BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. H002934

VANESSA DELAMAR, EMPLOYEE **CLAIMANT**

ARKADEPHIA HUMAN DEV. CTR., EMPLOYER **RESPONDENT**

PUBLIC EMPLOYEE CLAIMS DIV., CARRIER/THIRD-PARTY ADM'R **RESPONDENT**

OPINION FILED APRIL 16, 2025

Hearing before Administrative Law Judge O. Milton Fine II on January 29, 2025, in Little Rock, Pulaski County, Arkansas.

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

Respondents represented by Mr. Charles H. McLemore, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On January 29, 2025, the above-captioned claim was heard in Little Rock, Arkansas. A prehearing conference took place on November 20, 2024. The Prehearing Order entered on November 21, 2024, pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the order.

Stipulations

At the hearing, the parties discussed the stipulations set forth in Commission Exhibit 1. Following amendments, they read as follows:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The employee/employer/carrier/third-party administrator relationship existed at all relevant times, including May 11, 2020, when Claimant sustained compensable injuries to her back, right arm, and right shoulder. Respondents accepted these injuries as compensable.
3. Claimant's average weekly wage of $805.45 entitles her to compensation rates of $537.00/$403.00.
4. Respondents have controverted this claim for additional benefits.

Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit 1. Following amendments, the following were litigated:

1. Whether Claimant sustained a compensable injury to her left hip by specific incident.
2. Whether Claimant is entitled to reasonable and necessary medical treatment of her alleged compensable left hip injury, to include a total hip replacement.
3. Whether Claimant is entitled to additional temporary total disability benefits for the period of May 25, 2021, through July 6, 2022.[1]

[1]This was the date supplied by the parties at the hearing. [T. 7] But it is clearly an error; the payout history that is in evidence (Respondents' Exhibit 2) shows that payment of temporary total disability benefits to Claimant resumed on July 27, 2022.

4. Whether Respondents are entitled to an offset or a credit for temporary total disability benefits that they paid for the period of October 31, 2022, to November 29, 2022.

5. Whether Claimant is entitled to a controverted attorney's fee.

All other issues have been reserved.

Contentions

The respective contentions of the parties read as follows:

Claimant:

1. Claimant contends that she sustained compensable injuries to her right shoulder and left hip on May 11, 2020. Respondents have controverted the condition of the left hip. Claimant contends entitlement to payment of medical expenses associated with her left hip injury as well as temporary total disability benefits.

Respondent:

1. Respondents contend that Claimant reported having an injury on May 11, 2020, when she fell and landed on her right arm and injured her back, which they accepted as compensable. Claimant has been provided reasonable and necessary treatment of her compensable injury, and has been paid temporary total disability benefits while in her healing period for her compensable injury.

For that reason, it is reasonable to conclude that the parties intended the end date to be July 26, 2022. It will be analyzed as such.

2. Respondents provided medical treatment for Claimant's low back with Dr. Wayne Bruffett, who released her at maximum medical improvement to full duty with respect to her low back on August 5, 2020, but referred her to a hip specialist for her very arthritic left hip. They provided treatment for her left hip with Dr. Adam Smith until he released her at maximum medical improvement on December 22, 2020. On that date, he assigned her no permanent impairment to her left hip due to her work injury, and also wrote that she needed a total hip replacement for her end-stage, degenerative joint disease, which again was not due to her work injury.

3. Respondents covered Claimant's October 21, 2020, right shoulder rotator cuff repair with Dr. Phillip Smith. He released her at maximum medical improvement for her shoulder on May 3, 2021, with no work restrictions, along with an order for passive range-of-motion measurements to determine permanent impairment. Respondents paid temporary total disability benefits until May 3, 2021. Smith ultimately assigned Claimant an impairment rating of six percent (6%) to the body as a whole concerning her shoulder. Respondents accepted this rating and paid Claimant permanent partial disability benefits pursuant to it.

