

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO.: H008571**

**MARY MCKAMIE, EMPLOYEE**

**CLAIMANT**

**ARKANSAS DEPARTMENT OF HUMAN SERVICES,  
EMPLOYER**

**RESPONDENT**

**PUBLIC EMPLOYEE CLAIMS DIVISION,  
CARRIER/THIRD PARTY ADMINSTRATOR (TPA)**

**RESPONDENT**

**OPINION FILED MARCH 13, 2023**

Hearing held before ADMINISTRATIVE LAW JUDGE CHANDRA L. BLACK in Texarkana, Miller County, Arkansas.

Claimant represented by Mr. Gregory R. Giles, Attorney at Law, Texarkana, Arkansas.

Respondents represented by Mr. Robert H. Montgomery, Attorney at Law, Little Rock, Arkansas.

**Statement of the Case**

On December 13, 2022, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A pre-hearing telephone conference was conducted on September 14, 2022, from which a Pre-hearing Order was filed on that same day. A copy of said order and the parties' responsive filings have been marked as Commission's Exhibit No. 1 and made a part of the record without objection.

**Stipulations**

During the pre-hearing telephone conference, and/or during the hearing the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.

2. That the employee-employer-carrier relationship existed at all relevant times including on or about October 27, 2020, when the Claimant sustained compensable injuries to her lower left extremity, lower left hip, and lower back.
3. That the Claimant's average weekly wage (AWW) on the date of her accidental injury was \$548.07, with corresponding compensation rates of \$365.00 per week for temporary total disability (TTD) compensation, and \$274.00 a week for permanent partial disability (PPD) benefits.
4. That Respondents accepted these injuries as being compensable and have paid appropriate medical benefits owed on this claim to date.
5. The Claimant was found to be at maximum medical improvement (MMI) for her hip injury on May 14, 2021, and at MMI for her back injury on December 16, 2021. Respondents paid the Claimant TTD compensation until January 23, 2022. Therefore, Respondents are owed an overpayment of \$625.71.
6. The Claimant was assigned a 10% whole body impairment rating for her back injury by Dr. Calhoun. The Respondents have paid the Claimant PPD benefits owed for this rating. The Claimant was also assigned an 8% rating for her hip injury for a combined rating of 17%. The Respondents have accepted this rating. The Claimant is being paid by APERS \$217.17 in monthly benefits. In the event, the Claimant is awarded benefits herein, Respondents are entitled to an offset for payment of these benefits.
7. That Respondents have controverted this claim for additional benefits.

8. All issues not litigated herein are reserved under the Arkansas Workers' Compensation Act.

### Issues

By agreement of the parties, the issues to be litigated at the hearing included the following:

1. Whether the Claimant is entitled to TTD from May 1, 2021 until October 17, 2021.
2. Whether the Claimant is entitled to wage loss disability for the combined rating of 17%. (Of note, the Claimant's attorney specifically reserved permanent and total disability benefits).
3. Whether the Claimant's attorney is entitled to a controverted attorney's fee.

### Contentions

The respective contentions of the parties are as follows:

Claimant:

- a. Claimant contends that she took retirement effective May 1, 2021. Claimant contends that she was not able to continue to perform her work duties at that time. Claimant continued to have chronic hip and back pain. It was not discovered that she had a compensable herniated disc that was the source of these continuing symptoms until the MRI was performed on August 25, 2021. Claimant contends that there is an issue of whether she is entitled to temporary total disability benefits from May 1, 2021 until October 17, 2021 when TTD was reinstated. Claimant contends that given the severity of the herniated disc subsequently discovered and identified which required surgery that it is clear she had good faith basis for being unable to perform her job duties and it would be appropriate for her to have received TTD during that time frame.
- b. Claimant contends that she is entitled to wage loss disability benefits in excess of

the impairment ratings. Claimant contends that she has not been able to return to work and contends that she is entitled to substantial wage loss benefits. Claimant would contend she has lost approximately ten additional years of her working life and given the circumstances contends that she is now totally and permanently disabled or in the alternative entitled to wage loss disability benefits exceeding 85%.

c. Claimant contends that the medical treatment that she had that her health insurance Health Advantage paid for was reasonable and necessary such that Respondents should be ordered to satisfy the subrogation reimbursement request of Health Advantage.

d. Claimant contends that Respondents should be ordered to pay attorney's fees as provided by law.

Respondents:

Respondents contend that the Claimant has received all reasonable and necessary medical treatment for her compensable injury(ies). The Claimant is currently receiving permanent partial disability benefits in payment of the 10% impairment rating assigned by Dr. Calhoun for her back injury.

The Claimant reached MMI for her lumbar injury on January 5, 2022, and yet was paid TTD benefits through January 23, 2022. The Respondents would contend that the Claimant was overpaid TTD benefits in the amount of \$573.56 and that they are entitled to a credit in that amount against any PPD benefits owed to the Claimant.

The Claimant elected to retire from the Arkansas Department of Human Services. The Claimant is 61 years old and now contends she is entitled to wage-loss disability benefits. Respondents contend that had she not retired the Claimant could and would still be working today,

had she chosen to do so. Based on these facts the Claimant is not entitled to any additional indemnity benefits beyond those owed for the impairment ratings assigned. Since her recent retirement the Claimant has not sought employment nor has she requested any type of vocational rehabilitation assistance in order to assist her in finding another job. Respondents will contend that should the Claimant begin receiving disability retirement benefits as a result of her employment with Respondents they would be entitled to a credit pursuant to A.C.A. §11-9-411 for disability retirement benefits received by the Claimant.

