

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G900234

RAMONA K. RUTH, EMPLOYEE

CLAIMANT

EVERGREEN PACKAGING, LLC, EMPLOYER

RESPONDENT

**ACE AMERICAN INS. CO./ESIS, INC.,
CARRIER/TPA**

RESPONDENT

OPINION FILED JUNE 29, 2022

A hearing was held before ADMINISTRATIVE LAW JUDGE KATIE ANDERSON, in Pine Bluff, Jefferson County, Arkansas.

Claimant was represented by Mr. Gary Davis, Attorney at Law, Little Rock, Arkansas.

Respondents were represented by Mr. William C. Frye, Attorney at Law, North Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-captioned claim on March 31, 2022, in Pine Bluff, Arkansas. A Prehearing Order was previously entered in this case on February 2, 2022. The Prehearing Order has been marked as Commission's Exhibit No. 1 and was made a part of the record without any objection from the parties.

Stipulations:

During the prehearing telephone conference, the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. An employer-employee relationship existed on or about May 17, 2018, when Claimant sustained a compensable work-related injury to her right shoulder.

3. At the time of the compensable injury, Claimant was earning an average weekly wage of \$1300.51, entitling her to temporary total disability (TTD)/permanent partial disability (PPD) compensation rates of \$673.00/\$505.00.

Issues:

The parties agreed to litigate the following issues:

1. The extent of Claimant's permanent physical impairment rating.
2. Whether Claimant is entitled to wage loss disability benefits.
3. Attorney's fees.
4. All issues not litigated herein are reserved under the Arkansas Workers' Compensation Act.

Contentions:

The following contentions were submitted by the parties:

The Claimant contends that admitted compensable injuries were sustained May 17, 2018, to the right shoulder. The primary treating physician is Dr. Clay Riley. Dr. Riley has issued an impairment of 7% to the body as a whole. Respondents accepted and paid an impairment of 1% to the body as a whole pursuant to a separate medical evaluation. Respondents have failed to return the claimant to work, while indicating that they were trying to make something available to her. Claimant is entitled to a wage loss disability determination. These additional benefits are controverted for purposes of attorney's fees. Claimant also reserves the right to pursue other benefits to which claimant may become entitled in the future.

Respondents contend that the Claimant sustained a right shoulder injury on May 17, 2018. She was initially treated by Dr. Eric Gordon. She was then transferred to the care of Dr. Clayton Riley. Dr. Riley performed surgery and sent the Claimant for physical therapy. On April 6, 2020, Claimant underwent a Functional Capacity Evaluation that indicated she could return to work in the medium work category. Respondents then had the evaluator from Functional Testing Centers,

Inc., come to the Evergreen plant to review the job positions, and it was determined that she could not return to her previous job. However, Respondents did an Americans with Disabilities Act (ADA) evaluation for accommodations, and using the Functional Capacity Evaluation, determined that there were indeed jobs available at the plant within the Claimant's restrictions. The Claimant was offered a position but failed to return to work for the Respondents. Respondents contend that the Claimant is not entitled to wage loss disability at this time.

In addition, the Claimant was evaluated by Dr. Kirk Reynolds at OrthoArkansas. Dr. Reynolds assigned a one percent (1%) impairment rating, which Respondents accepted and paid.

Summary of the Evidence:

The record consists of the hearing transcript of March 31, 2022, and the exhibits contained therein. Specifically, the following exhibits have been made a part of the record: Commission's Exhibit No. 1 included the Prehearing Order entered on January 26, 2022, and the parties' responsive filings; Joint Exhibit No. 1 was forty (47) pages in length and consisted of medical records; Respondents' Exhibit No. 1 was four (4) pages and consisted of medical records; and Respondents' Exhibit No. 2 was a total of one hundred and forty-five (145) pages. Pages one (1) through eighteen (18) were employment records and forms from Respondent-Employer; pages nineteen (19) through eighty (80) were sections of the 2016-2020 Labor Agreement; and pages eighty-one (81) through one hundred and forty-five (145) were sections of the 2020-2024 Labor Agreement.

At the conclusion of the hearing, the Commission requested that the parties submit briefs on the issues litigated. The parties' briefs have been blue-backed and are incorporated into the hearing transcript of March 31, 2022.

Witnesses:

During the hearing, Ramona Ruth (Claimant, used interchangeably herein), testified on her own behalf. Will Huyck, Tiffany Curry, Tonya Reynolds, and Keith Bragg testified on behalf of Respondents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the evidence and other matters properly before the Commission, and after having had an opportunity to hear the witnesses' testimony and observe their demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2012):

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The stipulations set forth above are hereby accepted.
3. The Claimant proved her entitlement to a 7% permanent physical impairment to the body as a whole for her right shoulder injury of May 17, 2018.
4. The Claimant proved she sustained wage-loss disability in the amount of 18% in excess of the 7% anatomical impairment.
5. The Claimant's attorney is entitled to a controverted attorney's fee on all indemnity benefits awarded herein, pursuant to Ark. Code Ann. § 11-9-715.

CASE IN CHIEF

Hearing Testimony:

Claimant:

Claimant was fifty-three (53) years old at the time of the hearing. She completed high school and two years of college. She testified that she began working for Respondent-Employer in November of 2000 and worked full time until her last day of work on April 12, 2019. As for her work hours, Claimant testified that she worked a swing shift, which consisted of eighty (80)

hours for two (2) weeks and then eighty-eight (88) hours for the next two weeks. She also stated that she worked overtime hours. When she began working for Respondent-Employer, she was a Relief Process Specialist, and her base pay was a little over \$14.00 per hour. At that time, her job duties were to feed the paper shredder. She was required to be on her feet all day, to lift, and to push and pull. Claimant stated that she had moved around during her nineteen (19) years with Respondent-Employer, and in 2019, she was an Assistant Operator, which also required her to be on her feet all day and involved lifting, bending, pushing and pulling. Her Assistant Operator base pay was a little over \$27.00 per hour. She described her daily work as follows:

Okay. Butt rolls, as well, to put on a buggy after the completion of attaching the paper, big roller paper to the other paper that's running in the extrusion machine, from that, once it's finished, it's on a conveyor like sort of belt. It comes out and take a - - oh, what is the device called? It's a block of steel, where you can just - - the paper would slide on the butt roll, and then, we'd have to, you know, roll it to the buggy and lift it up. Once the buggy gets so high, we'd have to lift those butt rolls up and continue to put it, you know, into the buggy to stack to how high we can load it.

