

In the Matter of the Compensation of  
**ANTONIO L. MARTINEZ, Claimant**

WCB Case No. 05-05356

ORDER ON REVIEW

Philip H Garrow, Claimant Attorneys  
James B Northrop, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: En Banc.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Lipton's order that: (1) found that the conditions for which a left knee arthroscopy was proposed were caused in material part by the January 2004 injury; and (2) awarded an attorney fee. SAIF contends that the ALJ exceeded his jurisdictional authority. On review, the issues are jurisdiction, compensability and attorney fees. We affirm in part and modify in part.

FINDINGS OF FACT

In February 2003, claimant sought treatment from Dr. Thomas for bilateral knee pain. A left knee MRI showed a tear of the posterior horn of the medial meniscus. On September 17, 2003, Dr. Thomas performed an arthroscopic partial medial meniscectomy in the left knee. (Exs. 1, 5, 8).

Claimant was compensably injured on January 10, 2004, when he fell from a hay baler and landed on his left knee. A new left knee MRI showed a recurrent medial meniscus tear. On February 16, 2004, Dr. Thomas performed another arthroscopic partial medial meniscectomy. (Exs. 10, 12, 15).

SAIF accepted a "mild sprain left medial collateral ligament" and "recurrent tear horizontal cleavage left medial meniscus." (Ex. 16). Dr. Thomas performed a closing examination in August 2004 and the claim was closed on August 27, 2004. (Exs. 19, 21).

In October 2004, claimant sought treatment for worsening left knee pain. An October 13, 2004 left knee MRI included evidence of a nondisplaced fracture of the lateral femoral condyle. The finding was "suspicious" for a stress fracture, although "evolving spontaneous osteonecrosis"<sup>1</sup> was another consideration. (Exs. 22, 23). There was also evidence suggestive of a stress fracture within the proximal fibula.

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<sup>1</sup> "Osteonecrosis" is the "death of bone in mass, as distinguished from caries ('molecular death') or relatively small foci of necrosis in bone." *Stedman's Electronic Medical Dictionary*, v. 4.0 (1998).

Dr. Carlsen reviewed the new MRI and said that it showed a stress reaction and contusion to the lateral femoral and lateral fibular areas. (Ex. 24). Claimant returned to Dr. Thomas, who found that the MRI showed a remnant of medial meniscus with a persistent horizontal cleavage tear, as well as a contusion or possibly a small focal area of osteonecrosis in the lateral femoral condyle that was not present previously. (Ex. 27). After reviewing a bone scan, Dr. Thomas said that there appeared to be an area of osteochondritis dissecans<sup>2</sup> lateral femoral condyle, which was likely a result of the impact during the fall. He referred claimant to Dr. Bollom for surgery. (Ex. 31).

Dr. Bollom's assessment was left knee pain with small radial and medial meniscal tear with possible post-menisectomy changes, and "OCD/ON lesion of lateral femoral condyle, likely a result of the impact at the time of the patient's original fall." Dr. Bollom recommended knee arthroscopy and possible drilling or debridement. (Ex. 34). Dr. Bollom's surgery request said that the diagnosis was "osteonecrosis left knee" and the procedure would be "left knee scope, debridement, possible drilling of LFC osteonecrosis[.]" (Ex. 34A).

Dr. Woodward performed a chart review on behalf of SAIF. He found that the latest two MRIs were consistent with a bone contusion of the lateral femoral condyle, lateral tibial condyle and fibular head from the January 2004 fall. Dr. Woodward concluded that the contusions had resolved. He found no reason to perform an operation in the lateral compartment of the knee. (Exs. 35, 36).

On July 5, 2005, claimant's attorney requested approval of Dr. Bollom's proposed surgery. (Ex. 39). SAIF declined to authorize or pay for the surgery. (Ex. 39A).

On August 18, 2005, the Medical Review Unit issued a "Defer and Transfer Order" pursuant to ORS 656.704(3)(b) regarding Dr. Bollom's proposed surgery. The dispute "regarding whether a sufficient causal relationship exists between the arthroscopy; debridement and possible drilling of the lateral femoral condyle osteonecrosis" was transferred to the Workers' Compensation Board. (Ex. 42).

