

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F602593

SANDRA FOSTER,  
EMPLOYEE

CLAIMANT

GILSTER MARY LEE CORPORATION,  
EMPLOYER

RESPONDENT

GALLAGHER BASSETT SERVICES,  
TPA

RESPONDENT

OPINION FILED DECEMBER 14, 2010

Upon review before the FULL COMMISSION in Little Rock,  
Pulaski County, Arkansas.

Claimant represented by the HONORABLE RICHARD A. REID,  
Attorney at Law, Blytheville, Arkansas.

Respondent represented by the HONORABLE WILLIAM C. FRYE,  
Attorney at Law, North Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed as modified.

OPINION AND ORDER

The respondents appeal an administrative law judge's opinion filed August 12, 2010. The administrative law judge found that the claimant sustained wage-loss disability in the amount of 70%. After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's opinion as modified. The Full Commission finds that

the claimant proved she sustained wage-loss disability in the amount of 30%.

I. HISTORY

Sandra Diane Foster, now age 53, testified that she attended school through the fifth grade. Ms. Foster testified that most of her employment history involved factory work and manual labor. The record indicates that the claimant began working for the respondent-employer in about 2002. The parties have stipulated that the claimant sustained a compensable cervical spine injury on January 23, 2006. An MRI scan on February 15, 2006 showed "Moderate to large disc herniation with some bony spondylosis at C5-C6 causing fairly severe canal stenosis and cord flattening." Dr. Robert E. Abraham performed an anterior cervical discectomy with fusion at C5-6 on March 7, 2006. The pre- and post-operative diagnosis was "C5-6 HNP."

Dr. Abraham signed a note on May 25, 2006 indicating, "allow work with 25 pound weight restriction, limit overhead work to three hours....The patient is approximately two months out from an ACDF. She works in maintenance in a factory." The claimant testified that she returned to her previous job for the respondent-employer, but that work

restrictions were not provided. Dr. Abraham noted on April 5, 2007, "She has finished up w/PT and still hurting in her neck and shoulder, right arm and right fingers. She is still doing her same job doing maintenance. She has pain when she has to use her arms for any extended period of time."

Dr. Fereidoon Parsioon saw the claimant on July 12, 2007:

This is a 49-year-old white female who is referred for a second opinion. Her date of injury is January 23, 2006. On that date she was trying to get a conveyor belt unstuck and during this process of pulling on the conveyor belt starting having neck and right shoulder pain.

She was x-rayed and her spine was straight. Her pain got worse and she started having numbness of the hand and weakness of the right hand. Subsequently, she was evaluated with an MRI of the cervical spine and underwent surgery with removal of a disc in the neck and fusion by Dr. Abraham in Jonesboro, AR. This was performed on March 7, 2006. She says she was treated with physical therapy after surgery.

The patient states that she still gets on-and-off posterior cervical pain and shoulder blade pain. Her right hand strength was weak before, but is normal now and without weakness. She states she fell a few times after surgery and had right wrist pain and they evaluated her with an MRI of the right wrist which was normal....

I explained to the patient that she has done excellent after her surgery and her fusion is completed. Her pain is mainly due to a muscular-

type pain which she needs to overcome with continuation of the exercises. She is not currently doing any kind of neck and upper extremity exercises and I gave her instructions regarding this. I also gave her an exercise book.

According to Ms. Monica Fraser, RN, who is her case manager, Dr. Abraham has not given the patient her PPI rating and they are asking me to do so. I believe that her PPI rating is 12% to the whole person. In my opinion, she is at MMI today and she can work with regular duty without any restrictions.

She needs to quit smoking. She will be seen as needed.

The record indicates that Dr. Abraham released the claimant to work on August 7, 2007 with the limitations, "No lifting over 30 lb. - no overhead work over shoulder height until return visit." Dr. Abraham noted on November 8, 2007, "Pt has been working within her restrictions and she is able to do her job. She has some R arm pain with numbness especially when she works overhead....Continue work with previous restrictions."

