

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
WCC NO. H302292**

**JAMES ALLMON, EMPLOYEE**

**CLAIMANT**

**PRIMETALS TECH. USA LLC,  
EMPLOYER**

**RESPONDENT**

**FARMINGTON CASUALTY CO.,  
CARRIER**

**RESPONDENT**

**OPINION FILED AUGUST 21, 2024**

Hearing before Administrative Law Judge O. Milton Fine II on June 21, 2024, in Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. George H. Bailey, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

On June 21, 2024, the above-captioned claim was heard in Jonesboro, Arkansas. A prehearing conference took place on April 15, 2024. The Prehearing Order entered on April 16, 2024, pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the order.

**Stipulations**

At the hearing, the parties discussed the stipulations set forth in Commission Exhibit 1. With the addition of a fourth at the hearing, and the fifth via Respondents'

contentions and proposed stipulation (see *infra* note 3), they are the following, which I accept:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The employee/employer/carrier relationship existed on March 24, 2023, which Claimant sustained a compensable injury to his right ankle by specific incident.
3. Respondents accepted the above injury as compensable and paid benefits pursuant thereto.
4. Claimant has been assigned an impairment rating of nine percent (9%) to the lower extremity in connection with his stipulated compensable injury; and Respondents are currently paying permanent partial disability benefits pursuant to that rating.
5. Claimant's average weekly wage entitled him to the maximum compensation rates of \$835.00/\$626.00.

### Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit

1. After amendments, the following were litigated:
  1. Whether Claimant sustained an injury to his back as a compensable consequence of his stipulated compensable right ankle injury.
  2. Whether Claimant is entitled to reasonable and necessary treatment of his alleged back injury.

3. Whether Claimant sustained an injury in the form of atrophy of his right lower extremity above the knee as a compensable consequence of his stipulated compensable right ankle injury.
4. Whether Claimant is entitled to an impairment rating of three percent (3%) to his right lower extremity, and permanent partial disability benefits pursuant thereto, in connection with the alleged atrophying of that appendage.
5. Whether Claimant is entitled to a controverted attorney's fee not only on the permanent partial disability benefits sought in connection with the alleged atrophying of his right lower extremity, but on the as-yet unpaid portion of the benefits tied to the nine percent (9%) impairment rating.

All other issues have been reserved.

### Contentions

The respective contentions of the parties, following amendments at the hearing, read as follows:

#### Claimant:

1. Claimant contends that he sustained a compensable injury on or about March 24, 2023, during the course of and within the scope of his employment with Respondent Employer.
2. Claimant further contends that he is entitled to additional reasonable and necessary medical treatment and unpaid medically related travel

expenses, and treatment for the hip<sup>1</sup> and back. He was referred to Dr. Ashley Park, who has ordered an MRI, with a diagnosis of radiculopathy. That has not been approved and appears to have been denied.

3. Claimant contends that he is entitled to additional temporary total and temporary partial disability benefits for a period yet to be determined.<sup>2</sup>
4. Claimant also contends that he is entitled to permanent partial disability benefits pursuant to impairment ratings of nine percent (9%) or greater to the right foot and three percent (3%) to the right lower extremity above the knee. The latter is alleged to be related to muscle atrophy that he has suffered as a compensable consequence of his stipulated compensable right ankle injury.
5. Statutory attorney's fees based upon all controverted amounts are claimed.

Respondents:

1. Respondents will assert the following defenses: (a) they have stipulated to the maximum compensation rate<sup>3</sup>—there is no issue; (b) Claimant does

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<sup>1</sup>No issue has been raised concerning this, so it will not be addressed. Instead, it will be considered reserved.

<sup>2</sup>See *supra* note 1.

<sup>3</sup>Review of Respondents' March 14, 2024, prehearing questionnaire response confirms that they offered to stipulate that Claimant's average weekly wage entitled him to the maximum compensation rates of \$835.00/\$626.00. Based on this, I have found that the parties have reached a stipulation on this point. It has thus been added as Stipulation No. 5. See *supra*.

not have a compensable back injury—this is a foot injury; (c) the injury is a scheduled injury, and no permanent impairment rating<sup>4</sup> has been issued yet; (d) there is no wage loss<sup>5</sup> with a scheduled injury; and (e) the antalgic gait<sup>6</sup> table is only used when the proper rating to the extremity cannot be ascertained.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record as a whole, including medical reports, non-medical records, and other matters properly before the Commission, and having had an opportunity to hear the testimony of 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. Claimant has proven by a preponderance of the evidence that he sustained an injury to his back as a compensable consequence of his stipulated compensable right ankle injury.

