
In the Matter of the Compensation of
JOHN D. SWARTZ, Claimant
WCB Case No. 09-00329
ORDER ON REVIEW
Parker Bush & Lane, Claimant Attorneys
James B Northrop, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Weddell, Langer, and Herman. Member Langer dissents.

Claimant requests review of Administrative Law Judge (ALJ) Wren's order that upheld the SAIF Corporation's denial of his diagnostic medical services claim for lumbar facet injections. On review, the issues are jurisdiction and medical services. We affirm in part and reverse in part.

FINDINGS OF FACT

We adopt the ALJ's Findings of Fact, which we summarize as follows.

Claimant compensably injured his low back in July 2007 when he fell approximately five feet, landing on his tailbone and buttocks. (Exs. 50, 51). SAIF accepted a lumbar contusion, but denied a subsequent new/omitted medical condition claim for lumbar facet syndrome.¹ (Exs. 60, 73, 78).

In November 2007, claimant was evaluated by Dr. Koon, who diagnosed, *inter alia*, a possible facet injury. (Ex. 66-3). Dr. Koon stated that, with the history of claimant's injury and the then-undertaken "diagnostics," there were a number of potential diagnoses that would explain claimant's "presentation of pain complaints" and clinical examination findings. (Ex. 100-16). Among those diagnoses were both lumbar facet syndrome and chronic lumbar contusion. (Ex. 100-16, -17). According to Dr. Koon, based on the limited diagnostics, either diagnosis was equally probable, and the proposed lumbar facet injections would assist in arriving at a more definitive diagnosis. (*Id.*) Dr. Koon believed that the compensable July 2007 work injury was the major contributing cause of claimant's current complaints. (Ex. 98-2). He maintained that the proposed lumbar facet injections were a necessary medical service to determine claimant's pain generator and an appropriate diagnosis/plan of treatment. (Ex. 100-25).

¹ Claimant requested a hearing on that denial, which is currently pending before another ALJ.

In January 2008, Dr. Carr examined claimant at SAIF's request. Dr. Carr opined that the low back contusion had resolved, and that there was insufficient information to diagnose a lumbar facet syndrome. (Ex. 75-6, -9). Dr. Carr had "great doubts as to the efficacy" of the proposed lumbar facet injections, and, in any event, considered any diagnostic value of those injections to be for "a facet problem of some type," not a lumbar contusion. (Ex. 101-9, -34, -40).

SAIF declined to pay for the lumbar facet injections. Claimant requested review by the Medical Review Unit (MRU). (Ex. 102). The MRU issued a Defer and Transfer Order that deferred "administrative review regarding [the] appropriateness and entitlement of facet joint injections" and transferred "the dispute regarding compensability and the causal relationship to the Workers' Compensation Board." (Ex. 119-1).

Claimant also requested a hearing regarding the medical services dispute.

CONCLUSIONS OF LAW AND OPINION

The ALJ held that SAIF was not responsible for the disputed medical services, finding that there was an insufficient causal relationship between the lumbar facet injections and the accepted lumbar contusion. In doing so, the ALJ found that the Board had jurisdiction to determine that causal relationship.

On review, claimant asserts that the ALJ erred on both the jurisdiction question and the compensability of the medical services. We conclude that we are authorized to resolve this dispute, but agree with claimant that the proposed medical services are compensable. We reason as follows.

Jurisdiction

In *Hazel M. Hand*, 59 Van Natta 1028 (2007), we explained that ORS 656.704(3) addresses the authority of the Board and the Director to resolve disputes relating to the compensability of medical services. That statute 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).” *AIG Claim Services v. Cole*, 205 Or App 170, 173-74, *rev den*, 341 Or 244 (2006); *accord Hand*, 59 Van Natta at 1033.

