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Workers' Compensation Law: Act 796 of 1993 and the Definition of "Compensable Injury"

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I. INTRODUCTION

Act 796 of 1993, which vastly altered the landscape of workers' compensation law in Arkansas, has always meant different things to different people. Shortly after its passage, proponents of business hailed the Act as the answer to a crisis, while advocates for labor described it as a "devastating blow" that sought to reduce workers' compensation costs by simply excluding large categories of injured workers from coverage. Even those in relatively neutral corners asked whether the Act had gone too far.

Partisan feelings are just as strong nearly five years later, but the Act has endured two legislative sessions with essentially no substantive changes. In other words, love it or hate it, Act 796 is the law and appears to have a certain amount of staying power. The issue of the Act's overall propriety is thus secondary to the question of how it has been interpreted and applied by Arkansas's Workers' Compensation Commission and appellate courts over the past few years. Accordingly, this article will examine some of the more significant cases which have addressed the various requirements of proving a "compensable injury" within the meaning of Arkansas Code section 11-9-102(5)—the heart of Act 796 of 1993.

Few statutory provisions have undergone the sort of transformation that Act 796 imposed upon the previous definition of the term "injury." Once a humble collection of little more than three lines, the new definition of "compensable injury" is a formidable assemblage of six primary sections...
divided into twenty-two lesser sections. Its swath is wide, covering not only what a "compensable injury" is, but also what it is not. There are previously unknown phrases such as "rapid repetitive motion" and "major cause." The new definition even turns an old presumption on its head, and essentially prohibits subjective elements such as pain from serving as a basis for compensation.

Given its ambitious scope, and considering its role as the flagship of Act 796, it should come as no surprise that Arkansas Code section 11-9-102(5) has been the focal point of most recent workers' compensation litigation, and in turn, the subject of a veritable legion of opinions issued by the Full Workers' Compensation Commission and the Arkansas Court of Appeals. While a majority of these cases involve straightforward factual determinations, and may not be designated for publication, several others have addressed important questions surrounding the interpretation of what is required to establish a "compensable injury." Indeed, although the Act is only four-and-a-half years old, the flurry of caselaw it unleashed has left few of those questions unanswered.

II. THE FIVE CATEGORIES OF COMPENSABLE INJURIES

Briefly stated, any injury that "manifests itself" after July 1, 1993, will be governed by the provisions of Act 796. If the Act controls, the claim will proceed no further unless the injury falls into one of five categories of injuries which are eligible for compensation. Those categories are: (1) accidental, or "specific incident" injuries; (2) gradual injuries, which are further subdivided into "rapid repetitive motion" injuries, gradual back injuries, and hearing loss injuries; (3) mental illnesses as set out in section 11-9-113 of the Arkansas Code; (4) heart or cardiovascular injury, accident, or disease as set out in section 11-9-114 of the Arkansas Code; and (5) hernia injuries as set out in Arkansas Code section 11-9-523. Regardless of the category involved, a potential claimant faces a bewildering assortment of evidentiary requirements—all of which are called into question once a claim is controverted.

13. See Bennet v. City of Benton, No. E500506, slip op. at 4 (Workers' Comp. Comm'n
A. Accidental Injuries Resulting from a “Specific Incident”

The statute begins by identifying what might be thought of as the "traditional" workers compensation injury:

An accidental injury causing internal or external physical harm to the body or accidental injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident identifiable by time and place of occurrence.\(^4\)

Claims for "specific incident" ("accidental") injuries are subject to more than just the requirements set out above. As with most compensable injuries, they must also be "established by medical evidence supported by 'objective findings’"\(^5\) or "those findings which cannot come under the voluntary control of the patient."\(^6\) Furthermore, any medical opinion introduced to establish compensability "must be stated within a reasonable degree of medical certainty."\(^7\)

These requirements may not seem particularly unreasonable, but they do stand in marked contrast to prior law, which charged claimants with little more than proving "that they sustained an injury arising out of and in the course of their employment."\(^8\) Even so, an accidental injury is arguably the simplest type to establish under Act 796, as it does not involve any of the Act's various "major cause" provisions.\(^9\) Therefore, once it is clear that Act 796 will apply to a given claim, the next critical question for both claimant and respondent is whether the injury can be classified as "accidental."

It is not uncommon for substantial proof of a "specific incident" to reside within a given claimant's testimony, particularly where the event is recalled in relatively precise terms:

The appellant related in great detail the onset of her injury. She recounted a specific time, place, and incident—2:30 p.m. on September 14, 1993, at the J.C. Penney Store where she had been employed for seventeen years,

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while bending to remove a piece of jewelry from a case to show a customer.\textsuperscript{20} Not all claims will involve such a detailed recollection, and the Full Commission made it clear in \textit{Shepard v. Calion Lumber Co.}\textsuperscript{21} that other appropriate evidence will suffice:

Obviously, the General Assembly established this time-place definiteness requirement to distinguish injuries which occur suddenly, where the relationship to the employment is more easily seen, from those injuries that occur over a period of time, where the relationship to the employment may be more difficult to discern. However, the time of occurrence may be identified by evidence other than the claimant’s testimony regarding the precise day of the year on which the injury occurred. For example, the time can be established by evidence of contemporaneous events which serve to identify the time of occurrence.\textsuperscript{22}

While the foregoing passage from \textit{Shepard} speaks primarily of the temporal aspect of accidental injuries, the Full Commission has generally been reluctant to view the “specific incident” requirement in technical terms. For instance, in \textit{Arnold v. Williamette Industries, Inc.}\textsuperscript{23} the claimant alleged that he sustained a back injury on March 27, 1995, while he and a co-worker were “throwing boards” from an assembly line.\textsuperscript{24} The claimant’s testimony indicated that he was significantly taller than his partner, which required the claimant to bend down so that the two could pick up the boards in tandem. When the end of the board opposite to the claimant dropped without warning, the claimant “went down with the board,” resulting in his asserted injury.\textsuperscript{25} Although the claimant contended that he immediately told his co-worker of the injury, the co-worker later denied having any knowledge until three days after the event.\textsuperscript{26}

Moments after the injury, the claimant went to his foreman’s office and explained that he had injured his back while throwing boards and needed to see his chiropractor. According to the foreman, the claimant then began looking through a phone book for the chiropractor’s phone number.\textsuperscript{27} While the

\begin{itemize}
  \item \textsuperscript{20} See Jordan v. J.C. Penney Co., 57 Ark. App. 174, 177, 944 S.W.2d 547, 549 (1997). The Arkansas Court of Appeals commented on corroborating testimonial and medical evidence, but the claimant’s own account of an injury clearly played a pivotal role. \textit{See id.} at 177, 944 S.W.2d at 549.
  \item \textsuperscript{21} No. E320270 (Workers’ Comp. Comm’n Oct. 6, 1995).
  \item \textsuperscript{22} \textit{Shepard v. Calion Lumber Co.}, No. E320270, slip op. at 9 (Workers’ Comp. Comm’n Oct. 6, 1995).
  \item \textsuperscript{23} No. E505279 (Workers’ Comp. Comm’n Oct. 28, 1996).
  \item \textsuperscript{24} \textit{See Arnold}, No. E505279, slip op. at 2.
  \item \textsuperscript{25} \textit{See id.}
  \item \textsuperscript{26} \textit{See id.}, slip op. at 3.
  \item \textsuperscript{27} \textit{See id.}
\end{itemize}
claimant did manage to continue working until March 29, an MRI scan performed a few days later revealed a disk herniation in his lumbar spine.\textsuperscript{28}

Respondents initially accepted the claim but later controverted on the grounds that no actual "injury" had occurred on March 27, 1995.\textsuperscript{29} Instead, respondents pointed out that the claimant had been consulting a chiropractor since 1986 for back and hip pain, and argued that the claimant’s "report" of an injury to his foreman was nothing more than an effort to find his chiropractor’s phone number in order to schedule a routine appointment.\textsuperscript{30} The Commission did not find this reasoning persuasive:

The respondent seems to be arguing that the claimant did not specifically state he had injured his back at that time and this fact coupled with his history of treatment for back aches by a chiropractor establishes that the claimant did not injure his back at that time. We find this argument to be without merit. The distinction the respondent would have us draw between a report of a specific back injury and a general complaint of back pain is artificial. The fact remains that the claimant immediately reported an onset of symptoms arising out of the performance of his employment duties and a need for medical care as a result of the symptoms.\textsuperscript{31}

The result in \textit{Arnold} does not guarantee that a claimant’s bare assertion of a specific incident will always be sufficient. In \textit{Mikel v. Engineered Specialty Products},\textsuperscript{32} the Arkansas Court of Appeals affirmed the Commission’s finding that the claimant’s carpal tunnel syndrome did not arise from an “accidental” injury:

The issue before this Court is whether any medical evidence exists to support the fact that appellant experienced an injury due to a specific incident, as opposed to her injuries being gradual. Neither doctor mentioned any swelling of the wrist, as reported by appellant. Appellant claims that her supervisor witnessed the swelling. However, the supervisor did not testify to that nor was it stated in the accident report. Both doctors acknowledge that the appellant has carpal tunnel syndrome, but neither acknowledge that it was caused by a specific incident . . . . After reviewing

\begin{itemize}
  \item \textsuperscript{28} See \textit{id.}, slip op. at 5.
  \item \textsuperscript{29} See \textit{id.}, slip op. at 6.
  \item \textsuperscript{30} See \textit{Arnold}, No. E505279, slip op. at 6. Respondents also challenged claimant’s credibility in light of certain testimony from his co-workers and his own previous deposition. \textit{See id.} However, based on its \textit{de novo} review of the entire record (including claimant’s medical history and testimony tending to corroborate his account of an injury) the Commission found claimant’s testimony to be credible—a function squarely within its fact-finding powers and duties. \textit{See Arnold}, slip op. at 1-2; \textit{McClain v. Texaco}, 29 Ark. App. 218, 780 S.W.2d 34 (1989); \textit{Johnson v. Hux}, 28 Ark. App. 187, 772 S.W.2d 362 (1989).
  \item \textsuperscript{31} \textit{Arnold}, No. E505279, slip op. at 9.
  \item \textsuperscript{32} 56 Ark. App. 126, 938 S.W.2d 876 (1997).
\end{itemize}
the medical testimony by both doctors, this court agrees that the appellant
did not prove her claim by a preponderance of the evidence.\textsuperscript{33}

Even though the claimant in \textit{Mikel} contended that her injury arose when
"something in her wrist snapped,"\textsuperscript{34} neither the Commission nor the Court
found sufficient medical or testimonial evidence to corroborate her account.
Likewise, it can be harmful to a "specific incident" claim when pertinent
medical records state that no specific injury occurred, or relate a history of
gradually increasing symptoms which eventually culminate in an acute
episode.\textsuperscript{35} In addition, a "spontaneous onset of pain," standing alone and
unrelated to any particular work incident, will not qualify a given injury as
"accidental."\textsuperscript{36}

\section*{B. Gradual Injuries}

Not all injuries must result from an identifiable "accident" to be eligible
for compensation. Arkansas Code section 11-9-102(5)(A)(ii)(a)-(c) codifies
the previous judicial recognition that a "specific incident" is not the \textit{sine qua
non} of compensability.\textsuperscript{37} Even so, the schedule of gradual injuries which may
qualify for compensation is not open-ended, and it is necessary that a particular
gradual injury fall into one of three prescribed categories before the question
of compensability will even be entertained.\textsuperscript{38} The available categories are: (a)
injuries caused by "rapid repetitive motion," including carpal tunnel syndrome;
(b) back injuries not caused by a specific incident or not identifiable by time
and place of occurrence; and (c) hearing loss injuries not caused by a specific
incident or not identifiable by time and place of occurrence.\textsuperscript{39}

Hearing loss claims are rare and usually focus on questions of causal
connection or degree of impairment.\textsuperscript{40} Gradual back injuries are more

\begin{itemize}
\item \textsuperscript{33} \textit{Id.} at 129-30, 938 S.W.2d at 878-79.
\item \textsuperscript{34} \textit{Id.} at 127, 938 S.W.2d at 877.
\item \textsuperscript{35} \textit{See, e.g.}, Moore v. Browning-Ferris, Inc., No. E411456, slip op. at 4 (Workers' Comp.
Comm'n Oct. 13, 1995); Salyards v. Gemini Mfg., Inc., No. E318949, slip op. at 9 (Workers'
Comm'n July 29, 1996), \textit{aff'd}, No. CA96-1234 (June 11, 1997) (not designated for
publication).
\item \textsuperscript{36} McQuany v. Siemen's Energy and Automation, No. E318760, slip op. at 5-6
(Workers' Comp. Comm'n Oct. 13, 1995). In \textit{McQuany}, the claimant's own testimony was
fatal: "It was no one specific lifting motion that I noticed the pain." \textit{Id.}, slip op. at 6.
\item \textsuperscript{37} \textit{See Marcoe v. Bell Int'l,} 48 Ark. App. 33, 35, 888 S.W.2d 663, 665 (1994).
\item \textsuperscript{38} \textit{See Tillman v. Baldwin & Shell Constr. Co.}, 58 Ark. App. 177, 179-80, 948 S.W.2d
\item \textsuperscript{39} \textit{See ARK. CODE ANN.} \textsection{11-9-102(5)(A)(ii)(a)-(c) (Michie Repl. 1996).
\item \textsuperscript{40} \textit{See \textit{e.g.}, Kilgore v. Rheem Mfg. Co.}, No. E304918 (Workers' Comp. Comm'n Aug.
18, 1994); Colson v. International Paper Co., No. E200043 (Workers' Comp. Comm'n Feb. 3,
1995). Both of these cases were decided under prior law, which was changed only by the

common, and differ from "accidental" back injuries mainly because they bring the "major cause" requirement into play. Indeed, all gradual injuries must meet the major cause requirement, discussed in greater detail below.

By far the most common gradual injury claims are those involving rapid repetitive motion, particularly as it relates to the development of carpal tunnel syndrome. Although it is an important phrase, "rapid repetitive motion" is not defined by statute. Therefore, the task has devolved upon the Full Commission and, subsequently, the Arkansas Court of Appeals. The Commission first addressed the question in Throckmorton v. J. & J. Metals, perhaps one of its better known decisions. Throckmorton involved a claimant employed as a "drop-boy" responsible for picking up sheet metal scraps. The claimant began his duties in October, 1993, and by the early part of 1994 had developed numbness and tingling in his hands. A diagnosis of carpal tunnel syndrome soon followed.

The Throckmorton majority first noted that Act 796 provides no guidance as to what kind of activity qualifies as "rapid repetitive motion." Clearly mindful of its statutory duty to "strictly construe" Act 796, the majority essentially turned to a plain-language approach:

However, the term "rapid" is commonly used to refer to that which is marked by a notably high rate of motion, activity, succession, or occurrence, requiring notably little time, and without delay or hesitation. See, Webster's Third New Unabridged International Dictionary (1986). The term "repetitive" is commonly used for the act of doing the exact same thing again and again. Id.

From these two unadorned definitions, the majority crafted a standard that would govern rapid repetitive motion claims for the next two years:

Thus, we find that the requirement that the condition be caused by rapid repetitive motion requires proof that claimant's employment duties involved, at least in part, a notably high rate of activity involving the exact, addition of the "major cause" requirement to hearing loss injuries which manifest themselves after July 1, 1993. With this exception, an analysis of hearing loss claims should generally be unaffected by Act 796.

43. See Throckmorton, slip op at 2.
44. See id.
45. See id., slip op. at 3-4.
46. See Ark. Code Ann. §11-9-704(c)(3) (Michie Repl. 1996), which provides that "[a]dministrative law judges, the commission, and any reviewing courts shall construe the provisions of this chapter strictly." Id.
47. Throckmorton, slip op. at 4.
or almost exactly, same movement again and again over extended periods of time. Obviously, the determination of whether a certain employment duty satisfies the statutory requirement for rapid repetitive motion is a fact question which must be decided based on the evidence presented in each case. Furthermore, we point out that the statute does not require proof that the employee's duties involved rapid repetitive motion for the entire duration of the employee's shift or that he engaged in such activities every day. 48

In Throckmorton, the claimant performed a task that was arguably repetitive, picking up sheet metal scraps, but fell far short of being "rapid" insofar as the new standard envisioned it. Particularly fatal to the claimant's position was the fact that he allowed the pieces of scrap metal to accumulate before retrieving them, which produced anywhere from a one to twenty-five minute delay between pick-ups. 49 However, the majority opinion in Throckmorton established an extremely challenging standard, and it is questionable whether the claimant's particular task could have met that standard even absent the lengthy delays—it did not, after all, easily lend itself to being performed at a "notably high rate of speed" under any circumstances. Likewise, the necessity for a motion to be "almost exactly the same" to qualify as "repetitive" essentially precluded claims based on motion which may have been performed very quickly but consisted of a series of differing actions. This relative inflexibility, particularly the latter aspect, eventually proved to be Throckmorton's undoing.

The Arkansas Court of Appeals first considered the Throckmorton standard in Baysinger v. Air Systems, Inc., 50 which involved a claimant with "multiple-task" employment duties:

In deciding this case, the Commission examined the job duties of appellant. Testimony by three of appellant's co-workers showed that his tasks included shaping, molding, finishing, and polishing stainless-steel equipment. His work with metal involved grinding, polishing, finishing curved edges, and removing burrs. The Commission found that although appellant's duties varied during the day according to the particular item being manufactured, his duties required him to grip vibrating tools and to use a ball-peen hammer, and that each of the duties involved fairly constant stress and shock to the hands, wrists, and arms. 51

48. Id.
49. See id., slip op. at 5.
51. Baysinger, 55 Ark. App. at 175, 934 S.W.2d at 231.
Despite finding that the claimant's duties were hand intensive and "involved fairly constant stress and shock to the . . . wrists," the Commission determined that they did not amount to rapid repetitive motion under the *Throckmorton* standard, since they consisted of different steps that did not involve "the exact, or almost exactly, the same movement again and again . . . ." The Arkansas Court of Appeals, though it did not articulate a new definition, disagreed with this approach:

The Commission erred in requiring appellant to prove that his carpal tunnel syndrome was the result of the exact, or almost exactly, the same movement again and again . . . . We feel that the Commission's interpretation of the statute is too restrictive and precludes multiple tasks - such as the hammering and grinding motions performed by claimant - from being considered together to satisfy the requirements of the statute.

By deeming at least half of it "too restrictive," *Baysinger* arguably dealt the *Throckmorton* standard a mortal blow. As a result, the Full Commission began to move away from *Throckmorton*, though it suggested on one occasion that the Arkansas Court of Appeals had simply disagreed with its "factual assessment" of "multiple-task" rapid repetitive claims. For its own part, the Arkansas Court of Appeals declined a second opportunity to define "rapid repetitive motion" in *Lay v. United Parcel Service*, but shortly thereafter provided a much clearer picture of *Throckmorton*'s status in *Kildow v. Baldwin Piano & Organ*.

The claimant in *Kildow* performed a hand-intensive task which required her to secure electrical components to boards with wires that she twisted into place using pliers. While twisting the wires with her right hand, the claimant held onto the board with her left. Once all the components were secured to

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52. While the Arkansas Court of Appeals never referred to *Throckmorton* by name, it noted in *Baysinger* the Commission's comment that "[t]he requirement that the condition be caused by rapid, repetitive motion requires proof that the employment duties involved, at least in part, a notably high rate of activity involving the exact, or almost exactly, the same movement again and again over extended periods of time." *Baysinger*, 55 Ark. App. at 176, S.W.2d at 231.

53. *Id.*

54. *Id.*


58. 58 Ark. App. 194, 948 S.W.2d 100 (1997).

59. *See Kildow*, 58 Ark. App. at 197, 948 S.W.2d at 102.
a given board, she passed the completed unit on to the next work station. After carrying out these duties for approximately one year, eight to ten hours a day, five to six days a week, the claimant developed gradually worsening pain in her wrists.\textsuperscript{60} At both the Administrative Law Judge and Full Commission levels, the claimant's duties were found to be insufficiently rapid to qualify for benefits.\textsuperscript{61} In reversing that decision, the Arkansas Court of Appeals specifically noted the Commission's reliance on Throckmorton:

In denying benefits for appellant's CTS, the Commission relied on the requirements for gradual-onset injuries announced in its own opinion, Throckmorton, supra. Notably the Commission defines the two terms, "rapid repetitive," together as a single, interrelated concept.

However, our holding in Baysinger v. Air Systems, 55 Ark. App. 174, 934 S.W.2d 230 (1996), rejected the Commission's language "exact, or almost exactly, the same movement again and again." In light of our holding in Baysinger, the Commission's decision in Throckmorton is erroneous, as a matter of law, to the extent that it requires claimants to prove "exact, or almost exactly, the same movement again and again."

In discerning a definition for the term "rapid repetitive," we are bound to give the words their ordinary meaning, give effect to the intent of the legislature, and make use of common sense. State Office of Child Support Enforcement v. Harnage, 322 Ark. 461, 910 S.W.2d 207 (1995). In its ordinary usage, rapid means swift or quick. CONCISE OXFORD DICTIONARY 1137 (9th ed. 1995).\textsuperscript{62}

Though there was no indication of how many boards the claimant might have processed in an average day, the Court went on to state that: "It is clear to us that reasonable minds could not agree that appellant's testimony does not establish that her job did involve swift or quick motion... [I]t is a matter of common sense that reasonable minds would expect work on an assembly line to move at a swift or quick pace."\textsuperscript{63} The Court eventually found the claimant's duties to be repetitive as well, though it did not expressly define that term.\textsuperscript{64}

Kildow offers a relatively straightforward definition of the term "rapid," for example, "swift or quick," but also comes close to creating a form of rebuttable presumption. After all, there was little or no real evidence offered as to just how "swift or quick" the claimant had performed her assembly-line

\textsuperscript{60.} See id.
\textsuperscript{61.} See id. at 198, 948 S.W.2d at 102.
\textsuperscript{62.} Id. at 200, 948 S.W.2d at 103.
\textsuperscript{63.} Id. at 201, 948 S.W.2d at 103-04.
\textsuperscript{64.} See id. at 201, 948 S.W.2d at 104.
duties. Further, the Court provided no accompanying definition of the “repetitive” aspect of the dual requirement. What then, is the case’s effect?

Ultimately, Kildow is best understood by realizing the Arkansas Court of Appeals’ reluctance to define “rapid repetitive motion” at all. In a footnote to the decision, the Court stated that:

At least one commentator has noted the anomalous inclusion of “rapid” in Arkansas’s statute, and suggested that, “Possibly, the term rapid does not have any real significance in the 1993 Act. The addition of the term may be the result of inartful drafting arising out of the common knowledge that many repetitive motion cases involve rapid repetitive motion.” John D. Copeland, The New Workers’ Compensation Act: Did the Pendulum Swing Too Far?, 47 Ark. L. Rev. 1, 15 (1994).

We are mindful that assigning meaning to the term “rapid repetitive” may inappropriately exclude valid work-related carpal tunnel syndrome claims in certain fields of work that are characterized not by the speed of the work, but by abnormally strenuous or meticulous activity with the hands. We welcome from the legislature their promise in Act 796 of 1993 stating in part, “In the future, if such things as . . . the extent to which any physical condition, injury or disease should be excluded from or added to coverage by the law . . . it shall be addressed by the General Assembly . . . and not by the courts.”

Based upon this passage, it is a fair assumption that the Arkansas Court of Appeals will not attempt any further definition of “rapid repetitive motion.” For now, the most that can be said is that motion should at least be “swift or quick” before it will qualify as “rapid.” Since Kildow, the Commission has continued its move away from Throckmorton and toward a case-by-case approach, although at least one principal opinion quoted Judge Wendell Griffen’s dissent from Kildow, in which he proposed that “rapid repetitive motion” be defined as a “‘fast or notably high rate of recurring motion, processes, or actions.” However, because it originated from a dissenting opinion, and considering the Arkansas Court of Appeals’ comments in Kildow, it is unlikely that the Full Commission will adopt Judge Griffen’s position.

65. Kildow, 58 Ark. App. at 200, 948 S.W.2d at 103.
68. However, Judge Griffen’s proposal does seem more inclusive and flexible than the Throckmorton standard, and also offers the comfort of a general rule.
C. Hernias, Mental Illnesses, and Heart/Lung Injuries

While the majority of workers' compensation claims involve either an accidental or gradual injury, the Arkansas Code provides three additional categories of injuries which may qualify for compensation. They are as follows: mental illness as set out in section 11-9-113; heart, cardiovascular injury, accident, or disease as set out in section 11-9-114; and hernia injuries as set out in section 11-9-523.69

Act 796 of 1993 did not alter Arkansas Code section 11-9-523, and the statutory provisions and case law governing hernia injuries prior to July 1, 1993, are generally still in effect. Consequently, hernias will not receive further discussion, except to point out the requirements of the statute:

(a) In all cases of claims for hernia, it shall be shown to the satisfaction of the Workers' Compensation Commission:
(1) That the occurrence of the hernia immediately followed as the result of sudden effort, severe strain, or the application of force directly to the abdominal wall;
(2) That there was severe pain in the hernial region;
(3) That the pain caused the employee to cease work immediately;
(4) That notice of the occurrence was given to the employer within forty-eight (48) hours thereafter; and
(5) That the physical distress following the occurrence of the hernia was such as to require the attendance of a licensed physician within seventy-two (72) hours after the occurrence.70

In sharp contrast, Act 796 considerably strengthened the requirements surrounding cardiac injuries and mental illnesses, which had previously been matters of case law.71 Indeed, of all the injuries eligible for compensation,

70. ARK. CODE ANN. §11-9-523 (Michie Repl. 1996). With regard to requirement (5), it is not necessary that an employee prove that he or she actually consulted a physician within the seventy-two hour period. Instead, it is generally sufficient to show that the claimant's post-injury distress was sufficient to merit the attentions of a physician. See, e.g., Ayres v. Historic Preservation Assoc., 24 Ark. App. 40, 747 S.W.2d 587 (1988).
71. See, e.g., Dugan v. Jerry Sweetster, Inc., 54 Ark. App. 401, 928 S.W.2d 341 (1996), wherein Judge Wendell Griffen noted that: "Prior to Act 796, workers' compensation benefits were upheld for mental illness in a variety of situations ranging from psychological disorders resulting from traumatic physical injury to nontraumatic experiences involving job stress." Id. at 403, 928 S.W.2d at 342 (citations omitted). Also, in Fowler v. McHenry, 22 Ark. App. 196, 737 S.W.2d 663, (1987), the Arkansas Court of Appeals stated that: "When it is established that the claimant was putting forth unusual exertion in his work at the time of the heart attack it will ordinarily be held that the requirement of causal connection has been met. Absent "unusual exertion" the applicable test is whether the required exertion producing the injury is too great for the person undertaking the work, whatever the degree of exertion or the condition
those of a cardiac or mental nature are among the most difficult to establish. Moreover, even if a mental illness or injury is found to be work-related, the Act limits compensability to twenty-six weeks, and no death attributable to a mental injury or illness (whether directly or indirectly) will be compensable if the death occurs "one (1) year or more" from the date of the precipitating event.

1. Mental Injury or Illness

The requirements for establishing a compensable mental injury or illness are listed in Arkansas Code section 11-9-113(a)(1)-(2) state that:

(a)(1) A mental injury or illness is not a compensable injury unless it is caused by physical injury to the employee's body, and 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; provided, however, that this physical injury limitation shall not apply to any victim of a crime of violence.
(2) No mental injury or illness under this section shall be compensable unless it is also 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.

The "physical injury" requirement of subsection (a)(1) virtually eliminates compensation for mental illnesses resulting from job-related stress, unless a "violent crime" is somehow the source of the malady. The inclusion of this exception seems anomalous, since violent crimes usually are associated with a physical injury of some kind. As of this date, the "violent crime" exception has not been addressed by either the Full Commission or the Arkansas Court of Appeals—perhaps an indication of the unique factual situation required to bring it into play. The "physical injury" requirement itself, however, has been considered by both entities—most notably in Dugan v. Jerry Sweetster, Inc.

Dugan indicates that a relatively minimal physical injury will suffice for purposes of Arkansas Code section 11-9-113(a)(1). It should be noted that the ten-second electrical shock the claimant received was certainly not minimal of his health, provided the exertion is either the sole or a contributing cause of the injury." Id. at 203, 737 S.W.2d at 666 (citations omitted).

74. ARK. CODE ANN. § 11-9-113(a)(1), (2) (Michie Repl. 1996).
itself, but the incident left little physical evidence beyond a three to four millimeter burn wound on the claimant's hand where the current entered his body. Nevertheless, the claimant had been out of the hospital only a brief time when he began to experience stuttering, difficulty in walking, and loss of consciousness. Although extensive diagnostic efforts revealed no abnormalities, the claimant's physical difficulties gradually increased. Eventually, the claimant's treating neurosurgeon, as well as a clinical psychologist, determined that he suffered from a number of mental disorders which they attributed to the electrical shock injury. However, the Full Commission reversed the Administrative Law Judge's award of benefits, as the Arkansas Court of Appeals pointed out:

The Commission denied compensation to Dugan because it held that the preponderance of the evidence failed to show "actual demonstrable damage, impairment, wound, or other bodily harm or disorder to the internal or external structure of the body." For this definition of "physical injury," the Commission relied on Larson's workers' compensation treatise and other medical and legal dictionaries. The Commission's opinion also imported language from the statutory definition of "compensable injury" which requires medical evidence supported by objective findings. ARK. CODE ANN. § 11-9-102(5)(D) and (16).

After noting several definitions of the term "injury," the Dugan majority reversed the Commission:

The undisputed facts of this case show that Dugan received a 3-4 mm burn (the entry port) to his hand when the shock occurred. That burn is documented in the medical records, and by all accounts was caused by the electrical shock. Hence, it is clear that Dugan received an electrical shock in the course of his employment that produced a physical injury. He suffered a 3-4 mm burn on his hand where the electric current entered his body. Even if the more elaborate diagnostic tests such as the MRI and EKG produced no abnormal findings, it is inescapable that he suffered a wound to his hand . . . . Here, we have a physical injury; namely, an observable wound to the external structure of the body.

76. See Dugan, 54 Ark. App. at 402, 928 S.W.2d at 341.
77. See id., 928 S.W.2d at 341.
78. See id. at 402-03, 928 S.W.2d at 341-42. Dugan's physicians found him to be suffering from post-traumatic stress syndrome, conversion reaction, and depression. See id., 928 S.W.2d at 341-42.
79. Id. at 404, 928 S.W.2d at 342.
80. Id. at 404-05, 928 S.W.2d at 343.
Thus, *Dugan* suggests that the extent of the physical injury required by subsection (a)(1) is not particularly great. However, the case still seems to turn on the presence of an "objective" finding. Accordingly, though *Dugan* gives no real indication that the physical injury must be predicated on some observable basis, it is not clear whether the Court would have reached the same result in the absence of at least a minimal objective finding. Adding to this uncertainty is the fact that the Court discussed a Connecticut case where nothing more than "inappropriate touching" produced a compensable mental disorder, as well as a Florida case which found "touching" insufficient and relied instead on "a bite and scratch on the hand of a paramedic." For now at least, the question remains one of the few lingering mysteries of Act 796.

The requirements of subsection (a)(2) are fairly straightforward but cannot be taken lightly. For example, it is not enough to submit evidence of an illness that is categorized within the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) if there is no specific diagnosis from a licensed psychiatrist or psychologist. Along the same lines, it will not suffice to simply introduce office notes detailing the generalized observations of a licensed psychiatrist or psychologist. In sum, subsection (a)(2) is an "all or nothing" proposition.

It should be noted that the Full Commission has made a distinction between mental illnesses caused by a "physical injury to the employee's body," and thus governed by the mental injury statute, and those produced by an organic cause which are treated as ordinary accidental injuries. In *Coffman v. Jones Timber Co.*, the Commission determined that a "cognitive dysfunction" attributable to an "actual physical trauma" to the claimant's brain had an organic basis (from the brain injury itself, rather than an injury such as that in *Dugan*) that removed it from the ambit of the mental illness statute. Consequently, the claimant was not subject to the twenty-six week limitation on benefits. Although the extent of this "organic cause" exception is unclear, it is important to realize that injuries involving mental deficits may not always be subject to Arkansas Code section 11-9-113.

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81. *Id.* at 405, 928 S.W.2d at 343 (citing Crochiere v. Board of Educ., 630 A.2d 1027 (Conn. 1993); City of Hollywood v. Karl, 643 So.2d 34 (Fla. Ct. App. 1994)).
83. *See id.*, slip op. at 12-14.
2. **Heart and Lung Injuries**

Arkansas Code section 11-9-114 contains the requirements for proving a work-related "heart or lung injury or illness":

(a) A cardiovascular, coronary, pulmonary, respiratory, or cerebrovascular accident or myocardial infarction causing injury, illness, or death is a compensable injury only if, in relation to other factors contributing to the physical harm, an accident is the major cause of the physical harm.

(b)(1) An injury or disease included in subsection (a) of this section shall not be deemed to be a compensable injury unless it is shown that the exertion of the work necessary to precipitate the disability or death was extraordinary and unusual in comparison to the employee's usual work in the course of the employee's regular employment or, alternately, that some unusual and unpredicted incident occurred which is found to have been the major cause of the physical harm.

(b)(2) Stress, physical or mental, shall not be considered in determining whether the employee or claimant has met his burden of proof.

By subjecting cardiovascular-type injuries to the "major cause" requirement, Act 796 imposes a considerable burden of proof given the role that lifelong processes or habits (such as atherosclerosis or smoking) often play in heart and lung ailments. Equally striking (though consistent with the "physical injury" requirement for mental illness claims) is the fact that stress, even if job-related, cannot be submitted as proof of compensability. This exclusion is consistent with the "physical injury" requirement for mental illness claims.

Subsection (a) does not define the term "accident" within the heart/lung injury context. However, in *City of Blytheville v. McCormick*, the Arkansas Court of Appeals held that "accident" refers to an event "caused by a specific incident and identifiable by time and place of occurrence," and went on to affirm the Commission's finding that the claimant's heart attack was indeed the product of an "accident" which amounted to "extraordinary and unusual" work activity in comparison with his normal duties:

In light of this construction and the evidence that the appellee suffered a heart attack caused by and immediately following his exposure to smoke while ventilating the roof of the burning building, we hold that the Commission did not err in finding that an accident was the major cause of the appellee's heart attack.

86. 56 Ark. App. 149, 939 S.W.2d 855 (1997).
87. McCormick, 56 Ark. App. at 154, 939 S.W.2d at 857.
Nor do we think that the Commission erred in finding that the work that precipitated the appellee’s heart attack was unusual and extraordinary in comparison to the appellee’s usual work duties. There was evidence that the appellee was normally assigned to drive a fire truck, and that he would perform other tasks only when he answered a call while off-duty. Furthermore, there was evidence that the appellee inhaled a good deal of smoke that was unusually heavy, dark, and thick immediately prior to his heart attack.8

It is significant that the duty the claimant performed immediately before his heart attack (ventilating the roof of a burning building) was a task arguably expected of a firefighter. This fact did not preclude a finding that such a duty was “extraordinary and unusual” to the particular claimant in McCormick. In other words, as the language of the statute implies, the test for determining whether a given exertion is “extraordinary and unusual” is essentially subjective (a rarity within Act 796).

It is also of interest that the claimant in McCormick had suffered another heart attack approximately one year prior to his work-related heart attack, resulting in bypass surgery. However, the claimant’s treating physician attributed the second heart attack largely to “his exposure to heavy smoke, which caused his blood to become hypercoagulable and [result] in the formation of a clot,”89 and further opined that the risks associated with the claimant’s underlying heart disease were no more than ten percent responsible.90 In light of these circumstances, the Court affirmed the Commission’s finding that the “accident” was the major cause of the claimant’s second heart attack.

The Commission subsequently relied on McCormick in Couch v. Arkansas State Police,91 which involved a state trooper who suffered a heart attack after a high-speed chase. The Commission found, first of all, that the chase itself constituted an “accident” since it was a “specific incident identifiable by time and place of occurrence.”92 Also, as in McCormick, the Commission took a relatively subjective approach to determine that the high speed chase amounted to an “unusual and unpredicted incident”:

While it cannot be said that high-speed chases are unheard of in law enforcement, the evidence in the instant case reveals that such an event was decidedly uncommon to the particular work activities claimant was

88. Id. at 154-55, 939 S.W.2d at 857-58.
89. Id. at 153, 939 S.W.2d at 857.
90. See id.
92. See Couch, slip op. at 5-6.
required to perform. When asked at the hearing how many high-speed pursuits he had engaged in that were similar to that of October 29, 1994, claimant estimated that there had been no more than five or six over his thirty year career.93

Likewise, the Commission noted that the claimant served as a "Post Sergeant," and that his duties included highway patrol no more than twenty percent of the time—much of which he simply spent in transit.94 Another trooper testified that he had participated in only three high-speed pursuits during eleven years as a Post Sergeant.95 Finally, the Commission found that the "temporal proximity" between the claimant's accident and heart attack was sufficient to establish a "major cause" relationship between the two events.96

While *McCormick* and *Couch* illustrate that benefits are not unattainable under Arkansas Code section 11-9-114, the statute has compelled different results. For instance, *Williford v. North Little Rock Fire Department*97 involved a firefighter who participated in a physical fitness test on July 6, 1995. Shortly after the test, he went to a local emergency room with complaints of back pain, nausea, and vomiting.98 The claimant already possessed a significant medical history, including difficulty with diabetes and hypertension.99

The claimant died on July 9 from causes his treating physician described as "[a]cute myocardial infarction with congestive heart failure and subsequent

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93. *Id.*, slip op. at 6.
94. *See id.*, slip op. at 2.
95. *See id.*, slip op. at 6.
96. *See id.*, slip op. at 7. Shortly before publication of this article, the Arkansas Court of Appeals remanded *Couch* to the Full Commission with instructions to make additional findings on the "major cause" issue. On appeal, respondents had argued that "because neither appellee's treating cardiologist nor any other physician has stated that the chase was a 'major cause' of the myocardial infarction, the Commission erred in deciding that the appellee suffered a compensable injury." Arkansas State Police v. Couch, No. CA 97-1033, slip op. at 2 (Ark. App. Mar. 18, 1998). In reaching its decision, the Court stated that "nowhere in the Commission's finding does there appear medical evidence to the effect that in relation to appellee's coronary artery disease, the accident appellee experienced was the major cause of the physical harm." *Id.*, slip op. at 4. Though unpublished, the Court's comments in *Couch* at least give the impression that a medical opinion is necessary to resolve a major cause question, for there would seem to be little other "medical evidence" that could achieve the effect sought by the Court's remand. However, in a published opinion handed down only a few weeks prior to the decision in *Couch*, the Court of Appeals addressed a similar proposition: "Appellant asserts that an expert, meaning a physician, must state what the major cause was. However, the legislature did not so limit the acceptable evidence that could be considered." *See High Capacity Products v. Moore*, No. CA 97-880, 1998 WL 75961 (Ark. App. Feb. 25, 1998). It would seem then, that it is still an open question as to whether medical evidence is actually necessary to resolve major cause issues.
98. *See Williford*, slip op. at 3.
cardiac failure, complicated by diabetes, renal failure, hypertension and chronic obstructive pulmonary disease.\textsuperscript{100} Though some medical evidence suggested that the fitness test was the major cause of the claimant’s heart attack, the Full Commission concluded otherwise:

In short, we find that the greater weight of the credible evidence establishes that Mr. Williford experienced a number of preexisting coronary conditions (atherosclerosis, congenital valve abnormality, enlarged heart) and other risk factors (diabetes, hypertension, pulmonary disease) prior to July 6, 1995. In light of Dr. Bierle’s testimony that he could not agree (in light of laboratory data) that Mr. Williford sustained a myocardial infarction during the course of his activities on July 6, 1995, and in light of Dr. Peretti’s testimony that the claimant’s preexisting abnormalities rendered his health so compromised that [claimant] could have had a coronary event walking down the street, we find that claimant failed to establish that . . . any alleged coronary accident on July 6, 1995, was the major cause of [claimant’s] myocardial infarction.\textsuperscript{101}

Given his medical history, it is unlikely that the claimant in Williford could have received workers’ compensation benefits for a heart attack under any circumstances. Indeed, Williford is a prime example of just how formidable the major cause requirement can be in some cases.

II. “MAJOR CAUSE”

The term “major cause” simply means “more than fifty percent (50%) of the cause,”\textsuperscript{102} but this brevity is no indication of how important the major cause requirement can be in certain types of workers’ compensation claims. Specifically, major cause will be at issue in cases involving: (1) gradual injuries;\textsuperscript{103} (2) permanent impairment or disability;\textsuperscript{104} (3) pre-existing conditions that combine with a compensable injury to prolong a disability or need for treatment;\textsuperscript{105} and (4) heart/lung injuries.\textsuperscript{106}

Workers’ compensation findings depend on the facts of each particular claim, and those relating to major cause are no exception. Still, a few general observations are available. First among them is the Full Commission’s

\textsuperscript{100} Id., slip op. at 5.
\textsuperscript{101} Id., slip op. at 13-14 (emphasis added).
\textsuperscript{102} ARK. CODE ANN. §11-9-102(14)(A) (Michie Repl. 1996). See, e.g., ARK. CODE ANN. §11-9-102(14)(B) (Michie Repl. 1996), which requires a finding of major cause to be “established according to the preponderance of the evidence.”
\textsuperscript{104} See ARK. CODE ANN. §11-9-102(5)(F)(ii)(a), (b) (Michie Repl. 1996).
\textsuperscript{106} See ARK. CODE ANN. §11-9-114(a), (b)(1) (Michie Repl. 1996).
acceptance of the tendency to state the major cause issue in terms of a claimant’s "work activities," when in reality, the actual question is whether the "compensable injury" itself is the major cause of a given disability, impairment, or need for treatment. For example, in Sexton v. First Brands Corporation, the Commission found that the claimant had satisfied the major cause requirement since her treating physician provided affirmative answers to the following inquiries:

1. Based upon a reasonable degree of medical certainty [claimant's] work activity was the major cause of her need for treatment for her right carpal tunnel syndrome.
2. Based upon a reasonable degree of medical certainty [claimant's] work activity was the major cause of her disability due to her right carpal tunnel syndrome.

In reaching its conclusion, the Commission reasoned as follows:

We note, of course, that this issue is properly stated in terms of whether claimant's injury was the major cause of her disability or need for treatment. See Ark. Code Ann. §11-9-102(5)(E)(ii) (Repl. 1996). However, it is a logical conclusion that if claimant's work activities were the major cause of her injury and the resulting disability and need for treatment, then the injury itself is by implication the major cause of the resulting disability or need for treatment.

While medical evidence was important to the outcome in Sexton, the Full Commission's findings in Couch indicate that such evidence is not always imperative to establish major cause. However, when available, medical evidence will usually play a pivotal role. For instance, in McCormick, the claimant's treating physician opined that "appellee's exposure to smoke . . . was by far the major cause of his heart attack, with all other factors combined amounting to less than ten percent by comparison." Medical evidence was similarly paramount in Smith v. Gerber Products, where two physicians attributed the claimant's symptoms to "degenerative changes." In affirming the Commission's denial of benefits, the Arkansas Court of Appeals observed that the claimant's treating physician "would have given Ms. Smith the same work restrictions solely on the basis of the degenerative changes which preceded her

108. Sexton, slip op. at 7.
109. Id., slip op. at 7-8 (emphasis in original).
111. See supra note 96 for a discussion of major cause.
112. McCormick, 56 Ark. App. at 155, 939 S.W.2d at 858.
injury.\textsuperscript{114} Despite the obvious importance of medical evidence to a major cause analysis, the potential impact of non-medical factors should not be discounted. For example, where a claimant has diminished his credibility by virtue of inaccurate testimony, his effort to satisfy the major cause requirement may suffer as well.\textsuperscript{115}

Clearly, pre-existing or underlying conditions such as "degenerative changes" can make the major cause requirement especially challenging. On one occasion, the Full Commission denied compensation for carpal tunnel syndrome where the claimant "functioned in [his] job for over twenty years with relatively little problems, and it was not until after he was diagnosed with diabetes that he began to experience significant problems."\textsuperscript{116} Similarly, a claimant's past physical activities can be problematic. In \textit{Herrera v. Tyson Foods, Inc.},\textsuperscript{117} the Commission noted that the claimant's shoulder problems improved only slightly after she left her employment, and further pointed out that the claimant "had been a laborer for over twenty years. She previously had worked in California for eighteen years picking strawberries which required repetitive motion of her hands and arms."\textsuperscript{118}

In a fairly recent claim involving a dentist afflicted with cervical disc disease, the Full Commission compared "the nature of the claimant's work with the nature of his underlying medical abnormality . . ." to determine that the major cause requirement had not been met.\textsuperscript{119} In this instance, the Commission observed that the claimant had been a dentist for over thirty years when he began to experience neck pain and numbness in his right hand.\textsuperscript{120} Subsequent diagnostic efforts revealed significant nerve root compression attributable to degenerative changes in the claimant's cervical spine.\textsuperscript{121} While the claimant's family physician related the claimant's symptoms to his work, the Commission disagreed:

\begin{quote}
In the present case, we find that the preponderance of the credible evidence in the record establishes that the "major cause" of the claimant's cervical problems is the development of degenerative osteophyte abnormalities.
\end{quote}

\begin{notes}
\textsuperscript{114} \textit{Id.} at 59, 922 S.W.2d at 367.
\textsuperscript{118} \textit{Herrera}, slip op. at 7.
\textsuperscript{119} McDaniels \textit{v. Michael D. McDaniels, D.D.S.}, No. E600713, slip op. at 7 (Workers' Comp. Comm'n Sept. 9, 1997).
\textsuperscript{120} \textit{See id.}, slip op. at 2.
\textsuperscript{121} \textit{See id.}, slip op. at 3-4.
\end{notes}
causing nerve root compression in the claimant’s cervical spine, and not the claimant’s work related activity as the claimant asserts. In reaching our decision we note that diagnostic testing revealed similar degenerative osteophyte abnormalities in both the left and the right side of the claimant’s spine. Consequently, we find that the greater weight of the credible evidence establishes that the formation of these degenerative abnormalities is not related to the claimant’s right side posturing or to any other aspect of his employment as a dentist.122

The foregoing comments illustrate the precision that a causal connection analysis can involve, whether “ordinary” or “major.” Presumably, the outcome might have been different had the claimant’s cervical degeneration been limited to his right side, from which he evidently postured while performing dental services. On the other hand, in light of the General Assembly’s precise definition of “major cause,” it should come as no surprise when the claims it affects turn on subtle factors.

III. REQUIREMENTS COMMON TO ALL INJURIES

In addition to the requirements previously discussed, Arkansas Code section 11-9-102(5) contains a number of others that are generally common to all injuries. To begin with, a compensable injury must “arise out of and in the course of employment.”123 Also, a compensable injury must cause an “internal or external physical harm to the body,”124 require “medical services” or result in “disability or death,”125 and be established by “medical evidence supported by ‘objective findings.’”126 Finally, if a medical opinion is offered as evidence of compensability, it must be stated “within a reasonable degree of medical certainty.”127 Of all the foregoing, the establishment of “objective findings” tends to be the most challenging.

Act 796 defines “objective findings” as “those findings which cannot come under the voluntary control of the patient.”128 Previously, certain medical findings which were arguably subject to patient influence had been accepted as objective, such as those based on range of motion.129 However, following

122. Id., slip op. at 5 (emphasis in original).
124. Id.
125. Id.
129. See Taco Bell v. Finley, 38 Ark. App. 11, 826 S.W.2d 313 (1992). Similar exams, such as the “Phalens” (an effort to manipulate the median nerve into reproducing carpal tunnel syndrome symptoms), were also considered objective prior to the passage of Act 796. See, e.g.,
the implementation of Act 796, any finding based on a "patient's description of the sensations produced by various stimuli" will not qualify as objective—even if the examination which produced the findings was capable of detecting malingering or false responses.\textsuperscript{130} Put another way, "complaints of pain are not objective. Likewise, complaints of tenderness or positive range of motion tests are not objective."\textsuperscript{131}

Even so, there remains a wide variety of medical findings which may be considered objective. Almost any visible or palpable evidence of injury will suffice, as long as it is related to the asserted compensable injury. For instance, muscle spasms and fluid build-up are both acceptable objective findings.\textsuperscript{132} Moreover, muscle spasms can be "seen" as well as palpated, since radiographic diagnostics can reveal a straightening of the spine associated with muscular contraction.\textsuperscript{133} In claims involving carpal tunnel syndrome, positive results from electrodiagnostic nerve tests are the most reliable objective findings,\textsuperscript{134} and even relatively subtle findings, such as a "5 cm by 5 cm fibrous mass," can satisfy the requirement.\textsuperscript{135} There are also more overt objective findings such as a herniated disc.\textsuperscript{136}

Recently, the Arkansas Court of Appeals has had occasion to consider the overall scope of the objective findings requirement. In \textit{Stephens Truck Lines v. Millican},\textsuperscript{137} respondents argued that the objective medical evidence did reveal an injury, but failed to prove "that the injury took place on July 26, 1994, or that appellee injured his neck while working for appellant."\textsuperscript{138} The respondents should have argued that the objective findings simply bore no causal relationship to the claimant's asserted compensable injury. Framed as it was, however, the Court declined to accept respondents' position:

\begin{itemize}
  \item \textit{See generally Sexton}, No. E416667, slip op. at 4-5.
  \item \textit{See, e.g., Watson v. Stillmeadow Nursing Home}, No. E513037 (Workers' Comp. Comm'n Jan. 6, 1997).
  \item \textit{58 Ark. App. 275, 950 S.W.2d 472 (1997)}.
  \item \textit{Stephens}, 58 Ark. App. at 279, 950 S.W.2d at 474.
\end{itemize}
Appellant, in effect, asks us to apply the statutorily-mandated standard of strict construction to hold that a claimant must offer objective medical evidence to prove not only the existence of an injury, but also to show the circumstances under which the injury was sustained and the precise time of the injury's occurrence. This we cannot do.... We know of no type of medical examination or test that would result in objective findings to show exactly where and when an injury was incurred, or whether the employee was injured while performing employment services rather than while engaging in horseplay.... Consequently, we hold the requirement that a compensable injury must be established by medical evidence supported by objective findings applies only to the existence and extent of the injury.139

Previously, in *Adams v. Swift Eckrich, Inc.*,140 the Commission had determined that the objective findings requirement applied to the question of initial compensability, “and not collateral issues.”141 *Adams* itself relied on the Commission's prior decision in *Graham v. Chamber Door Industries, Inc.*,142 which held that the duration of a given claimant's “healing period” did not depend on objective findings:

Respondents insist that some objective medical evidence of injury is a necessary prerequisite to an award of temporary total disability in this case. We do not agree with this assertion. Instead, we note that the critical question is whether a claimant's healing period has “stabilized.” While the presence of objective findings, or lack thereof, may be a factor in an analysis of this question, it is not determinative.143

Generally, once the question of objective findings is resolved in a particular claim, so too is the issue of whether the injury has been established with “medical evidence.” Medical evidence devoid of objective findings will be of little use for proving compensability, while the identification of objective findings usually implies the existence of medical evidence as their source.144 In addition, the presence of an objective finding should be sufficient to prove

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139. *Id.* at 279, 950 S.W.2d at 474-75.
140. No. E600098 (Workers' Comp. Comm'n May 7, 1997).
143. *Graham*, slip op. at 4-5.
144. In the absence of specific documentation in an operative report, objective findings cannot be inferred from the mere fact that a claimant underwent surgery for a particular injury. *See* *Jackson v. Department of Human Servs.*, No. E515842, slip op. at 6 (Workers' Comp. Comm'n Sept. 5, 1997).
the occurrence of an internal or external physical harm to the body.\textsuperscript{145} Thus, the "physical harm" requirement does not often appear as an independent issue.

It is also necessary to show that a work-related injury required "medical services" or resulted in "disability or death." Not surprisingly, this particular requirement rarely provides cause for conflict. For instance, the fact that "medical services" were required can usually be inferred from the presence of medical documentation in the record,\textsuperscript{146} while "disability" simply refers to a reduction in a claimant's earning capacity as the result of a compensable injury.\textsuperscript{147} And though the battle may rage around the issue of causation, there is generally little dispute over the fact of a given claimant's death.

