

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F309318

OLLIE COX, III,
EMPLOYEE

CLAIMANT

CEDAR CREEK WHOLESALE CORPORATION,
EMPLOYER

RESPONDENT

UNITED STATES FIRE INSURANCE CO.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED DECEMBER 2, 2009

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by the HONORABLE M. KEITH WREN,
Attorney at Law, Little Rock, Arkansas.

Respondent represented by the HONORABLE GAIL PONDER GAINES,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The claimant appeals an administrative law judge's opinion filed March 4, 2009. The administrative law judge found that the claimant did not prove he was entitled to additional medical treatment recommended by Dr. Greaser. The administrative law judge found that the claimant did not prove he was entitled to additional temporary total disability benefits. After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's opinion. The Full Commission finds that the claimant did not prove he was entitled to a spinal cord

stimulator as recommended by Dr. Greaser. We also find that the claimant did not prove he was entitled to additional temporary total disability benefits.

I. HISTORY

The parties stipulated that Ollie Cox, III, age 38, sustained a compensable back injury on July 1, 2003. Mr. Cox testified, "I was a flat bed driver, hauled a lot of lumber, essentially building materials. I pulled over on the side of the road to tarp up and pulled out my tarp, got ready to throw it up over my head and, you know, somewhere between me picking it up and, you know, that one motion, my back popped." A neurological surgeon, Dr. Eric D. Akin, began treating the claimant on September 17, 2003:

The patient is a 31 year old male who I am seeing today in consultation at the request of Dr. Lewis for the evaluation of right lower extremity pain. The patient complains of pain in the posterior aspect of the right thigh and over the anterior aspect of the right leg. It is burning in nature and it is not present at all times. It is aggravated by walking and sitting for prolonged periods. Laying down helps. The pain started on July 1, 2003, and has been gradually worsening....The pain began while he was throwing a tarp on to the top of a truck. This was an on-the-job injury....has not worked since August 21, 2003....

MRI of the lumbar spine shows herniated disc on the right side at L4-5....His radiographic findings correspond with the clinical symptom of a

right L5 radiculopathy. I have offered him a right L4-5 lumbar diskectomy....

Dr. Akin performed a right L4-5 diskectomy on September 25, 2003 and a repair of lumbar cerebrospinal fluid leak on September 30, 2003. The claimant testified that he began suffering from migraine headaches following the September 30, 2003 surgery. Dr. Akin noted on November 5, 2003, "He should be able to return to work at this time with a 20 lb. weight restriction. I believe that he will continue to have improvement in his pain over the next several weeks. If his symptoms persist he would likely benefit from formal physical therapy exercises." Dr. Akin informed a case manager on January 9, 2004, "The patient had previously been under a 20 lb. lifting restriction and had shown improvement with this. He is not under a permanent 20 lb. lifting restriction, however. I have advised him as of our last visit that he should begin to gradually increase his activity level as he can tolerate. He will now be discharged from my care at this point."

Dr. Derek Lewis saw the claimant on March 4, 2004 and released the claimant to full duty with "no impairments." Dr. Butchaiah Garlapati corresponded with Dr. Lewis on June 24, 2004:

Thanks for referring Mr. Cox to our clinic today for evaluation and treatment of his chronic low back pain with a duration of one year. The patient states that the pain is continuous in nature and, at times, it is variable with no difference in its temporal course. The characters are burning, sharp, aching and throbbing with associated numbness over right lower leg and foot. On the day of examination, his pain score is 4/10. So far, the patient has had acupuncture, electrical stimulation, exercise, physical therapy, massage, nerve blocks, epidural injections and trigger point injections and only the exercise has helped to give him a little comfort....

IMPRESSION:

1. History of failed back syndrome with positive MRI finding previous to the surgery that showed large central and right lateral disc protrusion.
2. Acute exacerbation of pain over the lumbar region that radiates down the left lower extremity that might be due to some new onset pathology versus inflammatory component.
3. History of cocaine and marijuana use in the past.
4. History of bilateral SI dysfunction.
5. Patient lives with friends.

Dr. Garlapati's recommendations included additional diagnostic studies, steroid injection versus selective nerve root block, continued medications, and physical therapy.

