

In the Matter of the Compensation of
RICHARD L. HEADLEY, Claimant

WCB Case No. 10-00510, 09-03447

ORDER ON REVIEW

Kryger et al, Claimant Attorneys
Andersen & Nyburg, Defense Attorneys
Julie Masters, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Langer and Weddell.

Liberty Northwest Insurance Corporation (Liberty), on behalf of Salem Tent and Awning Co., requests review of Administrative Law Judge (ALJ) Poland's that: (1) set aside its responsibility denial of claimant's medical services claim for an "anterior cruciate reconstruction and re-tear of the anterior cruciate ligament"; (2) upheld the SAIF Corporation's responsibility denial, on behalf of Marion County Housing Authority, of claimant's injury claim for a left knee condition; and (3) awarded an attorney fee under ORS 656.307(5). On review, the issues are responsibility and attorney fees. We affirm in part and modify in part.

FINDINGS OF FACT

We adopt the ALJ's findings of fact and provide the following summary of the pertinent facts.

Claimant compensably injured his left knee on March 7, 1994, while working for Liberty's insured. In May 1994, claimant had surgery and the postoperative diagnoses were posterior horn tear of the lateral meniscus and partial tear of the anterior cruciate ligament. (Ex. 20). In November 1995, Dr. Stanley performed an anterior cruciate reconstruction. His postoperative diagnosis was "anterior cruciate ligament instability, left knee." (Ex. 45). Liberty accepted a torn lateral meniscus and "anterior cruciate ligament instability, left knee." (Exs. 24, 47, 50). Claimant was awarded 24 percent scheduled permanent disability for his left knee condition. (Exs. 54, 61-2).

Claimant and Liberty entered into a Claim Disposition Agreement (CDA), releasing claimant's rights to "non-medical service" benefits under the March 1994 claim. The CDA was approved on April 22, 1997. (Ex. 61).

On March 24, 2009, claimant reinjured his left knee while working for SAIF's insured. Dr. Yao performed surgery on September 2, 2009, diagnosing "ACL graft tear left knee with medial and lateral meniscal tears." (Ex. 81).

Claimant filed claims for his left knee condition with Liberty and SAIF. (Ex. 64). In May 2009, Dr. James examined claimant on behalf of SAIF. (Ex. 71). In August 2009, Dr. Baldwin examined claimant on behalf of Liberty. (Ex. 78). After SAIF and Liberty denied responsibility for claimant's left knee condition (Exs. 73, 93), claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

Responsibility

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

Based on Dr. James's opinion, the ALJ concluded that claimant's 1994 injury with Liberty was the major contributing cause of his disability/need for treatment for his left knee anterior cruciate ligament (ACL) condition. Relying on ORS 656.005(7)(a)(A) and *SAIF v. Webb*, 181 Or App 205 (2002), the ALJ concluded that Liberty was responsible for claimant's torn ACL graft/reconstructive surgery.

On review, Liberty and claimant argue that Dr. Yao's opinion is more persuasive and that SAIF is responsible for claimant's left knee ACL condition. On the other hand, SAIF contends that Liberty is responsible. SAIF argues that ORS 656.308(1) applies and that, based on the opinion of Dr. James, the 2009 injury involves the same condition previously accepted by Liberty. Alternatively, SAIF argues that ORS 656.005(7)(a)(A) applies and that Dr. James's opinion establishes that the current ACL condition is a compensable consequence of Liberty's accepted condition.

After reviewing the record, we agree with the ALJ's analysis that Dr. James's opinion is the most persuasive. We need not specifically decide whether ORS 656.308(1) or ORS 656.005(7)(a)(A) applies because Liberty would be responsible in either instance, based on Dr. James's persuasive opinion. We supplement the ALJ's analysis to address the arguments from Liberty and claimant, who contend that we should defer to the opinion of Dr. Yao as the treating surgeon.

