

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NOS. G704530 & G800411**

BRANDON B. McMURTRY, EMPLOYEE	CLAIMANT
VILONIA WATERWORKS ASSN., INC., SELF-INSURED EMPLOYER	RESPONDENT
ARK. MUNICIPAL LEAGUE, THIRD-PARTY ADMINISTRATOR	RESPONDENT

OPINION FILED DECEMBER 2, 2024

Hearing before Administrative Law Judge O. Milton Fine II on September 5, 2024, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. George Bailey, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Ms. Mary K. Edwards, Attorney at Law, North Little Rock, Arkansas.

STATEMENT OF THE CASE

On September 5, 2024, the above-captioned claims were heard in Little Rock, Arkansas. A pre-hearing conference took place on June 24, 2024. The Prehearing Order entered that same day pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulation, issues, and respective contentions were properly set forth in the order.

Stipulations

At the hearing, the parties discussed Stipulation No. 1 as set forth in Commission Exhibit 1. After the conclusion of the hearing, the parties reached Stipulation No. 2. They are the following, which I accept:

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1. The previous decisions in these claims are binding on this proceeding under the Law of the Case Doctrine.
2. The references in Claimant’s medical records in evidence (i.e., his Exhibit 1) to a “Kasey Bunting” is likely a clerical error; the records in question are those of Claimant.

Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit

1. They read:

1. Whether Claimant sustained an injury to his left hip as a compensable consequence of his stipulated compensable injuries.
2. Whether Claimant is entitled to reasonable and necessary medical treatment of his alleged compensable consequence left hip injury, and/or additional medical treatment of his compensable left hip injury of June 26, 2017.
3. Whether Claimant is entitled to additional temporary total disability benefits from November 1, 2022, to a date yet to be determined.
4. 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 that he is entitled to additional reasonable and necessary medical treatment and unpaid medically-related travel expenses.
2. Claimant also contends that he is entitled to a new period of temporary total disability benefits from November 1, 2022, to a date yet to be determined.
3. It is further contended that Claimant's hip condition and need for additional hip surgery undergone on May 15, 2024, is a compensable consequence. Claimant contends that he has sustained loss of medial femoral head, along with neck constriction, which are compensable consequences of the original compensable hip injury.
4. Claimant reserves issues of permanency.
5. Statutory attorney's fees based upon all controverted amounts are claimed.

Respondents:

1. Respondents contend that Claimant is not entitled to temporary total disability benefits for his back or his left hip. Pursuant to the previous opinions, Claimant was determined to be at maximum medical improvement on February 13, 2018, for his back.

2. Respondents further contend that he has not re-entered his healing period for his back; therefore, he is not entitled to any additional temporary total disability benefits.
3. Finally, Respondents contend that the hip treatment, including the most recent surgery by Dr. Lawrence O'Malley, is not reasonable, necessary, or related to his compensable hip injury.

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 witnesses and to observe their 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 he sustained an injury to his left hip as a compensable consequence of any his compensable injuries.
4. Because of Finding of Fact/Conclusion of Law No. 3, *supra*, and because he has not causally related it to his compensable injury of June 26, 2017, Claimant has not proven by a preponderance of the evidence that his

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May 15, 2024, left hip replacement surgery, or any of his other left hip treatment on and after October 8, 2021, is the responsibility of Respondents.

5. Claimant has not proven by a preponderance of the evidence that he is entitled to additional temporary total disability benefits for any period.
6. Because of Finding of Fact/Conclusion of Law No. 5, *supra*, Claimant has not proven by a preponderance of the evidence that he is entitled to a controverted attorney's fee.

CASE IN CHIEF

Summary of Evidence

Claimant and his mother, Gayle McMurtry, were the hearing witnesses.

In addition to the Prehearing Order discussed above, admitted into evidence were the following: Claimant's Exhibit 1, a compilation of his medical records, consisting of two index pages and 122 numbered pages thereafter; Claimant's Exhibit 2, his amended prehearing questionnaire response filed on June 11, 2024, consisting three pages; Respondents' Exhibit 1, another compilation of Claimant's medical records, consisting of one index page and 21 numbered pages thereafter; and Respondents' Exhibit 2, payment records, consisting of one index page and seven numbered pages thereafter. In addition, I have blue-backed to the record the one-page email thread memorializing the agreement of the parties to Stipulation No. 2.

The transcripts of the August 15, 2019, and August 11, 2022, hearings on these claims, along with their blue-backed exhibits, have been fully incorporated herein by reference.

Adjudication

A. Introduction

An assessment of the issues at bar first requires a recounting of the procedural history of these claims. On August 15, 2019, the first hearing was held on these claims before me. The October 28, 2019, opinion thereon contains the following Findings of Fact and Conclusions of Law:

1. The Arkansas Workers' Compensation Commission has jurisdiction over these claims.
2. The stipulations set forth [below] are reasonable and are hereby accepted[:]
 - A. The employee/self-insured employer/third-party administrator relationship existed on June 26, 2017, when Claimant was involved in a motor vehicle collision and sustained compensable injuries to his back and left shoulder.
 - B. The employee/self-insured employer/third-party administrator relationship existed on January 11, 2018, when Claimant sustained a compensable injury to his back.
 - C. Respondents accepted the above injuries as compensable and paid benefits pursuant thereto.
 - D. Claimant's average weekly wage with respect to Claim No. G704530 and concerning the date of injury of June 26, 2017, \$774.00, entitles him to compensation rates of \$516.00/\$387.00.