The Respondents contend that the Claimant is receiving and has received all appropriate indemnity benefits to which she is entitled.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based on my review of the record as a whole, to include the aforementioned documentary evidence, other matters properly before the Commission, and after having had an opportunity to hear the testimony of the witness and observe her 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 over this claim.
2. I hereby accept the above-mentioned proposed stipulations as fact.
3. The Claimant proved her entitlement to temporary disability compensation from May 1, 2021 until October 17, 2021.
4. The Claimant proved by a preponderance of the evidence that she sustained wage-loss disability in the amount of 27 % over and above her 10% impairment rating for her low back injury of October 27, 2020. The Claimant's hip injury in the form of a femoral neck fracture is a scheduled injury based on my review of the *A.M.A.*

*Guides to Permanent Impairment*, 4<sup>th</sup> Edition. Therefore, this impairment rating for this injury has not been taken into consideration for the assessment of the Claimant's wage-loss disability.

5. The Claimant's is entitled to a controverted attorney's fee on the indemnity benefits awarded herein.
6. All issues not litigated herein are reserved under the Arkansas Workers' Compensation Act.

### Summary of Evidence

During the hearing, the only witness to testify was Ms. Mary McKamie/the Claimant.

The record consists of the December 13, 2022 hearing transcript and the following exhibits: Specifically, Commission's Exhibit No. 1 includes the Commission's Prehearing Order filed on September 14, 2022 and the parties' responsive filings; Claimant's Exhibit No. 1 is an Abstract of Tables of Contents, which is made up of nine (9) numbered pages; Claimant's Exhibit No. 2 includes a Table of Contents/Medical Reports and other related documents consisting of one hundred and seventy-one (171) pages; and Respondents' Medical Exhibit includes six (6) numbered pages and it has been marked as Respondents' Exhibit 1. Also, the Respondents introduced into evidence the Claimant's Oral Deposition of September 8, 2022. It has been marked as Respondents' Exhibit No. 2 and is retained in the Commission's file. Moreover, the e-mails regarding wage-loss disability for the Claimant's hip impairment rating exchanged with the parties after the hearing have been blue-backed and made a part of the record. They have been marked Commission's Exhibit No. 2.

### Testimony

The Claimant, age 61, is a high school graduate and has earned some college credits. She has been married for almost three decades. Her husband is currently retired. Prior to her October 27, 2020 accidental work injury, the Claimant had worked for the Arkansas Department of Human Services since November 7, 2005. At the time of the Claimant's accidental injury, she worked as a local office administrative assistant, in the Lewisville office. Her employment duties entailed answering the window when clients brought in information, and she made copies of documents for them on an as needed basis. She also assisted them with filling out applications and/or using the kiosk. Her division also collected canned goods and things of that nature for donations made to the Division of Children and Family Services. The Claimant testified that some of the donations involved lifting. She was also responsible for ordering office supplies. She testified that once the supplies were delivered, she had to check them in, and put them away. According to the Claimant, the supplies included heavy cases of paper.

She confirmed that at the time of her accidental injury of October 27, 2020, her hourly rate of pay was \$13.70. However, the Claimant testified that overtime was a rare occurrence. Next, the Claimant explained the facts and circumstances surrounding her October 27 injury. The Claimant essentially testified that as a safety measure to prevent the spread of COVID-19, management had installed shower curtains around their desks. She agreed that she slipped on her coworker's shower curtain or the carpet as she got up to give her coworker a band-aid because she had a cut on her finger. Following her fall, the Claimant had an immediate onset of symptoms, which were all on her left side. She testified that she was unable to move and thought at that time she had jammed her leg. Subsequently, the Claimant was transported to Wadley Regional Medical

Center. There, the Claimant was diagnosed with a broken left hip for which she had to undergo surgery. She confirmed that Dr. Gregory Smolarz performed her hip surgery.

After her discharge from the hospital, the Claimant continued to follow up with Dr. Smolarz. She verified that a nurse case manager, Nicky Hobby, attended her appointments with her. The Claimant agreed that the nurse case manager's note is correct wherein she stated the Claimant was walking with an antalgic gait and requiring the assistance of a cane. She confirmed that she had difficulty transitioning from a seated position, and she continues to deal with pain in her left hip area.

The Claimant confirmed she was released from care by Dr. Smolarz on January 7, 2021 but she did not return to work for DHS until January 11, 2021. She testified that she tried working but had difficulty with walking, standing, lifting, and sitting. These activities caused the Claimant to have constant pain in her hip, down her leg, and into her knee and her lower back. Therefore, the Claimant submitted her resignation, effective April 30, 2021 from her position at DHS. According to the Claimant, she decided to retire because she was "just working, hurting and crying." The Claimant testified that once she got home, she cried even harder, and was unable to do any cooking or cleaning. Instead, the Claimant testified that she had to get on a heating pad to ease her pain." The Claimant underwent an MRI of the lumbar spine and therapy was ordered by Dr. Smolarz during this time frame.

