

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H204851

JANET FOSTER, Employee	CLAIMANT
GOODWILL INDUSTRIES OF AR, Employer	RESPONDENT
ATA WORKERS' COMP SI TRUST/RISK MGT., Carrier/TPA	RESPONDENT

OPINION FILED MAY 15, 2024

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by MELISSA WOOD, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On April 22, 2024, the above captioned claim came on for hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on November 8, 2023 and an amended pre-hearing order was filed on February 23, 2024. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. Claimant sustained a compensable hernia on June 6, 2022.
3. Claimant was earning an average weekly wage of \$717.88 which would entitle her to compensation at the weekly rates of \$479.00 for total disability benefits and

\$359.00 for permanent partial disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Temporary total disability benefits from December 19, 2022 through a date yet to be determined.
2. Claimant's entitlement to additional medical treatment.
3. Claimant's entitlement to a weight loss program.
4. Attorney's fee.

At the time of the hearing the claimant clarified that her request for temporary total disability benefits would end as of March 31, 2023. Claimant also acknowledged that respondent paid some temporary total disability benefits and would be entitled to a credit for those benefits.

The claimant contends she is entitled to temporary total disability benefits from December 19, 2022 until March 31, 2023. The claimant contends that she is entitled to additional medical treatment since the December 19, 2022 surgery was done without mesh and was only temporary treatment for her compensable injury. The claimant contends she is entitled to a weight loss program to be paid for by the respondents since her treating surgeon has recommended that she needs to lose weight before the mesh can be utilized regarding the surgical repair of the hernia. The claimant contends that she has made a good faith effort to lose weight and unfortunately has been unable to accomplish the objective of losing enough weight to make her a suitable candidate for the permanent repair of her compensable hernia. Claimant contends her attorney is entitled to an appropriate attorney's fee.

The respondents contend that all appropriate benefits are being paid with regard

to claimant's compensable hernia sustained on June 6, 2022. Temporary total disability benefits were paid after Dr. Shamim's surgery performed on December 19, 2022 until claimant's release in January of 2023. The medical records do not support entitlement to temporary total disability benefits after that timeframe. Respondents contend that the requested weight loss program is not reasonable and necessary and that claimant's need for weight loss is preexisting. Furthermore, it is premature to award a surgery with mesh without claimant first losing the requisite weight.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe her demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on November 8, 2023, and contained in an amended pre-hearing order filed February 23, 2024, are hereby accepted as fact.
2. Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment from Dr. Shamim.
3. Claimant has met her burden of proving by a preponderance of the evidence that the proposed weight loss program at Metabolic Research Center is reasonable and necessary medical treatment for her compensable injury.
4. Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to temporary total disability benefits from December 19, 2022

through January 6, 2023. Respondent is entitled to a credit for any temporary total disability benefits previously paid.

5. Claimant's attorney is entitled to the maximum controverted attorney fee on any indemnity benefits which were unpaid.

### FACTUAL BACKGROUND

The claimant was employed by the respondent as a career specialist. Claimant's job duties required her to help people find work by helping them with their resume; teaching them how to dress for an interview; and how to act during an interview. She also performed other duties such as putting out clothing and removing old clothing. Claimant was also responsible for keeping a community room clean, swept, and mopped.

On June 6, 2022, claimant was in the process of pulling on a table in the community room to move it when she suffered a compensable hernia.

Claimant came under the care of Dr. Shamim, who in a report dated November 15, 2022, noted that claimant had gained some weight since the last time he saw her. He also noted that claimant was having significant discomfort at the hernia site. Dr. Shamim went on to state:

Patient unfortunately has gained weight and is currently not optimized for hernia repair. However she is a very symptomatic and my fear is that the patient is [going to] have strangulation of the hernia. As such I advised the patient that we should most likely go ahead with that hernia repair at this point in time without a mesh which would at least buy a some time for her to lose weight in the future and perform a standard of care hernia repair with mesh at that time. Patient voices understanding. She does understand that this point in time with hernia repair is just to ensure that she does not have any complications, it is understood that the hernia will

eventually return especially if she stays at her current weight. Patient voices understanding. At this point in time we will post the patient for a hernia repair without mesh.

Dr. Shamim performed the hernia repair surgery on December 19, 2022 and claimant returned to Dr. Shamim on January 6, 2023, for a follow-up examination. In his report of that date, Dr. Shamim noted that claimant was doing great with no active issues and that she felt essentially normal. He also noted that claimant needed to proceed with weight loss in order to prevent a further occurrence and that if she did not lose weight she would likely have another recurrence in the future.

Claimant has filed this claim contending that she is entitled to additional medical treatment for her compensable hernia injury. She also contends that she is entitled to a weight loss program and temporary total disability benefits beginning December 19, 2022 and continuing through March 31, 2023.

### ADJUDICATION

Claimant contends that she is entitled to additional medical treatment for her compensable hernia injury. Claimant has the burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment for her compensable hernia injury. *Dalton v. Allen Engineering Co.*, 66 Ark. App. 201, 989 S.W. 2d 543 (1999).

I find that claimant has met her burden of proof. As previously noted, Dr. Shamim in his report of November 15, 2022, noted that claimant was not optimized for a hernia repair due to her weight. However, he stated that claimant was very symptomatic and believed that claimant was going to have a strangulation of her hernia; therefore, he

recommended that claimant undergo a hernia repair without mesh which would allow her some time to lose weight and then undergo a hernia repair with mesh. Dr. Shamim performed the hernia repair surgery without mesh on December 19, 2022.

