

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G803958

KENNETH THOMPSON, EMPLOYEE

CLAIMANT

**DEPARTMENT OF CORRECTIONS (ESTER UNIT),
EMPLOYER**

RESPONDENT No. 1

**PUBLIC EMPLOYEE CLAIMS DIVISION,
CARRIER/TPA**

RESPONDENT No. 1

**DEATH AND PERMANENT TOTAL DISABILITY
TRUST FUND**

RESPONDENT No. 2

OPINION FILED JUNE 1, 2021

A hearing was held by ADMINISTRATIVE LAW JUDGE KATIE ANDERSON in Little Rock, Pulaski County, Arkansas.

Claimant, Mr. Kenneth Thompson, was represented at the hearing by Mr. Neal Hart, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 were represented at the hearing by Mr. Robert Montgomery, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 was represented by Ms. Christy King, Attorney at Law, Little Rock, Arkansas. Ms. King waived her appearance at the hearing.

STATEMENT OF THE CASE

A hearing was held in the above-captioned claim on March 4, 2021, in Little Rock, Arkansas. A Pre-Hearing Order was previously entered in this case on December 15, 2020.

Stipulations:

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

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

2. An employer-employee relationship existed on June 1, 2018, at which time Claimant sustained a compensable injury to his lumbar spine.
3. Claimant was granted a Change of Physician to Dr. Jonathan Goree on April 18, 2019.
4. All issues not litigated herein are reserved under the Arkansas Workers' Compensation Act.

Issues:

The parties agreed to litigate the following issues, which were also clarified at the hearing:

1. Whether Claimant is entitled to a spinal cord stimulator.
2. Whether an Independent Medical Evaluation (IME) is reasonably necessary.
3. Whether Claimant is entitled to additional temporary total disability (TTD) benefits from November 17, 2020, to a date yet to be determined.
4. Attorney's fee.

Contentions:

The following contentions were submitted by the parties:

Claimant:

Claimant contends that Respondents No. 1 should be required to furnish additional medical care in the form of a spinal cord stimulator recommended by Drs. Jonathan Goree and David Bumpass. Claimant remains in his healing period and is entitled to payment of temporary total disability benefits from the date last paid through a date to be determined. An IME by Dr. Roman is not reasonably necessary. Claimant's Counsel is entitled to a statutory attorney's fee on all controverted indemnity benefits.

Respondents No. 1:

Claimant reported an injury to his lower back on June 1, 2018. The claim was accepted as compensable by Respondents No. 1 and appropriate indemnity and medical benefits were paid. Claimant underwent a left partial discectomy at L5-S1 by Dr. Wayne Bruffett on November 15,

2018. Dr. Bruffett assigned a ten percent (10%) impairment rating on February 12, 2019. Claimant underwent a lumbar interbody fusion at L5-S1 by Dr. David Bumpass on February 26, 2020. Respondents No. 1 contend that all appropriate indemnity and medical benefits have been paid to Claimant for his compensable injury.

Claimant contends he is entitled to a spinal cord stimulator. A spinal cord stimulator was recommended for Claimant. The recommendation for the spinal cord stimulator was sent for preauthorization as is required by Rule 099.30, Part I, S. Preauthorization, of the Arkansas Workers' Compensation Laws and Rules. The review for preauthorization indicated that criteria was not met for the trial or permanent implant of the stimulator. A second opinion was recommended. Respondents No. 1 proposed and paid for an IME with another pain management specialist, Dr. Carlos Roman, but Claimant's attorney indicated he would not allow Claimant to be seen by Dr. Roman. The spinal cord stimulator has not met preauthorization as required by Rule 099.30. Respondents No. 1 content that an IME with Dr. Roman is indicated and is reasonably necessary under the circumstances.

Respondent No. 2:

The Fund defers to the outcome of litigation.

