

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 MAY 29, 2024

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 May 8, 2024, the above captioned claim came on for hearing at Springdale, Arkansas. A pre-hearing conference was conducted on September 27, 2023 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 permanent and total disability benefits, or, in the alternative, additional wage loss disability.

2. Attorney fee.

The claimant contends that her condition has objectively and permanently worsened since a prior wage loss determination and that as a result of that worsening she is now permanently and totally disabled. In the alternative, she contends that she is entitled to wage loss disability in excess of what has previously been awarded. The claimant contends her attorney is entitled to an attorney's fee on all disability benefits not previously paid.

Respondent #1 contends that claimant is receiving appropriate benefits for her compensable injury. Respondents further contend that claimant is not permanently and totally disabled. Finally, respondent #1 contends that claimant is not entitled to additional wage loss disability benefits.

Respondent #2 defers to the outcome of litigation on the issues of PTD and wage loss and waives its appearance at the hearing. The Trust Fund has not controverted the claim against it.

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 September 27, 2023 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 has suffered a permanent physical impairment rating in an amount equal to 30% to the body as a whole for her compensable left hip injury.

3. Claimant has met her burden of proving by a preponderance of the evidence that she has suffered a permanent impairment in an amount equal to 5% to the body as a whole as a result of her compensable pelvic floor dysfunction.

4. Claimant has met her burden of proving by a preponderance of the evidence that she is permanently totally disabled as a result of her compensable injury.

5. Respondent #1 has controverted claimant's entitlement to permanent total disability benefits.

### FACTUAL BACKGROUND

Claimant is a 51-year-old woman who began working for respondent as an 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 the fall, claimant had pain in her knee, hip, and left buttock.

Claimant has undergone extensive medical treatment since January 22, 2016, with

multiple surgeries. On January 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, on March 7, 2018, Dr. Sites performed an IT band release; periformis release of the left hip; a 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; periformis resection; and psoas resection.

This claim has been the subject of multiple hearings. Following a hearing on June 12, 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 and in an opinion filed June 4, 2020 the Full Commission affirmed the finding 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 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 second hearing claimant returned to Dr. Dougherty for increased pain in her left hip. Dr. Dougherty diagnosed claimant as suffering from pelvic floor dysfunction which had not been addressed but was directly related to her prior injury and need for surgery. He prescribed physical therapy for this condition. In a report dated December 6, 2021, Dr. Dougherty also diagnosed claimant as suffering from gluteal tendinitis of the left hip and noted that her exam was consistent with a partial thickness gluteus tear. In a report dated January 19, 2022, Dr. Dougherty indicated that claimant needed a diagnostic hip arthroscopy for a possible gluteus repair. Prior to that procedure, he noted that claimant's lab results had been reviewed and that her ANA was positive and her vitamin D level was low. He recommended that claimant see her primary care physician to get those results under control before surgery could proceed. On March 2, 2022, Dr. Dougherty completed a work note indicating that claimant should be off work indefinitely beginning on November 3, 2022.

A third hearing was conducted on June 29, 2022 on the issue of whether claimant was entitled to additional temporary total disability benefits beginning November 3, 2021 and continuing through a date yet to be determined. In an opinion filed June 29, 2022, this administrative law judge found that claimant was entitled to the requested temporary total disability benefits. That opinion was not appealed.

Since the time of the last hearing on June 29, 2022, claimant has continued to treat with Dr. Mary Daut, who prescribes medication for chronic pain. She also receives some medication from her primary care physician, Dr. DeClerk. Claimant did not undergo surgery by Dr. Dougherty on her left hip, but continued under his care. On February 13, 2023, Dr. Dougherty indicated that physical therapy had helped claimant's condition a little but she continued to have hip pain. He diagnosed her condition as complex regional pain syndrome of the left lower limb; osteoarthritis of the left hip; and pain in the left hip. He also ordered a bone scan of the left hip to better assess her condition.

Claimant returned to Dr. Dougherty on April 24, 2023, after the bone scan and he noted that the scan was unremarkable with respect to her hip. He also confirmed this during his deposition testimony.

Claimant's last visit with Dr. Dougherty occurred on July 12, 2023, at which time he noted that her symptoms had not improved since her last visit. He also stated that she had reached maximum medical improvement; that she had significant limitations in lifting and ambulation; and assigned her an impairment rating in an amount equal to 30% to the body as a whole for her hip.

Claimant has filed this claim contending that she is permanently totally disabled, or alternatively entitled to additional wage loss benefits.

### ADJUDICATION

Claimant contends that she is now permanently totally disabled as a result of her work-related injury. Permanent total disability is defined by A.C.A. §11-9-519(e)(1) as “inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment.” Claimant has the burden of proving by a preponderance of the evidence they are unable to earn any meaningful wage in the same or other employment. A.C.A. §11-9-519(e)(2).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has proven by preponderance of the evidence that she is permanently totally disabled as a result of her compensable injury.

