
In the Matter of the Compensation of
CAMERON J. HORNER, Claimant
WCB Case No. 09-03509
ORDER ON REVIEW
Fontana & Takaro, Claimant Attorneys
Julie Masters, SAIF Legal, Defense Attorneys

Reviewing Panel: *En Banc*. Members Biehl, Langer, Herman, Weddell, and Lowell. Members Biehl and Weddell dissent.

Claimant requests review of Administrative Law Judge (ALJ) McCullough's order that upheld the SAIF Corporation's denial of his medical services claim for low back surgery. On review, the issue is medical services.

We adopt and affirm the ALJ's order with the following supplementation.

The ALJ upheld SAIF's denial of claimant's medical services claim for his L4-5 disc surgery, reasoning that the proposed surgery was not "directed to" his accepted L5-S1 disc or lumbosacral strain conditions. Asserting that the medical evidence establishes that his proposed surgery is directed to his L4-5 disc condition that is directly related to his work injury, claimant contends that his medical service claim is compensable under ORS 656.245(1)(a). Based on the following reasoning, we disagree with claimant's contention.

ORS 656.245(1)(a) provides:

"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, including such medical services as may be required after a determination of permanent disability. In addition, for consequential and combined conditions described in ORS 656.005(7), the insurer or the self-insured employer shall cause to be provided only those medical services directed to medical conditions caused in major part by the injury."

If the claimed medical service is “for” an “ordinary” condition, the first sentence of ORS 656.245(1)(a) governs the compensability of medical services. *SAIF v. Sprague*, 346 Or 661, 672 (2009). If the claimed medical service is “directed to” a consequential or combined condition, the second sentence of ORS 656.245(1)(a) applies. *Id.* at 673.

There is no contention that the L4-5 disc condition is a combined or consequential condition. Consequently, in accordance with the first sentence of ORS 656.245(1)(a), the medical service is compensable if: (1) the L4-5 disc condition was caused in material part by the compensable injury; and (2) the proposed surgery was for the current L4-5 disc condition. *Sprague*, 346 Or at 673; *Charles E. Pharis, Jr.*, 62 Van Natta 406, 407 (2010). The condition for which treatment is sought need not be the accepted condition, but the treatment must be necessitated in material part by the “compensable injury,” which is the condition previously accepted. *SAIF v. Martinez*, 219 Or App 182, 190-91 (2008).¹

Here, the medical opinions support a conclusion that the proposed L4-5 disc surgery is materially related to claimant’s November 2007 work injury. Nevertheless, these opinions do not establish that the disputed surgery is materially related to either claimant’s accepted L5-S1 disc or lumbosacral strain conditions. Under such circumstances, the record does not establish that the medical services claim is compensable.²

Noting that the legislature did not insert the word “accepted” before the word “conditions” in ORS 656.245(1)(a), claimant argues that we are not authorized to interpret the statute in a manner that treats “compensable injury” as synonymous with “accepted conditions.” Yet, we are simply applying the *Martinez* court’s rationale, which as promulgated by a higher appellate authority, we are obliged to follow.

Moreover, in *Kirk Larkins*, 61 Van Natta 819, 820 (2009), we held that, for purposes of the first sentence in ORS 656.245(1)(a), medical services must be for an accepted condition. *See also John D. Swartz*, 62 Van Natta 570, 576 (2010)

¹ We note that, for diagnostic purposes, medical services are compensable if designed to determine the cause or extent of a compensable injury, even if the discovered condition itself is not compensable. *Counts v. Int’l Paper Co.*, 146 Or App 768, 771 (1997). Here, however, the disputed surgery was not proposed for diagnostic purposes.

² Claimant has apparently not filed a new/omitted medical condition for his L4-5 disc condition. We note that such a claim may be initiated at any time. ORS 656.267(1).

(equating “compensable injury” under ORS 656.245(1)(a) with “accepted condition”). Noting that *Larkins* cited the Court of Appeals’ opinion in *Sprague*, claimant contends that the Supreme Court’s eventual decision in *Sprague* essentially overruled the Court of Appeals’ opinion and, as such, *Larkins* is not valid precedent.