Summary of Evidence:

The record consists of the hearing transcript of March 4, 2021, and the exhibits contained therein. Specifically, the following exhibits have been made a part of the record: Commission's Exhibit #1 included the Pre-Hearing Order entered on December 15, 2020; Claimant's Exhibit #1 consisted of seventy-five (75) pages of medical records; Claimant's Exhibit #2 consisted of three (3) pages of documentary evidence, including an email from Ann Wilson, R.N., an email from Mary Anderson, and Claimant's wage records; Respondents' No. 1 Exhibit #1 was five (5) pages

of documentary evidence and consisted of a preauthorization review and an IME report; Respondents' No. 1 Exhibit #2 was five (5) pages and included a copy of AWCC Rule 099.30, an October 9, 2020, email to the adjuster, a letter to Mr. Neal Hart, and an October 15, 2020, email to an adjuster; Respondents' No. 1 Exhibit #3 was seventeen (17) pages and included a February 1, 2019, FCE report.

Witness:

During the hearing, Mr. Thompson (Claimant, used interchangeably herein) was the only witness to testify.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the evidence and other matters properly before the Commission, and after having had an opportunity to hear the testimony of Claimant and observe his 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 of the within claim.
2. I hereby accept the above stipulations as fact.
3. Respondents No. 1 have failed to prove by a preponderance of the evidence that an Independent Medical Evaluation/IME by Dr. Carlos Roman is reasonably necessary.
4. Claimant has established by a preponderance of the evidence that the additional medical treatment, specifically a spinal cord stimulator, is reasonably necessary to treat his compensable low back injury of June 1, 2018.
5. Claimant has proved his entitlement to temporary total disability compensation from November 17, 2020, until the end of a reasonable healing period after Claimant has had time to heal from a spinal cord stimulator and is released to maximum medical improvement by Dr. Goree.
6. Claimant's attorney is entitled to a controverted attorney's fee on the indemnity benefits awarded herein.

CASE IN CHIEF

Hearing Testimony:

During the hearing, Mr. Thompson, (“Claimant,” used interchangeably herein) testified on his own behalf.

Claimant was fifty (50) years old at the time of the hearing. After he graduated from high school, he entered the military. He served in the Army for three and one-half (3 ½) years and received an honorable discharge in 1992. Claimant also worked as a machine operator for approximately one (1) year before he began working for the Arkansas Department of Correction in 1994. Claimant testified that he worked as a Correctional Officer, and his job duties included keeping up with inmates and “monitor[ing] traffic.”

Claimant testified that on June 1, 2018, he was working in the dining facility serving the lunch meal when two (2) inmates engaged in an altercation. When Claimant stepped in to help break up the fight, he fell and hit his back on a steel table. Afterward, Claimant was in excruciating pain in his lower back and legs (primarily his left leg), and Respondent-Employer sent him for medical treatment. Claimant was taken off work and received temporary disability benefits.

Claimant was treated by Dr. Wayne Bruffett for low back pain and leg pain. Dr. Bruffett administered injections and ultimately operated on Claimant’s back. According to Claimant, the surgery helped his back and leg pain for “a little while,” but the pain returned. Dr. Bruffett released Claimant to full-duty work and gave Claimant a ten percent (10%) impairment rating to the body as a whole.

Claimant also underwent a Functional Capacity Evaluation (FCE). He testified that during the evaluation, he experienced “a lot of pain” and that after the evaluation was over, his pain was “excruciating.”

On April 18, 2019, Claimant received a change of physician to Dr. Jonathan Goree, a pain management specialist, who prescribed medication and administered injections. The injections helped Claimant's symptoms for "a day or so." Claimant testified that when Dr. Goree took him off work for a while, he began receiving temporary disability checks. Dr. Goree ultimately referred Claimant to Dr. Bumpass, but Dr. Goree continued seeing Claimant in the meantime for pain management.

In February of 2020, Dr. Bumpass performed a lumbar fusion on Claimant. Claimant testified that one (1) week later, he had an unexpected second surgery to address a spine hematoma. Claimant testified that the lumbar fusion performed by Dr. Bumpass provided him with some relief; however, the pain in his left leg and low back returned months later. On November 17, 2020, Dr. Bumpass assigned Claimant a twenty-five percent (25%) impairment rating to the body as a whole.

