

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. E903153**

<b>BENJAMIN DUNIVAN, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>WACKENHUT CORPORATION, EMPLOYER</b>	<b>RESPONDENT</b>
<b>INSURANCE COMPANY STATE OF PENNSYLVANIA, CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED FEBRUARY 26, 2004**

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD on November 26, 2003, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE STEEN MCNEELY, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE FRANK B. NEWELL, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was conducted in the above-styled claim to determine the claimant's entitlement to additional workers' compensation benefits.

On October 7, 2003, a prehearing conference was conducted in this claim, from which a prehearing order of the same date was filed. The prehearing order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' respective contentions relative to the issues. The prehearing order is herein designated a part of the record as the Commission's Exhibit No. 1. In addition to the stipulations set forth in the prehearing order, the parties stipulated that the claimant had previously received a 19% impairment to the left foot and a 5% impairment to the knee for which he had been paid appropriate indemnity benefits. Further, the parties stipulated that if there is an award of attorney's fees as a result of the current claim, pursuant to the old statute the same would be 10% on any indemnity benefits.

Finally, the parties stipulated that the respondents have controverted the present claim for temporary total disability benefits.

The testimony of Benjamin Dunivan, the claimant, and Carrie Dunivan, coupled with medical reports and other documents comprise the record in this claim. Subsequent to the hearing, the respondents submitted a letter-brief of November 26, 2003, and claimant submitted a letter reply brief of December 5, 2003. The briefs are herein designated a part of the record as Commission's Exhibit No. 2.

### **DISCUSSION**

Benjamin Dewayne Dunivan, with a date of birth of October 15, 1957, was an employee of respondent on March 7, 1999, when he suffered an injury within the course and scope of his employment. The March 7, 1999 injury suffered by the claimant occurred when he slipped on some ice and injured his left knee and left ankle. The claimant underwent several surgeries relative to the injuries and was ultimately assessed a permanent physical impairment rating in the amount of 19% relative to the left ankle and 5% impairment relative to his left knee by his attending physicians. The claimant was paid appropriate temporary total and permanent partial disability benefits relative to the left ankle and knee injuries by respondents.

The evidence in the record reflects that upon the claimant's release to return to work by his treating physicians he returned to the employment of respondent. The claimant continued discharging employment duties for respondent through July 2001, at which time the respondent-employer lost his contract with the State. Thereafter, the claimant secured employment as a part-time employee at White River Medical Center, in Batesville, Arkansas as a floor nurse. The claimant worked in his employment with the subsequent employer, White River Medical Center, two

days per week, twelve hour shift on Friday night and a twelve hour shift on Sunday night.

The evidence in the record reflects that following the claimant's March 7, 1999 compensable injury and after receiving treatment relative to same, to include several surgeries, the claimant was referred by Dr. Steven A. Kulik, a Little Rock orthopedic physician, to Dr. William E. Ackerman, III, a Little Rock pain specialist, relative to the claimant's continued complaints of pain regarding the left lower extremity. The claimant was initially seen by Dr. Ackerman on March 12, 2001, and following diagnostic studies, was diagnosed with reflex sympathetic dystrophy relative to his left foot. (CX1, p. 63-64) At the time that the claimant's reflex sympathetic dystrophy was diagnosed by Dr. Ackerman, the claimant had returned to the employment of respondent and was working full-time. Following an April 26, 2001 visit to Dr. Kulik, while noting that the claimant's main problem was chronic swelling of the lower extremity, Dr. Kulik observed that the claimant was back at work and opined that the claimant had reached maximum medical improvement. (CX1, p. 68) In a July 2, 2001 clinic note Dr. Kulik assessed the extent of the claimant's anatomical impairment relative to the left ankle at 19% to the extremity. (CX1, p. 69)

The evidence in the record reflects that the claimant received treatment under the care of Dr. J.D. Allen, a Batesville orthopedic physician, relative to the left knee injury sustained on March 7, 1999. The medical in the record reflects that in addition to Dr. Allen, the claimant was also seen by Dr. Charles Pearce and other physicians relative to his left knee injury. Nonetheless, following a January 22, 2002, visit Dr. Allen assessed the extent of the claimant's anatomical impairment relative to the left knee as a result of the March 7, 1999 compensable injury. (CX1, p. 71)

