

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. H400848**

KERRY THARPE, EMPLOYEE	CLAIMANT
CITY OF NEWPORT, EMPLOYER	RESPONDENT
MUNICIPAL LEAGUE WC PROGRAM, CARRIER / ARKANSAS MUNICIPAL LEAGUE, TPA	RESPONDENT

OPINION FILED MAY 19, 2026

Hearing before Administrative Law Judge, Steven Porch, on March 27, 2026, in Jonesboro, Craighead County, Arkansas.

Claimant was represented by Mr. Phillip J. Wells, Attorney at Law, Jonesboro, Arkansas.

Respondents were represented by Ms. Mary K. Edwards, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A full hearing was held on this claim on March 27, 2026. A prehearing telephone conference took place on January 7, 2026. An amended prehearing order was entered on March 16, 2026, and subsequently entered into evidence as Commission Exhibit 1 with no further amendments. The parties confirmed the stipulations and the issues at the hearing. The parties' stipulations are set forth.

STIPULATIONS

By agreement of the parties, the stipulations applicable to this claim are as follows:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. An employer/employee/carrier relationship existed among the parties on or about January 27, 2024, when Claimant sustained a compensable injury to his pelvis, left elbow, and left shoulder.
3. The Respondents accepted the injuries as compensable and have paid medical expenses, temporary total disability benefits (TTD), and permanent partial impairment benefits based on a 9% impairment rating.

4. The parties stipulate that the Claimant had reached maximum medical improvement on December 17, 2024.
5. The parties stipulate to Claimant's average weekly wage of \$1,152.84, entitling him to temporary total disability (TTD) benefit rate of \$769.00 weekly, and permanent partial disability (PPD) benefit rate of \$576.00 weekly.

ISSUES

By agreement of the parties, the issues to be presented at the hearing are as follows:

1. Whether Claimant is entitled to a higher impairment rating and whether he is entitled to wage loss disability benefits.
2. Whether Claimant's attorney is entitled to a controverted attorney's fee.

All other issues are reserved.

CONTENTIONS

Claimant contends:

That the 9% impairment rating accepted by the Respondent is low and that he is entitled to a 29% permanent partial impairment rating based on the Fourth Edition of the AMA Guides to the Evaluation of Permanent Impairment.

The Claimant also contends that as a result of his compensable injuries, he's not able to earn the same wages at the time of his injury and therefore is entitled to significant wage loss disability benefits.

Respondent contends:

That they have paid for all of Claimant's medical treatment. Claimant primarily treated with Dr. Renard and Dr. Rabinowitz at UAMS. In a visit dated December 17, 2024,

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Dr. Rabinowitz placed Claimant at MMI. He was sent for an impairment rating evaluation at Functional Testing Centers and was assigned an impairment of nine (9%) to the body as a whole, which included all three body parts. Respondents have paid this rating in full. Of note, Dr. Renard signed off on the rating on January 15, 2025. Claimant cannot prove he is entitled to a higher impairment rating. Further Claimant cannot prove by a preponderance of the evidence he is entitled to wage-loss disability benefits.

Respondents reserve the right to file an Amended Response to the Prehearing Questionnaire or other appropriate pleading and to allege any further affirmative defense(s) that might be available upon further discovery.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Therefore, after a thorough consideration of the facts, issues, the applicable law, and the evidentiary record, and having the opportunity to hear testimony of the Claimant and to observe his demeanor, I hereby make the following Findings of Fact and Conclusions of Law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2012):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. The Claimant is not entitled to permanent total disability benefits but is entitled to wage-loss disability in the amount of 5% in addition to Claimant's 9% permanent anatomical impairment.
4. Claimant's attorney is entitled to a controverted attorney's fee.

CASE IN CHIEF

Summary of Evidence

The record is made up of Claimant's Exhibit A, medical records, consisting of 46 pages; Respondents' Exhibit 1, medical reports, consisting of 28 pages; Respondents' Exhibit 2, medical and indemnity payment logs, consisting of 20 pages; Commission Exhibit 1, Amended Pre-Hearing Order filed March 16, 2026, consisting of 6 pages. The Claimant's and Respondents' post hearing briefs are blue-backed and made a part of the record. The Claimant was the only witness testifying at the full hearing.

