

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. F303792**

**HARRY B. WILLIS, EMPLOYEE** **CLAIMANT**

**ROGERS LOGGING CO., INC.,  
EMPLOYER** **RESPONDENT NO. 1**

**AMERICAN INTERSTATE INS. CO.,  
INSURANCE CARRIER/TPA** **RESPONDENT NO. 1**

**SECOND INJURY FUND** **RESPONDENT NO. 2**

**DEATH & PERMANENT TOTAL  
DISABILITY TRUST FUND** **RESPONDENT NO. 3**

**OPINION FILED SEPTEMBER 22, 2008**

Hearing conducted before Administrative Law Judge S. Dale Douthit in Little Rock, Pulaski County, Arkansas.

Claimant was represented by Mr. Jesse L. Kearney, Attorney at Law, Pine Bluff, Arkansas.

Respondent No. 1 was represented by Mr. Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 was represented by Mr. David Simmons, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 was represented by Ms. Christy King, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

On June 26, 2008, the above captioned claim came on for a hearing in Little Rock, Arkansas. A prehearing conference was conducted on January 17, 2008, and a Prehearing Order was filed on January 18, 2008. A copy of the Prehearing Order was marked as Commission Exhibit "1" and made a part of the record without

**HARRY B. WILLIS - F303792**

objection, subject to any modifications made at the full hearing.

At the full hearing, the parties agreed to the following stipulations:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The employee-employer-carrier relationship existed at all relevant times, including April 11, 2003.
- 3) On April 11, 2003, the claimant sustained a compensable right leg injury.
- 4) The claimant's applicable compensation rates are \$247.00 per week for temporary total disability and \$185.00 per week for permanent partial disability.
- 5) Respondent No. 1 ceased paying temporary total disability benefits on May 1, 2004.
- 6) The parties agreed to reserve all issues not outlined herein; specifically, compensability of claimant's left leg is reserved.
- 7) The parties stipulated that the issue of an attorney's lien filed by Mr. McKissic is reserved.

At the full hearing, the parties agreed to litigate the following issues:

- 1) The date that claimant reached maximum medical improvement.
- 2) Whether the claimant is entitled to additional temporary total disability benefits.
- 3) Extent of claimant's permanent impairment to his right lower extremity.
- 4) Claimant's entitlement to past medical treatment and additional medical benefits from Dr. Armstrong and Dr. Safman.

**HARRY B. WILLIS - F303792**

5) The attorney's lien issue was reserved.

At the full hearing, the claimant contended that he has reached maximum medical improvement but that this occurred sometime after respondents quit paying temporary total disability benefits on May 1, 2004. The claimant contended that he is entitled to a permanent impairment rating of 56% to the right lower extremity. The claimant contends that he is entitled to compensation for past medical treatment not covered by the employer, and is entitled to future medical benefits from Drs. Safman and Armstrong, plus attorney's fees. The claimant also contends that all issues related to permanent total disability, Second Injury Fund liability, and vocational rehabilitation are reserved.

Respondent No. 1 contended at the prehearing conference that the claimant has a scheduled injury and is not permanently and totally disabled. That there is no wage loss. Respondent paid \$10,900.00 in permanent partial disability which was equivalent to a 32% permanent impairment rating for the leg. That there are two different ratings from two doctors, one assessing 10% to the leg and the other assessing 56% to the leg. Respondent contended that the claimant is entitled to 32% to the leg. That they have paid all medical bills which have been submitted. The respondent contended that the claimant reached maximum medical improvement on May 1, 2004, and is not entitled to any additional temporary total disability benefits.

**HARRY B. WILLIS - F303792**

Respondents No. 2 and 3 did not participate in the full hearing as permanent and total disability was reserved.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and to observe his demeanor, the following findings of fact and conclusions of law are hereby made in accordance with A.C.A. § 11-9-704:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
- 2) The stipulations agreed to by the parties and recited herein are reasonable and are hereby accepted as fact.
- 3) The claimant reached maximum medical improvement from his April 11, 2003, compensable right leg injury no later than May 1, 2004.
- 4) I find that the claimant's healing period ended no later than May 1, 2004; therefore, I find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits after May 1, 2004.
- 5) The claimant has failed to prove by a preponderance of the evidence that he sustained a 56% permanent anatomical impairment to his right leg as a result of his April 11, 2003, compensable injury. I find that the credible evidence contained in the record herein, shows that the claimant sustained a 10% impairment to his right lower extremity as a result of his April 11, 2003, compensable injury.