In September 2005, Dr. Woodward provided a supplemental report, concluding that the abnormal findings in the lateral femoral condyle, lateral tibia and proximal fibula were due to the January 2004 injury and represented a bone contusion. (Ex. 43).

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<sup>2</sup> "Osteochondritis dissecans" is the "complete or incomplete separation of a portion of joint cartilage and underlying bone, usually involving the knee, associated with epiphyseal aseptic necrosis." *Stedman's Electronic Medical Dictionary*, v. 4.0 (1998).

In a concurrence letter from claimant's attorney, Dr. Bollom stated that based on claimant's pain and symptoms post fall, the lateral femoral condylar lesion was likely related to the January 10, 2004 injury. Dr. Bollom checked a box agreeing that it was medically probable that claimant's current need for treatment and proposed surgery were caused in major part by the January 2004 injury. (Ex. 44).

### CONCLUSIONS OF LAW AND OPINION

The ALJ found that claimant suffered left knee conditions other than those identified in SAIF's acceptance, which were caused in material part by the January 2004 work injury. The ALJ concluded that claimant suffered at least a bone contusion as a result of the injury and that the purpose for which the arthroscopy was proposed was caused in material part by the compensable injury.

We first address SAIF's jurisdictional argument. SAIF argues that the ALJ exceeded his jurisdictional authority when he "decided the compensability" of new or omitted medical conditions without claimant first formally requesting the acceptance of those conditions, as required by ORS 656.262(6)(d), ORS 656.262(7)(a), and ORS 656.267(1). According to SAIF, only when the statutory procedures have been followed and the new/omitted medical condition has been found compensable, does one then invoke ORS 656.245(1)(a) to determine what medical services are compensable.

Claimant clarifies that he is not asking for acceptance of a new or omitted medical condition, or a consequential condition. Instead, his physicians suspect that he has a lesion likely caused by the work injury and they want to perform surgery to determine what is causing his continuing knee problems. Claimant contends that the persuasive medical evidence establishes that the need for the requested surgery was caused in material part by the compensable injury.

We disagree with SAIF's characterization of the ALJ's decision. The ALJ did not "decide compensability" of any new or omitted medical conditions. Instead, he determined that the conditions for which a left knee arthroscopy was proposed were caused in material part by the January 2004 injury. For the following reasons, we find that the ALJ had jurisdiction to make that determination.

ORS 656.704(3) addresses the authority of the Board and the Director to resolve disputes relating to the compensability of medical services. In *AIG Claim Services. v. Cole*, 205 Or App 170 (2006), the court explained that ORS 656.704(3)(b)<sup>3</sup> sets out three types of medical service disputes that potentially arise in the context of a claim and establishes which forum has jurisdiction:

“(1) A dispute concerning the compensability of the medical condition for which medical services are proposed is a ‘matter concerning a claim’ and is within the jurisdiction of the board. ORS 656.704(3)(b)(A). (2) A dispute concerning whether medical services are excessive, inappropriate, ineffectual, or in violation of the rules regarding the performance of medical services, or whether medical services for an accepted condition qualify as compensable medical services among those listed in ORS 656.245(1)(c), is not ‘a matter concerning a claim’ and falls within the jurisdiction of the director. ORS 656.704(3)(b)(B). (3) A dispute concerning whether a sufficient causal relationship exists between medical services and an accepted claim to establish compensability is a matter concerning a claim, within the jurisdiction of the board. ORS 656.704(3)(b)(C).”  
205 Or App at 173-74.

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<sup>3</sup> ORS 656.704(3)(b) (2005) provides:

“The respective authority of the board and the director to resolve medical service disputes shall be determined according to the following principles:

“(A) Any dispute that requires a determination of the compensability of the medical condition for which medical services are proposed is a matter concerning a claim.