The Claimant was employed as a city supervisor who oversaw the public works department for the Respondent Employer. The Claimant injured his left pelvis, left elbow, and left shoulder on or about January 27, 2024, when Claimant was climbing to the top of a flood gate and the guard rail broke off resulting in a 20-foot fall. This injury was accepted as compensable by the Respondents.

Claimant was transported by ambulance to Unity Health – Harris Hospital for stabilization then transported to the UAMS Medical Center. CL. Ex. A, pp. 1-6. The Claimant sustained a “highly comminuted fracture of the left proximal humerus involving the humeral head, which will likely require arthroplasty. He also has a lateral compression type injury of his pelvis and a left open olecranon fracture.” CL. Ex. A, pp. 7-8. On January 28, 2024, Dr. Robert Garrison, performed an irrigation with sharp excision debridement for the left open olecranon fracture, grade 2, to the bone level, and an open reduction with internal fixation to left open grade 2 olecranon fracture. *Id.* Claimant's fracture was stable, and he was later put into an arm sling. *Id.*

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On January 29, 2024, the Claimant received another operation for his diagnosis of a closed pelvic ring disruption with left root of ramus and left sided posterior sacral fracture. *Id.* The procedure involved percutaneous treatment of left sided sacral fracture, percutaneous left sacroiliac joint fixation at the S1 level, and dynamic fluoroscopic stress examination of the pelvic ring injury. *Id.* Dr. Regis L. Renard performed the surgery. *Id.* The operative findings were a “stable pelvic ring after percutaneous sacroiliac joint arthrodesis at the left S1 level and percutaneous treatment of left sacral fracture at the left S2 level.” *Id.* The Claimant, after this procedure, was full weight bearing on the right lower extremity and 50% weight bearing on the left lower extremity with a platform walker that allowed him to transfer and take a few steps as needed for the next 6 weeks. *Id.*

On January 31, 2024, the Claimant received another operation for his closed left multi-part proximal humerus fracture. CL. Ex. A, pp. 12-14. Dr. Renard performed an “Open treatment with plate and screw fixation of left proximal humerus fracture.” *Id.* The operative findings were “Satisfactory operative fixation of the left proximal humerus fracture with proximal humeral plating system.” *Id.* The Claimant was none weight bearing on the left upper extremity except for activities of daily living such as eating and hygiene. *Id.*

On June 26, 2024, the Claimant had a follow up visit with Dr. Renard for a routine postoperative evaluation after his surgical treatment for his injuries. CL. Ex. A, pp. 15-17. Dr. Renard notes that Claimant is making improvements with range of motion of the left hip and elbow. *Id.* He further noted that the Claimant still had some pain in the left hip especially when the weather changes, “but otherwise isn’t having any pain or issues.” *Id.* Dr. Renard also noted that Claimant

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ambulates without an assistive device; and that he has been “practicing his golf swing and thinks his LUE motion will improve.” *Id.* Dr. Renard’s conclusion was that Claimant can return to work with full weight bearing with restrictions on climbing, crawling, and squatting. *Id.* Claimant could also drive as needed. *Id.* The Claimant received a methylprednisone, marcaine, and lidocaine injection into his left Glenohumeral Joint. *Id.*

On July 31, 2024, Claimant had another follow up visit with Dr. Renard. CL. Ex. A, pp. 18-19. There he complained about continued stiffness with his left elbow and left shoulder but denied any pain or discomfort on either of these extremities. *Id.* Claimant reported occasional pain on the left side of his pelvis. *Id.* Claimant further reported that he is not able to touch the back of his head with his left upper shoulder [extremity]. *Id.* Despite that, Dr. Renard notes that Claimant can return to work full weight bearing with restrictions. *Id.*

On August 20, 2024, Claimant visited Dr. Rabinowitz concerning left shoulder pain. CL. Ex. A, pp. 20-21. Claimant reported that he is very bothered by the stiffness in his shoulder. *Id.* Claimant further reported that he enjoys playing golf and has been unable to do so. *Id.* Dr. Rabinowitz advised on different medical options and Claimant agreed to undergo a left shoulder manipulation under anesthesia and arthroscopic capsular release. *Id.* This operation took place on August 26, 2024. CL. Ex. A, pp. 22-23.