- 6) I find that the claimant has failed to prove by a preponderance of the evidence that his medical treatment from Dr. Armstrong was reasonable or necessary in connection with his April 11, 2003, compensable injury. However, I do find that all treatment contained in the record herein from Dr. Safman was reasonable, necessary, and related to the claimant's compensable injury in the form of pain management and therefore the respondent's responsibility. I also find that the claimant is entitled to additional pain management as now recommended by Dr. Safman, including but not limited to, medications and injections. All such pain management from Dr. Safman related to the claimant's compensable right leg injury of April 11, 2003, is the respondent's responsibility.
- 7) Attorney Gene McKissic's lien issue is hereby reserved.

**DISCUSSION**

The claimant sustained an admittedly compensable right leg injury in a logging accident on April 11, 2003. The claimant testified as follows regarding his compensable right leg injury:

A So the skidder came out and pulled it out with the top in it. So it's my job is to get the top out of it. And so, I went down there and cut the top out of it, but I didn't – didn't cut it off all the way before the skidder can try and break it loose, you know.

Q Uh-huh.

A So when I topped it and cut it a little bit on the – on the right-hand side and I started back up the log I was going to go across the slue bank where the cutting machine done got on flat level ground and top those trees. So I made it about – I guess when I made it around maybe halfway of the tree, not quite half, it broke and came rolling down the slue bank to the left.

**HARRY B. WILLIS - F303792**

Q Did it roll over you when it happened?

A Yes. That's how it got on me.

Q Did it stop on you or –

A It stopped on top of me.

Q So you were pinned under it?

A Pinned under it.

(T. pp. 18-19, lines 22-25 & 1-15).

The claimant was taken by ambulance to Ouachita County Hospital; however, the claimant then had to be transported to the Medical Center of South Arkansas in El Dorado to have surgery performed. On the same date as the injury, the claimant was diagnosed with right femur fracture and an operation was done on that same date. The operative report contained at Claimant's Exhibit 1, page 37, shows that the claimant had a surgical procedure entitled "Open treatment and internal fixation with retrograde intramedullary nail." The surgeon was Dr. Kenneth Gati, and following the surgery the claimant treated with Dr. Gati for several months. During the course of Dr. Gati's treatment, Dr. Gati referred the claimant to Dr. Safman for pain management. (Cl. Ex. 1, pg. 106). Ultimately on March 17, 2004, Dr. Gati pronounced the claimant at maximum medical improvement per his March 17, 2004, report found at Claimant's Exhibit 1, page 115. In Dr. Gati's report wherein he finds

**HARRY B. WILLIS - F303792**

the claimant at maximum medical improvement, Dr. Gati states, “He is going to need chronic pain management from Dr. Safman, and I will let Dr. Safman dictate the length of treatment for this.”

The medical records indicate that the claimant continued to treat with Dr. Safman through December 11, 2004. On December 11, 2004, Dr. Safman entered a report that stated the claimant was still being covered by workers’ compensation. (Cl. Ex. 1, page 121). The claimant testified that although he was receiving pain management from Dr. Safman, he felt the need to start treating with Dr. Simmie Armstrong for pain management as well. The claimant testified that he was under the impression that his treatment from Dr. Safman had been discontinued by the respondents, and that he was going to have to get his pain management from Dr. Armstrong. The claimant testified that he continues to get his pain medication from Dr. Armstrong; however, the claimant testified that Dr. Armstrong cannot administer injections which the claimant feels were very beneficial from Dr. Safman. The claimant contends that he is entitled to additional temporary total disability benefits from May 1, 2004, through the end of December 2004, additional medical benefits, and a permanent impairment rating of 56% to his lower extremity.

**ADJUDICATION**

The claimant has contended that he is entitled to additional temporary total

**HARRY B. WILLIS - F303792**

disability benefits from May 1, 2004, through the end of December 2004, because he asserts that Dr. Gati prematurely found him at maximum medical improvement. The first issue to be determined is the date that claimant actually reached maximum medical improvement. To be found at maximum medical improvement one must have had appropriate treatment, and be at a plateau medically and not likely to improve with future treatment. I have thoroughly reviewed all the medical evidence contained in this record and conclude that the claimant reached maximum medical improvement no later than May 1, 2004.

The claimant's primary treating physician following his right femur fracture, Dr. Gati, stated in his March 17, 2004, report that, "At this point, I discussed with him that as far as his femur and leg are concerned he is at MMI." (Cl. Ex. 1, page 115). Dr. Gati did place the claimant on restrictions of sedentary work, stating that he would benefit from vocational rehabilitation, and advised that the claimant would need chronic pain management from Dr. Safman. Continued pain management does not necessarily extend one's healing period, and I find that the credible evidence now before the Commission shows that the claimant reached maximum medical improvement no later than May 1, 2004.

The claimant is also requesting additional temporary total disability benefits from May 1, 2004, through December 2004. Temporary total disability benefits

**HARRY B. WILLIS - F303792**

cannot be awarded after the healing period has ended. Elk Roofing Co. v. Pinson, 22 Ark. App. 191, 737 S.W.2d 661 (1987). I recognize that the claimant continued and does continue to receive pain management after the end of his healing period.

Nevertheless, the persistence of pain does not prevent a finding that the claimant's healing period is over. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). An employee that suffers a scheduled injury is entitled to receive temporary total disability benefits or temporary partial disability benefits during their healing period or until they return to work, whichever occurs first. Wheeler Const. Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001). In the present case, I find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to additional temporary total disability benefits after May 1, 2004, because the claimant has failed to prove by a preponderance of the evidence that he remained within his healing period from his compensable right leg injury after May 1, 2004. Therefore, the claimant's request for additional temporary total disability benefits after May 1, 2004, is denied.

The claimant has requested a determination on the extent of his permanent impairment as a result of his compensable injury. The claimant contended that he is entitled to a 56% impairment to his right lower extremity. Permanent impairment is any permanent functional or anatomical loss remaining after the healing period has

**HARRY B. WILLIS - F303792**

been reached. Quachita Marine v. Morrison, 246 Ark. 882, 440 S.W.2d 216 (1969).

Pursuant to A.C.A. § 11-9-522(g), the Commission has adopted the *Guides to the Evaluation of Permanent Impairment*, 4<sup>th</sup> Edition 1993, as an impairment rating guide.

Any determination of the existence or extent of permanent physical impairment shall be supported by objective and measurable physical and mental findings. A.C.A. § 11-9-704(c)(1)(B).

Permanent benefits shall be awarded only upon determination that the compensable injury was the major cause of the disability or impairment. A.C.A. § 11-9-102(F)(ii). Major cause means more than 50% of the cause and a finding of major cause shall be established according to the preponderance of the evidence. A.C.A. § 11-9-102(14). At the full hearing, the claimant argued that the 56% permanent impairment rating assigned by Dr. Gati to the claimant's right lower extremity should be controlling in this case. However, upon thorough review of all the medical records, Dr. Gati's actual report regarding permanent physical impairment is not contained in any of the exhibits introduced at the full hearing. I do note that Dr. Peebles did an independent medical evaluation wherein he addresses a 56% rating that Dr. Gati gave the claimant. (Cl. Ex. 1, pg. 133). However, Dr. Peebles in his June 1, 2004, report states, "Specific breakdown regarding the basis of this high level of disability is not listed." Dr. Scott Carle also did an independent medical evaluation upon the claimant,

**HARRY B. WILLIS - F303792**

found at Respondent's Exhibit 1, wherein Dr. Carle stated, "There appears to be no objective basis for assigning 56% permanent impairment rating to the lower extremity apportioned to the injury described above."