Dr. Akin saw the claimant on September 27, 2004 and noted in part, "He is using profanity in the clinic, stating that he 'wants this damned disc cut out.' He did physical therapy earlier this month and states it made his back pain worse....He also reports that he has had migraine headaches

since starting physical therapy, and does not want to return to the pain specialist." Dr. Akin diagnosed "Low back pain" and stated, "He has been taking narcotic analgesics for over one year. At this point, the narcotics could be contributing to his pain. I have placed him on Ultram to see if that may possibly give him some improvement."

Dr. Scott M. Schlesinger performed an independent medical examination on December 15, 2004 and reported in part, "This gentleman has a rather poor prognosis for having a good outcome from this situation. Before considering any further treatment, I would get a more up to date MRI of the lumbar spine and plain x-rays with flexion/extension views....If his MRI looks largely the same, certainly one could consider doing a lumbar fusion at this level, but I think the prognosis for him doing well with this is probably poor."

Dr. Akin performed additional surgery on May 16, 2005: "1. Transforaminal lumbar interbody fusion. 2. Posterolateral lumbar fusion. 3. Aspiration of iliac crest bone marrow. 4. Lumbar segmental stabilization at L4-5 with pedicle screws. 5. Posterior lumbar fusion." The pre- and post-operative diagnosis was "1. Lumbar

degenerative disc disease. 2. Discogenic lumbar pain at L4-5. 3. Previous herniated disc."

An administrative law judge filed an opinion on June 8, 2005. The administrative law judge found that the claimant did not prove he was entitled to additional temporary total disability benefits beginning April 16, 2004. The administrative law judge found that the claimant proved he was entitled to additional temporary total disability benefits "from the date of his last surgery" and continuing "through a date yet to be determined." The administrative law judge found that the claimant "failed to prove entitlement to additional medical treatment by Dr. Counts for depression secondary to pain caused by his work injury[.]"

Dr. Akin provided an interval note on August 16, 2005:

The patient returns today with continued complaints of low back pain and right leg pain. He also states that the right leg goes numb from the knee to the foot on the anterior aspect. This has been constant ever since the recent functional capacity evaluation. He states that he has spasms throughout his body including the upper and lower extremities, and the spine in all levels....He states that he is having a lot of knee pain as well and says that he is in need of a knee replacement....

On his functional capacity evaluation, his efforts were apparently so inconsistent that no assertion of his disability could be made. I have advised

him that we will continue with conservative treatment measures for another 6-8 weeks and then we will repeat the functional capacity evaluation. I have told him that he should be sure to use full effort with each exam in the functional capacity evaluation so that we can determine his level of disability. I have also provided a letter for him to obtain special seating at school, which will be more comfortable for him.

Dr. Akin diagnosed "Status post posterior lumbar interbody fusion at L5-S1."

Dr. Akin reported on October 4, 2005:

The patient is status post lumbar fusion from 5/16/06. He continues to complain of some back spasms and lower back pain. He also complains of intermittent numbness in the right leg and left arm....

He has some spasms of the lower lumbar musculature. No palpable deformity....

MDM: I think he should see gradual improvement over the next several months from the fusion. I do not have a good explanation for the left arm numbness. This may need further investigation from his primary care physician. He has requested pain medications today. However, he has a history of diverticulitis and I do not feel comfortable prescribing him either narcotics or nonsteroidal anti-inflammatory medications. I would like his primary care physician, or whichever pharmacist the primary care physician uses, to determine what would be best in this situation....We will refer him to Dr. Braden for his final disposition. He is presently at maximum medical improvement from my standpoint and gets a disability rating of 10% with regard to the surgery, according to the Guides to the Evaluation of Permanent Impairment, Fourth Edition. He is now released from my services.

Dr. Akin diagnosed "Status post lumbar fusion."

Dr. Terence P. Braden, III, D.O., thoroughly examined the claimant on October 19, 2005 and provided the following summary:

Mr. Ollie Cox is a 33-year-old male who had a lumbar diskectomy and then repair of a dural leak in 2003. He was never returned back to his work environment since then except for a short stint in February of 2004 when his back pain was exacerbated. He subsequently underwent fusion of the lumbosacral spine without any improvement in his symptoms.

His examination has marked symptoms of non-physiological signs. There is give way weakness in the bilateral lower extremities, non-correlative seated versus supine straight leg raising, the non-physiological presentation of the entire right leg being numb and trying to correlate this with left shoulder problems.