On October 2, 2024, Claimant visited Dr. Renard for a routine postoperative evaluation after surgical treatment for his pelvis and left humerus fracture. CL. Ex. A, pp. 24-25. Dr. Renard’s medical note acknowledged that Claimant underwent arthroscopic release with Dr. Rabinowitz for the left shoulder and notes there was “some improvement” at the time. *Id.* The Claimant continued

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to have stiffness of the left shoulder and elbow but denied any pain or discomfort. *Id.* The Claimant stated that his golf game is somewhat improving with practice. *Id.* Dr. Renard found that Claimant had reached maximum medical improvement (“MMI”) for his pelvis. *Id.*

On November 13, 2024, the Claimant had another routine postoperative evaluation visit with Mr. Henry Allison, Physician Assistant, and complained of pain in his low back, especially with weather changes. CL. Ex. A, pp. 26-27. Claimant denied any pain in his left shoulder or elbow. *Id.* But did admit that he is still able to play golf. *Id.*

On December 30, 2024, The Claimant received a functional impairment evaluation by Functional Testing Centers, Inc. located in Mountain Home, Arkansas. Resp. Ex. 1, pp. 28-41. The physical examination findings from the evaluation report were “no swelling in the lumbar spine. There are no trophic changes or signs of scoliosis or malalignment. Normal muscle symmetry is noted. Range of motion is slightly limited for the lumbar spine but not utilized for purpose of establishing impairment. Right hip PROM is WNL. There is no other ratable finding revealed related to his pelvis injuries.” *Id.* The evaluation report concluded that the Claimant sustained a 7% WPI due to his left upper extremity and a 2% WPI due to his pelvis injury resulting in a combined permanent impairment rating of 9% to the whole person. *Id.* Dr. Renard signed off on this rating on January 15, 2025. *Id.*

On November 1, 2025, Claimant visited Dr. Terry L. Barnett, a Chiropractor, for a second permanent impairment evaluation. CL. Ex. A, pp. 42-45. Dr. Barnett, after his examination of Claimant, gave him a 29% whole person impairment. *Id.* Dr. Barnett states that the impairment

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rating was based solely on passive range of motion with measurements being obtained with the use of a goniometer. *Id.* Respondents disagreed with this impairment rating.

Adjudication

- A. Whether Claimant is entitled to a higher impairment rating and whether he is entitled to wage loss disability benefits.

Claimant has alleged that he is entitled to Dr. Barnett's higher impairment rating of 29% to the whole body, opposed to the 9% whole body impairment rating issued by Functional Testing Centers, Inc.

Permanent impairment, generally a medical condition, is any permanent functional or anatomical loss remaining after the healing period has been reached. *Ouachita Marine v. Morrison*, 246 Ark. 882, 440 S.W.2d 216 (1969). Pursuant to Ark. Code Ann. § 11-9-522(g) (Repl. 2012), the Commission adopted the AMERICAN MEDICAL ASSOCIATION, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (4th ed. 1993) (hereinafter "AMA Guides") as an impairment rating guide. *See* AWCC R. 099.34. A determination of the existence or extent of physical impairment must be supported by objective and measurable physical or mental findings. Ark. Code Ann. § 11-9-704(c)(1)(B) (Repl. 2012). "Objective findings" are "those findings which cannot come under the voluntary control of the patient." *Id.* § 11-9-102(16)(A)(i). Permanent benefits are to be awarded only following a determination that the compensable injury is the major cause of the disability or impairment. *Id.* § 11-9-102(4)(F)(ii)(a). "Major cause" is defined as "more than fifty percent (50%) of the cause," and a finding of major cause must be established by a preponderance of the evidence. *Id.* § 11-9-102(14). This standard means the evidence having

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greater weight or convincing force. *Barre v. Hoffman*, 2009 Ark. 373, 326 S.W.3d 415; *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

Any medical opinion concerning impairment must be stated within a reasonable degree of medical certainty. Ark. Code Ann. § 11-9-102(16)(B) (Repl. 2012). It should be noted, however, that in interpreting this provision, the Arkansas Supreme Court in *Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W.3d 760 (2001) stated: “This court has never required . . . that the magic words ‘within a reasonable degree of medical certainty’ even be used by the doctor.”

