

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F302526

JIMMY F. SINGLETON, EMPLOYEE	CLAIMANT
CITY OF PINE BLUFF, EMPLOYER	RESPONDENT NO. 1
ARKANSAS MUNICIPAL LEAGUE WORKERS' COMPENSATION TRUST, CARRIER	RESPONDENT NO. 1
DEATH AND PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED FEBRUARY 23, 2006

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

Claimant represented by HONORABLE KENNETH A. HARPER,
Attorney at Law, Monticello, Arkansas.

Respondent No. 1 represented by HONORABLE J. CHRIS BRADLEY,
Attorney at Law, North Little Rock, Arkansas.

Respondent No. 2 waived appearance at the hearing, as its
issues were not ripe for consideration.

Decision of Administrative Law Judge: Reversed, in part, and
vacated, in part.

OPINION AND ORDER

Respondent No. 1 appeals a decision of the
Administrative Law Judge filed on May 12, 2005. In that
opinion, the Administrative Law Judge made the following
relevant Findings Of Fact:

1. The stipulations agreed to by the parties are accepted as fact.
2. The claimant has proven by a preponderance of the evidence that his ophthalmic problems and conditions, as well as his post traumatic stress syndrome disorder are compensable consequences of his compensable injuries of March 1, 2003.
3. The claimant is entitled to treatment, both past and future, for complaints associated with his March 1, 2003, injuries, including his ophthalmic difficulties, specifically blurred vision, as well as post traumatic stress disorder.
4. The claimant is entitled to indemnity benefits for post traumatic stress syndrome; respondent No. 1 shall have credit for any benefits paid after March 25, 2004.
5. The claimant is entitled to an 8% rating to his lower extremity, as well as a 30% rating to the body as a whole.
6. The claimant has experienced a 50% wage loss over and above his 30% impairment rating to the body as a whole.
7. The respondents have controverted the compensability of claimant's ophthalmic injuries, claimant's entitlement to the impairment ratings given, as well as

claimant's entitlement to wage loss disability.

On appeal, respondents No. 1 (hereinafter, respondents), contest the 8% rating to the claimant's lower extremities and the 30% rating to the claimant's body as a whole. In addition, the respondents dispute a finding that the claimant is entitled to compensation for his glaucoma and other eye problems, in that the claimant made no specific contentions regarding these alleged injuries prior to the hearing. The respondents further contend that the claimant's glaucoma and other eye problems were neither injuries sustained on March 1, 2003, nor compensable consequences of that injury; that any impairment ratings issued were not based upon objective findings; and, that the claimant's failure to return to employment at the time of the hearing was due to his non-compensable illness coupled with his emotional state, and he is, therefore, not entitled to any wage loss above his anatomical rating. In the alternative, the respondents assert credit for indemnity benefits for post-traumatic stress syndrome paid after

March 25, 2004, should it be found that the claimant is entitled to indemnity benefits.

The claimant was undisputedly injured on March 1, 2003, in the line of duty while working as a police officer for the City of Pine Bluff. While in the process of assisting who he thought to be a disabled motorist, the claimant was shot in his left ankle, and he was struck on the right side of his head with a flashlight. Shortly thereafter, the claimant was taken to the emergency room of the Jefferson Regional Hospital where a CT scan revealed a soft tissue injury (concussion) to the claimant's right side of his head, with no acute calvarial fracture or intracerebral hemorrhaging demonstrated. X-rays of the claimant's left ankle revealed bullet fragments imbedded in the posterior aspect of the left talus, with small chip fractures also seen in that area. A subsequent MRI of the claimant's ankle conducted on April 3, 2003, confirmed that the claimant had sustained only a soft tissue injury to his left ankle with no major tendinous or other injury.

On March 25, 2003, an MRI of the claimant's brain revealed negative findings, indicating no abnormalities. The following day, the claimant was referred for an EEG by Dr. Elaine Wilson due to dizziness and headaches. This test was abnormal due to relatively minor sharp and slow wave activity seen in the left temporal leads. The testing physician, Dr. Bradley S. Boop, concluded that this was a "nonspecific finding" possibly associated with underlying paroxysmal (spasms or seizure) disorder.

The claimant continued to complain of headaches and vision problems. Therefore, on April 24, 2003, Dr. Jonathan Robertson of the Robertson Family Clinic conducted laboratory testing. When the results of this lab work came back normal, Dr. Robertson referred the claimant to Dr. Scott C. Claycomb, an ophthalmologist with Family Eye Care Associates of Warren/Monticello. On May 2, 2003, Dr. Claycomb diagnosed the claimant with "possible early glaucomatous visual field deficits". Otherwise, the claimant's eye examination was "relatively unremarkable". In his report of that visit, however, Dr. Claycomb recommended

that the claimant have his blood sugar levels checked, as well as his thyroid and hemoglobin.

Dr. Robertson next referred the claimant to Dr. Lon Burba for a neurological examination. On May 20, 2003, a comprehensive examination by Dr. Burba revealed that all of the claimant's physical findings were normal. Dr. Burba's impression was that the claimant suffered from post-traumatic headaches. Suspecting that the claimant's headaches might originate in his neck, Dr. Burba recommended that he undergo imaging studies of his neck.

On June 10, 2003, the claimant was seen for a neurosurgical evaluation by Dr. Scott Schlesinger. Like Dr. Burba, Dr. Schlesinger found the claimant's neurological examination to be normal, as was the claimant's recent brain MRI. Dr. Schlesinger concurred that the claimant was suffering from post-concussive headaches, which he expected to completely resolve within 4 to 6 weeks. Further, Dr. Schlesinger commented that from a neurosurgical standpoint, there was no treatment available for the claimant's condition, and that there was nothing on which to

base a permanent physical impairment rating. Dr. Schlesinger deferred further treatment of the claimant to Dr. Burba.

On October 2, 2003, Dr. Burba conducted a subsequent EEG study of the claimant's brain due to his continuing complaints of headaches, periods of confusion, and disorientation. This, too, was an abnormal EEG study, characterized by occasional left temporal sharp activity which, Dr. Burba stated, may reflect an area of cortex irritation in this region of the claimant's brain. Like Dr. Boop, Dr. Burba stated that this was a "non-specific" finding, and he added that this EEG was "not much changed" compared to his previous EEG.

Neuro-ophthalmologist, Dr. Andrew W. Lawton, examined the claimant for his vision problems on October 2, 2003. Of his findings from this examination, Dr. Lawton wrote:

I found no organic explanation for the reported decrease in vision in Mr. Singleton's left eye. In fact, when he was dilated, I dissociated his eyes using a 4 diopter base-up prism over his right eye and he read 20/25 with his left eye. I believe this is a conversion

reaction related to his left eye. He does have open angle glaucoma managed by Dr. Claycomb that appears unrelated to his trauma.

On February 25, 2004, the claimant presented to Dr. Jason G. Stewart with left ankle pain. Other than a mild amount of edema in the claimant's affected area, his ankle examination was otherwise normal. For example, Dr. Stewart noted that the claimant's toes were straight, that his sensation was normal, that his temperature and color in the affected area were normal. In addition, the position of the claimant's hindfoot, midfoot, and forefoot were normal, and he had normal range of motion in his affected area. Regarding the claimant's prognosis and degree of permanent physical impairment, Dr. Stewart stated:

Regarding his recovery, I think that he has reached maximum medical improvement at this time, but the AMA Guide to Permanent Impairment does not have a rating based upon residual bullet fragment. He does not have leg-length discrepancy, girth discrepancy, or any fractures, fusions or amputations and therefore cannot give him a rating at this time.

On March 25, 2004, the claimant was seen by Dr. Barry Baskin. In his report of that examination, Dr. Baskin made the following comments:

Jimmy [the claimant] is back in for follow up. Dr. Jason Stewart saw him and since the bullet was lodged in the bone of his foot he felt like to [remove it] would cause more damage than good and he feels like it should be left alone. The patient's date of injury was 3/01/03. He has mild traumatic brain injury, although that has dramatically improved. He has persistent headaches, left foot pain and some decrease in the vision out of the left eye. Dr. Andrew Lawton has seen the patient and did not feel like his visual problem was related to the accident. That will thus not be a ratable condition. He has been seeing psychology for counseling for his PTSD and does not seem to be getting much benefit from that and I think we will discontinue that.

Further in this report, Dr. Baskin noted that the claimant had a residual antalgic gait on the left due to his gunshot wound, a diagnosis of post traumatic stress syndrome, and mild cognitive deficits. Otherwise, the claimant's examination was unremarkable. Using the AMA Guides, 4th edition, Table 2 on page 142, Dr. Baskin

assigned the claimant with an 8% permanent physical impairment to the body as a whole based on his mild mental status impairment. In addition, Dr. Baskin assigned the claimant with a 10% permanent physical impairment to the body as a whole for emotional and behavior impairment, based upon Table III on page 142 of the Guides. Further, Dr. Baskin gave the claimant an 8% whole person impairment rating for his "traumatic headaches", which the doctor opined were migraine in nature. Finally, using Table 13 on page 148 of the Guides, Dr. Baskin gave the claimant an 8% whole body impairment rating for his bullet wound to his left ankle and resulting antalgic gait. As of his May 6, 2004, examination of the claimant, Dr. Baskin noted that the claimant was receiving retirement benefits from his work, as well as social security benefits.

The claimant developed edema in his left lower extremity and was sent for a left venous doppler ultrasound. This study, which was conducted on June 8, 2004, revealed no definite left lower extremity venous pathology. On July 8, 2004, Dr. Baskin stated that the claimant was continuing to

have problems with increased edema in his left lower extremity, and that he suffered from depression.

On August 5, 2004, Dr. W.R. Oglesby drafted a letter of response to Ms. Misty Brandon of the Municipal League Workers' Compensation Trust. In that letter, Dr. Oglesby stated the following:

Mr. Jimmy Singleton was seen at Delta Counseling Associates earlier this year and terminated treatment only after a few visits. His diagnosis was depression and Post Traumatic Stress Disorder which are treatable conditions from which full recovery was expected. Any mental impairment he may have had at the time of his visits here was considered temporary.

Dr. Oglesby further stated that although his group did not normally assign impairment ratings, he disagreed with Dr. Baskin's conclusions concerning the claimant's percentage of mental impairment, or that the claimant had reached maximum medical improvement for his mental injury.

On September 9, 2004, the claimant was assessed for impairment by Dr. William F. Blankenship of Ortho Arkansas. Based upon his comprehensive assessment of the

claimant's medical records, including a review of the numerous diagnostic studies performed since the date of the claimant's compensable injury, Dr. Blakenship opined that the claimant had sustained no permanent impairment of his left ankle. More specifically, Dr. Blankenship stated:

... [R]egarding a rating for his left foot, which is based on an antalgic gait as described by Dr. Baskin, there is a disagreement. This is a subjective gait. Although it may be rated in the permanent impairment, there is no objective basis for any permanent impairment rating for the structures around the left ankle. In the records furnished, there are no objective findings that mention any permanent structural damage to the areas he complained of.

Being a orthopaedic, Dr. Blankenship declined to comment on the claimant's mental impairment rating.

In the Pre-Hearing Order filed December 6, 2004, the parties stipulated that the claimant sustained a compensable injury to his left ankle and head on March 1, 2003, and that he reached maximum medical improvement and his healing period ended for these injuries on March 25,

2004. These stipulations were accepted at the hearing of February 11, 2005. Moreover, by agreement of the parties, the issues to be litigated at the hearing were limited to the claimant's extent of anatomical impairment and wage loss, if any. No other issues were presented for determination at the hearing. However, as the respondents have pointed out, in her opinion, the Administrative Law Judge decided *sua sponte* that the claimant's ophthalmic problems and conditions, are compensable consequences of his March 1, 2003, compensable injury. In addition, the Administrative Law Judge awarded medical treatment, both past and future, for complaints associated with his March 1, 2003, injuries, including his ophthalmic difficulties, specifically blurred vision, as well as medical treatment and benefits pursuant to A.C.A. § 11-9-113 for his post traumatic stress disorder. The respondents are correct in that the issues of compensability and award of benefits for the claimant's ophthalmic problems as well as benefits related to his post traumatic stress syndrome disorder were not properly raised prior to or during the hearing on this

claim. Moreover, the issue of medical treatment, past or future, for any condition associated with the claimant's compensable injury was not raised prior to or at the hearing, and there is no indication from the record that reasonable and necessary medical treatment is a controverted issue at this time. Rule 25(a)&(b), of the Arkansas Workers' Compensation Rules states the following:

(a) Parties appealing or cross-appealing to the Full Commission from an order or award of an Administrative Law Judge or a single Commissioner shall specify in the notice of appeal or cross-appeal all issues to be presented.

(b) All legal and factual issues should be developed at the hearing before the Administrative Law Judge or single Commissioner. The Commission may refuse to consider issues not raised below.
(Effective March 1, 1982)

Moreover, the Supreme Court of Arkansas has repeatedly stated that failure to obtain a ruling from the trial court is a procedural bar to consideration of an issue on appeal. Madden v. Aldrich, 346 Ark. 405, 58 S.W.2d 342 (2001); Estate of Donley v. Pace Indus., 336 Ark. 101, 984

S.W.2d 421 (1999). Likewise, the Commission has repeatedly held that an Administrative Law Judge may not impose a statutory penalty *sua sponte*, in that this is a denial of due process. Therefore, it is axiomatic that it is improper for an Administrative Law Judge to raise an issue, such as compensability, for the first time in her opinion. By doing so, the Administrative Law Judge puts herself in the shoes of the claimant's counsel, and essentially "makes the party's argument for him". Ilo v. State, 350 Ark. 138, 85 S.W.3d 542 (2002). As the issue of the compensability of the claimant's ophthalmic difficulties was not raised prior to or at the hearing, it was improper for the Administrative Law Judge to raise this issue *sua sponte* in her opinion. Consequently, the decision of the Administrative Law Judge concerning the compensability of the claimant's glaucoma and ophthalmic condition, as well as all future benefits associated with this condition, including medical and permanent impairment, are hereby vacated.

Likewise, the claimant did not raise the issue of entitlement to § 113 benefits for his post traumatic stress

syndrome or medical benefits associated with the treatment of this disorder, prior to or at the hearing. Therefore, the Administrative Law Judge's decision concerning these benefits associated with the claimant's post traumatic stress syndrome disorder is hereby vacated.

Concerning the claimant's degree, if any, of permanent physical impairment to his ankle, Dr. Baskin used Table 13 on page 148 of the Guides, to assign the claimant with an 8% whole body impairment rating for the bullet wound to his left ankle and resulting antalgic gait. In contrast, Dr. Stewart declined to give the claimant an impairment rating for his left ankle, noting that the claimant's "gait and station" were normal, and that the AMA Guides do not contain a rating based upon residual bullet fragments. Likewise, Dr. Blankenship concluded that there was "no objective basis for any permanent impairment rating for the structures around the [claimant's] left ankle". The Commission has the authority to resolve conflicting evidence and this extends to medical testimony. Foxx v. American Transp., 54 Ark. App. 115, 924 S.W.2d 814 (1996). Moreover,

the Commission is entitled to review the basis for a doctor's opinion in deciding the weight of the opinion. Reeder v. Rheem Mfg. Co., 38 Ark. App. 248, 832 S.W.2d 505 (1992). There is no requirement that medical testimony be expressly or solely based on objective findings, only that the record contain supporting objective findings. Swift-Eckrich, Inc. v. Brock, 63 Ark. App. 118, 975 S.W.2d 857 (1998). Further, a medical opinion based solely upon claimant's history and own subjective belief that a medical condition is related to a compensable injury is not a substitute for credible evidence. Brewer v. Paragould Housing Authority, Full Commission Opinion filed Jan. 22, 1996 (Claim No. E417617). A review of the basis for the three doctors' opinions regarding the claimant's impairment to his left ankle requires a review of the AMA Guides. Upon referring to Table 13 on page 148 of the Guides, it is evident that Dr. Baskin based his rating on the claimant's antalgic gait. However, as the respondents correctly assert, this is a subjective finding which is not supported by objective medical evidence. As previously noted,

Dr. Stewart's examination of the claimant exactly one month prior to Dr. Baskin's examination, revealed that the claimant's gait was normal. In fact, the only abnormality noted by Dr. Stewart during his February 25, 2004, examination of the claimant's left ankle was swelling, which the doctor stated could be treated with anti-inflammatories. Furthermore, Table 13 of the Guides rates impairments to station and gait resulting from neurologic syndromes involving the brain, brain stem, spinal cord, and peripheral nervous system. As previously noted, the medical records are devoid of objective evidence that establishes that the claimant sustained any permanent neurologic injury in the form of brain damage as a result of his accident. The claimant's emergency treatment revealed that the claimant sustained a soft tissue injury to the right side of his head, with no cranial fractures or intracerebral hemorrhaging. Although residual symptoms from the claimant's brain trauma were noted in various medical reports thereafter, these residuals were said to be mild and resolving. Otherwise, neurological examinations and

diagnostic studies of the claimant's brain have repeatedly produced normal findings, with the exception of a "non-specific" finding being indicated on the claimant's EEG studies. As both Dr. Stewart and Dr. Blankenship correctly opined, a review of the AMA Guides, particularly sections 3.2, 3.2(b), and Table 36 on page 76, reveals that the claimant is not entitled to any degree of permanent physical impairment for his ankle. Miraculously, the claimant sustained no permanent structural damage to his ankle as a result of his gunshot wound. Even though the claimant still has bullet fragments in his left ankle which cause discomfort and occasional swelling, this condition is not ratable under the Guides. Because Dr. Stewart and Dr. Blankenship based their opinions regarding impairment of the claimant's ankle on the appropriate section of the Guides, and because the claimant has failed to prove that he sustained structural damage to his left ankle, the opinions of Dr. Stewart and Dr. Blankenship are hereby given more weight than the opinion of Dr. Baskin concerning the claimant's left ankle impairment. Therefore, we find that

the claimant is not entitled to a permanent physical impairment rating to his left ankle and the decision of the Administrative Law Judge in this regard should be reversed.

Furthermore, the claimant has failed to prove by objective medical evidence that he has sustained any permanent mental or emotional impairment in that he voluntarily and prematurely discontinued his treatment for post traumatic stress syndrome and depression under the direction of Dr. Oglesby. Therefore, it is impossible to determine to what degree, if any, these disorders may have permanently affected the claimant's ability to earn a living. Diagnostic studies reveal that the claimant sustained only a soft tissue injury, or mild concussion, as a result of his accident on March 1, 2003. Diagnostic testing conducted by highly qualified medical personnel failed to conclusively show anything other than that the claimant sustained a mild concussion. While it could be argued that the slight abnormality seen on the claimant's EEG, combined with the claimant's current reported symptoms constitutes objective evidence of an organic brain injury,

there is no objectively conclusive medical evidence that the claimant sustained a permanent organic brain injury as a result of his compensable injury that is ratable under the Guides. For example, MRI's of the claimant's brain conducted on March 25, and June 10, 2003, returned with normal findings. EEG studies conducted on March 26, and October 2, 2003, revealed an occasional left temporal sharp activity, but this abnormality was consistently said to be "non-specific", possibly associated with a seizure disorder. In other words, neither doctor who interpreted these EEG studies stated with a degree of medical certainty that this observed abnormality was a result of the claimant's compensable injury. It is well established that medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Ark. Code Ann. §11-9-102(16)(B). Where a medical opinion is sufficiently clear to remove any reason for the trier of fact to have to guess at the cause of the injury, that opinion is stated within a reasonable degree of medical certainty. Huffy Service First v. Ledbetter, 76 Ark. App. 533, 69 S.W.3d 449 (2003).

Further, the record is devoid of any evidence that the claimant has suffered a seizure since his compensable injury, nor has he been definitively diagnosed with a seizure disorder. Therefore, the suggested likelihood of the claimant suffering from future seizures is speculative, and is not a proper basis on which to base an impairment rating. Moreover, the claimant's neurological examinations have consistently shown normal findings, and the claimant's antalgic gait has been attributed to his ankle injury, as opposed to a neurological deficit or condition. Furthermore, even though the claimant's headaches were thought by Dr. Burba, Dr. Schlesinger, and Dr. Baskin to be "post-concussive", Dr. Schlesinger indicated that they are treatable with medications and will eventually resolve. Therefore, we find that the claimant has sustained no permanent impairment to his brain and no structural impairment to his head. Because the claimant is not entitled to a rating for his head injury, he is not entitled to wage loss based thereon.

The Arkansas Workers' Compensation Law provides that when an injured worker's disability condition becomes stable and no further treatment will improve that condition, the disability is deemed permanent. In order to be entitled to any wage loss disability in excess of permanent physical impairment, the claimant must first prove by a preponderance of the evidence that she sustained permanent physical impairment as a result of the compensable injury. Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 278, (1998). If the employee is totally incapacitated from earning a livelihood at that time, he is entitled to compensation for permanent and total disability. See, Minor v. Poinsett Lumber & Manufacturing Co., 235 Ark. 195, 357 S.W.2d 504 (1962).