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- E. Claimant's average weekly wage with respect to Claim No. G800411 and concerning the date of injury of January 11, 2018, \$749.00, entitles him to compensation rates of \$499.00/\$374.00.
3. Claimant has proven by a preponderance of the evidence that he sustained a compensable left hip injury by specific incident on June 26, 2017.
 4. Claimant has proven by a preponderance of the evidence that he is entitled to reasonable and necessary treatment of his compensable left hip injury.
 5. Claimant has proven by a preponderance of the evidence that all of the treatment of his compensable left hip injury that is in evidence was reasonable and necessary.
 6. Claimant has proven by a preponderance of the evidence that all of the treatment of his compensable back injury that is in evidence was reasonable and necessary.
 7. Claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment of his compensable back injury in the form of pain management.
 8. Claimant has proven by a preponderance of the evidence that he is entitled to temporary partial disability benefits during the periods of time that he was on sick and/or catastrophic leave in connection with his compensable left hip injury from March 5, 2018, to July 22, 2018, and from November 19, 2018, to January 17, 2019.
 9. Claimant has proven by a preponderance of the evidence that he is entitled to a controverted attorney's fee under Ark. Code Ann. § 11-9-715 (Repl. 2012) on all indemnity benefits awarded herein.

Respondents appealed this decision. On June 11, 2020, the Full Commission affirmed and adopted the administrative law judge's decision. *Brandon McMurtry v. Vilonia Waterworks Assn., Inc.*, Claim Nos. G704530 & G800411 (Full Commission Opinion filed June 11, 2020)(unpublished).

On August 11, 2022, the second hearing on these claims was tried before me. The November 1, 2022, opinion thereon contains the following Findings of Fact and Conclusions of Law:

1. The Arkansas Workers' Compensation Commission has jurisdiction over th[ese] claim[s].
2. The stipulation set forth [below] is reasonable and is hereby accepted[:]
 - A. The administrative law judge opinion filed October 28, 2019, and the Full Commission opinion filed June 11, 2020, are binding on this proceeding under the Law of the Case Doctrine.
3. The evidence does not preponderate that Respondents have abridged Ark. Code Ann. § 11-9-802(c) & (e) (Repl. 2012) concerning their payment or (thus far) non-payment of any medical bills covered under the previous decision in this matter.
4. Notwithstanding Finding/Conclusion No. 3 *supra*, Respondents are hereby directed to reimburse Claimant forthwith for all of his out-of-pocket expenditures made in connection with treatment that was found in the previous hearing to be reasonable and necessary—and, consequently, their responsibility.
5. Claimant has proven by a preponderance of the evidence that all of the treatment of his compensable back injuries that is in evidence was reasonable and necessary. As part of this, he has established his entitlement to the ReActiv8 treatment recommended by Dr. Johnathan Goree.
6. Claimant has proven by a preponderance of the evidence that all of the treatment of his left hip that is in evidence and that occurred prior to October 8, 2021, was reasonable and necessary.
7. Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from February 26, 2020, to December 17, 2020.

8. Claimant has proven by a preponderance of the evidence that his counsel is entitled to a controverted attorney's fee on the additional indemnity benefits awarded herein under Ark. Code Ann. § 11-9-715 (Repl. 2012).

This decision was not appealed. These earlier opinions are binding on this proceeding under the Law of the Case Doctrine; and they are *res judicata*. See *Thurman v. Clarke Industries, Inc.*, 45 Ark. App. 87, 872 S.W.2d 418 (1994).

B. Compensable Consequence

Introduction. In this proceeding, Claimant wishes for the Commission to find that his May 15, 2024, hip replacement surgery is the responsibility of Respondents. His first hurdle in achieving this result is getting around the 2022 opinion, wherein I found that Claimant proved by a preponderance of the evidence that only the treatment of his left hip in evidence that occurred prior to October 8, 2021, was reasonable and necessary. See *supra*. To do this, Claimant is arguing that the condition of his left hip that allegedly necessitated this 2024 surgery—his sixth on that body part—is a compensable consequence of his compensable hip injury that he was found to have sustained by specific incident on June 26, 2017. Respondents dispute this.

Standards. If an injury is compensable, every natural consequence of that injury is likewise compensable. *Air Compressor Equip. Co. v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1 (2000); *Hublely v. Best West. Governor's Inn*, 52 Ark. App. 226, 916 S.W.2d 143 (1996). The test is whether a causal connection between the two (2) episodes exists. *Sword, supra*; *Jeter v. McGinty Mech.*, 62 Ark. App. 53, 968 S.W.2d 645 (1998). The existence of a causal connection is a question of fact for the Commission.

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Koster v. Custom Pak & Trissel, 2009 Ark. App. 780, 2009 Ark. App. LEXIS 947. It is generally a matter of inference, and possibilities may play a proper and important role in establishing that relationship. *Osmose Wood Preserving v. Jones*, 40 Ark. App. 190, 843 S.W.2d 875 (1992). A finding of causation need not be expressed in terms of a reasonable medical certainty where supplemental evidence supports the causal connection. *Koster, supra*; *Heptinstall v. Asplundh Tree Expert Co.*, 84 Ark. App. 215, 137 S.W.3d 421 (2003).

Under Ark. Code Ann. § 11-9-705(a)(3) (Repl. 2012), Claimant has the burden of proving by a preponderance of the evidence that he sustained a compensable consequence. 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).

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.*

Discussion. In my 2019 opinion, I analyzed Claimant’s alleged left hip injury as follows:

In his testimony, Claimant—who completed the eleventh grade and has a graduate equivalency degree—related that he works for Respondent Vilonia Waterworks Association (“Vilonia Waterworks”) as a Grade 4 Water Operator. He described his job there as follows:

We do connects, meaning—or tickets, meaning that, you know, like connects, turn people’s water on and off, seeing if they have a leak. Just anything a customer has a question about their water, we go out there and check. If we have a leak on our line, we have two crews of trackhoes, and we go out there and dig and fix water leaks. Also set meters for new houses, new constructions, set new meters for that. We also read meters. So every month, around the 26th of every month, we read meters. We have over—right around 10,000 meters. I believe we have five or six routes. My route is 1,400 meters. Other than that, just anything that needs to be done regarding water.

