

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F201682

MICHAEL L. VELORIA, EMPLOYEE	CLAIMANT
ZIMDAHL ELECTRIC, INC., EMPLOYER	RESPONDENT
FREMONT PACIFIC INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 9, 2005

A hearing in this case was conducted on June 15, 2005, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Mountain Home, Baxter County, Arkansas.

Claimant was represented by Frederick S. Spencer, Attorney at Law, Mountain Home, Arkansas.

Respondents were represented by Jeremy Swearingen, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A prehearing telephone conference was held on this claim on November 2, 2004; a Prehearing Order was filed on that same date. A copy of the Prehearing Order was admitted into the record as Commission Exhibit #2.

The parties agreed to five stipulations. Four of these stipulations are found in the Prehearing Order and were confirmed by the parties at the hearing. The fifth stipulation was agreed upon at the hearing. The following stipulations are hereby accepted.

1. Claimant sustained compensable injuries to his upper extremities on September 1, 2001.
2. The employee-employer-carrier relationship existed on September 1, 2001, and

at all other relevant times.

3. Respondents accepted Claimant's right upper extremity as compensable and have provided medical benefits, temporary total disability benefits, and permanent partial disability benefits for a 19% impairment rating to Claimant's right upper extremity.

4. Respondents accepted Claimant's left upper extremity as compensable and provided medical benefits until Claimant was diagnosed with cubital and carpal tunnel syndrome in this extremity.

5. Respondents controvert the compensability of Claimant's alleged carpal tunnel syndrome and cubital tunnel syndrome in his left upper extremity.

At the June 15, 2005 hearing, the parties discussed the issues set forth in the Prehearing Order. The parties agreed that the issues to be litigated and resolved are limited to the following:

1. What is Claimant's correct average weekly wage?
2. Whether Claimant's left upper extremity cubital and carpal tunnel syndromes are compensable.
3. Whether Claimant sustained a compensable low back injury.
4. Whether Claimant sustained a compensable organic brain injury.
5. Whether Claimant sustained a compensable mental injury.
6. Whether Claimant is entitled to reasonably necessary medical benefits in connection with his injuries.
7. Whether Claimant is entitled to temporary total disability benefits from October 14, 2003, to a date to be determined.
8. Whether Claimant is entitled to an additional 3% impairment rating to the right

upper extremity.

9. Whether Claimant is entitled to an attorney's fee.

PRE- AND POST-TRIAL MOTIONS

Three motions appear in the record, or in the Commission's file, that are directly related to this proceeding. Two motions were resolved prior to the hearing; the third motion must be resolved in this Opinion to clarify the record should an appeal be taken.

A. Motion to Recuse

Prior to the hearing, Claimant filed a Motion to Recuse and a brief in support thereof. This Motion was denied in an Order dated June 7, 2005. At the June 15, 2005 hearing, the parties were notified that the following items have been blue-backed and made a part of the Commission's record:

1. Claimant's attorney's cover letter dated May 16, 2005;
2. Claimant's attorney's letter to the Attorney General dated May 23, 2005;
3. Claimant's Motion to Recuse;
4. Claimant's Brief in Support of Motion to Recuse; and
5. Respondents' counsel's letter dated May 23, 2005.

At the hearing, a copy of the June 7, 2005 Order was admitted into the record as Commission Exhibit #1.

B. Motion in Limine

_____ Respondents filed a Motion in Limine on or about November 1, 2004, seeking to exclude Dr. Vann Smith's records and testimony for failure to meet the relevant evidentiary standards. Claimant's letter response was received on November 18, 2004. The Motion

in Limine was granted by an Order dated May 26, 2005. At the hearing, the parties were notified that the following items have been blue-backed and made a part of the Commission's record:

1. Respondents' Motion in Limine received November 1, 2004;
 2. Respondents' Brief in Support of the Motion in Limine;
 3. The deposition of Dr. Vann A. Smith taken September 24, 2004, with deposition exhibits numbered 1 through 9;
 4. Claimant's letter response to Respondents' motion, received November 18, 2004;
- and
5. Respondents' reply to Claimant's response, received November 23, 2004.

The Order granting Respondents' Motion in Limine was admitted into the record at the hearing as Commission Exhibit #3.

C. Motion to Strike

At the close of the June 15, 2005 hearing, the parties were invited to inform the Commission of their respective contentions with regard to each of the nine issues listed in the Prehearing Order. They were also invited to prepare post-hearing briefs, although those were not required. The following exchange then occurred:

Mr. Spencer: Yes sir. I assume that I can -- you have no[t] completely, since you've already ruled, but I mean, you certainly are not subject to having your mind changed. So you're not saying this is absolutely set in concrete, are you?

ALJ: Well, I think I have ruled on the motion in limine. Obviously, if you want to say something about those points, I mean, in relationship to the pre-hearing order issues, go ahead. It will be part of the record so that, if you want to make an appeal, there it is.

Mr. Spencer: Sure.

ALJ: No, I don't have a problem with that.

Subsequently, on June 30, 2005, the Commission received Claimant's Brief in Response to Order Granting Motion in Limine. An affidavit and three exhibits are attached to the brief, offered as evidence relevant to Respondents' November 1, 2004 Motion in Limine.

On July 5, 2005, the Commission received Respondents' Motion to Strike Claimant's Response and a brief in support thereof. Among other things, Respondents argue that Claimant's brief was not timely filed; that the evidence attached to the brief should have been presented at the initial hearing; that the exhibits attached to the brief are hearsay, not subject to cross examination; and that the brief had not been requested by the Commission at the close of the hearing.

Claimant responded to Respondents' Motion to Strike on July 11, 2005. Claimant argues that the Commission did not absolutely refuse to reconsider the admissibility of Dr. Smith's report, and that his brief was filed "more as a courtesy so that you might address this before you[r] final decision."

Ark. Code Ann. § 11-9-705(c)(1)(B) provides that "[e]ach party shall present all evidence at the initial hearing." In addition, all issues must be raised and developed no later than the hearing.

All legal and factual issues should be developed at the hearing before the Administrative Law Judge. The Full Commission has refused to consider issues not timely raised before an Administrative Law Judge.

Mickey v. Arkansas Methodist Hosp., Full Workers' Compensation Commission Opinion filed July 22, 2003 (F002633) (citations omitted).

I find that Claimant's Brief in Response to Order Granting Motion in Limine has not been timely filed, therefore, Respondents' Motion to Strike is hereby granted and

Claimant's brief will not be considered. Respondents filed their initial Motion in Limine on November 1, 2004; Claimant had ample opportunity to present the arguments and evidence contained in its brief prior to the Order filed May 26, 2005, granting Respondents' Motion in Limine. Claimant demonstrates absolutely no reason or justification for presenting these new arguments and his new evidence after the filing of that Order or after the hearing on June 15, 2005. Claimant's filing is clearly not timely.

However, in order to clarify the record concerning this matter, the following items will be blue-backed and considered to be a part of the record:

1. Claimant's Brief in Response to Order Granting Motion in Limine, with attachments, received June 30, 2005;
2. Respondents' Motion to Strike received July 5, 2005;
3. Respondents' Brief in Support of their Motion to Strike received July 5, 2005; and
4. Claimant's letter response to Respondents' motion received July 14, 2005.

THE RECORD

In addition to the items listed above, Claimant's brief concerning the constitutionality of the Arkansas Workers' Compensation Commission dated on or about July 5, 2005, will be blue-backed and made a part of the record. This brief was requested at the June 15, 2005 hearing.

At the conclusion of the June 15, 2005 hearing, the parties were invited to submit their respective contentions concerning each of the nine issues listed in the Prehearing Order. Claimant submitted his contentions by way of a letter dated June 27, 2005; the file does not reflect that Respondents provided their contentions. Therefore, Claimant's June 27, 2005 letter, providing his contentions with regard to each of the nine issues listed in the

Prehearing Order, will be blue-backed and made a part of the record in this matter.

As to the exhibits, there are a number of rulings concerning their admissibility throughout the transcript. In order to clarify which exhibits have been admitted into the record, the following is a list of these exhibits, the status of each (whether admitted or merely proffered), and a parenthetical entry noting where in the transcript the ruling on the exhibit's admissibility may be found.

1. Claimant's Exhibit #1; admitted; (9-10).
2. Claimant's Exhibit #2; admitted; (10).
3. Claimant's Exhibit #3; proffered; (10).
4. Claimant's Exhibit #4; proffered; (11).
5. Claimant's Exhibit #5; admitted; (11).
6. Claimant's Exhibit #6; admitted; (11).
7. Claimant's Exhibit #7; admitted; (11).
8. Claimant's Exhibit #8; admitted; (89).
9. Respondents' Exhibit #1; admitted, except for items 39, 40, and 82, which are proffered; (146).
10. Respondents' Exhibit #2; admitted; (27).
11. Respondents' Exhibit #3; admitted; (27).
12. Joint Exhibit #1; admitted, except for those items excluded by Commission Exhibit #3; (28).

CLAIMANT'S CONSTITUTIONAL CHALLENGES

Claimant raises a number of constitutional challenges to the Commission's adjudication process. His arguments are specified in great detail in his brief dated July 5,

2005. His constitutional arguments will be addressed in turn.

A. Evidence of Executive Branch and Private Interest Pressure

Claimant contends that he has presented evidence of executive branch and private interest pressure on the Commission, which allegedly infringes upon the decisional independence of the Commission's administrative law judges ("ALJs"). He contends that this pressure results in the ALJs' actual and apparent bias. Claimant cites certain newspaper articles involving former Administrative Law Judge Eileen Harrison, as well as the affidavits of former Administrative Law Judge Michael White (Claimant's Exhibit #5) and former Administrative Law Judge Bill Daniels (Claimant's Exhibit #6).

I find that the evidence relating to former Administrative Law Judge Eileen Harrison should be stricken. Claimant makes reference to certain newspaper articles in his brief that were not admitted into the record. As such, they do not constitute evidence in this claim. I also note that the facts concerning Harrison have not been judicially determined. See Harrison v. Coffman, 35 F. Supp. 2d 722, 724, 727 (E.D. Ark. 1999). Thus, Claimant's references to Harrison will not be considered.

Regarding the affidavits of White and Daniels, it should be noted that neither of these individuals was informed of the basis for their dismissal. In section 13 of his affidavit, White states: "I was given no reason whatsoever for my termination when it happened or subsequently, only being told that I was an 'at will' employee and could be fired for no reason...." Similarly, when addressing his termination in section 14 of his affidavit, Daniels stated: "I was given no reason whatsoever for my termination when it happened or subsequently even though I continued to try to find out the reasons...." Further, it should be noted that neither White nor Daniels claims to have acted upon, or been influenced by,

the pressure they perceived.

I find that the affidavits of White and Daniels constitute speculation and conjecture, and therefore cannot be considered as evidence. According to their affidavits, neither former employee knows why he was fired; both former employees speculate a great deal concerning the pressure they believe to be placed upon other ALJs. "Speculation and conjecture cannot substitute for credible evidence." Smith-Blair, Inc. v. Jones, 77 Ark. App. 273, 277, 72 S.W.3d 560, ___ (2002). Neither former employee identifies any concrete action that they, or any other of the ALJs, took in response to such pressure - which suggests such pressure either did not exist or was of no moment.

Finally, regarding any allegation of actual bias on my part, I note section 5 of Claimant's Motion to Recuse: "It should be very clear that the undersigned believes that Judge Arey would not consciously intend to discriminate against the claimant in this case." Claimant fails to present any evidence of actual or apparent bias. Contrary to his brief, Claimant has not submitted credible evidence of either bias or pressure on the Commission's ALJs, by either the executive branch or private interests.

B. Separation of Powers

Claimant notes that safeguards must be established to protect the decisional independence of the Commission's ALJs. If these safeguards are non-existent, or do not work, Claimant argues that there is a violation of the principle of separation of powers, as established in Ark. Const. art. IV, § 2. Claimant cites information concerning Harrison as well as the affidavits of White and Daniels as evidence that safeguards either do not exist or have failed completely. Thus, Claimant argues, the entire adjudicative process of the Commission violates the separation of powers doctrine.

The short answer to this contention is that Claimant has not produced any evidence to support his claim. As noted above, the evidence concerning Harrison will not be considered; the affidavits of White and Daniels constitute speculation and conjecture, not evidence. There is simply no evidence before me to establish that there is a violation of separation of powers in the adjudicative process.

As a general proposition, the separation of powers concern raised by Claimant appears in a different context: it typically arises where an agency's employee participates in a proceeding as advocate while another employee of that same agency is the adjudicator. See Suzanne Antley, The "Appearance of Fairness" Versus "Actual Fairness": Which Standard Should the Arkansas Courts Apply to Administrative Agencies?, 16 U. Ark. Little Rock L.J. 587, 609 (1994). Antley notes concerns regarding "internal ex parte communications" and "quasi-judicial proceedings in which agency employees may appear before one another." Id. at 589-90. Of course, no other Commission employees are involved in the claim before me; thus, the separation of powers argument brought by Claimant is not applicable here.

Further, the Full Commission recently held its adjudicative process to be free of separation of powers concerns. See Bland v. Baxter Reg'l Med. Ctr., Full Workers' Compensation Commission Opinion filed August 16, 2005 (F204378). There, the Commission specifically rejected "the affidavits of two former administrative law judges" as proof of the absence of institutional integrity. Id. As the Arkansas Supreme Court has observed, "[a]dministrative agencies may possess a combination of powers from the coordinate branches without violating the separation of powers principle." Arkansas Motor Carriers Association v. Pritchett, 303 Ark. 620, 624, 798 S.W.2d 918, ___ (1990). As one

commentator notes:

The Workers' Compensation Commission is the premier example of an administrative agency vested with the power to make factual determinations affecting the rights of private parties. Amendment 26 to the constitution authorizes the General Assembly to provide the "means, methods, and forum" for adjudicating the amount of compensation to be paid by employers for injuries or death of employees. This comprehensive grant of power to the General Assembly is the most obvious way to reconcile the functions of the Commission with separation of powers [limits]....

L. Scott Stafford, Separation of Powers and Arkansas Administrative Agencies: Distinguishing Judicial Power and Legislative Power, 7 U. Ark. Little Rock L.J. 279, 333 (1984). Claimant fails to demonstrate how the Commission's "combination of powers" violates the separation of powers principle; the Full Commission has held that it does not.

C. Due Process

Claimant next raises a due process claim. He notes that the administrative adjudicative process must allow for ALJs to exercise independent judgement free from external pressures. Any process subject to external pressures violates the parties' procedural process rights.

Again, the short answer to this contention is that Claimant has not produced any evidence to support his claim. The evidence concerning Harrison will not be considered; the affidavits of White and Daniels constitute speculation and conjecture, not evidence. Yet again, there is simply no evidence to establish that there is a violation of Claimant's procedural due process rights in the Commission's adjudicative process.

The Full Commission recently held its adjudicative process to be free of due process concerns. See Bland v. Baxter Reg'l Med. Ctr., Full Workers' Compensation Commission Opinion filed August 16, 2005 (F204378). In Bland, the Commission cited and quoted from

Douglas v. International Paper Co., Full Workers' Compensation Commission Opinion filed August 18, 1994 (E213574 & E212573); that opinion states in part:

[T]he workers' compensation system is replete with safeguards. The primary focus of the due process safeguards is that everyone has a fair trial, not the best trial. The focus is on the opportunity to be heard. Under our workers' compensation system, a claimant is afforded much more than the minimal elements of due process. Claimants have the right to a hearing, can compel discovery, subpoena witnesses, and appeal an unfavorable decision.

Id. (citations omitted). The Commission has held that its adjudicative process comports with procedural due process requirements; Claimant presents no credible evidence to the contrary.

DISCUSSION

A. Average Weekly Wage

At the June 15, 2005 hearing, Respondents offered to stipulate that Claimant's temporary total disability benefits rate is \$333.00, and that his permanent partial disability rate is \$250.00. Claimant could not agree to that proposed stipulation. However, in his post-trial letter dated June 27, 2005, Claimant's counsel wrote: "The claimant can stipulate to respondents ttd and ppd rates." Therefore, based upon the agreement of the parties, I find that Claimant's rate for temporary total disability benefits is \$333.00; his rate for permanent partial disability benefits is \$250.00.

B. Compensability

Claimant worked for the Respondent employer for over six years prior to his compensable September 1, 2001 injury. He described two accidents on that date.

Q. All right. After you had the injury September -- well, tell the Judge, in your own words, what happened on September 1, 2001.

A. I was working in an apartment complex, by myself, and I was running wire overhead. And the plumber had material thrown about, and I slipped, tripped, kind of did a Superman-style dive, and hit the bottom plate of a wall, new construction wall. And I landed on my lower wrist, upper wrist, however you want to call it, and it just jammed everything. My arms went numb pretty quick. I threw my fit, and I kept working, and then I did a slip-trip again, soon thereafter, where my feet went up in the air, and I came down on my right buttock and my right forearm. And, at this point, I pretty much laid up most of the day. I didn't do a whole lot more. I hurt. I piddled. It wasn't a very constructive day. You know, I had a talk with the person involved and the job supervisor.

Q. With regard to the messes left laying about by the plumber?

A. Yes.

Q. Now, the persons who would be reading this record if it's appealed will be wondering what you mean when you say "like this." The first injury, for the record, you indicated that you were -- you landed forward, face forward, palms down. Is that correct?

A. Yes.

Q. When you hit the floor?

A. Yes.

Q. The bottom plate of --

A. The bottom plate, yes.

Q. All right. And you say that shocked the area of the palms, as well as up into the shoulders?

A. Yes.

Q. Now, the second injury you indicated that you -- now, by the way, did your full weight fall on the palms of your hands?

A. Yes, it did.

Q. And did your wrists also -- were they part of that catching yourself?

A. Yes.

Q. Okay. Now, the second injury, describe the mechanics of how you fell as best you can.

A. Once again, I was wiring overhead and my feet came out from underneath me, and I kind of went back and I landed on my right hip or buttock.

Q. Were you on a --

A. On a concrete slab.

Q. Were you standing on your feet on the floor, or were they actually on a stilt or on a ladder?

A. I was on the floor, on a concrete floor.

Q. And then, when you fell, what part of your body hit -- struck the floor first?

A. Probably my right hip.

Q. Okay. And then what?

A. My right forearm. And then I went all the way back and landed flat on my back.

Q. Did you hit your head?

A. Yes, I did.

As noted, Respondents accepted the injury to Claimant's right upper extremity as compensable. Claimant underwent right ulnar transposition surgery and carpal tunnel release surgery to treat his right upper extremity. Respondents have paid medical benefits, temporary total disability benefits, and permanent partial disability benefits for a 19% permanent impairment rating to Claimant's right upper extremity.

However, Claimant also alleges injuries to his left upper extremity, low back, and brain, as well as a mental injury. In this proceeding, Claimant seeks a determination of compensability as to these alleged injuries.

1. Left Upper Extremity Injuries

On August 26, 1992, Dr. R. Vowell recorded Claimant's "complaints of pain in both elbows with numbness in the little fingers of both hands. He has been told in the past that he has tardy ulnar nerve palsy." Claimant also complained of "hypesthesia of the ulnar nerve distribution, particularly on the left." Dr. Vowell opined that Claimant "probably has a tardy nerve palsy in the left, although it is not to the point that it causes any muscular atrophy."

Claimant's left upper extremity complaints also appear in medical records from 1999. On January 18, 1999, Dr. Gregory Elders recorded that "[s]ince he was a teenager... [Claimant had] carpal tunnel..."; Claimant had presented with diffuse arthralgia. On July 13, 1999, Dr. Elders recorded that "[t]he hands hurts [sic] especially working overhead." Dr. Norman Simon recorded Claimant's November 30, 1999 report that "[h]e feels as though his left hand is also puffy and swollen...."

At the hearing, Claimant complained of carpal tunnel and ulnar problems in his left upper extremity. He explained: "My left arm, now that I've used it more, it's right where my right arm was. It feels like a toothache in the elbow. My fingers are numb."

However, the medical records do not reflect a complaint of left upper extremity pain or problems until June of 2002, nine months after his September 1, 2001 incidents. Dr. Thomas Knox examined Claimant on January 14, 2002, upon referral by Dr. Lonnie Robinson "for evaluation of paresthesias and numbness in the right hand." At his deposition, Dr. Knox noted that he was evaluating Claimant specifically for his right upper extremity, and that his records do not reflect a left upper extremity complaint. Although Claimant presented to Dr. Knox several times in the interim, a reference to left upper extremity problems is not found until a note dated June 3, 2002: "He is having similar

symptoms of parasthesias of the small finger in the left hand which he had prior to getting the nerve conduction studies here.” On August 5, 2002, Dr. Knox referred to Claimant’s left hand complaints as one of “two new complaints.” Similarly, on June 19, 2002, Dr. Robinson recorded that Claimant “is now having numbness in the ulnar two digits of his left hand and probably has an ulnar neuropathy on the left as well” (emphasis supplied).

Dr. Bruce Robbins reported on September 5, 2002 that, following a nerve conduction study and EMG needle examination of Claimant on that same date, there was evidence of bilateral carpal tunnel syndrome and problems with Claimant’s left side ulnar nerve. Dr. Robinson noted on September 11, 2002 that Dr. Knox recommended “carpal tunnel release and ulnar nerve transposition on the left.”

In a letter dated October 27, 2002, Dr. Michael Moore noted Claimant’s history of developing bilateral hand symptoms after sustaining a jamming injury to both hands on September 1, 2001. Based on the records he reviewed, Dr. Moore opined: “I cannot state that Mr. Veloria had a pre-existing medical condition prior to the injury that he reported....” Dr. Robinson’s April 13, 2004 office note states his belief that Claimant “developed these symptoms when he was employed previously”; Dr. Robinson refers to Claimant’s left upper extremity complaints.

Dr. Knox was deposed on May 22, 2003. As to the January 14, 2002 visit, Dr. Knox confirmed that his notes do not give a history of trauma to either wrist. He also agreed that Claimant’s patient medical history questionnaire did not list or report any symptomatology in Claimant’s left upper extremity. Dr. Knox agreed that if Claimant had mentioned a left upper extremity problem prior to June 3, 2002, Dr. Knox “would have had some mention of them, yes,” in his records. Dr. Knox reported that he was not aware of Claimant’s 1992 left

ulnar nerve complaints. The following exchange occurred:

Q. Would it require speculation or conjecture to say that his need for left ulnar nerve transposition now is related to some incident in December [sic] of 2001, as opposed to his more long standing complaints?

A. I would have to say that the symptoms that were evaluated were cubital tunnel, as to when they were caused, I can't really give you [an] answer on that.

Q. Okay, would it require speculation or conjecture to do so?

A. I, yeah, I would imagine.

...

Q. Okay, focusing somewhat on the ulnar nerve transposition that you recommended, with respect to the carpal tunnel releases that you've recommended, is there any way that you can state to a reasonable degree of medical certainty, whether the claimant's need for those surgeries is related to a his alleged work injury, as opposed to more long standing complaints of the pain in his hands and wrists that he had prior to the alleged incident?

A. Once again, I have no idea on that.

Q. Okay, would you have to engage in speculation or conjecture?

A. I would, I would.

Dr. Knox later confirmed "that there's a possibility that his left side on the ulnar nerve could have been a more chronic problem," but as to his carpal tunnel complaints, "definitely they're of a more recent onset." Dr. Knox discounted Claimant's 1999 self-report of carpal tunnel problems.

A compensable injury is one "arising out of and in the course of employment." Ark. Code Ann. § 11-9-102(4)(A)(i). In order to prove a compensable injury, a claimant must prove, among other things, a causal relationship between his employment and the injury. McMillan v. U.S. Motors, 59 Ark. App. 85, 90, 953 S.W.2d 907, ____ (1997). It is not essential that the causal relationship between the accident and the disability be established

by medical evidence. Wal-Mart Stores, Inc. v. Stotts, 74 Ark. App. 428, 432, 49 S.W.3d 667, ___ (2001).

If the claimant's disability arises soon after the accident and is logically attributable to it, with nothing to suggest any other explanation for the employee's condition, we may say without hesitation that there is no substantial evidence to sustain the commission's refusal to make an award. But if the disability does not manifest itself until many months after the accident, so that reasonable men might disagree about the existence of a causal connection between the accident and the disability, the issue becomes one of fact upon which the commission's conclusion is controlling.

Hall v. Pittman Constr. Co., 235 Ark. 104, 105-6, 357 S.W.2d 263, ___ (1962) (citations omitted). Claimant must sustain his burden of proving a compensable specific incident injury by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(i). "Preponderance of the evidence" means evidence of greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, ___ (1947).

I find that Claimant did not sustain his burden of proving by a preponderance of the evidence that his left upper extremity cubital and carpal tunnel syndromes are compensable. Specifically, the records reflect that Claimant experienced similar or related problems in his left upper extremity in 1992 and 1999. Then, following his compensable right upper extremity injury on September 1, 2001, the medical records do not report any complaints regarding his left upper extremity until June 3, 2002, nine months later. Claimant does not provide a satisfactory explanation for this delay. Further, Dr. Knox, who treated Claimant's symptoms in both upper extremities, agreed that it would require speculation or conjecture to relate Claimant's left upper extremity problems to his alleged work injuries. Thus, the preponderance of the evidence does not reflect a causal connection between Claimant's

September 1, 2001 incidents and his left upper extremity complaints.

2. Low Back Injury

Dr. Vowell's August 26, 1992 report also records Claimant's complaints of back pain and that "[h]e states that he was involved in a MVA in 1973 and suffered fractures in his back and was in the hospital for 2 months. ... He states that he has severe pain in his back that radiates into his right leg and down into his foot." Dr. Vowell opined that Claimant might have a chronic low back strain. Upon cross-examination at the hearing, Claimant conceded that he has "had low back pain, off and on, a lot of my life, due to the work that I was doing at the time."

Claimant contends that he injured his back on September 1, 2001. He testified to constant back pain and that his "right side is damaged. They tell me its from my back that causes my leg to drag. The pain, the numbness in my leg, stems from my back." Only his right leg is affected.

However, in the initial medical records following his September 1, 2001 incidents, Claimant did not report any problems with his back. Dr. Robinson's September 7, 2001 note records that Claimant discussed abdominal and incisional hernias, as well as right knee pain. Upon cross-examination, the following exchange occurred:

Q. So would you agree with me that you did not tell Dr. Robinson any history about back problems, or any kind of a work-related incident?

A. I don't know. I don't remember.

...

Q. ... Didn't you tell me at your deposition, under oath, that you did not know whether any particular incident at work for [the Respondent employer] was responsible for your back problems?

A. Right.

Q. Is that true?

A. Yes, it is.

Claimant admitted marking a March 8, 2001 medical record to indicate “low back pain” as an illness which he had in the past.

Dr. Robinson first recorded a complaint of back pain on December 5, 2001, when he reported that “[b]ack also gives him a lot of problems.” The medical records are then silent concerning Claimant’s back pain until August 28, 2002, when Dr. Robinson recorded the following in an office note:

43 YO WM w/ back pain in his right lower back radiating to his right leg. No numbness or tingling, just a sharp pain that radiates at times like lightening. This has been going on for about 6 wks. Initially started about July 9.

This particular record does not report any information concerning Claimant’s September 1, 2001 incidents. An MRI of Claimant’s lumbar spine dated August 29, 2002 gives an impression of “L4-L5 disc herniation on the right....”

Claimant was referred to Dr. Doug Foster for treatment of his back complaints. On a patient information form dated September 18, 2002, in response to the question, “Is your problem related to a Workers’ Compensation Accident?”, Claimant left the form blank. Similarly, in a questionnaire for Dr. Foster’s office completed that same date, Claimant failed to indicate that his back pain began on the job. Dr. Foster’s September 18, 2002 clinic note records that Claimant’s back and right leg pain “has been on-going for a year,” but it makes no reference to his September 1, 2001 incidents. Dr. Foster’s April 24, 2003 clinic note indicates that Claimant’s options are to live with his back pain, undergo conservative care, or perhaps undergo a decompression which would consist of an L4-5 lumbar microdiscectomy.

Claimant has undergone two epidural steroid injections without permanent relief for his low back pain. At the hearing, he testified that he would like to have the surgery suggested by Dr. Foster.

The parties deposed Dr. Foster on March 11, 2005. Upon examination by Respondents' counsel, the following exchange occurred:

Q. Okay. And here we are -- this is about seven months after you saw -- April 24th is about seven months after you saw Mr. Veloria the first -- the first time, and in the interim, you had seen him a few times. And my question is, at any of those times, from September 18th, all the way up until April 24th, 2003, did he ever indicate to you at -- at -- at any point in the interim that he felt his back problems were work-related?

A. Not that I'm aware of, no.

After reading Claimant's description of his September 1, 2001 incidents as recorded in Claimant's April 21, 2003 deposition, Dr. Foster stated: "Based -- Mr. Veloria's history of falling in September 1, 2001, two falls, he tripped both times, and his initial history and physical and parts that I haven't got as well as his MRI and complaints, I can't dictate within a realm of medical certainty that his back problems are work-related." Dr. Foster later reiterated: "I can't state within the realm of medical certainty that his injury and need for treatment is work-related."

I find that Claimant did not sustain his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his back on September 1, 2001. Claimant's complaints of pain in his low back and right leg predate September 1, 2001; Dr. Vowell's 1992 record makes reference to a 1973 motor vehicle accident. Claimant did not mention any problem with his back on September 7, 2001, when he was examined by Dr. Robinson. He complained about his back on December 5, 2001, but the medical record

makes no reference to an injury at work. Likewise, when Claimant again complained of his back on August 28, 2002, he made no reference to work, but did reference an initial injury on July 9, 2002. It is telling that Claimant never related his need for treatment of his back to his work accident to Dr. Foster, the specialist treating his back. And indeed, given Claimant's description of his two incidents on September 1, 2001, Dr. Foster cannot say that Claimant's need for treatment is related to his work. Thus, Claimant failed to prove a causal relationship between his employment and his injury.

3. Organic Brain Injury

Claimant contends that he sustained an organic brain injury on September 1, 2001. At the hearing, Claimant did not testify as to any specific physical injury to his brain. Commission Exhibit #3 is an Order granting Respondents' Motion in Limine; the Order excludes the report and testimony of Dr. Vann Smith concerning Claimant's alleged organic brain injury. There are no medical records in evidence that discuss Claimant's alleged brain injury.

The employee has the burden of proving a compensable injury. Carman v. Haworth, Inc., 74 Ark. App. 55, 59, 45 S.W.3d 408, ___ (2001). To be compensable, an injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i). Claimant must sustain his burden of proving the elements of a compensable injury by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(i).

I find that Claimant has not sustained his burden of proving an organic brain injury. In particular, there is no medical evidence in the record establishing such an injury; further,

there are no objective findings of such an injury. Thus, Claimant cannot prove the elements necessary to establish a compensable organic brain injury.

4. Mental Injury

Claimant's wife testified that Claimant was arrested for drug use in 1989. Claimant testified that when he was released from the Department of Correction, he was allowed to attend sessions at Ozark Counseling, a "mental health place." A referral form contains a note dated September 14, 1992 that reports Claimant's "drug dependence appears in remission, but he is depressed." Dr. Robert Yoder recorded the following in a letter dated December 4, 1992, addressed to a parole officer:

[Claimant] admitted to being to being depressed, but was not tearful. He states that on one occasion he thought of committing suicide, but the gun was empty. At that time he denied suicidal feelings.

Dr. Yoder believed Claimant had "a major depression without psychosis."

The record provides additional evidence of mental health concerns predating Claimant's September 1, 2001 incidents. At the hearing, he admitted to counseling or treatment in 1989 relating to marital problems. On a health questionnaire completed August 16, 1999, Claimant indicated that he had "frequent unhappiness or depression."

At the hearing, Claimant's son and wife testified to his changed mental condition, before and after September 1, 2001. Claimant's son testified that Claimant is harder to get along with; but, he was not aware of Claimant's emotional or psychological treatment or problems prior to September of 2001. Claimant's wife testified that he was harder to get along with, upset, and depressed after September of 2001. However, she was unaware of Dr. Yoder's 1992 statement concerning Claimant.

At the hearing, Claimant testified as follows:

Q. All right, sir. Were you ever, Mike, in the kind of shape, mentally, before you had this September, 2001, accident?

A. No, I wasn't.

Q. The shape you're in now.

A. No, I was not.

Q. And you have gone to see Dr. [Dollins]. Is he a psychiatrist?

A. [Dr. Dollins], yes.

Claimant believed that his mental condition had improved "a bit" after he received treatment for Dr. Dollins. On cross-examination, when asked if he told Dr. Dollins that he had no emotional problems at all prior to his September 2001 injury, Claimant replied: "I assume I did."

On or about September 15, 2004, a form was completed in connection with Claimant's initial visit with Dr. Stephen Dollins. Under the heading "Significant Medical History," Claimant did indicate depression; Claimant related his depression to his work injury. He denied any history of drug use. This September 15, 2004 form indicates that Dr. Dollins diagnosed Claimant with "major depression, single episode, severe."

The record also contains Dr. Dollins' September 15, 2004 report. It noted: "[Claimant] reports he had been in good mental and emotional health until suffering a severe injury at work in 2001...." Claimant also reported "He had no emotional problems prior to his injury in 2001. ... He has had outpatient medication management but has not previously been in counseling." This form also repeats Dr. Dollins' diagnosis of "major depression, single episode, severe."

The parties deposed Dr. Dollins on January 20, 2005. He agreed that if a patient

gave him inaccurate or incomplete information, that would affect his ability to make an informed opinion about that patient's condition. He conceded that Claimant did not reveal his past drug history, certain unreported activities, and an alternate date for the start of his back problems. Dr. Dollins was troubled by Claimant's failure to reveal his prior motor vehicle accident. However, although this may have affected his credibility, it did not seem to affect Dr. Dollins' ability to evaluate Claimant's psychiatric problem: "I still feel, you know, my main focus was on his psychiatric history and I don't see anything there that I would have any concern about. But it does appear that, given that, that he was less than truthful in detailing his medical history."

Although Claimant seemed to attribute his depression to his back problem, that did not seem to affect Dr. Dollins' diagnosis.

He said arm and neck injury, too, and he had several arm surgeries. I mean, even if we discount the back, just the injuries to his arm and the subsequent surgeries -- I mean, most of the medical records I've seen are all just focused on his arms. All these surgeries for carpal tunnel release and nerve stuff and pain in his arms and bone scans of his wrist, even discounting the back, even if he only suffered arm injuries in the fall, then that appears to be a significant factor in his being unable to work and in his problems with subsequently developing depression.

Dr. Dollins assessed Claimant with "a pretty bad depression." He did not perform any testing; he diagnosed Claimant based on his symptoms and his interview. Dr. Dollins used "the five axis, DSM-IV diagnostic assessment in my evaluation."

Upon examination by Claimant's counsel, Dr. Dollins adhered to his diagnosis, even after being provided with the foregoing information not revealed by Claimant.

Q. All right. And Doctor, based upon a reasonable degree of psychiatric certainty, medical certainty, do you have an opinion -- first of all, do you have an opinion as to whether or not the diagnosis that you have just given is causally related to Mr. Veloria, a man who worked for Zimdahl Electric some

six years, was a licensed electrician, until an injury of September 1st, 2001, when he had the injuries that you've described. Do you have an opinion, first of all, as to whether or not, based upon a reasonable degree of medical certainty, whether or not the diagnosis that you've described is causally related to that?

A. Yes.

Q. And what is that opinion, Doctor?

A. I believe it was causally related.

Q. All right, sir. Doctor, with regard to reasonable and necessary medical care, what would you believe would be appropriate for Mike now as we sit here today, taking into consideration what you saw when you saw Mike back on September 15th, 2004? What would you think would be reasonable and appropriate medical care arising out of this diagnosis?

A. I felt he needed to continue in the intensive outpatient program. The therapist did also. I've spoken with her, the therapist who was treating him there. We all wanted him to continue in the program and felt it was going to be helpful to him. And had -- that was our recommendation.

...

Q. All right, sir. Doctor, based upon a reasonable degree of psychological certainty, or medical certainty, do you believe that Mr. Veloria, unless and until he can have the treatment that he needs for this major depression, would not be able to perform a job eight hours a day, five days a week, without having to absent himself from the job situation because of the symptoms?

A. Yeah. I think completely independently from his physical symptoms, he has a bad enough depression going on, at least when I saw him in September, that would prevent him from working.

A mental injury is not a compensable injury unless it is caused by physical injury to the employee's body. Ark. Code Ann. § 11-9-113(a)(1). This means that a physical injury must precede and cause the mental injury in order for the mental injury to be compensable; the mental distress must be the result of the claimant's own physical injuries. Amlease, Inc. v. Kuligowski, 59 Ark. App. 261, 264-65, 957 S.W.2d 715, ___ (1997). Further, the claimed mental injury shall not be considered an injury arising out of and in the course of

employment or compensable unless it is demonstrated by a preponderance of the evidence. Ark. Code Ann. § 11-9-113(a)(1). Finally, no mental injury is compensable unless it is diagnosed by a licensed psychiatrist or psychologist and unless the diagnosis of the condition meets the criteria established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders. Ark. Code Ann. § 11-9-113(a)(2); see Branscum v. RNR Constr. Co., 60 Ark. App. 116, 959 S.W.2d 429 (1998).

I find that Claimant sustained his burden of proving by a preponderance of the evidence that he suffered a compensable mental injury. A physical injury preceded and caused Claimant's depression. As Dr. Dollins noted: "All these surgeries for carpal tunnel release and nerve stuff and pain in his arms and bone scans of his wrists, even discounting the back, even if he only suffered arm injuries in the fall, then that appears to be a significant factor in his being unable to work and in his problems with subsequently developing depression." There is a causal connection between Claimant's employment and his mental injury or illness. Claimant testified that his mental condition prior to the injury was better than his mental condition afterward; his testimony is corroborated by the testimony of his wife and his son. While Claimant's condition may have been serious in 1992, the evidence does not contradict Claimant's testimony and that of his wife and son as to the time period more immediately prior to his September 1, 2001 incidents.

It should be noted that Dr. Dollins has been in the private practice of psychiatry since 1993; at his deposition, Respondents' attorney stated that he did not have "any doubt of your qualifications or expertise...." Dr. Dollins' deposition also established that he made use of the Diagnostic and Statistical Manual of Mental Disorders. Dr. Dollins identified the specific DSM code for his diagnosis of "major depression, single episode, severe."

C. Medical Benefits

Claimant seeks reasonably necessary medical benefits in connection with his compensable injuries. His June 27, 2005 letter outlining his contentions requests such benefits for “the injuries to his left upper extremity cubital and carpal tunnel syndrome, back, organic brain injury[, and] ... depression....”

An employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508(a). Reasonably necessary medical services “may include that necessary to accurately diagnose the nature and extent of the compensable injury; to reduce or alleviate symptoms resulting from the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury.” Greer v. Phillip Mitchell Construction, Full Workers’ Compensation Commission Opinion filed February 14, 2003 (E906565) (citations omitted). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. Hamilton v. Gregory Trucking, ___ Ark. App. ___, ___ S.W.3d ___ (March 16, 2005).

1. Mental Injury

I find that Claimant sustained his burden of proving his entitlement to reasonably necessary medical benefits in connection with his compensable mental injury. In his deposition, Dr. Dollins noted that Claimant’s compensable right upper extremity injury and related treatment are a factor in his depression; this establishes a connection between the injuries and Claimant’s need for medical treatment. Further, Dr. Dollins identified Claimant’s continuation in the intensive outpatient program as reasonable and necessary medical care

in relationship to his depression. He also opined that Claimant's depression was serious enough to prevent him from working, as of September of 2004. Thus, continuing medical treatment for Claimant's depression is reasonably necessary.

2. Other Claimed Injuries

With regard to Claimant's claimed left upper extremity cubital and carpal tunnel syndromes, low back injury, and organic brain injury, I find that he did not sustain his burden of proving entitlement to medical benefits. As found above, these injuries are not compensable. Thus, Claimant is not entitled to medical benefits for these claimed injuries. See Ark. Code Ann. § 11-9-102(4)(F)(i).

D. Temporary Total Disability Benefits

Claimant seeks temporary total disability benefits from October 24, 2003, to a date to be determined. Claimant seeks these benefits with regards to his compensable right upper extremity injuries, as well as the four injuries that he claims are compensable in this proceeding.

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. Fred's, Inc. v. Jefferson, ___ Ark. ___, ___ S.W.3d ___ (March 31, 2005). "Disability" means incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury. Ark. Code Ann. § 11-9-102(8). The "healing period" is that period for healing of an injury resulting from an accident. Ark. Code Ann. § 11-9-102(12). The healing period ends when the employee is as far restored as the permanent nature of his injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that

condition, the healing period has ended. K II Constr. Co. v. Crabtree, 78 Ark. App. 222, 228, 79 S.W.3d 414, ___ (2002). The claimant bears the burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits. See Ark. Code Ann. § 11-9-704(c)(2).

1. Right Upper Extremity Injuries

At the hearing, Claimant testified to continuing problems in his right arm. "I still have a little bit of a throb in my elbow, but, basically, my right arm is numb. I still have a little bit of the carpal tunnel throb, fingers numb. I'm not able to hold a phone. You know, just bending the arm, it goes to sleep still." These conditions continue despite Claimant's right ulnar transposition and carpal tunnel release surgeries.

Dr. Knox performed these surgeries on Claimant's right upper extremity; he summarized his treatment of Claimant in a letter dated April 2, 2004. As to Claimant's February 26, 2002 ulnar nerve transposition, he wrote: "At his follow up visit on June 3, 2002, I noted that rehab efforts with his right upper extremity were coming along quite nicely." The letter indicates that, with regard to his right upper extremity, Claimant's subsequent complaints involved carpal tunnel syndrome. Following his September 2, 2003 right open carpal tunnel release, Claimant underwent therapy. Dr. Knox wrote: "I last examined Mr. Veloria on October 6, 2003. I would place him at maximum medical improvement from his right carpal tunnel release as of that date. He was released to return to work, with a lifting restriction of 25 lbs."

On April 22, 2004, Dr. Robinson signed a form statement containing the following language: "Further, I believe that [Claimant's] right arm has not reached maximum medical improvement at this time, and that a referral to Dr. Knox, an orthopedic surgeon, is

reasonable and necessary to provide this man with proper medical care.”

I find that Claimant has not sustained his burden of proving entitlement to temporary total disability benefits from October 14, 2003, to a date to be determined. It is more persuasive that the specialist treating Claimant’s right upper extremity, Dr. Knox, believes that Claimant is at maximum medical improvement as of October 6, 2003. Thus, the preponderance of the evidence indicates that Claimant’s healing period ended in October of 2003, so that he is no longer entitled to temporary total disability benefits with regard to his right upper extremity complaints.

2. Mental Injury

At the hearing, Claimant’s testimony indicated that his depression began when he figured out that his physical condition would not improve; his depression improved after treatment by Dr. Dollins. He stated: “I think, overall, it’s probably a bit better. I have moments not as severe -- I’m not as severe as I once was. This didn’t happen immediately after I got hurt. I mean, once it sunk in, I think the depression sunk in.”

As to the extent or length of Claimant’s depression, Dr. Dollins testified at his deposition:

Q. Oh, okay. Now, you say single episode major depression. What does that mean, single episode?

A. Just that he’s had one bout of depression, although it’s dragged out for a while. He’d been in treatment for, I believe, about a year and a half at the point that I saw him, and on anti-depressant medications. It had been one continuous episode rather than a bout of depression years ago, a period of remission, then another bout. When patients have had more than one separate episode of depression with a period of remission in between, it’s classified as major depression recurrent. In the case where the patient has only had one episode of depression, regardless of the length of it, it’s classified as a single episode.

Dr. Dollins believed that “completely independently from his physical symptoms, he has a bad enough depression going on, at least when I saw him in September, that would prevent him from working.”

Where a claim is by reason of mental injury, an employee shall be limited to twenty-six weeks of disability benefits. Ark. Code Ann. § 11-9-113(b)(1). The term “healing period” is noticeably absent from this section. Hope Livestock v. Knighton, 67 Ark. App. 165, 171, 992 S.W.2d 826, ___ (1999). Even if a claimant’s healing period for his physical injury has ended, that Claimant may still be entitled to temporary total disability benefits for twenty-six weeks due to mental injury. See Raper v. Drew Mem’l Hosp., Full Workers’ Compensation Commission Opinion filed June 30, 2005 (F210237).

I find that Claimant sustained his burden of proving by a preponderance of the evidence that he is entitled to twenty-six weeks of temporary total disability benefits under Ark. Code Ann. § 11-9-113(b)(1). As noted above, Claimant’s son testified that Claimant is harder to get along with after his injury; Claimant’s wife testified that he was upset and depressed after his incidents. Dr. Dollins testified that Claimant’s depression “dragged out for a while” and that Claimant had been in treatment for “about a year and a half at the point that I saw him” on September 15, 2004. This indicates that Claimant’s depression extended at least as far back as the date Claimant was declared to be at maximum medical improvement for his right upper extremity problems, October 6, 2003. Dr. Dollins also testified that Claimant’s depression was bad enough in September of 2004 that it “would prevent him from working.” Claimant was disabled from earning wages due to his mental injury; he is thus entitled to temporary total disability benefits for twenty-six weeks, commencing on and from October 14, 2003.

3. Other Claimed Injuries

I find that Claimant did not sustain his burden of proving entitlement to temporary total disability benefits with regard to his left upper extremity cubital and carpal tunnel syndromes, low back injury, and organic brain injury. As found above, these injuries are not compensable. Thus, under the statute, Claimant is not entitled to disability benefits for these injuries. See Ark. Code Ann. § 11-9-102(4)(F)(i).

E. Permanent Impairment Rating

Claimant seeks an additional 3% permanent impairment rating to his right upper extremity. Claimant's June 27, 2005 letter states: "The claimant also believes that he is entitled to the additional 3% impairment rating given by Dr. Knox as it arises out of a computerized machine that detects subjectivity." The parties stipulated that Respondents have paid permanent partial disability benefits for a 19% impairment rating; the dispute seems to stem from the fact that Dr. Knox rated Claimant at 22% impairment in his right upper extremity.

In his April 2, 2004 letter, Dr. Knox noted that Claimant was initially referred to him for an evaluation of paresthesias and numbness in Claimant's right hand; Claimant "reported the onset of these symptoms in August or September, 2001." Dr. Knox assessed carpal tunnel syndrome of recent onset and long standing ulnar neuropathy of the elbow. Of course, Respondents treated Claimant's right upper extremity complaints as compensable. With regard to Claimant's rating, Dr. Knox's letter states:

He recently had an impairment evaluation utilizing the Dexter system, a computer hardware/software system designed for the evaluation and rehabilitation of individuals with upper extremity (hand, wrist, elbow, or shoulder) musculoskeletal impairment. This system is licensed by the American Medical Association to use the Guides to the Evaluation of

Permanent Impairment, 4th Edition, in a software format. It calculates impairment ratings based on level of amputation, if applicable, and objective findings of active range of motion, static or manual muscle strength, and sensory loss.

This evaluation shows a right upper extremity impairment of 3% for abnormal motion, plus 20% grip strength impairment, for a total upper extremity impairment of 22%, which is 13% whole person.

Dr. Knox enclosed a copy of the evaluation report; it can be found in Claimant's Exhibit #1.

There are three statutory requirements to establish an entitlement to benefits for a permanent impairment. See Excelsior Hotel v. Squires, 83 Ark. App. 26, 33-34, 115 S.W.3d 823, ___ (2003); Schalski v. Family Cleaners & Laundry, Full Workers' Compensation Commission Opinion filed March 3, 2004 (E711809). First, it must be determined that the compensable injury was the major cause of the impairment at issue. Ark. Code Ann. § 11-9-102(4)(F)(ii)(a). "Major cause" means more than fifty percent of the cause. Ark. Code Ann. § 11-9-102(14)(A). Second, any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical findings. Ark. Code Ann. § 11-9-704(c)(1)(B). Third, benefits for permanent impairment must be based on an impairment rating using the American Medical Association's Guides to the Evaluation to Permanent Impairment (4th ed. 1993) (hereinafter "Guides"). Ark. Code Ann. § 11-9-522(g); Workers' Compensation Commission Rule 34. A claimant must prove by a preponderance of the evidence that he is entitled to an award of permanent physical impairment. Schalski, supra; see Ark. Code Ann. § 11-9-704(c)(2).

I find that Claimant did not sustain his burden of proving that he is entitled to an additional 3% permanent impairment rating to his right upper extremity. Specifically, Claimant cannot support the additional impairment rating by objective and measurable

physical findings. Claimant offers no evidence concerning such findings other than Dr. Knox's April 2, 2004 letter. The letter notes that the evaluation is based on "active range of motion, static or manual muscle strength, and sensory loss." Such findings are not objective because they can come under the voluntary control of Claimant. See Ark. Code Ann. § 11-9-102(16)(A)(i); see also Department of Parks & Tourism v. Helms, 60 Ark. App. 110, 115, 959 S.W.2d 749, ___ (1998) (noting "there is authority to suggest active range-of-motion tests are based almost entirely on the patient's cooperation and effort"). Claimant failed to sustain his burden of proving entitlement to an additional 3% permanent impairment rating to his right upper extremity.

F. Attorney's Fee

Attorney's fees shall only be allowed on the amount of compensation for indemnity benefits controverted and awarded. Ark. Code Ann. § 11-9-715(a)(2)(B)(ii). This Opinion awards Claimant disability benefits based upon his compensable mental injury. I find that Respondents controverted Claimant's contention that his mental injury is compensable; they made it necessary for Claimant to obtain counsel, in order to secure related benefits for his mental injury. Thus, Claimant is entitled to an award of attorney's fees pursuant to the statute.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. Respondents' motion to strike Claimant's Brief and Response to Order Granting Motion in Limine should be, and hereby is, granted. Claimant's brief was not timely filed, and therefore will not be admitted into the record.
3. Claimant's constitutional challenges to the Commission's adjudication process

should be, and hereby are, rejected. Claimant did not submit credible evidence of either bias or pressure on the Commission's administrative law judges. Further, Claimant failed to demonstrate how the Commission's adjudicative process violates the separation of powers principle or does not comport with procedural due process.

4. Claimant sustained compensable injuries to his upper extremities on September 1, 2001.

5. The employee-employer-carrier relationship existed on September 1, 2001, and at all other relevant times.

6. Respondents accepted Claimant's right upper extremity as compensable and have provided medical benefits, temporary total disability benefits, and permanent partial disability benefits for a 19% impairment rating to Claimant's right upper extremity.

7. Respondents accepted Claimant's left upper extremity as compensable and provided medical benefits until Claimant was diagnosed with cubital and carpal tunnel syndrome in this extremity.

8. Respondents controvert the compensability of Claimant's alleged carpal tunnel syndrome and cubital tunnel syndrome in his left upper extremity.

9. By agreement of the parties, Claimant's rate for temporary total disability benefits is \$333.00; his rate for permanent partial disability benefits is \$250.00.

10. Claimant did not sustain his burden of proving the compensability of his left upper extremity cubital and carpal tunnel syndromes. Specifically, the preponderance of the evidence does not reflect a causal connection between Claimant's September 1, 2001 incidents and these problems in his left upper extremity. The medical records do not report any complaints regarding his left upper extremity until nine months after his September 1,

2001 incidents; Dr. Knox testified that it would require speculation or conjecture to relate Claimant's left upper extremity problems to his alleged work injuries.

11. Claimant did not sustain his burden of proving that his low back injury is compensable. Specifically, he failed to prove a causal relationship between his employment and his injury. The first recorded report of a back problem occurred on December 5, 2001, but that medical record makes no reference to an injury at work. His August 28, 2002 record of a back complaint again makes no reference to work, but does reference an injury on July 9, 2002. Finally, Claimant never related his need for back treatment to his work accident to Dr. Foster, the specialist treating his back.

12. Claimant failed to sustain his burden of proving that his alleged organic brain injury is compensable. There is no medical evidence in the record establishing such an injury. Further, there are no objective findings of such an injury.

13. Claimant sustained his burden of proving that his mental injury is compensable. Claimant's compensable right upper extremity injuries preceded and caused his mental injury. His corroborated testimony demonstrates that his mental condition was better prior to his accident, but much worse afterwards. Dr. Dollins diagnosed Claimant's "major depression" using the DSM-IV.

14. Claimant sustained his burden of proving his entitlement to reasonably necessary medical benefits in connection with his compensable mental injury. Dr. Dollins established that Claimant's compensable right upper extremity problems and related treatment are a factor in his depression. Dr. Dollins also identified Claimant's continuation in the intensive outpatient program as reasonably necessary medical care in relationship

to his depression.

15. Claimant did not sustain his burden of proving entitlement to reasonably necessary medical benefits in connection with his alleged left upper extremity cubital and carpal tunnel syndromes, low back injury, and organic brain injury. These injuries are not compensable; thus, Claimant is not entitled to related medical benefits.

16. Claimant did not sustain his burden of proving entitlement to temporary total disability benefits from October 14, 2003, to a date to be determined, based upon his compensable right upper extremity injuries. The specialist treating Claimant's right upper extremity, Dr. Knox, established that Claimant was at maximum medical improvement as of October 6, 2003.

17. Claimant sustained his burden of proving that he is entitled to temporary total disability benefits under Ark. Code Ann. § 11-9-113(b)(1) based upon his compensable mental injury. Testimony in the record, including that of Dr. Dollins, establishes that Claimant's depression extended at least as far back as the date Claimant was declared to be at maximum medical improvement for his right upper extremity problems, October 6, 2003. As of September of 2004, Dr. Dollins testified that Claimant's depression was severe enough that it "would prevent him from working." Thus, Claimant is entitled to temporary total disability benefits for twenty-six weeks commencing October 14, 2003.

18. Claimant did not sustain his burden of proving entitlement to temporary total disability benefits with regard to his left upper extremity cubital and carpal tunnel syndromes, low back injury, and organic brain injury. These injuries are not compensable; thus, Claimant is not entitled to disability benefits for them.

19. Claimant did not sustain his burden of proving entitlement to an additional 3%

permanent impairment rating to his right upper extremity. There are no objective and measurable physical findings in the record that would support an additional impairment rating.

20. Claimant is entitled to an award of an attorney's fee based upon the disability benefits awarded herein. Respondents controverted Claimant's contention that his mental injury is compensable.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact and Conclusions of Law set forth herein.

Claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by Claimant and one-half to be paid by Respondents in accordance with Ark. Code Ann. § 11-9-715 and Death and Permanent Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

D. FRANKLIN AREY, III
Administrative Law Judge

DFA/ml