“(B) Any dispute that requires a determination of whether medical services are excessive, inappropriate, ineffectual or in violation of the rules regarding the performance of medical services, or a determination of whether medical services for an accepted condition qualify as compensable medical services among those listed in ORS 656.245(1)(c), is not a matter concerning a claim.

“(C) Any dispute that requires a determination of whether a sufficient causal relationship exists between medical services and an accepted claim to establish compensability is a matter concerning a claim.”

Here, the Medical Review Unit issued a “Defer and Transfer Order” pursuant to ORS 656.704(3)(b), regarding Dr. Bollom’s proposed surgery. The dispute “regarding whether a sufficient causal relationship exists between the arthroscopy; debridement and possible drilling of the lateral femoral condyle osteonecrosis” was transferred to the Workers’ Compensation Board. (Ex. 42).

Because the dispute does not pertain to whether the proposed medical services are excessive, inappropriate, ineffectual, or in violation of the rules regarding the performance of medical services, or whether medical services for an “accepted condition” qualify as compensable medical services, ORS 656.704(3)(b)(B) does not apply.

Moreover, in this proceeding, claimant is not seeking to establish compensability of a new or omitted medical condition, or a consequential condition. Therefore, ORS 656.704(3)(b)(A) does not apply. In addition, because he is not seeking to establish “the compensability of the medical condition for which medical services are proposed[,]” claimant was not required to comply with the procedures discussed in ORS 656.262(6)(d), ORS 656.262(7)(a) or ORS 656.267(1). SAIF argues that ORS 656.267(1) specifically states that a request to provide medical services for a new or omitted condition is *not* a claim for a new or omitted medical condition, but SAIF misunderstands the nature of claimant’s request.

This claim involves the third type of dispute discussed by the court in *AIG Claim Services*. This dispute requires a determination of whether a sufficient causal relationship exists between medical services and an accepted claim. ORS 656.704(3)(b)(C). The ALJ had jurisdiction to resolve this dispute.

ORS 656.245(1)(a) provides, in part: “For every compensable injury, the insurer or the self-insured employer shall cause to be provided medical services for conditions caused in material part by the injury for such period as the nature of the injury or the process of the recovery requires, subject to the limitations in ORS 656.225[.]”

In *Sprague v. U.S. Bakery*, 199 Or App 435, *on recons* 200 Or App 569 (2005), *rev den*, 340 Or 157 (2006), the court interpreted ORS 656.245(1)(a) and found that it described three categories of conditions for which medical expenses are compensable. In the first category, carriers are responsible for medical services for conditions caused in material part by the compensable injury. In the second and third categories, carriers are also responsible for medical services for

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consequential and combined condition so long as the medical services are caused in major part by the compensable injury. 200 Or App at 573. The court discussed the first category as follows:

“The first sentence in ORS 656.245(1)(a) begins with the phrase, ‘For every compensable injury.’ For purposes of application to claimant’s circumstances, that phrase refers to the torn meniscus that claimant suffered while working for SAIF’s insured. The next clause in the first sentence of the statute places the responsibility on employers and insurers to pay for medical services for ‘conditions’ caused in material part by the ‘injury.’ With regard to claimant’s claim, the word ‘conditions’ in the phrase refers to claimant’s knee condition, *i.e.*, the need for a total knee replacement. The same word could also refer to claimant’s obesity condition if he is able to satisfy the other requirements of the sentence. The word ‘injury’ in that phrase refers again to claimant’s torn meniscus.” 200 Or App at 572.

Here, the phrase “[f]or every compensable injury” refers to the “mild sprain left medial collateral ligament” and “recurrent tear horizontal cleavage left medial meniscus” claimant suffered while working for SAIF’s insured. (Ex. 16). SAIF is required to pay for medical services for “conditions” caused in material part by the “injury.” Here, the word “conditions” refers to claimant’s current left knee condition. Therefore, we review the medical evidence to determine whether claimant’s requested medical services are for “conditions caused in material part by the injury[.]”

