In the Matter of the Compensation of
**PATRICIA M. MOORE, Claimant**
WCB Case No. 09-05010
ORDER ON REVIEW
Shlesinger & deVilleneuve, Claimant Attorneys
Hornecker Cowling et al, Defense Attorneys

Reviewing Panel: Members Biehl and Langer.

The self-insured employer requests review of Administrative Law Judge (ALJ) Crummé's order that set aside its denial of claimant's left knee injury claim. On review, the issue is compensability.

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

Based on the opinion of Dr. Wenner, claimant's treating orthopedist, the ALJ determined that claimant's April 30, 2009 work injury was a material contributing cause of her disability or need for treatment for her left knee condition.

On review, the employer contends that Dr. Wenner's opinion is not persuasive because it was based on a speculative relationship between claimant's work incident and her symptoms. We disagree.

Dr. Wenner, as well as Dr. James, who reviewed claimant's records on behalf of the employer, recommended a diagnostic arthroscopy to evaluate claimant's left knee condition. (Exs. 11, 14, 15, 16, 17). The record does not indicate that an arthroscopy was performed. Because this is an initial claim, however, claimant need not prove a specific diagnosis if she proves that her symptoms are attributable to a work injury. *See Boeing Aircraft Co. v. Roy*, 112 Or App 10, 15 (1992). Furthermore, because the record does not establish a statutory "preexisting condition," we agree with the ALJ's reasoning that the "material contributing cause" standard applies to determine compensability of the left knee injury. *See Jose C. Agosto*, 57 Van Natta 849, 850 (2005), *aff'd without opinion*, 205 Or App 182 (2006) (in the absence of medical evidence establishing a combined condition, a material contributing cause standard applied).

Claimant was injured at work on April 30, 2009, when she was getting up from her chair and her left knee twisted, followed by popping and pain. Dr. Wenner and Dr. James both agreed that the mechanism of claimant's work incident was sufficient to injure her left knee. Dr. James explained that "[c]ertainly

the mechanism of injury could be consistent with a meniscal tear and/or articular cartilage injury to the knee." (Ex. 11-4). Dr. Wenner explained that standing up while twisting can put abnormal forces on the joint. (Ex. 17-2). Given claimant's acute onset of pain and the "pop," he indicated that claimant injured the articular surface and had a fracture into the subchondral cyst. (Ex. 17-1).

Dr. Wenner did not conclusively diagnose claimant's left knee condition because the diagnostic arthroscopy had not been performed. Nevertheless, he explained that, even without a definitive diagnosis, claimant's need for treatment resulted from the work injury. Dr. Wenner concluded that claimant's April 2009 work incident was the major cause of her need for treatment. (Ex. 17-2).

The employer contends that Dr. Wenner did not specifically reject or discount an alternative theory that claimant did not have an injury at all, but was instead experiencing pain from degenerative changes. We disagree. Dr. Wenner explained that claimant's work injury produced the onset of her symptoms, notwithstanding her preexisting arthrosis. As explained above, he concluded that her need for treatment resulted from the work injury. (Ex. 17-2).

The employer also argues that Dr. Wenner changed his opinion about the diagnosis of a chondral fracture without explanation. According to the employer, Dr. Wenner and Dr. James initially ruled out the possibility of a chondral fracture, but Dr. Wenner later returned to that diagnosis without any explanation for the change.

As discussed above, because a definitive diagnosis is not required to establish compensability, we agree with the ALJ's analysis that a change in Dr. Wenner's diagnosis is not critical here. *See Roy*, 112 Or App at 15. In any event, the record indicates that Dr. Wenner interpreted claimant's later films as showing severe narrowing of the medial joint line that had progressed from previous films. Dr. Wenner noted that a chondral injury would explain the rapid progression of the joint space narrowing in her knee. (Ex. 16A). In a concurrence letter from claimant's attorney, Dr. Wenner explained that it was probable that claimant either had a meniscus tear or an articular cartilage injury that related to the cyst area. (Ex. 17-2). Even if interpreted as a change of opinion, we find that Dr. Wenner's later comments about the progression of the joint space narrowing provided a sufficient explanation for any such change. *See Kelso v. City of Salem*, 87 Or App 630, 633 (1987) (where there was a reasonable explanation in the record for a physician's change of opinion, that opinion was persuasive).

Viewing Dr. Wenner's opinion as a whole, we conclude that it persuasively establishes that claimant's April 2009 work injury was a material contributing cause of her disability or need for treatment for her left knee condition. *See SAIF v. Strubel*, 161 Or App 516, 521-22 (1999) (medical opinions are evaluated in context and based on the record as a whole to determine sufficiency). Accordingly, we affirm.

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 issue, we find that a reasonable fee for claimant's attorney's services on review is $3,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief and his counsel's uncontested fee request), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel may go uncompensated.

Claimant is also awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary Gettman*, 60 Van Natta 2862 (2008).

## ORDER

The ALJ's order dated March 26, 2010 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of $3,000, payable by the employer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer.

Entered at Salem, Oregon on September 16, 2010