4. Respondents provided Claimant with further treatment with Dr. Smith, and she was paid additional temporary total disability benefits from July 27, 2022, until November 29, 2022. However, Smith again released her at maximum medical improvement on October 31, 2022—resulting in an

overpayment of temporary total disability benefits. Respondent is entitled to a credit therefor.

5. Respondents further contend that the left total hip replacement that Claimant demands is not reasonable and necessary medical treatment for her compensable injuries. She has reached maximum medical improvement for them. After Claimant requested a continuance of the hearing, on June 3, 2022, this file was returned to the Commission's general files, and no hearing took place. Respondents filed a motion to dismiss this claim, to which she has objected.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including 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, 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. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant has not proven by a preponderance of the evidence that she sustained a compensable injury to her left hip by specific incident.
4. Because of Finding/Conclusion NO. 3, *supra*, Claimant has not proven by a preponderance of the evidence that she is entitled to reasonable and

necessary medical treatment of her alleged compensable left hip injury, to include a total hip replacement.

5. Claimant has proven by a preponderance of the evidence that she is entitled to additional temporary total disability benefits from May 25, 2021, through July 26, 2022.

6. The evidence preponderates that Respondents are entitled to a dollar-for-dollar offset concerning their overpayment to Claimant of temporary total disability benefits for the period of October 31, 2022, through November 29, 2022.

7. Claimant has proven by a preponderance of the evidence that she is entitled to a controverted attorney's fee.

ADJUDICATION

Summary of Evidence

Claimant was the sole witness. Along with the Prehearing Order discussed above, the exhibits admitted into evidence were Claimant's Exhibit 1, a compilation of her medical records, consisting of two index pages and 92 numbered pages thereafter; Respondent's Exhibit 1, another compilation of Claimant's medical records, consisting of four abstract/index pages and 128 numbered pages thereafter; and Respondents' Exhibit 2, non-medical records, consisting of one index page and 23 numbered pages thereafter.

In addition, I have blue-backed to the record the post-hearing briefs of Claimant and Respondents, both filed on February 12, 2025, and consisting of four and six numbered pages, respectively.

A. Compensability

Introduction. As set out above, the parties have agreed that Claimant sustained compensable injuries to her back, right arm, and right shoulder on May 11, 2020. But in this action, she is asserting that as a result of that same specific work-related incident, she also suffered a compensable injury to her left hip. Respondents have controverted the alleged hip injury.

Standards. Arkansas Code Annotated § 11-9-102(4)(A)(i) (Repl. 2012), which I find applies to the analysis of this alleged injury, defines "compensable injury":

> (i) An accidental injury causing internal or external physical harm to the body . . . arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D) (Repl. 2012). "Objective findings" are those findings that cannot come under the voluntary control of the patient. *Id*. § 11-9-102(16).

If Claimant fails to establish by a preponderance of the evidence any of the requirements for establishing compensability, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997). This standard means the evidence having greater weight or convincing force. *Barre v. Hoffman*, 2009

Ark. 373, 326 S.W.3d 415; *Smith v. Magnet Cove Barium Corp*., 212 Ark. 491, 206 S.W.2d 442 (1947).

Discussion. Claimant, who is 67 years old and a high school graduate, testified that she first went to work for Respondent Arkansas Human Development Center - Arkadelphia ("AHDC") in May 1999. At the time of the stipulated work-related incident on May 11, 2020, she was employed as a teacher's assistant. This job, which she held until July 20, 2020, was strenuous; and her duties varied widely. For example, not only did she assist clients with personal grooming, but she brought boxes of books for them to shred. She helped them with craft projects, and used a computer to track their progress in the classroom. At times, she even had to operate a forklift. On other occasions, she transported clients to and from their homes, medical appointments, and various outings.