PLANS:

1. I really don't believe that therapy is going to give him Mr. Cox any improvement in his symptomatology.
2. TENS unit trial will be instituted.
3. We'll try him on Neurontin with a graduated dose.
4. I don't see him ever returning back to his work environment based upon his subjective complaints.
5. Lumbosacral spine flexion, neutral in extension, films to be done to ascertain for stability through the area that was fused.

Dr. Braden planned a follow-up visit in one month and stated, "I expect maximum medical improvement to be reached within the next 4 to 8 weeks."

The claimant informed Dr. Braden on November 17, 2005 that Neurontin had provided only temporary relief of his symptoms. Dr. Braden noted, "He wants to tell me about new symptoms that he is having now. His face is jumping, he is having chest spasm, his eyelids are jumping. He says that if he squats down to fix a tire on his car and gets up, then he loses vision in both of his eyes. I explained to Mr. Cox that these symptoms are not related to his low back. Dr. Braden planned the following on November 17, 2005:

1. Mr. Cox has reached maximal medical improvement from the injury that he reports to have sustained and his subsequent surgeries.
2. His impairment based on the AMA Guide for Evaluation of Permanent Impairment 4th Edition, would add an additional 2% to his original 10% giving him a total of 12% impairment to the whole person based on the AMA Guide to Evaluation of Permanent Impairment 4th Edition, Table 75, Page 113.
3. Reviewed with him his x-ray of his Lumbosacral spine which revealed no evidence of instability in flexion and extension views. He should continue with the TENS unit since it does give him some improvement.

The parties stipulated that the claimant sustained a 12% whole-body impairment rating.

The Full Commission affirmed and adopted the administrative law judge's June 8, 2005 decision in an opinion filed May 11, 2006. The claimant appealed to the Arkansas Court of Appeals. The Court of Appeals delivered

an opinion on May 9, 2007 and held, "Substantial evidence supports the Commission's denial of additional temporary total disability benefits, and we affirm on that issue. We reverse and remand for additional findings of fact about Cox's entitlement to medical treatment for his psychological problems." The Full Commission subsequently remanded the matter to an administrative law judge "for additional findings consistent with the May 9, 2007, opinion of the Arkansas Court of Appeals."

The parties stipulated that "the previous decisions of the administrative law judge, Commission and Arkansas Court of Appeals are binding on this proceeding under the law of the case doctrine and *res judicata*." The parties stipulated that "per Commission Order affirmed by the Court of Appeals, respondents have paid appropriate temporary total disability benefits."

The claimant agreed on cross-examination that he "began experiencing debilitating migraines" in October 2007. The claimant also agreed on cross-examination that he had fallen down a flight of stairs in October 2007. The claimant testified on questioning by the administrative law judge, "When I fell down the stairs, my condition was exacerbated

and aggravated....my body has just been getting worse ever since basically."

The record indicates that Dr. Timothy J. Dow referred the claimant to NEA Center for Interventional Pain Management. Dr. Raymond D. Greaser saw the claimant at NEA Center on February 26, 2008 and assessed lumbago, lumbar spondylosis, possible tethered cord syndrome, post-laminectomy syndrome (lumbar), lumbar neuritis, and lumbar radiculopathy. The treatment plan included additional diagnostic studies, consideration of a lumbar epidural steroid injection, and consideration of "spinal cord stimulation therapy." An MRI taken on March 7, 2008 showed post-operative changes and degenerative changes in the claimant's lower lumbar spine.

An administrative law judge entered an order dated May 5, 2008: "By letter of April 23, 2008, Claimant through counsel notified the undersigned that he wishes to abandon the issue of whether he is entitled to additional medical treatment by Dr. Ken Counts. Hence, this issue is hereby dismissed, and no findings need to be made pursuant to the remand, as they would now be moot. The claim will proceed on the sole issue of whether Claimant is entitled to wage loss disability benefits."

The claimant was seen at NEA Clinic on May 29, 2008: "Patient reports he has a history of migraine headaches. He states the headache pain is much worse than his back pain. He wishes to pursue alternatives to migraine treatment before beginning treatment for back pain which he feels is not a problem for him at the present time. He states 'I want to finish my bachelor's degree and I need these headaches taken care of to do that. Then I need to have my knees worked on..'" It was further noted on May 29, 2008, "Patient states he is having a great deal of trouble with migraines. He wishes to be weaned off his migraine medications and find alternative treatment options before beginning treatment of his back pain. Recommended referral to the Arkansas Headache Clinic for treatment of his headaches."