The evidence in the record reflects that following the claimant's diagnosis of Reflex Sympathetic Dystrophy in March 2001, he received principal treatment relative to the complaint

under the care of Dr. William E. Ackerman, III. Treatment furnished the claimant relative to the RSD by Dr. Ackerman included medication. (CX1, p. 65-66) A April 24, 2001 clinic note of Dr. Ackerman, noted improvement in the claimant's reflex sympathetic dystrophy and the fact that the claimant was able to work full-time and to bear weight on the extremity. With respect to the April 24, 2001 clinic note is the following:

ASSESSMENT: The patient's sympathetic pain has essentially resolved. He does have some neuropathic component to his chronic pain syndrome.

PLAN: Continued medication as previously prescribed. It is my medical opinion that he should approach maximum medical improvement in 4 to 6 weeks. (CX1, p. 67)

The claimant's testimony reflects that with the medication prescribed by Dr. Ackerman he did realize improvement in the RSD in his left lower extremity. The claimant noted that shortly after the April 24, 2001 visit with Dr. Ackerman, upon returning home he received a telephone call from the insurance adjuster, Mr. Dan Ray, who was handling the claim for respondent. The claimant presented credible testimony to reflect that he was informed by Mr. Ray that respondent would pay no further benefits in his claim and that the file was being closed. The claimant noted that as a result of not having access to further medical treatment under the care of Dr. Ackerman relative to the treatment of RSD, his condition progressively worsened or deteriorated once he had taken all the available medication. The claimant was without access to medical treatment for a period of eight to nine months based upon the actions of the assigned claims adjuster.

The claimant testified that near the end of 2001, based upon a conversation he had with a friend, he was advised that the insurance company could not automatically turn him off of his

medical benefits and that he needed an attorney. Thereafter, the claimant contacted an attorney, Henry Boyce, who represented him relative to the claim. The testimony in the record reflects that as a result of the efforts of Mr. Boyce, a court order was entered and workers' compensation benefits were resumed, to include access to medical treatment. The claimant testified that Mr. Boyce began representing him on April 22, 2002.

The testimony in the record reflects that between the time the respondent ceased payment of workers' compensation benefits, to include medical benefits, in April 2001 and the point in time that benefits were reinstated in 2002, respondent-employer had lost the contract with the State in July 2001. The claimant had been employed by the respondent-employer, on and, off for a period of three to four years at the time of the July 2001 loss of the contract. Thereafter, the claimant secured employment with White River Medical Center where he worked two days per week. The testimony in the record reflects that the claimant's complaints relative to the RSD in his left lower extremity continued to deteriorate once he no longer had access to the medical treatment rendered by Dr. Ackerman.

Once the medical benefits were reinstated in 2002, claimant returned to Dr. Ackerman for treatment relative to the RSD. The claimant testified that while Dr. Ackerman resumed the medical treatment plan that was in place prior to April 2001, some of the medications were not as effective.

An August 12, 2002 clinic note of Dr. Ackerman reflects that the claimant had last been seen by him in April 2001, at which time he was doing well and approaching maximum medical improvement. The clinic note further reflects that when the claimant's medications were stopped, the claimant had an exacerbation of his severe pain along with the onset of other symptoms. In the August 12, 2002 clinic note Dr. Ackerman relayed:

. . .The causation of his complaints then, and now, is related to his work-related injury. He has difficulty ambulating and can only work part-time as a result of his pain. . .

\* \* \*

ASSESSMENT: He meets the International Association for the Study of Pain criteria for complex regional pain syndrome as described in 1994. It is my medical opinion that this is a result of his discontinuation of medication. One needs to consider that medications need to be weaned; his medications were abruptly stopped by his workman's compensation carrier. Rebound hypertension was not considered by his insurance company when his medications were discontinued.