A claimant’s testimony is never considered uncontroverted. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). The determination of a witness’ credibility and how much weight to accord to that person’s testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.*

The Commission may determine its own impairment rating under the AMA Guides, rather than simply assessing the validity of the ratings that have been assigned. *Avaya v. Bryant*, 82 Ark. App. 273, 105 S.W.3d 811 (2003). However, after closely reviewing the evidentiary record in light of the AMA Guides, I am in agreement with and credit the 9% whole person impairment assessed by Functional Testing Centers, Inc. This rating was also signed off on by Claimant’s treating physician, Dr. Renard. Moreover, the Claimant plays a minimum of nine holes of golf daily and, if he misses a day, then he plays eighteen holes of golf the following day. TR-27, 46-47, 63-64. He

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plays golf with friends and admitted that he does equally well as his apparently uninjured golfing buddies. TR-54-55. Though the Claimant further admitted to using a golf cart when on the golfing course, the game requires a lot of hip, shoulder and elbow movements.

Claimant also testified that he could only sit on soft surfaces for 30 minutes and hard surfaces for 20 minutes. But later admitted to riding in his car for forty-five minutes to an hour to get to the full hearing in Jonesboro. TR-57. He never stated that he had to make multiple stops to stretch his legs or had to lean his seat back for comfort. Rather, he stated that he had to turn on the heated seat for his back. Moreover, the Claimant does not have any restrictions for sitting or standing for any prolonged period. Resp. Ex. 1, pp. 3-4, TR-44. In fact, Claimant testified that he has a special recliner at his home that he leans back in for one hour to rejuvenate his body after physical therapy but sits in it for 5 to 6 hours daily, exceedingly longer than 30 minutes for a soft surface. TR-26. The Claimant based on submitted evidence, the AMA guides 4th Edition, and my observations, was not a person who had a 29% whole person impairment, rather a 9% impairment. The Commission is authorized to accept or reject a medical opinion and is authorized to determine its medical soundness and probative value. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002); *Green Bay Packing v. Bartlett*, 67 Ark. App. 332, 999 S.W.2d 692 (1999). I credit the opinion of Functional Testing Centers regarding his rating of Claimant's shoulder and hip/pelvic injuries.

In sum, Claimant has failed to prove by a preponderance of the evidence that he is entitled to an impairment rating higher than what was set by Function Testing Centers, Inc. of 9% whole body impairment. With that, Claimant has also contended that because of his compensable injuries,

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he is permanently and totally disabled. Thus, in the alternative, Claimant argued that he is entitled to wage loss disability benefits over and above his impairment rating as discussed above. Respondents disagreed with this argument.

As the parties have stipulated, the January 27, 2024, accident caused Claimant to suffer multiple compensable injuries. Some of these injuries—namely, the one to his left elbow—was scheduled. *See* Ark. Code Ann. § 11-9-521(a)(4), (11) (Repl. 2012). The others—specifically, those involving his left shoulder and his hip/pelvis, were unscheduled. *Cf. id.* § 11-9-521. The term “permanent total disability” is defined in the statute as “inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment.” *Id.* § 11-9-519(e)(1) (Repl. 2012).

Claimant’s entitlement to wage loss disability benefits is controlled by Ark. Code Ann. § 11-9-522(b)(1) (Repl. 2012), which states:

In considering claims for permanent partial disability benefits in excess of the employee’s percentage of permanent physical impairment, the Workers’ Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee’s age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity.

See Curry v. Franklin Elec., 32 Ark. App. 168, 798 S.W.2d 130 (1990). Such “other matters” include motivation, post-injury income, credibility, demeanor, and a multitude of other factors. *Id.*; *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961). As the Arkansas Court of Appeals noted in *Hixon v. Baptist Health*, 2010 Ark. App. 413, 375 S.W.3d 690, “there is no exact formula for determining wage loss” Under § 11-9-522(b)(1), when a claimant has been assigned an impairment rating to the body as a whole, the Commission possesses the authority to increase the

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rating, and it can find a claimant totally and permanently disabled based upon wage-loss factors.

Cross v. Crawford County Memorial Hosp., 54 Ark. App. 130, 923 S.W.2d 886 (1996).

To be entitled to any wage-loss disability in excess of an impairment rating, the claimant must prove by a preponderance of the evidence that he sustained permanent physical impairment as a result of a compensable injury. *Wal-Mart Stores, Inc. v. Connell*, 340 Ark. 475, 10 S.W.3d 727 (2000). The wage loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Emerson Elec. v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). In considering factors that may impact a claimant's future earning capacity, the Commission considers his motivation to return to work, because a lack of interest or a negative attitude impedes the assessment of his loss of earning capacity. *Id.* The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability. *Oller v. Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982). Finally, Ark. Code Ann. § 11-9-102(4)(F)(ii) (Repl. 2012) provides:

- (a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.
- (b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

“Major cause” is more than fifty percent (50%) of the cause and has to be established by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(14) (Repl. 2012). “Disability” is the “incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury.” *Id.* § 11-9-102(8).

