

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
WCC NO. H306917**

<b>STEVE GRAY, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>VISKASE COMPANIES, INC., EMPLOYER</b>	<b>RESPONDENT</b>
<b>TRUMBULL INS. CO., CARRIER</b>	<b>RESPONDENT</b>
<b>THE HARTFORD, TPA</b>	<b>RESPONDENT</b>

**OPINION FILED JULY 22, 2024**

Hearing before Administrative Law Judge Steven Porch on June 14, 2024, in Jonesboro, Arkansas.

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

Respondents were represented by Mr. Randy P. Murphy, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A full hearing was held on this claim on June 14, 2024. A prehearing telephone conference took place on April 16, 2024. A prehearing order was entered on that date and subsequently entered into evidence, with amendments by the parties, as Commission Exhibit 1. 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 October 13, 2023, when Claimant sustained a compensable injury to his left fibula and lower extremity.
3. Respondents accepted this claim as compensable and paid some related benefits.

4. The parties have stipulated to Claimant's average weekly wage that entitles him to a temporary total disability rate of \$835 and a permanent partial disability rate of \$626 a week.

### **ISSUES**

The parties have identified the following issues<sup>1</sup> to be adjudicated:

1. Whether Claimant sustained injuries to his left foot, left lower extremity above the knee, and left lower extremity below the knee as a compensable consequence of his stipulated compensable injuries.
2. Whether Claimant is entitled to an anatomical physical impairment determination for his left foot, left lower extremity below the knee and above the knee.
3. Whether Claimant is entitled to a controverted attorney's fee.

All other issues are reserved.

### **CONTENTIONS**

Claimant's Contentions: The Claimant contends that he is entitled to multiple impairment ratings. Those claimed are as follows: 9% to the left foot; 3% to the left lower extremity below the knee; and 3% to the left lower extremity above the knee. The rating of 3% to the left lower extremity below the knee and the 3% rating to the left lower extremity above the knee are each alleged to be a compensable consequence under Arkansas Worker' Compensation Law as the same are based on the muscle atrophy occurring as a result of, and subsequent to the fracture injury.<sup>2</sup>

Respondents' Contentions: Respondents contend that the Claimant has received all benefits to which he is entitled for the compensable injury.

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<sup>1</sup> Issue 1, whether Claimant is entitled to additional reasonable and necessary medical treatment and unpaid medically related travel expenses; and Issue 2, whether Claimant is entitled to temporary partial disability benefits, have been resolved by the parties and are no longer issues for this hearing.

<sup>2</sup> Claimant amended his contentions through a letter from his counsel, George Bailey, on June 3, 2024. This amendment was accepted.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record as a whole, including medical reports, non-medical documents, post hearing briefs from the parties, and other matters properly before the commission, and having the opportunity to hear the 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 has proven by the preponderance of the evidence that he sustained a compensable injury to his left lower extremity above the knee, left lower extremity below the knee, and left foot as a compensable consequence of his stipulated compensable injuries.
4. The Claimant has proven by the preponderance of the evidence that he is entitled to impairment ratings of 3% to his left leg above the knee, 3% to his left leg below the knee, and 9% to his left foot.
5. Claimant has proven by the preponderance of the evidence that his attorney is entitled to a controverted attorney's fee.

**CASE IN CHIEF**

**Summary of Evidence**

The sole witness at the hearing was the Claimant. In addition to the prehearing order discussed above, I also have admitted into evidence Claimant's Exhibit 1, medical records, consisting of 46 pages, Claimant's Exhibits 2, non-medical documents, correspondence, pleadings, consisting of 47 pages, Claimant's Exhibit 3, payment record, consisting of 1 page, Respondents'

Exhibit 1, Claimant's return to work document, consisting of 1 page, Respondents' Exhibit 2, potential settlement letter dated, May 7, 2024, consisting of one 1 page, and Respondent Exhibit 3, functional capacity letter dated March 21, 2024, consisting of 1 page. Claimant's and Respondents' post hearing briefs are blue-backed and made a part of this record. I have also blue-backed the final page of the impairment rating signed by Dr. Michael Haughey.