He has not been rated to date with respect to his reflex sympathetic dystrophy. He has become worse and the signs and symptoms that I observed today are, within a reasonable degree of medical certainty, caused by his workman's compensation injury. (CX1, p. 72-73)

After the claimant did not improved with the resumption of the medication following his return to the care and treatment of Dr. Ackerman in August 2002, consideration was had relative to a spinal cord stimulator in the care and treatment of the claimant's reflex sympathetic dystrophy. The record reflects a October 18, 2002 correspondence from Dr. Ackerman to the claimant's former attorney outlining the costs of the dorsal column stimulator, recuperative time entailed with the procedure, both from a trial and permanent standpoint, the benefits to be realized as a result of the procedure, and maintenance of the device once in place. The October 18, 2002 correspondence of Dr. Ackerman concludes:

It is my medical opinion that a dorsal column stimulator could theoretically increase significantly his activities of daily living and significantly decrease

his chronic suffering. (CX1, p. 75)

The record reflects that October 28, 2002, following a visit to Dr. Ackerman, the claimant was taken off work for a period of two weeks. (CX1, p. 83) On November 5, 2002, under Dr. Ackerman's treatment, a trial dorsal column stimulator was implanted. (CX1, p. 84-85) The claimant's testimony reflects that the trial dorsal column stimulator was effective in reducing his pain complaint. As a consequence of the afore, the claimant was referred by Dr. Ackerman to Dr. F. Richard Jordan, a North Little Rock neurosurgeon, for placement of the permanent dorsal column stimulator. On November 13, 2002, the claimant was initially evaluated by Dr. Jordan pursuant to the referral of Dr. Ackerman. (CX1, p. 87-88) On November 18, 2002, the claimant was admitted to St. Vincent's Health System North under the care of Dr. Jordan and underwent an implantation of epidural electrodes and implanted epidural stimulator. (CX1, p. 89-91)

Following the November 18, 2002 implantation by Dr. Jordan, the claimant returned to Dr. Ackerman for follow-up. During the November 25, 2002 visit to Dr. Ackerman, an assessment was had of the claimant's progress as a result of the placement of the dorsal column stimulator. The November 25, 2002 clinic note of Dr. Ackerman reflects that the claimant was continued on his medication. The November 25, 2002 clinic note further reflects that the claimant would be released to return to work around mid-January 2003. (CX1, p. 92)

Pursuant to the November 25, 2002 clinic note of Dr. Ackerman, the claimant in fact returned to his employment with White River Medical Center in mid-January 2003. During the time the claimant was off work while undergoing the placement of the trial and permanent dorsal column stimulator, he received temporary total disability benefits from respondent. The claimant's testimony reflects that although he continues to take some of the prescription medication of Dr.

Ackerman, there was an appreciable reduction in his pain complaints and other symptoms, to include the cramping or spasms in his left lower extremity.

The testimony of the claimant reflects that he progressed well and was able to discharge his employment duties after the placement of the dorsal column stimulator in November 2002. The claimant noted that after a period of time the beneficial effect of the stimulator tended to diminish. As a consequence of the afore, the claimant related his concerns to Dr. Ackerman during his follow-up visits in April 2003. The claimant continued to discharge his employment duties with White River Medical Center while receiving medical treatment under the care of Dr. Ackerman and Dr. Jordan. A June 16, 2003 clinic note of Dr. Ackerman reflects that a revision of the claimant's dorsal column stimulator had been planned as a result of the claimant's visit to Dr. Jordan. The claimant was requesting medication for his severe pain, which was located in his left leg at the time of the June 16, 2003 visit to Dr. Ackerman. The June 16, 2003 clinic note reflects medications being taken by the claimant at the time included Zonegram, Bextra, Lortab, and Catapres patch. The June 16, 2003 clinic note further reflects:

. . .It is my medical opinion that following the dorsal column stimulator revision that he should be able to be weaned from his medications. He will return back to this office for a follow-up appointment in four weeks. Hopefully at that time he will have his dorsal column stimulator revision done and I can begin weaning him from his current medications. (CX1, p. 100)

On July 2, 2003, the claimant was admitted to Baptist Memorial Medical Center, in North Little Rock, Arkansas, under the care of Dr. F. Richard Jordan for the revision procedure. The records relative to the July 2, 2003 admission reflects, in pertinent part:

Mr. Dunivan is a 45-year-old man who developed problems in his leg after he fell and slipped on ice. He developed complex regional pain syndrome in the left lower extremity and has been treated with an epidural stimulator. He reports that he started getting less stimulation in the leg and is not getting any in the foot. He is also getting symptoms in the right leg where before that was mostly on the left. We decided to bring him back for revision of the epidural lead. (CX1, p. 110)

The claimant was taken off work at the time of his revision procedure in July 2003.