Claimant, however, did not return to work for Respondent-Employer (or any other employer). Claimant stated that he could no longer perform his job duties as a correctional officer. He testified that Respondent-Employer fired him because he "ran out of time" to return to work. Claimant stated that there was no light-duty work as a correctional officer.

Claimant testified that on the day of the hearing, he was experiencing symptoms of low back pain and left leg pain. While his right leg was not bothering him that particular day, it had been symptomatic two (2) days prior to the hearing. He often experienced right leg numbness and sharp pain, which resulted in numbness in his right foot. Claimant used a cane, prescribed by Dr. Bumpass, on the day of the hearing. Claimant's pain level at the hearing was a six (6) on a scale of one (1) to ten (10), ten (10) being the worst. His pain was, on average, around a five (5). When his pain level was at a ten (10), he would take medication and try to get in a comfortable position.

Claimant testified that he had trouble sleeping due to his symptoms and only slept approximately five (5) hours per night. In the mornings, he had trouble getting out of bed, brushing his teeth, and washing his face. Claimant stated that he attempted to exercise every day, as instructed by his doctors.

According to Claimant, he had an upcoming return appointment with Dr. Bumpass on March 16, 2021. He also had not returned to Dr. Goree recently because he had not been approved to receive the spinal cord stimulator, which Dr. Goree had recommended for Claimant. Claimant also testified that he had not undergone a physical examination by Dr. Roman.

According to Claimant, he had undergone the requisite psychological evaluation for receiving a spinal cord stimulator. Claimant believed that a spinal cord stimulator would improve his quality of life and help him return to a sense of normalcy.

On a typical day, Claimant stated that he would watch television, walk around the house, and exercise. His wife assisted him with bathing and getting dressed. He could drive long distances and could ride in a vehicle for approximately one hour.

As for the surgery performed by Dr. Bruffett, Claimant testified on cross-examination that his symptoms improved afterward; however, the sharp pains in his left leg returned after a few weeks. Thereafter, when completing his Functional Capacity Evaluation (FCE), Claimant testified he attempted as many of the lifting and bending activities as he could. Afterward, even though Dr. Bruffett released him to return to full-duty work, it was Claimant's understanding that he would not be able to return to work for Respondent-Employer until he was able to perform his job duties at full duty.

Subsequently, Claimant received a change of physician to Dr. Goree, who referred him to Dr. Bumpass. After the February 2020 surgery performed by Dr. Bumpass, Claimant's back pain

and left leg pain eventually returned. He also testified that his right leg pain had recently returned as well. Claimant acknowledged that in September of 2020, Dr. Bumpass' clinic notes stated that his right leg pain had resolved; however, Claimant testified at the hearing that his right leg pain had returned. Dr. Bumpass did not recommend additional surgery for Claimant but opined that Claimant's other treatment options included a spinal cord stimulator.

Claimant testified that he had a conversation with Respondent-Employer in April of 2020 regarding his termination. He was eligible for retirement benefits at that time and was receiving those benefits as of the date of the hearing. Also, as of the hearing date, Claimant did not believe he was capable of working at all. He stated that his pain level would fluctuate, and he did not have "the full capacity right now to bend like [he] need[ed] to."

Medical Exhibits:

On June 28, 2018, Claimant saw Dr. Victor Vargas for complaints of low back pain on the right and left side equally and radiating pain to both lower extremities. Dr. Vargas noted that Claimant previously had a TENS unit and had undergone physical therapy, which resulted in mild worsening of his symptoms. Claimant was assessed with low back pain, contusion of the lumbar spine, strain of the lumbar spine, and paresthesia in the lower extremities of unknown origin. Because of Claimant's remaining complaints of significant pain, which had not improved with physical therapy and medication, and complaints of radiating pain to the lower extremities, Dr. Vargas ordered an MRI of the lumbar spine for evaluation of the neurovascular structures. Claimant was taken off work during this time.