Claimant explained that the butt rolls looked kind of like a log where the end of the paper rolls (hence the name). She testified that the rolls were one hundred and seven and three quarters (107 and 3/4) inches in length, and that all of the positions she had while working for Respondent-Employer involved the use of her right arm in lifting the rolls.

On May 17, 2018, Claimant stated that she was injured while working for Respondent-Employer. She explained the incident as follows:

Well, I was working with what we call a suspended roll. That's where the actual whole roll of paper is taken from one machine, which is the extruder - - extrusion machine and placed in the floor to be prepped to go into what we call the wider machine. And with this particular process we have - - oh, I'm just going blank. We have the crane that picks it up and take it. We have to turn the roll around; so it can be able to go into the other machine correctly.

Claimant stated that when she turned the suspended roll and stopped it, she felt pain in her right shoulder.

As for her medical treatment, Claimant testified that she underwent two surgeries on her right shoulder, performed by Dr. Riley on April 24, 2019, and on October 14, 2019. Later in June of 2020, Dr. Riley opined that she had reached maximum medical improvement and gave her an impairment rating. She also stated that she had a one-time visit with Dr. Kirk Reynolds; however, she was still under the care of Dr. Riley at the time of the hearing. She stated that her current medication was for her right shoulder injury.

Claimant stated that she had not worked since her first surgery in April of 2019. However, she testified that she would like to return to work “as long as [she] can’t get hurt.” As for returning to work, Claimant testified that she had one meeting with Tonya Reynolds and visited with her over the phone after the meeting. Claimant said that she and Ms. Reynolds discussed her coming back to work and finding a job that she could do within her limitations. When asked about the discussion, Claimant testified that:

Okay. So on that particular meeting, which was with just Tonya only, it was a job offer to work in Finishing and Shipping on the bottom; and so I had questions about the job. I didn’t decline the job. I just had questions pertaining to the job, because of [sic] it was the bottom job and it was, actually, harder work than what I was already doing upstairs; and so - - so we talked, basically, you know, on that - - about that. And she said that, you know, they would get back with me; and so we did have a second meeting with Tonya, but it was also with Tiffany Curry as well.

When asked about the second meeting, Claimant stated that:

That meeting, they discussed again with me about the Finishing and Shipping job, which I had paperwork of what the job requires. I got paperwork on everything that it does, which verified that it was - - it would be hard on my shoulder; so - - and I told them I did not want to get hurt. So what they did, they talked to me about trying to find me something based on my restrictions. They gave me paperwork for - - it’s accommodations for the job to fill out to see what I could do, and then,

they told me that they were sending my doctor, Riley, paperwork; so he could fill out what I could do, based on the job.

According to the Claimant, on or around August or September of 2020, she completed her paperwork, and submitted it to Respondent-Employer. Her understanding was that Ms. Reynolds or someone at Respondent-Employer would reach out to her based on the paperwork received from her doctor, and they would find her a suitable position. She clarified that she did not have any additional meetings with Respondent-Employer other than the one with Ms. Reynolds alone, and the one with Ms. Reynolds and Ms. Curry. Claimant testified that she “called and called” trying to reach Ms. Curry and Ms. Reynolds for follow up, and she also called the company headquarters in Memphis to reach Terry Harnett. Ms. Harnett and Claimant communicated regarding her vacation pay, but not about her job. There was no further communication until 2021, when Claimant went to Respondent-Employer’s office and spoke to Ms. Curry regarding some vacation pay that she had not received. Claimant testified that she raised the issue of her job with Ms. Curry that day. She stated, “The next thing I knew, I got a call from the lawyer, and I didn’t really understand all of that, you know, so since I was seeing her in person...” Claimant stated that there had been no further discussions about her returning to work for Respondent-Employer.

When questioned further regarding the Finishing and Shipping job that Ms. Curry had offered her, Claimant testified that she had concerns that the job would be more physically harmful to her shoulder than what she was doing at the time she was injured, and that it would be a reduction in hourly pay for her from her previous rate of approximately \$27.00 down to approximately \$21.00. Claimant further testified that if she went back to work for Respondent-Employer at a lesser rate of pay, it would not impact her time with the company or retirement purposes or her health insurance, which the Claimant still had as of the date of the hearing. Lastly, she stated that she was not sure if Respondent-Employer received any information back from Dr. Riley about her

activity restrictions. She stated that she had not been in communication with anyone from Respondent-Employer since 2020.

Claimant testified that she had pain in her shoulders every day. The pain was throbbing at times and sharp pain at other times and was worse some days than others. Reaching and lifting would increase the pain. She had trouble sleeping on her right shoulder, and she took hydrocodone approximately six (6) to eight (8) times a month for pain.

On cross-examination, the Claimant testified that she filed for social security disability in 2020. Claimant included in her application for social security disability that she was unable to work due to the following conditions: neck pain, bilateral tennis elbow, fear of COVID-19, depression, panic attacks, shortness of breath from occasional bronchitis, bilateral carpal tunnel syndrome, and knee problems. The Claimant stated that the medication she was currently taking also helped her knee pain, that had been present for several years, and the symptoms from her carpal tunnel syndrome. Lastly, Claimant testified that she was looking for work in customer service so that she could work remotely.

Claimant testified that after her injury, she returned to work on light duty and was working in the office for a year. Respondent-Employer accommodated her for one (1) year until she had her surgery. She admitted that Respondent-Employer made her a job offer in Finishing and Shipping and put together a plan for her transition to return to work. In the plan, Claimant was to participate in safety and fire training, but Claimant was unsure at first why she would have to go through new-hire training because, according to the Claimant, she did not see the transition plan and could not remember if Ms. Reynolds or anyone else reviewed the transition plan with her. However, she testified that by the end of her meeting with Ms. Reynolds, she understood the reason for the training.