At the second hearing in this claim the parties stipulated that claimant had a 14% impairment rating to the body as a whole as a result of the injuries to her back and SI joints. It was determined that claimant had failed to prove that she was permanently totally disabled, but instead that she had suffered a loss in wage earning capacity in an amount equal to 60% to the body as a whole. This finding was affirmed and adopted by the Full Commission in an opinion filed August 26, 2021.

Since that second hearing the claimant returned to Dr. Dougherty for additional medical treatment for increased hip pain. Dr. Dougherty testified that claimant suffers from Greater Trochanteric Pain Syndrome in her left hip.

Q Okay. All right. What is your diagnosis of Ms. Miller's condition now?

A She has what's called Greater Trochanteric

Pain Syndrome.

Q Okay. Tell me what that is.

A It's just chronic pain about the hip. It's not really trochanteric bursitis as an isolated entity. So when you tear tendons, when you sew them back down, they can develop what's called neovascularization, which can cause continued pain when there's an increased substance P, which is associated with pain that comes from the repair site.

In his report dated July 12, 2023, Dr. Dougherty stated that claimant had an impairment rating of 30% to the body as a whole for her hip injury. He confirmed this 30% rating during his deposition testimony and indicated that the rating was based on the *AMA Guides, Fourth Edition*.

Respondent contends that the 30% rating is based on subjective factors, not objective findings as required by A.C.A. §11-9-102(16). However, according to Dr. Dougherty's testimony, the tendon inflammation in claimant's left hip is confirmed by objective findings and imaging studies. There is no requirement that medical testimony be based solely on objective findings, only that the record contains supporting objective findings. *Ark. Dep't. of Corr. v. Washington*, 2024 Ark. App. 181, 685 S.W. 3d 347; *Singleton v. City of Pine Bluff*, 97 Ark. App. 59, 244 S.W. 3d 709 (2006).

Therefore, I find that the 30% impairment rating assigned by Dr. Dougherty is a valid rating. This rating is a new rating assigned after the last hearing on claimant's entitlement to wage loss. Thus, in addition to the 14% impairment rating to the body as a whole previously assigned to claimant for her back injury, she also has a 30% impairment rating to the body as a whole for her left hip.



Claimant also contends that she is entitled to an impairment rating for her pelvic floor dysfunction. Dr. Dougherty described this dysfunction as follows:

A So any time you have an injury about the hip, the muscles that connect to the hip are actually very close to the pelvic floor. What we know through research and published studies is, if you have hip pain, you can develop pelvic floor dysfunction.

So what that means is problems with urination, bladder retention, posture, simple things like that. And so any time that we do hip scopes now, we start - - we started recommending people do pelvic floor exercises.

Q And did those exercises correct Ms. Miller's problem, or does she still have a problem with control of her bladder?

A She occasionally still has a struggle with it.

Q She has testified in a deposition that she cannot control her bladder, and that she sometimes has issues with urgency, and she can't get to the bathroom quick enough. Is that consistent with what you would expect, based upon your medication evaluation?

A Yes. She - - the chronic pain leads to the chronic pelvic floor dysfunction.

Dr. Dougherty indicated at his deposition that he would not know how to calculate an impairment rating for pelvic floor dysfunction. At the hearing, claimant's counsel referred to pages 149 and 254 of the *AMA Guides, Fourth Edition*, as appropriate for consideration in assessing an impairment rating. The Commission may assess its own impairment rating rather than rely solely on the determination of a rating assigned by a physician. *Carrick v. Baptist Health*, 2022 Ark. App. 134, 643 S.W. 3d 466. In this case, I find that Table 17 on page 149 of the *AMA Guides* is appropriate as it deals with bladder

dysfunction resulting from spinal cord and central nervous system disorders. The table assigns a 1-9 percent to the body as a whole for a patient that has some degree of voluntary control but is impaired by urgency or intermittent incontinence. Claimant testified that the more hip pain she has, the harder it is to control her bladder. She testified that she has bladder leakage and sometimes feels as if she needs to go to the bathroom when she doesn't. Dr. Dougherty confirmed that claimant occasionally struggles with control of her bladder.

Based upon the foregoing evidence, I find that claimant is entitled to an impairment rating in an amount equal to 5% to the body as a whole for her bladder dysfunction.