Here, the ALJ had jurisdiction to address the issue regarding claimant’s lumbar facet injections pursuant to ORS 656.704(3)(b)(C) because the dispute requires a determination of whether a sufficient causal relationship exists between the diagnostic medical service and the compensable injury. *See Cole*, 205 Or App at 173-74; *Hand*, 59 Van Natta at 1034. To the extent that claimant is challenging the MRU’s defer and transfer decision, we have previously decided that we lack appellate jurisdiction to decide that question. *See John D. Swartz*, 61 Van Natta 1677 (2009); *see also SAIF v. Martinez*, 219 Or App 182, 186 n 4 (2008) (“[t]he MRU may, at its discretion, transfer cases to the board via a Defer and Transfer Order if it believes that there is a dispute about both the propriety of the proposed treatment--which it may determine--and the compensability of the condition itself”). Accordingly, that portion of the ALJ’s order concerning jurisdiction is affirmed.

Medical Services

Under ORS 656.245(1)(a), “[f]or every compensable injury, the [carrier] 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 * * *.” The phrase “in material part” means a “fact of consequence.” *Mize v. Comcast Corp.--AT & T Broadband*, 208 Or App 563, 569-70 (2006).

Diagnostic medical services are compensable if the services “are necessary to determine the cause or extent of a compensable injury.” *Counts v. Int’l Paper Co.*, 146 Or App 768, 771 (1997). This is true even if the condition discovered during the diagnostic service is itself not compensable. *Martinez*, 219 Or App at 191; *Counts*, 146 Or App at 771.

Here, the diagnostic medical services at issue are lumbar facet injections. For the following reasons, we find the disputed medical services compensable.

Dr. Koon stated that the July 2007 compensable injury was the major contributing cause of claimant’s current back condition, and that there were a number of potential diagnoses that would explain that condition. (Exs. 98-2, 100-5, -16). Among those diagnoses were both lumbar facet syndrome and a chronic lumbar contusion. (Ex. 100-16, -17). According to Dr. Koon, based on the limited diagnostics currently undertaken, either diagnoses was equally probable, and the proposed lumbar facet injections would assist in arriving at a more definitive diagnosis; *i.e.*, the injections were necessary to determine the extent of claimant’s compensable injury. (Ex. 100-11, -12, -16, -17). Dr. Koon further explained that the proposed lumbar facet injections were a necessary medical service to determine claimant’s pain generator. (Ex. 100-11, -12, -25).

In other words, according to Dr. Koon, the extent of claimant’s injury was unknown in the absence of the proposed lumbar facet injection, and he could not conclusively determine the extent of the compensable injury without the proposed diagnostic service. (*Id.*) Based on this well-explained opinion, we find that the proposed lumbar facet injections were “necessary to determine the * * * extent of [claimant’s] compensable injury.” *Martinez*, 219 Or App at 188.

In doing so, we are not persuaded by the contrary opinion of Dr. Carr. Dr. Carr equivocated on the general diagnostic utility of the proposed lumbar facet injections, asserting both that the injections were essential to make a proper diagnosis, and that the injections were of dubious diagnostic value. (*See* Exs. 75-9, 101-9, -34). Dr. Carr did not adequately explain this apparent contradiction. As such, his opinion is unpersuasive. *See Steven W. Hagen*, 60 Van Natta 2014, 2016 (2008) (unexplained change of opinion inconsistent and unpersuasive). In any event, Dr. Carr ultimately acknowledged that, despite his personal reservations, the proposed lumbar facet injections “would be part of the normal workup” for claimant’s current low back condition. (Ex. 101-34, -35).

We disagree with the dissent's assertion that Dr. Koon's opinion should be found unpersuasive because of purported inconsistencies or unexplained changes of opinion. Medical opinions are to be evaluated in context and based on the record as a whole. *SAIF v. Strubel*, 161 Or App 516, 521-22 (1999); *Terri D. Bradshaw*, 59 Van Natta 1265, 1271 (2007). Applying that standard here, a preponderance of the evidence establishes that Dr. Koon believed that claimant's ongoing symptoms could be caused by the accepted contusion, and that the contusion could have become "chronic." (Ex. 100-16, -17).