Claimant further testified that:

Q: Okay. And when I asked you this question, “If they had told you that this was within the FCE restrictions, even though it’s a bottom job, would you have taken it?” And you told me, “If they would have paid me what I was making, yes.” That still true today, isn’t it?

A: I also said about my shoulder as well, that - -

Q: Okay.

A: - - if it was a job, if they gave me a job in Finishing and Shipping that could accommodate my injuries, because what they were trying to give me was a job, a bottom job, that would have harmed my injury versus - - it would have caused more problems.

Q: Okay. Well, let me ask you - -

A: And the pay was a problem as well.

Q: All right. Well, I asked you, - - well, let’s assume - - well, I asked you if the FCE restrictions, if it was within the FCE, you told me that you would have a problem with that job, didn’t you?

A: Yes.

Q: Okay. Then on page 28, “Since it’s \$7.00 less an hour you did not want that job?” “Yeah, I didn’t think it was fair that I had been out there twenty years and they wanted to put me at rock bottom, which is no problem but you want to dock my pay. I didn’t get hurt on purpose.” I can understand you not getting hurt on purpose, but you clearly told me you didn’t want that job, didn’t you?

A: Because - -

Q: Yes or no, did you or did you not tell me that?

A: Yes, sir.

Q: Okay. Now, you are a member of the Labor Union out there, is that correct?

A: Yes, sir.

Claimant further testified that she was unsure how the new labor union agreement determined what employees were supposed to make per hour each year, but she understood that each department

had a different amount of pay. The pay started at the bottom and then an employee would work their way up, just as she had done when she first started her job in the Extruder Department.

As for the position in Finishing and Shipping, Claimant testified that after that job offer was made, she completed a request for accommodations, stating that she had problems lifting, reaching overhead and a weight limit with lifting of twenty (20) pounds frequently and fifty (50) pounds occasionally. Claimant testified that she had not ever worked the job in Finishing and Shipping but had only helped in that department. Thus, she was not familiar with all of the requirements for the job. Per Claimant's testimony, she was aware that if she accepted the Finishing and Shipping position, she would be in line for a job as a Service Operator. Claimant testified that she was aware that a Service Operator position consisted of primarily driving a rover all day, and she testified that she could do that type of work.

As for her rate of pay, Claimant testified that she was cautious about the Finishing and Shipping job because it was at a lesser rate of pay than she was currently making, and she also was concerned about re-injury to her shoulder. Claimant testified on cross-examination that she was a member of the union, and she had spoken to the union rep regarding her rights. However, she also testified that she was not aware that per the labor union agreement she would have received her actual, regular hourly rate (that she was previously making in her department) for ninety (90) days after she began the job in Finishing and Shipping, and then she would have received a figure that was halfway between her regular rate and the new rate for two hundred and seventy (270) days. When asked if that agreement would have been acceptable to her, Claimant responded:

I'm sorry, Your Honor. I guess, I had a problem with being out there for so long and making what I was making, which was close to \$28.00 so that was a problem. The fact that even starting out for a short while, I got the job duties. I talked with some people down there and it would have been hard on my shoulder, so even if just a little bit, I'm sorry, (witness crying) - - even if just a little bit of working, I didn't want to get my shoulder hurt again. So I felt like they could have found me

something that could have accommodated me, because they accommodated me before working in the - - in the office and so that's pretty much it.

According to the Claimant, she was also having problems with both of her knees, which prevented her from bending and stooping. Although she stated that her knee problems were not as bad when she was previously working for Respondent-Employer, she testified that she had recently had surgery on her right knee and was due for surgery on her left knee and admitted that she would not have been able to do the job for Respondent-Employer because of her knee issues.

Claimant testified that she was receiving unemployment benefits from September of 2020 until March of 2021; however, it had "been a while" since she had looked for work. Her reason for not looking for work was because she had an "open disability case going on and also [she had] been having different problems." Further, she stated she had been going back and forth to the doctor and was still employed at Respondent-Employer, so she had taken a break from looking for a job. She clarified that she had not been terminated from Respondent-Employer and that she had been able to keep her health insurance. As for her other health issues, Claimant stated that she was having trouble with her bilateral knees, her right shoulder, bilateral carpal tunnel syndrome, bilateral elbows, and depression.

When questioned regarding her Functional Capacity Evaluation, Claimant stated that Dr. Riley opined that she could perform work withing the FCE of medium work, and she agreed with the evaluation results, including the overhead work restrictions. Claimant stated in her deposition testimony that she could "do the fifty pounds, but [she was] not going to carry fifty pounds all the time." When asked by Respondents' counsel if that's what she had decided she could do, Claimant responded, "Yes, sir."

On re-direct examination, Claimant testified that per the job description of the Finishing and Shipping job, the “rolls” that were referenced in that job description weighed in excess of fifty (50) pounds and that a requirement of that job would be handling the rolls.

Also, on re-direct, Claimant testified that to her knowledge, Respondent-Employer did not contact Dr. Riley to determine his opinion as to whether Claimant could perform the job in Finishing and Shipping based on the handling of the rolls. She also was not aware that Respondent-Employer had contacted Dr. Reynolds or the Functional Capacity Evaluation administrator to determine if they had an opinion as to whether Claimant could perform the Finishing and Shipping job. On re-direct examination, Claimant’s counsel noted that in a transition plan put together by Respondent-Employer, there was a note at the bottom of the plan that stated, “Return to full duty.” When asked if Claimant had ever been released to return to full-duty work by her physicians, Claimant responded, “No, sir.”

Also on re-direct examination, Claimant testified that even if she had not had the compensable right shoulder injury, she would not have been able to return to her old job because of her knee problems. She could do the old job with the carpal tunnel syndrome in both hands and wrists, but not without pain. As for her knees, she had upcoming surgery scheduled on the left knee, and had previously had surgery on her right knee. Here, Claimant testified that she could have performed her old job with her knee issues, and that it was her shoulder that had prevented her from doing the old job.

Claimant further testified that she was unsure if any of the jobs or prospective jobs would be in compliance with her activity restrictions. She added that in the rover job (much like a forklift), she would be using a steering wheel, and manipulating that with her right arm would be difficult.