She confirmed that August 25, 2021 an MRI of her back was performed which revealed a herniated disc at L4-5. As a result, the Claimant came under the care of Dr. Calhoun for her back condition. Dr. Calhoun performed surgery on the Claimant's low back in the form of a discectomy on October 18, 2021. She confirmed that the respondent-carrier began paying her temporary total disability benefits again following her back surgery. The Claimant confirmed that she started



drawing benefits from the Arkansas Public Employees Retirement System (APERS) during this period of time. She also applied for Social Security Disability benefits for which she is awaiting a court date. The Claimant confirmed that she currently draws monthly retirement benefits in the amount of \$210.17.

The Claimant confirmed that at the beginning of her effective date of her retirement (May 1, 2021), she did not receive any temporary total disability benefits. She agreed that she is asking for consideration of those benefits. The Claimant also confirmed that she was not capable of working at the time of her retirement. She agreed that she is asserting that she was unable to work from May 1, 2021 until October 2021.

Regarding the surgery, the Claimant testified that it took away some of her pain in the back of her leg, but she still has pain going the side into her lower back. The Claimant confirmed that she continues with the symptoms reflected in Dr. Calhoun's report of January 2023. Specifically, said symptoms include pain in her left buttock, left groin and left thigh to mid-thigh level, which the Claimant described as a "squeezing sensation." She also stated that she is unable to stand for more than five minutes before "her leg starts to feel like it is going to give-out."

The Claimant confirmed that she brought to court with her a cane and a rolling walker. She explained that she must rely on the cane for walking short distances but if she has to go any distance such as the courtroom hallway, she uses the walker. According to the Claimant, her walker has wheels and a seat, therefore if she has to stop and sit for a second, she can do so, and this makes it easier for her to get around. The Claimant agreed that Dr. Calhoun referred her to Dr. Roman for pain management. She confirmed that she continues to see Dr. Roman. The Claimant explained that although Dr. Roman performed a lumbar epidural injection, this eased some of her pain, but she still has ongoing pain related to her back. According to the Claimant, she has had a diagnosis

of rheumatoid arthritis for twenty-seven years. Her rheumatologist is Dr. Jonathan Thomas, in Texarkana. She takes a medication regimen for this condition. Currently, the Claimant takes Leflunomide, Methotrexate, Tramadol and Leucovorin. The Claimant testified that she was instructed by Dr. Roman that the above medications were sufficient to provide relief for her hip and back pain. She testified that she told Dr. Roman she did not want to take any more pain pills. The Claimant denied any other treatment or procedures by Dr. Roman other than the one epidural injection. Per the Claimant, she is scheduled for a follow-up visit with Dr. Roman in March 2023.

The Claimant confirmed that her cane became entangled on her chair at her kitchen table, and she fell at home and broke her pelvis. She confirmed that there was some mention of the possibility of a screw “backed-out” but it ended up resolving itself somewhat. The Claimant confirmed that the screw is still “backed-out” but no additional treatment has been recommended to resolve it. She agreed that she recovered from the broken pelvis with no lasting problems, and that she was released from care associated with this fall on April 21, 2022.

According to the Claimant, she continues with problems related to her left hip and back. Specifically, she testified:

Q So can you describe for us the pain that you have in your left hip and back now?

A There is a pain in that left buttock area. It goes into that hip and it goes down the leg right to my knee. It doesn't go quite to the knee, probably four inches from the knee, and it goes in the groin area, and it's in that lower back. I have to - if I'm sitting in a chair, as you can see, I have a pillow behind my back or something keep me sitting up because it hurts.

Q Did the one epidural give you any temporary relief from any of those symptoms or issues?

A Not really. It helped some for maybe about week, but never relieved the pain.

As of the date of the hearing, the Claimant continued to receive payment for the 17% impairment rating to her body as whole from the Respondents. She was asked to do a self-assessment of her limitations at this point in terms of her ability to lift and carry objects around her household without causing herself more than mild pain or discomfort. Her reply was “Less than twenty pounds. I mean, I can’t lift my granddaughter and she’s two.” The Claimant testified that her granddaughter weighs approximately thirty pounds. She testified she is able to sit for only thirty minutes at a time in a chair without repositioning. However, the Claimant can stand at her kitchen sink for no more than five or ten minutes. She uses a barstool to wash dishes. The Claimant testified that she uses a barstool to do laundry, and she does not lift any of her laundry baskets. When the Claimant goes to the grocery store, she uses a handicapped shopping cart, or she leans over the cart to take the weight off of her legs and that gives her some relief. However, the Claimant testified that it is almost impossible for her stand in a line for check out. Around the house, the Claimant is able to do a few chores, but she has to grab hold of furniture as she goes from one area to other parts of her house. The Claimant uses her walker to go to the mailbox and to walk her yard.

She confirmed that during the three-month period that she returned to work, prior to them discovering she had a herniated disc in her back, she relied on her cane at work.

Regarding an average day for the Claimant, she testified:

A Well, I get up – if I sleep in bed, I get out of the bed. I get up and I’ll go in there and turn the coffee on the and then my husband and I will fix breakfast together because he can stand at the stove and do more than I can, and I’ll make the toast and things like that over at the kitchen. If I’m cooking, I have to have the barstool over at the stove.