Asked how she was injured at work, Claimant responded:

> I went to work that morning and I was getting ready to get off, and I was—I had one of the clients in a wheelchair and I was proceeding to push her home from the classroom, and as I got to the door to push her out the door, I ended up with the wheelchair and me both landing on the concrete pavement, and I had to end up at the emergency room from there.[2]

[2]The report from Claimant's treatment at CHI St. Vincent Hot Springs on May 12, 2020, contains the following recountings of Claimant's accident:

> Per Provider Injury Alert, "Employee stated that she was getting ready to leave. She was walking around another client in a wheelchair. The employee moved the wheelchair and it caught her pants. She [f]ell and landed on her right arm and injured her back."
>
> . . .

Claimant initially treated at an emergency room in Arkadelphia before going on to Hot Springs.

Asked about the condition of her hip after the wheelchair incident, Claimant related:

> It was like my hip would—when I would, like, try to get up, it was like I could feel something in there that wasn't right, and it was just like be hurting all the time, so that's why I went to the doctor and then he started giving me injections. Then he told me the injections didn't work so he told me I needed to have a total hip [replacement].

Along with the injections, her hip was being treated with physical therapy.

According to Claimant, she was being treated for her hip by Dr. Phillip Smith. The following exchange took place on direct examination:

> Q. And to the best of your knowledge—before you had your hip replacement surgery, to the best of your knowledge, were the bills being paid by workers' compensation?
>
> A. No.
>
> Q. Tell me—
>
> A. My insurance—
>
> Q. —at what point in time did your insurance take over and pay?
>
> A. When the doctor said—it turned around that he didn't think that I got hurt when I fell.
>
> Q. Okay.

> The problem began on 5/11/2020. 1st visit; 5/12/2020: going around a client in wheelchair that was then pushed essentially knocking her down, falling onto R side.

A. And I told him I did, and so workman's comp stopped paying for me at my office visits, so then my insurance took over.

. . .

Q. Before Dr. Smith indicated that a hip replacement surgery was being recommended for you. Okay?

A. Yes, sir.

Q. Okay. Before that happened—

A. Mm-hm.

Q. —the hip treatment that you were getting, do you know whether or not it was being paid by workers' compensation?

A. Yes, it was.

Claimant added that while her need for a hip replacement was broached in December 2020, the operation did not happen until May 25, 2021. During December 2020, she discovered that Respondents were not going to cover the surgical procedure.

As a result of the hip replacement, per Claimant, the condition of her hip improved. She is glad that she underwent the procedure.

During her testimony, Claimant acknowledged that, as reflected in Respondents' Exhibit 1, she had pre-existing hip problems. The following exchange occurred:

Q. What's the difference between after this May the 11th of 2020 accident and those things that you had been to the doctor for before?

A. Because before it was like after the doctor had treated me for the other two incidents, my hip got better. It wasn't—it didn't bother me. But this time when I fell, it didn't stop hurting.

On cross-examination, Claimant acknowledged that her left hip problems go back to 2016. During that period, she saw physicians including Drs. Charity Loudermilk and Bryan McDonnell. But despite the fact that she treated with them for her hip in 2018 and 2019 for arthritic hip pain, she hastened to add that her hip issues were not continual.

Asked about the statement in her Form AR-N that is in evidence and which reflects that "[s]he fell and landed on her right arm and injured her back," Claimant explained: "[t]hat's what the doctor said at first, but then my hip started hurting me . . . ." Notwithstanding the description in the form, Claimant elaborated: "[s]o when I landed, it jarred my whole body . . . I'm hitting concrete pavement." Per Claimant, her hip was not bothering her prior to the fall, and did not hurt immediately after the wheelchair incident.

She saw Dr. Adam Smith in December 2020, and he described her as having a history of left hip osteoarthritis. He was the one who recommended that the hip be replaced. Again, she testified that this surgery improved her condition.

The medical records in evidence reflect that when Claimant presented to CHI St. Vincent Hot Springs on the day after her work-related fall, May 12, 2020, she stated that she "[f]ell and landed on her right arm and injured her back." Claimant described having pain in her right shoulder and pain in her lower back that was extending up into her neck.