As the parties have stipulated, he was involved in a work-related motor vehicle accident on June 26, 2017. Claimant described what occurred:

Me and a co-worker were reading meters, and we were headed to the next meter and a lady pulled out of her driveway as—she pulled out the opposite way we were going. We were headed east; she was headed west. And it’s a narrow road, and she just pulled out without looking, and I pushed her back in her driveway, and I kind of bounced around, hit my knees on the truck . . . [s]o it was basically a head-on collision with her. I pushed her out of the way and ended up into the—I hit two trees, and that’s where the truck stopped.

His truck’s speed at the time of the collision was approximately 40 to 45 miles per hour. The force of the impact totaled both vehicles; it knocked the front axle off of the Vilonia Waterworks vehicle and caved in the left side. Claimant added:

I believe that [being stricken by the side mirror, which was sheered off by the impact] might’ve knocked me out just for a split second, the reason why I couldn’t stop before hitting the trees. During that

time, I was bouncing up and down. I hit my knee on the—my left knee on the dash, on the under part of the dash. I was jerked around. I had my seatbelt on. I was jerked around, going back and forth because of the collision with the vehicle and then also with the collision with the tree. And I was in all different types of positions because of the impact. I bounced up on—I bounced up, nearly hit my head on top of the roof of the truck.

His knee ended up nearly touching his chest—stopped only by the dash. At the same time, Claimant was hunched over because his seat belt did not catch right away.

Claimant is 29 years old and has led an active life. Prior to the head-on collision, he never had undergone any treatment of his hip. He was able to walk and run without difficulty. Moreover, he was able to perform the physical aspects of his job without any problems. Jeff Ruple and Josh McReynolds, his supervisors, and the General Manager of the waterworks, Cecil McMurtry, confirmed this, with McReynolds stating that before the head-on collision, Claimant “was one of the first people to—he would knock people out of the way to get down to be the one to fix the leak.” He had no difficulty lifting heavier objects at that point in time. The elder McMurtry concurred, stating that his son (and Ruple) regularly had to work extra hours on the weekend with no problems.

After the accident, he treated with, inter alia, Dr. Justin Seale. This treatment included physical therapy. While he was having difficulty walking after the wreck, it was during the second round of therapy that he noticed a problem with his left hip. He related:

I had trouble walking and had a little bit of pain, but it wasn't that bad until the second physical therapy, because I was released from [Dr.] Reynolds then [concerning the left shoulder], and she [the therapist] focused all on my back this time. So I was doing exercises for my back, which meant different—since I was no longer doing the shoulder exercises, so that changed where I was lifting my leg, both legs, and having to like go knee to chest for my back strengthening and a lot more like being on my knees and stretching out my legs and stuff like that for strengthening my back, and that's when I noticed, the first day of the second physical therapy, that's when I noticed something definitely was wrong with my hip. I then tried to call Patrice Baker [the adjustor].

In explaining his symptoms, he described experiencing an “agonizing pain” in the area of his left hip and groin. He denied having an accident or any type of injury between the time of the collision and the time he first experienced this sensation in physical therapy. Ruple agreed with this in his testimony.

After multiple failed attempts to reach Baker, which began in the first or second week of September 2017, Claimant finally heard from her one week before his scheduled return visit to Dr. Seale on October 23, 2017. She told him to bring up the matter with Seale. He continued:

The exercises that bothered me as far as my hip, and I was still doing the lifting of the weights and stuff, that was part of it also, but I would lay on my back and I would go knee to chest with my legs, and I just couldn't do it. I could do it with my right leg, not my left leg. I mean, I couldn't do it. I was in a tremendous amount of pain whenever I did . . . So after that first day of physical therapy, I missed the next two physical therapy dates because my hip was weak and I was in pain and I just couldn't do the exercises.

More weakness and difficulty walking coincided with this therapy.

Once Claimant presented to Seale with his left hip problem, the doctor had him undergo an MRI. This test revealed, inter alia, a labral tear. Seale referred Claimant to Dr. James Tucker. After their November 7, 2017 visit—during which time the MRI was discussed—Tucker had Claimant return in three months. He released Claimant to full duty as well. Claimant acknowledged that as reflected in the record of that visit, Dr. Tucker informed him that his hip condition was not a work-related injury. However, he denied that Dr. Seale told him this. He did acknowledge that Seale wrote in the record that “[Claimant] and his mother understand that this [the hip condition] may not be related to his work injury.”

During this interim—from the November 7, 2017 release by Tucker until the work-related incident on January 11, 2018—Claimant worked. Asked to describe his condition during that time, he replied: “Even though I was on—even though I wasn't on restricted duties, I did not do my full job . . . I was still weak and had difficulty walking, getting in and out of trucks, doing shovel work. Everything that my job is I had trouble—I had difficulty doing.” Co-workers assisted him. He was not able to drive a vehicle to read meters, because it required him to, among other things, exit the vehicle left leg-first. But he was able to ride in the front of the vehicle on

the right side and read meters on the right side of the street. The elder Mr. McMurtry and McReynolds corroborated Claimant's testimony that he was having difficulty doing his job after he returned to work following the collision. Mr. McMurtry testified that during this period, Claimant's "stride was shorter. From what I noticed, he kind of favored--favored that [left] leg."

Claimant returned to Dr. Tucker in February 2018. He scheduled Claimant for a CT scan of the hip. Thereafter, on March 5, 2018, Tucker performed hip surgery to repair the torn labrum. Claimant returned to work on July 22, 2018. But because he was experiencing numbness and tingling going down his leg, he went back to the doctor. Dr. Tucker performed another hip surgery on November 19, 2018.

The medical records in evidence reflect that on October 23, 2017, Claimant told Dr. Seale that "[d]uring therapy he developed anterior hip pain with the exercises. He does report some hip pain at the time of the accident but is unsure if it is anterior hip pain." Seale recommended an MRI of the left hip. Per Dr. Michael Kendrick, who read the MRI, it showed:

IMPRESSION:

- Q. No acute findings.
- R. Possible healed fracture versus sessile osteochondroma at the medial aspect of the femoral neck.
- S. Lack of femoral head neck junction cut back of the left with an associated anterior superior labral tear. These findings can be seen with femoral acetabular impingement, if clinically compatible.