The Claimant can dust by sitting on her sofas and leaning over to do that. Her husband does the sweeping, mopping, and vacuuming. She is able to drive by positioning her legs and moving around in the seat to take the pressure off her hip and back. The Claimant testified that quite often she sleeps in her recliner because it provides heat and vibration, which helps to ease her pain. Per the Claimant, she sleeps in the recliner four days out of the week. She is not able to garden anymore because she is unable to operate the tiller. The Claimant is unable to remove the leaves and other debris to tend to her flowerbeds because she has to have a chair and help from others. According to the Claimant, she no longer can decorate for the different seasons. She was once active with the Relay for Life, but she has not done that in a while, and nor she has not been involved in any activities outside of her home.

Once the Claimant recovered from her fall at home, she considered returning to work. According to the Claimant, she put in some applications, but no one would hire her. The Claimant has past work experience as a cashier at Family Dollar, Walmart, and a Shell station. She has unloaded trucks of merchandise. She also worked as a CNA, substitute teacher, and as an aide/paraprofessional at the school. The Claimant confirmed that at page 171 of Claimant's Exhibit, she provided a list of the job applications and places that she submitted job applications. However, the Claimant agreed that she has not received any follow up or job offers.

The Claimant confirmed that she would have continued working until full retirement had she not had her injuries. She confirmed that full retirement age for her would have been 67½. The Claimant denied any prior problems with her back or hip before her work-related injury of October 2020. In addition to rheumatoid arthritis, the Claimant suffers from diabetes and high blood pressure. The Claimant denied that her pre-existing conditions interfered with her working life or her ability to perform any of her job functions. As far as prior surgeries in her lifetime, the

Claimant had her appendix removed when she was 17 years old. She also underwent a tubal ligation. The Claimant previously suffered a broken left wrist and a trigger finger. However, she denied that any of these conditions interfered with her working life. She also suffered a prior broken left shoulder, but no surgery was required. According to the Claimant, this condition did not interfere with her job abilities or performance.

On cross-examination, the Claimant confirmed she completed three years of college work at SAU. The Claimant confirmed that essentially, she might have one year of college left before she could complete a college degree. She testified that she was studying to become an elementary school teacher. The Claimant testified that when she went to work for DHS, she started out as a document examiner and moved up to a secretary II position. Later, the Claimant's position was reclassified to a local office administrative assistant (LOAA), which is the position she held at the time of her October 27, 2020 work-related injury.

With respect to her employment duties, the Claimant confirmed she was responsible for entering information into the computer. She also assisted with the computer set-ups and things of that nature. The Claimant testified that she entered information into the computer when people applied for assistance, such as Medicaid and food stamps. However, she denied that those activities required a lot of typing. She verified that she was doing those kinds of activities during the last four months of her employment until she retired. The Claimant also confirmed that she worked full-time during her last few months of employment with DHS.

She confirmed that Dr. Smolarz performed surgery on her hip. As of the date of hearing, the Claimant did not have any additional surgeries scheduled for her hip although she has an issue with "a screw backing out." She admitted that she has no return appointments scheduled with Dr. Smolarz. The Claimant confirmed that he released her to work on January 7, 2021. She confirmed

seeing Dr. Smolarz after her fall with the cane earlier in the year. The Claimant testified that it has been six months since her last visit with him. She reaffirmed that she returned to work in January 2021 and retired on April 30, 2021. As of May 1, the Claimant is considered retired and eligible for retirement benefits. She denied that she went back to DHS after she retired and had any further discussions with them about returning to work for them. The Claimant admitted that she lives in Lewisville, Arkansas and it is about thirty-five miles from Texarkana.

The Claimant confirmed that she saw Dr. Michael Calhoun for her low back problems for which he performed a surgical procedure. She denied that Dr. Calhoun has planned any additional procedures for her low back. The Claimant denied telling Dr. Calhoun in June of 2022 that she wished to take only over-the-counter medication for her pain. However, she did admit that she told him she did not want to take any more medication because she hates swallowing a bunch of pills.

The Claimant confirmed that she is able to operate a computer. She also has the ability to operate a smart phone and send a text message and do e-mail on her phone. She balances her own checkbook and is able to drive. The Claimant testified that the potential employers of record did not require an online application process. She denied having looked into the possibility or come across any employer that might allow her to work remotely from her home.

Regarding additional medical treatment, the Claimant agreed that no other epidural steroid injections are planned for her low back or hip are planned by Dr. Roman. The Claimant denied that Dr. Roman or Dr. Smolarz has proposed any additional surgery, nor does the Claimant have any return appointments scheduled with Dr. Smolarz or Dr. Calhoun.

On redirect-examination, the Claimant denied she was in any position to pursue a degree given her current circumstances. The Claimant testified that the only way she could teach is from home.

### **Medical Evidence**

An Operative Report was authored by Dr. Gregory J. Smolarz on October 28, 2020 regarding his surgical intervention on the Claimant's hip:

**Pre-Operative Diagnosis**

Minimally displaced comminuted subcapital left femoral neck fracture.

**Post-Operative Diagnosis**

Same.

**Procedure(s) Performed**

Cannulated screw fixation left hip.