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<sup>4</sup>As shown by Stipulation No. 3 *supra* and the evidence (*infra*), both the stipulated compensable right ankle injury and the atrophying of Claimant's right thigh have been rated.

<sup>5</sup>This issue has been reserved.

<sup>6</sup>This is not at issue in this proceeding.

4. Claimant has proven by a preponderance of the evidence that he is entitled to reasonable and necessary treatment of his compensable back injury.
5. Claimant has proven by a preponderance of the evidence that he sustained an injury in the form of atrophying of his right thigh as a compensable consequence of his stipulated compensable right ankle injury.
6. Claimant has proven by a preponderance of the evidence that he is entitled to an impairment rating of three percent (3%) to his right lower extremity, and permanent partial disability benefits pursuant thereto, in connection with the compensable atrophying of his right thigh.
7. Claimant has proven by a preponderance of the evidence that he is entitled to a controverted attorney's fee in connection with the indemnity benefits awarded in Finding of Fact/Conclusion of Law No. 6.
8. Claimant has not proven by a preponderance of the evidence that he is entitled to a controverted attorney's fee in connection with the as-yet unpaid portion of the permanent partial disability benefits tied to the nine percent (9%) impairment rating that the parties have stipulated was accepted and is being paid out.

### **CASE IN CHIEF**

#### **Summary of Evidence**

Claimant was the sole witness at the hearing.

In addition to the Prehearing Order discussed above, exhibits admitted into evidence in this case were Claimant's Exhibit 1, a compilation of his medical records, consisting of a cover sheet, an index page, and 49 numbered pages thereafter; Claimant's Exhibit 2, non-medical records, consisting of a cover sheet, an index page, and five numbered pages thereafter; and Respondents' Exhibit 1, an indemnity payout history on this claim, consisting of six pages.

### Analysis of Issues

#### A. Compensable Consequence-Back

Introduction. As the parties have stipulated, Claimant sustained a compensable injury to his right ankle injury on March 24, 2023, while working for Respondent Primetals Technologies USA LLC ("Primetals"). In this action, he is seeking, inter alia, treatment of a back injury that he claims is a compensable consequence of his ankle injury.

Standards. If an injury is compensable, every natural consequence of that injury is likewise compensable. *Air Compressor Equip. Co. v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1 (2000); *Hublely v. Best West. Governor's Inn*, 52 Ark. App. 226, 916 S.W.2d 143 (1996). The test is whether a causal connection between the two (2) episodes exists. *Sword, supra*; *Jeter v. McGinty Mech.*, 62 Ark. App. 53, 968 S.W.2d 645 (1998). The existence of a causal connection is a question of fact for the Commission. *Koster v. Custom Pak & Trissel*, 2009 Ark. App. 780, 2009 Ark. App. LEXIS 947. It is generally a matter of inference, and possibilities may play a proper and important role in establishing that relationship. *Osmose Wood Preserving v. Jones*, 40 Ark. App. 190,

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843 S.W.2d 875 (1992). A finding of causation need not be expressed in terms of a reasonable medical certainty where supplemental evidence supports the causal connection. *Koster, supra; Heptinstall v. Asplundh Tree Expert Co.*, 84 Ark. App. 215, 137 S.W.3d 421 (2003).

Under Ark. Code Ann. § 11-9-705(a)(3) (Repl. 2012), Claimant has the burden of proving by a preponderance of the evidence that she sustained a compensable injury. This standard means the evidence having 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).