In some situations, the opinion of a treating surgeon is accorded greater weight because of the surgeon's opportunity to observe the claimant's condition during surgery. *See Argonaut Ins. Co. v. Mageske*, 93 Or App 698, 702 (1988). Here, however, we are not persuaded by Dr. Yao's opinion because it was

inconsistent, did not adequately explain his observations at surgery, did not include a review of claimant's prior medical records, and did not adequately rebut Dr. James's opinion in several regards.

When Dr. Yao first examined claimant in May 2009, he diagnosed "old disruption of anterior cruciate ligament" and recommended a "revision ACL reconstruction" of the left knee. (Ex. 69). Dr. Yao performed surgery on September 2, 2009, diagnosing "ACL graft tear left knee with medial and lateral meniscal tears." Regarding the ACL, he reported "graft with intrasubstance tear and incompetence." (Ex. 81). Dr. Yao's discharge instructions to claimant explained that his ACL was torn and that he was able to reconstruct it. (Ex. 83).

In a September 11, 2009 postoperative chart note, Dr. Yao continued to diagnose "old disruption of anterior cruciate ligament." (Ex. 84).

In an October 2009 letter to claimant's attorney, Dr. Yao acknowledged that he did not have claimant's prior treatment records. (Ex. 91). Dr. Yao said that claimant's "March 2009 injury was likely the cause of the ACL graft tear (new tear)." Dr. Yao explained that he had no reason to believe that claimant's previous ACL graft had failed before his new injury in March 2009, noting that his knee was doing well until the new event in March 2009. He said that the March 2009 hyperextension injury when claimant missed the last step off a ladder represented the kind of force and mechanism that could cause an ACL to fail. Dr. Yao concluded that the "new injury" represented the major reason for claimant's current disability. (*Id.*)

Thus, in October 2009, Dr. Yao explained that claimant had a "new" ACL graft tear. (Ex. 91). But he had previously diagnosed "old disruption of anterior cruciate ligament" before and after performing the left knee surgery. (Exs. 69, 84). Dr. James explained that Dr. Yao's diagnosis of an "old disruption" implied something that had happened through the years, rather than recently. (Ex. 92-13, -14). Dr. James was concerned that Dr. Yao referred to the tear as "old" in his follow-up report after claimant's surgery. (Ex. 92-25).

We are unable to reconcile Dr. Yao's "new" and "old" diagnoses. Because the record provides no explanation for the inconsistencies in Dr. Yao's opinion, we are not persuaded by his opinion that the ACL graft tear was "new." *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); *compare Kelso v. City of Salem*, 87 Or App 630, 633 (1987) (medical opinion found persuasive where there was a reasonable explanation in the record for the change of opinion).

Moreover, Dr. Yao did not explain why his observations during claimant's surgery helped him determine that claimant had a new tear. Dr. Yao did not rebut Dr. James' opinion that because claimant's surgery was about six months after the work injury, "[b]y that time a lot of things that were acute began to look chronic." Dr. James explained that "[b]y the time you wait six or eight weeks down the road it's going to be really difficult." (Ex. 92-36). To the extent that Dr. Yao relied on his surgical findings to conclude that claimant had a new tear, his opinion is not persuasive because he did not rebut Dr. James' testimony. *See Laddie L. Crippen*, 58 Van Natta 1722, 1724 (2006) (treating surgeon's opinion not persuasive because he did not explain how the surgical observations supported his opinion and there was a contrary medical opinion explaining why the surgical findings would not be helpful in determining causation).

At a deposition, Dr. James indicated that the surgeon's observation at surgery was the "gold standard" to determine whether the graft had been return and he said he would defer to Dr. Yao. (Ex. 92-8, -9, -10, -17, -29). However, as discussed above, Dr. James was concerned about Dr. Yao's postoperative reference to an "old disruption." (Ex. 92-13, -14, -25). Moreover, after the deposition, Dr. James had an opportunity to review claimant's surgical photos and he found nothing to suggest that the ACL pathology was acute. Dr. James did not find indications of acute pathology, such as shredding of the ACL graft. He noted that it was not pulled off the femur or tibia. On the other hand, he said that the ACL graft did appear to be stretched and attenuated, which was more consistent with a chronic pathology. Dr. James explained that those findings, along with the MRI evidence of cystic degenerative changes in the insertion site, lead to the conclusion that ACL condition was chronic and degenerative, rather than acute. (Ex. 94). We are more persuaded by Dr. James's well-reasoned explanation.

In assessing causation, Dr. Yao relied on the fact that claimant was doing well before the March 2009 injury, but his symptoms changed after that injury. He commented: "I do not believe I can answer the questions you have asked of me any more effectively than the reiteration of the facts as he has told to me." (Ex. 91-1).

But Dr. Yao did not rebut Dr. James's opinion that some people can function very well without an ACL. Dr. James said that the fact that claimant was functioning pretty well up until the March 2009 injury did not necessarily imply that his anterior cruciate was competent and normal. (Ex. 92-12). He explained that some people can have ACL instability or even an ACL tear and do well, so that was not necessarily indicative of the age of claimant's ACL tear. (Ex. 92-34). Dr. James also stated that other ligaments can substitute to a certain extent for an incompetent ACL or even one that is torn completely. (Ex. 92-27).

Similarly, Dr. Baldwin explained that before the March 2009 injury, claimant had signs of “chronic trouble with swelling, discomfort, tibial tunnel expansion, osteoarthritis, weakness, loss of motion and patella Baja. It is not unusual to have a seemingly good knee with these findings as the joint is able to compensate for these difficulties.” (Ex. 78-16).

Finally, Dr. Yao’s opinion is not persuasive because he did not rebut Dr. James’ opinion that claimant’s ACL condition was not new based on the MRI evidence of cystic degenerative changes in the insertion site. (Ex. 94). Dr. James explained that the MRI showed changes at the insertion of the ACL graft that included some cystic degeneration in the tunnel where the graft was fixed. (Ex. 92-8). He said that the insertion site was enlarged, which suggested that part of the ligament was loosened from its moorings, so to speak. (Ex. 92-28, -30).

The only other medical opinion on causation was from Dr. Baldwin, but he did not believe claimant had an ACL tear, or an articular cartilage injury or a new ligamentous injury. (Ex. 78-14, -18). He said that the 2009 injury probably did not affect the ACL graft, which was probably already absent. (Ex. 78-14). Dr. Baldwin concluded that claimant’s primary problem was weakness related to preexisting atrophy, an effusion related to chronic inflammation, and sub-acute inflammation from his injury. (Ex. 78-17).

In summary, we conclude that Dr. Yao’s opinion is not persuasive because it was inconsistent, lacked adequate explanation, and did not adequately respond to or rebut the contrary medical opinions. *See Janet Benedict*, 59 Van Natta 2406, 2409 (2007), *aff’d without opinion*, 227 Or App 289 (2009) (medical opinion unpersuasive when it did not address contrary opinions); *Claudia J. Stacy*, 58 Van Natta 2998, 3000 (2006) (same). We agree with the ALJ that Liberty is responsible for claimant’s left knee ACL condition and, therefore, affirm.

Attorney Fee

At hearing, Liberty argued that if it was responsible, claimant’s attorney was not entitled to an assessed attorney fee because claimant had relinquished all rights to further benefits under the Liberty claim, except for medical services, when he entered into a CDA in 1997. Liberty contended that claimant had prevailed over a denial of responsibility, not medical services.

The ALJ cited ORS 656.307(5) and *Liberty Northwest Ins. Corp., Inc. v. Watkins*, 347 Or 687 (2010), and concluded that the litigation with Liberty was a claim for medical services in a responsibility context. The ALJ reasoned that

awarding an assessed fee was consistent with the legislature's intent under ORS 656.245 to provide medical services for the life of the worker. The ALJ awarded a \$3,000 attorney fee.