On November 10, 2020, the Claimant presented to Dr. Smolarz for postop follow-up of placement of three cannulated hip screws, which he performed on her left hip two weeks ago. The Claimant reported she was feeling better and keeping the weight off of her left hip. At that time, the Claimant denied any complaints of numbness or tingling. An MRI of the Claimant's left hip was performed with an impression of: "1. Left femoral neck ORIF with anatomic alignment. 2. Bilateral hip calcific tendinitis." His assessment was "Supcapital fracture of neck of femur, left, closed, initial encounter." Dr. Smolarz instructed the Claimant to remain toe touch weight bearing on the left for another two weeks. After that, the Claimant could start walking on the left side. Dr. Smolarz discussed with the Claimant the possibility of avascular necrosis in six to twelve weeks. At that time, Dr. Smolarz directed the Claimant remain off work pending her return visit and findings at the next scheduled visit. He noted that the nurse case manager who presented with the Claimant at the office visit was also provided this information.

The Claimant presented to the office of Dr. Smolarz for follow-up of her hip surgery under the care of Heather Leslie, CCMA (Medical Assistant), December 10, 2020. Per these clinic notes, the Claimant was tolerating standing. On physical examination, Dr. Smolarz opined that the Claimant walked with a slight antalgic gait favoring the left lower extremity. Her incision was completely healed. Left hip x-rays revealed “No acute bony findings and the fracture was healing.”

On March 23, 2021, the Claimant presented to Dr. Smolarz for follow-up of her hip injury. The Claimant was accompanied by the nurse case manager, but she remained in the waiting area due to clinic restrictions. At that time, the Claimant continued to have pain on her left hip. Dr. Smolarz reviewed findings of x-rays of the Claimant’s hip with her. Specifically, this x-ray indicated that the fracture was healing and in good position and alignment. His assessment included: “1. Subcapital fracture of femur, left, closed, with routine healing, subsequent encounter. 2. Hip pain, left.” The Claimant was directed to undergo a left hip cortisone injection under fluoroscopy.”

The Claimant resigned from her position with the Arkansas Department of Human Services on March 31, 2021 effective April 30, 2021.

Dr. Rudy Braza performed a fluoroscopic-guided left hip steroid injection on the Claimant’s left hip on April 15, 2021 with an impression of: “fluoroscopic-guided left hip steroid injection without immediate complication.”

On May 14, 2021 the Claimant presented to Dr. Smolarz for a follow-up visit of her left hip pain. The Claimant reported continued pain in her left hip, but she did state that she was doing better after she got the steroid injection. Per this clinic note, Dr. Smolarz performed x-rays of the Claimant’s left hip and reviewed the findings with her. The findings indicated a healed fracture, three screws in place and in good position with alignment. Some degenerative changes were also



noted. Dr. Smolarz assessed the Claimant with “Subcapital fracture of femur, left closed, with routine healing, subsequent encounter.” The Claimant was given a prescription for physical therapy of the left hip, which would give the Claimant the opportunity to strengthen the muscles and improve her overall pain. Dr. Smolarz noted that the Claimant used a cane for support of her left hip when walking.

Dr. J. Michael Calhoun evaluated the Claimant on September 1, 2021 due to a complaint of lower extremity pain. According to this clinic note, Dr. Smolarz stated that a lumbar MRI was recently obtained with findings of “L4-5 spondylolisthesis, but clearly, a large central disc herniation at L4-5 with stenosis.” Dr. Calhoun assessed the Claimant with “Lumbar disc herniation (M51.26); Lumbar stenosis (M48.061); Spondylolisthesis of the Lumbar Region (M43.16); and Lumbar Radiculopathy (M54.16).” Dr. Calhoun opined that the Claimant’s work injury was the major contributing cause of the development of her disc herniation. Yet, Dr. Calhoun stated: “I will consider the L4-5 spondylolisthesis as a pre-existing and unrelated condition.” Nevertheless Dr. Calhoun provided the Claimant with treatment options including surgery, physical therapy, lumbar epidural steroid injections or a left L4-5 hemilaminectomy and microdiscectomy. The Claimant elected to undergo surgical intervention for her back injury.

On October 18, 2021 the Claimant underwent lumbar surgery by Dr. Calhoun. Per a clinic note written that same day, Dr. Calhoun wrote the following in an Operative Report:

**PREOPERATIVE DIAGNOSIS:**

L4-L5 central herniated nucleus pulposus with stenosis and radiculopathy.

**POSTOPERATIVE DIAGNOSIS:**

L4-L5 central herniated nucleus pulposus with stenosis and radiculopathy.

**OPERATIVE PROCEDURES:**

Left L4-L5 hemilaminectomy, microdiscectomy.

Dr. Calhoun authored a Post Operative Note on November 19, 2021.

The patient is one month status post a left-L4-5 microdiscectomy. She still has some residual left leg symptoms. Her incision is okay. She has started doing the exercises she was shown from physical therapy. We're placing her on a Medrol Dosepak. She has received Zanaflex 4 mg #30 with refills. She is not released to work in any capacity, but she is retired.

The Claimant saw Dr. Calhoun for a follow-up visit on December 16, 2021. She was two months out post status left L4-5 microdiscectomy. At that time, Dr. Calhoun noted the Claimant was still having pain over her left lateral thigh. He stated that this was the area where she had her left femur fracture repaired. Dr. Calhoun stated the plan was to see the Claimant back in the clinic in a month and at that time maximum medical improvement (MMI) would be attained and she would have a 10% impairment rating to the body as a whole. Her current restrictions would include no lifting more than ten pounds and no repetitive bending, twisting, or lifting.