Nevertheless, our analysis of ORS 656.245(1)(a) in *Larkins* was based on the *Martinez* rationale. Admittedly, the Court of Appeals in *Martinez* applied its *Sprague* opinion in analyzing ORS 656.245(1)(a) and the Supreme Court subsequently issued its own opinion regarding the disputed medical services claim in *Sprague*. However, the Supreme Court did not disagree with the proposition that, for purposes of ORS 656.245(1)(a), “compensable injury” referred to the claimant’s original meniscus tear (which was the initial accepted condition, followed by the claimant’s subsequently accepted consequential arthritic knee condition). Furthermore, in contrast to this case, as well as *Martinez* and *Larkins*, the Supreme Court’s holding was focused on the second sentence of the statute (*i.e.*, the “combined / consequential condition” – “directed to” section), rather than the first sentence (*i.e.*, the “ordinary” condition – “for” section).

Under such circumstances, we decline to analyze *Sprague* in a manner that would nullify the *Martinez* court’s interpretation of the pertinent statutory language. Any such nullification or modification of the *Martinez* rationale is a matter for an appellate court, not this forum.

In conclusion, for the foregoing reasons, we find that claimant has not established the compensability of the proposed medical services under his accepted L5-S1 herniated disc and lumbosacral strain claim. Therefore, we affirm.

ORDER

The ALJ’s order dated October 7, 2009 is affirmed.

Entered at Salem, Oregon on August 16, 2010

Members Biehl and Weddell, dissenting.

In November 2007, claimant compensably injured his low back when he slipped at work. The SAIF Corporation accepted a lumbosacral strain and L5-S1 herniated disc. (Ex. 13).

Thereafter, an April 2009 MRI showed a large L4-5 disc protrusion/extrusion. (Ex. 27). Dr. Buza, a neurosurgeon who had been referred to by claimant's treating physician, Dr. Cook, recommended decompression and surgery on the ruptured L4-5 disc. (Ex. 28-2).

Dr. Cook opined that the need for the L4-5 surgery was materially related to the November 2007 work event, and that the November 2007 injury was a material contributing cause of the L4-5 disc condition. (Ex. 40-2, -3). Dr. Buza likewise asserted that the November 2007 injury was a material contributing cause of both the L4-5 disc condition and the need for the L4-5 surgery to treat the L4-5 disc condition. (Ex. 44-3).

Despite uncontroverted medical evidence that the compensable November 2007 work injury was a material contributing cause of the proposed L4-5 surgery, SAIF denied claimant's request that it pay for the proposed surgery. The majority upholds that denial, reasoning that such a result is dictated by *SAIF v. Martinez*, 219 Or App 182 (2008). We disagree.

We begin our analysis of ORS 656.245(1)(a), as we must, with the language of the statute, which provides, in relevant part, that “[f]or 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 * * *.” ORS 656.005(7)(a) defines “compensable injury” as “an accidental injury * * * arising out of and in the course of employment requiring medical services or resulting in disability or death.”

In *Errand v. Cascade Steel Rolling Mills*, 320 Or 509, 517 (1995), the court interpreted that portion of the statute as follows: “the ‘compensable injury’ referred to [in ORS 656.005(7)(a)] may be simply an ‘accidental injury’ ‘arising out of and in the course of employment.’”³ The *Errand* court added that the definition of “compensable injury” “governs statutory construction of that term as used in the Workers’ Compensation Law ‘except where the context otherwise requires.’” 320 Or at 517 (quoting ORS 656.003); *see also PGE v. Bureau of Labor and Industries*, 317 Or 606, 611 (1993) (use of the same term throughout a statute generally indicates that the term has the same meaning throughout the statute). In *SAIF v. Sprague*, 346 Or 661, 665 (2009), the court confirmed that “compensable injury,” as defined in ORS 656.005(7)(a), applied in the context of a medical services dispute under ORS 656.245(1)(a).

³ The court proceeded to note that subparagraphs (A) and (B) of ORS 656.005(7)(a) provide limitations to that definition; those subparagraphs, however, are not at issue in the instant matter.