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.*

Evidence. Claimant, who is 56 years old, testified that he worked for Primetals for 21 years. Prior to March 24, 2023, his physical condition was "healthy." But on that date, the following occurred:

I'd just got through filling up the machine with coolant, turned the water hose straight up, and I was going to clean—pick the water hose up. I went to go retrieve my glove so I wouldn't get metal shavings into my hands, and as I was walking around to get those, I walked by a pallet that has



cellophane that had been left out, grabbed my boot as I'm walking past it, and basically tripped me. And as I'm trying to keep my balance from falling, I broke my foot<sup>7</sup> and then just more and more impact on it damaged it in several—broken several bones before I hit the ground.

He was taken by ambulance to a hospital in Blytheville. There, emergency room personnel tried unsuccessfully to re-set his fractured ankle. After Claimant's right lower extremity was placed in a temporary cast, he was transferred to Region One Medical Center in Memphis that same day.

Following three more abortive attempts to re-set his ankle, Claimant had an orthopedic consultation with Dr. Christopher Cosgrove. Claimant was discharged from the hospital on March 27, 2023, to await surgery. The operation took place on April 7, 2023. This involved placement of multiple pieces of metal hardware to repair his fractures. Claimant saw Cosgrove again on April 26, 2023, and was sent to physical therapy. The cast was removed, and he was placed in a boot. Returning again to Dr. Cosgrove on July 10, 2023, Claimant was directed to undergo additional therapy. He related that during this period, he had "been laid up . . . so there was a lot of issues [he] had about just getting up and down and—and being able to move." Claimant elaborated: "[b]asically three months laying in a recliner with my leg elevated to maintain [sic] the swelling and keep an ice pack on it, and, you know, and just not even getting out to—to use the bathroom yet."

At the time of the July 2023 visit to Dr. Cosgrove, Claimant requested that he be released to light duty. This was granted. Claimant saw the doctor again on September

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<sup>7</sup>The only compensable injury to which the parties have stipulated involves Claimant's right ankle. *See supra*.

13, 2023. On that occasion, Cosgrove examined Claimant's back. Claimant explained further: "He—we talked about it, the issue of it, 'cause I was trying to stay off of that leg and I'm walking around and all that stuff, it's—I'm favoring one side all the time and it's starting to bother me in my back and hip and stuff." The following exchange took place:

Q. When did your back start bothering you?

A. Shortly after I got to work and to constantly favoring that one leg all the time and then being there and then—and then I noticed it. But last time I went to the—Dr. Cosgrove, I just told him, I said, "Look, my back is killing me." I said, "I"—I said, "I'm favoring this leg all the time," I said, "and I'm trying to stay off this other one it's just—it's killing my back, my hip. I'm just"—I said, "I'm not trying to—" I think he thought I was trying to ask for some pain pills, and I didn't want any pain pills. I just wanted to have—make sure that I'm not hurting myself doing—favoring this one leg all the time, that it's becoming an issue for me."

After this appointment, Dr. Cosgrove sent Claimant to Dr. Park for the back issue. He saw him on October 24, 2023. As a result of that visit, where Claimant underwent x-rays of his back, it was recommended that he have physical therapy. Park also recommended that he have an MRI of his back; but neither this nor the therapy has taken place, despite his desire to have them. Claimant returned to him on March 4, 2024. Respondents have not covered this visit; and the bill therefor remains outstanding. He takes no medication for his back condition.

In his testimony, Claimant related that his ankle injury has impacted the way he walks and works:

It affects almost everything that I do now because, where they used to didn't have no problem trying to move around, now I'm—as simple as getting off the forklift and on the forklift, I—I used to could just jump up there. Now I have to go to one particular side and I grab the cage and pull myself up. Getting into other areas where there's steps and stuff, I have

to watch the way I walk up and down. And then anything that I'm looking for something down low, I have to try to find a way to squat down to keep my left stiff to where—I just don't have the ability to bend it and get down like I used to.

Describing how he ascends and descends stairs, Claimant testified: "I favor one leg, my left leg, and use it to pick me up and take me down." He now limps; and while his back pain is not as severe as it was after its onset, "it's still there. It's not going away." Motor vehicle trips that last more than one hour bother his back. When asked during the hearing to indicate the source of his discomfort, he pointed to his lower back, near his belt line.

Under questioning from the Commission, Claimant related the following:

Q. When did your back start bothering you?

A. First—the first it started really bothering me, when I was laying that dadgum recliner being laid up all the time for them three months, and then when I got to the work, it seemed to—it helped to move around.