A pre-hearing order was filed on June 9, 2008. The claimant contended, among other things, that he had sustained wage-loss disability and that his attorney was entitled to fees for legal services. The respondents contended that the claimant was not entitled to wage-loss disability benefits "as he is capable of working at the same or similar wages to what he was earning at the time of the compensable injury."

The parties agreed to litigate the following issues:

1. Whether Claimant is entitled to wage-loss disability benefits.
2. Whether Claimant is entitled to a controverted attorney's fee.

Dr. Greaser corresponded with the claimant's attorney on August 19, 2008 and stated in part:

Briefly, as the interventional anesthesiologist for the NEA Clinic, I have over seventeen years of clinical expertise in treating the neuropathophysiology of the disease state of chronic pain....

A review of my medical records with specific regard to Mr. Ollie Cox reveals that on service date 02.26.08, I performed an extensive initial evaluation during which he reported chronic 07/10 VAS, aching, bilateral, lumbar back pain with pain radiation to the lower extremities. According to him, the chronic pain syndrome began abruptly on 01.27.08 as a result of a fall at work....

Previous treatments for his chronic pain syndrome have included such modalities as non-steroidal anti-inflammatory COX-I inhibitor therapy (Motrin), celecoxib COX-2 inhibitor therapy (Celebrex), opioid therapy (Hydrocodone, OxyContin), benzodiazepine therapy (Klonopin), muscle relaxant therapy (Soma, Flexeril), anti-convulsant neurostabilizer therapy (Neurontin), physical therapies, and an interlaminar epidural corticosteroid injection therapy. To date, Mr. Cox has had a mixed response to non-steroidal anti-inflammatory COX-I inhibitor therapy, Mobic, in conjunction with oral anti-convulsant neurostabilizer therapy, Neurontin. To date the mixed response to therapies is due to the sustained disease state of the chronic pain syndrome. Although the musculoskeletal system of the body has healed from the causative work place injury and surgeries, the neuropathophysiology of the nervous system will require ongoing clinical treatment, and management. Within my best

clinical determination of medical certainty, it is my clinical opinion that the work place injury on 07.01.03 requiring the subsequent three therapeutic surgeries is the cause for the chronic pain syndrome, which will require future treatment as outlined:

- He will require a therapeutic maximum of six epidural corticosteroid injection procedures per year (\$900 per procedure).
- He will require approximately six-twelve clinical follow-up visits per year (\$80 per visit) for on-going medical management.
- In addition, he is to be scheduled for a percutaneous trial of lumbothoracic spinal cord stimulation therapy (\$26,000).
- In the strong likelihood that the trial of therapy proves to be successful, then he would be scheduled for the surgical implantation of the lumbothoracic spinal cord stimulation system (\$100,000).
- Also, his rechargeable, implanted power generator will require surgical replacement (\$35,000) in approximately seven years after its surgical insertion.

In addition, within my best clinical determination of medical certainty, the outlined therapeutic plan will benefit Mr. Cox greatly with regard to improving his chronic pain syndrome for a happier, functional life. With regard to the ability of Mr. Cox to return to work, this would be best determined by an objective functional capacity evaluation, which may point to the future requirement for vocational rehabilitation.

On September 17, 2008, the claimant sent an electronic mail message to the administrative law judge assigned to his case and stated, in part, "Hello my name is Ollie Cox. I was seriously injured on my job in 2003. I have been suffering psychically and financially every since, all while

fighting the insurance company and the Workers Compensation Commission seeking any kind of justice, but there is none. Now that the trucking industry has exploited me, and worked me around the clock for thirteen years, my back and my spirit are broken, and I have been discarded without adequate compensation for my injuries....You would have me die a broken, lonely, miserable death, because the status quo must be maintained at all cost. Judge Fine you sir are a piece of status quo feces, and a prevaricating unnecessary waste of the citizens tax money. The workers in Arkansas would be better off without you and your miserable ilk. Now go and screw yourself just like you're doing to the workers of this state. I hate you, and I look forward to seeing you in hell. Thank you for your attention."

The claimant sent another electronic mail on September 18, 2008 and stated in part, "I will be at a hearing in Little Rock, Arkansas before an administrative law judge of the Arkansas Workers Compensation Commission located at 324 Spring Street. I have made plans to set myself on fire at this hearing....You are all invited to the barbeque." The claimant testified on cross-examination at hearing, "I had no real intention of setting myself on fire, but yes I was - I intended to burn an effigy of an injured worker in front

of the Commission to raise awareness for the disabled and injured in Arkansas[.]”