The claimant followed up with Dr. Abraham on July 14, 2008: "Ms. Foster is here for complaints of neck pain radiating down both shoulders and arms. She states the pain is getting worse since Nov. '07. She has pain in the R arm radiates to the hand. She also has some numbness in the hand and arm. She is still at work on restrictions. She is

having an increase in her pain with work." Dr. Abraham kept the claimant off work "indefinitely" on August 18, 2008.

The claimant's testimony indicated that she did not work after August 2008. The parties have stipulated that the claimant's healing period ended on November 18, 2008, "with a residual 12% whole-body anatomical impairment."

Heather Taylor, a vocational rehabilitation consultant, began working with the claimant on July 10, 2009. A Functional Capacity Evaluation was done on October 19, 2009:

Ms. Sandra Foster is referred to Functional Testing Centers, Inc. for a comprehensive functional capacity evaluation for the purpose of determining her current functional status. Ms. Foster is referred with reports of on-going neck pain that originated as the result of a work related accident. Ms. Foster is referred to FTC by Dr. Robert Abraham of Jonesboro, AR....

The results of this evaluation indicate that Ms. Foster gave a reliable effort, with 44 of 44 consistency measures within expected limits....

Ms. Foster demonstrates functional limitations with bi-manual material handling at 15 lbs. for lifting and carrying on an Occasional basis. Ms. Foster exhibits decreased use of the RUE as compared to an average worker and performed Reaching Overhead and Reaching with a 1 Lb. Weight at the Occasional frequency level only. Ms. Foster exhibits limited AROM of the cervical region and performed all activities that required cervical deviation from neutral with poor tolerance....

Overall, Ms. Foster demonstrated the ability to perform work in the SEDENTARY classification as defined by the US Dept. of Labor's guidelines over the course of a normal workday with limitations as noted above....

Heather Taylor reported on October 26, 2009, "She completed an FCE on 10/19/09, which indicated that she gave a reliable effort. In summary, Ms. Foster is able to occasionally lift up to 15 lbs; can constantly sit/stand/walk/balance/stoop; can frequently kneel/crouch/reach/push/pull; and occasionally carry up to 15 lbs. On 10/26/09 I spoke with her employer again about the possibility of her return-to-work within her restrictions (I last spoke with her employer in August and he indicated that they may have a position for her to return to, but needed to confirm her restrictions). On 10/26/09 I provided the employer with her restrictions from the FCE. The employer advised they would review and get back with me to discuss any possible job option for Ms. Foster."

A pre-hearing order was filed on March 8, 2010. The claimant contended that she was entitled to additional temporary total disability benefits. The respondents contended that the claimant was not entitled to additional temporary total disability. The respondents contended that

there was "no wage loss, pending further reports from Heather Taylor." The parties agreed to litigate issues including "wage loss/permanent partial disability benefits."

The respondents' attorney questioned Dr. Abraham at a deposition taken April 23, 2010:

Q. As far as her attempting to return to work, what restrictions would you put on her now?

A. I don't think I addressed her returning to work. I think she's been off work.

Q. I understand. But has her condition stabilized at this point?

A. If her condition is the same as it was when I put her off work indefinitely, I would probably keep her off indefinitely.

Q. You would not allow her to even attempt sedentary or light duty?

A. If she had trouble with that, you know, when she goes to work, if she continues to have difficulties, I would probably hold her off. Now, if somebody else wanted to let her go back to work, that would be fine, you know. That would be up to them.

Q. If she had a functional capacity evaluation and they indicated that she could go back to work in the light category, would you have any problems with her doing that?

A. I wouldn't have any problem with somebody else saying that....FCEs are pretty extensive and everything, and they would give you a pretty objective finding as to what she would be able to do....

The claimant's attorney questioned Dr. Abraham:

Q. Now, Doctor, she told us in a prior hearing that the work she did when she was working full-time before she got hurt, she was a lead person on an assembly line at Gilster Mary Lee, and that in doing this, it means that if the line broke down she was responsible for getting it going again, regardless of what it required, lifting overhead, lifting heavy things, crawling, or doing anything like that. Would you recommend that she do that now?