On January 5, 2022 the Claimant saw Dr. Calhoun for a follow-up visit of her lumbar surgery. Dr. Calhoun noted that the Claimant would see her orthopedist. However, Dr. Calhoun stated, "I doubt the orthopedist will have anything else to offer the patient (the Claimant) and will continue to say her pain is radicular in nature." At that time, the Claimant reported to Dr. Calhoun that she still had pain and tenderness over the left lateral thigh. Basically, Dr. Calhoun opined that the Claimant's left thigh pain was the result of her lower back injury. He pronounced the Claimant to be at MMI with regard to her lumbar surgery. However, Dr. Calhoun stated that the Claimant did not have any specific restrictions with regard to her lumbar surgery. Specifically, Dr. Calhoun wrote "She has suffered a 10% impairment to the whole person according to the 4<sup>th</sup> edition of AMA Guides to Permanent Impairment."

The Claimant underwent an Independent Medical Evaluation on February 14, 2022 by Dr. Carlos Roman due to continued left hip, groin, and thigh pain. The Claimant was noted to walk with an antalgic gait with the use of a single pronged cane. At that time, the Claimant reported

that she had continued pain down her posterior thigh that went away with surgery. However, since her surgery, the Claimant stated the pain was constant in her left groin and left buttock. Dr. Roman stated the following Final Diagnoses: “1. Lumbar radiculopathy left side L3-L4. 2. Low back pain. 3. Left hip pain. 4. Status post left hip fracture. 5. Open reductions and internal fixation, left hip. 6. Lumbar decompressive surgery, L4-L5. 7. Lumbar disc bulge, L4-L5. 8. Significant rheumatoid arthritis. 9. Long-term opiate use. 10. Opiate use by way of Tramadol.” He recommended that the Claimant undergo a pinpoint steroid injection at the greater trochanter in the clinic to provide some relief of symptoms and suggested a LESI at L4-L5. Dr. Roman opined that the Claimant’s symptoms were consistent with swelling at the L4-L5 nerve root.

On March 8 2022, the Claimant was scheduled for a return visit to Dr. Gregory Smolarz, orthopedic with complaints of pain in her left hip after on March 4, 2022. She reported a fall over a kitchen chair and landed on her left hip. The Claimant was seen at Wadley ER on the day of her fall. She was referred over to him for further evaluation for a possible fracture in her pelvis. Dr. Smolarz noted that the Claimant had a history of previous sub-capital fracture of left femur. Since her fall, the Claimant reported she had continued pain and difficulty standing due to pain. Her pain was noted to be present prior to her fall. Dr. Smolarz’s Assessment/Plan included:

1. Closed fracture of multiple rami of left pubis, initial encounter (HC Category).
2. Closed subcapital fracture of left femur with delayed healing, subsequent encounter.

For the left hip he discussed with the Claimant the possibility to a bipolar endoprosthesis or total hip replacement. Dr. Smolarz directed the Claimant to follow-up with him in four to six weeks.

The Claimant returned to Dr. Smolarz on April 21, 2022 for a follow-up visit for her left hip and pelvis pain. Dr. Smolarz attributed the Claimant’s hip pain to one of the screws in the hip being backed out some, of which was revealed on a CT scan of the pelvis. Dr. Smolarz noted that the Claimant’s continued hip pain was due to the screw. He stated that the Claimant’s pelvic

fracture was healed, and the screws were in the same place since the time the CT scan was performed. However, Dr. Smolarz told the Claimant he would be unable to remove the screw because it was needed for stability. At that time, Dr. Smolarz opined that the Claimant was doing well, and no further treatment was indicated at that time for her left hip.

On May 9, 2022, the Claimant returned to Dr. Roman for severe pain down her left hip, left leg, and lower back, for which he performed an epidural injection.

**PREOPERATIVE DIAGNOSES:**

1. Lumbar radiculopathy left L4-L5.
2. Lumbar disk disease.
3. Previous lumbar decompressive surgery.

**POSTOPERATIVE DIAGNOSES:**

1. Lumbar radiculopathy left L4-L5.
2. Lumbar disk disease.
3. Previous lumbar decompressive surgery.

**OPERATIVE PROCEDURE:**

Lumbar epidural steroid injection, L4-L5, left bias.

Dr. Roman saw the Claimant for a follow-up visit on June 7, 2022 due to ongoing pain. At that time, the Claimant had radicular pain present in the L4 pattern but overall, her pain was under control. The LESI performed in May gave her some relief and she no longer experienced pain in the groin area. The Claimant continued to walk with an antalgic gait with the use of a single prone cane. She had a little bit of joint tenderness of the greater trochanter of the left, but he injected that last time with good relief. Dr. Roman released the Claimant from his care with follow-up in a year.

An Impairment Rating Evaluation was performed on October 3, 2022. The examiner assessed the Claimant with a 10% whole person rating per Dr. Calhoun for her lumbar injury. The Claimant was assessed an additional 8% whole impairment for her left side femoral neck fracture.