Dr. Seale saw Claimant on October 30, 2017, [and] stated that he "has normal findings in the left hip."

Claimant told Dr. Tucker on November 7, 2017 that his hip symptoms began with the June 26, 2017 motor vehicle accident. X-rays of the hip were normal. The doctor assessed Claimant as having femoroacetabular impingement and osteochondroma in the left hip and wrote:

There is no acute injury to the hip related to his work injury. We will release him to full duty. I will see him back in 3 months, at which time his workers' comp issues will be resolved. We will then

proceed with left hip arthroscopy with labral repair and femoroplasty. Again, this is not related to his work injury.

On February 9, 2018 Tucker recommended that he undergo a CT scan of the hip and stated: “At his last appointment, I discussed with Brandon that his issues were unrelated to his work injury but that they would need to be addressed at a later point.” The CT scan, performed that same day, was found by Dr. Kathleen Sitarik to show “[b]ony excrescence compatible with osteochondroma medial aspect femoral neck.” Tucker on February 13, 2018 wrote that the scan showed a “CAM lesion, indicative of CAM-type femoroacetabular impingement and a benign osteochondroma.” They agreed to proceed with surgery.

Dr. Tucker operated on March 5, 2018, performing a femoroplasty and a labral repair. While the pre-operative diagnosis was only femoroacetabular impingement, left hip, the post-operative diagnoses specified that the impingement was a CAM-type; Tucker added that Claimant had a labral tear of the left hip. As of July 20, 2018, the doctor prescribed an additional two months of physical therapy.

Claimant again presented to Dr. Tucker with left hip pain on October 2, 2018. He ordered a second CT scan. This scan, per Tucker on October 17, 2018, “show[ed] a very large sessile osteochondroma, which is likely causing impingement of the iliopsoas tendon.” A second surgical procedure took place on November 19, 2018. In that instance, Dr. Tucker performed a diagnostic arthroscopy of the hip and a resection of an osteochondroma on the femoral neck. Claimant reported to the doctor on January 4, 2019 that about a week prior, he experienced left hip pain. But an epidural steroid injection into the back at that time alleviated it. Tucker gave Claimant work restrictions of no squatting or heavy lifting.

In a return visit to Dr. Tucker on May 24, 2019, six months after the second surgery, the doctor examined him and wrote: **“The labral tear that the patient had that we treated with repair and snip, was consistent with a hyperflexion injury from a motor vehicle accident.”** (Emphasis added)

In this case, the evidence is clear that Claimant has objective findings of an injury to his left hip in the form of, inter alia, a labral tear. I credit Claimant’s testimony that the mechanism of his injury was the stipulated work-related head-on motor vehicle collision that took place on June 26, 2017. The incident is identifiable by time and place of

occurrence. Moreover, the hip injury caused internal or external physical harm to his body and required medical services.

Respondents have attempted to cast doubt on the above, arguing that Claimant did not complain about his hip until around three months after the accident. But the October 23, 2017 report by Dr. Seale confirms that Claimant told him that he experienced “some hip pain at the time of the accident but is unsure if it is anterior hip pain.” He also told Dr. Tucker his belief that the hip condition was the result of the accident. I credit Claimant’s testimony that he was not having any hip problems prior to the accident. In addition, I credit his testimony that he had been having trouble walking since the accident. As the evidence reflects, the hip injury merely became more pronounced later, during physical therapy, when the maneuvers being performed then—manipulation of the left lower extremity—made it clear that something was wrong.

Respondents have also highlighted statements/opinions by certain of Claimant’s treating physicians in the medical records to show that Claimant’s hip injury is not work-related. First, they have pointed out that Dr. Seale on October 30, 2017 stated that the hip condition “may not be related to his work injury.” Certainly, this does not conform with the standards governing medical opinions regarding causation. See *infra*. But curiously, Seale also stated that the hip MRI was “normal,” when it certainly was not. It showed, inter alia, a labral tear. Kendrick, who read the MRI, wrote that a labral tear “can be seen with femoral acetabular impingement, if clinically compatible.” But as Dr. Tucker, who actually operated on the hip, wrote, “[t]he labral tear that the patient had that we treated with repair and snip, was consistent with a hyperflexion injury from a motor vehicle accident.” Claimant’s testimony at the hearing concerning what occurred when his work truck collided with the other vehicle (and, thereafter, trees) on June 26, 2017 readily show that he hyperflexed his left hip at that time.

Respondents have attacked the May 24, 2019 opinion by Tucker quoted above, asserting that it was not given within a reasonable degree of medical certainty. In *Cooper v. Textron*, 2005 AWCC 31, Claim No. F213354 (Full Commission Opinion filed February 14, 2005), the Commission addressed the standard when examination medical opinions concerning causation:

Medical evidence is not ordinarily required to prove causation, i.e., a connection between an injury and the claimant's employment,

Wal-Mart v. Van Wagner, 337 Ark. 443, 990 S.W.2d 522 (1999), but if a medical opinion is offered on causation, the opinion must be stated within a reasonable degree of medical certainty. This medical opinion must do more than state that the causal relationship between the work and the injury is a possibility. Doctors' medical opinions need not be absolute. The Supreme Court has never required that a doctor be absolute in an opinion or that the magic words "within a reasonable degree of medical certainty" even be used by the doctor; rather, the Supreme Court has simply held that the medical opinion be more than speculation; if the doctor renders an opinion about causation with language that goes beyond possibilities and establishes that work was the reasonable cause of the injury, this evidence should pass muster. See, *Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W.3d 760 (2001). However, where the only evidence of a causal connection is a speculative and indefinite medical opinion, it is insufficient to meet the claimant's burden of proving causation. *Crudup v. Regal Ware, Inc.*, 341, Ark. 804, 20 S.W.3d 900 (2000); *KII Construction Company v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002).