For nearly three months after this initial treatment, Claimant made no mention of her left hip. This changed on August 6, 2020, when she went to OrthoArkansas. On that date, per the report, [s]he [was] complaining of low back pain with radiation into her

left hip." After studying her x-rays, Dr. Phillip Smith wrote that Claimant "has a very arthritic appearing hip joint on the left side." Returning to OrthoArkansas on September 3, 2020, and seeing Dr. Adam Smith, Claimant told him that she "has had worsening left hip pain since" her May 2020 fall at work. The record continues:

> She is [sic] never had an injection in her hip. She did see Dr. Breathitt initially who got an MRI of her hip and back and recommend[ed] she follow-up with me. She denies having pain in her hip before her fall."

Dr. Smith added:

> X-rays of her left hip show loss of the joint space, subchondral sclerosis and osteophyte formation.
>
> Assessment: Left hip osteoarthritis

On September 3, 2020, Claimant underwent a steroid injection of her hip by Dr. Adam Smith. He assessed her on September 10, 2020, as having trochanteric bursitis of the left hip with IT band syndrome in addition to her osteoarthritis. The report of her December 17, 2020, visit to him reads in pertinent part:

> Osteoarthritis of hip – Patient is a 63-year-old female with a history of left hip osteoarthritis returns today for follow[-up]. I had previously given her left hip ultrasound injection which did provide her with some relief but it did not last. She returns today stating that she has continued pain in her left hip that is made worse with any type of prolonged walking or standing as well as getting in and [out] of a chair or going up and down stairs. Is improved with rest. She states the longer she is on the more it hurts. She has failed conservative management to date and is read to proceed to further options.
>
> . . .
>
> Assessment: End-stage osteoarthritis left hip.
>
> Plan: She has failed conservative management and wants to pursue operative intervention. We discussed the risks and benefits of surgery

> today in great detail. She understands the risks and wants to proceed. Get her set up for a left total hip at her convenience.

During another appointment at OrthoArkansas on May 14, 2021, she related that she was returning to the clinic to have her hip surgery rescheduled under her primary insurance because Respondents had declined to cover it. X-rays again showed end-stage osteoarthritis with complete loss of joint space, along with subchondral sclerosis and osteophyte formation.

On May 26, 2021, Claimant underwent a total left hip replacement. This is only documented from reports of hip x-rays taken during surgery; the surgical report itself, assuming such exists, is not a part of the evidentiary record. In a follow-up appointment with Dr. Adam Smith on June 10, 2021, Claimant reported that she was doing well with respect to her hip. When she saw him again on July 9, 2021, Claimant complained of "a fair amount of pain" that was radiating from her left buttock down into her foot. The doctor did not ascribe the pain to her hip, but instead to her back.

On September 10, 2021, Claimant told Dr. Adam Smith that she was "doing much better with regards to her hip." The doctor on September 13, 2021, added the following Addendum to the report of that visit:

> Patient is a Worker's Comp. patient and sustained an injury which precipitated her symptoms in May 2020. She states that she was not having symptoms prior to her fall. Given her x-rays that were performed in August 2020 she does have arthritis in those x-rays. It is highly unlikely that the arthritis developed with the fall. What is more likely the case is that she had pre-existing arthritis that was asymptomatic or minimally symptomatic that was exacerbated by the fall worsening of pre-existing condition.

When Claimant went back to Dr. Adam Smith on June 10, 2022, she told him that her hip was still "doing very well." But because she was presenting with pain along her trochanteric bursa and distally along her IT band, he assessed her as having trochanteric bursitis, gave her an injection into the bursa, and sent her to physical therapy "to stretch out her IT band." He also prescribed Voltaren.

Dr. Adam Smith has opined that Claimant had pre-existing arthritis in her left hip. Her medical records that are in evidence reflect that prior to the stipulated work-related fall that she suffered on May 11, 2020, she had presented on two occasions—in 2016 and 2018—with left hip pain. The Commission is authorized to accept or reject a medical opinion and is authorized to determine its medical soundness and probative value. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002); *Green Bay Packing v. Bartlett*, 67 Ark. App. 332, 999 S.W.2d 692 (1999). Based on the evidence, I credit his opinion on this point.