Claimant relies on the opinions of Drs. Bollom and Thomas, asserting that they propose surgery for his small radial and meniscal tears in his left knee, for exploration of the cartilage and for an osteonecrosis lesion of the lateral femoral condyle, all resulting from the compensable injury.

SAIF disagrees, arguing that the medical evidence does not indicate that the surgery is directed at the left knee tears or the accepted sprain. Instead, SAIF relies on Dr. Bollom’s request for surgery, which referred only to the diagnosis of osteonecrosis of the left knee.

For the following reasons, we conclude that the persuasive medical evidence from Drs. Thomas and Bollom establishes that the proposed surgery is for “conditions caused in material part by the injury.”

In *Counts v. International Paper Co.*, 146 Or App 768, 771 (1997), the court explained that “if diagnostic services are necessary to determine the cause or extent of a compensable injury, the tests are compensable whether or not the condition that is discovered as a result of them is compensable.” See also *Roseburg Forest Products v. Langley*, 156 Or App 454, 463 (1998) (tests were for determining extent of compensable injury and not for establishing the existence of a new or consequential condition); *Brooks v. D & R Timber*, 55 Or App 688, 692 (1982).

In October 2004, claimant sought treatment for worsening left knee pain. An October 13, 2004 left knee MRI showed a small vertical tear of the posterior horn of the medial meniscus and an oblique tear of the posterior horn. The MRI showed evidence of a nondisplaced fracture of the lateral femoral condyle, which was “suspicious” for a stress fracture, although “evolving spontaneous osteonecrosis” was another consideration. There was also evidence suggestive of a stress fracture within the proximal fibula. (Ex. 23).

Dr. Carlsen reviewed the new MRI and said that it showed a stress reaction and contusion to the lateral femoral and lateral fibular areas. (Ex. 24). Claimant returned to Dr. Thomas, who found that the MRI showed a remnant of medial meniscus with persistent horizontal cleavage tear within it, but more importantly, claimant had either a contusion or possibly a small focal area of osteonecrosis in the lateral femoral condyle that was not present previously. (Ex. 27). He recommended a bone scan, which showed abnormal uptake in the posterior surface of the lateral femoral condyle, which was “most consistent with a stress fracture, although spontaneous osteonecrosis is an additional less likely differential consideration.” There was also abnormal increased uptake in the proximal left fibula, which was compatible with a stress fracture. (Ex. 30).

Claimant returned to Dr. Thomas after the bone scan. He said that there appeared to be an area of osteochondritis dissecans lateral femoral condyle, which was likely a result of the impact during the fall. He referred claimant to Dr. Bollom for arthroscopy and possibly debridement of that area. (Ex. 31).

Dr. Bollom explained that an October 2004 MRI showed a small new vertical tear of the posterior horn. However, he noted that claimant’s “main symptoms were not medial in nature and less mechanical and more pain related.” (Ex. 34). Claimant had a significant amount of edema involving the weightbearing surface of the lateral femoral condyle and Dr. Bollom agreed with Dr. Thomas that there was concern for osteonecrosis involving a small portion of the lateral femoral condyle. (*Id.*) Dr. Bollom’s assessment was left knee pain with small radial and

medial meniscal tear with possible post-meniscectomy changes, and “OCD/ON lesion of lateral femoral condyle, likely a result of the impact at the time of the patient’s original fall.” Dr. Bollom recommended knee arthroscopy and possible drilling or debridement. He noted that claimant’s knee was in an “unacceptable level with respect to pain[.]” If the overlying cartilage appeared excellent, claimant would be a candidate for anterograde drilling. If the overlying cartilage was unacceptable, softened and fissured, then a debridement would be reasonable. (*Id.*) Dr. Bollom’s discussion establishes that the surgery is proposed at least in part for diagnostic services, *i.e.*, to determine the cause or extent of the compensable injury. *See Counts v. International Paper Co.*, 146 Or App at 771.

Dr. Bollom’s surgery request said that the diagnosis was “osteonecrosis left knee” and the procedure would be “left knee scope, debridement, possible drilling of LFC osteonecrosis[.]” (Ex. 34A).