The parties deposed Dr. Greaser on November 18, 2008. Dr. Greaser testified that the claimant had sustained a compensable injury on July 1, 2003 and that the claimant had fallen on January 27, 2008. The respondents’ attorney questioned Dr. Greaser:

Q. Part of the plan I see looks like the fourth little bullet point is consider a trial spinal cord stimulation therapy.

A. Correct.

Q. Are you simply considering this as a potential treatment, or is this a recommendation? How strong is this?

A. Simply when a patient has had an injury and it’s been addressed with neurosurgery, and in his case he’s had, I believe, three surgeries, and you then see on imaging that he has scar tissue around a nerve root, neuro-stimulation is the next step. I was one of 20 physicians in the United States to meet back in I believe 2005 to develop consensus statements for the United States on neuro-stimulation. This is the next step in the algorithm of treatment....He’s had physical therapy and he’s had interventional therapy with regard to epidural steroid injection, none of which has provided sustained pain relief. Then we throw in the mix three back surgeries with scar tissue, so the neuro-anatomy has changed. So, we’re into a chronic diseased state of pain where his nervous system is performing abnormally, and I can get into the details of that if you’d like. But suffice it to say, neuro-modulation is the next step in his therapeutic treatment plan....

Q. But why will this next step work for Mr. Cox?

A. Because no one has approached his pain from a neuro-modulatory standpoint, other than the Gabapentin which has helped....

Dr. Greaser testified, "I don't believe that we're gonna get sustained pain relief with repeated epidural steroid injections in his case, I really don't. And I - I would say now that that's gonna end up being a waste of monies." Dr. Greaser testified that he had diagnosed the claimant as having chronic pain syndrome. Dr. Greaser also opined that the claimant had not reached maximal medical improvement. The claimant's attorney questioned Dr. Greaser:

Q. And is it your opinion, Doctor, that this, his current diagnosis that you've given him, is related to the workplace injury of July 1st of 2003?

A. Yes....

Q. So, Doctor, as of February the 26th of 2008 up through today, do you have an opinion about Mr. Cox's ability to return to work?

A. Right at the present, due to ineffective treatments, I don't believe he can return to work as of today.

A hearing was held on December 4, 2008. At that time, the claimant modified his contentions and stated that he was entitled to temporary total disability benefits beginning

February 26, 2008 until a date yet to be determined. The claimant reserved the issue of wage-loss disability. The claimant contended that he was entitled to medical treatment as outlined in Dr. Greaser's August 19, 2008 letter. The respondents did not object to the claimant's modification of his contentions.

The claimant testified that, following the compensable injury, he had worked part-time as a tutor and as a pizza deliverer. The claimant testified, however, that he had not worked since seeing Dr. Greaser on February 26, 2008. The claimant testified regarding his physical condition, "My back aches, throbs. It causes - I mean, I have numbness, tingling in my - all of my extremities. It's caused me to be tense at times. It has - it causes me not to be able to sit long, stand long, walk far. Well, and then the medicines that I take affect me. The medicines that I take to try to control the pain in my back affect me....I use this cane for walking, standing, balance. Pretty much, I use this cane for everything." The claimant testified that he wanted to pursue the medical treatment proposed by Dr. Greaser, "not only to try to get me out of some of the pain that I'm in, but try to get me off of some of the drugs that I'm on, as well." The claimant testified on cross-

examination that he had undergone knee surgery since a deposition in May 2008.

An administrative law judge filed an opinion on March 4, 2009. The administrative law judge found that the claimant had "abandoned the issue concerning whether he is entitled to treatment by Dr. Kenneth Counts - the subject of the remand by the Arkansas Court of Appeals." The claimant does not appeal that finding. The administrative law judge otherwise found that the claimant did not prove he was entitled to additional treatment recommended by Dr. Greaser, and that the claimant did not prove he was entitled to additional temporary total disability benefits. The administrative law judge therefore denied and dismissed the claim. The claimant appeals to the Full Commission.

II. ADJUDICATION

A. Medical Treatment

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. 2002). The claimant must prove by a preponderance of the evidence that he is entitled to additional medical treatment. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153

(2003). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Dalton v. Allen Eng'g Co.*, 66 Ark. App. 201, 989 S.W.2d 543 (1999).

