NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G008831

ELIZABETH L. JOHNSON, EMPLOYEE	CLAIMANT
BERRYVILLE SCHOOL DISTRICT, EMPLOYER	RESPONDENT #1
ARKANSAS SCHOOL BOARDS ASSOCIATION WCT, INSURANCE CARRIER/TPA	RESPONDENT #1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #2

OPINION FILED MAY 16, 2016

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

Claimant represented by the HONORABLE JASON M. HATFIELD, Attorney at Law, Fayetteville, Arkansas.

Respondent #1 represented by the HONORABLE CURTIS L. NEBBEN, Attorney at Law, Fayetteville, Arkansas.

Respondent #2 represented by the HONORABLE CHRISTY L. KING, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed September 22, 2015. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on March 19, 2015, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to an award of $3,500.00 for facial disfigurement pursuant to A.C.A. §11-9-524.

3. Claimant has met her burden of proving by a preponderance of the evidence that respondent is liable for payment of medical treatment received from the emergency room on September 29, 2012.

4. Claimant has met her burden of proving by a preponderance of the evidence that respondent is liable for payment of dental treatment provided by Dr. Brooks.

5. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a permanent physical impairment in an amount equal to 13% to the body as a whole for the injury to her left shoulder.

6. Claimant has met her burden of proving by a preponderance of the evidence that her permanent physical impairment rating for her brain injury equals 50% to the body as a whole as assigned by Dr. Back.

7. Claimant has met her burden of proving by a preponderance of the evidence that she is permanently totally disabled.

8. Claimant’s healing period ended on April 10, 2013.

9. Respondent #1 has controverted claimant’s entitlement to permanent total disability benefits.

We have carefully conducted a *de novo* review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We, therefore, affirm and adopt the September 22, 2015, decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. §11-9-809 (Repl. 2002).

Since the claimant’s injury occurred after July 1, 2001, the claimant’s attorney’s fee is governed by the provisions of Ark. Code Ann. §11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. §11-9-715 (Repl. 1996) with Ark. Code Ann. §11-9-715 (Repl. 2002). For prevailing on this appeal before the Full

Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of $500.00 in accordance with Ark. Code Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

SCOTTY DALE DOUTHIT, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's opinion finding that the claimant proved by a preponderance of the evidence that 1) she is permanently and totally disabled as a result of her October 1, 2010, compensable injury; 2) she sustained fifty percent (50%) permanent anatomical impairment as a result of her head/brain injury, as opposed to fifteen percent (15%) previously accepted by the respondents; 3) she is entitled to thirteen percent (13%) permanent anatomical impairment to the body as a whole, as opposed to one percent (1%) previously accepted by the respondents, for

her shoulder injury; 4) she is entitled to $3,500 for facial disfigurement, which is the maximum amount allowed under Ark. Code Ann. §11-9-524; 5) the respondents are liable for emergency medical treatment rendered to the claimant on September 29, 2012, and; 6) the respondents are liable for dental treatment provided by Dr. Brooks.

Injured workers bear the burden of proving by a preponderance of the evidence that they are entitled to an award for a permanent physical impairment. Moreover, it is the duty of this Commission to determine whether any permanent anatomical impairment resulted from the injury, and, if it is determined that such an impairment did occur, the Commission has a duty to determine the precise degree of anatomical loss of use. *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994); *Crow v. Weyerhaeuser Co.*, 46 Ark. App. 295, 880 S.W.2d 320 (1994). Physical impairments occur when an anatomical or physiological abnormality permanently limits the ability of the worker to effectively use part of the body or the body as a whole. Consequently, an injured worker must prove that the work-related injury resulted in a physical abnormality which limits the ability of the worker to effectively use part of the body or the body as a whole. Therefore,

in considering such claims, the Commission must first determine whether the evidence shows the presence of an abnormality which could reasonably be expected to produce the permanent physical impairment alleged by the injured worker. *Crow, supra*.

Ark. Code Ann. §11-9-704(c)(1) (Supp. 2009) provides that "[a]ny determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings." Objective findings are defined at Ark. Code Ann. §11-9-102(16)(A)(I) as those findings which cannot come under the voluntary control of the patient. When the Commission determines physical or anatomical impairment, complaints of pain, straight-leg raising tests, or active range of motion tests shall not be considered objective findings. Ark. Code Ann. §11-9-102(16)(A)(ii)(a)&(b). With regard to medical findings other than those which are specifically precluded from being considered objective, a medical finding may be considered objective only if it is the result of a diagnostic procedure which does not come under the voluntary control of the patient. *Department of Parks & Tourism v. Helms*, 60 Ark. App. 110, 959 S.W.2d 749 (1998). Moreover, test results that are based upon the patient's description of the sensations produced by

various stimuli are clearly under the voluntary control of the patient and therefore, by statutory definition, do not constitute objective findings. *Duke v. Regis Hair Stylists*, 55 Ark. 327, 935 S.W.2d 600 (1996).