When Claimant returned to Dr. Vargas on July 16, 2018, clinic notes revealed that Claimant had a herniated disc at L5-S1 and left S1 radiculopathy. Dr. Vargas opined that Claimant's symptoms were at least fifty-one percent (51%) related to his work injury. Dr. Vargas also noted

some previous back pain that Claimant had experienced, but noted that Claimant had improved and was doing well until the June 1, 2018, work incident. Dr. Vargas recommended a diagnostic and therapeutic injection at the left foramen of L5-S1 and instructed him to remain off work.

Claimant underwent a steroid injection on August 1, 2018, which was administered by Dr. Gary Frankowski. Dr. Vargas' notes from August 9, 2018, indicated that Claimant had some relief with the injections, and he recommended physical therapy. Claimant remained off work.

On August 29, 2018, Dr. Vargas' notes indicated that Claimant's low back pain was worsening, so he referred Claimant to Dr. Wayne Bruffett for a surgical consultation. Claimant was to remain off work until he saw Dr. Bruffett.

Dr. Bruffett evaluated Claimant on October 22, 2018, and opined that Claimant's herniated disc with nerve impingement and left leg radiculopathy was a result of the work incident on June 1, 2018. Because Claimant had already undergone extensive non-operative treatment, Dr. Bruffett recommended a microscopic partial discectomy at L5-S1 on the left. He recommended physical therapy as a follow-up to surgery. Hence, Claimant underwent a partial discectomy at L5-S1 (left), performed by Dr. Bruffett, on November 15, 2018.

Dr. Bruffett released Claimant to light sedentary office work at a post-operative appointment on December 2, 2018; yet, Dr. Bruffett noted that Claimant continued to have back and leg pain.

At his next post-surgical follow-up with Dr. Bruffett, Claimant complained of a considerable amount of back pain and bilateral leg pain. Dr. Bruffett recommended a new MRI scan with gadolinium to rule out recurrent disc herniation or other significant problems. He noted that if Claimant planned to return to his prior occupation, he would likely require additional

physical therapy. He also opined that if Claimant did not plan to return to his previous occupation, he could be at maximum medical improvement (MMI).

Dr. Bruffett saw Claimant again on January 23, 2019, when he noted that Claimant's new MRI scan did not show a problem of further surgical significance. An x-ray of Claimant's lumbar spine also showed no evidence of disc herniation, significant stenosis, or nerve compression. At that time, Dr. Bruffett opined that Claimant could return to work without restrictions. His clinic notes indicated that Claimant did not feel that he could return to his current job. As a result, Dr. Bruffett recommended a Functional Capacity Evaluation ("FCE") to better define Claimant's capabilities.

The February 1, 2019, FCE results revealed that Claimant demonstrated the ability to perform work in the sedentary classification of work. However, the results also indicated an unreliable effort.

Following the FCE, Dr. Bruffett found Claimant to have reached maximum medical improvement (MMI). On February 6, 2019, Dr. Bruffett released Claimant to work without restrictions and assigned Claimant a ten percent (10%) impairment rating to the body as a whole.

After a change of physician request, Claimant saw Dr. Johnathan Goree on May 14, 2019. At that appointment, Dr. Goree noted that Claimant complained of severe lumbar radicular pain and post-laminectomy syndrome. Claimant described the pain as greater on the left than the right and radiating down his left leg. He also noted associated weakness in the left leg. Claimant reported that his pain had worsened since his surgery, despite physical therapy. Dr. Goree noted that Claimant ambulated with a cane, had an antalgic gait, and had no ability to heel or toe walk. As a result of his examination, he recommended series of left-sided S1 nerve root injections.

Claimant saw Dr. David Bumpass on August 20, 2019. Claimant reported at that time that he received a “little” relief after the injections by Dr. Goree. After a physical examination, Dr. Bumpass recommended an EMG of the lower extremities and offered Claimant possible treatment options, depending on the EMG results, including surgery, a spinal cord stimulator, and continuing conservative treatment management.