Thus, neither the text of the statute in context nor the court's controlling interpretation of the statute in *Errand* or *Sprague* limit a "compensable injury" to only those *conditions* accepted by a carrier *after* a "compensable injury" occurs. See *Armstrong v. Rogue Fed. Credit Union*, 328 Or 154, 159-60 (1998) ("When a worker is injured at work, the injury is a compensable injury under ORS 656.005(7)(a) from the moment of its occurrence * * *). Rather, "compensable injury" encompasses any "accidental injury * * * arising out of and in the course of employment requiring medical services or resulting in disability or death." ORS 656.005(7)(a); see also *Sprague*, 346 Or at 665; *Errand*, 320 Or at 517. In other words, although often times the at-issue "compensable injury" will be synonymous with a "previously accepted condition," a "compensable injury" under ORS 656.245(1)(a) is not limited to *only* a "previously accepted condition." See *SAIF v. Martinez*, 219 Or App 182, 187-88 (2008) (rejecting the argument that "payment for medical services under ORS 656.245 [was] limited to accepted conditions").

Here, there is no dispute that claimant sustained a compensable injury in November 2007 (*i.e.*, that he had "an accidental injury * * * arising out of and in the course of employment requiring medical services * * *"). See ORS 656.005(7)(a). Thus, under ORS 656.245(1)(a) and *Sprague*, the "employer shall cause to be provided medical services for conditions caused in material part by the injury * * *." As set forth above, the medical evidence establishes that claimant's L4-5 condition, for which the disputed medical service is proposed, was caused in material part by that injury. (See Exs. 40-2, 44-3). We would find, therefore, that the proposed medical service is compensable.

In reaching a different result, the majority correctly recognizes that the compensability of those services rests on whether or not the L4-5 disc condition was caused in material part by the compensable injury. See *Sprague*, 346 Or at 673 (2009). The majority also rightly concludes that the expert medical evidence establishes "that the proposed L4-5 disc surgery is materially related to claimant's November 2007 work injury." For the reasons expressed above, we would find that sufficient to find the medical services claim compensable.

The majority, however, departs from the textual requirements of ORS 656.245(1)(a) to require that, rather than establishing a material relationship between the proposed medical services and the *compensable injury*, claimant must prove such a relationship between the medical services and *conditions previously accepted by SAIF*. In other words, the majority has replaced the statutory term "compensable injury," as used in ORS 656.245(1)(a), with "accepted condition." It reasons that it is obligated to do so under *Martinez*.

In our view, however, *Martinez* imposes no such obligation. To begin, *Martinez* previously rejected the precise arguments advanced by SAIF (and effectively endorsed by the majority): namely, that ORS 656.245 requires payment for medical services only for conditions that have been accepted, and that a contrary conclusion bypasses the procedural requirements for filing a new/omitted medical condition claim for the unaccepted condition. *See Martinez*, 219 Or App at 187-190. Nevertheless, citing the following observation concerning the compensability of a *diagnostic* medical service, the majority concludes that *Martinez* supports its position:

“the condition for which treatment is sought need not be the accepted condition; however, the treatment must be necessitated in material part by the ‘compensable injury,’ which, we said in [*SAIF v.*] *Sprague*, [200 Or App 569, 572 (2005), *rev den*, 340 Or 157 (2006),] is the condition previously accepted.” *Id.* at 191.

As noted above, *Martinez*’s observation was made in the context of assessing the compensability of a *diagnostic* medical service, which is not at issue in the instant matter. Therefore, *Martinez* is not directly on point.

Moreover, *Martinez* relied on an analysis of ORS 656.245(1)(a) employed in the appellate court decision in *Sprague*, which was subsequently rejected by the Supreme Court’s *Sprague* decision. *See* 346 Or at 673-74. In light of the Supreme Court’s subsequent directive concerning the proper approach to analyzing medical services claims under ORS 656.245(1)(a), we are required to follow *that* mandate.

The majority notes that claimant may initiate a new/omitted medical condition claim for his L4-5 disc condition. We agree. We also note that a carrier could expand its Notice of Acceptance at any time in compliance with ORS 656.262(6)(b)(F) and without a written request from claimant.⁴

In sum, as set forth above, we would find that claimant’s current L4-5 condition was “caused in material part by the [compensable] injury” (*i.e.*, “an accidental injury * * * arising out of and in the course of employment requiring medical services * * *”), and that the proposed L4-5 surgery was “for” the L4-5 condition. Therefore, we would find the proposed surgery compensable. *See* ORS 656.245(1)(a); *Sprague*, 346 Or at 663. Because the majority determines otherwise, we respectfully dissent.

⁴ ORS 656.262(6)(b)(F) provides that the “notice of acceptance *shall* * * * [b]e modified by the insurer or self-insured employer from time to time as medical or other information changes a previously issued notice of acceptance.” (Emphasis added).