Q. Uh-huh.

A. But then as the day went longer and my leg bothered me more, it was almost like I'm putting myself back in a recliner because I'm trying to stay off that leg all the time, so then it just kind of aggravated my back again.

Q. So—go ahead.

A. If—I'm kind of explaining. If somebody told you to stay on one leg for hours at a time and—and try to stay off that, which is what I've had to do for light work, they told me to stay off that at work, and it just—it was like I'm shifting one problem somewhere else, you know. You're trying to fix one issue by—and you're causing another is what I feel like I was doing, and that's what I told Dr. Cosgrove, so that's why he set me up a[n] appointment with Dr. Parker.

Q. So you believe that favoring your left leg, your uninjured leg, over your right one is what's messed your back up, if that what I'm hearing from you?

A. I believe that's what is causing the issue, yeah.

Q. Did you do anything else during this time period that would explain why your back would be bothering you?

A. No.

Q. Did it get worse when you went back to work? You talked about it began when you were in the recliner while you were convalescing?

...

A. Yes, sir.

Q. Did it get worse when you went back to Primetals?

A. It—it's—when I first got out of the recliner, it was so—and you've been laid up for three months, it's sore. And it seems when I got back to work, the moving around helped me, but then as I had to keep favoring that one leg because of the restrictions and all that and because of what it—it is, it started getting back worse again. You know what I'm saying?

Later in his testimony, Claimant elaborated that whatever back issues he had from extended time spent in his recliner resolved after he had been back at work for a while. But after resuming his duties at Primetals for a week or two and having to compensate for his right leg by altering his gait, he began having back trouble again. After dealing with the symptoms for a couple of weeks, when his second visit with Dr. Cosgrove came around, he sought help from him, informing him that his back was “killing” him.

The medical records in evidence reflect that Claimant suffered a right trimalleolar fracture/dislocation, and on April 7, 2023, had to undergo an open reduction and internal fixation of the medial, latera, and posterior lip because of the displaced and unstable

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nature of the fracture. On July 10, 2023, Dr. Cosgrove released him to light duty, with a 10-pound lifting restriction and no standing/walking for more than one hour without a rest period.

When Claimant saw Cosgrove again on September 13, 2023, he related the following:

Work is going well per his account. He does describe having some lower back pain than has been progressive in nature as after he has returned to work and feels like this is a compensation injury from unbalanced walking due to his right lower extremity deficits.

The doctor in the report of the visit noted that Claimant “ambulates with a shortened and mildly antalgic gait pattern” and wrote:

**With regards to the low back pain, I do believe that this is likely a compensatory injury as a result of prolonged unbalanced walking due to his ankle rehabilitation.** I [would] like for him to see one of our nonoperative spine providers for an assessment and optimization of management of this. In the meantime, he is at maximal medical improvement for his right lower leg injury.

(Emphasis added)

Claimant saw Dr. Park on October 24, 2023. The report of that visit reads in pertinent part:

#### HISTORY OF PRESENT ILLNESS

Mr. Allmon is a 55-year old male who apparently suffered a work injury to his right foot in late March 2023. He states that because of his foot fracture on his right foot, it altered his gait pattern. In June of this year, he started having discomfort in his back. He is not reporting any referred pain into the lower extremities. He notices discomfort particularly if he assumes a sitting or standing position for any length of time. On a visual analog scale, he rated his discomfort between a 2 and 4 out of a possible 10 score.

...

### PHYSICAL EXAMINATION

. . .

Examination of the lower extremities revealed motor strength to be good. Sensation was intact to light touch. Deep tendon reflexes were symmetrical. There was no evidence of clonus. There were negative root tension signs of both lower extremities. Range of motion of the lumbar spine was normal. There was some discomfort with lumbar extension and hyperextension. There was no appreciable pain with side bending motion. He ambulated without analgesia.

### RADIOGRAPHIC EVALUATION/INTERPRETATION

AP, lateral, oblique and spot films of the lumbar spine were obtained today. The lumbar vertebrae were of normal height and alignment other than for some slight levocurvature. Intervertebral disc heights were maintained. The foramen were patent. The lumbar facets were normal.

