BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. G807027

DAVID BURKHOLDER, Employee	CLAIMANT
ACME BRICK COMPANY, Employer	RESPONDENT NO. 1
TRAVELERS INDEMNITY CO., Carrier	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED FEBRUARY 18, 2025

Hearing before ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, Attorney at Law, Fort Smith, Arkansas.

Respondents No. 1 represented by GUY ALTON WADE, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by CHRISTY L. KING, Attorney at Law, Little Rock, Arkansas, although not appearing at hearing.

STATEMENT OF THE CASE

On November 21, 2024, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on September 23, 2024, and a Pre-hearing Order was filed on September 27, 2024. A copy of the Pre-hearing Order has been marked Commission's Exhibit No. 1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

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

2. The relationship of employee-employer-carrier existed between the parties on March 20, 2018.

3. The claimant sustained a compensable injury to his low back on or about March 20, 2018

4. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of $673.00 for temporary total disability benefits and $505.00 for permanent partial disability benefits.

5. All prior opinions are final and *res judicata*.

By agreement of the parties the issue to litigate is limited to the following:

1. Whether Claimant is entitled to medical treatment in the form of a spinal cord stimulator as recommended by his authorized treating physician.

The claimant's contentions are as follows:

> "The Claimant contends that the spinal cord stimulator recommended by his authorized treating physician is reasonably necessary and therefore the respondents should be ordered to approve and pay for said stimulator."

Respondents' No. 1's contentions are as follows:

> "Respondents contend the proposed treatment is not reasonable and necessary in relation to the compensable injury and does not meet the required pre-certification required in accordance with Commission Rule 30. As an alternative, respondents propose an IME to determine any possible future reasonable, necessary and related treatment recommendation and/or plan."

The claimant in this matter is a 60-year-old male who sustained a compensable low back injury on March 20, 2018. The claimant has a long history of treatment for his compensable low back injury, including both conservative and surgical care. The claimant's treatment is well documented in Dr. Claude L. Martimbeau's "independent medical evaluation" report dated November 14, 2024, and found at Respondents' Exhibit 2. Dr. James Blankenship began treating the claimant in January of 2019 and continues to treat the claimant at the time of the hearing in

this matter. The claimant has asked the Commission to determine if he is entitled to additional medical treatment in the form of a spinal cord stimulator trial that has been recommended by Dr. Blankenship.

The claimant's wife, Cynthia Burkholder, was called as a witness at the hearing in this matter. Ms. Burkholder was asked about falling events found in her husband's medical records on direct examination as follows:

> Q The medical records talk about him complaining about falls. Have you ever actually witnessed him fall?
>
> A Yes.
>
> Q And has the frequency of those falls changed any between when they first started and now?
>
> A Yes, sir. They are definitely more frequent.
>
> Q Give us some examples of situations where you noticed him fall.
>
> A Trying to get up out of his recliner. Trying to, you know, get up and turn and when he turns it's – you know, he will just go down. Most of the time he will catch himself before he goes all the way down, but not always.
>
> Q Now, although his primary or his initial injury was to his low back in March of 2018, the records indicate that in November of 2020, his leg gave out on him and he fell and hurt his mid back. Do you recall that?
>
> A Yes.
>
> Q So he is not always able to catch himself when he falls?
>
> A He is not always able to catch himself.

The claimant also gave direct examination testimony about his falling events as follows:

> Q So do your legs just give way out from under you or does the pain make you fall or what happens?

A I get a real sharp pain going down my butt cheek and down my leg and as soon as that pain shoots down – and it is normally my right leg – it goes completely out. (Witness snaps his finger.) It is that quick.

Q Now, you underwent surgery on your mid back because of a fall that you had in 2020; is that right?

A That's right.

Q And have the falls continued since then?

A Yes.

Q Have they gotten less frequent or about the same or more frequent?

A I think I am falling more now. I am having to catch myself more now than I did before.

Additionally, the claimant was asked about his belief as to whether his condition had improved or worsened since 2021 on direct examination:

Q Well, let me just suggest to you that there is a medical report from Dr. Heim that is dated October the 14th of 2021. So if the report says that he examined you, you don't have any reason to believe he didn't, do you?

A No. My wife puts all my appointments and everything up and takes me.

Q Okay. In his report at that point, he says he believes you had an 18 percent permanent impairment to the body as a whole. You were examined by another doctor that the insurance company sent you to fairly recently and that doctor says you have a 35 percent permanent impairment to the body as a whole. That was Dr. Martimbeau. Do you think your condition has changed between October of 2021 and today?

A It seems like I hurt more now than I did then.

Q So you think it is worse?

A I think it is definitely worse.

Q What about your falls, are you falling about the same or are you falling more?

A I am falling more.

During testimony, the claimant also described his current condition while on direct examination as follows:

Q So what is the major issue that you have got in terms of your condition right now, from your perspective? What is your main problem?

A My lower back, my center back, it is constantly in pain. I get positioned one way to try to get some relief from my lower back and then my center back starts hurting. Then I have to move a different way to try to get my center back from hurting. Then my lower back gets hurting. I just can't get comfortable. No matter what position I get into, I can't stay there that long.

Q Now, the psychology report says that you haven't been taking all of the pain medication that has been prescribed for you. Is that true?

A I was –

Q Just listen to my question. Is it true that you have not taken all of the pain medication?

A I have taken every bit of the pain medicine that they gave us.

Q Okay. Did you at some point stop taking the narcotic pain medication?

A I don't know what that is.

Q Well, did some of the medications cause you some side effects?

A They would –

> Q Okay. Listen to my question. My question is simply did some of the medications cause you some side effects?
>
> A Yes.
>
> Q Now, what were those side effects?
>
> A I would get real light-headed and it would make me fall a lot more than normal when I was taking that medicine. And it gave me – it messed with my stomach. Made me feel like I was going to get sick.
>
> Q And were those the narcotic pain medications that you were taking?
>
> A Yes.
>
> Q That were causing you to have problems?
>
> A Yes.
>
> Q And when those issues kept bothering you, did you stop taking the narcotic pain medication and continue to take the other stuff that your wife talked about?
>
> A Yes.

The claimant was seen by Dr. James Blankenship on May 25, 2023. Following is a portion of that visit note:

> HPI:
> The patient is in today for followup. He is eight months out from his surgical intervention. He does have an MRI for review today. The MRI was actually done in February. We reviewed it and got him back in. We told him to get back into some physical therapy as well as get and injection. Unfortunately he did not start his physical therapy. He has continued to do his home exercises. He saw Dr. Cannon for an LESI. This gave him very minimal relief. He is still having low back pain that radiates to the bilateral hips, bilateral buttocks, and goes down the bilateral lower extremities. The right is worse than the left. He is also having some neck pain and significant headaches. Sitting, walking, and standing all aggravate his pain. He states he has decreased strength in both

> legs, right greater than left. Extension aggravates this pain. He is still taking Celebrex, Lyrica, and Baclofen as needed for pain.
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> ***
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> Impression:
> Mr. Burkholder is in for his eight-month postop visit. His plain radiographs look good. I have reviewed his MRI in its entirety. He amazingly does not have any significant advancement of adjacent segment disease between this thoracotomy fusion and his lumbar fusion. He does have facet arthropathy but nothing of marked significance. There are no gross complications of the orthopedic implants noted and the pedicle screws appear to be in good position.
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> ***
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> Recommendations:
> We will set him up for an injection. I also recommended he get back in working with Steve with physical therapy. He declined to do that. Mr. Burkholder says that his lower back pain is the same as it has been. He also has bilateral lower extremity pain. His ESI afforded him some very minimal relief. I told him unfortunately I think we have done all we can do. He does not have any significant adjacent segment disease. His radiographs look good with no gross complications. I told him unfortunately I think he is falling into the 10% that we warn preoperatively that might not do well. This really frustrated him because the surgery that has a larger failure rate is the thoracotomy and he has done well with that.
>
> That being said, he is also having some new-onset headaches. I told him that unfortunately with all that is going on, I would recommend that we get a cervical, thoracic, and lumbar myelogram. I will review this and we will call him with a further treatment plan.

On January 25, 2024, the claimant again saw Dr. Blankenship regarding his low back condition. Following is a portion of that medical report:

> Impression:
> His chief complaint is lower back pain. The patient's right leg is giving out on him. We did an ACDF on him in May of 2022. We did a myelogram on him both on his low back and neck in September of last year. First of all I have looked at his cervical spine. His cervical spine sows the spinal cord is completely decompressed with no residual stenosis. His implant is slightly

anterior to C3-C4 with some subsidence and the plate is slightly anteriorly placed. It does appear that he has solid fusion behind the implant which would be indicative of solid arthrodesis. The most important part of this his spinal cord is well-decompressed with no residual stenosis. The implant has been like this in his cervical spine. Postoperative radiographs a year ago demonstrate that the anterior placement of his implant is unchanged over the last year. His SI joint examination is completely negative. His intraoperative radiographs do demonstrate that the plant is slightly anterior. I do not think it has really changed since then. His piriformis examination is also negative. His myelogram of his lumbar spine last year really confirms what we already knew. First of all the distal construct shows his spinal cord well-decompressed. He does not have any significant stenosis. His sagittal imaging gives the imaging of possible arachnoiditis but the axial images demonstrate well-separated nerve roots. He does not have any significant stenosis at the C1-C2 and C2-C3 levels in between. At the surgical site just as his MRI demonstrates, he has good decompression. I agree with the reviewer there is some lucency around the right cortical screw of L3 but he appears to have good bond formation in and around the ENZA implant so I do think he is solidly fused. I have had Dr. Cannon check him out today. I cannot find a neurologic etiology for his leg weakness. What I do know is Mr. Burkholder has always been real solid. We did a thoracotomy on him. He did fantastic and actually did not have any really significant post thoracotomy pain.

Recommendations:
I have had Dr. Cannon check in on him today and see if he has any thoughts about the pain he is having. It is around the L4-L5 level but it is really axially located and is point tender. Dr. Cannon and I agree that the first step on his lower back would be to do a trigger point injection in the muscle at the exact place where he is hurting. If that helps and is still helping, we are going to get him in to see Steve to do some physical therapy. If it does not help at all, we are going to do an S1 joint injection higher up in the joint. If that works but it comes back we can always talk about an arthrodesis. If that does not help at all I am going to put my thinking cap back on. I do want to get EMG’s and nerve conductions on the right lower extremity. We will get him in to see Dr. Mike Morse and get that done. I told him that unfortunately even if it shows something there is not much we can do about it but it will be good information. Lastly the area in between where I have operated, I think it is time for us to discuss fusing that but this is a secondary place although it had him down all weekend so I do not think we

> are at the point where we are going to talk bout that until we can figure out what is going on with this spot in his lower back.

On May 16, 2024, Dr. Blankenship authors a note regarding the claimant's recent EMG and nerve conduction tests. In that same note, Dr. Blankenship discusses a dorsal column stimulator for the claimant as follows:

> Mr. Burkholder did get his EMGs and nerve conductions. Unfortunately, he cannot find any neurologist that is willing to see a workers' comp patient for all the headaches that you have to go through. His EMGs did not demonstrate any evidence of neuropathy affecting his lower extremity. I have had Rhonda call and talk to David and tell him that really all I have left to offer him would be a consideration for a dorsal column stimulator trial. If he is interested, they are going to run by and get the literature on this. If he wants to proceed on with it, then we will start the ball rolling with his workers' comp carrier and getting his psychological testing.

On June 13, 2024, the claimant is again seen by Dr. Blankenship and has a discussion about having a dorsal column stimulator trial. Following is a portion of that medical record:

> HPI:
> The patient is in today for evaluation. His greatest pain complaint is his low back pain that radiates to bilateral hips, bilateral buttocks, and goes down bilateral lower extremities anterolateral and posterior. He states that his leg pain is equal. He rates it about 70% towards the worst pain imaginable. He is also still having some neck pain but states that that is very minimal, and he is pleased with his surgical outcome. He was given a dorsal column stimulator video to watch, and he states that he is interested in having a dorsal column stimulator trial.
>
> ***
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> Impression:
> We discussed in detail with Mr. Burkholder about a possible dorsal column stimulator trial. He did want to proceed on with this, but unfortunately his workers' comp carrier made him come back in to talk with me. We have already talked about this in detail. He has watched the video. He wants to proceed on.
>
> Recommendations:

> We need to start the ball rolling as far as getting his neuropsychological evaluation and then get him set up for a trial date with possible permanent placement. I have told him that I may be wrong and we possibly should be doing the 2 levels that are in between his thoracotomy and arthrodesis in his lumbosacral arthrodesis, but he just does not have a lot of disc space pathology at this level. In summary, the patient has postlaminectomy syndrome with bilateral lower extremity pain and lower back pain. I think he is an excellent candidate for a trial and possible permanent placement of a dorsal column paddle lead. He wants to proceed on with the workup.

The respondent admitted a "physician advisor report" dated July 26, 2024, produced by Genex physician Dr. Luc Jasmin. That report considers the recommendation of Dr. Blankenship to place the claimant in a dorsal column stimulator trial. The report has an "adverse determination" to Dr. Blankenship's recommendation, based on the lack of a psychological evaluation. This report has little value as a psychological evaluation of the claimant was performed by Dr. Richard Back on September 16, 2024. Following is a portion of the evaluation report:

> Mr. Burkholder's Paindex score, calculated from his MMPI-2 profile, is 15. This exceeds the cut-off score of 13, which indicates he is a poor candidate for further conventional medical interventions. There is only a 13 percent chance of his improving from such an intervention. This does not mean that Mr. Burkholder's symptoms are imagined, it means that overfocus on symptoms and perhaps intragenic factors have made him a poor candidate.
>
> DIAGNOSTIC IMPRESSION:
> Somatic Symptom Disorder with predominant pain
>
> RECOMMENDATIONS:
> 1. Consecutive intervention is recommended.
> 2. Mr. Burkholder has been wary of pain medication, taking it only as needed. If such intervention is tried again, he needs to take his medication on a fixed schedule, taking it (medicine) even when he is feeling "okay", and waiting to the scheduled time even if his pain is severe. No increase in dosage should be entertained after

> awhile, as this will likely lead to habituation, which is what he, apparently, fears.

The claimant was again seen by Dr. Blankenship on October 24, 2024, after his psychological evaluation. Dr. Blankenship discusses that evaluation and his continued belief that the claimant should "proceed on with dorsal column stimulation" as follows:

> HPI:
> The patient is in today for followup. We had offered the patient a dorsal column stimulator. We sent him for a psych eval to see Dr. Back, and Dr. Back did not recommend he proceed with the dorsal column. His notes re on the chart. The patient still wants to proceed on with the dorsal column stimulator. Conservative treatment has not helped any, and he has chronic pain syndrome, low back pain that radiates to bilateral hips, bilateral buttocks, and goes down the posterior aspect of the right lower extremity. He rates his low back pain anywhere from 60% to 70% towards the worst pain imaginable.
>
> ***
>
> Impression:
> David Burkholder returns to the office today. The reason for this visit is both requested by his workers' comp carrier and his attorney, Dr. Eddie Walker. I have reviewed Dr. Back's neuropsychological evaluation. It was Dr. Back's opinion that he had only a 13% chance of improving with the dorsal column stimulator. I have a great deal of respect for Dr. Back as a neuropsychologist. I do also appreciate Dr. Back's assessment that this in now way means that Mr. Burkholder is not hurting. I agree with Dr. Back Mr. Burkholder has been through quite a bit and has been hurting for quite some time. I have the advantage of seeing this patient frequently, as does Steve Flory, my physical therapist. The gentleman has done absolutely wonderfully with every surgery we have done until most recently.
>
> Recommendations:
> With all due respect to Dr. Back, knowing Mr. Burkholder as well as I do, my offering of spinal cord stimulation to him still stands. The purpose of the trial is to see if he gets any benefit. I do feel completely comfortable that Mr. Burkholder will give us an honest and up front assessment of how he does during that week period of time, which will give us an indication of how he is going to do for a while. He still wants to proceed on with dorsal column

> stimulation, and my opinion about this being potential benefit to him is unchanged. He understands, and it is my understanding that he has a court date to go over all of this. We will await their findings and proceed forward.

The respondent sent the claimant to see Dr. Claude L. Martimbeau for what Dr. Martimbeau termed as an independent medical evaluation on November 14, 2024. As previously stated, Dr. Martimbeau includes an extensive listing of medical providers and medical procedures that the claimant has seen or undergone for his compensable low back injury. Dr. Martimbeau also summarizes that treatment inside his 28-page report. Dr. Martimbeau also gives the following diagnosis in his report:

> DIAGNOSES: Status post back injury, and back pain; status post C3 through C6 anterior cervical fusion; status post T12 corpectomy and arthrodesis T11 to L1; status post L3 to S1 arthrodesis, status post residual upper; and lower back pain, with referred pain to the upper, and lower extremities.

