transcript pp 4-5) she was not recalled to the stand as a witness by either party (pp 7-8, 11-12). Likewise, plaintiff was not recalled as a witness for any further testimony at the time of the record proceedings conducted before Magistrate Rochau on December 5, 2012.

Therefore, apart from the expert depositions, the only testimony or evidence as to plaintiff's post-injury vocational activities is as set forth in the transcript from the initial, October 10, 2007, trial proceedings.[15] That did not

[15] The only witness on the November 1, 2007 continued trial date was one of Defendant's, Mr. Edwin Tompkins.

however, include any reference to job search activities after April 4, 2005. (See: 4/7/09 hearing transcript pp. 48-50 and 84-85, when she talked about her unsuccessful effort to return to restricted work for a brief period in August or September, 2006.)

The record contains no evidence of any kind with respect to either viable post-injury occupations suitable to plaintiff's qualifications and training or jobs which were actually available from the December, 2006 to February, 2009 time frame.[16] As mentioned earlier in the instant opinion (p. 3, 5-6, *supra*), it had been found by Magistrates Paige and Rochau that as of early 2009 plaintiff had a then-existing potential earning capacity from minimum wage up to $10.00 per hour (Ms. Feldman) and was capable of applying for part-time work located by Ms. Pelini which paid approximately $180.00 per week (20 hours x $9.00/hr.). While that information is valuable for addressing the period from February 3, 2009 onwards, (see *infra*), it does nothing to supply facts or evidence which would enable the trier of fact to render a determination of wage earning capacity, either theoretical or actual, from December 5, 2006 to February 3, 2009. In the absence of any testimony from plaintiff herself about job seeking efforts (unsuccessful or not, for full or part-time work and at what rates of pay) or expert vocational opinion as to what plaintiff's retained earning capacity was (or could reasonably be found to exist) during that interval, there is no evidence upon which to connect wage loss to physical impairment (effects of the injury) during that 26 month period. Absent such proofs and given that plaintiff was authorized to work within the confines of similar restrictions imposed by both Doctors Best and Lawley, she was not totally disabled, only partially so. However, she provided no basis to measure the difference between her pre-injury wages and the level of retained earning capacity. Accordingly, no partial disability rate can be calculated for that period of time. Therefore, the only option available is to conclude that, on this record, there was no proof presented that any wage loss incurred by plaintiff during that span of time was connected to her work-related back condition. Hence, no weekly benefits in any amount are found due and owing from December 5, 2006 to February 2, 2009.

3. February 3, 2009 – October 8, 2012

As set forth above, it was not until Ms. Barbara Feldman conducted a *"Stokes"* evaluation of plaintiff in early February, 2009 that there exists any evidence concerning what types of jobs were suitable to plaintiff's qualifications, training, within her physical restrictions and at what rate(s) of pay she may reasonably be expected to earn were she to secure such work. Based upon a combination of restrictions imposed by both Dr. Best and Dr. Lawley, Ms. Feldman testified that:

[16] Up to when Ms. Feldman conducted her vocational assessment and labor market survey. Although her report reflects the year 2008, rather than 2009, the later date is consistent with her actual testimony (1F 4, line 18), (1F 5, line 17) and (1F 6, lines 3-4). Evidence of that nature was also not provided by Ms. Pelini prior to a date in late March, 2009 when she met with Plaintiff.

> "The only thing she would be able to do would be entry level type work. Where she would be trained quickly on the job. That may pay her anywhere from minimum wage up to about $10 an hour." (1 F 13)

She added that, given the economy, Ms. Harris would likely have a difficult time securing work (1 F 14, lines 12-21). She later mentioned that it was also possible that the rate of pay could "perhaps [be] a maximum of $12 an hour" (1 F l4-l5). See also; (1 F 16-17; 18-19). Basically Ms. Feldman opined that plaintiff's reasonably expected maximum earning capacity at that point in time was $400.00/week (1 F 16, lines 23-26). No actual labor market survey was conducted by Ms. Feldman in 2009.