The testimony of the claimant reflects that from the time of his revision surgery in July 2003, until late August 2003, he did not receive any indemnity benefits from respondent. The claimant noted that he was off work under the direction of his treating physician during the afore period. The testimony of the claimant reflects, with respect to the revision procedure, that an open incision was made at the same site of the previous incision and the lead revised. The incision was in the claimant's thoracic area.

The claimant noted that following his discharge after the July 2, 2003 revision, he experienced problems which necessitated returning to the hospital for further treatment. The claimant's testimony reflects:

. . . They said it needed to be – they called it a revision. And what they did was they wanted to go back in and re-calibrate it's what they call it. And they went back in and re-calibrated it and during the surgery something had happened and I had formed a blood clot in my spine that was over two inches long and in the process of this I became paralyzed and I was paralyzed for the better part of two days and they had – my brother and my son-in-law loaded me into a car and took me back to the Baptist Medical Center in North Little Rock and they went in and had to do another surgery to remove the blood clot and apply a

pinrose drain to drain off the extra fluid. I stayed in the hospital there for a bout two or three days, I believe. (T. 22-23)

The claimant noted that he did ultimately receive some temporary total disability benefits to cover the time period of three to four weeks in July 2003, he was off work. The claimant noted that there was a period of three weeks that he did not receive any indemnity benefits and then on or about August 4, 2003, he received his last check which included the afore period.

The testimony of the claimant reflects that because he was without any indemnity benefits for a substantial period of time he went to Dr. Ackerman and requested that he be allowed to return to work so that he would have a source of income. The testimony of the claimant reflects that he returned to his employer and attempted to resume his regular job duties that he had performed prior to the July 2003 revision, however, was unable to do so due to the residuals of the compensable injury. The claimant noted that he was only able to work for two days after persuading Dr. Ackerman to allow him to return to White River Medical Center. The claimant's testimony reflects that he has been unable to work since the two days prior to September 4, 2003. The claimant was again taken off work by Dr. Ackerman on September 4, 2003.

The testimony of the claimant reflects that following the revision surgery and his hospitalization for treatment of the blood clot in addition to the pain and muscle spasms and cramps in his left lower extremity he also experience similar symptoms in his upper back. The claimant also noted that in addition to the spasms, pain, and cramps in his left lower extremity and upper back, he experienced swelling in the same areas along with the pain which rendered him unable to discharge his employment duties, even on a part-time basis, with White River Medical Center.

The testimony of the claimant reflects that he was prompted to secure the services of his

current attorney as a result of his contact with the new claim adjuster, Ellen Mackie. The claimant testified:

Well, Ms. Mackie, the insurance adjuster that I had been dealing with, I didn't have an attorney at the time I was dealing with the workers' compensation adjuster

\* \* \*

Yes, Ms. Mackie. Ms. Mackie is the one that was the insurance adjuster for the insurance company. And she called me one day and told me she wanted to discuss a settlement and I told her that I would need to talk to my adjuster first and see what, you know, all I could do. And I called a Ms. Paul at the Workers' Compensation Commission –

\* \* \*

Yes, a Legal Advisor, that was it. An advisor, I'm sorry. And the advisor had recommended that I not settle because of all the problems that I had been having and when I called Ms. Mackie and told Ms. Mackie that my advisor had recommended that I not settle, she told me that I would settle whether I liked it or not and I said, well, Ms. Mackie that doesn't sound right. And she told me. She said, you're going to settle, because as of this date, you will no longer receive any benefits from our insurance company and she hung the phone up and I never drew another dime after that. (T. 25-26)

The testimony of the claimant reflects that at the time of his conversation with Ms. Mackie, the cost of his medication for pain averaged approximately \$2,000.00 a month. Thereafter, the claimant contacted and secured representation by his current attorney.