The examiner combined these two ratings using the value charts (p. 322 of the Guides), which amounted to a totaled combined rating of 17% to the whole person. The Respondents accepted this rating and began making payments to the Claimant.

The Claimant's Oral Deposition was taken on September 8, 2022.<sup>1</sup> Her deposition testimony is consistent with her hearing testimony. The original copy of the Claimant's deposition is retained in the Commission's file.

### **Adjudication**

#### **A. Temporary Total Disability Compensation**

The Claimant contends she is entitled to temporary total disability compensation from May 1, 2021 through October 17, 2021. The Respondents contend that the Claimant is not entitled to any additional indemnity benefits because had she not chose to retire, she would still be working for DHS.

In the case at bar, on October 27, 2020 the Claimant suffered an admittedly compensable injury to her left hip, which is a scheduled injury. Subsequently, the Claimant was found to have suffered a compensable injury to her back, which is an unscheduled injury. Given the severity of the Claimant's compensable back injury, I am convinced that it was primarily for that reason she was unable to continue working at DHS beginning on May 1, 2021 and continuing through October 17, 2021. Therefore, an analysis for temporary total disability compensation for the Claimant's scheduled hip injury is not necessary.

With that in mind, an injured employee for an unscheduled injury is entitled to temporary total disability compensation during the time that she is within her healing period and totally

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<sup>1</sup> Regarding the Claimant's Oral Deposition of September 8, 2022 there is a clerical error regarding the file number reflected on this document. The correct WWC File No. for this claim is: H008571.

incapacitated to earn wages. *Arkansas State Highway and Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period is that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). If the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition, the healing period has ended. *Id.* Temporary total disability cannot be awarded after the Claimant's healing period has ended. *Trader v. Single Source Transportation*, Workers' Compensation Commission E507484 (February 12, 1999).

Here, the Claimant suffered an admittedly compensable injury to her left hip on October 27, 2020 when she tripped and fell while working for the Respondents as described above in full detail. The Claimant was transported to a local hospital following her fall. The Claimant came under the care of Dr. Smolarz and he performed surgery on the Claimant's left hip on the day of the incident.

The Claimant was the sole witness to testify. After having observed the Claimant's demeanor during the hearing and when comparing her testimony with the medical evidence and other documentary evidence, I found her to be a credible witness, particularly regarding her inability to work due to her compensable back injury for the time frame in question. Therefore, the Claimant's refusal to continue her employment with DHS beginning May 1, 2021 was not unreasonable and is not a bar to her claim for temporary total disability benefits.

With that in mind, the Claimant was released to return to work on January 7, 2021, by Dr. Smolarz due to her admittedly compensable left hip injury. Therefore, the Claimant returned to work for DHS on January 11, 2021 in her previous job. However, the Claimant experienced significant and excruciating pain down the left side of her back into left knee. At that time, the

Claimant had difficulty working, standing, lifting, and sitting. Therefore, the Claimant retired from DHS effective April 30, 2021. Her testimony demonstrates she was not able to continue to perform her employment duties at that time due to back pain and other related symptoms.

Subsequently, the Claimant came under the care of Dr. Calhoun for her back condition. On August 25, 2021 the Claimant underwent a lumbar MRI. She was found to have a significant herniated disc at L4-5 causing impingement that was the source of her continuing symptoms. Dr. Calhoun related this to her work injury of August 27, 2020. The Claimant underwent back surgery in the form of a left L4-5 microdiscectomy by Dr. Calhoun on October 25, 2021. Her testimony validates that she was unable to work from May 1, 2021 until at least October 17, 2021 due to her compensable back injury. Given the severity of the Claimant's herniated disc which required surgery, I am convinced she had a good faith basis for being unable to perform her job duties and that it was due to her compensable back injury that she was unable to continue performing her employment at DHS, beginning on May 1, 2021. Of significance, the parties stipulated that the Claimant reached MMI for her back injury on December 16, 2021.

Under these circumstances, I find that the Claimant proved she remained within a healing period and was totally incapacitated to earn wages beginning May 1, 2021 and continuing until October 17, 2021. As such, I further find that the Claimant proved her entitlement to temporary total disability from May 1, 2021 through October 17, 2021.

B. Wage Loss Disability

Here, the Claimant has asserted her entitlement to wage loss disability over and above her 10% impairment rating for her compensable back injury of October 2020. The parties stipulated that the Claimant was entitled to a determination of wage disability of the combined rating of 17% for the 8% hip impairment rating and the 10% impairment rating for the lumbar spine. However,

per my e-mail exchanges with the parties in this regard (which has been blue-backed and made a part of the record as Commission's Exhibit 2), I find that the Claimant's hip injury in the form of a femoral neck fracture, is listed in the A.M.A. Guides 4<sup>th</sup> Edition under the "lower extremity impairments" section. Therefore, I find that the Claimant's hip injury is a scheduled injury. As such, I must agree with the Respondents that only the lumbar spine impairment rating of 10% should be used in the wage-loss disability determination.

In that regard, a Claimant who has sustained a scheduled injury is limited to the applicable allowances in Ark. Code Ann. §11-9-521 and such benefits cannot be increased by considering wage-loss factors *Federal Compress & Whse. v. Risper*, 55 Ark. App. 300, 935 S.W. 2d 279 (1996).

When 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 her future earning capacity. Ark. Code Ann. § 11-9-522(b)(1). 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).