In a concurrence letter from claimant’s attorney, Dr. Bollom stated that based on claimant’s pain and symptoms post fall, he believed that the lateral femoral condylar lesion was likely related to the January 10, 2004 injury. Dr. Bollom agreed that it was medically probable that claimant’s current need for treatment and proposed surgery were caused in major part by the January 2004 injury. (Ex. 44).

The opinions of Drs. Thomas and Bollom are the most persuasive because they are well-reasoned and based on complete and relevant information. *See Jackson County v. Wehren*, 186 Or App 555, 559 (2003). Based on their opinions, we conclude that the proposed surgery is for “conditions caused in material part by the injury[.]” ORS 656.245(1). The proposed surgery is materially related to the compensable injury as treatment of continued symptoms that claimant’s treating physicians reasonably relate causally to his injury. The medical evidence indicates that the surgery would determine the extent of the injury and appropriate treatment. Although there is a possibility that the proposed surgery could discover new medical conditions, we find that the persuasive medical evidence establishes that the surgery is proposed primarily to treat claimant’s pain and determine the extent of the compensable injury. *See Roseburg Forest Products v. Langley*, 156 Or App at 463; *Counts v. International Paper Co.*, 146 Or App at 771.

Dr. Woodward performed a chart review on behalf of SAIF and concluded that the latest two MRIs showed some abnormal findings in the lateral femoral condyle, lateral tibia and proximal fibula, which were due to the January 2004 injury and represented a bone contusion. Thus, Dr. Woodward believed that

claimant had abnormal findings in his left knee that were related to the work injury. However, he believed that the contusion had resolved and no surgery was necessary for the bone contusion. (Exs. 36-3, -4, 43). Dr. Woodward did not agree that the diagnosis of osteonecrosis had been established and he did not diagnose osteochondritis dissecans. (Ex. 43).

Dr. Woodward did not explain why claimant continued to have symptoms if the contusion had resolved. Furthermore, he did not explain why he did not believe that claimant had osteochondritis dissecans. Instead, he merely opined that, if claimant does have osteochondritis dissecans or osteonecrosis, it was unlikely to be due to a fall; instead, those conditions were often idiopathic. (Ex. 43). Dr. Woodward's conclusory opinion about the causal relationship of the proposed surgery is not persuasive. *See Blakely v. SAIF*, 89 Or App 653, 656, *rev den*, 305 Or 972 (1988) (physician's opinion lacked persuasive force because it was unexplained); *Moe v. Ceiling Systems*, 44 Or App 429, 433 (1980) (rejecting conclusory medical opinion).

In conclusion, having reviewed the relevant medical evidence, we agree with the ALJ's determination of the causation issue with respect to the proposed medical services. We now turn to the issue of attorney fees.

The ALJ awarded an assessed attorney fee of \$4,000 based on claimant having prevailed on the causation aspect of this medical services dispute. On review, claimant requests an attorney fee under ORS 656.382(2) and ORS 656.385 for "prevailing" on the medical services issue. We resolve the attorney fee issues as follows.

In *AIG Claim Services. v. Cole*, 200 Or App 170, 178-79 (2006), the court concluded that a fee under ORS 656.386(1) is awarded only when a claimant "prevails finally" over a denied claim. A claimant does not "prevail finally" until both aspects of a challenge to a medical services claim (the causal relationship under ORS 656.704(3)(b)(C) and whether the medical services are medically appropriate under ORS 656.704(3)(b)(B)) have been decided in favor of claimant. Because this proceeding pertains only to the causal relationship under ORS 656.704(3)(b)(C), claimant has not yet "prevailed" on the medical services claim and, therefore, he is not entitled to an attorney fee under ORS 656.386(1) *at this time*.