The medical in the record reflects that when the claimant was seen in follow-up by Dr. William Ackerman on August 12, 2003, following the July 2, 2003 revision surgery under the care

of Dr. Jordan and subsequent hospitalization for the blood clot, he was experiencing muscle spasms and unable to work or do physical therapy. Dr. Ackerman's August 12, 2003 clinic note reflects, in pertinent part:

PLAN: Valium to be taken at night. He will be given a prescription for a transmucosal fentanyl preparation to be taken for episodes of severe pain, which he relates causes him to cry. He will continue with hydrocodone. Vioxx will be discontinued and he will be given a prescription for Bextra. Gabitril, which is not working, will be discontinued and he will be given a prescription for Zonegran. He will return back to this office for follow-up in 4 weeks. (CX1, p. 102)

Based on a review of the medical in the record coupled with the testimony of the claimant, the evidence reflects that between the August 12, 2003, visit by the claimant to Dr. Ackerman and a follow-up visit of September 4, 2003, the claimant had persuaded Dr. Ackerman to allow him to return to work. The testimony of the claimant reflects that he was unable to consistently engage in employment duties following the release due to residuals of the injury. A September 4, 2003 clinic note of Dr. Ackerman relative to the claimant reflects, in pertinent part:

INTERIM HISTORY: The patient is having difficulty working. His dorsal column stimulator has been revised, but he is having increasing pain in his extremity. The dorsal column stimulator does provide him with some relief, but he does require medications. He feels that he is unable to work when he has to take a hydrocodone preparation. He has difficulty controlling spasms in his extremity. He may wish to see Dr. Jordan's nurse for reprogramming of his stimulator. . .

PLAN: He will be given a prescription for a fentanyl transdermal patch and hydrocodone will be discontinued. He will continue with the Actiq fentanyl lozenges. He will return for followup in 30

days. (CX1, p. 103)

Dr. Ackerman authored an off-work slip for the claimant during the September 4, 2003 visit directing the claimant to remain off work until October 4, 2003. (CX1, p. 93) In a September 22, 2003 correspondence to the claimant's current attorney, Dr. Ackerman noted that the claimant was under his care for the work-related injury and receiving medications including an opioid. The September 22, 2003 correspondence further noted that the claimant had an exacerbation of pain, and for this reason had been placed off work. The September 22, 2003 correspondence concluded that the claimant may not be able to do work as a floor nurse, but may be a candidate for a supervisory type position. (CX1, p. 104)

The claimant was seen in follow-up by Dr. Ackerman on October 2, 2003, during which time Dr. Ackerman noted that the claimant was not working. The October 2, 2003 clinic note further reflected that the claimant's dorsal column stimulator was beginning to provide the claimant with some relief and that the claimant was continued on prescribed medications.

The claimant's testimony reflects that since the revision surgery he experienced pain and muscle spasms in his upper back, or thoracic area, as well as in the left lower extremity. Additionally, the claimant noted that he began to experience symptoms also in his cervical area as well as upper extremities. The claimant attributed the expansion of symptoms as residuals of the revision surgery and a spread of the reflex sympathetic dystrophy.

On October 21, 2003, the claimant was again seen by Dr. Ackerman. The October 21, 2003 claim note of Dr. Ackerman, in pertinent part:

INTERIM HISTORY: The patient is getting worse pain in his upper extremity. He relates that he has had pain since his surgery. He feels that he has spreading

of his reflex sympathetic dystrophy. He has been unable to work. He does follow with Dr. Jordan's office for his dorsal column stimulator. His pain intensity has decreased. Apparently, the stimulator is beginning to provide him with relief.

\* \* \*

ASSESSMENT: It is my medical opinion that he has a radiculopathy as oppose to a spread of his reflex sympathetic dystrophy.

PLAN: I recommend a MRI of his cervical spine. He is unable to work at present. I am going to remove him from work for 3 to 4 weeks. He will return back to this office in 4 weeks. (CX1, p. 106)

The claimant's testimony reflects that while Dr. Ackerman scheduled him for an MRI of the cervical spine, the same was not had because respondent refused to pay for it. The claimant notes that he is unable to discharge his employment duties with White River Medical Center because of the residuals of his compensable injury, to include revision of the dorsal column stimulator. The claimant noted that the also experiences numbness and weakness in his left upper extremity as well as swelling, pain, and muscle spasms in his left lower extremity. Further, the claimant's testimony reflects that he experiences severe symptoms in his upper back, to include swelling and muscle spasms.