In his follow-up report dated January 6, 2023, Dr. Shamim noted that claimant needed to proceed with weight loss in order to prevent a recurrence of her hernia. He also indicated that she should follow up as needed and that she had been counseled regarding alarm signs and her need to call back. It is clear from a review of Dr. Shamim's medical records that he believed claimant would need additional medical treatment in the form of hernia repair with mesh when she had lost weight.

I find based upon this evidence that claimant has met her burden of proving by a preponderance of the evidence that she is entitled to continued medical treatment from Dr. Shamim for her compensable hernia.

I also find that claimant has met her burden of proving by a preponderance of the evidence that she is entitled to a weight loss program at Metabolic Research Center. Pursuant to A.C.A. §11-9-508(a), an employer is required to provide for an injured employee such medical services as may be reasonably necessary in connection with the injury received. What constitutes reasonable and necessary medical treatment is a question of fact for the Commission. *Shiloh Nursing & Rehab, LLC, v. Lawson*, 214 Ark. App. 433, at 3, 439 S.W. 3d 696, 698. Weight loss treatment has been recognized as a medical benefit which may be awarded if it is determined to be reasonable and necessary medical treatment for a compensable injury. *Lybyer v. Springdale School District*, 219 Ark. App. 77, 568 S.W. 3d 805.

Here, I find that claimant has met her burden of proving by a preponderance

of the evidence that the proposed weight loss program is reasonable and necessary. As previously noted, Dr. Shamim in his report of November 15, 2022, indicated that claimant was not currently optimized for her hernia repair surgery due to her weight. However, Dr. Shamim performed a hernia repair surgery without mesh due to the claimant's symptoms and a fear of strangulation of the hernia. In his report of January 6, 2023, Dr. Shamim indicated that claimant was in danger of a recurrence unless she lost weight.

On January 9, 2024, claimant was evaluated by her primary care physician, Dr. Lance Barton. In his report of that date, Dr. Barton stated:

This is to certify that Janet Foster has a BMI of 48.56 and has not been successful in many exercise programs and weight loss diets she has tried in the past. She would benefit in the enrollment of Metabolic Research Center program for weight loss.

Based upon the foregoing, I find that claimant has met her burden of proving by a preponderance of the evidence that the weight loss program is reasonable and necessary medical treatment for her compensable hernia injury.

The last issue for consideration involves claimant's request for temporary total disability benefits from December 19, 2022 through March 31, 2023. In order to be entitled to temporary total disability benefits, claimant has the burden of proving by a preponderance of the evidence that she remains within her healing period and that she suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Dept. v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981).

After reviewing the evidence in this case, I find that claimant remained within her healing period and that she suffered a total incapacity to earn wages from December 19,

2022 through January 6, 2023.

First, I find that claimant has remained within her healing period for her compensable hernia since the date of the injury on June 6, 2022. However, after claimant's compensable injury she continued working for the respondent until December 19, 2022, when she underwent the surgery by Dr. Shammim. Accordingly, claimant's total incapacity to earn wages began on December 19, 2022. I find that her total incapacity to earn wages continued until January 6, 2023. On January 6, 2023, claimant had her follow-up appointment with Dr. Shamim who noted that she was doing great with no active issues and that she essentially felt normal. Dr. Shamim placed limitations on the claimant of a lifting restriction of 10 pounds for twelve weeks and 30 pounds thereafter. Dr. Shamim also placed these same restrictions in a "To Whom It May Concern" letter also dated January 6, 2023. While claimant testified that she did not work during this twelve week period of time and did not feel that she was physically capable of working during that twelve week period of time, I note that on January 16, 2023, claimant applied for unemployment compensation benefits. In doing so, claimant indicated that she could begin work immediately; that she could work full time; and that she did not have any disabilities that limited her ability to perform her normal job duties.

With respect to this issue, it should be noted that claimant has job skills which would allow her to work at a sedentary type job. As previously noted, claimant worked for the respondent as a career specialist which included duties of helping individuals with resumes and teaching them how to dress and act during work interviews. Furthermore, at the time of her deposition on January 9, 2024, claimant indicated she had been working for a company at home since October 2023. Claimant was working 40 hours per week,



making \$17.00 per hour performing a sit down job at her computer. Thus, claimant clearly had job skills which would allow her to work at a sedentary type job.

Accordingly, I find that claimant's total incapacity to earn wages ended as of January 6, 2023, the date she was seen by Dr. Shamim. Therefore, claimant is entitled to temporary total disability benefits from December 19, 2022 through January 6, 2023. Respondent is entitled to a credit for any benefits previously paid during this period of time. Claimant's attorney is entitled to the maximum attorney fee on any unpaid indemnity benefits during this period of time.

#### AWARD

Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment from Dr. Shamim for her compensable hernia injury. Claimant has also proven by a preponderance of the evidence that she is entitled to additional treatment in the form of a weight loss program at the Metabolic Research Center. Claimant is entitled to temporary total disability benefits from December 19, 2023, and continuing through January 6, 2023. Respondent is entitled to a credit for any temporary total disability benefits previously paid.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

Respondents are liable for payment of the court reporter's charges for preparation of the hearing transcript in the amount of \$355.75.

All sums herein accrued are payable in a lump sum and without discount.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE