The social security number and dates of birth have been redacted from this opinion.

STATE OF MICHIGAN
DEPARTMENT OF LABOR AND ECONOMIC OPPORTUNITY
WORKERS' COMPENSATION BOARD OF MAGISTRATES

Donald Walton
SS# XXX-XX-XXXX

Plaintiff,

v

Nexteer Automotive Corporation,
Hartford Insurance Company of the Midwest

Defendant.
_____/

APPEARANCES:

Michael P. Doud (P55491), attorney for the Plaintiff
Denice LeVasseur (P32137), attorney for the Defendant

TRIAL DATE:

April 26, 2022; May 10, 2022

OPINION

STATEMENT OF CLAIM:

The Plaintiff by way of Application for Mediation or Hearing, signed by the claimant on March 13, 2020, received by the Agency on March 16, 2020, alleged the following dates of injury: June 30, 2014 and August 28, 2015, claiming the following:

> "Mr. Walton took his case to trial and obtained an open award. Nexteer has continued to refuse to pay for appropriate medical care and treatment despite numerous submissions. This is a clear violation of the order. A $1,500 penalty is requested for each denial."

WITNESSES TESTIFYING PERSONALLY:

Plaintiff:

Donald Walton, Plaintiff

Defendant:

None

WITNESSES TESTIFYING BY DEPOSITION:

Plaintiff:

Marvin Bleiberg, MD

Defendant:

Phillip J. Mayer, MD

EXHIBITS:

Plaintiff:

1. Deposition transcript – Dr. Bleiberg taken July 22, 2020
2. Deposition transcript – Dr. Bleiberg taken February 2, 2022
3. Medical records – Matrix Pain Management

Defendant:

A. Deposition transcript – Dr. Mayer
B. Pharmacy Printouts
C. Records – Schafer, Inc.
D. Surveillance on a flash drive

INTRODUCTION

There were no trial stipulations in the present matter. The case in chief was tried before the undersigned on June 25, 2019 and July 8, 2019. An Opinion and Order was issued on August 8, 2019. The only issue in the present matter is whether a cervical spinal cord stimulator is reasonable and necessary medical treatment for Plaintiff.

DISCUSSION

DONALD WALTON, PLAINTIFF

Mr. Walton testified that he has received treatment at Matrix Pain Management. Treatment has been in the form of a nerve ablation. He also is taking the following medication: Oxycontin which he takes 2 times a day; Oxycodone which he takes 4 times a day; and Lyrica which he takes 3 times a day or as needed.

He describes his symptoms as extreme neck and shoulder pain on the left side. He has no grip in the left hand and also experiences tingling and numbness. He testified further that he “drops a lot of stuff.” On a good day, the pain level is

between 4 and 5 on a scale of 1 to 10. On bad days the pain level could be 8 to 9. Activity worsens his pain.

He does have a hobby in the form of restoring motorcycles. He indicated that he works approximately 2 hours at a time.

If he fails to take his medication his pain increases; when he does take the medication his pain is alleviated. He described his pain level without medication as 9 to 10 on a scale of 0 to 10; with medication his pain level is 4 to 5. He does experience some side effects such as drowsiness which requires him to take a nap once or twice a day for approximately 1 to 2 hours. He was still treating with Matrix Pain Management as of April 25, 2022. There was some discussion with the treaters at Matrix regarding a spinal cord stimulator but apparently there was some concern that the stimulator might not be appropriate considering Plaintiff's diabetic condition.

Plaintiff has also been treated by Dr. Marvin Bleiberg. The first discussion with Dr. Bleiberg regarding the spinal cord stimulator was on January 28, 2020. It was also at that time that Plaintiff met with Dr. Bleiberg and a representative of Abbot Labs at which time Plaintiff was given an explanation as to the procedure and benefits of the spinal cord stimulator. Plaintiff also had a mental examination in connection with the spinal cord stimulator. He received this treatment from Ronan Psychological. He has continued to receive billings from Ronan which have not been paid.

On May 7, 2020 a spinal cord stimulator was implanted on a trial basis. The procedure involved the insertion of the lead up through the spine which took about an hour. After one hour, his pain gradually subsided and he felt 50% or more better. The spinal cord stimulator was implanted for approximately one week. He describes his improvement as 60-70%. When the stimulator was removed, his pain level went up and he had to return to usage of his full medications. He further testified that while the stimulator was implanted, he did not need all of his medications.

Plaintiff testified that Dr. Mayer never conducted an examination upon him. He still wants the spinal cord stimulator to ease his pain and improve his mobility. He still takes medication.

On cross-examination, Plaintiff confirmed that he had used narcotics prior to his injury. Defendant offered a pharmacy printout list which was received as Defendant's Exhibit B. He also confirmed that pain does limit his mobility.

Plaintiff was then questioned by defense counsel regarding treatment records at Matrix Pain Management beginning with June 16, 2020. A history recorded at that time indicated Plaintiff was working in his garage 10 hours a day. Plaintiff testified that the information contained in the entry was incorrect. He indicated he worked perhaps 10 hours per week. Plaintiff acknowledged that during this time he was still working as a bus driver for the school district. There

was a further entry on September 15, 2020 also referencing a work day of 10 hours in his garage. Again, Plaintiff indicated he had no recollection of indicating that he worked 10 hours per day. Plaintiff had a vague recollection of an entry dated December 14, 2020 indicating that his medications were adjusted. An entry of March 8, 2021 referenced pain medication not helping his hands which Plaintiff does recall. A further reference in the note of that date indicated Plaintiff's pain was worse when he is working and making tables. Plaintiff testified that he has only built 2 tables in 2 years. The entry of May 18, 2021 indicated a complaint of chronic low back pain and that Plaintiff was much busier making tables. Plaintiff indicated that he recalled working a little more in the spring time. On August 10, 2021 Plaintiff continued to complain of chronic low back pain and further indicated he was doing well on pain medication. This entry also involved information regarding a drug test for THC. Plaintiff acknowledged that he took his wife's "gummies" while out of state. The entry of November 1, 2021 indicates Plaintiff doing a job for a pot company which involved cleaning filters. The filters were of different sizes. Plaintiff indicated that he did this job perhaps 2 or 3 times and was paid $100. The entry further indicated that Plaintiff's pain was "tolerable" and that Plaintiff wanted no changes in his medication.

Plaintiff saw Dr. Bleiberg on July 22, 2020 and confirmed the history provided to Dr. Bleiberg at that time. He was working as a bus driver.

Plaintiff further testified that he just got a new boat which is 23 feet. He has a trailer attached to the boat which is in his driveway. He still has a motorcycle but does not drive very much. Defendant offered records from Schafer Inc. regarding Plaintiff's employment which occurred between December 27, 2020 through June 27, 2021. Plaintiff described his work as driving auction cars. These records were offered as Defendant's Exhibit C which was conditionally received. Plaintiff indicated that he has had no employment other than with Schafer and as a school bus driver.

Plaintiff testified that he has two trucks. As to his motorcycle, he reiterated he does not use the motorcycle very often, perhaps only 2,000 miles.

The trial resumed in this matter on May 10, 2022. At that time, defense counsel offered and presented video surveillance of the Plaintiff marked as Defendant's Exhibit D and admitted without objection. Surveillance took place on three separate days, July 7, 2020, September 16, 2020, and June 30, 2020. The video was a little less than 10 minutes.

The surveillance on July 7, 2020 was taken at 9:38 a.m. The video depicts Plaintiff exiting and entering his pickup truck on several occasions. It appears that Plaintiff is attempting to adjust the trailer on his truck which is hauling a boat. Plaintiff eventually enters the cab of the truck and drives off with both the boat and the trailer. Plaintiff was depicted using both arms and cranking what appears to be a lever or a hoist.

The video taken on September 16, 2020 was at 1:31 p.m. The video depicts Plaintiff at a car wash washing his pickup truck. He is shown wiping the vehicle using both arms with no apparent restrictions. He eventually enters the vehicle and leaves.

The final video was taken on June 30, 2020 at 9:51 a.m. The video depicts Plaintiff riding his motorcycle. The Plaintiff is not seen for a few seconds but is eventually picked up again riding the motorcycle.

MARVIN BLEIBERG, MD

July 20, 2020

Plaintiff offered the deposition testimony of Dr. Marvin Bleiberg first taken on July 22, 2020. Dr. Bleiberg is board certified in physical medicine and rehabilitation and also board certified in the field of pain medicine. His curriculum vitae was marked as Plaintiff's exhibit 1 without objection from defense counsel.

It appears that Dr. Bleiberg has treated the Plaintiff prior to July 25, 2018 when his deposition was taken at that time. Dr. Bleiberg treated the Plaintiff between October 9, 2018 and May 7, 2020. Dr. Bleiberg's reports beginning on October 9, 2018 through May 7, 2019 were typed into the record of the transcript of his deposition with counsel for Defendant objecting to any hearsay contained in the reports.

The visit of October 9, 2018 is labelled as a "progress note" and further appears to show treatment by Cheri M. Wohlscheid, a physician's assistant. The report sets forth all of the medication that Plaintiff was taking at that time. The recorded reason for the appointment is listed as neck pain, left shoulder pain, left arm pain, and mid back pain. A general examination was performed at that time. It was noted that Plaintiff demonstrated no acute distress. The neurological examination was reported as normal. The assessment made at that time by the physician's assistant was radiculopathy in the cervical region, sprain of the left rotator cuff capsule, impingement syndrome of the left shoulder, cervicalgia, and pain in the left arm. Under the heading of treatment, it was noted that Plaintiff had failed at conservative treatment including recent injections in the cervical area. As to the left shoulder, it was reported that Plaintiff had an incomplete RCT tear and fraying of the labrum without tear. It was further noted that symptoms were likely resulting from neck pathology. As to cervicalgia, it was recommended that Plaintiff continue with the pain clinic for management of opiates.

The progress note of January 24, 2019, also prepared by Cheri M. Wohlscheid, reported substantially the same medications as previously noted. Historical information taken at that time regarding Plaintiff's past medical history and family history and social history were substantially the same as previously noted. The reasons for the appointment were listed the same as the previous visit. The general examination which occurred at that time did not reveal any substantial differences with previous examination. The assessments and treatment notes

were also substantially the same. It was also noted that Plaintiff was going to be referred to Dr. Adams.

It appears that Plaintiff was seen by Dr. Bleiberg on November 26, 2019. It was noted that Plaintiff was seen at that time for his "work related neck injury only." Plaintiff reported that his neck problem is getting worse and had no other questions or concerns at that time. He complained of neck pain going into the arms with numbness and tingling. He also reported bilateral shoulder pain as well. The list of Plaintiff's current medications was set forth and appeared to be substantially the same as previously reported. Past medical history, surgical history, family history, and social history were as previously reported. Plaintiff reported no recreational drug use. This is the same history given in the previous 2 progress notes. The general examination indicated no acute distress with an appearance of his stated age. The assessments set forth in this progress note are the same as previously reported in the prior progress notes. It was recommended that Plaintiff undergo cervical and upper extremity EMG. It was also recommended that Plaintiff undergo epidural injection.

Plaintiff was next seen on January 6, 2020 by Dr. Michael Barrett, a chiropractor. Primary complaints at that time were in the neck and upper mid back area with shoulder pain and headaches. Once again Plaintiff's current medications was reported. The past medical history was also reported. This note refers to a "DMX report." Plaintiff was seen again on January 28, 2020 by Dr. Bleiberg. The primary reason for the visit was for Plaintiff's neck pain. He reports the quality of pain as sharp and shooting. It is also reported that Plaintiff was working without restrictions. The list of medications Plaintiff was taking was reported. Past medical history, surgical history, family history, and social history were reported without any changes. The general examination does not disclose any significant changes from previous examinations. The assessments set forth at the time of this progress note were the same as the initial progress note in October, 2018. The treatment of Plaintiff's cervical area noted that consideration would be given to a spinal cord stimulator trial with Abbott Burst for the neck pain and radicular pain due to the work injury. Dr. Bleiberg noted that he will have the Abbott rep present at the next visit. Plaintiff was still working as a school bus driver 4 hours per day.

Plaintiff was next seen on February 5, 2020, again with Dr. Bleiberg. The progress note contains no significant differences regarding the reason for the appointment, current medications, past medical history, surgical history, and social history as previously reported. There appeared to be no significant changes with regard to the general examination performed by Dr. Bleiberg. It also appears that a representative of Abbot Burst was present at that time discussing the spinal cord stimulator. There was also a referral to George Ronan Psychiatry for psych clearance in connection with the SCS trial for Plaintiff's neck pain. Dr. Bleiberg reported that his review of the cervical MRI was abnormal as well as the "DMX" of the cervical spine.

Plaintiff's final visit before Dr. Bleiberg's deposition was on May 7, 2020 when he was seen by Dr. Herman Ruiz, MD. It was reported that Plaintiff was

seen at that time for his “SCS trial” for his neck pain. At that time the SCS was inserted at the cervical level.

The previously discussed progress notes were attached to the deposition as Plaintiff’s Exhibit 2.

Upon further direct examination, Dr. Bleiberg testified that throughout the times he saw Plaintiff, his complaints were ongoing neck pain, left shoulder pain, left arm pain and mid back pain. Dr. Bleiberg’s working diagnosis remained the same. Injections gave Plaintiff temporary relief in the cervical spine. Plaintiff was also maintained on medication including an opiate known as Percocet which was helping him but not resolving all of his pain.

Dr. Bleiberg did order diagnostic studies which included EMGs, an MRI as well as a digital motion x-ray. These studies did reveal pathology in the cervical spine including carpal tunnel syndrome.

Dr. Bleiberg’s treatment has essentially been medication management. The Plaintiff did not get long lasting relief with the injections and Dr. Bleiberg was trying to get Plaintiff off the medication if possible to improve his quality of life and get his pain under control. Eventually, Dr. Bleiberg moved on to a spinal cord stimulator trial. A trial for the spinal cord stimulator was done on May 7, 2020 through May 14, 2020. Plaintiff indicated that he noted an 80% improvement in his pain with the spinal cord stimulator. Dr. Bleiberg testified that 80% improvement is a successful trial. With that percentage of relief, Dr. Bleiberg could slowly decrease Plaintiff’s medication and hopefully get him off the medication. Dr. Bleiberg further testified that he has been very successful in getting patients to reduce their opiates and typically get off opiates with use of the spinal cord stimulator. With the new current modern technology, there are very few adverse effects.

Dr. Bleiberg did not continue with the stimulator after the trial period essentially because the trial period was never paid for and he was told that there would be no funding for a permanent implantation. Dr. Bleiberg reiterated that he believed that the stimulator was absolutely clinically indicated in Plaintiff’s case and if it was not done, Plaintiff would be “stuck on opiates.” He testified that this treatment would be absolutely reasonable and medically necessary and related to the work injury for the cervical spine.

Dr. Bleiberg was presented with the report of Dr. Philip Mayer dated May 11, 2020 wherein Dr. Mayer expressed an opinion that the spinal cord stimulator for Plaintiff was not reasonable and necessary for the treatment of the cervical spine condition in Plaintiff’s situation. Dr. Bleiberg disagreed with Dr. Mayer’s opinion. He questioned whether Dr. Mayer, as an orthopedic surgeon, was in the type of specialty to be qualified to review the question of a spinal cord stimulator. He also questioned Dr. Mayer’s failure to examine Plaintiff. Dr. Bleiberg indicated that Plaintiff had “sensory radiculopathy” which is where you have a negative EMG but the symptoms are sensory in nature. He questioned how Dr. Mayer could

determine whether Plaintiff had a sensory radiculopathy without an examination. He also believed that the MRI showed a disc displacement at C6-C7 which is objective evidence. There were abnormalities on the digital motion x-ray. He further opined that there is no need to have cervical radiculopathy as an indication for a spinal cord stimulator. Dr. Bleiberg emphasized that he has practiced pain management and physical medicine and rehabilitation for over 25 years. He also has practiced "neuromodulation" which is the science of spinal cord stimulation. He further stated that "neuromodulation…has come a long way; and this is what I practice."

Dr. Bleiberg testified that he has a total outstanding bill of $21,174 which is solely for treatment of Plaintiff's cervical spine.

The MRI which Dr. Bleiberg referred to in his testimony was performed on January 15, 2020 in Mt. Pleasant. The digital motion x-ray was performed on January 6, 2020. Those studies were marked as Plaintiff's Exhibit 3 and 4 with no objection.

On final direct examination, Dr. Bleiberg reiterated that with an 80% relief factor, if Plaintiff is not allowed to get the spinal cord stimulator, he would be "stuck" on narcotics to try and control his pain which does not give him the same amount of relief as the spinal cord stimulator.

On cross-examination, Dr. Bleiberg admitted that the determination of an 80% relief factor was subjective based upon what Plaintiff told him and there would be no objective way to measure that. Plaintiff did not decrease the opiates that he was using during the one week trial period with the stimulator. At this point, Defendant proposed Exhibit 1 which is an MRI dated August 8, 2018 and Exhibit 2 which is an MRI dated June 19, 2018. Both were admitted without objection.

Dr. Bleiberg testified that he personally performed an EMG upon Plaintiff on November 26, 2019 with regard to the neck and upper extremities. This report was marked as Defendant's Exhibit 2 and admitted without objection. Dr. Bleiberg confirmed that his summary/interpretation of that EMG indicated "no electrodiagnostic evidence for a cervical radiculopathy based upon this study." Dr. Bleiberg confirmed that he also reported the study to show carpal tunnel syndrome, bilaterally. He also reported the studies revealed bilateral upper limb peripheral sensory polyneuropathy. He agreed that diabetes can cause the upper limb peripheral sensory polyneuropathy and can predispose someone to have carpal tunnel syndrome. He went on to testify that neither carpal tunnel syndrome nor upper limb peripheral sensory polyneuropathy can cause neck pain radiating down the arms with numbness and tingling. Plaintiff has a cervical radiculopathy superimposed upon those other issues. Dr. Bleiberg explained that someone can have a cervical radiculopathy and have a negative EMG describing the radiculopathy as a "sensory radiculopathy" which an EMG cannot look for. He went on to say there were two separate pathologies. Dr. Bleiberg was treating Plaintiff for the cervical radiculopathy which was the major part of the reason he elected to move on to the spinal cord stimulator.

As to any shoulder pathology, abnormal findings in that area have nothing to do with the cervical pathology. Dr. Bleiberg reiterated there were objective findings of cervical pathology which included a positive digital motion x-ray and an abnormal MRI.

With regard to the physical digital motion x-ray performed on Plaintiff, a chiropractor in Dr. Bleiberg's office actually administered the x-rays. Dr. Bleiberg did not perform a physical neurological examination on November 26, 2019. He performed what he described as a "inspection examination" which was an electrodiagnostic examination. When asked whether any of his reports use the phrase "preganglionic sensory radiculopathy," Dr. Bleiberg responded that the term is one which falls under his first diagnosis of "radiculopathy, cervical region."

Dr. Bleiberg was questioned with reference to the performance of a neurological examination and his failure to do so. Dr. Bleiberg disagreed with regard to same with the following exchange between Dr. Bleiberg and defense counsel:

> Q. You wouldn't bother not once to perform a neurological examination, so that you would never know whether or not there was evidence of a positive Spurling's test, so you would never know that there was evidence or not of reflex asymmetry or absence, or that you would never know whether or not there was evidence of long-tract signs suggestive of cervical myelopathy; am I correct? You never did any of that testing?
>
> A. That's absolutely incorrect. In fact, this gentleman was initially seen, to remind you, on January 30th of 2018; and at that time, I actually did quite an extensive physical examination; and I had some findings that were present; and all the positives and negatives were documented. The gentleman did not have any changes in his symptomatology of any substance, any new complaints of any substance that would warrant a thought that there would be any of what you said being present. So understanding what the physical exam was and understanding that an additional physical examination would not give me any important data that would change my treatment plan, that was not done.
>
> Instead I performed what was clinically and medically indicated which was performing the EMG, obtaining the digital motion x-ray, reviewing the MRI, focusing on the testing that gave me objective information about the pathology. Why go ahead and do a test that's not going to help me in the treatment and care of this patient? Why do an additional examination on this patient when it simply is not going to make a difference, understanding that I already know what the pathology is.
>
> (Bleiberg dep., pg. 81-82)

At this point, Dr. Bleiberg's report of January 30, 2018 was marked as Defendant's Exhibit 3 and admitted without objection.

Defense counsel also raised the "information" contained in Dr. Bleiberg's various reports identifying the information as "preload information." Dr. Bleiberg explained that his medical assistant gets information with regard to the history of present illness, current medication, past medical history, surgical history, family history, social history, allergies, hospitalizations and review of symptoms. The information does come from the patient and if the information does not change with subsequent visits, the information is simply carried over for the visit at hand. Dr. Bleiberg confirmed that on February 5, 2020, Plaintiff told Dr. Bleiberg's assistant that he was working without restrictions. He confirmed that on that same occasion Plaintiff wrote that he experienced joint cracking, crunching (crepitus), and also indicated that he had muscle aches in the shoulders, hands and joint pain. At this point Dr. Bleiberg's report of March 20, 2020 was marked as Defendant's Exhibit 4 and admitted without objection. On that occasion, Dr. Bleiberg ordered a psychological examination for preclearance for the spinal cord stimulator trial procedure. Dr. Bleiberg did have the report of the assessment made by Dr. George Ronan and confirmed what Plaintiff was seeking, i.e., to manage pain, reduce need of medication and improve physical function.

With regard to Dr. Ronan's report, defense counsel referred to that portion in which Plaintiff indicated that he woke up at 3:30 a.m., went to work at 6, got home at 8, and then worked in his garage. The history provided to Dr. Ronan by Plaintiff also referred to Plaintiff going to several volleyball games per week. Defense counsel also asked Dr. Bleiberg to assume that in addition to that history there was evidence of Plaintiff working on motorcycles, riding his motorcycle every day and repairs and refurbishes motorcycles. When asked whether Dr. Bleiberg would agree that Plaintiff was "pretty functional as is," Dr. Bleiberg responded as follows:

> THE WITNESS: Well, you know, how functional he is, is more a function of what he wants to do and what he can do; and if you look at the section you looked at called current daily functioning, he actually goes on to say he describes his sleep as spotty. He explained that his pain disturbs his sleep every night. He reported that he is usually awake after four hours. He reported that he will try and sleep in a chair. He reported that he attempts to compensate for his sleep disturbance by taking daytime naps.
>
> So I don't think that that is a perfect function. Someone that has to take naps during the day, can only sleep four hours before he has to wake up, has to sleep in a chair, those are significant functional deficits and quality-of-life deficits that need to be addressed. So we can't take things out of context. For this gentleman, this is not a normal life; and if I asked you if you would want to live like that, if this was you, I'm expecting that you would tell me, no, Doctor, I would never was not to have this type of life; and, yes, Doctor, I'd like to improve my function above and beyond that.
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> (Bleiberg dep., pg. 92-93)

Defense counsel also made reference to the "PAI" clinical profile in Dr. Ronan's report indicating that Plaintiff may become preoccupied with his physical complaints and those complaints may be the focus of his interaction with others. When asked whether the statement in Dr. Ronan's report was a classic type of chronic pain person that a spinal cord stimulator is not likely to help, Dr. Bleiberg responded as follows:

> A. No, absolutely that's not true, because if he's preoccupied with his physical complaints, and I can minimize his physical complaints, I change this man's life; and, again, if you go back to page one of this letter you have, it says we feel confident in stating that he's competent to make this medical decision and is an appropriate candidate for a trial using neurostimulator. So even the doctor that actually performed the test, did the study, he wrote in his opinion the gentleman is an appropriate candidate; and I agree with him. Somebody who is preoccupied with his physical complaints, if we could eliminate or reduce that, we change the man's life.
>
> (Bleiberg dep., pg. 94)

Dr. Bleiberg agreed that a spinal cord stimulator is not going to eliminate the addiction of a drug addict. He further stated that he was not treating Plaintiff as a drug addict but was actually trying to work as much as possible to get him off medications. He did acknowledge that Plaintiff had been on Percocet for many years. He further agreed that Plaintiff had a dependency on the drug to control his pain which was no different than a diabetic having a dependency on insulin. He further agreed that taking Plaintiff off the drug "cold turkey" would result in Plaintiff having to go through withdrawal. Dr. Bleiberg further responded that getting the stimulator placed, if Plaintiff were doing well, he would slowly drop the dose until it's low or off in an ideal world.

Dr. Bleiberg was also questioned on whether he had performed or read any study that quantifies the number of patients who decrease significantly their opiate use following spinal cord stimulation. Dr. Bleiberg responded that he had not performed any studies although he has read numerous studies none of which he had brought to the deposition which deal with neuromodulation and spinal cord stimulators. When asked whether he was familiar with a study cited in Dr. Mayer's report entitled Work Loss Data Institute, Dr. Bleiberg responded that he was not familiar with the study and did not recognize it as being authoritative when it comes to spinal cord stimulation.

Dr. Bleiberg acknowledged that there are possible adverse outcomes because of the insertion of a spinal cord stimulator one of which was possible paraplegia which Dr. Bleiberg indicated was "extremely rare."

On re-direct examination, Dr. Bleiberg indicated that it was extremely unlikely that in Plaintiff's case, there would be a possible bad outcome. He further testified that during the course of his practice, he has never had a patient with a bad outcome using a cervical cord spine stimulator.

Dr. Bleiberg further testified that there was absolutely no evidence of substance abuse, diversion, or misuse with regard to Plaintiff. He further indicated that his note of January 28, 2020 indicated that Plaintiff wanted to try and get off of Percocet.

As to the psychological assessment made by Dr. Ronan, Dr. Bleiberg indicated that the recommendation by Dr. Ronan was that Plaintiff was an appropriate candidate to undergo the trial stimulator.

Finally, Dr. Bleiberg reiterated that Plaintiff's other conditions such as upper limb peripheral sensory polyneuropathy are completely unrelated to what he was treating Plaintiff for.

February 2, 2022

Dr. Bleiberg was once again deposed by Plaintiff on February 2, 2022. An objection to Dr. Bleiberg's deposition was also placed at the time of the deposition by defense counsel on the basis that no new issues were presented with regard to the need for a spinal cord stimulator which was the subject of Dr. Bleiberg's testimony on July 22, 2020. Plaintiff's counsel correctly pointed out that defense counsel had presented records at the time of the deposition of Dr. Bleiberg to Dr. Mayer for review after Dr. Bleiberg's deposition on July 22, 2020. Under these circumstances, Defendant's objection is overruled.

Dr. Bleiberg's curriculum vitae was inserted into the record as previously set forth in his first deposition. Dr. Bleiberg is certified in physical medicine and rehabilitation and in the field of pain medication. Dr. Bleiberg's testimony regarding his opinion as to Plaintiff's need for a spinal cord stimulator was substantially the same as he testified to in his previous deposition. Essentially, it would assist Plaintiff in getting off medications such as Percocet. A representative of Abbott Lab was present for the implantation of the spinal cord stimulator. He confirmed again that the stimulator was implanted on May 7, 2020 by Dr. Herman Ruiz. Plaintiff had the spinal cord stimulator implanted for one week. When asked whether the permanent implantation of the spinal cord stimulator would be less expensive than a lifetime on narcotic pain medication, Dr. Bleiberg responded as follows:

> A. It depends on the narcotics that they are actually on, but the expense comes with the adverse effects of long-term use of narcotics. So we know that opiates or narcotics actually suppress hormone levels, decrease testosterone. They can lead to depression. So there's a cost involved in caring for that and a cost of quality of life. We know that opiates can lead to dependency and addiction. If that happens, there's a cost in that regard as well. Opiates slow down the gastrointestinal tract and lead to constipation and all sorts of gastrointestinal issues. If those complications occur, there's a cost to that as well. So the cost to use the opiates is more so than just the opiate itself; and opiates can impair cognition and reaction time, which can increase a

> patient's risk for being in a car accident if they are driving. So the costs are actually very, very global. They cover a lot as far as the cost of the opiates as far as the patient is concerned, plus it's just not healthy for the patient.
>
> Whereas with a spinal cord stimulator trial, you put it in one time. You may have to replace the battery once every five or ten years; and if the patient is off the opiates and the spinal cord stimulator works, the patient now has quality of life. They are not popping pills all the time, and you take away the risk of the opiates and all the cost associated with it.
>
> (Bleiberg dep., pg. 118-119)

Dr. Bleiberg was asked whether he agreed with Dr. Mayer's conclusion that the spinal cord stimulator was not reasonable and necessary for Plaintiff. Defense counsel objected to the question on the basis that it had been previously asked and answered at the time of Dr. Bleiberg's deposition in 2020. In reviewing the transcript of Dr. Bleiberg's deposition of July 20, 2020 I would concur with defense counsel that the same question was asked and was answered at some length by Dr. Bleiberg at that time. I would therefore sustain defense counsel's objection to the question at the deposition taken on February 2, 2022.

Dr. Bleiberg went on to specifically respond to Plaintiff's counsel's questions as to whether he agreed with certain findings made by Dr. Mayer. It is clear that Dr. Bleiberg disagreed with Dr. Mayer's findings such as radiculopathy.

Dr. Bleiberg's office notes for visits on January 20, 2020, February 5, 2020 and May 7, 2020 were placed into the record. Plaintiff's visit on January 20, 2020 was for follow up treatment. The office notes for all three dates dealing with current medications, past medical history, surgical, family and social history, reveal no differences in the information contained from one visit to another. Review of systems appeared to be substantially the same including vital signs. The examinations performed on those occasions appear to show substantially the same findings. The treatment portion of the note on January 20, 2020 indicated consideration of a spinal cord stimulator trial with Abbott Burst DR for Plaintiff's neck pain and radicular pain. The note indicates that Plaintiff is on Percocet and really wants to get off the medication. At that time Plaintiff was working as a school bus driver 4 hours per day.

On February 5, 2020, in addition to the previously stated identical information, the note indicated that Plaintiff was to be referred to George Ronan Psychiatry for a psychological clearance for the spinal cord stimulator trial. In addition, a representative of Abbott Burst DR was present on that occasion for a discussion regarding the spinal cord stimulator. Finally, it was noted that following the psychological clearance, a spinal cord stimulator trial with Dr. Ruiz would be scheduled along with Mr. Williams, the Abbott representative.

As alluded to previously, the spinal cord stimulator was implanted on May 7, 2020. A procedure was performed by Dr. Ruiz. The office note described how

the implantation was performed. There were no complications. Plaintiff was provided with instructions regarding activities.

Plaintiff was seen on May 14, 2020. The purpose of the visit was for a "SCS lead pull" with a description of the procedure. Plaintiff reported that he got about 80% relief from the spinal cord stimulator trial. He further indicated that he wanted to move forward to a permanent implantation.

Plaintiff was still taking a variety of medications at that time, set forth on pages 150-151 of the deposition transcript.

Plaintiff was next seen on July 21, 2020, once again for substantially the same reasons, i.e., neck pain, left shoulder pain, left arm pain and mid-back pain. Plaintiff reiterated that he wanted to move forward with getting the permanent SCS inserted. Plaintiff continued to take the medications as previously described. The note indicates that the bill for the trial implantation was not paid. The note also indicates a statement that the SCS trial and permanent implantation is reasonable, medically necessary and related to the work injury.

Plaintiff was next seen on October 20, 2020. Complaints were substantially the same as previously. Plaintiff reports that his right shoulder pain is increasing starting a few weeks previously. Plaintiff denied any new injury. Plaintiff was still taking the medications as previously reported. The note once again indicates that the SCS is reasonable, medically necessary and related to the work injury.

Dr. Bleiberg's medical report of May 31, 2020 was also made part of the record. The report includes a history of Plaintiff's injury while working for Nexteer as well as subsequent treatment including treatment rendered by Dr. Bleiberg. The report also included reference to the spinal cord stimulator trial. Dr. Bleiberg concluded that the spinal cord stimulator trial which was performed on May 7, 2020 was successful and that the permanent spinal cord stimulator is reasonable, medically necessary and related to the work injury.

Dr. Bleiberg was then questioned with regard to a further report by Dr. Mayer dated August 13, 2020. Dr. Bleiberg explained the nature of the digital motion x-ray as follows:

> A. Digital motion x-rays are exactly what they say. They are x-rays. What happens is we take many x-rays in many different planes and get many more views than is possible utilizing the tradition x-ray. Any one of those films can be printed off as an actual x-ray film. So a digital motion x-ray is actually an acceptable form of evaluating a patient, because x-rays have been around forever. We have been doing that forever, and you can actually see a lot on digital motion x-rays. They actually are beneficial and helpful and utilized on a regular basis when a clinician feels that they will be helpful or may be helpful in the diagnosis and treatment of a patient.
>
> (Bleiberg dep., pg. 174)

Dr. Bleiberg went on to report the efficacy of the digital motion x-ray which he indicated provides more specific information regarding the position and movement of one disc over another set forth on page 175 and 176 of his deposition.

It appears that Plaintiff suffered a ligament injury at levels C1 and C2 which is not the result of any aging process but rather the result of some sort of trauma to the ligaments. Symptoms arise such as neck pain, cracking, crunching, and crepitus. Spasm would also be a finding.

Dr. Bleiberg further testified that an MRI will pick up ligamentous damage if there is a frank tear in a ligament. He further testified that an MRI will miss a ligament injury whereas a digital motion x-ray will not, because the digital motion x-ray takes so many x-rays in so many planes.

Dr. Bleiberg confirmed that a chiropractor actually performed the digital motion x-rays and did look at the films but Dr. Bleiberg also personally reviewed the films. Dr. Bleiberg questioned Dr. Mayer's competency in judging the quality and value of a digital motion x-ray on the basis of what he understood to be Dr. Mayer's lack of any experience in using the process and/or procedure.

Dr. Mayer presumably felt that a small syrinx at the C6-C7 level would not be an indication of a cord injury. Dr. Bleiberg disagreed with Dr. Mayer's characterization and opinion. His answer referred to the fact that a radiologist some four years prior to the injury reported "an area of low T1 and high T2 signal" seen within the central portion of the cord posterior to the C6-C7 level that has the appearance of myelomalacia that could be related to a prior trauma and clinical correlation was suggested.

Dr. Bleiberg acknowledged that pain is subjective and that the guidelines for the use of a spinal cord stimulator for neck pain of the trunk and or limbs is to look at the reduction in pain. Plaintiff reported that he had an 80% relief of his pain which is the goal of the spinal cord stimulator.

Dr. Mayer apparently opined that if there had been a significant ligamentous injury or soft tissue injury that did not heal, those findings should have been evident on an MRI imagining to which Dr. Bleiberg responded that he absolutely disagreed. He further stated that MRIs are "notoriously bad at picking up pathology unless we have a frank tear."

On cross-examination, Dr. Bleiberg testified that had not seen the Plaintiff since October 20, 2020. The complaint at that time was increased pain in the right shoulder. No digital motion x-ray was taken of the shoulder.

Dr. Bleiberg further testified that even though the spinal cord stimulator trial was successful resulting in 80% relief of Plaintiff's pain, Dr. Bleiberg did not request Plaintiff to stop taking the opiates he was taking during the trial period.

While Dr. Bleiberg could not guarantee that the spinal cord stimulator would allow Plaintiff to completely go off opiates forever, he did believe that it was more likely than not. He further testified that most of his patients that are on opiates prior to the spinal cord stimulator are off opiates completely after the permanent implantation.

Dr. Bleiberg further testified that he could not make any comment as to the accuracy of history provided by the Plaintiff to a treating physician on November 1, 2020 that his status was tolerable and that he did not want to make any changes at that time.

Dr. Bleiberg further testified that with older spinal cord stimulators, an MRI could not be performed; however the new models are MRI compatible. Current spinal cord stimulators do not have to be turned off while driving. Ultrasounds are not used to detect spinal ligaments.

During the taking of his deposition, defense counsel appears to have gone on the Abbott Industries website which did indicate that the spinal cord stimulator should always be turned off while driving a car. When asked whether that would be contrary to Dr. Bleiberg's testimony above, Dr. Bleiberg responded that he was unsure as to what exact site defense counsel was referring to and what stimulator was being referred to because Abbott makes many different kinds. He reiterated that the units that he used from Abbott did not require the stimulator to be turned off when driving.

Dr. Bleiberg acknowledged that Plaintiff had radicular pain which was part of the clinical examination on the first visit in 2018. He also confirmed that he did not perform the same clinical evaluation on every examination. He acknowledged that in some patients radiculopathy can change over time. He conceded that in some patients it is permanent and in some patients it can change. He did not feel the need over two years to do a second check up of Plaintiff's status. He gave his reasons as follows:

> A. No. I had all diagnostic testing, where I was able to actually look into his body with an MRI, with electrodiagnostic study, with digital motion x-ray. I was able to talk to him. I understood that his radiculopathy was a preganglionic sensory radiculopathy and was not something I could see on a physical examination. I followed him over time, and so I didn't need to. It wasn't necessary. He didn't come to me and say, all my symptoms went away, so I'm 50-percent better, or I'm so much worse, where I would have to go ahead and do a re-evaluation. He was staying fairly stagnant and fairly stable with the consistent complaints of pain affecting him and his quality of life.
>
> (Bleiberg dep., pg. 195)

On re-direct examination, Dr. Bleiberg explained that preganglionic sensory radiculopathy is diagnosed on a clinical basis. He confirmed that in his opinion, the condition was related to the injury Plaintiff sustained at work.

PHILIP MAYER, MD

Defendant offered the deposition testimony of Dr. Philip Mayer taken on August 18, 2020. Dr. Mayer's curriculum vitae was inserted into the record without objection to the procedure. He is a board certified orthopedic surgeon.

Dr. Mayer testified that his experience with spinal cord stimulators began in the early 1990's when he was the physician in charge of the Henry Ford Hospital spinal surgery program in the department of orthopedics. At that time, spinal cord stimulators were relatively new and the usage was not particularly impressive. Patients reported perhaps 50% pain relief primarily those patients in extreme symptoms. The program was never instituted. He has stayed abreast of the procedure but it's not something he will commonly refer to. He is also on the Cervical Spine Research Society and the American Academy of Orthopedics Surgeons which have courses that are ongoing. He acknowledged that his knowledge base is ongoing and updated but it does not personally insert them. If they are needed he would refer them out.

Dr. Mayer also testified with regard to the Work Lost Data Institute which is a company that publishes the "official disability guideline." It is multidisciplinary in scope. It is not industry supported. It is the accepted guideline standard in over 30 states. Dr. Mayer opined that it is the most respected evidence based guideline relative to diagnosis and treatment. It is independent and not company supported.

Dr. Mayer opined that based upon his experience and history in the practice of cervical spine issues and after his review of all the medical records which are contained in his reports, he concluded that a spinal cord stimulator would not be reasonable and necessary and would not recommend it in Plaintiff's case.

Dr. Mayer was then asked to explain the difference between digital motion x-rays and an MRI with regard to the diagnosis of ligament damage. Dr. Mayer responded that the appropriate standard to physically image the ligaments is MRI imagining. MRIs are very sensitive to soft tissues and when considering a sprain which means damage to ligaments the "gold standard for making that identification is the MRI." He further testified as follows:

> Ligament damage is directly visualized by MRI. Digital motion x-rays have been around for years and I do cite that in my reports. They're simply not recognized as being appropriate. They expose the person to a lot of radiation and in this case they were done by a chiropractor and interpreted by a chiropractor, and chiropractors practice chiropractic medicine, not allopathic medicine. Allopathic means MD, medical physician, and it's not

> the standard that's acceptable for the determination of ligament damage.
>
> So it would be plain radiographs to look for instability with specific criteria, but anatomically the gold standard is MRI imaging.
>
> (Mayer dep., pg. 34-35)

Regarding a diagnosis of cervical radiculopathy, Dr. Mayer testified that a physical examination is more significant than electrophysiological evaluation. He further testified that in the cervical spine, diagnosis can be established looking for findings sufficiently focused enough to come up with a named nerve root of involvement by which he meant specific myotomal weakness, dermatomal sensory patterns and reflex abnormality all matching a specific named nerve root. In cases of "equivocal diagnosis," if electrodiagnostic testing is chosen, the "test of record is EMG." Nerve conduction studies can show peripheral nerve root entrapment but are not considered the standard for diagnosing radiculopathy.

Dr. Mayer also testified that he had reviewed the report of Dr. Bleiberg dated January 30, 2018. Dr. Mayer was told that Dr. Bleiberg had testified that the only physical examination that he performed upon Plaintiff was in January, 2018. Dr. Mayer was asked whether the examination that Dr. Bleiberg referred to in his notes contained findings that would be consistent with cervical radiculopathy. Plaintiff's counsel objected on the basis of hearsay and relevance. Dr. Bleiberg's report of January 30, 2018 is in evidence and therefore Plaintiff's counsel objection is overruled. Also, the objection as to relevance is overruled.

In responding to the question, Dr. Mayer indicated that there were no objective abnormalities to support the diagnosis of radiculopathy as noted by Dr. Bleiberg on his own examination. The only thing noted was on the left 4-5 elbow extension weakness which is just a subjective finding. Everything else on the exam was normal including reflexes and sensory. He further testified that cervical radiculopathy can evolve. He also testified that about 90% of them resolve with time but you have to keep doing physical examinations. Dr. Mayer's standard is to perform a neurological examination every time he sees the patient.

Dr. Mayer also thought it was "rather extraordinary that a representative of the spinal cord stimulation company would have been allowed to speak directly to the patient." He believed sales people have a vested interest in selling what their product is and he did not think it was appropriate for them to be instructing patients.

Dr. Mayer noted that not only was the physical examination not supportive of a diagnosis of radiculopathy but also noted that EMGs from February 27, 2018 and November 26, 2019 only showed positive results for carpal tunnel syndrome and specifically stated there was no evidence of radiculopathy.

Dr. Mayer was asked about the effectiveness of a spinal cord stimulator with someone who has been continuously using narcotics. Dr. Mayer noted that as late

as May 7, 2020 Plaintiff had been still on Percocet 10/325 mg as well as OxyContin 15 mg every 12 hours. Dr. Mayer testified that there is a correlation between the failure of effectiveness of spinal cord stimulation in individuals on significant doses of opioids. He further stated that the figure in "ODG" is 30 morphine equivalent per dose which is significant. He further stated that a history of opioid abuse is considered virtually a counterindication now and ongoing for the use of spinal cord stimulation.

As to Plaintiff's weight which is above 300 pounds, according to the official disability guidelines of the Work Lost Data Institute, obesity is a problem at least to higher revision rates and higher failure rates so therefore his weight would be a relative counterindication.

Dr. Mayer further testified that scientific data does not support and the "ODG" does not recommend using spinal cord stimulation to facilitate weening of pain medication.

Dr. Mayer opined that Dr. Bleiberg rendered an opinion that was not supported in the medical literature as it relates to the diagnosis of radiculopathy on the basis of nerve conduction velocity tests and in the absence of abnormalities identified on EMG and in the absence of any neurological findings to support a pattern of symptoms sufficient enough to identify a named nerve root. He went on to explain that the EMG should be considered an extension of the physical examination and should match the physical examination. He went on to say that the AMA is of the opinion that at present only the needle EMG is considered diagnostic of radiculopathy. He further testified as follows:

> H-reflex, F-wave, nerve conduction studies and evoked potentials are adjuncts in testing and can help evaluate for other pathologies, but the diagnosis of radiculopathy is specific to the EMG and in this case on two occasions the electromyographer, meaning Dr. Bleiberg, concluded that the EMG was normal, and when you look at the correlation of the EMG to the physical examination, it matches because there's no reflex loss. There's nothing on the exam that says you have radiculopathy.
>
> (Mayer dep., pg. 43-44)

Dr. Mayer also noted that multiple MRIs disclosed the presence of a small syrinx which is a fluid filled cavity in the center of the spinal cord. He testified that syrinxes may stay the same or get larger and it would be important to be able to image Plaintiff's spinal cord in the future and he should be monitored. Given Plaintiff's age and the fact that there is an anatomic lesion in the spinal cord, Dr. Mayer believed it would be absolutely critical to be able to image the cord in the future by way of an MRI. He further testified as follows:

> So given his age, given the fact there is an anatomic lesion in the spinal cord, I think it's absolutely critical to be able to image it is with MRI. The problem you're now talking about putting a mechanical object or a lead into the epidural space behind the

> cord and the cord is already comprised by the syrinx. The last thing in the world I would want to do would be to put a space-occupying lesion in the epidural space when there is a lesion in the center of the spinal cord and there is a need for future imaging, and this is also one of the criteria that the ODG states specifically, not recommended for patients who will require further MRI evaluation for existing pathology.
>
> (Mayer dep., pg. 46)

Dr. Mayer also questioned having the nerve stimulator operating while Plaintiff was driving a bus and also questioned the usage of opioids while driving a bus.

Finally on direct-examination, Dr. Mayer testified that according to the official disability guidelines of the Work Lost Data Institute, spinal cord stimulation is not recommended for failed cervical surgery, surgical or post surgical pain or cervical radiculopathy or cervical axial pain. He further testified of the risks involved particularly in the cervical spine where the canal is more narrow. In addition, in Plaintiff's case there is a lesion in the cord and placement of the stimulator increases the risks of spinal cord injury. Infection is an ongoing problem in diabetics.

On cross-examination, Dr. Mayer testified that he last performed surgery in approximately 2005 and does not implant spinal cord stimulators. He confirmed that he did not perform a physical evaluation on the Plaintiff. He also did not review any imaging films. He agreed that he reviewed medical records and concluded that Plaintiff does not need a spinal cord stimulator. He agreed that Dr. Bleiberg had treated Plaintiff since 2018 and opined that a spinal cord stimulator was reasonable and necessary.

Dr. Mayer was aware that a trial spinal cord stimulator was used with Plaintiff and agreed that Plaintiff indicated that he got some benefit. He agreed that he did not speak to Dr. Bleiberg after the trial stimulator nor did he speak to the Plaintiff. He reiterated that there was some benefit from the trial stimulator.

The remaining portion of cross-examination by Plaintiff's counsel involved Dr. Mayer disclosing that he charged $500 per hour in his review of the medical records that were presented to him but did not recall the specific number of hours that it took him to review all of the records. He also testified that he has no vested interest in Tri-County Associates Medicine Company and charges between $700-$750 per hour for a deposition.

On re-direct-examination, Dr. Mayer testified that there is a decreasing success rate given the lapse of time with the implantation of the nerve stimulator. Approximately 40% of them are removed most often because they lose effectiveness and further there is information that the trial is not a reliable indicator of ultimate success. The "trial-to-permanent conversation rate" has been studied

and the conversation rate success can be as low as 41% by virtue of data between 2000 and 2009 cited in the "ODG."

On re-cross-examination, Dr. Mayer reiterated that the success rate from trial to permanent is 41% based on date from 2000 to 2009. Dr. Mayer agreed that once the permanent spinal cord stimulator is implanted there are people that are successful and some that are not.

Attached to the deposition as exhibit 1 are two lengthy medical reports authored by Dr. Mayer, May 11, 2020 and August 13, 2020. These reports are the result of Dr. Mayer's review of numerous medical records as well as the deposition of Dr. Bleiberg. A review of both of these reports consisting of 17 pages in the report of May 11, 2020 and 19 pages with regard to the report of August 13, 2020 do not reveal any inconsistencies with the testimony of the doctor at the time of his deposition.

EXHIBITS

Plaintiff's Exhibit 1 is the deposition testimony of Dr. Marvin Bleiberg taken on July 22, 2020 which has been previously summarized.

Plaintiff's Exhibit 2 is the deposition testimony of Dr. Marvin Bleiberg taken on February 2, 2022 which has been previously summarized.

Plaintiff's Exhibit 3 are the records of Matrix Pain Management. The records contain office visits commencing on January 13, 2020 through November 1, 2021 with a total of 9 visits. When first seen on January 13, 2020, Plaintiff's chief complaint was cervical pain and muscle spams. Past medication included narcotics such as Vicodin, Norco, Percocet, and Morphine. Current medication included Oxycodone, OxyContin and Lyrica. On March 19, 2020 Plaintiff was seen for the same complaints. Symptoms reported at that time were substantially the same as those indicated on January 13, 2020 indicating pain on both sides of his neck. Past and current usage of pain medications and narcotics was the same. This note indicated that consideration could be given to a spinal cord stimulator, however it would represent "high infection risk BMI 46.4." Alternative treatment was discussed with the patient. Treatment on June 16, 2020 was due to again complaints of cervical pain and muscle spasms. Symptomatology recorded was the same as previous visits. Medication remained the same. The note further indicates consideration of a spinal cord stimulator with further indication of the risk of infection. A notation is made that Plaintiff appears to be doing well on this "regimen" and is working in his garage about 10 hours per day – very busy. The note indicates that Plaintiff was currently on opioid therapy and has experienced good analgesic efficacy. The note further indicates Plaintiff reporting improvement in functional capacity as well with daily activities. Opioid medications will continue on a conditional basis. When seen on September 15, 2020 again Plaintiff complained of cervical pain and muscle spasms on both sides with pain radiating down the left arm and into the shoulder. No changes were noted in medication

and opioids. Notation was also made that Plaintiff was "doing well on current medication regimen, continuing Lyrica and Percocet." The note also indicates again high risk of infection with a spinal cord stimulator. This note further indicates Plaintiff working in his garage about 10 hours per day and reports improvement in functional capacity as well with daily activities. Opioid medications would be continued on a conditional basis. A visit of December 14, 2020 also is for cervical pain and muscle spasms and for refill of medications Lyrica, Oxycodone and Percocet. The record does not indicate any different information than in previous visits. Several diagnoses were listed at that time including the cervical thoracic region as well as the right knee and diabetes mellitus. Once again the note refers to the risk of a spinal cord stimulator and Plaintiff working in a garage 10 hours per day. The notation also indicates that Plaintiff was doing well on his current medication regimen including Lyrica and Percocet. On March 8, 2021 Plaintiff was seen for chronic neck pain "secondary to mild degeneration and syrinx at C6 as per reviewed MRIs." Plaintiff was also seen for refilling Lyrica, Oxycodone and Percocet. The ending note for this visit indicates Plaintiff reporting worsening pain during the day with the reduction of OxyContin ER to only bedtime. It is noted that Plaintiff is "very busy working in garage and currently making tables." Plaintiff loves working with his hands but his hand pain is also getting worse. On May 18, 2021 Plaintiff was seen indicating pain was interfering with his daily activities. It is unclear and unreported in this note as to where Plaintiff experiences increased pain. There is reference to a new area of pain, foot/feet. The ending note indicates Plaintiff was there for an examination and evaluation and treatment for chronic low back pain. He reports pain during the day with reduction of OxyContin. Plaintiff reports being much busier at that time of year working in his garage and making tables. On August 10, 2021 Plaintiff was seen again for chronic neck pain secondary to mild degeneration and syrinx at C6-7 as per reviewed MRIs as well as chronic low back pain due to muscle spasms. Plaintiff was also seen for narcotic management. The diagnoses listed in this visit are the same as previously set forth. The final note on this visit indicates "with current pain medications he is able to be active and enjoy life." The final note in this exhibit is dated November 1, 2021. The complaint was chronic neck pain again secondary to mild degeneration and syrinx at C6-7 as per reviewed MRIs. Plaintiff was also seen for narcotic management. History indicates that pain level has increased. The level of pain interferes with his daily activities. He reports severe pain in his neck and upper back for a period of about two weeks between August and September. This note also reports Plaintiff working part time for a large company that grows Marijuana (FC Johnson – Au Gres). The note indicates that he is doing well on his current medication regiment. Plaintiff reported his neck pain radiates into his left shoulder with a flare up in September but has somewhat improved. Options for treatment were discussed but the note indicates Plaintiff is tolerable and does not want to make any changes at that time. Plaintiff was on opioid therapy and has experienced good analgesic efficacy. Plaintiff reports improvement in functional capacity as well as with daily activities.

Defendant's Exhibit A is the deposition testimony of Dr. Philip Mayer taken on August 18, 2020 which has been previously summarized.

Defendant's Exhibit B is a Rite Aid Pharmacy patient report setting forth the medication Plaintiff has received from this particular Rite Aid Pharmacy located in Tawas City, Michigan. This exhibit consist of 39 pages some of which are two sided. The document does not list the dates of prescriptions in any chronological order. It appears the earliest date was in May, 2020. Numerous types of medication are listed on these pages. Some of the prescriptions appear to be opioids and others are not explained as to what type of medication it is. At least some of the listing is for vitamins. The most recent date for a prescription appears to be March 8, 2022.

Defendant's Exhibit C are records of Schafer Inc. These records consist of earning statements the most recent of which appear to be for a period ending July 3, 2021. It does appear that Plaintiff only works on a part-time basis sometimes as little as three hours. The earning statements appear to cover a period beginning in January, 2021 through July 3, 2021. A W2 form for 2020 shows a total earnings of $890.67.

Defendant's Exhibit D is the surveillance video which has been previously summarized.

ANALYSIS AND FINDINGS

As stated at the outset, the issue for determination in the instant case is whether the implantation of a cervical spinal cord stimulator is a reasonable and necessary medical treatment for Plaintiff's work related cervical injury.[1]

Section 315(1) of the WDCA provides the following in pertinent part:

> The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines or other attendants or treatment recognized by the laws of this State as legal, when they are needed.
>
> The employer shall also supply to the injured employee dental service, crutches, artificial limbs, eyes, teeth, eyeglasses, hearing apparatus, and other appliances necessary to cure and as far as reasonably possible, and relieve from the effects of the injury.

The burden of proof to establish that medical treatment for an injury is not reasonable or unnecessary is on the employer (see the extensive analysis and holding in Daldos v Grand Rapids Gravel Company, 2006 ACO #105).

[1] An Opinion and Order finding that Plaintiff sustained a work related cervical injury was rendered by the Undersigned on August 30, 2019, mailed by the Agency on September 16, 2019. The Opinion also ordered Defendant to pay "reasonable and necessary medical benefits related to the cervical spine injury."

> A finding as to the reasonableness and necessity of a given treatment is a question of fact.
>
> (Stackable v G Tech Corporation, 2019 ACO#30, citing Weakland v Toledo Engineering Company, Inc., 467 Mich 344 (2003); and Epps v Mercy Hospital, 69 Mich App 1 (1976))

The Commission in Stackable, supra, also quoted the Court of Appeals Decision in Cuddington v United Health Services, Inc., 298 Mich App 264 (2012):

> Rather, whether an employee "needed" medical services following a work place injury necessarily requires a fact intensive reasonableness inquiry focusing on the totality of the circumstances surrounding the employee, the work place, the nature of the injury, and the injuries adverse effect on the employee's overall health and wellbeing. No single factor is dispositive, and a reasonableness inquiry may encompass any evidence bearing on whether medical services were necessary.
>
> (Stackable, at pg. 5)

Let us examine the record in light of the above legal framework.

Plaintiff testified that he takes OxyContin twice daily; Oxycodone four times daily; and Lyrica three times daily. When he takes his medication his pain level is 4 to 5 on a scale of 0 to 10. Without medication his pain medication is 9 to 10. The pain medication causes some side effects such as drowsiness requiring him to nap 1 to 2 hours twice per day. Implantation of the cervical spinal cord stimulator for one week improved his symptoms 60% to 70%. When the stimulator was removed, his pain level increased and he returned to using his medication at full dosage. He still wants the stimulator to ease his pain and improve his mobility.

There is no question that Plaintiff has taken and continues to take numerous types of medication both before and after the trial implantation of the stimulator. In fact, medical records indicate that Plaintiff's intake of medication is far more than what he testified to at the time of the hearing. Dr. Bleiberg's office notes reveal Plaintiff's numerous prescription medication as far back as December 10, 2018 (Plaintiff's Exhibits 1 and 2). Likewise, the records of Matrix Pain Management (Plaintiff's Exhibit 3). These prescription medications include Percocet, OxyContin, Oxycodone and Lyrica. Significantly, in my opinion, the dosage for these medications have never changed. These records do not support Plaintiff's testimony that he reduced his intake of medication at any time.

The records of Matrix Pain Management are significant for three further reasons as they relate to Plaintiff's testimony. Recall, Plaintiff's testimony that his physical activity is somewhat limited. He testified on direct examination to a hobby in the form of restoring motorcycles only 2 hours at a time. However, upon further questioning by defense counsel, Plaintiff admitted that he worked as a bus driver during 2020. He also worked for Schafer, Inc. between December 27, 2020 and

June 27, 2021 which he described as a "pot company" cleaning filters (see, Defendant's Exhibit 6).

The Matrix records also make multiple references to Plaintiff working in his garage 10 hours per day. Plaintiff had no recollection of making any such statements. The Matrix's records also reference Plaintiff being busy making tables in May, 2021. Plaintiff testified that he only built two tables in two years.

At this point I would add more than just parenthetically that the surveillance video on Plaintiff also casts some doubt as to the reliability of Plaintiff's testimony regarding his "mobility" (Defendant's Exhibit D). The summary of what appears on the video is set forth on page 4 and 5 of this opinion and need not be repeated here. While the video does not depict Plaintiff doing what could be described as strenuous activity, he clearly demonstrated what I would describe as normal mobility without any evidence of restriction.

The second reason the Matrix Pain Management records are significant is with regard to medical opinion as to whether a cervical spinal cord stimulator is an appropriate treatment for Plaintiff. According to these records, Plaintiff was treated between January 13, 2020 through November 1, 2021 with a total of 9 visits. On every occasion with the exception of Plaintiff's first visit on January 13, 2020, the records indicate that "spinal cord stimulation would represent high infection risks."

Finally, it appears that as of November 1, 2021 Plaintiff reported improvement in both symptoms and functionality:

> Don is here today for exam/eval/treatment of his chronic LBP. Is doing well on current pain medication regiment and his GPS is quite stable. States his neck pain which radiates into his left shoulder flared up in September but has improved somewhat. Discussed options for treatment but he states is tolerable and does not want to make any changes at this time. Patient denies any adverse effects from the opioids we are currently prescribing for pain. Currently on opioid therapy and has experienced good analgesic efficacy. No aberrant drug seeking behaviors noticed or reported since the last visit. Compliance with our regimen is good at this time. The patient reports improvement in functional capacity as well as daily activities. Based on this and future assessments of risk and benefit, we will continue to provide opioid medications on a conditional basis.
>
> (Plaintiff's Exhibit 3)

Let us now turn to the medical testimony submitted in this case. There is no question that Dr. Bleiberg and Dr. Mayer hold diametrically opposed opinions as to the reasonableness and necessity of the implantation of the stimulator. Those opinions have been summarized above and will not be repeated in totality. I believe a fair summary of Dr. Bleiberg's opinion regarding the need for a stimulator was his reliance on Plaintiff's report of pain reduction of 80%. Moreover, Dr. Bleiberg believed the stimulator would improve Plaintiff's physical function and

reduce reliance on medication. He strongly disagreed with Dr. Mayer's opinions questioning whether Dr. Mayer was qualified to render an opinion and emphasizing his 25 years experience practicing pain management and physical medicine and rehabilitation. Dr. Bleiberg acknowledged that Plaintiff's EMG results were negative for any cervical radiculopathy. Dr. Bleiberg's opinion that Plaintiff had a "sensory radiculopathy" which essentially relied on a report of symptoms only by the patient.[2] Dr. Mayer testified that digital motion x-rays, upon which Dr. Bleiberg relied in support of his opinion, are not recognized as being appropriate. MRIs are the "gold standard":

> Ligament damage is directly visualized by MRI. Digital motion x-rays have been around for years and I do cite that in my reports. They're simply not recognized as being appropriate. They expose the person to a lot of radiation and in this case they were done by a chiropractor and interpreted by a chiropractor, and chiropractors practice chiropractic medicine, not allopathic medicine. Allopathic means MD, medical physician, and it's not the standard that's acceptable for the determination of ligament damage.
>
> So it would be plain radiographs to look for instability with specific criteria, but anatomically the gold standard is MRI imaging.
>
> (Mayer dep., pg. 34-35)

Dr. Mayer further testified that the "test of record" for determining cervical radiculopathy is the EMG which was negative in Plaintiff's case. He also testified that there is a correlation between the failure of effectiveness of spinal cord stimulation in individuals with significant doses of opioids. As discussed above, Plaintiff has used significant opioid medication. Plaintiff's weight was over 300 pounds. Dr. Mayer testified that according to the Work Lost Data Institute's "official disability guidelines," obesity is associated with higher failure rates with spinal cord stimulators.[3]

I choose to accept Dr. Mayer's opinion over that of Dr. Bleiberg. His opinion on several points were unrebutted by Dr. Bleiberg, e.g., risk factors, and more evidenced based, e.g., negative diagnostic studies. Dr. Mayer's opinions are also supported by records of Matrix Pain Management.[4]

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[2] Dr. Bleiberg also questioned the validity of Dr. Mayer's opinion based upon Dr. Mayer's failure to examine Plaintiff. However, Dr. Bleiberg admitted that he examined Plaintiff on only one occasion on January 30, 2018.

[3] Dr. Mayer testified that the Work Lost Data Institute publishes the "official disability guidelines." It is independent and not company supported and is the most respected evidenced based guidelines relative to diagnosis and treatment.

[4] "The magistrate's choice of which medical expert opinion or opinions to adopt is within his or her discretion and we defer to that choice if it is reasonable. The magistrate need not adopt expert opinions in their entirely but may give differing weight to differing portions of testimony." (*Isaac v Masco Corporation,* 2004 ACO #81)

I address one final issue. As stated above, Plaintiff testified that when the stimulator was implanted for the one week trial period, his pain level reduced by 60% to 70%. The Appellate Commission has held that proof of "measurable results" from treatment is not required under Section 315(1) of the WDCA (Dixon v GMC, 219 ACO #3; Stackable, supra). It also appears that relief from symptoms, even for short periods, is sufficient to deem treatment reasonable and necessary (Dixon, supra; see also, Ljucovic v Lakeside Building Maintenance of Michigan, 2006 ACO #40; and, Goddard v Ottawa County Road Commission, 2017 ACO #5). I believe that it is significant to note that all of the above cases involved medical treatment such as injections (Dickson, supra and Goddard, supra) or physical therapy (Stackable, supra).[5]

The analysis of the reasonableness and necessity of the treatment in the above cases was conducted with reference to the first sentence of Section 315(1) cited above. However, in the instant case the proposed treatment is a cervical spinal cord stimulator which I find is more properly characterized as an "appliance."[6] Consequently, I believe the analysis should fall under the above quoted language of Section 315(1) which obligates employers to "supply to the injured employee appliances necessary to cure, as far as reasonably possibly, and relieve from the effects of the injury." (Emphasis supplied). The language just quoted is in the conjunctive, i.e., "cure and relieve." In the instant case, there is no evidence that implantation of a cervical spinal cord stimulator will provide any cure for Plaintiff's injury. Moreover, the evidence as to "relief" is only by way of Plaintiff's testimony. Arrayed against his testimony are Plaintiff's statements recorded at Matrix Pain Management set forth above and the video surveillance depicting fairly normal activity. The totality of the evidence does not support a finding of the reasonableness and necessity of the implantation of a spinal cord stimulator.

CONCLUSIONS

Based upon the above discussion and analysis, I find that Defendant has sustained its burden of proof that the implantation of a cervical spinal cord stimulator with regard to Plaintiff is not a reasonable and necessary medical treatment. Plaintiff's claim is hereby denied.

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[5] The type of treatment provided to Plaintiff in Ljucovic, supra, is unclear. The Appellate Commission does not specifically describe the treatment as in the above cited cases. Magistrate Barney described Dr. Learners treatment as "forensic rather than a true treating physician." (pg. 4)

[6] One dictionary definition of "appliance" is "a device or piece of equipment designed to perform a specific task." This definition is consistent with the above quoted language of Section 3015(1) describing other devices.

WORKERS' COMPENSATION
BOARD OF MAGISTRATES

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E. LOUIS OGNISANTI, MAGISTRATE (246G)

Signed on July 20, 2022 at Saginaw, Michigan.