On review, Liberty argues that claimant expressly released his right to future attorney fees in the CDA. Liberty contends that *Watkins* is inapposite because that case involved a Workers' Compensation Division disposition of an ORS 656.245 dispute, rather than a responsibility dispute.

Claimant relies on *Watkins* and argues that, by virtue of ORS 656.385(1), the ALJ properly awarded the assessed attorney fee against the responsible insurer for his medical services claim.

Notwithstanding the CDA terms, we find that claimant's reliance on ORS 656.385(1) is misplaced.¹ We do not have jurisdiction to award an assessed attorney fee under ORS 656.385 because such proceedings are before the Director. *John D. Swartz*, 62 Van Natta 570, 576 (2010); *Antonio L. Martinez*, 58 Van Natta 1814, 1822 (2006), *aff'd*, 219 Or App 182 (2008).

Moreover, even assuming claimant's entitlement to an attorney fee, ORS 656.307(5)² does not apply because there was no paying agent order issued under ORS 656.307. *See Kevin D. Cierniak*, 58 Van Natta 2991, 2996 (2006) (on remand) (because the carrier was not a party to the ".307" order, it was not subject to the ".307" order and therefore, ORS 656.307(5) did not govern the attorney fee award in regard to that carrier); *David W. Denton*, 43 Van Natta 1033, 1035, *recons*, 43 Van Natta 1221 (1991) (Board cannot "deem" any insurer/employer joined under and subject of a "307" order, absent the Director's designation).

¹ ORS 656.385(1) provides, in part:

"In all cases involving a dispute over compensation benefits pursuant to ORS 656.245, 656.247, 656.260, 656.327 or 656.340, where a claimant finally prevails after a proceeding has commenced, the Director of the Department of Consumer and Business Services or the Administrative Law Judge shall require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant's attorney."

² ORS 656.307(5) provides:

"The claimant shall be joined in any proceeding under this section as a necessary party, but may elect to be treated as a nominal party. If the claimant appears at any such proceeding and actively and meaningfully participates through an attorney, the Administrative Law Judge may require that a reasonable fee for the claimant's attorney be paid by the employer or insurer determined by the Administrative Law Judge to be the party responsible for paying the claim."

Because the only issue at hearing was responsibility, an attorney fee could arguably be awarded ORS 656.308(2)(d). First, however, we must consider the effect of the CDA.

Claimant and Liberty entered into a CDA regarding the March 1994 claim, which provided for a full release of penalties and attorney fees. (Ex. 61-1). Claimant released “all rights to all workers’ compensation benefits allowed by law, including temporary disability, permanent disability, vocational rehabilitation, aggravation rights to reopen claim, attorney fees, penalties, and survivors’ benefits potentially arising out of this claim, except for medical services, regardless of the condition(s) stated in this agreement.” (Ex. 61-2). The CDA was approved on April 22, 1997. (Ex. 61-8).

Claimant relies on *Watkins*, arguing that a CDA cannot release a right to assessed attorney fees when those fees derive from a subsequent claim for medical services, such as this. Liberty disagrees, explaining that claimant’s medical services were not at issue here because, no matter which party was responsible, any bill for his medical services would be paid. Liberty argues that *Watkins* does not extend to responsibility disputes in which the medical services are assured, no matter how the litigation issue is decided.

In *Watkins*, the issue involved a medical services dispute over the insurer’s refusal to provide the claimant with a wheelchair-accessible van. The Medical Review Unit (MRU) found that a van was reasonable and appropriate for the claimant’s condition and issued an order that required the insurer to purchase the van and to pay a fee to the claimant’s attorney under ORS 656.385(1). The insurer contested the attorney fee award, arguing that it was improper because the parties’ CDA included a release of the claimant’s right to attorney fees. Based on the text of ORS 656.236(1)(a), the court held that a CDA does not resolve a claimant’s right to attorney fees when those fees derive from a subsequent medical services claim. *Id.* at 693. The court considered its interpretation consistent with the legislature’s intent to provide medical services for the life of a worker under ORS 656.245 and the provision for mandatory attorney fees for prevailing in medical service disputes pursuant to ORS 656.385(1). *Id.* at 694. Reasoning that attorney fees were derivative of medical service claims, the court concluded that a successful medical service claim carries with it the right to an attorney fee award under ORS 656.385(1).