Dr. Koon's separate observation concerning whether the contusion had resolved should not be read in isolation, but in the broader context of his other responses. The whole of Dr. Koon's opinion, read in context, establishes that the proposed lumbar facet injections were necessary to determine the source of claimant's symptoms and the extent of the compensable injury. (Ex. 100-11, -12, -25). In other words, we read Dr. Koon's opinion to say that, although it was likely that the lumbar contusion had resolved, it was equally likely that the contusion had become chronic. Thus, Dr. Koon asserted that the proposed lumbar facet injections were a reasonable diagnostic tool for purposes of the accepted contusion, and that, without the injections, he could not conclusively determine the extent of claimant's compensable injury. (Ex. 100-17, -25).

Based on the persuasiveness of Dr. Koon's opinion, we find a sufficient causal relationship between the proposed lumbar facet injections and claimant's compensable injury. In doing so, we find the instant matter analogous to *Martinez*. In that case, the claimant sustained a knee injury, which was accepted for a medial sprain and meniscus tears. Following claim closure, the claimant sought further treatment. An MRI revealed a meniscus tear, contusion, and possible necrosis, and an arthroscopy was recommended. The carrier opposed the diagnostic surgery, contending that it was for an unclaimed condition (the necrosis).

Despite the necrosis being a non-accepted condition, we held that the surgery was compensable because it was designed, at least in part, to determine the cause or extent of the compensable injury. We were persuaded by medical opinions that the proposed surgery was necessary, as a diagnostic tool, to explore whether the claimant's current symptoms were caused by the accepted meniscal tear, and to determine the extent of his compensable injury. 219 Or App at 291. Therefore, we concluded that the surgery was for conditions caused in material part by the injury. The court affirmed, finding our order "supported by substantial evidence and substantial reason." *Id.*

Likewise, here, we are persuaded by Dr. Koon's opinion that the proposed lumbar facet injections are necessary, as a diagnostic tool, to explore whether claimant's current symptoms are caused by the accepted lumbar contusion, and to determine the extent of his compensable injury. *See id.* In doing so, we reiterate that Dr. Koon believed that a chronic lumbar contusion was one possible explanation for claimant's ongoing symptoms. (Ex. 100-16, -17). Although Dr. Koon also speculated that the accepted lumbar contusion had resolved, read as a whole, his opinion indicated that he was uncertain as to the cause of claimant's ongoing symptoms, and that the accepted contusion was equally likely to be the cause of those symptoms. (Ex. 100-16, -17, -25). Significantly, Dr. Koon also asserted that the proposed lumbar facet injections were a reasonable diagnostic tool for purposes of the accepted lumbar contusion. (Ex. 100-25). Accordingly, as in *Martinez*, we find that the proposed lumbar facet injections were necessary to determine whether claimant's current lumbar symptoms were caused by the accepted lumbar contusion, and to determine the extent of his compensable injury.

In reaching this decision, we distinguish *Kirk Larkins*, 61 Van Natta 819 (2009). In *Larkins*, the claimant was compensably injured when a case of water fell on him, and the employer accepted a cervical strain, lumbar strain, bilateral hip contusion and head contusion. *Id.* The claimant's attending physician ordered a nerve conduction study (NCS) and concluded that the results were consistent with an elbow condition (ulnar neuropathy). *Id.* The attending physician referred the claimant to another physician for further evaluation regarding the NCS results. The claimant requested that the employer accept ulnar neuropathy, and amended his request for medical services authorization as diagnostic under the already accepted claim. *Id.* The employer denied the new/omitted medical condition claim and refused to authorize the referral regarding the NCS results. We upheld the carrier's medical services denial because the medical evidence established that the disputed service (the NCS referral for an ulnar neuropathy condition) was not to determine the cause or extent of the accepted head, neck or hip conditions, but rather to evaluate and treat an unrelated and noncompensable ulnar neuropathy condition.

Here, unlike *Larkins*, Dr. Koon's opinion, which we find persuasive, explained that the proposed lumbar facet injections would assist in determining the extent of the accepted lumbar contusion and whether that accepted condition was the source of claimant's ongoing lumbar complaints. (*See* Ex. 100-16, -17). Dr. Koon further explained that the proposed injections were a reasonable diagnostic tool for purposes of the accepted lumbar contusion. (Ex. 100-25).

Thus, unlike *Larkins*, the medical evidence establishes a sufficient causal relationship between the proposed diagnostic medical services and the compensable injury.