An employer under the Arkansas Workers' Compensation Act takes an employee as the employer finds her. Employment circumstances that aggravate pre-existing conditions are compensable. *Nashville Livestock Comm. v. Cox*, 302 Ark. 69, 787 S.W.2d 64 (1990). A pre-existing infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with the infirmity to produce the disability for which compensation is sought. *St. Vincent Med. Ctr. v. Brown*, 53 Ark. App. 30, 917 S.W.2d 550 (1996). However, "[a]n aggravation, being a new injury with an independent cause, must meet the requirements for a compensable injury." *Crudup v. Regal Ware, Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000); *Ford v. Chemipulp Process,*

Inc., 63 Ark. App. 260, 977 S.W.2d 5 (1998). This includes the prerequisite that the alleged injury be shown by medical evidence supported by objective findings. *See Heritage Baptist Temple v. Robison*, 82 Ark. App. 460, 120 S.W.3d 150 (2003).

The medical evidence, as recounted above, is devoid of objective findings of a hip injury. The only objective findings are strictly degenerative. For that reason, Claimant cannot show that she suffered a compensable left hip injury. Consequently, this portion of her claim must fail.

B. Reasonable and Necessary Medical Treatment

Introduction. Claimant has argued that she is entitled to reasonable and necessary treatment of her alleged left hip injury, to include the total hip replacement that she has undergone.

Standards. Arkansas Code Annotated Section 11-9-508(a) (Repl. 2012) states that an employer shall provide for an injured employee such medical treatment as may be necessary in connection with the injury received by the employee. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). But employers are liable only for such treatment and services as are deemed necessary for the treatment of the claimant's injuries. *DeBoard v. Colson Co.*, 20 Ark. App. 166, 725 S.W.2d 857 (1987). The claimant must prove by a preponderance of the evidence that medical treatment is reasonable and necessary for the treatment of a compensable injury. *Brown*, *supra*; *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). What constitutes reasonable and necessary medical treatment is a question of fact for the

Commission. *White Consolidated Indus. v. Galloway*, 74 Ark. App. 13, 45 S.W.3d 396 (2001); *Wackenhut Corp. v. Jones*, 73 Ark. App. 158, 40 S.W.3d 333 (2001).

As the Arkansas Court of Appeals has held, a claimant may be entitled to additional treatment even after the healing period has ended, if said treatment is geared toward management of the injury. *See Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, 184 S.W.3d 31 (2004); *Artex Hydrophonics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983). Such services can include those for the purpose of diagnosing the nature and extent of the compensable injury; reducing or alleviating symptoms resulting from the compensable injury; maintaining the level of healing achieved; or preventing further deterioration of the damage produced by the compensable injury. *Jordan v. Tyson Foods, Inc.*, 51 Ark. App. 100, 911 S.W.2d 593 (1995); *Artex*, *supra*.

Discussion. Claimant has not proven by a preponderance of the evidence that she sustained a compensable left hip injury. Consequently, she cannot establish her entitlement to reasonable and necessary treatment of it—including her hip replacement surgery.

C. Temporary Total Disability

Introduction. As part of this action, Claimant is seeking additional temporary total disability benefits from May 25, 2021, through July 6, 2022. Respondents have denied responsibility for this period, and have asserted that they are entitled to an offset or a credit for a period during which they allegedly incorrectly paid these benefits to her: from October 31, 2022, to November 29, 2022.

Standards. The stipulated compensable injuries to Claimant's back and right shoulder are unscheduled ones. S*ee* Ark. Code Ann. § 11-9-521 (Repl. 2012). An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he has suffered a total incapacity to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). As for the stipulated compensable injury to her right upper extremity, it is scheduled. Ark. Code Ann. § 11-9-521(a)(1)-(2). An employee who has sustained a compensable scheduled injury is entitled to temporary total disability compensation "during the healing period or until the employee returns to work, whichever occurs first . . . ." *Id*. § 11-9-521(a). *See Wheeler Const. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). Also, a claimant must demonstrate that the disability lasted more than seven days. Ark. Code Ann. § 11-9-501(a)(1).