Claimant worked as a maintenance mechanic for Respondent/Employer. On October 13, 2023, while working for the Respondent/Employer, Claimant slipped on a gel-like substance on the floor, causing him to fall and suffer a broken left fibula. Respondent/Employer was made aware of this incident on the same day. Respondent has accepted this claim as compensable and has paid benefits. Claimant underwent surgery on October 27, 2023, performed by Dr. Haughey. Dr. Haughey installed permanent hardware to secure Claimant's left ankle.

The Claimant was later referred by Dr. Haughey for a functional capacity evaluation and an impairment rating evaluation. The Functional Capacity Evaluation ("FCE") was conducted on March 5, 2024, and concluded that the Claimant could return to work at the medium classification of work. The impairment evaluation summary, conducted on the same date as the FCE, resulted in an assignment of "2% Whole Person, 6% Lower Extremity, 9% Foot Impairment as a work-related injury." The Impairment Rating Summary and FCE were prepared by a certified occupational therapist, Casey Garretson, and Dr. Haughey signed and agreed with the impairment evaluation.<sup>3</sup> See Claimant's Exhibit 1, pp. 41-45, and blue-backed signed impairment rating. The rating follows the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. The report includes

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<sup>3</sup> I am hereby reversing my decision at the hearing to not include the signed last page of the FCE since it was in violation of the seven-day time limit prescribed in my prehearing order. The unsigned FCE is a part of the record. Therefore, allowing the final page of that report signed by Dr. Haughey would not prejudice the Respondents. This final page will be blue-backed and made a part of the record.

a finding that there was muscle atrophy in the Claimant's left foot, left thigh, and left calf. Based on the report, due to the reduced circumference of the left thigh by 1 cm and left calf by 1.2 cm, the Claimant was assigned an impairment rating to the left thigh of 3% and the left calf of 3%. The report combined these ratings to reflect a 6% lower left extremity impairment. The Claimant's left foot eversion of 2% resulted in a 9% impairment rating.

The FCE combined 6% impairment rating for the lower left extremity below the knee and above the knee was accepted by Respondents. Respondents paid Claimant \$4,936.00 based on this 6% rating. However, Claimant disagrees with this amount. The Claimant argues that the 6% rating that was based on two ratings of 3% above the knee and 3% below the knee was deficient by \$979.70. Claimant, in comparison, using the maximum compensation rate, 3% below the knee is \$2,460.18, and 3% above the knee is \$3,455.52, for a total of \$5,915.70.

#### Adjudication

A. Whether Claimant sustained injuries to his left foot, left lower extremity above the knee and left lower extremity below the knee due to a compensable consequence of the work-related injury.

Standard. 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). The test is whether a causal connection between the two episodes exists. *Id.*; *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. *Id.*; *Carter v. Flintrol, Inc.*, 19 Ark. App. 317, 720 S.W.2d 337 (1986). 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, 843 S.W.2d 875 (1992). It is not essential that the causal connection be established via medical evidence. *Koster v. Custom Pak & Trissel*, 2009 Ark. App. 780, 2009 Ark. App. LEXIS 947; *Gerber Prods.*

*v. McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985). Under Ark. Code Ann. § 11-9-705(a)(3) (Repl. 2012), Claimant has the burden of establishing the existence of a compensable consequence by a preponderance of the evidence.

The parties have stipulated that Claimant's injury, a lateral malleolar fracture of the left lower extremity, a broken ankle, was a compensable injury. Claimant underwent surgery on October 27, 2023, where permanent hardware was placed and affixed, including a six-hole metal fibular plate and various locking screws. Due to this surgery, the Claimant did not have full use of his left leg and foot for several weeks. According to the FCE and Impairment Evaluation Summary, the Claimant sustained atrophy of 1 centimeter to his left thigh, atrophy of 1.2 centimeters to his left calf, and a 2% eversion to the left foot. See Claimant's Exhibit 1, pages 42, 43, and 45. I credit this report. The Impairment Rating Summary and FCE were prepared at the Functional Testing Centers, Inc, by a certified occupational therapist, Casey Garretson, and Rick Byrd, Emeritus, Certified Senior Disability Analyst. Dr. Haughey signed and agreed with the findings of this report. The law is clear that 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). Based on the surgical procedure and the hardware installed into the left ankle (See Claimant's Exhibit 1, pages 10-12), the FCE, and the Impairment Evaluation Summary, it is clear that this atrophy is a direct result of the work-related injury, the left ankle fracture, preventing the full and continued use of the left leg and left foot for several weeks. Thus, Claimant has proven by the preponderance of the evidence that he has sustained an injury, via muscle atrophy, to his left foot, left calf, and left thigh, consistent with Casey Garretson and Rick Byrd's Impairment Rating Summary and FCE as a compensable consequence of his work-related injury, a broken left ankle. This leaves the question of a physical

impairment rating therefor.