Defendant's vocational expert at the time, Ms. Pelini, concluded that as of late March, 2009 Plaintiff had transferrable skills consistent with positions such as: salesperson, dispatcher for maintenance services, telephone solicitor and small products assembler (P 12). A labor market survey disclosed the two open positions as previously mentioned, both part-time, paying $9.00 per hour with one also mentioning commissions (P 12-14). Accordingly, Ms. Pelini reported that plaintiff had a then-existing wage earning capacity of $9.00/hr. (P 14, lines 13-15). She testified that if positions were full time then plaintiff's weekly wage earning capacity would be $360.00 (P 17, lines 6-11). However, both of the open jobs were part-time and entailed one way travel to or from work of between 19 and 35 miles (P 8-10).

Given that plaintiff provided no testimony whatsoever as to any job search efforts that she undertook after April 4, 2005, one can only speculate as to whether: (1) she even looked for work and (2), if so, what type of work or job(s) may have been available and (3) the rate of pay for any such position(s). Absent this, per the vocational experts, the only conclusion that can be reached concerning a retained earning capacity at the time, beginning in early February, 2009, is that: There were jobs available, suitable to plaintiff's qualifications, training and experience, fitting within the confines of the medical restrictions and which paid $10.00 per hour. Therefore, I find that plaintiff's post-injury retained earning capacity as of February 2, 2009 was in the amount of $400.00 per week.[17] This retained earning capacity remains unchanged until late 2012 when Ms. Feldman conducted a further vocational assessment and labor market survey, as was also undertaken by another vocational expert (retained by defendant), being Mr. Guy Hostetler. That effect upon the WEC and weekly rate will be further discussed in the next subsection of this opinion.

For now however, the task is to determine the applicable weekly compensation rate of plaintiff Harris predicated upon a post-injury earning

[17] It is deemed that this hourly rate of pay ($10.00) times a regular 40 hour week would satisfy the criteria for determining a post-injury earning capacity pursuant to WDCA Sec. 371(5) MCL. 418.371 (5) and is consistent with WDCA 301 (5)(d)(ii); MCL 418.301(5)(d)(ii).

capacity of $400.00 per week. The rate calculated per the Agency-generated computer program yields a "partial" rate of $454.57.[18] The rate for 2010 would be $453.37; for 2011 $453.44 and for 2012 (pursuant to a change in October 2012-see below) at $453.03.[19]

3. October 9, 2012 – December 5, 2012

Using the same factual foundation as in the preceding subsection of this Opinion, but with the one change as it relates to plaintiff's earning capacity as of October, 2012, the "partial" rate will likewise require adjustment.

Mr. Guy Hostetler conducted both a vocational assessment/wage earning capacity and labor market survey over the course of a number of days beginning August 20, 2012 (H 9-11) and concluding with a report issued October 9, 2012. Based upon the records and information received (which factually was in large measure the medical, prior Magistrate and Commission decisions, etc., skills profile research and a Transferable Skills Analysis (TSA), he concluded that a number of occupations were suitable to plaintiff's prior education, training and work history. These included: team assembler; cashier; inspector/tester and security guard (H 23, lines 9-13). All were of a light to sedentary nature (H 23-24). Entry level wages ranged from $16,500.00 to $30,230.00 per year (H 24-25). The Labor Market Survey (LMS) he conducted, which entailed the essence of restrictions imposed by Doctors Best and Lawley, located a number of jobs in the Metro Detroit area. (H 27-30). Rates of pay ranged from $9.00 to $14.00 per hour. However, the higher end required "experienced electronics assemblers" (H 28, lines 10-20). One of the security positions was estimated to pay $25,010.00 annually. Broken down to an hourly rate that would be consistent with other suitable positions which paid $11.00 to $12.00 per hour. The latter amount was Mr. Hostetler's opinion as to plaintiff's then-existing earning capacity (H 30-13; 36, lines 17-21; 38, lines 9-12) or up to $480 per week: 40 x $12 (H 36, lines 19-21).

Finally, Mr. Hostetler concluded that the history of plaintiff's job search efforts that she provided him at the time of their meeting in August, 2012, was not very conducive to actually securing work (H 20-21), especially given the current economic climate.