The Commission has a duty to translate the evidence on all the issues before it into findings of fact. *Stone v. Dollar General Stores*, 91 Ark. App. 260, 209 S.W.3d 445 (2005); *Weldon v. Pierce Bros. Const. Co.*, 54 Ark. App. 344, 925 S.W.2d 179 (1996). Moreover, 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). The Commission has the duty of weighing the medical evidence as it does any other evidence, and the resolution of any conflicting medical evidence is a question of fact for the Commission to resolve. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001); *CDI Contractors McHale*, 41 Ark. App. 57, 848 S.W.2d 941 (1993); *McClain v. Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (1989).

There is no question that the claimant sustained serious, life-altering injuries as a result of her October 1, 2010, work-related accident. Furthermore, there is no question that the claimant sustained permanent physical impairment as a result of

those injuries, primarily to her shoulder and brain. The issue, then, is the degree of impairment that the claimant sustained.

First, with regard to her shoulder injury, the record demonstrates that the claimant suffered a SLAP tear to her left shoulder as a result of her 2010 accident that was surgically repaired by Dr. Knox in September of 2012. Prior to this procedure, however, the claimant's treating physician, Dr. Corsolini, had issued a one percent (1%) permanent physical impairment rating to the body as a whole as a result of the claimant's left shoulder injury. Subsequent to her surgery, Dr. Knox, by-and-through a physical therapist, namely, M. K. Smith, assessed the claimant with thirteen percent (13%) permanent physical impairment as a result of her compensable shoulder injury. A review of Smith's assessment, however, fails to reveal whether this rating was based on passive, objective range of motion and loss of strength testing, inasmuch as Smith's report fails to indicate that any objective measurement devices or instruments were utilized in this testing. Rather, the evidence indicates that the testing performed by Smith was active as opposed to passive, and thus came under the voluntary control of the claimant. Clearly an impairment rating based on active range of motion and

strength testing violates our statutory provisions governing anatomical impairment ratings in that any degree of anatomical impairment must be based upon objective findings from diagnostic procedures which do not come under the voluntary control of the patient. *Department of Parks & Tourism v. Helms, supra.*

The preponderance of the evidence of record in this claim demonstrates that Dr. Knox's shoulder impairment rating was based on subjective measures versus objective findings, inasmuch as the record is devoid of proof otherwise. Therefore, I would have to resort to speculation and conjecture, which I cannot do, (see, *Ark. Dept. of Correction v. Glover*, 35 Ark. App. 32, 812 S.W.2d 692 (1991), in order to find that this testing was passive and, therefore, resulted in objective findings. Dr. Knox's impairment rating, therefore, must be discounted in that it appears more likely than not to have been based on active range of motion and strength testing, the results of which came under the claimant's voluntary control.

Because Dr. Knox's impairment rating cannot be validated by objective findings and appears to be more likely than not an empirical measurement of the claimant's disability which resulted from her left shoulder injury, I must rely on Dr. Corsolini's

impairment rating, which identifies the basis for his measure of the claimant's permanent left shoulder impairment as found in the 4th edition of *The Guides*, and which was clearly based on objective findings. Therefore, Dr. Corsolini's impairment must stand as the correct impairment rating for the claimant's left shoulder, especially in view of the fact that the record shows that the procedure performed by Dr. Knox was successful in repairing the claimant's shoulder injury and that, by her own admission, she suffers no physical limitations associated with her left shoulder. Therefore, Dr. Corsolini's impairment rating must be given deference over Dr. Knox's rating.

Concerning the claimant's brain injury, the preponderance of the evidence in this claim shows that Dr. Halfaker's impairment assessment should be given deference over all others in this claim. Without rehashing the specific details of every psychological or neuropsychological evaluation conducted in this claim, I note that in March of 2011, Dr. Faitak concluded that the claimant met the criteria for "Cognitive Disorder due to traumatic brain injury, Post Traumatic Stress Syndrome, and Adjustment Disorder with mixed anxiety and depressed mood." I further note, however, that Dr. Faitak based this conclusion, in part, on the results of

the claimant's IQ testing which showed "markedly uneven" results in that some of the claimant's scores were very high while others were "high average range." Moreover, Dr. Faitak stated that the claimant's Full scale IQ of 84 failed to "adequately represent her true intellectual skills," which Dr. Faitak added should improve in time. All-in-all, Dr. Faitak concluded that the claimant had good verbal reasoning skills, that she had "maintained her fund of specific knowledge," and she showed slow but accurate reading skills. Among the claimant's noted deficits at that time were difficulty with tasks that required rapid responding of motor skills; slow thinking speed; poor concentration; a tendency to be "overwhelmed" by moderate levels of stimulation; diminished comprehension due to concentration difficulties; diminished self-esteem; post traumatic stress syndrome (PTSD), and; anxiety-related issues. Dr. Faitak failed to assign the claimant an impairment rating at that time, and he recommended that she be re-evaluated in one year.

Approximately five-and-a-half months later, the claimant underwent a neuropsychological evaluation with Dr. Whetstone, who agreed with Dr. Faitak's test results, which (just as Dr. Faitak had predicted), showed mild improvements in her full scale IQ and

processing speed. In terms of her personality assessment, Dr. Whetstone noted that the claimant demonstrated "phobic behaviors" which he opined may have begun to interfere with her life. In addition, Dr. Whetstone noted "some indication of variable effort and consistency of responding," which he attributed to the claimant's frontal lobe dysfunction. Dr. Whetstone diagnosed the claimant with cognitive disorder due to traumatic brain injury, PTSD, and adjustment disorder with mixed anxiety and depressed mood, which was essentially consistent with Dr. Faitak's diagnoses. At that time, however, Dr. Whetstone opined that the claimant had reached maximum medical improvement for her traumatic brain injury for which he assigned her forty percent (40%) permanent physical impairment.

Approximately one year after Dr. Faitak's assessment, Dr. Halfaker conducted a comprehensive neuropsychological evaluation of the claimant's cognitive functioning level and concluded that the claimant did, in fact, likely continue to experience "chronic, permanent neurocognitive impairment" as a result of her work-related accident and resulting head injury. However, Dr. Halfaker rated the severity of the claimant's neuropsychological dysfunction as within the "mild range" once related issues such as pain,

depression, sleep disturbance, generalized anxiety, health-related anxiety, fluctuating effort, symptom magnification, and secondary gain were taken into account. It is noted that Dr. Halfaker performed tests to measure malingering and effort, which according to Dr. Halfaker showed fluctuating results, which, in turn, indicated that the claimant suffers from a somatic disorder that keeps her "stuck in the patient role and producing verbal complaints that are in excess to that of expectation and what appears to be her actual level of functioning." Dr. Halfaker noted that this represented a "serious psychological overlay that results in a greater degree of perceived or expressed disability than the objective data and her actual level of functioning would warrant." Further, Dr. Halfaker questioned the claimant's PTSD diagnosis due to the fact that the claimant admittedly could not remember the accident or any other "significant traumatic features of the accident."

In conclusion, Dr. Halfaker agreed that the claimant's brain injury likely represented a "mild neurocognitive disorder" not otherwise specified due to traumatic brain injury, with a "considerable psychological overlay present." In other words, while Dr. Halfaker failed to make specific finding of

malingering on the claimant's part, he agreed with earlier medical observations that the claimant suffers from a somatization disorder. In addition, Dr. Halfaker opined that the claimant experienced a "generalized anxiety disorder in which she experiences excessive anxiety and worry regarding a number of events or activities that she finds difficult to control, especially her health." According to Dr. Halfaker, this anxiety disorder is part and parcel of her "personality functioning." Therefore, Dr. Halfaker concluded that the claimant was likely "misinterpreting or misattributing" her symptoms of anxiety to the residuals of her closed head injury. Moreover, compulsive personality features appeared to easily influence the claimant's obsession concerning her problems, which according to Dr. Halfaker, resulted in her viewing her otherwise mild neurocognitive problems "as being more severe than they actually are."

Dr. Halfaker concluded that the claimant experienced an adjustment disorder with mixed anxiety and depressed mood that had become chronic and which was associated with her perceived losses, and he assigned the claimant fifteen percent (15%) permanent physical impairment as a result of her traumatic brain injury.

During Dr. Halfaker's July 31, 2015, deposition, he clarified the fact that traumatic brain injuries typically "plateau" around twelve (12) months post-injury. I note that this is consistent with Dr. Faitak's opinion of the average healing time for such injuries. Furthermore, Dr. Halfaker stated that "significant cognitive decline is not expected unless a person with a brain injury has some kind of other condition present that influences it" after a year or two following the injury. Agreeing, therefore, that the claimant's brain injury had stabilized at the time of his March 2012 evaluation, Dr. Halfaker stated that it made no "neurological sense" that some of the claimant's scores were lower when he saw her as compared to Dr. Whetstone's previous evaluation.

Perhaps most compelling of all, however, was Dr. Halfaker's testimony that, because many of the claimant's cognitive and physical limitations appeared to have no organic basis, she suffered from a condition which he referred to as "learned helplessness." Dr. Halfaler characterized this condition as someone who can do more than they perceive they can. Therefore, Dr. Halfaker recommended that the claimant try volunteer work in order to "stretch" her potential. Furthermore, Dr. Halfaker indicated that, among other things, the

claimant's unique personality traits and familial support likely contributed to her self-limiting ideation. Denying that the claimant was "consciously producing the exaggeration" of her symptoms, Dr. Halfaker opined that the claimant "truly does believe that her problems are as bad as they are," and that they are a result of her injury. Therefore, Dr. Halfaker agreed that the claimant engages in symptom magnification and that she is self-limiting in her disability.

Dr. Back's May 15, 2015, assessment of the claimant's disability varies widely from Dr. Halfaker's assessment, in that Dr. Back found the claimant to be functioning "in the borderline range of mental retardation." Dr. Back noted a marked decrease in the claimant's IQ, from the mid-80's to 66, as well as marked decreases in the claimant's processing speeds, response speed, speech, production, and ambulation. In addition, Dr. Back noted that the claimant's neuropsychological scores were also "severely impaired" for delayed memory, concentration, attention, fine motor speed, and verbal fluency. Dr. Back concluded that the claimant's scores reflected permanent "marked to severe impairments." Dr. Back further noted that no tests for malingering, such as TOMM, were administered by him

because, in his opinion, these tests are ineffective when moderate to severe cognitive dysfunction is present. Based upon his conclusions of the claimant's current condition and her dire prognosis, Dr. Back assigned the claimant fifty percent (50%) permanent physical impairment as a result of her brain injury.

Finally, I note that Dr. Pingleton concluded from his numerous individual counseling sessions with the claimant that her "realization that she would never return to teaching or recover her very high premorbid (sic) intellectual prowess" was "particularly hard on her" and had resulted in a loss of "personal fulfillment, identity, and satisfaction." However, Dr. Pingleton expected that, due primarily to her determination, the claimant's condition would continue to improve.

In addition, the testimony of the claimant's care coordinator, Ms. Hudgens, who worked closely with the claimant over a period of years, reflects that she often observed the claimant obsessing over her physical condition. According to Hudgens, she attempted to divert the claimant's thinking to more positive subjects, and she even suggested that the claimant try to volunteer at a library. To Ms. Hudgens's knowledge, the claimant failed to follow-up on this suggestion.

Without minimizing the severity of the claimant's injuries, I find that the opinion of Dr. Halfaker in terms of the claimant's true measure of cognitive disability is supported by the opinions of Dr. Faitak, Whetstone, Pingleton, and even Dr. Back, to some extent. Each of these doctor's agree that the claimant suffers from some level of cognitive dysfunction, depression, anxiety, and diminished self-esteem. While all but Dr. Halfaker agree that the claimant also suffers from PTSD, I find merit in Dr. Halfaker's questioning of the validity of this diagnosis due to the claimant's testimony that she has no memory of the accident or of any events following the accident for three days thereafter. I, therefore, agree that while the claimant suffers from pronounced anxiety issues related to her accident and any suffering she experienced during her recovery, it is unlikely that she suffers from PTSD as a direct result of the accident.

With regard to the profound difference in Dr. Halfaker's impairment rating as compared to Dr. Back's, I find that the preponderance of the evidence in this claim supports Dr. Halfaker's assessment in that 1) approximately one year prior to Dr. Halfaker's evaluation, Dr. Faitak noted "markedly uneven" results in the claimant's IQ testing, and; 2) subsequent to Dr.

Faitak's assessment and prior to Dr. Halfaker's evaluation, Dr. Whetstone noted that the claimant demonstrated "phobic behaviors" which he opined may have begun to interfere with her life along with "some indication of variable effort and consistency" in her responses. I find that these facts tend to validate Dr. Halfaker's opinion that the claimant suffers from a psychological overlay or somatization disorder which influences her true functional capabilities. And, while I would agree that the record fails to support a conclusion that the claimant is being dishonest in her effort, I further agree with Dr. Halfaker that the claimant is "self limiting" and that she likely suffers from "learned helplessness." In so finding, I must note that whereas Dr. Back failed to conduct tests to measure malingering, Dr. Halfaker did. In addition, both Drs. Faitak and Whetstone's opinions as to when a patient's brain injury should have stabilized are consistent with Dr. Halfaker's opinion in this regard, as opposed to Dr. Back's opinion regarding said same.

The totality of the evidence in this claim not only supports Dr. Halfaker's unbiased, objective assessment of the claimant's cognitive functioning, but also his conclusions derived therefrom. Therefore, I assign greater weight to the opinion of Dr. Halfaker

than to the opinion of Dr. Back in this claim, especially in view of the fact that Dr. Halfaker's conclusions are supported by the findings of other physicians. Therefore, I find that the claimant sustained fifteen percent (15%) permanent physical impairment as a result of her traumatic brain injury, as opposed to fifty percent (50%) as awarded by the majority.

With regard to the issue of permanent and total disability, I find that the claimant has failed to prove that she is unable to engage in any type of meaningful employment as a result of her compensable injury. Permanent total disability means inability, because of a compensable injury or an occupational disease, to earn any meaningful wages in the same or other employment. Ark. Code Ann. §11-9-519(E)(1)(Repl. 2002). The claimant has the burden of proving that she was unable to earn meaningful wages. Ark. Code Ann. §11-9-519(E)(2). Attendant factors relevant to whether a claimant is unable to earn any meaningful wages include medical evidence, age, education, experience and other circumstances reasonably related to a claimant's earning power. *Rutherford v. Mid-Delta Community Servs., Inc.* 102 Ark. App. 317, 285 S.W.3d 248 (2008).

Dr. Owen opined that, due to the claimant's limitations, it would be "difficult" to place the claimant back into the competitive job market earning her pre-injury salary. Dr. Owen failed, however, to rule out the possibility of the claimant returning to some type of meaningful employment. Moreover, the claimant cites her greatest current physical complaint as chronic facial pain. Otherwise, the claimant is able to ambulate without the use of an assistive device, such as a walker or cane, she can dress and feed herself, she reads, she drives, she walks and grooms her dogs, etc. In other words, the claimant's greatest barrier to returning to work appears to be her cognitive issues, which Dr. Halfaker opines are inhibited by the claimant's own self-limiting behaviors. Otherwise, the claimant is highly educated, and, according to Dr. Faitak, she still has good verbal reasoning skills and she has maintained her "fund of specific knowledge."

Furthermore, the preponderance of the evidence reveals that the claimant's disability lies not so much in a lack of knowledge, transferable skills, or cognitive abilities, but more so in the speed and accuracy with which she can process, communicate, and perform these various attributes. Moreover, Dr. Halfaker has opined that the claimant would actually

benefit in attempting to return to some sort of activity, be it volunteer work or otherwise, in order to stretch her cognitive functioning, while Dr. Pingleton views the claimant as someone fiercely determined to recover to her fullest potential. Therefore, reasonable minds could conclude that a return to some type of outside activity would be beneficial to the claimant's health and recovery. However, while it is understandable that the claimant might feel that she is no longer able to teach, she has either failed or refused to even attempt to return to work in any capacity. Therefore, it is impossible to gauge the claimant's true ability to return to work. At this juncture, however, I am compelled to note that individual's with similar, or even worse, disabilities have been deemed employable and actually hold down meaningful employment.[1]

Because the claimant is in her mid-fifties, highly educated, has a wealth of knowledge and experience, and has few, if any, physically limiting disability, I find that her failure to attempt to work in some capacity against the recommendation of Dr.

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[1](i.e., Brad Edwards, a well-known greeter for Wal Mart in Conway, Arkansas; *see, thecabin.net/news/local/2014-10-11/door greeter*; article written by Rachel Parker Dickerson and posted in the Log Cabin Democrat on October 11, 2014).

Halfaker impedes our full assessment of her true disability. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that she is permanently and totally disabled as a result of her compensable injury. Further, this conclusion is supported by the claimant's demonstrated self-limiting, phobic behaviors and her "learned helplessness." Therefore, I find that the claimant has filed to prove by a preponderance of the evidence that she is permanently and totally disabled.