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001). To be entitled to any wage-loss disability benefit in excess of permanent physical impairment, a claimant must first prove, by a preponderance

of the evidence, that he or she sustained permanent physical impairment as a result of a compensable injury. Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000).

In as much as we find that the claimant has failed to prove by a preponderance of the evidence entitlement to permanent partial disability benefits as he has failed to prove that he sustained a compensable permanent physical impairment, we further find that the claimant has failed to prove entitlement to any wage loss disability.

Based upon the above and foregoing, we find that the compensability of his ophthalmic problems and conditions was not properly raised by the claimant and was, therefore, improperly determined by the Administrative Law Judge *sua sponte*. Likewise, the issue of entitlement to benefits pursuant to Ark. Code Ann. §11-9-113, as well as, additional medical benefits for the claimant's post traumatic stress disorder were not properly raised by the parties prior to the hearing and were improperly determined by the Administrative Law Judge *sua sponte*. We further find that the claimant has failed to prove by a preponderance of the

evidence that he is entitled to a permanent physical impairment to his left ankle or for his head injury. Having established that the claimant has failed to prove that he sustained a compensable anatomical impairment, we further find that the claimant has failed to prove that he sustained any wage loss disability. Therefore, the decision of the Administrative Law Judge is hereby reversed and the claimant's claim for anatomical impairment and wage loss are hereby denied. Further, the findings rendered *sua sponte* by the Administrative Law Judge regarding the claimant's ophthalmic problems and conditions as well as the awards of additional medical benefits and of §113 benefits for the claimant's post traumatic stress syndrome are hereby vacated.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

Commissioner McKinney concurs.

CONCURRING OPINION

I fully concur with the principal opinion. I write separately only to address the weight of the evidence with regard to the issues decided *sua sponte* by the Administrative Law Judge.

Even if, for the sake of argument, the claimant's glaucoma and ophthalmic condition *could be* considered a potential consequence of the claimant's compensable head injury, the preponderance of the evidence fails to support a finding that this condition is causally connected to the claimant's compensable head injury. Dr. Lawton stated unequivocally that the claimant's left eye open angle glaucoma appeared to be unrelated to his right sided head trauma. The mere fact that the claimant testified that he had not experienced problems with his eyes prior to his injury is not sufficient, in and of itself, to establish a causal connection between his glaucoma and his compensable injury. A compensable injury must be established by medical evidence supported by objective findings as defined in Ark.

Code Ann. §11-9-103(16). Moreover, an employee is required to show that a causal connection exists between the injury and his employment. Gerber Products v. McDonald, 15 Ark. App. 226, 691 S.W.2d 879 (1985). The claimant in this instance has failed to present medical evidence supported by objective findings that establishes a causal connection between his glaucoma and ophthalmic condition and his compensable injury and/or his employment. Although the claimant has not made a claim, *per se*, for this condition, the objective medical evidence fails to establish a causal connection between this condition and the claimant's compensable injury. Accordingly, even if this issue were properly before the Commission, the weight of the evidence would mandate reversal as the evidence fails to support a finding that the claimant's ophthalmic condition is a compensable consequence or otherwise causally related to the his compensable head injury.

KAREN H. MCKINNEY, Commissioner

Commissioner Turner concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

I must respectfully concur in part and dissent in part from the Majority opinion. Specifically, I concur with the Majority's finding to vacate the Administrative Law Judge's award of benefits relating to the claimant's ophthalmic and post traumatic stress syndrome benefits and his entitlement to associated benefits. However, I must respectfully dissent from the portion of the decision finding that the claimant is not entitled to receive an impairment rating due to his admittedly compensable ankle injury. Likewise, I must respectfully dissent from their finding that he did not sustain an organic brain injury to support an award of an impairment rating. Lastly, I must dissent from the Majority's finding that the claimant is not entitled to receive wage loss benefits.

The Majority finds that the claimant did not sustain an organic brain injury and that he should not have been given impairment ratings for his brain or ankle injury.

They further find that the claimant should not be entitled to receive wage loss benefits because at this time he has allegedly only shown that he sustained a scheduled injury to his ankle. In my opinion, the claimant has shown that he sustained an organic brain injury. He has also shown that he should be entitled to impairment ratings based off of both that injury and his admittedly compensable ankle injury. Lastly, since the claimant has shown he sustained an organic brain injury, which is unscheduled in nature, I find that he should be entitled to wage loss benefits.

In my opinion, the claimant's entitlement to an impairment rating for his head must be dealt with in two separate aspects. The first is in regard to his mental injury. The second is his entitlement to benefits based off an injury to his head itself.

However, I do find that the claimant has shown that he is entitled to an impairment rating based off an organic brain injury and that such an injury was properly adjudicated by the Administrative Law Judge. In my opinion, the claimant sustained a compensable organic brain injury

and is entitled to the 8% and 10% previously assessed by Dr. Baskin based on his brain injury. The claimant was rendered unconscious due to a blow to the head. The respondent does not dispute that he sustained an injury to the head. Rather, they argue that he did not sustain an organic brain injury caused by physical trauma to the head. In my opinion, the record consistently shows that the claimant did sustain an organic brain injury as a result of being struck in the head.

On the date of the compensable injury a CT Scan was performed on the claimant. It revealed soft tissue swelling on the right side of the claimant's head. Shortly thereafter he presented with persistent headaches and dizziness. The record is devoid of any indication that the claimant had ever suffered from similar symptoms in the past. Further evidencing the claimant's brain injury is the Electroencephalography performed on March 26, 2003, which indicated that the claimant had abnormal brain activity.