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The Claimant has suffered a compensable injury, by specific incident, to his hip and shoulder on January 27, 2024, when he fell 20 feet off a ladder. The injury occurred during the course and scope of his employment with Respondent/Employer. The essential issue in this matter is whether the Claimant is entitled to only the 9% whole body impairment rating or benefits beyond that impairment rating.

The Claimant is 64 years old with a high school diploma and one year of college. The Claimant also has his CDL license. Claimant has worked on a farm as farm help, a flying service, was elected as the Jackson County Judge for four years, owned his own dump trucking business and worked as a city supervisor for the City of Newport, public works department. TR-12-15. Claimant was apparently having difficulty sitting or standing for any reasonable period which was evident with his constant standing and sitting during his testimony. I do believe this was staged behavior. Claimant has not professed a strong desire to continue working. Rather he has shown an exceedingly strong desire to golf. Claimant plays a minimum of nine holes of golf daily and, if he misses a day, then he plays eighteen holes of golf the following day. He plays golf with friends and admitted that he does equally well as his seemingly uninjured golfing buddies. Though the Claimant stated he used a golf cart when on the golfing course, the game still requires the use of the hips, shoulders, and elbow.

Claimant, also previously mentioned, testified that he could only sit on soft surfaces for 30 minutes and hard surfaces for 20 minutes. But again, he later admitted to riding in his car for forty-five minutes to an hour to get to the full hearing in Jonesboro. He again never stated that he had to

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make multiple stops to stretch his legs and hips or had to lean his seat back for comfort. He had to turn on the vehicle's seat warmer to make it to the hearing. TR-56-57.

Though Claimant has presented nine jobs that he has applied for (TR-51), those job applications came approximately eleven months post December 17, 2024, maximum medical improvement date. I believe these job applications came because of the upcoming full hearing, not because the Claimant was wanting to work. Moreover, and without question, the Claimant's dedication to golfing is substantially greater than his desire in finding meaningful employment. True, the Claimant has permanent restrictions on climbing, crawling, squatting and lifting nothing heavier than 20 pounds. CL. Ex. A, pp. 26-27. But notably, he has no restrictions on sitting or standing for any prolonged period. Claimant's sitting and standing limitations are self-imposed, not medically imposed. Despite this, the permanent restrictions can affect his wage-earning capacity, based on his work history. Though he has supervisory experience, that in itself does not mean that this type of employment will be 100% sedentary. In fact, Claimant's current injury occurred while engaged in physical labor, as a supervisor.

In sum, I do find by the preponderance of the evidence that Claimant proved he sustained wage-loss disability in the amount of 5% in addition to the Claimant's 9% anatomical impairment. I further find by the preponderance of the evidence that Claimant's January 27, 2024, compensable work injury was the major cause of his 9% anatomical impairment and 5% wage-loss disability.

ATTORNEY FEES

One of the purposes of the attorney's fee statute is to put the economic burden of litigation

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on the party who makes litigation necessary. *Brass v. Weller*, 23 Ark. App. 193, 745 S.W.2d 647

(1998). Under Ark. Code Ann. § 11-9-715 (Repl. 2012):

(B) Attorney's fees shall be twenty-five percent (25%) of compensation for indemnity benefits payable to the injured employee or dependents of a deceased employee . . . In all other cases whenever the commission finds that a claim has been controverted, in whole or in part, the commission shall direct that fees for legal services be paid to the attorney for the claimant as follows: One-half (½) by the employer or carrier in addition to compensation awarded; and one-half (½) by the injured employee or dependents of a deceased employee out of compensation payable to them.

The evidence before me clearly shows that Respondents have controverted Claimant's entitlement to additional indemnity benefits. Thus, the evidence preponderates that his counsel, the Hon. Phillip Wells, is entitled to the fee as set out above for all indemnity benefits that should have been paid consistent with this opinion and in compliance with the Arkansas Workers' Compensation Act.

CONCLUSION

Respondents are hereby directed to pay/furnish benefits in accordance with the findings of fact and conclusions of law set forth above. All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid, pursuant to Ark. Code Ann. § 11-9-809 (Repl. 2012). *See Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

IT IS SO ORDERED.

Hon. Steven Porch
Administrative Law Judge