Respondents are correct that the above statement—particular the phrasing "was consistent"—falls short of the standard applied to causation opinions. But while I cannot credit the above as an opinion with[in] a reasonable degree of medical certainty that the accident caused the torn labrum—which was not the opinion that the doctor was offering—I nonetheless credit the opinion that he did give: that the injury Claimant suffered is consistent with hyperflexion. 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). The evidence preponderates that Claimant suffered a hyperflexion injury in the June 26, 2017 accident that resulted in the torn labrum.

Also, Respondents have posited that the above opinion is not worthy of credit because "[i]t was also written more than fourteen months after the [surgery] and contradicts Dr. Tucker's own testimony at the time of the surgery." Respondents' Brief at 2. Nothing before me shows that Tucker has given any testimony. Furthermore, the opinion statement concerning hyperflexion was the only opinion offered by the doctor on this matter since he actually viewed the hip during surgery. That the statement was given much later is of no consequence; Tucker made it in

the course of an appointment with Claimant, during which he examined him and had the medical records. Respondents' arguments on this point are thus without merit.

As for the other conditions of Claimant's hip disclosed by the surgery and radiological findings that may have been chronic and/or pre-existing—the femoroacetabular impingement and a benign osteochondroma—an employer under the Arkansas Workers' Compensation Act takes an employee as the employer finds him. 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). "An 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). These standards have been met here.

In sum, Claimant has proven by a preponderance of the evidence that he sustained a compensable injury by specific incident to his left hip.

...

Claimant has proven by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment of his compensable left hip injury as set out in the above-quoted statute. Moreover, I have reviewed Claimant's Exhibit 1 and Respondents Exhibit 1, and I find that all of the treatment of the injury reflected therein was reasonable and necessary.

In turn, the 2022 opinion, in which Claimant sought additional treatment for his hip, contains the following analysis:

With respect to his hip, Claimant reported to Dr. Tucker on November 22, 2019, that he was "doing fairly well overall." X-rays showed no arthritic changes. Tucker wrote that Claimant was "doing well."

On March 11, 2020, Claimant began treating with Chad Bryant, D.C. A series of 20 visits are documented in the records in evidence. He presented with lower back pain of 7/10 in intensity that began in January 2018 after he lifted a heavy pump at work. Claimant informed Bryant that his pain started to worsen in January 2020. He also complained of left hip pain that had “c[o]me on gradually” but was “progressively getting worse.” Claimant rated his hip pain as 4/10. Dr. Bryant palpated spasms on both sides of the lumbar and sacral spine, along with subluxation at L1, L4 and L5. The treatments that Bryant recommended and administered included, inter alia, chiropractic adjustments and electric muscle stimulation.

On June 30, 2020, Claimant underwent an intra-articular steroid injection by Dr. Victor Vargas into the left coxa femoral joint. He also underwent an MRI of the left hip, which Dr. Tucker wrote showed no signs of a recurrent labral tear. The doctor added: “We will put him in a light-duty no climbing extended standing pushing or pulling [sic].” Later, Claimant reported to Tucker that the injection only gave him two days of relief.

Dr. Tucker recommended a diagnostic arthroscopy of the left hip with a resection of capsular scarring. This procedure took place on August 5, 2020. Claimant was given post-operative diagnoses of a labral tear, capsular labral adhesions, and femoral acetabular impingement. The operative notes reflect that Tucker found the labrum was torn anteriorly, and also that “[t]here was dense scarring between the labrum and capsule” Claimant told Tucker on December 3, 2020, that “his left hip feels about the same or even a little worse than before surgery.” The report also reads:

[Claimant] indicates he was initially much better after surgery but now is having increasing problems[. H]e has pain with flexion and internal and external rotation[. H]e has limited range of motion [and] has swelling in the lower extremity along with burning type pain.

The doctor noted that x-rays of the hip did not show advancing arthritis or joint space narrowing. He recommended a bone scan to rule out complex regional pain syndrome, along with another MRI of the joint. Tucker gave Claimant restrictions of “[n]o lifting, squatting, pushing, pulling or twisting.” Neither the bone scan nor the MRI showed any signs of obvious pathology, per Dr. Tucker. The doctor on December 17, 2020, wrote: “At

this point I think the only thing that is going to improve [Claimant's] symptoms is getting his core and hip in better shape to stabilize and D rotate the pelvis's [sic]"

. . .

On October 8, 2021, Claimant reported to Dr. Tucker that "he has been having hip pain again for the past 3 to 4 months and it just keeps progressively getting worse." The report reads in pertinent part:

Assessment/Plan

He presents back is continued to have pain in his left hip he has an osteochondroma which we have done arthroscopic resection on because of the impingement caused however he still has bone remaining posterior medially from the osteochondroma. His pain is predominantly in the groin. He has numbness in the right leg extending from the head of the fibula distally distribution is also has weakness and difficulty with dorsiflexion of the foot.

. . .

We discussed that if we are going to remove any more of the osteochondroma it would have to be done with an open surgery. We need a CT scan to assess that this we[']re going to obtain a CT scan of the left hip He also appears to have peroneal nerve compression of the fibular head so we[']re going to obtain an EMG nerve conduction study. We will follow him up with a telemedicine visit once that is complete. [Sic]

That same day, Tucker assigned Claimant restrictions of no lifting, pushing, pulling, squatting, climbing, or bending. Later, on November 17, 2021, Tucker wrote:

I saw Brandon McMurtry in the office today.

Please excuse Brandon for 11/27/2021. It is my medical opinion Brandon needs to undergo surgery for a[n] osteochondroma resection.

He is scheduled for a left femoral neck osteochondroma resect [f]or 12/30/2021[.]

On December 30, 2021, Dr. Tucker operated as he outlined above, performing an open resection of a femoral osteochondroma in the femoral neck of the left hip. The surgery confirmed the diagnosis of this osteochondroma. Tucker took Claimant off work for three months in a note dated January 3, 2022. On January 12, 2022, he amended this to restart the three-month period. The reason for this is because on January 13, 2022, Dr. Eric Gordon had to operate on the hip to drain and debride a hematoma that had developed on its anterior aspect. Claimant reported to Tucker on January 18, 2022, that he was “doing okay.”