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[18] This is in part predicated upon dropping of the child's dependency-who turned age 18 on Nov. 29, 2008 and the post-injury earnings for the balance of 2009. Calculations were also done for 2010, 2011 and 2012.

[19] See attached print-out (Appendix A) for periods from 2009-2013 which is incorporated herein as it relates to the calculation of benefits for partial disability under WDCA Sec. 361(1) *Lofton* and *Harder*, *supra*. It is further concluded that this manner of calculation is appropriate in this case insofar as the injury predated 2011 PA #226 and the "PIWEC" calculations contained in the Agency computer program which yield different figures for the weekly compensation rate (see Appendix B-1 and B-2).

Ms. Feldman's updated wage earning capacity evaluation conducted in November, 2012 (2 F 4) yielded a current figure of up to $9.00/hour (2 F, 8-9). On this occasion her opinion was predicated upon both an updated TSA and LMS (see report; 11/26/12 Dep. Ex. #2, p.1 and attachments). On cross exam she conceded that if she had testified in her earlier deposition that, as of 2009, plaintiff's earning capacity could be as high as $12.00 per hour, that she would stand by that statement (2F 11, lines 8-10). There were also some jobs believed to be within plaintiff's physical limitations, paying more than $9.00/hour in 2012 ($14.50-$18.00/hr.), but which she discounted based upon the likelihood that plaintiff lacked the necessary qualifications, hence were not suitable (See 2 F 16-17).

As previously mentioned, the fact that plaintiff herself provided no testimony as to any job seeking efforts post-injury means that there is no evidence in the record that any of the jobs located by either Ms. Feldman in her 2012 LMS or by Mr. Hostetler in the LMS which he performed in fairly close temporal proximity, were either "not suitable" or otherwise "not reasonably available".[20] Therefore, the only conclusion which can be drawn from the testimony and evidence presented herein is that had plaintiff been seriously looking for work suitable to her qualifications and training, within physical limitations imposed by the physicians, as of late 2012 there was at least a reasonable likelihood that she would have been able to secure work that paid on the order of $12.00/hr. Accordingly, I find that as of October 9, 2012 plaintiff Harris had a retained earning capacity of $480.00/week ($12 x 40/hr.).

Further, as noted at the outset, even plaintiff in her December 4, 2012 Trial Brief After Trial Remand (p.9) and at the hearing on December 5, 2012 effectively concedes that at present she has a post-injury wage earning capacity ("PIWEC") of $480.00. Per her calculations the current weekly rate (claimed to go back to September 27, 2011-date of the last Magistrate's Opinion on Remand) is $305.00 due to a rate decrease (i.e. subtraction) of $393.07 for such PIWEC. [21] However, I believe that those calculations are erroneous in at least two respects. First, the PIWEC rate adjustment appears to be based upon the statutory language of amended WDCA, [22] and second, a tax filing status different from that which existed at the time of injury and when there have been no further proofs to reflect a change (save for the dropping of the dependency as of the child's 18th birthday – which would be proper even absent additional proofs). Third, as set forth in the last subsection of this decision, I found that the retained earning capacity did not increase to $480.00 per week until October 9, 2012. Thus, the rate reduction would occur at that time, not a year earlier, on September 27, 2011.

PIWEC

[20] The historical information provided by plaintiff to Mr. Hostetler as to her job seeking attempts beginning January, 2012 are, standing alone and without further details, patently insufficient to support a finding that work was "unavailable".
[21] Plaintiff's status now being single with no dependents. See p.10 Plaintiff's Brief.
[22] 2011 PA #226, effective 12/19/11, *supra* – otherwise why the difference in the partial disability rates using essentially identical data input.