On November 5, 2019, Claimant returned to Dr. Goree. Dr. Goree’s clinic notes indicated that Claimant’s EMG revealed bilateral left greater than right L5-S1 radiculopathy and normal sensory conduction. He noted that Claimant was scheduled to undergo surgery by Dr. Bumpass in January of 2020; that he should continue his current medication regimen in the meantime; and that he should return eight (8) weeks after surgery with a plan for spinal cord stimulator trial, if his radicular pain had not improved.

Claimant underwent a transforaminal lumbar interbody fusion at L5-S1 on February 26, 2020, and consequently, a second surgery to correct an epidural hematoma, left side at L5-S1 on March 2, 2020. Both procedures were performed by Dr. Bumpass. When Claimant returned to Dr. Goree after his recent surgeries, he was still complaining of severe pain in his back that was shooting down his leg. Dr. Goree recommended physical therapy, and he and Claimant discussed the option of a spinal cord stimulator.

When Claimant returned to Dr. Bumpass on September 15, 2020, Dr. Bumpass noted Claimant’s complaints of worsening left buttock pain that radiated into his lateral thigh, calf, and foot. He noted specifically that Claimant’s right leg pain had resolved. He stated that Claimant had completed his physical therapy and that he continued to do the exercises that he learned while in therapy. Dr. Bumpass stated the following:

Recommended consultation w/ Dr. Goree regarding candidacy for spinal cord stimulator for chronic neuropathic pain. We will evaluate him after his stimulator

is placed, or at 1 year post-surgery, whichever is sooner. Cannot return to full duty at work. If he is deemed not a candidate for a stimulator, or stimulator does not work, he will be at MMI.

At a September 29, 2020, visit with Dr. Goree, Dr. Goree's clinic notes indicated that Claimant continued to have left-sided radicular pain in an L5 and S1 distribution and back pain. Claimant ambulated with a cane due to his pain, but Claimant reported that his strength had improved. Clinic notes also indicated that Claimant wished to discuss spinal cord stimulation treatment. Dr. Goree opined that Claimant had failed all other conservative management and was a candidate for spinal cord stimulation due his diagnoses of post laminectomy syndrome and chronic pain syndrome. Dr. Goree recommended getting started with a trial spinal cord stimulator, and he ordered a neuropsychological evaluation.

On November 17, 2020, Dr. Bumpass' clinic notes reflected his opinion that further surgical treatment was not an option for Claimant and that with regard to surgical treatment, Claimant was at maximum medical improvement (MMI). However, Dr. Bumpass opined that Claimant did have other treatment options that could include spinal cord stimulator placement. He concluded that based on his assessment, he would issue Claimant a twenty-five percent (25%) impairment rating to the body as a whole.

On December 1, 2020, Claimant underwent the spinal cord stimulator pre-trial psychological evaluation. Overall, the evaluation showed that there were no significant cognitive or psychological barriers present in the evaluation that would negatively impact the placement of a spinal cord stimulator.

On January 4, 2021, Dr. Roman conducted an independent review of Claimant's medical records and opined that the proposed spinal cord stimulator was "absolutely not indicated." Dr. Roman further opined,

It will not change the outcome of this patient's work status or overall pain scores. The main contradiction is the unreliable rating on the Functional Capacity Exam after Dr. Bruffett did surgery which is a strong indicator of secondary gain by the patient which is an absolute contraindication to having spinal cord stimulator placement. Given that the patient also underwent a second surgery without any relief and that MRIs and x-rays demonstrate a decompressed lumbar spine with no severe stenosis, there is no objective rationale. There is only the subjective complaint of pain by the patient. The patient has not returned to work since the injury.

Relevant Documentary Evidence:

On October 9, 2020, Nurse Ann Wilson authored an email to Mary Anderson and Glenda Clark, stating that, "RN criteria is not met for a temporary trial or a implanted spinal cord stimulator. A peer review or second opinion is indicated."

On October 15, 2020, Mary Anderson, adjuster, authored a letter to Claimant's Counsel, informing him that a peer review had been requested and that Respondents No. 1 had scheduled an appointment for Claimant with Dr. Carlos Roman.