The claimant provided testimony regarding his current medications that he is taking for his compensable injury which include Bextra, Zanaflex taken three times a day, a Fentanyl duragesic, as well as the Fentanyl lozenges-for break through pain and Cardizem, for blood pressure. The testimony of the claimant reflects that since the revision of the spinal cord stimulator the symptoms have gotten progressively worse. The claimant added that while his leg symptoms and complaints

have gotten a little worse all the time since the revision the same is not as bad as his back.

The claimant presents the testimony of his wife, Carrie Dunivan, who is also a LPN, to corroborate his relative to his incapacitation and symptoms experienced subsequent to the July 2003 revision procedure. The claimant also notes that with the exception of the two days that he attempted to work in August 2003, after persuading Dr. Ackerman to release him to return to work, he has been unable to work. The claimant further asserts that since September 4, 2003, he has not received any indemnity benefits from respondent and has been off work pursuant to the direction of his treating physicians.

Respondents deny that the claimant is entitled to temporary total disability benefits subsequent to September 2003 or any other period other than those previously paid the claimant. Respondent maintains that the claimant is not within his healing period and as such is not entitled to the payment of temporary total disability benefits.

Subsequent to the hearing, the parties submitted letter-briefs on the issue of temporary total disability benefits. Respondents submitted their brief on November 26, 2003. The letter-brief of the claimant was filed with the Commission on December 5, 2003. Both briefs are herein designated a part of the record as the Commission's Exhibit No. 2. From all the evidence, I make the following:

### **FINDINGS**

- \_\_\_\_\_ 1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On March 7, 1999 the relationship of employee-employer-carrier existed among the parties.
3. On March 7, 1999 the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$308.00/\$231.00 for temporary total disability/permanent partial disability

benefits.

4. On March 7, 1999 the claimant sustained an injury arising out of and in the course of his employment.

5. The evidence in the record preponderates that the claimant entered a subsequent healing period as of September 4, 2003, relative to his compensable injury of March 7, 1999, and compensable consequences thereof.

6. The claimant was temporarily totally disabled for the period beginning September 4, 2003 and continuing through the end of his healing period, a date yet to be determined.

7. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of March 7, 1999.

8. The respondents have controverted the payment of temporary total disability benefits subsequent to September 4, 2003.

### **CONCLUSIONS**

The compensability of the claimant's March 7, 1999 injury in the employment of respondent is not disputed. The claimant was employed by respondent for a period of three to four years, and returned to the employment of same following his March 7, 1999 compensable injury. The claimant's employment with respondent ceased in July 2001 when respondent lost its contract to provide services for the State of Arkansas. Thereafter, the claimant secured employment with White River Medical Center. The claimant suffered injuries to his left knee and left ankle in the March 7, 1999 compensable injury; underwent several surgeries relative to the left lower extremity; and was ultimately rated by his treating physicians with respect to the ankle injury and the knee injury. On April 24, 2001, Dr. Steven Kulik noted that the claimant had reached maximum medical

improvement relative to the ankle injury. On July 2, 2001, Dr. Kulik assessed the claimant with a 19% impairment to the ankle as a result of the compensable injury. In a January 22, 2002 report Dr. J.D. Allen, a Batesville orthopedic physician, assessed the claimant with a 5% impairment to the left knee as a result of the March 7, 1999 compensable injury.

The evidence in the record clearly reflects that the claimant suffered specific injuries to his left ankle and knee in the March 7, 1999 compensable injury. Additionally, the evidence preponderates that the claimant developed reflex sympathetic dystrophy in the left lower extremity as a consequence of the March 7, 1999 compensable injury, for which he received treatment under the care of Dr. William Ackerman, a Little Rock pain specialist. Additionally, the evidence reflects that the claimant was on his way to recovery relative to the reflex sympathetic dystrophy in April 2001 through treatment with medication by Dr. Ackerman at the time respondent arbitrarily suspended access to medical treatment. The claimant was without access to medical treatment relative to his compensable injury for a period of eight to nine months. As a consequence of the afore, the progress previously realized in the treatment of the reflex sympathetic dystrophy ceased and claimant's condition deteriorated to the point that placement of a dorsal column stimulator was necessitated in the treatment of the RSD.

