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In the Matter of the Compensation of  
**BRYON E. SWINEY, Claimant**  
WCB Case No. 01-07989, 01-06879  
**ORDER ON REVIEW**  
Mustafa T Kasubhai PC, Claimant Attorneys  
Employers Defense Counsel, Defense Attorneys  
Julie Masters, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Lowell and Phillips Polich.

The self-insured employer requests review of Administrative Law Judge (ALJ) Stephen Brown's order that: (1) set aside its compensability and responsibility denials of claimant's omitted medical condition claim for a left knee condition; (2) upheld the SAIF Corporation's responsibility denial of the same condition; and (3) assessed a penalty for the employer's allegedly unreasonable claim processing. On review, the issues are compensability, responsibility and penalties. We affirm in part and reverse in part.

FINDINGS OF FACT

We adopt the ALJ's Findings of Fact.

CONCLUSIONS OF LAW AND OPINION

Compensability

On August 22, 2000, claimant compensably injured his left knee while working for the self-insured employer. He caught his foot on a pallet, twisted, and fell on his left knee. An MRI scan of claimant's left knee on September 20, 2000 revealed a "complete tear" of the posterior cruciate ligament. (Ex. 8). On November 21, 2000, the employer accepted a nondisabling left knee strain. (Ex. 13). On January 1, 2001, claimant's on-site employer switched coverage to SAIF.

On July 1, 2001, claimant initiated an omitted medical condition claim for a PCL injury. (Ex. 26). The employer denied compensability of and responsibility for the condition. (Ex. 29A). SAIF denied only responsibility. (Ex. 29). Claimant requested a hearing.

The ALJ set aside the employer's denial based on the opinions of Dr. Thompson and Dr. Walton. The ALJ also assessed a penalty under ORS 656.262(11)(a), reasoning that the employer had no reasonable basis for its denial.

On review, the employer contends that Dr. Thompson's and Dr. Walton's opinions are unpersuasive for various reasons. With regard to Dr. Thompson's opinion, we agree with the employer. However, we still affirm the ALJ's order on the compensability issue, based on the opinion of Dr. Walton.

A compensable injury is established by proof that claimant's work exposure is a material contributing cause of his disability or need for treatment, if the injury is established by medical evidence supported by objective findings. ORS 656.005(7)(a); *Mark N. Weidle*, 43 Van Natta 855 (1991). Claimant bears the burden of proving compensability. ORS 656.266.

Considering the conflict in medical opinion over the cause of claimant's left knee PCL condition, the causation issue is a complex medical question requiring expert medical opinion for its resolution. See *Uris v. Compensation Department*, 247 Or 420 (1967); *Kassahn v. Publishers Paper Co.*, 76 Or App 105 (1985), *rev den* 300 Or 546 (1986). We rely on those opinions which are both well-reasoned and based on accurate and complete information. *Somers v. SAIF*, 77 Or App 259 (1986).

Here, Dr. Thompson examined claimant at the request of the employer on November 16, 2000. (Ex. 12). Based on his review of an MRI scan, he concluded that claimant had torn his PCL in the August 22, 2000 fall at work. (Ex. 12-4). Dr. Thompson reasoned that in order to tear a PCL, there must be a significant posterior force applied on the proximal tibia with the knee flexed. (*Id.*) Dr. Thompson concluded that there were no preexisting conditions related to claimant's PCL condition. (*Id.*)

However, on March 6, 2002, Dr. Thompson signed an opinion letter that stated that the fact that claimant's knee was 80 percent resolved within seven days of the work injury would make it more likely that the PCL was "old," and had been exacerbated or aggravated by the injury. (Ex. 32-1).

Based on these two opinions, which are at least partially inconsistent, we find that Dr. Thompson's opinion changed without adequate explanation. Accordingly, we find Dr. Thompson's opinion unpersuasive. See *Kelso v. City of*

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*Salem*, 87 Or App 630 (1987). Contrary to the ALJ's reasoning, we decline to rely on Dr. Thompson's first opinion in these circumstances.

Claimant's treating physician, Dr. Walton, concluded that claimant suffered a complete tear of his PCL due to the August 22, 2000 work injury. Dr. Walton stated that the major contributing cause of claimant's current left knee condition and need for treatment was the August 2000 work injury. Dr. Walton noted that claimant's more recent work activity for SAIF's insured may have exacerbated claimant's symptoms somewhat. (Ex. 30). We find Dr. Walton's opinion well-reasoned and persuasive.