The Claimant is 61 years of age. She attended college for three years and studied to become an elementary educator. However, the Claimant essentially testified that she is physically unable to return to college due to her compensable back injury of October 2020. The Claimant began working for DHS in November 2005. While working for DHS she performed primarily clerical type employment duties. In her last position, the Claimant worked as an administrative assistant.



She assisted clients with filling out applications for Medicaid and food assistance. According to the Claimant, she also had to make copies of documents for clients making application for these programs. The Claimant also assisted clients with the use of the kiosk. According to the Claimant, she ordered supplies for the office and was required to put them away. This job task caused the Claimant to have to lift heavy cases of paper. Her hourly rate of pay at the time of her 2020 injury was \$13.70.

However, the Claimant took early retirement from DHS effective April 30, 2021 because she was having ongoing problems with chronic back pain and other related symptoms. She credibly testified she was unable to perform her employment duties without crying. The Claimant underwent an MRI in August 2021 and her complaints of pain were substantiated. The MRI revealed a significant herniation at L4-L5 causing impingement. Dr. Calhoun attributed these findings to the Claimant's work-related injury of October 2020. The Claimant underwent back surgery under the care of Dr. Calhoun on October 18, 2021. The Respondents accepted this claim and have paid benefits including the 10% impairment rating assessed by Dr. Calhoun, with the exception of the above period of temporary total disability currently in question. Yet, Dr. Calhoun assessed the Claimant to be at MMI for her back injury on December 16, 2021. Since leaving DHS in April 2021, the Claimant has not tried to return to work for DHS. Following her deposition in September 2022, the Claimant submitted job applications at several places. However, the Claimant has not heard from any of the potential employers or received any follow-up or job offers.

She has prior work experience as a cashier at Family Dollar, and at a Shell gas station. The Claimant has also worked as a CNA, substitute teacher and as a paraprofessional.

The Claimant ambulates with a cane and walker. She is unable to engage in prior hobbies of gardening because she is unable to use a tiller and perform other tasks related to gardening such

as walking, bending, and standing. The Claimant is able to perform limited household chores and her ability to ambulate is significantly restricted primarily due to her back injury. Yet the Claimant is able to drive. She is under the care of Dr. Roman for pain management due to her compensable back injury and resulting symptoms. However, the Claimant does not receive any additional prescription pain medication from Dr. Roman. The Claimant's medication regimen for rheumatoid arthritis which includes Tramadol, is sufficient to cover her back pain and other symptoms. Dr. Roman has performed one lumbar injection with temporary relief of her back pain symptoms. She has another follow-up visit with Dr. Roman this March of 2023.

Although Dr. Calhoun assessed the Claimant a 10% impairment rating to her back, he did not place any physical restrictions on the Claimant. Despite this, the Claimant is limited in her ability to lift, walk, stand, and sitting. This was demonstrated by the Claimant's guarded movements during the hearing, and her testimony which was corroborated by the medical evidence of record. The Claimant credibly testified that she had not planned to return until she reached full retirement age for Social Security, which was age sixty-seven. Currently, the Claimant receives early retirement benefits from the state of Arkansas/DHS in the amount of \$210.17. She has applied for Social Security disability benefits, but her claim was denied. The Claimant is awaiting a court date on this claim. She is married and her husband is retired. In fact, her testimony demonstrates she has a granddaughter that she is unable to lift due to her injury.

Based on my review of the evidence, including the Claimant's credible testimony, and when considering her advanced age, education, work experience, the nature and extent of her injury, the 10% permanent anatomical impairment to the body as a whole for her back compensable injury, use of assistive devices, her restricted activities of daily living, prior work experience, and the fact that she had to take early retirement, and all other relevant matters reasonably expected to

affect her future earning capacity, I find that the Claimant has proven by a preponderance of the evidence that she sustained a 27% wage-loss earning capacity in excess of her 10% permanent anatomical impairment to the body as a whole for her compensable back injury of October 2020.

C. Controverted Attorney's Fee

It is undisputed that the Respondents have controverted this claim for additional benefits as evidenced by their stipulation to conversion. Therefore, pursuant to Ark. Code Ann. §11-9-715 (Repl. 2012), the Claimant's attorney is entitled to a controverted attorney's fee on all indemnity benefits awarded herein.

**AWARD**

The Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to temporary total disability compensation for her October 27, 2020 compensable back injury from May 1, 2021 through October 17, 2021.

Additionally, the Claimant proved by a preponderance of the evidence she sustained wage loss disability in the amount of 27% over and above her 10% permanent anatomical impairment for her compensable back injury of October 27, 2020. The Claimant's hip injury in the form of a femoral neck fracture, is listed in the A.M.A. Guides 4<sup>th</sup> Edition under "lower extremity impairments" section. Therefore, I find that that her hip injury is a scheduled injury. As such, the hip injury is not a consideration for wage-loss disability.

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 (Repl. 2012). *See Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W. 2d 57 (1995).

Pursuant to Ark. Code Ann. §11-9-715 (Repl. 2012), 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.

All issues not addressed herein are expressly reserved under the Arkansas Workers' Compensation Act.

**IT IS SO ORDERED.**

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**CHANDRA L. BLACK**  
**ADMINISTRATIVE LAW JUDGE**