In November 2002 under the care of Dr. F. Richard Jordan a dorsal column stimulator was implanted in the claimant to treat the reflex sympathetic dystrophy. The claimant was off work pursuant to the direction of his treating physicians, Dr. William Ackerman and Dr. Richard Jordan during the placement of a trial dorsal column stimulator as well as the placement of the permanent device. The claimant received appropriate temporary total disability benefits during the afore period and was released to return to work in mid-January 2003.

In July 2003 the claimant underwent a revision of the dorsal column stimulator under the care of Dr. Jordan. Following his discharge after the revision, the claimant was returned to the hospital for treatment of complications from the revision procedure, a blood clot. The claimant remained in the hospital for several days thereafter. The evidence in the record reflects that the claimant received temporary total disability benefits for the period that he was off work in July 2003 while undergoing the revision and recuperation. With the exception of a two day period that the claimant returned to work in August 2003 when released to do so at his request by Dr. Ackerman, the claimant has not been released to return to work thereafter. The claimant asserts he is entitled to the payment of temporary total disability benefits subsequent to September 4, 2003.

The present claim is a claim for temporary total disability benefits by the claimant for the period commencing September 4, 2003, and continuing until such time as he has been released to return to work by his treating physician. The respondents deny that the claimant is entitled to temporary total disability benefits and controvert his entitlement to same. The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to workers' compensation benefits as a result of an injury sustained subsequent to the effective date of the afore provision.

The evidence in the record preponderates that the claimant was taken off work by his treating physicians, Dr. William Ackerman, and Dr. Richard Jordan, in July 2003 when he underwent the revision under the care of Dr. Jordan for the dorsal column stimulator.

It is not disputed that the claimant has been diagnosed with reflex sympathetic dystrophy as a consequence of the compensable March 7, 1999 injury. The symptoms of the claimant's RSD were lodged in his left lower extremity, to include muscle spasm, pain, swelling, differences in

temperature, and weakness. The claimant attributes his current complaints and symptoms, to include muscle spasm, pain and cramps, in his upper back, as well as his left lower extremity and weakness and numbness in his left upper extremity as either compensable consequences of the July 2, 2003 revision or a spread of the RSD.

At the time there was consideration of the initial dorsal column stimulator in 2000, Dr. Ackerman outlined the procedure, recuperative periods, prognosis, and maintenance in an October 18, 2002 correspondence to the claimant's attorney. The October 18, 2002 correspondence reflects, in pertinent part:

. . .The patient was given a rating by Dr. Kulik with respect to damage to his posterior nerve, which included the medial and plantar lateral aspects. This was to the sensory aspect, which was demonstrated nerve conduction findings.

I have discussed a spinal cord stimulator placed dorsally to the spinal cord with Mr. {,} It is my medical opinion that that the stimulator is necessary to control hyperconductivity of the lower extremity nerve. With reflex sympathetic dystrophy, the dorsal column stimulator should vasodilate his blood vessels and increase blood flow to both the nerve as well as his lower extremity. . .

A dorsal column stimulator surgery would disable him for approximately two months. The leads could possibly move about the spinal cord: For this reason, two months of decreased activity are recommended to allow scar to form around the leads.

Long-term, the patient will need intermittent medications. For this reason, two months of decreased activity are recommended to allow scar to form around the leads. Long-term, the patient will need intermittent medications. The purpose of the dorsal column stimulator is not to completely relieve

his pain but to decrease a significant portion. For this reason, patients do require continued medications. However, I have had patients who have had significant relief with the stimulator and were able to discontinue all medications. On occasion, the leads have to be revised. Dependent upon battery use, which is approximately 5 years, the battery needs to be replaced surgically.

It is my medical opinion that a dorsal column stimulator could theoretically increase significantly his activities of daily living and significant decrease his chronic suffering. (CX1, p. 74-75)

On July 2, 2003, the claimant underwent a revision of the epidural electrode under the care of Dr. Jordan due to a malfunction. The operative note of Dr. Jordan relative to the July 2, 2003 revision reflects, in pertinent part:

With the patient prone on the radiolucent operating table, the back was prepped and draped in the usual fashion. The controller was taped over his generator in the buttocks. The thoracic area was infiltrated around the old scar with the 1% locaine with epinephrine. The incision made and the skin edges controlled with Michelle clips and dissection carried down sharply to the electrode. This was monitored under fluroscopy so as to avoid damage to the electrode and connecting wires. The electrode was dissected out of his epidural bed. The epidural space was then further dissected of scar and the electrode repositioned in a slightly more caudal position. Testing was then carried out at each side and in each electrode he reported stimulation only as far and actually largely restricted to the left knee. The electrode was again withdrawn from epidural space and the epidural space developed caudally from the laminectomy. The electrode was then inverted and replaced into the epidural space over T12. The programmer will have to be aware that the electrode is upside down so that the higher numbered electrode contacts are actually on the patient's left.