Discussion. During her testimony, Claimant related that as a result of her stipulated compensable right shoulder injury, she underwent two surgeries on it. Both were covered by Respondents. The medical records reflect that the first operation, performed by Dr. Phillip Smith, took place on October 21, 2020. On that date, she underwent a right rotator cuff repair, along with a subacromial decompression with acromioplasty. Her pre and post-operative diagnoses were (1) right rotator cuff tear and (2) impingement. Dr. Smith found that Claimant reached maximum medical improvement ("MMI") with respect to her shoulder on May 3, 2021. Thereafter, he sent her to be evaluated for an impairment rating by Functional Testing Centers, Inc.

Thereafter, on May 24, 2021, Dr. Smith reiterated the aforementioned MMI date and released her with an impairment rating of six percent (6%) to the body as a whole.

Prompted by the above, Respondents ceased payment of temporary total disability benefits on May 24, 2021. The following exchange took place during Claimant's direct examination:

Q. Now between May 25th of 2021, and July the 7th of 2022, when you had that shoulder surgery, did you work during that period of time?

A. No.

Q. Okay. Were you able to work during that—

A. No.

Q. —period of time? Okay. You took a retirement, did you not?

A. Yes, sir.

Q. If I'm correct—if my notes are correct, it would be somewhere around July—

A. Yes, sir.

Q. Maybe July the 11th—

A. Yes, sir.

Q. —of 2020, that you took a retirement?

A. Yes, sir.

Q. Okay. Now why was it that you took a retirement in July of 2020?

A. Because I felt I wasn't gonna be able to continue to do my job because I was in so much pain.

Q. Okay.

A. My shoulder hurt me so bad that it was like I was having to stay on meds and stuff just to, you know, be able to function on a daily basis.

Q. Okay.

A. I know I couldn't work like that.

Q. I think that your first surgery was October the 21st of 2020, to your right shoulder.

A. Yes, sir.

Q. And then you later had this second surgery—

A. Yes.

Q. —in July of '22.

A. Yes, sir.

A claimant's testimony is never considered uncontroverted. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). The determination of a witness' credibility and how much weight to accord to that person's testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id*. In so doing, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id*. After due consideration, I credit Claimant's testimony on this point.

At the same time, per *Poulan*, *supra*, I cannot and do not credit the opinion of Dr. Phillip Smith that Claimant reached MMI concerning her stipulated compensable right

shoulder injury as of May 3, 2021—or even as of May 24, 2021, when he repeated this finding and assigned her a permanent impairment rating for her shoulder. The reason for this is that, as the medical evidence thereafter readily bears out, his opinion was given in error and based upon an incomplete picture of her shoulder condition.

On May 3, 2021—which, again, is the date that Dr. Phillip Smith found Claimant to be at MMI—she was still "complaining of some pain" in her right shoulder despite being "six months out" from her first shoulder surgery. When she returned to him on April 22, 2022, she presented "with continued pain in the right shoulder." The doctor noted that "[t]here has been no new trauma." The report continues:

> Physical Exam: Right shoulder shows healed portals. She does have some pain with overhead forward flexion. She also has pain against rotator cuff resistance. She is neurovascularly intact.
>
> . . .
>
> Assessment: Previous right rotator cuff repair with continued right shoulder pain[.]
>
> Plan: I am going to order an MRI of her right shoulder due to her continued pain after rotator cuff repair. She can continue to work without restriction,[3] I will see her back after her MRI of her right shoulder.