Liberty's argument that *Watkins* does not extend to "responsibility" disputes overlooks the complexity of medical services disputes. In *AIG Claim Services v. Cole*, 205 Or App 170 (2006), the court explained that ORS 656.704(3)(b) 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.

The proceeding in *Watkins* pertained to the second type of medical services dispute, which was within the Director's jurisdiction and involved the reasonableness and necessity of the requested medical services. Here, in contrast, the responsibility issue includes the third type of medical services dispute, *i.e.*, whether there is a sufficient causal relationship between claimant's need for medical services and his accepted claim with Liberty. That is a matter concerning a claim within our jurisdiction.

Liberty's responsibility denial stated that "[c]urrent medical evidence shows that your current treatment is due to a new and intervening injury" while working for SAIF's insured. (Ex. 93). Thus, Liberty denied claimant's need for medical treatment, asserting that another employer was responsible. Therefore, ORS 656.308(2)(d) applies. We have determined that Liberty is responsible. Because of the CDA terms, the only claim against Liberty is for claimant's medical services. Under these circumstances, we agree with the ALJ that the litigation with Liberty was essentially a claim for medical services in a responsibility context. Our conclusion is consistent with the legislature's intent to provide medical services for the life of the worker. ORS 656.245; *Watkins*, 347 Or at 694.

For finally prevailing over Liberty's responsibility denial at the hearing level, claimant's counsel is entitled to an attorney fee award. *See* ORS 656.308(2)(d); OAR 438-015-0038. Absent extraordinary circumstances, ORS 656.308(2)(d) provides a maximum limit for the attorney fee.³ *See Liberty Northwest Ins. Corp. v. Gordineer*, 150 Or App 136, 141-42 (1997) (maximum award under *former* ORS 656.308(2)(d) for prevailing over a responsibility denial was \$1,000 for all levels of review, absent a showing of extraordinary circumstances).

Here, the ALJ awarded a \$3,000 attorney fee. Yet no "extraordinary circumstances" finding was included in the ALJ's order and no such contention has been made on review. Moreover, claimant's attorney argued that SAIF was responsible for the disputed condition. As previously explained, we have agreed with the ALJ's determination that Liberty is responsible. Under such circumstances, we do not find "extraordinary circumstances."

Accordingly, 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 at the hearing level is \$2,500, payable by Liberty. In reaching this conclusion, we have particularly considered the time devoted to the responsibility issue (as represented by the hearing record), the complexity of the issue, and the value of the interest involved. The ALJ's attorney fee award is modified accordingly.

ORDER

The ALJ's order dated July 28, 2010 is affirmed in part and modified in part. In lieu of the ALJ's \$3,000 attorney fee award, claimant's counsel is awarded an attorney fee of \$2,500, to be paid by Liberty.

Entered at Salem, Oregon on March 15, 2011

³ ORS 656.308(2)(d) provides:

"Notwithstanding ORS 656.382 (2), 656.386 and 656.388, a reasonable attorney fee shall be awarded to the attorney for the injured worker for the attorney's appearance and active and meaningful participation in finally prevailing against a responsibility denial. The fee shall not exceed \$2,500 absent a showing of extraordinary circumstances. The maximum attorney fee awarded under this paragraph shall be adjusted annually on July 1 by the same percentage increase as made to the average weekly wage defined in ORS 656.211, if any."

Pursuant to the Workers' Compensation Division's Bulletin 356 (effective July 1, 2010), the average weekly wage increased 2.346 percent over the previous year's average weekly wage. Therefore, the maximum attorney fee under ORS 656.308(2)(d), absent extraordinary circumstances, is now \$2,558.65.