Then reprogramming trials were again carried out and finally he reported that the stimulation was all the way down the leg and into the foot. The electrode was sutured to the dura with 4-0 Nurolon to anchor it. The wound was irrigated with antibiotic solution. The edges of the bone were waxed. . . (CX1, p. 109)

It is undisputed based upon the medical in the record that subsequent to the July 2, 2003 revision procedure the claimant experienced additional complaints and symptoms in other parts of his body. While the claimant attributes the increase in symptoms in his upper back to a spread of the RSD, or in the case of his cervical spine to referred pain, the evidence nonetheless discloses that the symptoms are objective, to include muscle spasms, and that they have resulted in an incapacitation of the claimant to engage in gainful employment. The medical documents reflect that the claimant has been directed to remain off work by his treating physician since September 4, 2003.

The claimant has received active medical treatment under the care of his treating physician, Dr. William Ackerman, since the July 2, 2003 revision surgery. Further, the claimant has been directed to remain off work by Dr. Ackerman since September 4, 2003 and has not been released to return to work. Dr. Ackerman, in his October 21, 2003 clinic note assessed the claimant's complaint as radiculopathy. Further, Dr. Ackerman recommended a MRI of the claimant's cervical spine and noted that the claimant was unable to work during the October 21, 2003 visit. (CX1, p. 106)

The healing period is defined as that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. Arkansas Highway & Transportation Department v. McWilliams, 41 Ark. App. 1, 846 S.W.2d 670 (1993). If the underlying condition causing the disability has become stable and if nothing further in the way of treatment will improve that condition, then the healing period has ended. However, the healing

period has not ended so long as treatment is administered for the healing and alleviation of the condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982); Arkansas Highway & Transportation Department v. McWilliams, *supra*.

The evidence in the record clearly reflects the surgical procedure the claimant underwent in July 2003 as a result of the revision of the electrodes malfunction to the dorsal column stimulator. Thereafter, the claimant developed symptoms, to include muscle spasm, pain, and cramps, not only in his upper back but also numbness in the upper left extremity. The evidence discloses that as a result of the July 2, 2003 revision surgery, the claimant developed a blood clot at the surgical site which required additional hospitalization. The claimant's upper back or thoracic complaints as well as the diagnosed radiculopathy are compensable consequence of the claimant's compensable injury, for which respondents are liable, with respect to medical and indemnity benefits. The evidence further reflects that the claimant remains within his healing period as a result of the July 2, 2003 revision surgery and has remained totally incapacitated from engaging in gainful employment as a result of same since September 4, 2003. Respondents have controverted the claimant's entitlement to temporary total disability benefits subsequent to September 4, 2003.

#### **AWARD**

Respondents are hereby ordered and directed to pay to the claimant temporary total disability benefits at a weekly compensation benefit rate of \$308.00, for the period covering September 4, 2003, and continuing through a date yet to be determined, as a result of the claimant's compensable injury of March 7, 1999. Said sums accrued shall be paid in lump without discount.

Respondents are further ordered and directed to pay all reasonable related medical, hospital, nursing, and other apparatus expenses, relative to the claimant's compensable injury of March 7,

1999, to include compensable consequences of said injury, with the same being the RSD and rediculopathy. As well as relative travel.

Maximum attorney fees are herein awarded to the claimant's attorney, the Honorable Steven McNeely, on the controverted portion of this Award, pursuant to Ark. Code Ann. §11-9-715, and, in accordance with Holiday Inn-West v. Coleman, 31 Ark. App. 224, 792 S.W. 2d 345 (1990).

This Award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809, until paid.

Matters not addressed herein are expressly reserved.

**IT IS SO ORDERED.**

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**Andrew L. Blood**  
**Administrative Law Judge**