...

When Claimant went back to Tucker’s office on March 11, 2022, and saw Tristan Jenkins, P.A., he reported that he “doing okay.” But his pain had not improved. Jenkins wrote:

Continued left hip pain. He has had 5 previous surgeries prior to this including arthroscopies of the left hip. He is worried he has another labral tear. I offered an intra-articular steroid injection today but he says he had 1 of these about 6 months ago that did not give any pain relief. He would like to move forward with an MRI to evaluate for repeat labral tear. We will get this done and see him back after this.

Per the report, the March 24, 2022, MRI showed:

Low-grade articular cartilage loss in the left hip joint with small curtain osteophytes.

No evidence for labral tear or re-tear.

Small left hip joint effusion is likely reactive.

Postsurgical artifact and/or scarring within the anterior soft tissues. Mild apparent edema in the rectus femoris musculotendinous junction is either artifactual or secondary to low-grade strain.

Mild left iliopsoas and gluteus minimus tendinosis.

Trace edema in the left trochanteric bursa is likely reactive or secondary to low-grade bursitis.

Tucker reviewed this and wrote on March 29, 2022:

His MRI shows no sign of a recurrent tear in the left hip it does show some muscle atrophy and tendinitis . . . [b]ecause he does continue to have some muscle atrophy we are going to continue him in therapy and limit him to no climbing or lifting over 25 pounds will work on getting his hip strengthening.

Tucker on April 6, 2022, gave Claimant restrictions of no climbing, squatting, twisting, excessive bending, or lifting of over 25 pounds. That same day, Tucker wrote a letter to Amanda Blair of Respondent Arkansas Municipal League that reads:

In regards to your letter dated January 3, 2022, concerning the above patient [Claimant], please find my answers below:

The injury from 2017 on the left hip is not the cause of the need for surgery and is not related to the right leg numbness and weakness. Other than the patient attending two physical therapy sessions at our office, there was no treatment or physician visits between December 2020 and October 2021. There was no new injury reported or noted from the December 2020 visit to the October 2021 visit. My treatment of the left hip on Mr. McMurtry has not been related to the injury in 2017.

IMPAIRMENT RATING

The patient was placed at MMI as of December 2020. According to the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, Mr. McMurtry has a 0% partial impairment of the left hip associated with his work-related injury. These statements are made with a reasonable degree of medical certainty.

Per the medical records in evidence, Dr. Tucker last saw Claimant on July 13, 2022. He wrote:

[Claimant] presents back today with continued left hip pain we have a recent MRI which shows no signs of a tear only mild degenerative changes. On exam today he is tender over the greater trochanteric bursa and has a snapping iliopsoas. We discussed this we[']re going to get him set up for a greater trochanteric bursa injection and possibly an iliac psoas injection later. We obtain[ed] 4 view x-rays today that showed no progression of any of the degenerative

changes and no recurrence of his impingement. He has been treated long-term with hydrocodone for his back and hip. I discussed this with him today we cannot treat long-term pain he will have to see his pain physician for this. I am giving him a prescription for Talwin NX until he follows up with his pain physician. We are also going to set him up for the injections.

...

As for the left hip treatment, I credit Dr. Tucker's opinion that the compensable June 26, 2017, injury was not the cause of Claimant's need for surgery. See *Poulan Weed Eater, supra*. The context clearly shows that the doctor is referring to the December 30, 2021, and January 13, 2022, surgical procedures. In rendering this opinion, Tucker correctly pointed out that there was an approximate ten-month gap in hip treatment, from December 2020 to October 2021, save two therapy appointments. In making this finding, I am mindful of Claimant's testimony that he did not re-injure his hip during this interim (which his father corroborated), and that the reason for the gap was his belief that nothing more could be done for him. But I note that the medical report from October 8, 2021, reflects that Claimant at that time only "ha[d] been having hip pain again for the past 3 to 4 months" Also, the December 17, 2020, report by Tucker, cited above, supports the doctor's opinion. Then, an MRI and bone scan that had been performed did not "show any signs of any obvious pathology." In fact, "[t]he MRI show[ed] the hip to be very stable as far as articular cartilage loss or labrum." Therefore, Claimant has proven by a preponderance of the evidence that only the treatment of his left hip in evidence that occurred prior to October 8, 2021, was reasonable and necessary.

It bears repeating: the above decisions are binding on this proceeding under the Law of the Case Doctrine.

In the most recent hearing, Claimant testified that he received a referral from Dr. Goree to Dr. O'Malley concerning his left hip. Within a month of his first seeing O'Malley, Claimant underwent surgical replacement of his hip. The following exchange took place during his direct examination:

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Q. And you were ready, willing, and able to do the operative procedure he recommended, were you not?

A. I was.

Q. Had your hip gotten any better over the last couple of years?

A. Not until this last surgery.

Q. **Okay. Was the way your hip felt pretty much the same as it felt when Dr. Tucker got through with you?**

A. **Can you say that one more time?**

Q. **Was your hip about the same when you saw Dr. O'Malley as it was back when Dr. Tucker treated you?**

A. **Yes.**

Q. **Did you have any accidents in the meantime—between the last time you saw Dr. Tucker and when you saw Dr. O'Malley, had you had [any] kind of accident where you fell or injured your hip?**

A. **No.**

Q. **Had your hip been just pretty much the same the last two years?**

A. **(No audible response)**

Q. **Before you saw Dr. O'Malley, had your hip been about the same for two years?**

A. **Yes. Before O'Malley, yes.**

(Emphasis added)

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On cross-examination, Claimant acknowledged that Dr. O'Malley has given no opinion as to whether his need for the hip replacement surgery was related to his compensable left hip injury. Claimant paid for O'Malley's treatment on his own.