Dr. Carle in his independent medical evaluation found at Respondent's Exhibit 1, that the claimant sustained a 10% permanent impairment rating to his right lower extremity and based his rating upon the *AMA Guides* 4<sup>th</sup> Edition as mandated by the Commission. Based upon the credible evidence now before the Commission, I find that the claimant's permanent anatomical impairment to his right lower extremity as a result of his compensable injury to be 10%. Further, it is the only rating report that is actually contained in the hearing record. It is true that other doctors make reference to an alleged report from Dr. Gati; however, it must be noted that no such report made it into the hearing record. I will note that Dr. Gati in his March 17, 2004, report did state, "As far as his permanent impairment, he will have a separate letter dictated for his impairment to his leg." (Cl. Ex. 1, pg. 115). However, that separate letter regarding impairment is not contained in the record. As such, the credible evidence leads this examiner to find that the claimant sustained a 10% anatomical impairment to his right lower extremity as a result of his April 11, 2003, compensable injury.

The employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by

**HARRY B. WILLIS - F303792**

the employee. A.C.A. § 11-9-508(a). A claimant must prove by a preponderance of the evidence that he is entitled to additional medical treatment. Wal-Mart Stores, Inc. v. Brown, 82 Ark. App. 600, 230 S.W.3d 153 (2003). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. Deboard v. Colson Company, 20 Ark. App. 166, 725 S.W.2d 857 (1987).

At the full hearing, the claimant requested all medical benefits from Dr. Safman, Dr. Armstrong, and any referrals those two doctors may have made after May 1, 2004:

JUDGE DOUTHIT: Okay. So just so I can narrow this – because there's a lot of medical in these records here. You're asking for all medical benefits from Dr. Safman, Dr. Armstrong, and any referrals they may have made after May 1<sup>st</sup> of '04?

MR. KEARNEY: Yes, sir.

(T. pg. 12, lines 4-9).

Since the claimant's compensable injury on April 11, 2003, his primary treating physician was Dr. Gati. Ultimately Dr. Gati released the claimant at maximum medical improvement and recommended pain management and referred the claimant to Dr. Safman for said pain management. The medical records indicate Dr. Safman treated the claimant for pain management between 2003 and the end of 2004. According to Dr. Safman's last report dated December 11, 2004, he indicated that the claimant was still covered under workers' compensation to treat with him. (Cl. Ex. 1,

**HARRY B. WILLIS - F303792**

pg. 121). My review of the medical records indicate that the referral from Dr. Gati to Dr. Safman for pain management was reasonable and necessary and related to the claimant's compensable leg injury and therefore the respondent's responsibility. However, respondents are only responsible for such pain management that relates to the claimant's stipulated compensable right leg injury and not the claimant's other diagnoses of lumbar problems and fibromyalgia. Therefore, I find that all treatment contained in the record from Dr. Safman related to the claimant's right leg to be the responsibility of the respondents and any referrals made from Dr. Safman for a Functional Capacity Evaluation is also the responsibility of the respondents.

The claimant has also requested additional medical treatment contained in the record from Dr. Armstrong. The medical records appear to indicate that Dr. Armstrong was also treating the claimant for pain management. However, I cannot find that such treatment from Dr. Armstrong is reasonable. I find that it is not reasonable or necessary for the claimant to have two pain management doctors. I cannot find any medical records to indicate that Dr. Safman referred the claimant to Dr. Armstrong for pain management of his right leg. If the claimant wished to go see Dr. Armstrong for pain management for ailments other than his compensable injury that is the claimant's prerogative however it is not the responsibility of the respondents. Therefore I find that the treatment contained in the record from Dr.

**HARRY B. WILLIS - F303792**

Armstrong was not reasonable or necessary and therefore said additional benefits to Dr. Armstrong are hereby denied.

**ORDER**

Respondents are directed and ordered to pay for all medical treatment from Dr. Safman regarding pain management for the claimant's right lower extremity contained in the record. Respondents are also directed and ordered to pay for any additional pain management from Dr. Safman regarding the claimant's right leg that Dr. Safman may now deem appropriate. Since this is a medical award only, attorney's fees are not applicable. Respondents are directed and ordered to carry out the findings of fact and conclusions of law outlined herein.

**IT IS SO ORDERED.**

---

**S. DALE DOUTHIT**  
**Administrative Law Judge**

SDD/pjb