As previously noted, it was determined that claimant had suffered a 60% loss in wage earning capacity following the second hearing in this claim. After my review of the relevant wage loss factors, I find that due to her increased impairment ratings as well as other relevant wage loss factors, that claimant is now permanently totally disabled as a result of her compensable injury. In considering claims for permanent disability in excess of the percentage of permanent physical impairment, the Commission may take into account in addition to the percentage of permanent physical impairment other factors such as the employee's age, education, work experience, and all other matters reasonably expected to effect her future earning capacity. A.C.A. §11-9-522(b)(1). Here, claimant is 51 years old. She has an associate's degree in nursing and has a varied work history. From 2000 through 2003 claimant worked for PeoplePlus as the regional coordinator for the State of Alabama. She testified that PeoplePlus staffed demonstrations at Walmarts and merchandising events. Thereafter, from 2003 to 2006 the claimant worked as a senior account representative for J.B. Hunt. Claimant previously

testified that this job required her to be on the phone, sitting at a desk and using a computer. Subsequent to J.B. Hunt the claimant sold toner and ink with her sister. She testified that she primarily worked on the phone from her home and used a computer in the performance of that job which she did for almost three years. Claimant was employed by Motorola from 2009 through 2013. Claimant testified that she worked in the receiving department which would receive approximately 5000 units a week and was in charge of getting those units checked in and making sure proper paperwork was performed for each unit and getting the unit to a technician for repair. These units were devices such as handheld devices with scanners used at Walmart.

After Motorola, the claimant worked as a parttime mechanic with her husband placing skirts underneath trailers to make them more aerodynamic. She also testified that she could change a truck tire, change a trailer tire, and perform oil changes. It was during this time that claimant obtained her nursing degree and began working for respondent as a floor nurse.

Much of this history regarding claimant's prior work history was given by claimant at the January 13, 2021 hearing and confirmed at the most recent hearing.

At the time of the January 13, 2021 hearing claimant had also undergone a functional capacities evaluation which revealed full levels of physical effort on claimant's behalf. That evaluation determined that claimant was capable of performing work in the sedentary classification of work. All of these factors were considered in assigning claimant a loss in wage earning capacity in an amount equal to 60% to the body as a whole.

Since that time, claimant has continued to have increased pain in her left hip. This

has resulted in additional medical treatment from Dr. Dougherty and continued pain medication from Dr. Daut.

At his deposition, Dr. Dougherty indicated that claimant should not perform any heavy lifting and no pushing or pulling over 10 pounds. He indicated that claimant would only be capable of performing seated work. He further noted that claimant's main limitation was chronic pain in her hip and that increased activity caused additional pain. He testified that claimant could not sit or stand for prolonged periods of time and that if she were to engage in some work activities she would have to be in a position that would allow her to alternative between sitting and standing at will. Specifically, in his report dated July 12, 2023, Dr. Dougherty stated:

Is in fact at MMI. She has significant limitations in lifting, ambulation and she is unable to perform any of her prior work capacity and I feel she is unable to work gainfully due to these limitations. (Emphasis added.)

Claimant testified that she currently suffers from burning pain on the top of her left thigh; pain in her left hip; groin pain; pelvic pain; pain in her low back; and pain in her right buttock that radiates into her right foot. In addition, with respect to the pelvic floor dysfunction, she testified that she frequently has bladder leakage and that she has feelings as if she needs to go to the bathroom but is unable to do so. Because of this leakage, claimant is required to wear a diaper or pad on a daily basis.

In addition, as a result of the pain and her bladder dysfunction she testified that she has difficulty falling asleep and staying asleep due to not being able to get comfortable. She also testified that she only sleeps two or three hours before waking due

to pain or feeling as if she has to go to the bathroom.

Finally, as previously noted, claimant has a 14% impairment rating to her low back and SI joints as a result of her compensable injury in addition to a 30% impairment rating to the body as a whole for her left hip injury and a 5% impairment rating to the body as a whole for her pelvic floor dysfunction.

After consideration of all of the relevant wage loss factors in this case, I find that claimant has met her burden of proving by a preponderance of the evidence that she is permanently totally disabled. Although the claimant might be able to perform some limited sedentary work, I find that claimant has proven that she is unable to earn any meaningful wages in the same employment she previously performed or any other employment.

Finally, with respect to this issue, I note that even if claimant did not have a permanent physical impairment attributable to her pelvic floor dysfunction, claimant nevertheless does suffer from the symptoms of pelvic floor dysfunction and based on the totality of the relevant wage loss factors, I would nonetheless find that claimant is permanently totally disabled even if she did not have a 5% impairment rating to the body as a whole as a result of the pelvic floor dysfunction.

### AWARD

Claimant has met her burden of proving by a preponderance of the evidence that she has suffered a permanent physical impairment in an amount equal to 30% to the body as a whole for her left hip and 5% to the body as a whole for her pelvic floor dysfunction. Claimant has also proven by a preponderance of the evidence that she is permanently totally disabled as a result of her compensable injury.

Respondent #1 has controverted claimant's entitlement to all benefits in excess of those previously accepted or paid. Respondent #2 has not controverted claimant's entitlement to compensation benefits and is therefore not liable for payment of an attorney fee. However, respondent #2 is to withhold claimant's portion of the attorney fee from benefits it will pay claimant at the appropriate time in the future.

Respondent #1 is responsible for payment of the court reporter's charges for preparation of the hearing transcript in the amount of \$606.00.

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