

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G600552

TAMMY L. MILLER, Employee	CLAIMANT
MHM SUPPORT SERVICES, Employer	RESPONDENT #1
MERCY HEALTH, Carrier/TPA	RESPONDENT #1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #2

OPINION FILED JUNE 29, 2022

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

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

Respondent #1 represented by RANDY P. MURPHY, Attorney, Little Rock, Arkansas.

Respondent #2 represented by DAVID L. PAKE, Attorney, Little Rock, Arkansas; although not present at hearing.

STATEMENT OF THE CASE

On June 8, 2022, the above captioned claim came on for hearing at Springdale, Arkansas. A pre-hearing conference was conducted on April 27, 2022 and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection. In addition, respondent #1's letter brief dated June 9, 2022 has been blue-blackened and made a part of the record herein.

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. All prior opinions are final.

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

1. Claimant's entitlement to temporary total disability benefits from November 3, 2021 through a date yet to be determined.

2. Attorney fee.

The claimant contends she reentered her healing period on November 3, 2021 and that she is entitled to temporary total disability benefits from that date until a date yet to be determined. The claimant contends she is entitled to an appropriate attorney's fee. The claimant reserves all other issues.

Respondent #1 contends that claimant is not entitled to additional temporary total disability benefits.

Respondent #2 contends that the Trust Fund is not responsible for the payment of temporary total disability benefits. It defers to litigation on the issues of temporary total disability and attorney fees. The Trust Fund waives its appearance at the hearing on those issues.

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 April 27, 2022 and contained in a pre-hearing order filed that same date are hereby

accepted as fact.

2. Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to temporary total disability benefits beginning November 3, 2021, and continuing through a date yet to be determined.

3. Respondent has controverted claimant's entitlement to temporary total disability benefits beginning November 3, 2021.

### FACTUAL BACKGROUND

Claimant began working for respondent #1 as a RN on March 30, 2015. On January 22, 2016, she was running down a hallway to get a blood consent form when her scissors fell out of her scrub pocket. Claimant turned to see what had fallen and when she did, she fell to the floor. As a result of this fall, claimant had pain in her knee, hip, and left buttock.

Claimant has undergone extensive medical treatment since January 22, 2016, with multiple surgical procedures. On July 5, 2017, Dr. Blankenship performed a lumbar fusion procedure at L4-5 and L5-S1. He also performed a revision with decompression and posterior lateral fusion on September 13, 2017. On December 26, 2017, Dr. Blankenship performed a left SI joint fusion and on April 17, 2018, he performed a right SI joint fusion.

In addition, Dr. Sites on March 7, 2018 performed an IT band release, piriformis release of the left hip, greater trochanteric bursectomy of the left hip, and debridement of the gluteus medius tendon with repair of the left hip. Claimant's final surgical procedure was performed by Dr. Dougherty on December 21, 2018, which included a gluteus medius repair; a piriformis resection; and psoas resection.

This claim was the subject of a prior hearing on June 12, 2019. In an opinion filed August 5, 2019, this administrative law judge found, *inter alia*, that claimant had proven that she suffered a compensable injury to her left hip, left knee, and low back on January 22, 2016. I also found that claimant had failed to prove that her SI joint complaints were a compensable consequence of her compensable injury. Claimant was awarded medical treatment for her compensable injury and temporary total disability benefits from January 23, 2016 through a date yet to be determined.

That opinion was appealed by both parties. In an opinion filed June 4, 2020, the Full Commission affirmed the findings that claimant had proven a compensable injury to her left hip, left knee, and low back. The Full Commission reversed the SI joint finding and held that claimant had proven that her SI joint complaints were related to her compensable injury.

A second hearing in this claim was conducted on January 13, 2021. In addition to the stipulations from the first hearing, the parties also agreed to stipulate that claimant had reached maximum medical improvement on June 30, 2019, and that she sustained a 14% impairment rating to the body as a whole as a result of the injuries to her back and SI joints. Claimant contended that she was permanently totally disabled as a result of the compensable injury or alternatively, entitled to wage loss in excess of her impairment rating. In an opinion filed February 25, 2021, this administrative law judge found that claimant was not permanently totally disabled but instead had suffered a loss in wage earning capacity in an amount equal to 60% to the body as a whole. That opinion was appealed by the claimant and cross-appealed by respondent #1. In an opinion filed August 26, 2021, the Full Commission affirmed and adopted the February 25, 2021

opinion.

Subsequent to the last hearing claimant returned to Dr. Dougherty on November 3, 2021, for additional treatment because the pain in her left hip was worsening. Dr. Dougherty diagnosed claimant as suffering from pelvic floor dysfunction which he indicated had not been addressed but was directly related to her prior injuries and need for surgery. He also ordered a CT myelogram of her lumbar spine for a better assessment.