A. No.

Rick Byrd, the disability analyst who performed the claimant's Functional Capacity Evaluation, reported on May 6, 2010:

A job description for the position of Sugar Free Gelatin Packer with Gilster (sic) Mary Lee was obtained for the purpose of comparing the functional aspects of this job with the functional abilities exhibited by Ms. Sandra Foster during a FCE on 10-19-2009.

When comparing the physical demands of this position with the physical performance that Ms. Foster exhibited during her FCE, she DOES MEET all of the physical demands as described in this written job description.

Heather Taylor informed a representative of the third-party administrator on May 18, 2010, "Per your request, an onsite Job Analysis was completed with Ms. Foster's employer for the position of *Sugar Free Gelatin Packer*. Enclosed is a written analysis of the job, as well as video footage of

the job being performed." The enclosed Job Analysis indicated that the Physical Demand Classification was "Light." The Job Analysis described the lifting involved: "Lift bundle of (25) boxes weighing apprx 7-8 lbs. or lift 2 lb. box of gelatin." The Carrying description was "Same as lifting requirements."

A hearing was held on May 28, 2010. The claimant testified that she was physically unable to perform the position of Sugar Free Gelatin Packer: "No, it's very fast and you have to reach with your arms, and no, those lines are fast. That's not something that I could do. I could lift something on an occasional basis. He said that I could use my arms repetitively. So, that job requires the repetitive use of your arms; you're constantly picking up your cartons and the cartons come down off those scales; they fall over, you've got to set them up; and you're using them making your cases and putting them in and folding them down - you're repetitively using your arms."

An administrative law judge filed an opinion on August 12, 2010. The administrative law judge found, among other things, that the claimant "has sustained a loss of earning capacity in the amount of 70% over and above, and in

addition to her anatomical impairment as a result of the January 23, 2006, compensable injury." The respondents appeal to the Full Commission.

## II. ADJUDICATION

Ark. Code Ann. §11-9-522 (Repl. 2002) provides:

(b) (1) In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity.

(2) However, so long as an employee, subsequent to his or her injury, has returned to work, has obtained other employment, or has a bone fide and reasonably obtainable offer to be employed at wages equal to or greater than his or her average weekly wage at the time of the accident, he or she shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence.

(c) (1) The employer or his or her workers' compensation insurance carrier shall have the burden of proving the employee's employment, or the employee's receipt of a bona fide offer to be employed, at wages equal to or greater than his or her average weekly wage at the time of the accident.

In the present matter, the Full Commission finds that the claimant proved she sustained wage-loss disability in the amount of 30%. Although the claimant is relatively

young, only age 53, the claimant left school after the 5<sup>th</sup> grade and therefore has very little formal education. The claimant's work history involves mostly unskilled manual labor. The claimant was employed as a factory worker for the respondents and sustained a compensable injury to her cervical spine on January 23, 2006. The claimant subsequently underwent a cervical fusion by Dr. Abraham, and the record shows that the claimant's physical capacity to perform manual labor has decreased as a result of the compensable injury and resulting surgery. The claimant was assigned a 12% anatomical impairment rating on July 12, 2007. The parties stipulated that the claimant sustained 12% anatomical impairment as a result of the compensable injury and surgery.

The claimant participated in a Functional Capacity Evaluation on October 19, 2009. The claimant gave a reliable effort during the evaluation and it was determined that the claimant could only perform work in the Sedentary classification. The respondent-employer thereafter attempted to place the claimant in the position of Sugar Free Gelatin Packer. The claimant testified, however, that she was physically unable to perform the physical duties

required of this position. Suzanne Alma, an individual who has worked for the respondents over three decades and is knowledgeable about the Sugar Free Gelatin Packer position, corroborated the claimant's testimony that the claimant was physically unable to perform the repetitive work required for a gelatin packer. We note the Job Analysis describing the Gelatin Packer position as "Light" duty, but we reiterate the results of the Functional Capacity Evaluation showing the claimant physically able to perform only "Sedentary" work duties.