With regard to the claimant's claim for compensation pursuant to Ark. Code Ann. §11-9-524, I find that the claimant has failed to prove that she is entitled to the maximum award of benefits allowed pursuant to this statutory provision. Ark. Code Ann. §11-9-524(a) states:

> The Workers' Compensation Commission shall award compensation for serious and permanent facial or head disfigurement in a sum not to exceed three thousand five hundred dollars ($3,500).

A review of the photograph submitted into the record of the claimant's face simply fails to show serious facial disfigurement as anticipated by the governing statute, and it certainly fails to show any permanent disfigurement which would merit the full

amount of money that can be awarded pursuant to this statute. Rather it shows mild spotted discoloration at the claimant's hairline and greyish discoloring around the claimant's eye. Otherwise, there are no visible scars or other marred or grotesque facial features resultant from the claimant's injury observed from this evidence. In addition, the record reveals that whatever permanent discoloration the claimant may have sustained as a result of her compensable injury can be hidden with makeup. Therefore, I find that an award of $3,500 for facial disfigurement, especially where there is actually no "disfigurement" shown, is excessive in this claim. And, while I would be open to discussing a reduced award pursuant to Ark. Code Ann. §11-9-524 due to the claimant's slight discoloration around her eye at her hairline, that award would be minimal.

Finally, concerning the claimant's dental treatment with Dr. Brooks, I find that this treatment was unauthorized and should be denied. Ark. Code Ann. §11-9-514(a)(2)(A) states:

> If the employer selects a physician, the claimant may petition the commission one (1) time only for a change of physicians, and if the commission approves the change with or without a hearing, the commission shall determine the second physician and shall not be bound by

> recommendations of claimant or respondent.

However, section (b) of this statute provides that "Treatment or services furnished or prescribed by any physician other than the ones selected according to the foregoing, except emergency treatment, shall be at the expense of the claimant." This condition is, of course, dependent on whether the claimant received notice of her rights to a one-time change of physician. The evidence in this claim shows that she did.

The claimant's husband testified that he is a senior accountant for FedEx. This inherently implies that he possesses, at the very least, average intelligence. Mr. Johnson further testified that they (he and the claimant) sought treatment with Dr. Brooks outside of those physicians approved by the respondent-carrier, thus indicating that they were provided notice and understood the requirement for obtaining authorization for a statutory one-time change of physician. Furthermore, Mr. Johnson admitted that they paid for Dr. Brooks' services via health insurance benefits.

The administrative law judge and now the majority found that references made in the clinic notes of both Dr. Poe and Brooks concerning Dr. Brooks's

treatment of the claimant provides sufficient proof to show that Dr. Poe referred the claimant to Dr. Brooks; thus, making Dr. Brooks an authorized treating physician. This is not only an illogical assumption, but it contradicts the testimony of Mr. Johnson in this matter. It is also inconsistent with the clinic notes of Drs. Poe and Brooks in that, while in his August 19, 2014, clinic note Dr. Brooks seems to suggest that the claimant was referred to him by Dr. Poe, he expressed doubt concerning the validity of this referral when it was noted that Dr. Brooks wanted the claimant's previous treatment records in order to "make sure he could do [the procedure] needed" because he did not want "them to change to him and then be unable to complete" that procedure. Moreover, Dr. Poe's follow-up clinic note of September 4, 2014, merely references the fact that Dr. Brooks was "redoing" the claimant's broken implant and crown. In no way does this report imply, state, or otherwise indicate that Dr. Poe had referred the claimant to Dr. Brooks for treatment.

In conclusion, the claimant and her husband admitted that they were unhappy with the dental services she had received, they understood that she was entitled to a one-time change of physician, but, by their own volition, they chose to proceed under the care of Dr.

Brooks at their own expense and without proper referral or authorization. Therefore, I find that the Dr. Brooks' dental treatment was unauthorized and that the respondents should not be liable for this treatment.

Likewise, I find that the claimant's trip to the emergency room on September 29, 2012, for a torn stitch does not constitute a true emergency in the sense anticipated by our statute, namely Ark. Code Ann. §11-9-514(b). Therefore, I find that this treatment was unauthorized and that the respondents are, therefore, not liable for this treatment. Accordingly, for the reasons stated herein, I respectfully dissent from the majority's opinion.

KAREN H. McKINNEY, Commissioner