The employer contends that Dr. Walton failed to compare the relative contribution of claimant's preexisting conditions. *See Dietz v. Ramuda*, 130 Or App 497 (1994), *rev dismissed* 321 Or 416 (1995) (assessment of major contributing cause involves evaluating the relative contribution of different causes of an injury or disease and deciding which is the primary cause). Specifically, the employer argues that Dr. Thompson acknowledged that claimant's left knee "laterally situated patella with chondromalacia" and loose body conditions could explain claimant's left knee symptoms, yet did not evaluate the contribution of these conditions when reaching his opinion on major contributing cause. We disagree.

Initially, we note that there is no medical opinion specifically stating that either of these conditions "combined with" claimant's compensable injury to cause his PCL tear condition. Therefore, application of the major contributing cause standard in ORS 656.005(7)(a)(B) is not appropriate. It follows that the "weighing" required by *Dietz v. Ramuda* is not applicable. In any event, even if the major contributing cause standard does apply, there is no medical evidence that these other left knee conditions, which coexist in claimant's left knee with the PCL tear condition, actually contributed to the cause of the PCL tear. In these circumstances, we decline to discount Dr. Walton's opinion for failing to evaluate the contribution of the laterally situated patella with chondromalacia and loose body conditions.

In addition, although Dr. Walton conceded at deposition that, by the time he first evaluated claimant on April 16, 2001, he thought the PCL tear was "chronic," he also stated that there was nothing about claimant's left knee MRI scan that suggested the PCL tear was "old." (Ex. 33-13, -26). More importantly, Dr. Walton maintained his opinion that the tear was caused by the August 22, 2000 work injury. (Ex. 30, 33-22).

Finally, the employer contends that the PCL tear condition is not supported by objective findings. ORS 656.005(19);<sup>1</sup> *SAIF v. Lewis*, 335 Or 92 (2002). We disagree. Although some physicians in the record have questioned the clinical evidence of a PCL tear, Dr. Walton, Dr. Lundsgaard and Dr. Thompson have all interpreted the September 20, 2000 MRI scan as demonstrating a PCL tear. (Exs. 9, 12-3, 30). Claimant has proved the requisite objective findings of a PCL tear condition. Accordingly, we affirm the ALJ's compensability determination.

### Responsibility

On the responsibility issue, the ALJ found that there was no evidence that claimant's work activity with SAIF's insured worsened his left knee condition. On review, the employer contends that ORS 656.308(1) applies to determine responsibility. We disagree.

ORS 656.308(1) applies only where there is an earlier accepted claim and a later injury involves the same condition as did the earlier accepted claim. *Sanford v. Balteau Standard*, 140 Or App 177, 181 (1996); *SAIF v. Yokum*, 132 Or App 18 (1994). Under ORS 656.308(1), a new compensable injury "involves" the same condition for which another carrier is responsible if the new compensable injury meets either of the following definitions: "to have within or part of itself: CONTAIN, INCLUDE \* \* \* c: to have effect on: concern directly: AFFECT \* \* \*." *Multifoods Specialty Distribution v. McAtee*, 333 Or 629, (April 11, 2002) (quoting *Webster's Third New Int'l Dictionary*, 1191 (unabridged ed 1993)).

Here, neither carrier ever accepted a left knee PCL tear condition. There is no evidence that the employer's accepted left knee strain condition "has within or part of itself," or "contains, includes or affects" the left knee PCL tear condition. Accordingly, ORS 656.308(1) does not apply. When ORS 656.308(1) does not apply, the last injurious exposure rule (LIER) applies to assign responsibility. *SAIF v. Yokum*, 132 Or App 18, 23-24 (1994). The LIER rule assigns initial responsibility to the last period of employment whose conditions might have

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<sup>1</sup> ORS 656.005(19) provides:

"'Objective findings' in support of medical evidence are verifiable indications of injury or disease that may include, but are not limited to, range of motion, atrophy, muscle strength and palpable muscle spasm. 'Objective findings' does not include physical findings or subjective responses to physical examinations that are not reproducible, measurable or observable."

caused the disability. *Reynolds Metals v. Rogers*, 157 Or App 147, 153 (1998), *rev den* 328 Or 365 (1999).

Because claimant first sought and obtained medical treatment for the PCL tear in 2000, his “date of disability” arose while the employer was on the risk. Presumptive (initial) responsibility under the LIER is, therefore, assigned to the employer. (Ex. 9). See *Timm v. Maley*, 125 Or App 396, 401 (1993), *rev den* 319 Or 81 (1994); *Pamela M. Christman*, 52 Van Natta 122, 123 (2000).

The employer may avoid responsibility only if it proves that claimant’s later work activity with SAIF’s insured contributed to the cause of, aggravated, or exacerbated the PCL tear condition. See *Bracke v. Baza’r*, 293 Or 239, 250 (1982) (once assigned, responsibility may shift forward if later work activities “contribute to the cause of, aggravate, or exacerbate the underlying disease”).

Here, there is no such evidence necessary to shift responsibility to SAIF’s insured. The employer cites to no specific medical evidence supporting such a conclusion. Dr. Walton stated only that claimant’s more recent work activities for SAIF’s insured might have exacerbated his left knee *symptoms* somewhat. (Ex. 30). Accordingly, we affirm the ALJ’s order assigning responsibility to the employer.

### Penalty

Under ORS 656.262(11)(a), if an insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation, the insurer or self-insured employer shall be liable for an additional amount up to 25 percent of the amount then due. The standard for determining an unreasonable resistance to the payment of compensation is whether, from a legal standpoint, the carrier had a legitimate doubt as to its liability. *International Paper Co. v. Huntley*, 106 Or App 107 (1991). If so, the refusal to pay is not unreasonable. “Unreasonableness” and “legitimate doubt” are to be considered in light of all the evidence available to the carrier at the time of the denial. *Brown v. Argonaut Insurance Company*, 93 Or App 588, 591 (1988); *Ginter v. Woodburn United Methodist Church*, 62 Or App 118, 122 (1983); *Tammy L. Smith*, 54 Van Natta 236, 239 (2002).

Here, the employer originally accepted only a nondisabling left knee strain. (Ex. 13). By the time of its September 27, 2001 denial, the employer had received (claimant’s former treating physician) Dr. Lundsgaard’s November 28, 2000 chart note, in which Dr. Lundsgaard characterized claimant’s left knee condition as an

“old PCL injury sometime in the past, causing some patellofemoral discomfort.” (Ex. 14). Dr. Lundsgaard also indicated that claimant’s “old” PCL injury might be aggravated by his “general body habitus” and the anatomic alignment of his legs. (*Id.*) Moreover, on March 12, 2001, Dr. Lundsgaard stated that, on examination of claimant’s left knee, he could not detect any instability, “even though his MRI suggests a PCL tear.” (Ex. 17).

Although the employer’s denial ultimately was set aside after further development of the medical evidence, based on the above-referenced chart notes from Dr. Lundsgaard, we find that the employer had a legitimate doubt as to whether claimant actually had a PCL tear diagnosis, and, if so, whether the condition was related to claimant’s compensable injury, as opposed to being the result of an “old” injury and/or aggravated by claimant’s body habitus or anatomic alignment. Consequently, we reverse the ALJ’s penalty assessment.

Claimant’s attorney is entitled to an assessed fee for services on review. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4), and applying them to this case, we find that a reasonable fee for claimant’s attorney’s services on review is \$2,000, payable by the self-insured employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant’s respondent’s brief and claimant’s attorney’s uncontested attorney fee request), the complexity of the issues, and the value of the interest involved.<sup>2</sup>

### ORDER

The ALJ’s order dated July 19, 2002 is reversed in part and affirmed in part. That portion of the ALJ’s order that assessed a penalty for an unreasonable denial is reversed. The remainder of the order is affirmed. For services on review, claimant’s attorney is awarded \$2,000, payable by the self-insured employer.

Entered at Salem, Oregon on January 30, 2003

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<sup>2</sup> Claimant is not entitled to an assessed fee for services on review devoted to the penalty issue. *Saxton v. SAIF*, 80 Or App 631, *rev den* 302 Or 159 (1986). Although claimant’s attorney requested \$2,200 for services on review, and that request was uncontested, claimant’s attorney did not segregate out the time devoted to the penalty issue. Because only a small portion of claimant’s respondent’s brief was devoted to the penalty issue, we have awarded \$2,000 for claimant’s counsel’s services on review.