The Full Commission therefore finds, based on the evidence in the present matter, that the respondents did not prove that they provided the claimant with a bona fide offer of employment within the claimant's physical restrictions. We find that the claimant was motivated to return to work but was rendered physically unable to perform full-time manual labor in a factory setting as a result of the compensable injury, surgery, and anatomical impairment.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved she sustained wage-loss disability in the amount of 30%. We therefore affirm as modified the administrative law judge's award of

wage-loss disability. The Full Commission finds that the compensable injury was the major cause of the claimant's 30% wage-loss disability. The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(a) (Repl. 2002). For prevailing in part on appeal, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority opinion finding that the claimant was entitled to a 30% loss in wage earning capacity and the finding that the respondents did not provide the claimant with a bona fide offer of employment. In my opinion, the claimant has failed to meet her burden of proof.

In my opinion, the claimant was given a bona fide offer of employment by the respondents. After reviewing the record, it is apparent that the respondents made a bona fide offer of employment to the claimant. The job description of the sugar-free gelatin packer was given to Rick Byrd who did the claimant's functional capacity evaluation. The claimant's functional capacity evaluation demonstrated that the claimant was able to work in the sedentary category. She was able to occasionally lift up to 15 pounds and could constantly sit, stand, walk, balance, stoop, and frequently kneel, crouch, reach, push and pull, and carry up to 15 pounds. The claimant had 44 of 44 reliability factors. Mr. Beard, upon reviewing the job description provided by the respondent employer stated:

A job description for the position of sugar-free gelatin packer with Gilster Mary Lee was obtained for the purpose of comparing the functional aspects of this job with the functional abilities exhibited by Ms. Sandra Foster during a FCE on 10/19/2009.

When comparing the physical demands of this position with the physical performance level that Ms. Foster exhibited during her FCE, she DOES MEET all of the physical demands as described in this written job description.

In fact, when the claimant's treating physician was confronted with the FCE and the claimant's return to work, Dr. Abraham testified as follows:

Q If she had a functional capacity evaluation and they indicated that she could go back to work in the light category would you have any problems with her doing that?

A I wouldn't have any problem with somebody else saying that.

Q Well, would you defer to an FCE that says she could --

A FCEs are pretty extensive and everything, and they would give you a pretty extensive finding as to what she would be able to do.

Q I've got too many papers here, Doctor. Well, I'm not going to have you review the FCE, but if the FCE says that -- it was done on October 19<sup>th</sup> of 2009.

A Uh-huh.

Q That she could occasionally lift up to 15 pounds, which is about a third of the day, constantly sit, stand, walk, balance, stoop, and frequently kneel, crouch, reach, push, and pull, and passed 44 out of 44, is there any reason from your standpoint she couldn't try to go back and do that?

A If, like I said, if somebody wanted to let her go back and do that, I wouldn't, you know, I wouldn't have any objection to it.

Further, Dr. Abraham testified during his deposition:

Q Doctor, based on your exams from an objective standpoint, I'm talking about the spasms are gone, tenderness is gone, and neurological deficits -- based on the objective findings, is there any reason why she can't work?

A There is no reason why -- I don't think there's a reason she couldn't do the things that are listed, you know, on her FCE, or, you know, the times that I gave her, you know, return to works. You know, like I said, I held her off indefinitely because of her pattern, you know, when she is working in her exams.

Q Well, when you were looking at there and she had those physical exams, you thought she could lift up to 30 pounds as long as she stayed with no overhead work, isn't that right?

A Yes, sir.

Q And you felt like she could do that from a safety standpoint?

A Yes, sir.

The evidence demonstrates that the claimant has other health issues that might keep her from working for the respondent employer. However, the claimant's compensable injury is not what is keeping the claimant from working. The respondent employer has offered the claimant light duty and she refuses to work. Therefore, I find that the claimant is not entitled to any wage loss disability benefits in

addition to her permanent anatomical impairment.  
Accordingly, for all the reasons set forth herein, I  
respectfully dissent from the majority's award of benefits.

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KAREN H. MCKINNEY, COMMISSIONER