Dr. Phillip Smith saw Claimant again on July 11, 2022. The report of that visit shows that the repeat MRI "showed a healed rotator cuff but some evidence of inflammation." The doctor wrote:

> She has had continued pain in her right shoulder following her repair. She did not respond to therapy and an injection. At this point we will plan for

[3]In light of what is discovered during her second surgery—*see infra*—I likewise do not credit this under *Poulan*, *supra*.

> repeat right shoulder arthroscopy with evaluation of a rotator cuff repair with lysis of adhesions.

Dr. Smith performed the second shoulder surgery on July 27, 2022. Per his report, which is in evidence, he discovered that Claimant had not only developed subdeltoid adhesions, but that there were "multiple large cartilaginous loose bodies throughout the shoulder." An expanded incision had to be made to extract these "loose bodies." A shaver was employed to remove the smaller ones.

Again, in order to be entitled to additional temporary total disability benefits, Claimant must show, inter alia, that during the period in question, she was still in her healing period. The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The medical evidence recounted above clearly shows that she did not reach the end of this healing period as of May 3, 2021. Instead, she remained in that period all the way until she recovered from her second shoulder surgery (October 31, 2022—see *infra*). Respondents assumed responsibility for this second operation and resumed the payment of temporary total disability benefits as of July 27, 2022. During the period at issue here when benefits were suspended or ended—May 4, 2021, through July 26, 2022—Claimant was not only still in her healing period, but as her credible testimony outlined above amply demonstrates, she was suffering a total incapacity to earn wages. Consequently, she has proven by a preponderance of the evidence her entitlement to additional benefits of this type from May 4, 2021, through July 26, 2022.

At the same time, Respondents have alleged that they should be entitled to an offset or credit for temporary total disability benefits that they claim were incorrectly paid for the period of October 31, 2022, through November 29, 2022. Per the payout history, contained in Respondents' Exhibit 2, they did continued to pay her these benefits during that time frame. But as they correctly point out, Dr. Phillip Smith found Claimant to be at MMI concerning her shoulder as of October 31, 2022, and released her to full duty as of that same date. After consideration of the evidence, I credit the doctor's opinion on this particular matter under *Poulan*, *supra*, and find that Claimant reached the end of her healing period on October 31, 2022. For that reason, it has been established that Claimant was not entitled to temporary total disability benefits from October 31, 2022, through November 29, 2022. That said, the evidence preponderates that Respondents are entitled to a dollar-for-dollar offset against current and future liability for indemnity benefits concerning this overpayment. *See Maulding v. Price's Utility Contrs., Inc.*, 2009 Ark. App. 776, 358 S.W.3d 915, *pet. reh'g denied*, 2010 Ark. App. 51, 2010 Ark. App. LEXIS 47.

D. Attorney's Fee

Claimant has asserted that she is entitled to a controverted attorney's fee in this matter. One of the purposes of the attorney's fee statute is to put the economic burden of litigation on the party who makes litigation necessary. *Brass v. Weller*, 23 Ark. App. 193, 745 S.W.2d 647 (1998). In this case, the fee would be twenty-five percent (25%) of any indemnity benefits awarded herein, one-half of which would be paid by Claimant and one-half to be paid by Respondents in accordance with *See* Ark. Code Ann. § 11-9-

715 (Repl. 2012). *See Death & Permanent Total Disability Trust Fund v. Brewer*, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

As the parties have stipulated, Respondents have controverted Claimant's entitlement to the additional indemnity benefits awarded above. Thus, the evidence preponderates that his counsel, the Hon. Gary Davis, is entitled to the fee as set out above.

CONCLUSION AND AWARD

Respondents are directed to furnish/pay benefits in accordance with the findings of fact and conclusions of law set forth above. All accrued sums shall be paid in a 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).

Claimant's attorney is entitled to a twenty-five percent (25%) attorney's fee awarded herein, one-half of which is to be paid by Claimant and one-half to be paid by Respondents in accordance with Ark. Code Ann. § 11-9-715 (Repl. 2012).

IT IS SO ORDERED.

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Honorable O. Milton Fine II
Chief Administrative Law Judge