With regard to medical opinions, Act 796 does not specifically require them as a prerequisite to compensability. Instead, it is only necessary that if a medical opinion is introduced, it be stated in reasonably certain terms.\textsuperscript{148} Such certainty was not required prior to Act 796, so long as an asserted causal relationship could be supported by supplemental evidence.\textsuperscript{149}

Because medical opinions are not a necessity for proving a compensable injury, the issue of reasonable medical certainty is somewhat secondary to this discussion. However, one should be aware that certain words in a physician's statement can cast doubt on the strength of the opinion offered. As an example, the Full Commission has held that the phrase "I suspect" does not amount to a reasonable degree of medical certainty.\textsuperscript{150} Terms such as "possibly" or "maybe" are equally questionable, but "probably" should suffice.\textsuperscript{151}

Finally, the requirement that a compensable injury "arise out of and in the course of employment" is perhaps the most fundamental aspect of workers' compensation law. As a first principle, this concept pre-dates Act 796 of 1993, and has been judicially explained as follows:

A claimant before the Workers' Compensation Commission must prove that the injury sustained was the result of an accident arising out of and in the course of employment. The phrase "arising out of the employment" refers to the origin or cause of the accident and the phrase "in the course

\textsuperscript{145} See Norvell, No. E402198, slip op. at 6, 8.
\textsuperscript{146} See Watkins v. Stax, No. E416219, slip op. at 6 (Workers' Comp. Comm'n May 6, 1997).
\textsuperscript{147} See ARK. CODE ANN. §11-9-102(9) (Michie Repl. 1996).
\textsuperscript{151} See Peridore v. Childress Gin Co., No. E504068, slip op. at 2, 6 (Workers' Comp. Comm'n Nov. 14, 1996). Peridore involved the issue of "reasonably necessary medical treatment," but should be applicable to claims involving initial compensability.
of employment” refers to the time, place, and circumstances under which the injury occurred. Bass v. Mecklenburg County, 258 N.C. 226, 128 S.E.2d 570. In order for an injury to arise out of the employment, it must be a natural and probable consequence or incident of the employment and a natural result of one of its risks.152

This basic approach to injury/employment causation remains essentially intact in the wake of Act 796 and, as a general rule, the case law associated with it still governs.153

IV. “COMPENSABLE INJURY DOES NOT INCLUDE . . .”

Though not the focus of this discussion, Arkansas Code section 11-9-102(5)(B)(i)-(iv) goes to considerable lengths to define what a “compensable injury” is not. Specifically, subsection (B)(i) denies compensation for injuries sustained by “any active participant in assaults or combats which . . . are the result of nonemployment-related hostility or animus of one, both, or all of the combatants,” and likewise excludes injuries stemming from “horseplay” unless the injured party was an “innocent bystander.”154 Subsection (B)(ii) rules out injuries resulting from “any recreational or social activities for the employee’s personal pleasure,”155 and is slightly redundant in light of the more commonly asserted “employment services” defense found at Arkansas Code section 11-9-102(5)(B)(iii).156 Briefly stated, “employment services” are those activities which carry out an employer’s purpose or advance an employer’s interests, and can take the form of either the employee’s “primary activity” or “incidental activities which are inherently necessary for the performance of the primary

153. This is not, however, universally true. For example, in light of the “employment services” defense found at ARK. CODE ANN. §11-9-102(5)(B)(iii) (Michie Repl. 1996), the Arkansas Court of Appeals has held that the “premises exception” to the “going and coming rule” is no longer available. See Hightower v. Newark Pub. Sch. Sys., 57 Ark. App. 159, 943 S.W.2d 608 (1997). As a general caveat, any potential interplay between the “employment services” defense and the “arising out of and in the course of employment” requirement should always be considered.
156. This section states that a compensable injury does not include any “[i]njury which was inflicted upon the employee at a time when employment services were not being performed, or before the employee was hired or after the employment relationship was terminated.” ARK. CODE ANN. §11-9-102(5)(B)(iii) (Michie Repl. 1996).
as a general rule, an employee who is not performing employment services at the time of injury will be ineligible for compensation. as a general rule, an employee who is not performing employment services at the time of injury will be ineligible for compensation.

one of the most dramatic changes wrought by act 796 relates to injuries which are "substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders." that compensation is denied for such injuries is not surprising, for the same rule applied before act 796 went into effect. however, prior to the act, there was a statutory presumption that an injury did not result from intoxication. arkansas code section 11-9-102(5)(b)(iv)(b) completely reverses this approach:

the presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders.

the statute further provides that "[e]very employee is deemed by his performance of services to have impliedly consented to reasonable and responsible testing by properly trained medical or law enforcement personnel . . . ." under the rule currently followed by the commission, a failure to submit to such testing will itself give rise to the presumption in subsection (b)(iv)(b).

157. pettey v. olsten kimberly quality care, no. e405037, slip op. at 4 (workers' comp. comm'n sept. 13, 1995), aff'd, 55 ark. app. 343, 934 s.w.2d 956 (1996) and aff'd, 328 ark. 381, 944 s.w.2d 524 (1997). in pettey, the claimant traveled to various patients' homes to provide in-home nursing services and sustained an injury en route. see id., slip op. at 2. in affirming the commission, the arkansas court of appeals commented that: "whatever 'performing employment services' may mean in the context of ark. code ann. § 11-9-102(5)(b)(iii), it must include the performance of those functions which are essential to the success of the enterprise in which the employer is engaged." olston kimberly quality care v. pettey, 55 ark. app. 343, 346, 934 s.w.2d 956, 958 (1996), aff'd 328 ark. 381, 944 s.w.2d 524 (1997).

158. this may seem redundant given the broader requirement that compensable injuries "arise out of and in the course of employment." however, the mission of the employment services exclusion is to close some of the gaps left by the traditional rule. see supra note 153.


162. ark. code ann. §11-9-102(5)(b)(iv)(b) (emphasis added).


164. davis v. your employment servs., inc., no. e415603 (workers' comp. comm'n dec. 5, 1996).
V. CONCLUSION

Over the last few years, most of the questions surrounding Arkansas Code section 11-9-102(5) have been answered. However, the statute is relatively young and there is a virtually unlimited supply of factual variations yet to be seen. Therefore, the subject of this discussion has not reached a static point, as the evolving approach to "rapid repetitive motion" illustrates. In addition, the possibility of legislative "fine-tuning" can never be ruled out. For now, Act 796 of 1993 remains a brave new world to some and a wasteland to others. Such polarity of opinion suggests that no status quo is particularly safe. 165

165. Indeed, decisions rendered by the Full Commission are often appealed, and those cited herein are no exception. The reader is cautioned that, to the author's knowledge, Mullins, No. E600667 (Workers' Comp. Comm'n Mar. 13, 1997); Barnette, No. E603971 (Workers' Comp. Comm'n Aug. 13, 1997); Henderson, No. E603760 (Workers' Comp. Comm'n Aug. 20, 1997); Boyd, No. E604907 (Workers' Comp. Comm'n Sept. 26, 1997); Williford, No. E510333 (Workers' Comp. Comm'n Sept. 23, 1997); McDaniels, No. E600713 (Workers' Comp. Comm'n Sept. 9, 1997); and Risner, No. E513459 (Workers' Comp. Comm'n Aug. 20, 1997) are all currently pending before the Arkansas Court of Appeals. While Mullins, Barnette, Henderson, and Boyd have only been cited as indications of trends or for their dicta, the remaining cases bear close watching. Most importantly, the Arkansas Court of Appeals' decision in Kildow, 58 Ark. App. 194, 948 S.W.2d 867, is now before the Arkansas Supreme Court, as is Kuligowski, 59 Ark. App. 261, 957 S.W.2d 715.