In sum, for the reasons set forth above, we find that Dr. Koon's opinion persuasively establishes that claimant's need for diagnostic lumbar facet injections was necessary to determine the cause or extent of his compensable injury (*i.e.*, his accepted lumbar contusion). See *Martinez*, 219 Or App at 191; *Counts*, 146 Or App at 771. Accordingly, we find the claimed diagnostic medical services compensable under ORS 656.245(1)(a).

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. *Antonio L. Martinez*, 58 Van Natta 1814, 1822 (2006), *aff'd*, 219 Or App 182 (2008). Furthermore, we do not have jurisdiction to award an assessed attorney fee under ORS 656.385, because that statute refers to attorney fees awarded by the Director, not the Board. *Id.*

Although claimant 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 a reasonable assessed attorney fee of \$7,500 for services at hearing and on review, payable by SAIF. ORS 656.386(1). In making this "contingent" award, we have considered the factors set forth in OAR 438-015-0010(4), giving particular consideration to the time devoted to the issue (as represented by the record and claimant's appellate brief), the complexity of the issues, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.

ORDER

The ALJ's order dated May 14, 2009 is affirmed in part and reversed in part. The portion of the ALJ's order that upheld SAIF's denial of claimant's medical services claim is reversed. SAIF's denial is set aside and the claim is remanded to SAIF for processing according to law. The remainder of the ALJ's order is affirmed. For services at hearing and on review, claimant's attorney is awarded an assessed fee of \$7,500, 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 March 5, 2010

Member Langer dissenting.

The majority finds that claimant satisfied his burden of proof under ORS 656.245 by way of Dr. Koon's opinion. Because I find Dr. Koon's opinion unpersuasive, and therefore insufficient to satisfy claimant's burden, I dissent.

In November 2007, claimant was evaluated by Dr. Koon, who diagnosed, *inter alia*, a possible facet injury. (Ex. 66-3). That condition, however, was not accepted; to the contrary, his claim for lumbar facet syndrome was denied. (Ex. 78).

Dr. Koon recommended lumbar facet injections, which he stated were directed "solely" at the denied lumbar facet syndrome. (Ex. 100-24). He also stated that the accepted lumbar contusion had resolved and was "no longer in play whatsoever" with respect to further medical treatment. (Ex. 100-7, -8, -28-31). Moreover, Dr. Koon distinguished between the accepted lumbar contusion and the denied lumbar facet syndrome, explaining that the facet syndrome, which involved joints, was "a different structure" from the contusion, which involved "soft tissue," "muscle" and skin. (Ex. 100-11, -30).

Despite those statements from Dr. Koon, the majority finds the proposed lumbar facet injections compensable because Dr. Koon separately stated that the lumbar facet injections were diagnostic and potentially therapeutic with respect to the accepted lumbar contusion. This observation, however, was directly contrary to Dr. Koon's assertion that the lumbar contusion had resolved and was unrelated to the lumbar facet syndrome. (*See* Ex. 100-7, -8, -11, -28-31). It is equally at odds with his acknowledgment that the lumbar facet injections were directed "solely" at the denied lumbar facet syndrome. (Ex. 100-24).

Dr. Koon did not explain the basis of any of these opinion changes or internal inconsistencies. Therefore, I would find his opinion unpersuasive, even if read in "context." *See Sue E. Staggs*, 59 Van Natta 3095 (2007) (because there was no reasonable explanation in the record for the physician's change of opinion, his opinion was unpersuasive); *see also Moe v. Ceiling Systems, Inc.*, 44 Or App 429 (1980); *Marsha U. Sanderson*, 59 Van Natta 1203, *recons*, 59 Van Natta 1397 (2007) (unexplained inconsistencies rendered medical opinion unpersuasive); *Mark A. Mason*, 58 Van Natta 2403, 2405 (2006) (internally inconsistent opinion found unpersuasive). Given that claimant cannot prevail in the absence of a finding that Dr. Koon's opinion was persuasive, I would find that claimant did not meet his burden of proving the compensability of the requested medical services. Because the majority concludes otherwise, I respectfully dissent.