In any event, the partial rate per *Lofton*, *Harder*, and related cases calculates the retained earning capacity in a means essentially identical to that which would be the case where the plaintiff had actually returned to work and earned the wages of $480 per week, not merely be imputed to have that figure as a so-called retained or residual earning capacity.[23] So doing for this period as well, yields a "partial" disability rate from October 9, 2012 through December 31, 2012 of $407.40 per week. Due to the tax change for 2013, that partial rate would decrease to $398.99 per week effective January 1. That is also the applicable rate from the date of this decision and ongoing, until further order.[24]

CONCLUSION:

In summary, plaintiff established a work-related personal injury occurring on April 4, 2005 at which time she had an AWW of $1307.80. She is found entitled to benefits for total disability for a period thereafter, as set forth above, and then, subsequently, a period of no benefits given the lack of any proof connecting wage loss to the injury. Thereafter, beginning in February, 2009 and to date, she is found entitled to weekly benefits for only partial disability in light of the finding of a retained earning capacity, with a rate change in the Fall of 2012 per updated testimony of vocational experts, based upon more recent wage earning capacity assessments and contemporaneous labor market surveys.

ORDER:

Therefore, **IT IS HEREBY ORDERED** that plaintiff is entitled to weekly workers' compensation benefits for the periods set forth below and at the rates specified herein, as follows:

1. From April 5, 2005 to December 4, 2006 at $689/ week.
2. From December 5, 2006 to February 2, 2009 at $0 / week.
3. From February 3, 2009 to December 31, 2009 at $454.57/ week.
4. From January 1, 2010 to December 31, 2010 at $453.37/ week.
5. From January 1, 2011 to December 31, 2011 at $453.44/ week.
6. From January 1, 2012 to October 8, 2012 at $453.03 / week.

[23] And this is the premise upon which the calculations of the partial rate were made at figures arrived at for the period February 3, 2009 – October 8, 2012, as set forth in the preceding subsection C.3 of this Opinion. See also: Appendix A. If, however, it were to be later determined that the Workers' Compensation Agency PIWEC calculation program applies, then the applicable rates for plaintiff's benefits based upon a "post-injury wage earning capacity" of either $400.00 or $480.00 per week would be $391.39 and $327.39 per week, respectively. (See Appendix B-1 and B-2 attached hereto).

[24] Which could change in the future depending on a number of possibilities, including but not limited to medical restrictions, the labor market or, even further evidence from the parties which establishes that plaintiff no longer continues to have such level of retained earning capacity.

7. From October 9, 2012 to December 31, 2012 at $407.40/ week.
8. From January 1, 2013 to February 27, 2013 at $398.99 / week and
9. From February 28, 2013 until further order at $398.99 / week.

IT IS FURTHER ORDERED that the above – detailed benefits are subject to offset or reduction for alternative benefits plaintiff was paid by Defendant pursuant to WDCA Sections 354 and/or 358. MCL 418.354 and MCL 418.358.

IT IS ALSO ORDERED that Defendant shall receive credit for all weekly benefits paid to date, including 70% benefits under WDCA Sec. 862(1); MCL 418.862(1), against any accrued benefits owed.

IT IS FURTHER ORDERED that all accrued weekly benefits are subject to payment of interest per WDCA Sec. 801(6), MCL 418.801(6).

WORKERS' COMPENSATION BOARD OF MAGISTRATES

DAVID H. WILLIAMS (253G)

Signed this 27th day of February, 2013, in Pontiac, Michigan.

Workers' Compensation Agency
Verification of Monetary Information
Partial Benefit Rates
All Records