_____ On March 24, 2003, a report from Drew Memorial Hospital indicated that the claimant suffered a "severe

headache, secondary to concussion and head trauma with short term memory loss." Further evidencing the claimant's brain injury is the note dated May 5, 2003, which opined the claimant suffered from post-concussive headaches. Likewise, the note from Dr. Lon Burba, dated May 20, 2003 indicates the claimant lost consciousness for eight to twelve minutes and was disoriented and confused after being taken to the hospital.

Another abnormality in the claimant's brain was seen on October 2, 2003. On that date an EEG revealed that the claimant continued to have, "occasional left temporal sharp activity...". The report also indicated that the abnormal brain activity, "may reflect an area of cortex irritation in this region of the brain."

Dr. Barry Baskin agreed with Dr. Burba's assessment that the claimant sustained a brain injury. As early as November 10, 2003, Dr. Baskin noted that the claimant had two abnormal EEGs. He noted that the claimant suffered from a concussion due to the incident. On January 22, 2004, he opined, "He has had causation for being

off work due to his brain injury, his headaches and the left foot injury." He further noted the claimant was having, "mild cognitive defects." Lastly, he noted the claimant's abnormal EEGs. In February 2004, Dr. Baskin noted that the claimant was suffering from short term memory problems. On March 25, 2004 he assigned the claimant an impairment rating and noted that the claimant had suffered from a mild traumatic brain injury. On the same date he noted that the claimant had mild cognitive defects. On January 10, 2005, Dr. Barry Baskin also opined that the claimant suffered from symptoms of a mild traumatic brain injury.

While the Majority opines that the abnormal EEGs both showed non-specific findings, I note that there is a multitude of medical reports, each indicating that the claimant suffered from an organic brain injury. Though the claimant has not been diagnosed with a particular disease or named dysfunction as a result of his EEG tests, he has consistently suffered from neurological problems and headaches after being struck on the head. In short, the facts show he was rendered unconscious for several minutes

after being struck, was disoriented and had no memory of being struck, that he consistently and continually suffered from what was diagnosed as post-concussive headaches, blurred vision, and short term memory loss. When considered in conjunction with the fact that the claimant had no such problems prior to the incident, I find that the claimant has shown causation and objective findings to show a compensable organic brain injury.

I further find that the claimant should be entitled to receive an anatomical rating based on his organic brain injury.

Ark. Code Ann. §11-9-704(c) (1) (B) (Repl. 2002) provides:

[a]ny determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings.

Further, permanent disability "benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment." Ark. Code Ann. §11-9-102(4) (F) (ii) (a) (Supp. 2002).

I find that his headaches and abnormal EEGs are due to the trauma to his head. The medical records support this finding in that they repeatedly diagnose the claimant with having post-concussive headaches. Likewise, there is an interruption in the claimant's brain activity as demonstrated by his EEGs. In my opinion, the admittedly compensable injury was the major cause of both of these conditions. The Majority opines that the claimant's ratings are not based on objective medical findings, however, in my opinion, all the ratings assigned to the claimant are shown by objective medical findings that establish the extent of the claimant's permanent physical impairment.

In Avaya v. Bryant, 82 Ark. App. 273; 105 S.W.3d 811 (2003), the Court of Appeals stated,

Any determination of the existence or extent of physical impairment must be supported by objective and measurable physical findings. Pursuant to Ark. Code Ann. § 11-9-522(g)(1) (Repl. 2002), the Commission must adopt an impairment rating guide to be used in the assessment of anatomical impairment, and the Commission has adopted the AMA Guides to be used in this assessment. The Commission is authorized to decide

which portions of the medical evidence to credit and to translate this medical evidence into a finding of permanent impairment using the AMA Guides. Thus, the Commission may assess its own impairment rating rather than rely solely on its determination of the validity of ratings assigned by physicians. (Internal citations omitted).

I further find the case of Swift-Eckrich, Inc. v. Brock, 63 Ark. App. 118; 975 S.W.2d 857, (1998) to be instructive in assessing the claimant's entitlement to an impairment rating for his organic brain injury. In Brock, the claimant sustained a compensable injury when she was knocked unconscious. CT scans revealed that the claimant had cerebral edema and interhemispheric hemorrhage. Neurological testing indicated the claimant had defects in verbal memory, higher level balance, and that she had loss of smell and taste due to cranial nerve damage. The Court of Appeals found that the claimant was entitled to a 5% permanent impairment rating. In making that determination, the Court noted that while the claimant had control over her complaints of pain and headaches, the CAT scan showed

results that were indicative of an objective finding.

Accordingly, they awarded benefits.

Dr. Baskin's explanation of his assignment of impairment ratings for the claimant is as follows:

using the AMA Guidelines Fourth Edition, Page 142, Table 2, under mental status impairments, Mr. Singleton has a mild mental status impairment but he is able to perform satisfactorily most activities of daily living. He has an 8% impairment to the whole person based on mental status impairment. In table III, Page 142, emotional and behavior impairment, Mr. Singleton would have an impairment in the mild category which would give him a 10% whole person impairment rating. Due to the patient's post traumatic headaches, which seem to be migraine in nature, he would have an 8% whole person impairment rating. Due to the patient's bullet wound to the left foot with antalgic gait using Table 13, Page 148 he would have an 8% impairment rating to the whole person.