Furthermore, we do not have jurisdiction to award an assessed attorney fee under ORS 656.385 because such proceedings are before the Director. Although claimant requests an attorney fee under ORS 656.382(2), that requires

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a determination that the “compensation awarded to a claimant should not be disallowed or reduced[.]” Because our order does not determine whether claimant has “prevailed,” we cannot determine whether his compensation will be disallowed or reduced. Claimant is, therefore, not entitled to an assessed fee for his attorney’s services on review *at this time*.

As the preceding discussion demonstrates, the *Cole* court’s decision left unresolved the issue of how claimant’s attorney might receive an assessed attorney fee for services at hearing or on review should claimant ultimately prevail over the denied claim in proceedings before the Director. In that event, the Board would no longer have jurisdiction to award such fees. To resolve this issue, we look to what practice the Court of Appeals has adopted when confronted with a similar issue.

In *Steven R. Cummings*, 57 Van Natta 2223 (2005), we observed that the court had conditionally granted the claimant’s counsel a fee for services on judicial review in the event that he prevailed on remand; because the claimant prevailed on his denied claim after remand, we held that he was entitled to the attorney fee award conditionally granted by the court. *Id.* at 2230. In light of *Cummings*, as well as other Board precedent, we conclude that there is legal authority for a “contingent” attorney fee. See *David Converse*, 50 Van Natta 2067 (1998) (court remanded on merits and granted the claimant a specified attorney fee for services rendered on judicial review, conditioned on the claimant prevailing on remand; Board found claim compensable on remand and awarded attorney fees for services at hearing and on review, in addition to the specified “conditional” attorney fee awarded by the court); *Gene H. Gosda*, 50 Van Natta 2279 (1998) (same).

We acknowledge, however, that, unlike the Board, the Court of Appeals does have a rule that allows for the award of a “contingent” attorney fee. See ORAP 13.10(3). Nevertheless, statutes that allow assessed attorney fees (such as ORS 656.386(1) and ORS 656.382(2)) apply to the Board, as well as to the court. As *Cummings* and other cases demonstrate, the court has granted contingent attorney fee awards even though the aforementioned statutes do not expressly allow such awards. Because those statutes apply to the court as well as to the Board, the absence of a Board rule authorizing a “contingent” fee is not determinative of our authority to award an assessed fee in this case.

Accordingly, given the issue left unresolved in *Cole*, and considering the court’s practice of granting contingent assessed fees, as well as our prior decisions awarding conditional attorney fees from the court, we conclude that an award of a contingent attorney fee is appropriate in this case. Therefore, although claimant

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has not yet “finally prevailed” within the meaning of ORS 656.386(1), in the event that he ultimately prevails, *i.e.*, if both aspects of the challenge to the medical services claim are decided in favor of claimant, we conclude that he is entitled to the ALJ’s \$4,000 assessed attorney fee.<sup>4</sup>

Moreover, if both aspects of the challenge to the medical services claim are decided in favor of claimant, we also award a reasonable assessed attorney fee of \$2,000 for claimant’s attorney’s services on Board review, payable by SAIF. ORS 656.382(2). In making this “contingent” award, we have particularly considered the time devoted to the issues (as represented by claimant’s respondent’s brief), the complexity of the issues, and the value of the interest involved. *See* OAR438-015-0010(4).

### ORDER

The ALJ’s order dated December 9, 2005 is affirmed in part and modified in part. The portion of the ALJ’s order that awarded a \$4,000 attorney fee is modified. In lieu of the ALJ’s attorney fee award, we award claimant’s attorney a contingent assessed attorney fee of \$4,000 for services at hearing. In the event that claimant ultimately prevails, *i.e.*, if both aspects of the challenge to the medical services claim are decided in favor of claimant, that award is then payable by SAIF for claimant’s counsel’s services at hearing. The remainder of the ALJ’s order is affirmed. For services on review, claimant’s attorney is awarded an assessed fee of \$2,000, payable by SAIF, contingent on claimant prevailing in proceedings before the Director regarding the appropriateness of the proposed medical treatment.

Entered at Salem, Oregon on July 27, 2006

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<sup>4</sup> Neither party has challenged the amount of that attorney fee on review.