The medical records in evidence reflect that on April 4, 2024, Claimant first saw Dr. O'Malley. The report of that visit reads in pertinent part:

History of Present Illness: Brandon Baxter McMurtry is a 34 y.o. year old male patient presents as a new patient for evaluation of the left hip. Patient has a complex history including 5¹ previous hip surgeries. He reports this started after a MVC in 2017. He had left hip pain following this but no fractures were identified. He was later worked up and diagnosed with a hip labral tear and underwent labral repair in March 2018 with Dr. Tucker. He did not improve following this and this was repeated in November 2018. He most recently had a hip scope done towards the end of 2020. He reports his pain he feels now is the same as his pain from his initial labral tear injury. He has pain in the posterior hip but most of it is in the groin. Does not radiate past the knee. In physical therapy, abduction exercises make his pain worse. He has had a previous hip injection that helped his pain for about 1 week. He has history of HYN and smokes ½ PPD.

...

Physical Examination:

...

Musculoskeletal:

LEFT HIP: Inspection no ecchymosis, well healed previous portal incisions. TTP over the greater trochanter. ROM normal flexion, normal extension, normal internal rotation, normal external rotation, normal adduction. Significant pain with rotation of the hip and deep flexion. Strength 5/5 hip flexors, 5/5 hip extensors, 5/5 hip abductors, 5/5 hip adductors. Positive FABERS test.

¹As discussed *supra*, those surgeries took place on March 15, 2018, November 19, 2018, August 5, 2020, December 30, 2021, and January 13, 2022.

...

IMAGING:

Radiographs of the left hip show a mild cam deformity. There is a normal appearing joint space in the hip. No signs of acetabular dysplasia.

MRI arthrogram of the left hip shows minimal residual labral tissue with possible scar tissue around the joint capsule.

IMPRESSION: 34 yo M with left FAI and history of multiple previous hip arthroscopy procedures and persistent left hip pain.

PLAN:

We discussed treatment options with the patient including observation, therapy, oral anti-inflammatories, injections, advanced imaging and surgery.

At this point we recommended trialing a diagnostic left hip intra-articular injection by our partner in clinic today. The patient states his pain completely resolved following injection today. Therefore we think it is reasonable to consider a hip arthroscopy for the left hip to evaluate the labrum and cartilage. We will first plan to obtain a CT for hip mapping. We will start a course of Mobic as well.

A CT scan performed on April 12, 2024, showed the following:

Intact and well aligned pubic symphysis and sacroiliac joints without significant degenerative changes.

No significant soft tissue abnormality is noted.

Impression:

Lower extremity aligned as described above.

A small osseous bump along the anterior aspect of the right femoral head neck junction. No evidence of cam morphology on the left side. No evidence of acetabular over coverage on either side.

Bilateral femoral retro torsion. No evidence of hip dysplasia.

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When Claimant returned to Dr. O'Malley on April 15, 2024, the doctor opined that "[h]e ha[d] failed conservative management of his symptoms." Claimant elected to proceed with a left hip arthroscopy with labral repair femoroplasty.

This surgery—a left hip arthroscopy, with revision of the hip and labral repair, and a revision femoroplasty—took place on May 15, 2024. Dr. O'Malley assigned Claimant the same pre and post-operative diagnoses: (1) left hip superolateral labral tear; and (2) femoroacetabular impingement. The operative notes indicate that O'Malley found grade 2 chondromalacia of the femoral head, along with "[e]xtensive capsule labral adhesion," a thickened capsule, "a severe amount of adhesions of the capsule on the labrum," and a labral tear from the 12:00 to 2:00 position.

Claimant reported to Dr. O'Malley on May 30, 2024, that he was doing well. He was referred to physical therapy. During a July 11, 2024, follow-up visit, Claimant stated he was doing well. The doctor wrote: "He can keep working hard with physical therapy."

I credit Claimant's testimony that the condition of his left hip at the time Dr. O'Malley began seeing him was the same as it was when Dr. Tucker treated him. This is borne out by the medical records in evidence, discussed above. And as also noted above, following the 2022 proceeding, I credited Tucker's opinion that the condition of Claimant's hip that necessitated the 2021 and 2022 hip surgeries was not related to his compensable June 26, 2017, injury. Only the treatment occurring prior to October 8, 2021, was reasonable and necessary. Dr. O'Malley has not rendered a causation

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opinion. Therefore, no reason exists to revisit Dr. Tucker’s opinion. I am unable to find that Claimant has proven under *Air Compressor Equip. Co.* and *Hublely, supra*, that he sustained an injury to his left hip as a “natural consequence” of either his compensable left hip injury or his compensable back and left shoulder injuries.

C. Reasonable and Necessary Treatment

Introduction. Claimant has also asserted that he is entitled to reasonable and necessary treatment of the alleged compensable consequence injury to his left hip. This includes the surgery thereon that was performed by Dr. O’Malley on May 15, 2024. Respondents disagree that they should be liable for this treatment.

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). A

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claimant is not required to furnish objective medical evidence of his continued need for medical treatment. *Castleberry v. Elite Lamp Co.*, 69 Ark. App. 359, 13 S.W.3d 211 (2000).

Discussion. Because of the above finding, I cannot find that Claimant is entitled to reasonable and necessary treatment of his alleged compensable consequence. To the extent that Claimant is arguing that the treatment of his hip on and after October 8, 2021—particularly his May 15, 2024, surgery—was reasonable and necessary treatment of his compensable June 26, 2017, hip injury, Claimant must show that the procedure is causally related to that injury. *See Pulaski Cty. Spec. Sch. Dist. v. Tenner*, 2013 Ark. App. 569, 2013 Ark. App. LEXIS 601. But in accordance with the Finding of Fact/Conclusion of Law No. 6 in the 2022 opinion, and further based on the evidence that was adduced at the most recent hearing and outlined above, I cannot find this. Consequently, Claimant has not proven his entitlement to any of this treatment at Respondents' expense.

D. Temporary Total Disability

Introduction. Following the 2022 hearing, Claimant was awarded temporary total disability benefits from February 26, 2020, to December 17, 2020. As part of this proceeding, he has contended that he is entitled to additional temporary total disability benefits from November 1, 2022, to a date yet to be determined. Respondents have argued otherwise.