An administrative law judge found in the present matter, "6. Claimant has not proven by a preponderance of the evidence that he is entitled to additional treatment recommended by Dr. Greaser." The Full Commission affirms this finding. The parties stipulated that the claimant sustained a compensable back injury on July 1, 2003. The claimant has subsequently complained of chronic back pain and numbness radiating to his right lower extremity. Dr. Akin performed two surgeries in September 2003. Dr. Garlapati, a pain manager, saw the claimant in June 2004 and diagnosed a "history of failed back syndrome." Dr. Garlapati's treatment recommendations included steroid injections and physical therapy. Dr. Akin noted in September 2004 that the claimant was using profanity in his clinic and that the claimant did not want to continue treating with Dr. Garlapati. Following an independent medical examination by Dr. Schlesinger, Dr. Akin performed a third surgery in May 2005. Dr. Akin performed a lumbar interbody fusion and segmental stabilization. The claimant continued to complain of chronic pain.

Dr. Akin assigned an impairment rating and released the claimant in October 2005. The claimant subsequently began treating with another pain manager, Dr. Braden. Dr. Braden's treatment plan included utilization of a TENS unit and a graduated dose of Neurontin, a pain-relieving medication. Dr. Braden pronounced maximum medical improvement on November 17, 2005. Dr. Braden recommended, "He should continue with the TENS unit since it does give him some improvement." The claimant began treating with Dr. Greaser on February 26, 2008, over two years since his release by Dr. Braden, and through a referral from a Dr. Dow. There is no record before the Commission of any treatment from Dr. Dow and there is no indication as to why Dr. Dow referred the claimant to Dr. Greaser. Dr. Greaser also attributed the claimant's renewed pain complaints to "a fall at work" in January 2008. In any event, Dr. Greaser ultimately recommended "a percutaneous trial of lumbothoracic spinal cord stimulation therapy." Dr. Greaser described this proposed treatment as "neuro-modulation."

The Commission recognizes that a claimant may be entitled to ongoing medical treatment after the healing period has ended, if the medical treatment is geared toward management of the claimant's injury. *Patchell v. Wal-Mart*

Stores, Inc., 86 Ark. App. 230, 184 S.W.3d 31 (2004), citing *Hydrophonics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983). Medical treatments which are required so as to stabilize or maintain an injured worker are the responsibility of the employer. *Pippin, supra*. It is also within the Commission's province to weigh all of the medical evidence and to determine what is most credible. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). Dr. Greaser was the only physician of record to recommend use of a spinal cord stimulator. This proposed treatment was not recommended by treating physicians Dr. Akin, Dr. Lewis, Dr. Garlapati, or Dr. Braden. Nor did the independent medical examining physician, Dr. Schlesinger, recommend trial of a spinal cord stimulator. The instant claimant did not prove that a spinal cord stimulator was necessary to stabilize or maintain his condition. The record indicates that reasonably necessary treatment was available with Dr. Braden, to whom the claimant was referred by the treating surgeon, Dr. Akin. The claimant did not seek authorized follow-up treatment with Dr. Braden after November 17, 2005.

Again, the claimant was examined, evaluated, and treated by a number of well-qualified physicians. None of

these treating physicians recommending the type of invasive treatment recommended by Dr. Greaser. Further, the medical evidence reflects that the claimant's primary complaint involved chronic headaches at the time he was first seen for diagnostic/therapeutic and interventional pain management at the NEA Clinic on February 22, 2008. Because the claimant wished to be weaned off his migraine medications and find alternative treatment options, Dr. Greaser at the NEA Clinic recommended referral to the Arkansas Headache Clinic for treatment of the claimant's headaches. The claimant did not pursue this recommended treatment. Following further evaluations, Dr. Greaser recommended a spinal cord stimulator for pain. The claimant's course of conduct, including his work history and attendance at school, together with his failure to seek authorized follow-up treatment after the end of his healing period for the compensable injury, strongly suggests that the claimant was shopping for a medical provider willing to provide alternative treatment for the claimant's complaints. All of the other authorized medical providers had determined that the claimant's physical condition was stable and could be maintained with medications.