ADJUDICATION

A. Independent Medical Evaluation:

The first issue for determination is whether an Independent Medical Evaluation/IME with Dr. Carlos Roman, at the request of Respondents No. 1, is reasonably necessary. Claimant contends that an Independent Medical Evaluation/IME is not reasonably necessary. On the other hand, Respondents No. 1 contend that it is reasonably necessary under the circumstances.

Ark. Code Ann. §11-9-511(a) (Repl. 2012) provides, in relevant part: An injured employee claiming to be entitled to compensation shall submit to such physical examination and treatment by another qualified physician, designated or approved by the Workers' Compensation Commission, as the Commission may require from time to time if reasonable and necessary. The

threshold question is whether the examination is reasonable and necessary. King v. Willow Oaks Acres, Full Commission Opinion filed on January 25, 2001 (Claim No. E903202).

In the matter at hand, Claimant sustained an admittedly compensable injury to his low back on June 1, 2018, while working for Respondent-Employer. Since the work-related injury on June 1, 2018, Claimant has consistently complained of low back pain that radiated down both lower extremities (the pain was predominately down his left leg; however, the pain also radiated down his right leg, albeit somewhat less frequently than on the left). Claimant has repeatedly failed conservative treatment measures, as they offered him only temporary relief. Claimant has also undergone two (2) failed surgeries on his lumbar spine; the second spine surgery then necessitated a third surgery to correct a spinal hematoma. As a result, two (2) of his treating specialists, Dr. Goree and Dr. Bumpass, have recommended a treatment option in the form of a spinal cord stimulator for Claimant's lumbar radicular pain, post laminectomy syndrome, and chronic pain syndrome.

Furthermore, the evidence demonstrated that Dr. Carlos Roman has already reviewed Claimant's file and has rendered an independent medical opinion based on Claimant's medical records. Under these facts, I am not persuaded that that an Independent Medical Evaluation/IME by Dr. Roman is reasonable and necessary.

Therefore, based on all of the evidence before me, I find that Respondents No. 1 have failed to prove by a preponderance of the evidence that an Independent Medical Evaluation/IME by Dr. Carlos Roman is reasonable and necessary pursuant to Ark. Code Ann. § 11-9-511(a) (Repl. 2012).

B. Reasonable and Necessary Medical Treatment:

The second issue for determination is whether Claimant is entitled to additional medical treatment in the form of a spinal cord stimulator. Claimant contends that Respondents No. 1 should

be required to furnish additional medical care in the form of a spinal cord stimulator recommended by Drs. Jonathan Goree and David Bumpass. Respondents No. 1 contend that the claim was accepted as compensable and that all appropriate indemnity and medical benefits have been paid. Respondents No. 1 further contend that the spinal cord stimulator has not met preauthorization as required by Rule 099.30.

The employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508(a) (Repl. 2012). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary. Stone v. Dollar General Stores, 91 Ark. App. 260, 209 S.W.3d 445 (2005).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that Claimant proved by a preponderance of the credible evidence that the additional medical treatment in the form of a spinal cord stimulator is reasonably necessary in connection with his compensable low back injury of June 1, 2018.

Here, it is undisputed that Claimant suffered a compensable low back injury on June 1, 2018. After failed conservative treatment measures, Claimant underwent surgery by Dr. Bruffett; however, the testimony showed, and the medical records corroborated, that his symptoms of low back pain and pain radiating to his lower legs, ultimately returned. Subsequent conservative treatment measures performed by Dr. Bruffett and Dr. Goree also failed. After the second and third surgeries performed by Dr. Bumpass, Claimant's symptoms once again returned. Additional conservative treatment while in Dr. Bumpass' care also provided only temporary relief. In light of Claimant's medical treatment history, both treating specialists, Dr. Goree and Dr. Bumpass, ultimately recommended treatment in the form of a spinal cord stimulator. A Spinal Cord

Stimulator Pre-Trial Psychological Evaluation provided that Claimant was a suitable candidate for spinal cord stimulation treatment. At Claimant's most recent appointment with Dr. Bumpass, he opined that Claimant was not able to return to work at that time.