Claimant underwent the CT scan of the lumbar spine on November 8, 2021, and it was read as negative with no spinal stenosis or nerve root compression. Claimant also underwent an MRI of the pelvis on December 6, 2021, with the following Impression:

1. Mild tendinosis of the distal left gluteus medius and gluteus minimus tendons. Low-grade partial tear distal left gluteus medius tendon. Mild fluid adjacent to this tear is improved when compared to prior MRI 7/30/2018. Additionally, no significant bursitis identified today, improved from prior.
2. Moderate tendinosis of the distal right gluteus minimus and gluteus medius tendons.
3. Mild tendinosis proximal right hamstring tendons.

Claimant returned to Dr. Dougherty on December 6, 2021, and he diagnosed her condition as gluteal tendinitis of the left hip and noted that her exam was consistent with a partial thickness gluteus tear. He also noted that claimant was undergoing physical therapy for the pelvic floor dysfunction and in an amendment indicated that claimant would be prescribed medication for the gluteus tendinitis in the left hip.

Claimant again returned to Dr. Dougherty on January 19, 2022, at which time he stated:

She reports therapy is going well, but slow. Her therapist is not pleased with her progress due to her hip. She would like to discuss surgery to have this fixed.

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Her chart was reviewed today. Her MRI from 12/6/21 shows a partial thickness gluteus tear. She needs to be set up for a diagnostic hip arthroscopy for possible gluteus repair.

In that same report Dr. Dougherty went on to indicate that claimant would need to complete presurgical requirements which included having her Vitamin D level checked and an RA panel completed.

The final report of Dr. Dougherty's which was submitted into evidence is dated February 7, 2022. He indicated that claimant's lab results had been reviewed and that her ANA was positive and her Vitamin D level was low. He noted that claimant would need to see her primary care physician and get that condition under control before he could proceed with surgery.

On March 2, 2022, Dr. Dougherty completed a work note indicating that claimant should be off work indefinitely beginning on November 3, 2021.

Claimant has filed this claim contending that she is entitled to additional temporary total disability benefits beginning November 3, 2021 and continuing through a date yet to be determined.

### ADJUDICATION

Even though the parties had previously stipulated that claimant had reached maximum medical improvement as of June 30, 2019 and a determination was made with respect to claimant's entitlement to permanent disability benefits, respondent #1 agrees

that claimant can enter a second healing period and be entitled to additional temporary total disability benefits if she suffers a total incapacity to earn wages. Respondent #1 contends that claimant has not reentered a healing period and that she is not totally incapacitated from earning wages. Respondent #1 contends that claimant has the ability to perform sedentary work and therefore she is not entitled to additional temporary total disability benefits.

No physician has opined that claimant is capable of performing sedentary employment. Claimant returned to Dr. Dougherty for additional medical treatment on November 3, 2021, and he has diagnosed claimant with pelvic floor dysfunction and gluteal tendinitis of the left hip. He has prescribed physical therapy for the pelvic floor dysfunction and as of January 19, 2022 recommended a diagnostic hip arthroscopy for a possible gluteus repair. The surgery is currently on hold pending low Vitamin D levels. In the course of his treatment, Dr. Dougherty completed a work note indicating that he had seen claimant on several occasions since November 3, 2021 and that claimant should remain off work indefinitely as of that date. This would constitute a total incapacity to earn wages. Specifically, Dr. Dougherty did not indicate that claimant could perform sedentary work.

Based upon the opinion of Dr. Dougherty which I find to be credible and entitled to great weight, I find that claimant has re-entered her healing period and that she suffers a total incapacity to earn wages which began on November 3, 2021, and will continue through a date yet to be determined.

In reaching this decision, I note that the work note was completed by Dr. Dougherty as a result of claimant asking him to address her work status. Claimant testified that she

made this request at the behest of her attorney. The fact that the request was prompted by claimant's counsel does not invalidate Dr. Dougherty's opinion. There is no indication that the work note does not reflect his medical opinion. In fact, respondent #1 sent a letter to Dr. Dougherty requesting that he address several questions. One of those questions was as follows:

3. Please explain why you wrote an off work slip on Ms. Miller since, I am sure you are aware, she has been off work for several years due to the workers' compensation injury?

In response, Dr. Dougherty wrote: "Has it – she's off work".

While this admittedly is not the clearest response that could have been given to the question, I interpret Dr. Dougherty's answer to be that claimant has been given an off work note and that she is off work. I do not interpret his answer as an indication that claimant is capable of working which would contradict his previously completed off-work note.

In summary, 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 Department v. Breshears*, 272 Ark. 244, 613 S.W 2d 392, (1981). After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met her 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. As previously noted, claimant is currently receiving treatment by Dr. Dougherty in the form of physical therapy for her pelvic floor



dysfunction and he has recommended a diagnostic hip arthroscopy for possible gluteus repair. In addition, Dr. Dougherty completed an off work note indicating that claimant should be off work indefinitely as of November 3, 2021.

AWARD

Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to additional temporary total disability benefits beginning November 3, 2021 and continuing through a date yet to be determined.

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.

Respondent #1 is responsible for paying the court reporter her charges for preparation of the hearing transcript in the amount of \$373.15.

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