It is unclear how Dr. Baskin arrived at the impairment rating assessed for the claimant's migraines. However, I find that the claimant should be entitled to a rating based on his loss of cognitive ability and involuntary abnormal brain functions.

More specifically, I find that the claimant should be entitled to a 14% impairment rating pursuant to page 143, Table 5 of the Guides. In calculating that amount I use the language which reads,

Paroxysmal disorder with predictable characteristics and unpredictable occurrence that does not limit usual activities but is a risk to the patient or limits performance of daily activities.

The Table further provides that such a patient would be entitled to receive a 0-14 % impairment rating. In this instance the claimant's first EEG noted that the activity could be related to an underlying paroxysmal disorder. Furthermore, the claimant was prescribed Depakote, a medication used for treating headaches and seizures. While the claimant has not suffered a known seizure and the record is not clear as to the reason the medication was prescribed, the results of his EEG indicate that he would still be at risk for having a seizure. In fact, since the claimant was taking anti-seizure medication, in my opinion, that is the likely explanation why he has had no known seizures. I also

note that as provided by the Guides on page 143, "the control of an episodic disorder does not necessarily prevent its being properly considered a permanent impairment." As the claimant suffers from an increased risk of having seizures in the future, I find that he should be awarded a 14% impairment rating pursuant to the Guides.

I further find that the claimant's short term memory loss and headaches would entitle him to an additional impairment rating pursuant to Table 2 and Table 3 of the Guides. These amounts should be the 8% and 10% previously assessed by Dr. Baskin. Located on page 142 of the Guides, Table 2 provides for an impairment rating for deficits in the general effects of, "organic brain syndrome, dementia, and some specific, focal, neurologic deficiencies." The Guides provide that the ability to document such conditions would include information regarding the claimant's capability regarding,

(1) orientation concerning time, person and place; (2) recent recall; (3) ability to remember and repeat a series of digits and repeat them in reverse order; (4) ability to perform serial

subtractions of 7s from 100 or 3s from 20; (5) ability to do other simple calculations; (6) ability to spell a word such as "world forward and backward"; (8) ability to repeat a short paragraph; (9) ability to understand and explain proverbs or abstract thoughts; and (10) judgment.

In my opinion, the language in the Guides indicating that the rating applies to neurological defects such as an organic brain injury indicates that the claimant's impairment rating was based on the organic brain injury rather than due to his Post Traumatic Stress Disorder. Furthermore, the medical reports indicated that the claimant sustained short term memory loss and a brain injury. Accordingly, I find the claimant sustained an organic brain injury which would be distinguishable from his depression. Accordingly, I find that Dr. Baskin's recommendation to give the claimant impairment ratings based on Table 2 and Table 3, located on page 142 of the Guides to be appropriate.

The Majority also finds that the claimant should not be entitled to receive an impairment rating based on his

ankle injury. Specifically, they argue that the Guides do not provide a rating for a defect in an ankle which occurred due to a remaining bullet fragment. They also note that Dr. Stewart and Dr. Blankenship declined to give the claimant an impairment rating for that reason. In my opinion, their opinions fail to consider whether the claimant is entitled to an impairment rating since the bullet fragments are an actual defect in the ankle. I note that the Commission is not bound by the ratings assessed by doctors in assessing an impairment rating. See, Avaya; supra. The medical records indicate the fragments will not be removed for fear of causing worse damage and it is apparent the claimant will suffer from swelling and pain, a gait derangement, and will have permanent residual problems associated with his ankle. Since it is undisputed these problems are due to his admittedly compensable injury and the bullet fragments that remain in the claimant's ankle, I find he should be entitled to receive an impairment rating for his ankle.

I find the case of Tom Williams v. Willamette Industries, ___ Ark. App. ___; ___ S.W. 2d ___; (CA 04-974,

March 16, 2005), to be instructive in determining whether the claimant is entitled to an impairment rating on his ankle. See also, Williams v. Willamette Industries, Claim No. E700242, (Full Commission Opinion Filed June 21, 2005). In Willamette, the claimant suffered from an admittedly compensable injury to his right foot, ankle, and lower leg. To treat these conditions, a fist sized mass of muscle tissue was grafted from the claimant's abdomen and grafted to his lower leg. As a result of the graft, the claimant suffered from an abdominal defect similar to that occurring from a hernia. The Commission found the claimant was not entitled to an impairment rating based on the abdominal defect because the Guides do not provide for impairment ratings in stomach conditions absent the presence of a hernia. The Court of Appeals reversed and remanded the case to the Commission in order to assign an impairment rating. The Court of Appeals indicated that while the claimant did not suffer from a hernia, that did not preclude a finding that he had suffered an impairment rating in accordance with the Guides. The Court of Appeals noted that the claimant

suffered a palpable defect in his abdominal wall and that the condition was due to his admittedly compensable injury. They further noted that while the doctor that had previously assigned an impairment rating to the claimant's condition used language from the Guides, the doctor never indicated that the claimant suffered from a hernia; instead he simply gave a rating based off the claimant's abdominal defects.

Id.

In my opinion, the claimant in the present case suffers from the same dilemma as the claimant in the Williams case. He suffers from an objective defect in his body which is undisputedly from his admittedly compensable injury. However, he also has the misfortune of having obtained that defect from a source not specifically covered by the Guides. Just as in Williams, the claimant's treating physician rated the claimant with an impairment rating based on what he believed to be the appropriate language in the Guides and based on the claimant's objective medical findings. However, unfortunately for the claimant, he now has bullet fragments in his ankle and the Guides do not

provide a rating for such a condition. Despite this, his doctor appropriately found that his defect was ratable under the Guides as there was still a way to rate the defect the bullet fragments caused to his ankle.