Standards. The compensable injuries that Claimant suffered—to his back, left shoulder and left hip—are all unscheduled ones. See 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). 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). Also, a claimant must demonstrate that the disability lasted more than seven days. *Id.* § 11-9-501(a)(1). Claimant must prove his entitlement to temporary total disability benefits by a preponderance of the evidence. *Falcon v. NW Med. Ctr.*, 2019 Ark. App. 6, 567 S.W.3d 893.

Discussion. The 2022 opinion contains the following analysis:

However, the question remains whether Claimant was still in his healing period then regarding any of his compensable injuries. At the time of his 2019 hearing, per his testimony, Claimant had long since been released from treatment by Dr. Kirk Reynolds for his shoulder. The evidence shows that he reached the end of his healing period for his shoulder before February 25, 2020. Thus, it cannot support his claim for temporary total disability benefits; and Claimant has not cited his shoulder in support of this portion of his claim.

Concerning his left hip injury, I credit Dr. Tucker's opinion that he reached maximum medical improvement as of December 2020. Specifically, based on my review of the medical evidence, I find that he reached the end of his healing period on December 17, 2020. Based on the copious evidence concerning the physical requirements of the job, including bending, twisting, and lifting, Claimant was not capable of performing it because of his hip problems once the meter change-out

project concluded. He has not worked anywhere since his termination; and I find that the evidence preponderates that he was totally incapable of earning wages during that period. See *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981); *Sanyo Mfg. Corp. v. Leisure*, 12 Ark. App. 274, 675 S.W.2d 841 (1984)(claimant who has been released to light duty work but has not returned to work may be entitled to temporary total disability benefits where insufficient evidence exists that the claimant has the capacity to earn the same or any part of the wages he was receiving at the time of the injury). Therefore, based on his compensable hip injury, Claimant has established his entitlement to temporary total disability benefits from February 26, 2020, to December 17, 2020.

As to whether he is entitled to temporary total disability benefits in connection with his stipulated compensable back condition, I found in the previous opinion that “per the opinion of Dr. Miedema—which I credit—he reached the end of his healing period for his back injury on February 13, 2018.” That opinion, as the parties have stipulated, is binding on this proceeding under the Law of the Case Doctrine; and it is *res judicata*. See *Thurman v. Clarke Industries, Inc.*, 45 Ark. App. 87, 872 S.W.2d 418 (1994). Nothing before me shows that he entered another healing period regarding his back after the above-referenced date. Thus, his compensable back condition does not entitle him to temporary total disability benefits for any period. Claimant has not met his burden of proof here.

It bears repeating that the above findings are binding on this proceeding under the Law of the Case Doctrine. See *supra*.

The only event that happened on November 1, 2022, with respect to these claims was the issuance of the second opinion. There is no evidence that Claimant entered a new healing period on that date; the entry of the opinion certainly did not trigger one. For that reason, assuming Claimant is entitled to additional temporary total disability benefits, his eligibility did not resume on that date.

It must first be determined whether, if at all, Claimant has entered a new healing period at all. With regard to his respective injuries, Claimant has not argued, and the evidence does not show, that he has begun a new healing period concerning his stipulated compensable left shoulder injury. As for his adjudicated compensable left hip injury of June 26, 2017, I have found that none of Claimant's treatment therefor on and after October 8, 2021, is causally related to it; and he has not proven a compensable consequence with regard to that body part. Thus, nothing concerning his left hip that has occurred since October 8, 2021—and, especially, since November 1, 2022—has led to Claimant entering another healing period.

That leaves his stipulated compensable back injury. Claimant's testimony and his medical records reveal that he has undergone the trial implantation of a peripheral nerve stimulator on multiple occasions. Again, this was treatment that he was awarded out of the 2022 proceeding. The first time Claimant saw Dr. Goree after the 2022 opinion was handed down was on April 25, 2023. Goree recommended the implantation of the stimulator. This happened on May 22, 2023, with Dr. Gregory Smith installing it. According to Claimant, the stimulator worked for approximately one week. On June 23, 2023, Claimant went to Goree's office in an effort to have the device fixed. Unfortunately, the stimulator still did not work, and the leads were removed. Claimant returned to Dr. Goree on August 29, 2023. On that occasion, the doctor ordered more physical therapy. Another implantation was scheduled. This new procedure, conducted by Goree, occurred on October 12, 2023. In this instance, the

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stimulator worked for 60 days. Claimant's testimony was that the device improved his functionality. After the 60-day period, the stimulator was removed. More therapy was ordered.

The evidence shows that the peripheral nerve stimulators did not extend the healing period for Claimant's back injury—which I found in the 2022 opinion that he reached on February 13, 2018. Nor did the implantations result in his entering a new healing period. Instead, the stimulator trials and other back treatments discussed above were aimed merely at managing Claimant's back injury beyond the end of his healing period. See *Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, 184 S.W.3d 31 (2004).

In sum, Claimant has not met his burden of proving his entitlement to additional temporary total disability benefits for any period.

E. Attorney's Fee

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). Under Ark. Code Ann. § 11-9-715 (Repl. 2012):

(B) Attorney's fees shall be twenty-five percent (25%) of compensation for indemnity benefits payable to the injured employee or dependents of a deceased employee . . . In all other cases whenever the commission finds that a claim has been controverted, in whole or in part, the commission shall direct that fees for legal services be paid to the attorney for the claimant as follows: One-half (½) by the employer or carrier in addition to compensation awarded; and one-half (½) by the injured employee or dependents of a deceased employee out of compensation payable to them.

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Discussion. Claimant has now been awarded any additional indemnity benefits herein. For that reason, the evidence does not preponderate that his counsel, the Hon. George Bailey, is entitled to a controverted fee.

CONCLUSION

Judgment is hereby entered in accordance with the Findings of Fact and Conclusions of Law set forth above.

IT IS SO ORDERED.

Hon. O. Milton Fine II
Chief Administrative Law Judge