On re-cross examination, Claimant clarified her earlier testimony, and she reiterated that based on the issues with her knees alone, without considering the shoulder injury, she could not return to her regular job or the modified job because they both required standing, walking and bending all day. She also clarified that Dr. Riley had opined that she could work within the medium work classification and that she was released to return to work with restrictions on overhead lifting. Claimant admitted that those restrictions had not changed. When asked by Respondents' counsel if the Functional Capacity Evaluation stated that she could do any work below the shoulder level, Claimant replied, "Yes, sir." Claimant also testified that the rover (forklift) job would be below the shoulder just as in driving a car, which Claimant admitted that she could also do.

Will Huyck:

Mr. Huyck testified that he was the Environmental Health and Safety Manager for Respondent-Employer and was responsible for the investigation and subsequent activities when an employee had been injured at work.

Mr. Huyck testified that the rates of pay for particular positions was set by the labor agreement. By way of example, Claimant's job as an Assistant Operator (the position she held when she injured her left shoulder) was determined by the collective bargaining agreement and set at \$26.55 per hour as of September 1, 2019. Mr. Huyck clarified that length of employment is irrelevant, and per the bargaining agreement, the employees in the same job classification have the same rate of pay. Mr. Huyck also testified that per the collective bargaining agreement, the Respondent-Employer was also confined to the constraints of the job classification, in that there was no room for modification or reasonable accommodations.

Mr. Huyck testified that in trying to determine if Claimant could return to her previous job as an Assistant Operator, Respondent-Employer requested a Functional Capacity Evaluation to determine her restrictions, which showed no overhead lifting. As a result, the determination was made that Claimant could not return to her previous position as an Assistant Operator. Mr. Huyck testified that afterward, he reviewed the vacancies in the mill to see if there were jobs within Claimant's restrictions. He spoke with Keith Bragg, the Business Unit Manager for the Finishing and Shipping area, and they determined that Service Operator II in the Finishing and Shipping department was suitable for Claimant with her overhead lifting restrictions. He also clarified that the "rolls" - - referenced in the document for the Finishing and Shipping Roll Handling Procedures for a Service Operator II - - weigh from seven (7) tons to approximately one (1) ton; however, the rolls were conveyed via conveying systems and picked up by a clamp truck. Mr. Huyck stated that there was not any job duty in the Service Operator II position (in the Finishing and Shipping department) that would require an employee to lift anything over fifty (50) pounds.

On cross-examination, Mr. Huyck stated that there were no references to any amount of weight based on the job description for the Service Operator II position in Finishing and Shipping. He further stated that he was the one that opined that the Claimant could perform the Service Operator II job in Finishing and Shipping and he did that based on the job description. He also stated that to his knowledge, the job description was not sent to Dr. Riley, and that the document referencing the Roll Handling Procedures for a Service Operator II would not have been sufficient for Dr. Riley to make a determination as to whether or not the Claimant would be physically able to perform the job.

Mr. Huyck testified that regarding the Transition Plan for the Claimant (that he authored), the reference to "full duty" at the bottom of the page would have included any of the restrictions

that the Claimant had as a result of her work injury. Lastly, Mr. Huyck stated that he was unaware if the informational form for Dr. Riley’s review as to the Claimant’s disability and reasonable accommodation had been sent to Dr. Riley or not. He said that would have come from HR (specifically from “Tiffany or Tonya”).

On re-direct examination, Mr. Huyck admitted that the job he testified about previously on cross-examination (the Service Operator II - - Finishing and Shipping) was not the one that was offered to Claimant, but rather she was offered an entry-level position as a Process Specialist.

On re-cross-examination, Mr. Huyck testified that he did not have the job description for the Process Specialist position, which was the one offered to the Claimant. When asked if that would have been an important document to bring to the hearing, Mr. Huyck replied, “Yes, sir.”

Tiffany Curry:

Ms. Curry testified that she was the Senior HR Manager for Respondent-Employer. Ms. Curry stated that she began her position in June of 2020 and became aware of Claimant’s situation and the fact that she needed to return to work. In July of 2020, she met with the Claimant, and they discussed Claimant returning to work within her FCE restrictions. She testified that the Claimant was offered a position as a Process Specialist in Finishing and Shipping (PS80). Ms. Curry explained that the Process Specialist position was an entry level position, and it was “mostly warehouse kind of work, so that the person grabs the paper and does that.” She explained that per the Bargaining Agreement between United Steel Workers and the International Brotherhood of Electrical Workers, when an employee was moved to another job, the employee must start at the bottom of the line of progression in that department, which would be an entry level job. Because there would be a cut in wages, there was a wage adjustment that would occur over time. Ms. Curry explained that when an employee was moved to another job, in the new role from day one (1) until

day ninety (90), the employee was paid at the previous wages; then at day ninety-one (91) to day two hundred and seventy (270), the employee would received a rate in between the old pay rate and the new pay rate; and then the employee would receive the rate of pay for the new position.

Ms. Curry testified that during a meeting with the Claimant in July, a job offer was extended for the Finishing and Shipping department as a Process Specialist and then a follow-up on the offer occurred in August. Ms. Curry testified that Claimant's response to the offer was that she "did not want to come back to work and make less money and she felt as though going to New Hire Orientation with the amount of years of service that she had was a slap in the face." Ms. Curry testified that she explained to the Claimant that the Respondent-Employer did not have flexibility with regard to the rate of pay per the labor agreement and that with regard to the orientation, the Claimant had been out of the mill for quite some time, and she needed to be up to date on the new safety standards. Ms. Curry explained that just because Claimant would be moved to the Process Specialist position for the time being she would still have the opportunity to move up the line of progression (in the form of a promotion), and that it would likely happen very quickly based on the turnover in that area of the organization. Ms. Curry described the Process Specialist position as a role where employees "kind of move around picking up rolls from across the mill." This is done with a forklift or clamp truck, which would require them to drive all day. If the Claimant was promoted to the Service Operator, her wages as of the day of the hearing would have been \$24.40 per hour.