File Name: Debbie Harris v. Chrysler

Last Update: 02/27/2013 14:01:03

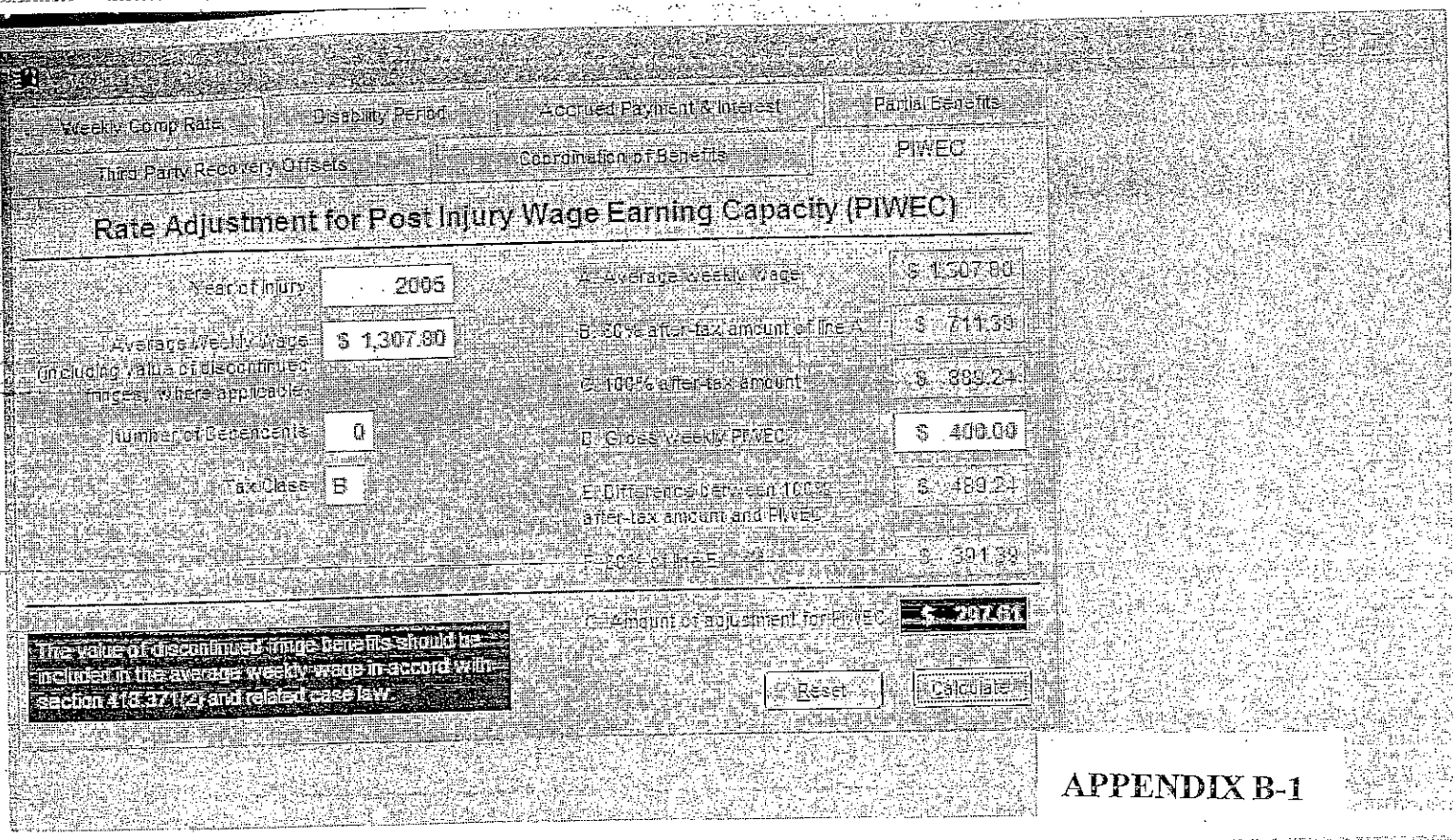
Prior to Injury

Year of Injury:	2005
Gross Weekly Wage:	$1,307.80
Discontinued Fringes:	$0.00
Nbr of Dependents:	0
Tax Class:	2
80 Percent Rate	$711.39 (Including fringes)