Nor does the Commission find the instant claimant to be a credible witness. Determination of the credibility and weight to be given a witness's testimony is within the sole province of the Commission. *Nucor Corp. v. Rhine*, 366 Ark. 550, 237 S.W.3d 52 (2006). In the present matter, the claimant was disruptive in Dr. Akin's office in September 2004. The claimant reported in Dr. Greaser's clinic in May 2008 that back pain was "not a problem for him at the present time." The claimant complained of knee pain and continuing problems with headaches. The claimant testified that his "whole body hurt" after a fall down a flight of stairs in October 2007. Dr. Greaser noted that the claimant had fallen in January 2008. In September 2008, the claimant began sending coarse and threatening electronic communication to the administrative law judge assigned to his case. The Full Commission is unable to determine that "neuro-modulation" proposed by Dr. Greaser beginning in 2008 would be reasonably necessary in connection with the July 1, 2003 compensable back injury. We assign minimal weight to Dr. Greaser's deposition testimony that his treatment recommendations were causally related to the July 1, 2003 compensable injury. The administrative law judge's decision is affirmed.

B. Temporary Disability

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. *Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the employee is as far restored as the permanent nature of his injury will permit, and if the underlying condition causing the disability has become more stable and if nothing in the way of treatment will improve that condition, the healing period has ended. *High Capacity Prods. v. Moore*, 61 Ark. App. 1, 962 S.W.2d 831 (1998). Persistent pain does not suffice in itself to extend the healing period. *Mad Butcher Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The determination of the end of the healing period is a question of fact for the Commission. *K II Constr. Co. v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002).

An administrative law judge found in the present matter, "7. Claimant has not proven by a preponderance of the evidence that he is entitled to additional temporary total disability benefits." The Full Commission affirms this finding. The parties stipulated that the claimant sustained a compensable back injury on July 1, 2003. The

claimant subsequently underwent three surgeries performed by Dr. Akin. The record indicates that the respondents paid a period of temporary total disability benefits. Dr. Akin assigned the claimant a permanent impairment rating on October 4, 2005. Dr. Braden assigned the claimant a 12% impairment rating on November 17, 2005. The parties stipulated that the claimant sustained a 12% whole-body impairment rating. Permanent impairment, which is usually a medical condition, is any permanent functional or anatomical loss remaining after the healing period has been reached. *Ouachita Marine v. Morrison*, 246 Ark. 882, 440 S.W.2d 216 (1969). Temporary total disability benefits cannot be awarded after a claimant's healing period has ended. *Milligan v. West Tree Serv.*, 57 Ark. App. 14, 946 S.W.2d 697 (1997), citing *Elk Roofing Co. v. Pinson*, 22 Ark. App. 191, 737 S.W.2d 661 (1987).

The record in the present matter does not demonstrate that the claimant continued within a healing period after Dr. Braden assigned a permanent anatomical impairment rating on November 17, 2005. Nor does the evidence before us demonstrate that the claimant re-entered a healing period at any time subsequent to November 17, 2005. The probative evidence before the Commission does not support Dr.

Greaser's testimony at deposition that the claimant had not reached maximum medical improvement. The administrative law judge's decision is affirmed.

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's opinion denying additional medical treatment and additional temporary total disability benefits. The Full Commission finds that the claimant did not prove he was entitled to additional treatment recommended by Dr. Greaser. The claimant did not prove that a spinal cord stimulator recommended by Dr. Greaser in 2008 was reasonably necessary in connection with the July 1, 2003 compensable injury. The Full Commission finds that the claimant reached the end of his healing period no later than November 17, 2005, the date Dr. Braden assigned a permanent anatomical impairment rating. The claimant did not continue in a healing period as of November 17, 2005 and the claimant did not re-enter a healing period at any time after November 17, 2005. The claimant thus did not prove he was entitled to any additional temporary total disability benefits after November 17, 2005. We note that the parties have reserved the claimant's entitlement to wage-loss disability. The instant claim is denied and dismissed.

IT IS SO ORDERED.