As noted previously, I find Claimant to be a credible witness. Claimant not only spent several years in the Army, but he had worked at the Arkansas Department of Correction for twenty-four (24) years as a correctional officer, which could be a physically demanding position. Claimant's testimony, which is supported by the medical records, demonstrates that since his compensable June 1, 2018, low back injury, he has consistently reported to his physicians that he experiences low back pain and pain radiating down his left leg, primarily, but also down his right leg, all of which only temporarily subsides after injections, physical therapy, and surgical procedures. He testified that his pain has been significant, ranging from a five (5) to, at times, a ten (10) on the pain scale, ten (10) being the worst pain. The day of the hearing, he stated that his pain was at a six (6). Even at his young age, Claimant's back and leg pain has negatively impacted his activities of daily living. Claimant was using a cane to ambulate on the day of the hearing. Testimony shows that his wife assists him with personal care and that he has trouble sleeping. Claimant credibly testified that because of the nature of his job duties, his injuries, and the lack of availability of light-duty work as a correctional officer, he was not able to return to work.

I acknowledge that Claimant underwent a Functional Capacity Evaluation where he was found to be capable of sedentary work and that the FCE results also showed that Claimant gave unreliable effort. However, Claimant's testimony was that he was in "a lot of pain" during the evaluation and in "excruciating" pain afterward. I also find this testimony to be credible in light of the supporting medical records.

As noted above, I also acknowledge that Dr. Carlos Roman reviewed Claimant's medical records and rendered an Independent Medical Evaluation/IME wherein he opined that a spinal cord stimulator was "absolutely not indicated" However, in light of the foregoing, I am attaching minimal weight to this determination.

Furthermore, I acknowledge the contention by Respondents No. 1 that the evidence shows that a trial or permanent implant of a spinal cord stimulator has not met preauthorization review requirements and that a peer review and second surgical opinion were recommended. That determination, however, is not binding on the Commission. Nevertheless, I have attached minimal weight to this determination in light of the evidence presented.

In sum, based on the record before me, I find that Claimant has established by a preponderance of the evidence that additional medical treatment, specifically a spinal cord stimulator, is reasonably necessary to treat his compensable low back injury of June 1, 2018.

C. Temporary Total Disability from November 17, 2020, to a date yet to be determined:

Claimant asserts that he is entitled to additional temporary total disability compensation from November 17, 2020, to a date yet to be determined as a result of his June 1, 2018, back injury at work. Respondents No. 1 contend that all indemnity benefits have been paid.

An injured employee who suffers an unscheduled injury is entitled to temporary total disability compensation during the time that he is within his healing period and totally incapacitated to earn wages. Arkansas State Highway and Transportation Department v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981).

In this matter, all of the foregoing shows that Claimant has remained within his healing period and unable to work since the date of his compensable back injury on June 1, 2018. Therefore, Claimant is entitled to temporary total disability compensation from November 17,

2020, until the end of a reasonable healing period after Claimant has undergone implementation of the spinal cord stimulator, after he has had time to heal from the spinal cord stimulation treatment, and once he has been released at maximum medical improvement by Dr. Goree.

D. Attorney's Fee:

Respondents have controverted Claimant's entitlement to additional temporary total disability benefits from November 17, 2020, to a date yet to be determined. Therefore, I find that the Claimant's attorney is entitled to a controverted attorney's fee on all indemnity benefits awarded herein to Claimant, pursuant to Ark. Code Ann. § 11-9-715.

AWARD

Respondents are directed to pay benefits in accordance with the findings of fact set forth in this Opinion.

All accrued sums shall be paid in lump sum without discount, and this award shall earn interest at the legal rate until paid, pursuant to Ark. Code. Ann. § 11-9-809.

Pursuant to Ark. Code Ann. § 11-9-715, Claimant's attorney is entitled to a twenty-five percent (25%) attorney's fee on the indemnity benefits awarded herein. This fee is to be paid one-half by the carrier and one-half by Claimant.

IT IS SO ORDERED.

KATIE ANDERSON
ADMINISTRATIVE LAW JUDGE