Dr. Martimbeau also addresses a number of questions posed to him by the respondent. Following is a portion of those questions and responses:

> 1. Please address the diagnosis, history of injury and pre-existing conditions.
>
> The diagnoses are:
> * status post back injury, and back pain
> * status post C3 to C6 anterior cervical fusion
> * status post T12 corpectomy/arthrodesis T11 to L1
> * Status post residual upper and lower back pain, with referred pain to the upper and lower extremities
>
> The history of the injury is that on 03/20/2018, Mr. Burkholder was on a catwalk while stabilizing a 350 lb. burner block that was hanging from a chain. As he was lining it up, he twisted, felt a pop and sharp pain in his lower back, and immediately fell to the ground due to the pain, possibly hitting the handrail. There is no pre-existing condition.

> 2. Does medical documentation support a causal relationship between the accident or injury?
>
> Yes, the medical documentation supports a causal relationship between the accident or injury.
>
> 3. Is ongoing treatment (Orthopedic) reasonable and medically necessary for the accident or injury of record?
>
> Yes, the ongoing Orthopaedic treatment is reasonable and medically necessary for the accident or injury of record.
>
> 4. If ongoing treatment is reasonable and medically necessary, please five [sic] the type, frequency, and duration for continued current treatment in your discipline.
>
> Mr. Burkholder will require follow-up treatment for his chronic upper, mid, and lower back pain with his physician(s). He may require medications, antalgic modalities, LEISs, and possibly a neuro-stimulator. Frequency is anticipated every 3 months, or more frequently if Mr. Burkholder develops an acute, or sub-acute condition regarding his upper, mid, and/or lower back. Duration of treatment is indefinitely.

Employers must promptly provide medical services which are reasonably necessary in connection with the compensable injuries, Ark. Code Ann. §11-9-508(a). However, injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary. *Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, 184 S.W.3d 31 (2004). What constitutes reasonable and necessary medical treatment is a fact question for the Commission, and the resolution of this issue depends upon the sufficiency of the evidence. *Gansky v. Hi-Tech Engineering*, 325 Ark. 163, 924 S.W.2d 790 (1996).

Dr. Back's psychological evaluation of the claimant included a Paindex score of 15. That was calculated from the claimant's Minnesota Multiphasic Personality Inventory-2 (MMPI-2). This is a low score; however, I do recognize it is a score that is higher than the cutoff score of 13 as noted by Dr. Back in his report. Dr. Blankenship addresses Dr. Back's report directly in his

October 24, 2024, visit note, stating, "I have a great deal of respect for Dr. Back as a neuropsychologist. I also appreciate Dr. Back's assessment that this in no way means that Mr. Burkholder is not hurting. I agree with Dr. Back Mr. Burkholder has been through quite a bit and has been hurting for quite some time. I have the advantage of seeing this patient frequently, as does Steve Flory, my physical therapist. The gentleman has done absolutely wonderfully with every surgery we have done until most recently." … "With all due respect to Dr. Back, knowing Mr. Burkholder as well as I do, my offering of spinal cord stimulation to him still stands."

Dr. Martimbeau, to whom the respondent sent the claimant for an "independent medical evaluation" also recognized a neuro-stimulator and other treatments, including LESI and medications, as reasonable and medically necessary treatment for the claimant's compensable low back injury. Dr. Martimbeau does not specifically address Dr. Back's psychological evaluation when discussing the possibility of a neuro-stimulator for the claimant, but he does include Dr. Back's September 16, 2024, psychological evaluation as a document he reviewed for his "independent medical evaluation" of the claimant.

Given that the claimant's psychological evaluation was above the cutoff level according to Dr. Back's report and that both Dr. Blankenship and Dr. Martimbeau still recommend a trial spinal cord stimulator after having considered Dr. Back's report, I find that the trial spinal cord stimulator is reasonable and necessary medical treatment for the claimant's compensable low back injury.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on September 23, 2024, and contained in a Pre-hearing Order filed September 27, 2024, are hereby accepted as fact.

2. The claimant has proven by a preponderance of the evidence that he is entitled to medical treatment in the form of a spinal cord stimulator trial as recommended by Dr. Blankenship.

ORDER

The respondents shall pay the costs associated with the spinal cord stimulator trial recommended by Dr. Blankenship.

Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded "only on the amount of compensation for indemnity benefits controverted and awarded." Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant's attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

If they have not already done so, the respondents are directed to pay the court reporter, Veronica Lane, fees and expenses within thirty (30) days of receipt of the invoice.

IT IS SO ORDERED.

HONORABLE ERIC PAUL WELLS
ADMINISTRATIVE LAW JUDGE