B. Whether Claimant is entitled to an Anatomical Physical Impairment determination for his left foot, left lower extremity below the knee and above the knee.

Standard. 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 Fourth Edition of 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 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).

Discussion. Based on the Impairment Rating Summary and FCE, the Claimant sustained atrophy of 1 centimeter to his left thigh, and atrophy of 1.2 centimeters to his left calf, and a 2% eversion to the left foot resulting in a 9% impairment rating. See Claimant Exhibit 1, pages 42, 43, and 45. These are clear objective findings. But for the work-related left ankle injury, followed by the surgery, disrupting the continued and full use of his left leg and foot for several weeks, Claimant would not have experienced atrophy to his left thigh, calf and foot. Therefore, I find Claimant has proven by the preponderance of the evidence that he has sustained an injury to his left foot, left calf, and left thigh, with objective findings of muscle atrophy consistent with Casey Garretson and Rick Byrd’s Impairment Rating Summary and FCE. I further find that Claimant’s

work-related compensable injury was a major cause of the left thigh, calf, and foot impairment; and as such, the Claimant is entitled to a 3% impairment rating to the left lower extremity above the knee, and a 3% impairment rating to the left lower extremity below the knee, and a 9% impairment rating to the left foot consistent with Casey Garretson and Rick Byrd's Impairment Rating Summary and FCE.

The impairment rating report makes clear that Claimant's muscle atrophy impairment is the greatest impairment and is the most appropriate, applicable impairment for him. See Claimant's Exhibit 1, page 45. During the hearing, Claimant testified, very convincingly, that all his issues involving his left leg have resolved. See Transcript page 46, lines 16-25, to page 47, lines 1-22. However, whether the muscle atrophy did in fact resolve is unclear. Claimant had serious hardware installed to secure his ankle. Though he has some range of motion with the permanent hardware, it stands to reason he does not have full range of motion with the installation of the hardware. Moreover, since Claimant may not be experiencing symptoms does not mean that the atrophy has indeed resolved. Simply stated, we will need another FCE to make that determination. Thus, I don't credit Claimant's testimony in this respect though I am convinced he feels better. In this respect, I continue to credit the FCE and Impairment Evaluation Summary performed by Casey Garretson, Occupational Therapist, and Rick Byrd, Emeritus, Senior Disability Analyst. See Claimant's Exhibit 1, page 45.

During the hearing, the argument was made that Respondents have accepted and paid the 6% rating to Claimant in full satisfaction of Claimant's impairment to the left lower extremity above the knee and below the knee in an amount of \$4,936.00. Claimant challenges this payment as full satisfaction of the 6% impairment rating. Claimant reasons that the 6% rating was based on two combined ratings of 3% above the knee and 3% below the knee. Claimant, in his calculation,



using the maximum statutory compensation rate, shows 3% below the knee (\$82,006 x .03) is \$2,460.18, and 3% above the knee (\$115,184 x .03) is \$3,455.52, for a total of \$5,915.70, resulting in a deficit of \$979.70 owed by Respondent. Though I agree with Claimant's calculation of the 6% impairment rating, this argument was not officially made an issue before the Commission, and it will not be formally addressed beyond this point. However, the Claimant is entitled to payment for the left lower extremity below and above the knee, and his foot consistent with this opinion.

C. Whether the Claimant is entitled to a controverted attorney's fee.

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). 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.

Discussion. The evidence before me clearly shows that Respondents have controverted Claimant's entitlement to the additional indemnity benefits awarded herein. Thus, the evidence preponderates that Claimant's counsel, the Hon. George Bailey, is entitled to a controverted fee thereon pursuant to the above provision.

**CONCLUSION AND AWARD**

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, minus any lawful offsets, 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*,

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49 Ark. App. 102, 898 S.W.2d 57 (1995).

**IT IS SO ORDERED.**

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Hon. Steven Porch  
Administrative Law Judge