As for the Claimant's request for accommodation, Ms. Curry stated that the accommodation request is the starting point for the interactive process for the Americans with Disabilities Act ("ADA"). According to Ms. Curry, the Claimant did not accept the job, so Ms.

Curry provided her with the ADA paperwork for her accommodation request. If the Claimant had accepted the job, she would have been scheduled for the New Hire Orientation immediately.

According to Ms. Curry, the Claimant was provided with physician verification paperwork that she was to have completed by her healthcare provider. Ms. Curry stated that she did not receive any of the completed paperwork from Dr. Riley.

Ms. Curry testified that she met with Claimant on two occasions, once in July and once in August of 2020. During the meeting in August of 2020, the Claimant stated that she was not interested in the previous job offer to return to work making less money. At that point, Ms. Curry provided the Claimant with the information on the ADA. According to Ms. Curry, there was almost no contact with the Claimant after that meeting. Ms. Curry stated that if the Claimant had inquired about the job after their last meeting in August of 2020, which Claimant did not, Ms. Curry would have responded to that call. Specifically, she would have asked the Claimant about the paperwork from her physician that had not been returned to Respondent-Employer. According to Ms. Curry, the information requested from Claimant's physician was as a result of the Claimant's request for accommodation.

On cross-examination, Ms. Curry testified that it was the Claimant's responsibility to submit the information to her physician and provide the documentation by the physician that supports her request for an accommodation. Ms. Curry also testified that she did not have any knowledge of how the job description for the Process Specialist in Finishing and Shipping would match up to the Claimant's FCE results. In other words, Ms. Curry could not speak to whether or not the Process Specialist job was actually a job that Claimant could have performed if she was trying to perform it within the limitations set forth in the FCE.

Tonya Reynolds:

Ms. Reynolds testified that she was an HR Business Partner (similar to an HR Rep) for Respondent-Employer. Ms. Reynolds testified that she and Claimant had an initial meeting, and she made the offer to the Claimant for the job in Finishing and Shipping. She also met with the Claimant a second time, and Ms. Curry was present. They had the same discussion regarding the job offer for the Finishing and Shipping job and the rate of pay. According to Ms. Reynolds, the Claimant did not accept the job because she did not want a lower rate of pay for the work. As far as any further conversations with the Claimant regarding the job offer, Ms. Reynolds stated, “There may have been conversations where she’s called and I told her that we were working on her questions, but other than that, I don’t think I had any other meetings with her, that I recall.”

Ms. Reynolds stated that the Claimant made an ADA request, which included the Claimant filling out a form, and then the Claimant having her doctor complete the physician portion of the form. The form must be returned to the HR department. Ms. Reynolds testified that she did not keep Claimant’s file, but rather that Ms. Curry had it.

On cross-examination, Ms. Reynolds testified that she did not handle the ADA paperwork in the Claimant’s file. She also stated that either the employee or a representative from the HR Department could send the information to an employee’s physician to request information on the employee’s disability and reasonable accommodation. Furthermore, other than a bona fide offer being an “official offer,” Ms. Reynolds was not aware of what a bona fide offer to return to work was under the Arkansas Workers’ Compensation Act. When asked if Ms. Reynolds thought it would be a good idea to find out what the doctor would have to say about whether or not the doctor believed the person could perform the work as it was described in the job description, Ms. Reynolds responded, “I’m assuming that would be information needed.”

Keith Bragg:

Mr. Bragg testified that he is the Business Unit Manager over Finishing and Shipping for Respondent-Employer, and he is responsible for all of the operations of day-to-day shipping. He became familiar with the Claimant in 2019, when Mr. Huyck asked him about the Claimant moving over to his department.

Mr. Bragg testified that he made some changes to the Process Specialist I position. Mr. Bragg described those changes as follows:

A: Okay. When I started at Pine Bluff PS1's is two main positions, rover and car bracer. For all intents and purposes, a car bracer, they get the rail cars ready to go and they prep them to be - - cars to be loaded with paper. At that point in time, when they had to prep a car, they'd have to put metal banding in a car. AAI Regulations do not require metal banding in the car anymore; so as soon as I got here, I done [sic] away with that.

Q: Okay. Why is that significant as far as your physical requirements for that job?

A: Well, without banding - - without banding having to be put in the car, you're not working with any major tools. I mean, weight. Basically, you're cleaning the car out, prepping it, getting it ready to go and when you get done, on the opposite end, instead of binding up the car, binding up strapping, you are filling an air bag with air, put the stuffing - - they call it stuffing - - but bracing its what it is and you fill the air with a hose. So the job goes from a hose from a - - the job goes from running manual tools and automatic tools to pretty much having an air line.

Q: What other changes have you made - - but when was that change made by the way?

A: That was done - - I arrived in Pine Bluff on May 1st of 2019. Somewhere around June or July I made that change.

Q: Okay. What other changes did you make to that job? Anything- -

A: I guess, I'm not sure what you are asking.

Q: Were there any other changes you made to the Process Specialist I job, other than that one particular change?

A: That would be - - that was the biggest change.

When asked by Respondents' counsel if based on an FCE where Claimant could occasionally, bi-manually lift up to fifty (50) pounds, frequently push and pull, handle, finger, stand, and sit, would she be able to do the job as a Process Specialist I, Mr. Bragg replied, "It's my belief that she could have done that job." Mr. Bragg further testified that based on the amount of turnover in the Finishing and Shipping department, the Claimant would have already moved up to a Service Operator II, which was primarily driving a clamp truck and was within her FCE restrictions.

On cross-examination, Claimant's counsel asked Mr. Bragg the following:

Q: Okay, so the jobs that you were talking with Mr. Frye about in your department that you were - - do you have a written job description of those jobs?

A: There is a written description, but I do not have one with me.

Q: Okay. Do you know whether or not the written description is aligned with the Functional Capacity Assessment that Mr. Frye was talking about?

A: I don't know that.