### MUSCULOSKELETAL IMPRESSION

Onset of low back pain after suffering a right foot fracture in the workplace on 03/24/2023. It is my impression that Mr. Allmon's low back condition is a result of pain emanating from posterior elements.

When Claimant went back to Dr. Park on March 4, 2024, he was still presenting with lower back pain. The doctor recommended a lumbar MRI and a possible spinal injection based on the MRI findings.

Discussion. Claimant, whose testimony I credit, suffered a severe right ankle injury that necessitated surgery and a lengthy convalescence in a recliner. Once Claimant returned to work at light duty, he began favoring his "good leg"—the left one. As a result of his altered gait, his back began bothering him. He first sought approached his surgeon, Dr. Cosgrove, about his back problem. The doctor in his report gave his opinion regarding causation: "With regards to the low back pain, I do believe that this is likely a compensatory injury as a result of prolonged unbalanced walking due to his ankle rehabilitation." I credit this opinion. Medical evidence is not

ordinarily required to prove causation. *Wal-Mart v. Van Wagner*, 337 Ark. 443, 990 S.W.2d 522 (1999). But if a medical opinion is offered on causation, the opinion must be stated within a reasonable degree of medical certainty. Ark. Code Ann. § 11-9-102(16)(B) (Repl. 2012). It should also be noted 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.” However, where the only evidence of a causal connection is a speculative and indefinite medical opinion, it is insufficient to meet the claimant's burden of proving causation. *Crudup v. Regal Ware, Inc.*, 341, Ark. 804, 20 S.W.3d 900 (2000); *KII Construction Company v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002). Here, use of the term “likely” by Dr. Cosgrove complies with the statute.

The preponderance of the credible evidence, highlighted above, establishes that Claimant’s back injury was a natural consequence of his stipulated compensable right ankle injury. The causal connection between the two has been established. Accordingly, he had met his burden of proving that his back injury is a compensable consequence.

B. Reasonable and Necessary Treatment-Back

Introduction. Claimant has alleged that he is entitled to reasonable and necessary treatment of his back injury.

Standards. Arkansas Code Annotated Section 11-9-508(a) (Repl. 2012) states that an employer shall provide for an injured employee such medical treatment as may

be necessary in connection with the injury received by the employee. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). But employers are liable only for such treatment and services as are deemed necessary for the treatment of the claimant's injuries. *DeBoard v. Colson Co.*, 20 Ark. App. 166, 725 S.W.2d 857 (1987). The claimant must prove by a preponderance of the evidence that medical treatment is reasonable and necessary for the treatment of a compensable injury. *Brown, supra*; *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). What constitutes reasonable and necessary medical treatment is a question of fact for the Commission. *White Consolidated Indus. v. Galloway*, 74 Ark. App. 13, 45 S.W.3d 396 (2001); *Wackenhut Corp. v. Jones*, 73 Ark. App. 158, 40 S.W.3d 333 (2001).

As the Arkansas Court of Appeals has held, a claimant may be entitled to additional treatment even after the healing period has ended, if said treatment is geared toward management of the injury. See *Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, 184 S.W.3d 31 (2004); *Artex Hydroponics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983). Such services can include those for the purpose of diagnosing the nature and extent of the compensable injury; reducing or alleviating symptoms resulting from the compensable injury; maintaining the level of healing achieved; or preventing further deterioration of the damage produced by the compensable injury. *Jordan v. Tyson Foods, Inc.*, 51 Ark. App. 100, 911 S.W.2d 593 (1995); *Artex, supra*.

Discussion. I find that Claimant has proven by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment of his compensable back injury, to include the MRI and physical therapy that have been recommended



*supra*. Moreover, I have reviewed his treatment records of his back that are in evidence, and I find that he has proven by a preponderance of the evidence that all of it reflected therein was reasonable and necessary.

C. Compensable Consequence-Atrophy

Introduction. In addition to his alleged back condition, Claimant has asserted that he also suffered a compensable consequence in the form of atrophying of his right lower extremity above the knee.

Evidence. Per Claimant, his right lower extremity was “good, good to go” before he suffered his stipulated compensable right ankle injury. After the cast was removed in the weeks after his surgical procedure, however, he was shocked to see the withered condition of his right lower extremity. He described its appearance as being “kind of like [his] arm” instead of his leg. Its shrunken appearance was due to its disuse. For example, Claimant’s testimony concerning his physical difficulties in performing his job duties since going back to work included this passage:

When you’re climbing up on a forklift, it’s pretty high so you have to use a lot of leg muscles, but one side of the forklift to the other, depending on what leg it is, there’s—you’ll have to use that leg muscle and I don’t have that leg muscle in it when I get on that side because of the way it’s injured. So what I do is have to use my body weight—body muscles to compensate for my leg.

Later in his testimony, the following exchange took place:

Q. Now, the problems you’re having doing your daily routine, chores or at work, is there more than your ankle affected? Could you tell us how the other part of your leg affects these things that you’ve described?

A. Just no strength in my leg. Just I don’t have—

Q. Is that your leg above and below the knee?

A. My—my thigh here. I don't have any—how to explain it. If you take a step up on a step, you use your thigh to push yourself down, pick yourself up, and if I put my bad leg on a step and it's like—there's nothing there, so I pull it back down and put my left foot back up there and then pull my right leg up. That's the only way I can explain. And that's some of the issues also with the forklift and getting down into the pits where the machines are at is I end up always favoring the one leg because the other leg's—it lets me down. It won't do what I need it to do.

Q. Is your—is your thigh smaller than it was before?

A. Yeah. In my mind, it's—you know, it—

Q. Besides weak, it's just diminished in size, is that correct?

A. Yeah.

Claimant's testimony was that the difference in circumference between his right and left thighs is noticeable to both him and his spouse. The following exchange occurred:

Q. Any indication that your right thigh is not going to increase now that you're up and about? How do you know it's permanent?

A. I don't know if anything's permanent. That's why I want to have—I don't know if anything is permanent, you know what I mean? I need to—that's why I want to do something about it.

He was of the opinion that, based on his own observation, that the difference between his two thighs is more than the one centimeter measurement reflected in his evaluation.

The medical records in evidence reflect that on May 22, 2024, Claimant underwent a functional capacity evaluation by Casey Garretson, OTD, OTR/L, CFE, CEAS; and Charles Davidson, M.Ed., CEAS, CFE, CSDA, of Functional Testing Centers, Inc. That report reads in pertinent part:

IMPAIRMENT EVALUATION SUMMARY – Lower Extremity

...

Please review the following Impairment Evaluation. The evaluation was conducted based on The AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition (1992) using Objective findings.

\*Under Arkansas workers['] compensation law, a determination of the existence and extent of physical impairment must be supported by objective and measurable findings. Arkansas code also prohibits use of pain or complaint of pain in assessing permanent impairment. Objective findings are defined under Arkansas code as those which cannot come under the voluntary control of the patient, and specifically exclude pain, straight-leg -raising tests, and range-of-motion tests. In other words, although pain, active range-of-motion, and straight-leg-raising tests are criteria used in the Guidelines, they may not be used in Arkansas for assessment of impairment in Arkansas workers' compensation cases.

Determination of impairment was based on objective findings (Objective finding is defined as a finding that cannot come under the voluntary control of the patient) for potential impairment utilizing Section 3.2: The Lower Extremity (p[p]. 75-91): Anatomic, diagnostic, and functional methods are used in evaluating permanent impairments of the lower extremity. While some impairments may be evaluated appropriately by determining the range of motion of the extremity, others are better evaluated by the use of diagnostic categories or according to test criteria.

...

3.2c – Muscle Atrophy (Unilateral) using Table 37 (p.77): Mr. Allmon did have a documented girth deficit of the thigh as noted below.

Instruction: The Thigh circumference is measured 10 cm above the patella with the knee fully extended and the muscle relaxed. The Calf circumference is measured at the maximum circumference region and is compared to the same level on the contralateral side. The [G]uides indicate that neither limb should have swelling or varicosities that would invalidate the measurements. If the unaffected limb has had prior injury or any other varicosity, then muscle atrophy would not be accurate for purposes of impairment.

<b>Muscle Atrophy</b>	<b>Deficit cm</b>	<b>Whole Person %</b>	<b>Lower Extremity %</b>
Thigh	1 cm	1%	3%
Calf	0 cm	0%	0%

Discussion. I credit Claimant’s testimony that disuse of his right lower extremity has led to its being atrophied. This is corroborated by Garretson and Davidson, whose measurements of Claimant’s thighs revealed that the right is 1 cm smaller than the left. This is an injury that under *Sword* and *Hublely, supra*, is a natural consequence of Claimant’s stipulated compensable right ankle injury. The causal connection between the right ankle injury and the atrophying of his thigh has been established. Therefore, he has proven that the latter is a compensable consequence of the former.

D. Impairment Rating-Thigh Atrophy

Introduction. Claimant has alleged that is entitled to the impairment rating that he has been assigned in connection with the atrophying of his right thigh.

Standards. 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. 2002), the Commission adopted the 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). 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(F)(ii). “Major cause” is defined as “more than fifty percent (50%) of the cause,” and

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a finding of major cause must be established by a preponderance of the evidence. *Id.* § 11-9-102(14). Any medical opinion must be stated within a reasonable degree of medical certainty. *Id.* § 11-9-102(16)(B).

Discussion. 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). After consideration of the evidence, I credit the report of Garretson and Davidson, quoted above. Claimant has proven by a preponderance of the evidence that he is entitled to an impairment rating of three percent (3%) to his right lower extremity, and permanent partial disability benefits pursuant thereto, in connection with the compensable atrophying of his right thigh. In so doing, I find that the preponderance of the evidence establishes that his compensable consequence—in the form of the atrophying of his right thigh—is the major cause of his impairment.

E. Attorney's Fee

Introduction. As part of this action, Claimant is seeking a controverted attorney's fee on the permanent partial disability benefits he is owed that are related to the two impairment ratings he has been assigned in the course of this matter.

Discussion. One of the purposes of the attorney's fee statute is to put the economic burden of litigation on the party who makes litigation necessary. *Brass v. Weller*, 23 Ark. App. 193, 745 S.W.2d 647 (1998). Since Claimant has proven herein his entitlement to permanent partial disability benefits in accordance with the impairment

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rating that was assigned for the compensable atrophy of his right thigh—three percent (3%) to the lower extremity—and because Respondents have controverted this, he has shown that his attorney should be awarded a controverted fee at their expense under Ark. Code Ann. § 11-9-715 (Repl. 2012) on those indemnity benefits awarded herein.

As for Claimant's quest for a fee on the as-yet unpaid permanent partial disability benefits related to the nine percent (9%) rating assigned for his stipulated compensable right ankle injury, I do not find this to be valid. As the parties have stipulated, Respondents accepted this rating and are paying it out. The evidence reflects that Claimant was assigned this rating by Garretson and Davidson on May 22, 2024. Claimant's credible testimony was that the week before the hearing, he received a check from Respondents; and two more checks arrived a day or two thereafter. The payout history shows that this first check, in the amount \$1,746.54, was issued on June 5, 2024—14 days after he was rated. Two more—each in the amount of \$626.00 (his stipulated permanent partial disability rate) were issued seven days thereafter. When Claimant called Respondents about this, they confirmed that these monies were payments toward his nine percent (9%) impairment rating. Yet another check, for the same amount, was issued the following week—just two days before the hearing. Neither the rating nor any portion of those related benefits have been controverted; they are being paid in due course. No litigation thereon has been necessary under *Brass, supra*. Accordingly, no attorney's fee is owing in connection with this; Claimant has not established his entitlement thereto.

**CONCLUSION AND AWARD**

Respondents are directed to pay/furnish benefits in accordance with the findings of fact 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. 2002). See *Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

Claimant's attorney is entitled to a 25 percent (25%) attorney's fee awarded herein, one-half of which is to be paid by Claimant and one-half to be paid by Respondents in accordance with Ark. Code Ann. § 11-9-715 (Repl. 2012). See *Death & Permanent Total Disability Trust Fund v. Brewer*, 76 Ark. App. 348, 65 S.W.3d 463 (2012).

**IT IS SO ORDERED.**

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Hon. O. Milton Fine II  
Chief Administrative Law Judge