Specifically, the claimant in the present case was given an impairment rating based on gait derangement. The medical records are clear that he has bullet fragments that remain in his ankle and that as a result he has swelling, atrophy, and gait derangement due to being shot in the ankle. In my opinion, Dr. Baskin based the impairment rating on the objective defect of remaining bullet fragments and the claimant's resultant problems of swelling, atrophy, pain, and gait derangement.

In my opinion, it is contrary to the holding in Williams to find that the claimant now has to show that the cause for his condition is specifically considered in assigning an impairment rating; particularly when the ratings for ankle injuries in the Guides largely do not contain language requiring one to show the reason for the injury. Additionally, it is apparent that the claimant's

physician did not assign a rating entirely on the existence of bullet fragments, instead he worked within the confines of the Guides to assign a rating to the claimant's now defective ankle.

In my opinion, there is more than one way to properly assign the claimant an ankle rating due to his injury. I find that either using the portion of the Guides regarding ankle injuries, or the portion of the Guides pertaining to the central nervous system, that was apparently used by Dr. Baskins to be appropriate.

Specifically, I find that the Guides support a finding that the claimant is entitled to receive an impairment rating in the amount of 15% rather than the 8% previously assigned by Dr. Baskin. First, I note that this rating was assessed by using Table 13 on page 148, which deals with the nervous system. I find that Table 36, on page 76 should be used in assessing his gait derangement impairment. In my opinion, the claimant should be assessed with a 15% rating pursuant to (c) located in the "Mild category". This would indicate that the claimant had,

"Antalgic limp with shortened stance phase and documented moderate to advanced arthritic changes of hip, knee, or ankle" and would mandate the patient, "requires part-time use of cane or crutch for distance walking but not usually at home or in workplace."

Despite my preference to use a different chart in the Guides, in my opinion, Dr. Baskin's mechanism for assigning a rating is also appropriate. I find that the claimant would be entitled to an impairment rating based on the finding that the claimant suffered a palpable defect in his ankle due to the admittedly compensable injury. Just as in Williams, where the doctor assigned the rating on the claimant's resultant condition rather than whether the defect was due to a hernia, in the present case, the evidence indicates the claimant's rating was given on the resultant conditions that were directly due to the palpable defect of having bullet fragments in his ankle. There is no evidence that Dr. Baskin's assessment was based on any finding that the claimant's ankle impairment was due to a defect in his central nervous system. Rather, it appears

that he simply assigned a rating based on the end result to the claimant's ankle; which is an ankle that now has permanent defects in the form of swelling and resultant gait derangement.

Dr. Barry Baskin indicated on January 10, 2005, that he observed the claimant walking without his knowledge and observed the claimant walking with an antalgic gait. On the same date, Dr. Baskin noted the claimant's leg suffered from atrophy. Further, the medical records indicate that the claimant has suffered from swelling in his ankle since his surgery. I note that the claimant's post-injury MRI from April 3, 2003, indicates that the claimant's ankle has posterior joint effusion. Lastly, there is no doubt that the claimant still retains a portion of the bullet in his ankle, which has been the only explanation for his ankle pain and swelling.

Finally, I find that since the claimant has shown he has suffered from a compensable, ratable, permanent defect in the form of an organic brain injury and post

concussive headaches, he should be entitled to receive wage loss benefits.

The wage loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. The Commission is charged with the duty of determining disability. Cross v. Crawford County Memorial Hosp., 54 Ark. App. 130, 923 S.W.2d 886 (1996). In determining wage loss disability, the Commission may take into consideration the worker's age, education, work experience, medical evidence and any other matters which may reasonably be expected to affect the worker's future earning power. Such other matters are motivation, post-injury income, credibility, demeanor, and a multitude of other factors. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984). Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990).

In this instance, the claimant worked in law enforcement from the onset of his ability to work until the time of his injury. Accordingly, I find him to be a highly

motivated individual. Though the respondents argue that the claimant has hindered his ability to return to work by stopping therapy, I note that the claimant ceased therapy only after being advised to stop the sessions by Dr. Baskin on March 25, 2004. Furthermore, the claimant attempted to return to work after his injury but was sent home by his supervisor due to his inability to work. In my opinion, this was in part due to his headaches and the associated pain in his head due to the blunt trauma to his head. Furthermore, Dr. Baskin indicated that it was unlikely the claimant would ever be able to return to work in his prior profession. When considering the claimant's ongoing headaches, I find it unlikely that he would be able to perform a job requiring a great deal of concentration. Accordingly, his chances for finding employment replacing his income have become limited due to his compensable injury. As such, I find that the claimant should be entitled to receive wage loss benefits in the amount of 30% over and above his awarded impairment ratings.

I further find that the claimant should be entitled to receive impairment ratings in the amounts of 8% and 10% for his head injury and resultant loss of cognitive ability as previously assessed by Dr. Baskin. He should also be awarded a 14% rating for his abnormal brain function and risk of having seizures. Likewise, the claimant should have been awarded an impairment rating to his ankle since he suffers from an objective defect in his ankle.

For these reasons, I respectfully concur in part and dissent in part.

SHELBY W. TURNER, Commissioner