Medical Exhibits:

Claimant's medical records showed that Claimant saw Dr. Eric Gordon at OrthoArkansas on August 8, 2018, regarding her right shoulder pain. Dr. Gordon's notes indicated that Claimant had experienced pain in her right shoulder since her work injury on May 17, 2018, when she used her right hand to turn a paper roll that was suspended in the air. Claimant felt a pull in her shoulder as she pushed the roll, and then a sharp pain as she tried to stop the roll. Claimant continued working regular work duties but had pain with lifting paper rolls and pain at night. Claimant also complained of numbness in her ring finger.

An MRI of Claimant's right shoulder revealed a high-grade partial-thickness tear of the supraspinatus involving the articular surface. As Claimant's complaints of pain in the right shoulder had continued on August 15, 2018, when Claimant returned to see Dr. Gordon, he administered an injection in her right shoulder. Medical records indicate that Claimant also attended physical therapy; however, conservative treatment did not improve her pain.

As a result, Claimant began seeing Dr. Clayton Riley, and on April 24, 2019, Dr. Riley performed a right arthroscopic rotator cuff repair and biceps tenodesis. Claimant was given a sling and a recommendation for additional physical therapy. At that point, Claimant had work restrictions of no lifting, pushing or pulling with her right shoulder.

Dr. Riley's July 19, 2019, clinic records stated that:

She was doing well and then about a month ago swatted at a spider and had increased pain and decreased motion in her shoulder. She has not improved since that time despite continued therapy. She is also complaining that her arm swells sometimes. She states that she [has] also had wrist pain since around that time of surgery. It is possible that she has adhesive capsulitis[,] but it is also possible that she [has] re-torn something in her shoulder. We discussed her condition and treatment options. She was given a right glenohumeral injection. She will continue with physical therapy.

On August 20, 2019, Dr. Riley's notes indicate that Claimant continued to complain of right shoulder pain. After only temporary relief from an injection in July of 2019, Dr. Riley recommended an MRI of the right shoulder, which was performed on September 3, 2019. When Claimant returned to Dr. Riley, his notes reveal that the Claimant's MRI showed no test signs of re-tearing and was a normal postoperative MRI. Dr. Riley opined that she was likely suffering from adhesive capsulitis. Dr. Riley recommended another injection and scheduled surgery for a right shoulder manipulation, arthroscopic capsular release, and extensive debridement. Claimant underwent the second surgery on October 14, 2019, which was performed by Dr. Riley.

When Claimant returned to Dr. Riley on November 22, 2019, for a postoperative follow-up, Dr. Riley noted that while Claimant was still experiencing some pain, she was only one month out from surgery and that could be expected. She had very little active range of motion; however, her passive range of motion had improved. Her right shoulder additional ROM was 90/30/SI. Her pain was only at 2/10 that day. Dr. Riley recommended she continued with physical therapy. At a second follow-up with Dr. Riley on January 8, 2020, Dr. Riley's notes indicate that Claimant was continuing to improve. Her pain was a 2/10 that day and her right shoulder additional ROM was 110/40/SI. He recommended that she continue physical therapy.

In February of 2020, Dr. Riley's February of 2020, office notes indicate that Claimant's pain level was a 2/10. Her right shoulder additional ROM was 140/45/L5. Dr. Riley noted that Claimant was improving and administered a cortisone injection in the right shoulder for inflammation and pain.

On April 6, 2020, Claimant underwent a Functional Capacity Examination where she gave reliable effort. She demonstrated the ability to perform work at the medium classification of work with the following limitations: ability to lift/carry up to 50 pounds on an occasional basis; maximal RUE lift of 20 pounds as compared to 30 pounds with the LUE when lifting unilaterally from the floor to shoulder level; and reaching overhead and reaching with a five (5)-pound weight with the RUE as she performed these activities only at the occasional level.

When Claimant returned to Dr. Riley on April 14, 2020, she reported hearing a pop in her shoulder during physical therapy and reported her pain to be a 6/10 that day. Her right shoulder additional ROM was 140/100/45/L4. Dr. Riley noted that Claimant had improved considerably after her second surgery but that she had never gotten back to normal. Although Claimant had some decrease in function after her setback in physical therapy, she had since returned to where

she was previously. He also noted that while she had improved overall, she had some pain and difficulty sleeping. He noted her FCE results indicating a medium work classification. He also noted that he did not have a job description to determine if Claimant could return to her previous role with Respondent-Employer, but he opined that she could return to a medium work category if it did not involve repetitive overhead use of her shoulder. Dr. Riley recommended continuing her home exercise program.

On May 13, 2020, Claimant was seen by Dr. Kirk Reynolds at OrthoArkansas for an Independent Medical Evaluation. Dr. Reynolds opined that Claimant's symptomology was 100% related to her work injury. He opined that she had no disability related to her right shoulder, but she did have a permanent impairment of the shoulder based upon her loss of range of motion and permanent work-related restrictions. He stated that Claimant had lost active and passive range of motion of the right shoulder directly associated with her work-related injury resulting in rotator cuff tear and repair followed by adhesive capsulitis requiring manipulation under anesthesia with arthroscopic capsular release. He opined that she had reached maximum medical improvement (MMI) as of May 13, 2020, and that no further treatment was required. He also opined that she had a permanent partial impairment of 2% of the right upper extremity and 1% of the whole person secondary to loss of passive range of motion of the shoulder.

On June 8, 2020, Dr. Riley opined that Claimant had reached maximum medical improvement (MMI) on April 14, 2020. He stated that based on the Guides to the Evaluation of Permanent Impairment, (4th edition), her permanent impairment rating was eleven percent (11%) to her right upper extremity which equates to a seven percent (7%) permanent impairment rating for the whole person. He noted her FCE and her medium work classification. He agreed that she could be released to work in this capacity with permanent restrictions of repetitive overhead work.

On August 11, 2020, Claimant returned to Dr. Riley after getting a second opinion from Dr. Kirk Reynolds, who released her to return to work. Claimant reported to Dr. Riley that she had right shoulder pain of a 5/10 that day, for which Dr. Riley administered a cortisone injection for pain and inflammation. At a follow-up on September 4, 2020, Claimant was given a prescription for Robaxin for her right shoulder pain.

In May of 2021, Claimant returned to Dr. Riley with reported shoulder pain of 4/10. An x-ray of Claimant's right shoulder demonstrated no fracture, no glenohumeral joint space narrowing, and normal soft tissue after a soft tissue examination. Dr. Riley administered a steroid injection that day.

On a September 9, 2021, visit to Dr. Riley, Claimant complained of only left elbow pain with gradual onset that was exacerbated by activity. Dr. Riley's notes indicate that Claimant had experienced bilateral elbow pain, worse on the left than the right. Claimant reported having sleephead tennis elbow about four years prior and saw her primary care physician. She was treated previously with Mobic and braces, and she wanted try medication and braces again. There was no mention of her right shoulder.

Documentary Exhibits:

Respondents submitted the following documentary exhibits:

The Entry Level Production – Process Specialist job description states that an employee was required to frequently reach at or below shoulder height and reach above shoulder height.

Respondents-Employer's Roll Handling Procedures for Service Operator II in Finishing and Shipping demonstrates the rules with regard to handling the "rolls."

Respondent-Employer's Return to Work – Transitional Duty Assignment for the Claimant references a transition plan for the Claimant to the Finishing and Shipping department.

Claimant submitted a completed form for a Request for Accommodation related to her compensable work injury to her right shoulder, where she requested light duty until her right shoulder improved further.

Respondents submitted a Physician letter, which was an HR form for a physician to complete when requesting assistance in determining an employee's disability and reasonable accommodation. The form was blank.

Respondents submitted a one-page document with their calculation as to Claimant's hourly rate of pay per the Union Agreement for the Process Specialist job.

Respondents also submitted Claimant's Request for leave of absence (short term disability) from Cigna.

Respondents have also submitted Labor Agreements from 2016 to 2020 and from 2020 to 2024, demonstrating the set rate of pay for the various positions with Respondent-Employer.

ADJUDICATION

A. Extent of Claimant's Permanent Physical Impairment:

An injured worker must prove by a preponderance of the evidence that he or she is entitled to an award for a permanent physical impairment. Weber v. Best Western of Arkadelphia, Workers' Compensation Commission F100472 (Nov. 20, 2003). Any determination of the existence or extent of physical impairment shall be supported by objective and measurable findings. Ark. Code Ann. § 11-9-704(c)(1)(B) (Repl. 2012). "Objective findings" are defined as those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i) (Repl. 2012).

Pursuant to Ark. Code Ann. § 11-9-522(g) (Repl. 2012) and our Rule 099.34, the Commission has adopted the Guides to the Evaluation of Permanent Impairment (4th ed. 1993),

to be used to assess anatomical impairment. Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. Ark. Code Ann. § 11-9-102(4)(F)(ii)(a).

Here, the Claimant sustained admitted compensable injuries on May 17, 2018, to her right shoulder. Claimant's primary treating physician was Dr. Riley, who performed two surgeries on Claimant's right shoulder. The first surgery was on April 24, 2019, to repair a rotator cuff tear and bicep tenodesis. As a result of a subsequent diagnosis of adhesive capsulitis, Claimant had a second surgery on October 14, 2019, where an arthroscopic capsular release, an extensive debridement, and a manipulation were performed under anesthesia. Thereafter, Dr. Riley opined that the Claimant had reached maximum medical improvement (MMI) on April 14, 2020, and assigned Claimant an eleven percent (11%) impairment rating to the right upper extremity and a seven percent (7%) to the body as a whole, associated with the surgeries performed on Claimant's right shoulder. Claimant's Functional Capacity Evaluation, which she performed with reliable effort, showed that she was capable of returning to work in the medium classification with restrictions of occasional bi-manual lift of up to 50 pounds; frequent lifting/carrying of up to 20 pounds; occasional lift of 20 pounds with the RUE and 30 pounds with the LUE when lifting unilaterally from floor to shoulder level; and occasional reaching overhead and reaching with 5 pound weight with the RUE. Dr. Riley opined that Claimant could return to work with the medium capacity per the FCE and with the permanent restriction of repetitive overhead work. As Dr. Riley is the Claimant's treating physician, I give his opinion great weight.

As Respondents contend, the Claimant also had an evaluation by Dr. Kirk Reynolds at OrthoArkansas. As a result, Dr. Reynolds assigned Claimant a two percent (2%) permanent impairment rating to the right upper extremity or a rating of one percent (1%) to the body as a

whole. Respondents have accepted and paid the one percent (1%) impairment rating to the body as a whole pursuant to Dr. Kirk's separate medical evaluation. I note that Dr. Reynolds saw the Claimant on only one occasion. I, therefore, give his opinion little weight.

Nonetheless, based on the evidence before me, particularly the expert opinion of Dr. Riley, the Claimant's treating physician, I find that Claimant has met her burden of providing objective and measurable findings to support an assessment of an impairment rating of eleven percent (11%) to her right upper extremity, which equates to a seven percent (7%) permanent rating for the whole person based on physical changes to the Claimant's right shoulder as the result of two surgical procedures. The seven percent (7%) permanent impairment rating to the body as a whole is in accordance with Table 3, page 20 of the Guides.

Accordingly, I find that Dr. Riley's seven percent (7%) permanent impairment rating is consistent with Claimant's injuries and treatment (including the two surgeries) to the Claimant's right shoulder. Therefore, I find that the Claimant sustained a permanent anatomical impairment rating of 7% to the body as a whole as a result of her compensable right shoulder injury and that the compensable injury was the major cause of the Claimant's 7% anatomical impairment to the whole person. Respondents are therefore liable for payment of this rating.

B. Whether Claimant is Entitled to Wage Loss Disability Benefits:

Claimant asserts that she is entitled to wage loss as the result of her compensable right shoulder injury of May 17, 2018, as Respondents have failed to return the claimant to work. On the other hand, Respondents contend that the Claimant was offered a position but failed to return to work; she is therefore, not entitled to wage loss disability at this time.

The wage-loss factor is the extent to which a compensable injury has affected the Claimant's ability to earn a livelihood. Whitlatch v. Southland Land & Dev., 84 Ark. App. 399,

141 S.W.3d 916 (2004). When considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the 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 her future earning capacity. Ark. Code Ann. § 11-9-522(b)(1) (Repl. 2012).