DAVID GREENBAUM, Special Commissioner

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully concur, in part, and dissent, in part, from the majority opinion. I agree that the claimant reached the end of his healing period no later than November 17, 2005 and is not entitled to any further temporary total disability benefits at this time. However, the claimant has a compensable injury, and the respondent's responsibility for pain management does not end when the healing period ends. It is undisputed that the claimant had a compensable injury. He has had a fusion surgery. It is also apparently undisputed that the claimant suffers pain from his compensable injury. Treatment for pain is reasonably necessary medical treatment. Dr. Greaser, the only doctor to have seen the claimant in the last two years, has recommended a course of pain management, including implantation of a spinal cord stimulator. Here, the majority

has discounted Dr. Greaser's opinion, the only recent medical opinion, in favor of medical reports over two years old. This simply cannot be done. The opinion of the claimant's previous treating physicians regarding his past medical condition and reasonably necessary medical treatment provided in the past is not dispositive as to the question presented in the instant hearing, i.e. what reasonably necessary medical treatment is required now? The question of what is reasonably necessary medical treatment now must be based on current medical records. If it were a question of competing current doctor's opinions regarding what is reasonably necessary medical treatment now, the majority could decide to credit one doctor's opinion over the other doctor's opinion. But the majority cannot discount the only current medical opinion and instead resort to speculation and conjecture based on what other doctors recommended over two years ago. The claimant has a compensable injury and an undisputed pain condition. The respondent has a duty to pay for pain management for the claimant's condition and the majority has a duty to make sure that the claimant is provided with reasonably necessary medical treatment. The majority has not done so here.

The claimant has requested medical treatment from Dr. Greaser for the purpose of decreasing the pain in the area where he has had three previous surgeries related to his work accident and the associated radiating symptoms. Dr. Greaser testified at length that the purpose of the spinal cord stimulator is for relieving the pain associated with the work-related back injury and that the claimant's complaint of a migraine being more severe than his back pain on the date of his second visit did not mean that his back was not still giving him problems. While the law states that it is not necessary for a claimant to support a continued need for medical treatment with objective findings, in this case, Dr. Greaser has pointed out numerous objective findings which support the proposed treatment. Chamber Door Industries, Inc. v. Graham, 59 Ark. App. 224, 956 S.W.2d 196 (1997). Specifically, he noted the implanted hardware in the back, as well as scar tissue on the right L5 nerve root.

I would note that previous precedent also supports an award of the spinal cord stimulator treatment. In the very factually similar case of Hedges v. Whirlpool, WCC Claim No. F013563 (Full Commission Opinion entered November 21, 2007), this Commission affirmed and adopted the opinion

of an Administrative Law Judge which awarded spinal cord stimulator treatment to the claimant. In Hedges, the claimant had a compensable back injury which resulted in a lumbar fusion. He was declared to be at MMI in July of 2002 and released to return to work, which he did. Although the surgery helped, he continued to have symptoms in the form of back pain and pain and numbness into his lower extremity. His pain caused him to have mental side effects of irritability and lack of sleep, which caused him emotional problems. This Commission accepted the testimony of Dr. Capocelli in that case, which is virtually identical to the testimony of Dr. Greaser that the Administrative Law Judge in this case has rejected. Dr. Capocelli stated that the claimant, Hedges, had chronic pain syndrome due, in part, to nerve root scarring. He testified that this was not amenable to surgical intervention and that it was not uncommon for individuals with chronic pain syndrome to have their symptoms wax and wane over time. He recommended the spinal cord stimulator because Hedges had already had surgery, therapy, and other pain management, and needed something to allow him to continue to work. Here, the claimant has had three back surgeries, ultimately resulting in the most aggressive form of back surgery, a fusion. Dr.

Greaser, the only expert to testify regarding Mr. Cox's need for additional treatment, opined that a spinal cord stimulator is the next logical step in treatment for a person who has exhausted all other forms of treatment and that the need for this treatment is supported by objective findings. The statements of Dr. Greaser mirror the statements of Dr. Capocelli in the factually similar Hedges case.

I also feel compelled to comment on the majority's consideration of the inappropriate e-mails the claimant sent to the Administrative Law Judge, ostensibly on the issue of the claimant's credibility. The Administrative Law Judge stated that he would give the claimant a fair hearing despite having received these e-mails. And although he did not rule in the claimant's favor, the Administrative Law Judge did give the claimant a fair hearing by not mentioning the e-mails in his adjudication and by not making a non-essential ruling on the claimant's credibility. Despite having a de novo review, the majority should have given the claimant at least as much consideration as that given by the Administrative Law Judge. It is obvious from reading the majority's opinion that the inappropriate e-mails have colored the majority's decision on what should have been

mainly a medical question, not a question of the claimant's credibility.

For the aforementioned reasons I must concur, in part, and dissent, in part, from the majority opinion.

PHILIP A. HOOD, Commissioner