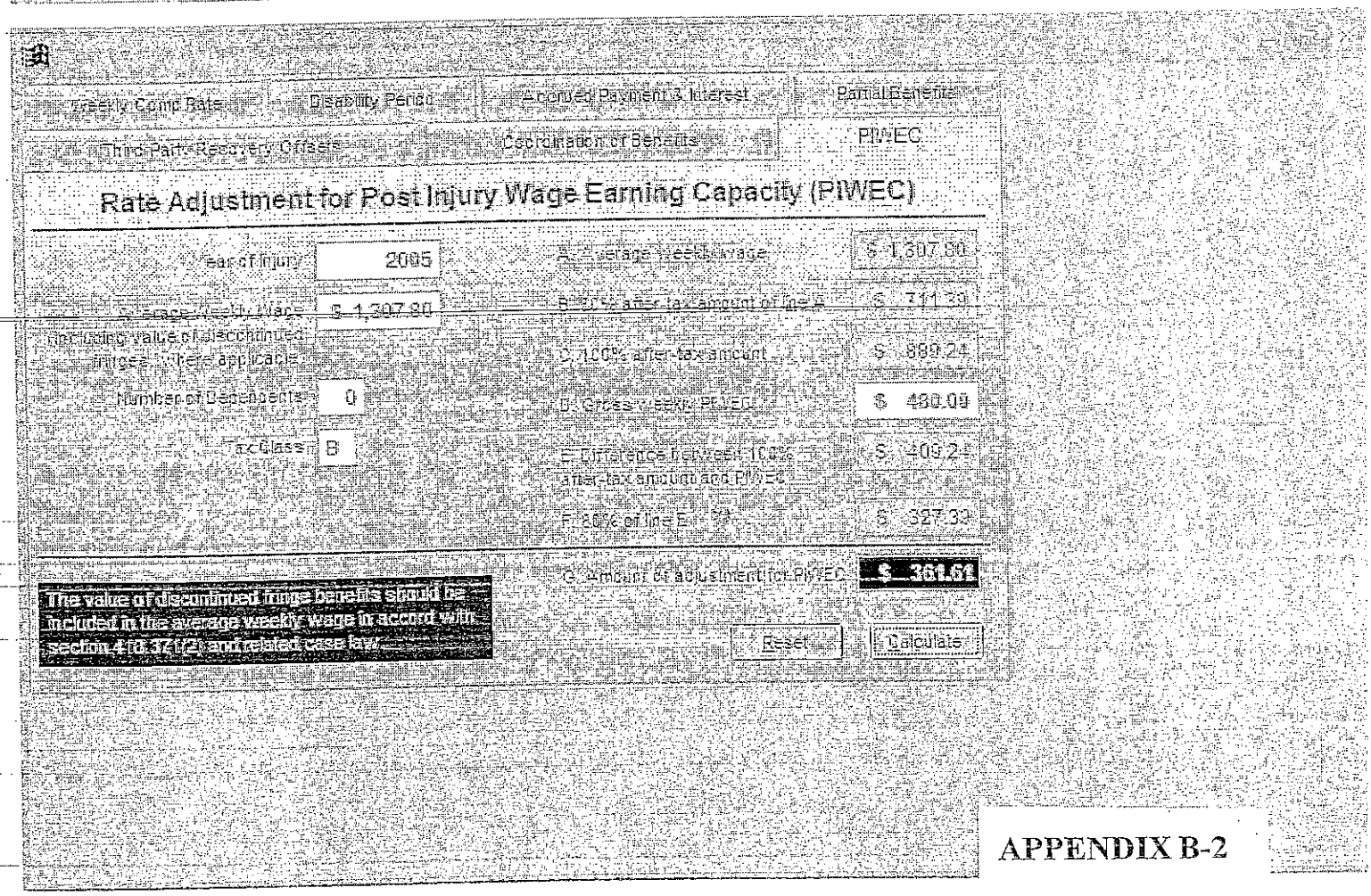
After Injury

Begin Date	End Date	Year Paid	80% Rate Before Injury	Wages Received	80% Rate After Injury	Partial Rate
02/09/2009	02/15/2009	2009	$711.39	400.00	256.82	454.57
01/01/2010	01/07/2010	2010	$711.39	400.00	258.02	453.37
01/01/2011	01/07/2011	2011	$711.39	400.00	257.95	453.44
01/01/2012	01/07/2012	2012	$711.39	400.00	258.36	453.03
10/09/2012	10/15/2012	2012	$711.39	480.00	303.99	407.40
01/01/2013	01/07/2013	2013	$711.39	480.00	312.40	398.99
02/28/2013	03/06/2013	2013	$711.39	480.00	312.40	398.99

APPENDIX A



APPENDIX B-1



APPENDIX B-2

DEBBIE L. HARRIS
SSN: XXX-XX-2582 CASE: 1
PAGE: 1

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