In considering factors that may affect an employee's future earning capacity, the appellate court considers the Claimant's motivation to return to work, since a lack of interest or a negative attitude impedes an assessment of the Claimant's loss of earning capacity. Ellison v. Therma Tru, 71 Ark. App. 410, 30 S.W.3d 769 (2000).

Here, the parties stipulated that the Claimant sustained a compensable injury to her right shoulder on May 17, 2018. An MRI of her right shoulder revealed a rotator cuff tear. Thereafter, the Claimant underwent conservative treatment including injections and physical therapy. When extensive conservative treatment failed, Claimant came under the care of Dr. Clayton Riley, who diagnosed her with a right rotator cuff tear. Dr. Riley performed surgery on Claimant's right shoulder in April of 2019.

However, the Claimant continued with ongoing problems of complaints of right shoulder symptoms. Claimant continued to undergo conservative treatment, including injections and physical therapy. Her September 3, 2019, post-operative MRI was normal. However, due to her continued complaints of pain and issues with range of motion, Dr. Riley diagnosed her with adhesive capsulitis and eventually recommended right shoulder arthroscopic capsular release, extensive debridement, and manipulation under anesthesia, which was performed on October 14, 2019. Claimant underwent an FCE, which showed that she gave reliable effort and that she was capable of performing medium work with restrictions, including occasional overhead reaching

with the right upper extremity. Dr. Riley also assessed her with an impairment rating of 11% to her right upper extremity and a 7% permanent rating for the whole person. He released Claimant to return to work with permanent restrictions of repetitive overhead lifting.

Since this time, the Claimant has had additional extensive conservative treatment in the form of injections, medication, and physical therapy. This treatment was provided under the care of Dr. Riley, and as of the date of the hearing, he was still her treating physician.

The Claimant is fifty-three (53) years old and has a high school education along with two years of college. At the time of the compensable injury, the Claimant was a long-time employee of Respondent-Employer. The testimony showed that she had worked for Respondent-Employer for almost twenty (20) years doing manual labor involving lifting large, heavy objects. The Claimant worked her way of up from an entry level position to an Assistant Operator. At the time of her compensable injury, she was earning a little over \$27.00 per hour.

Claimant credibly testified that she had continued to have pain in her right shoulder, which was corroborated by the medical evidence. She testified that she took hydrocodone six (6) to eight (8) times a month for her right shoulder pain. She also stated that she had trouble sleeping on her right side. Claimant stated that at the time of the hearing she was still having pain in her right shoulder every day. She testified that the pain was throbbing at times and more of a sharp pain at other times and was aggravated with lifting and reaching. The Claimant testified that she had good days and bad days with her right shoulder symptoms.

The Claimant also credibly testified that she wanted to return to work, which was evident from the fact that she worked for almost one (1) year for Respondent-Employer in a light-duty, office setting after her compensable work injury until she underwent the first surgery by Dr. Riley. She later gave a valid effort during her Function Capacity Evaluation testing. She testified was

anxious to return to work after her surgery, but she testified that she was fearful of work that could lead to her re-injuring her shoulder. I find this testimony to be credible.

Furthermore, the evidence of record in this matter revealed that Respondent-Employer made an offer to the Claimant for a job in the Finishing and Shipping area as a Process Specialist at a lower rate of pay pursuant to a Collective Bargaining Agreement. Both Respondent-Employer's representatives, as well as the Claimant, testified as to the two in-person meetings when the job offer was discussed. However, the Claimant credibly testified that she could not perform the job duties of a Process Specialist. Claimant stated that she had held many positions during her time with Respondent-Employer, and they all required the use of her right arm, lifting, bending, stooping, pushing and pulling. In particular, she had previously assisted in the Finishing and Shipping area and was familiar with some of the requirements for a Process Specialist. She stated that she could not do that work with her right shoulder restrictions "because it was the bottom job, and it was, actually, harder work than what [she] was already doing upstairs." Testimony showed that the Claimant's restrictions to her right shoulder had not changed since Dr. Riley last assessed her with an impairment rating of 7% and gave her permanent restrictions on overhead lifting. While the record contains a job description for the entry level Process Specialist position; it states that, "Employees are required to frequently reach at or below shoulder height and reach above shoulder height." As such, the Process Specialist position was not suitable for Claimant in light of her FCE results of medium work with restrictions, including occasional overhead lifting with the right upper extremity, and in light of Dr. Riley's assignment of permanent restrictions of repetitive overhead lifting. Notably, not one of Respondent-Employer's representatives testified that the Process Specialist position was suitable for the Claimant in light of her FCE results and Dr. Riley's permanent restrictions on overhead reaching. Therefore, I find

that it was reasonable for the Claimant to not accept the position as a Process Specialist offered to the Claimant pursuant to Ark. Code. Ann. § 11-9-522(2), as the job offered to the Claimant had requirements that were outside of the Claimant's permanent restrictions.

Therefore, taking into account the Claimant's 7% permanent physical impairment rating to the body as a whole, her middle-age, average education, demeanor, prior work experience in the manual labor category, and other matters reasonable expected to affect her future earning capacity, I find that the Claimant sustained wage-loss disability in the amount of 18% over and above her 7% permanent anatomical impairment rating.

C. Attorney's fee:

Here, the Respondents have controverted this claim in its entirety. As such, I therefore find that the Claimant's attorney is entitled to a controverted attorney's fee pursuant to Ark. Code Ann. § 11-9-715, on all indemnity benefits awarded herein to the Claimant.

ORDER

The Respondents are directed to pay benefits in accordance with the findings of fact set forth herein this Opinion.

All accrued sums shall be paid in lump sum without discount, and this award shall earn interest at the legal rate until paid, pursuant to Ark. Code Ann. § 11-9-809.

Pursuant to Ark. Code Ann. § 11-9-715, the Claimant's attorney is entitled to a 25% attorney's fee on the indemnity benefits awarded herein. This fee is to be paid one-half by the carrier and one-half by the claimant.

IT IS SO ORDERED.

KATIE ANDERSON
ADMINISTRATIVE LAW JUDGE