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In the Matter of the Compensation of  
**FRANCISCO M. CARLOS-MACIAS, Claimant**  
WCB Case Nos. 10-04555, 10-04446  
ORDER ON RECONSIDERATION  
Dale C Johnson, Claimant Attorneys  
Bruce A Bornholdt, SAIF Legal, Defense Attorneys

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

On December 2, 2011, we abated our November 4, 2011 order that found that claimant's diagnostic medical services claim for a left shoulder condition was compensable. We took this action to address the SAIF Corporation's motion for reconsideration. Having received claimant's response, we proceed with our reconsideration.

SAIF argues that our decision regarding the diagnostic medical services contradicts another portion of our decision that upheld its denials of claimant's current left shoulder condition and need for medical treatment. SAIF also asserts that the medical opinion on which we relied, that of the attending physician, Dr. Lin, was internally inconsistent.

Having considered SAIF's contentions, we continue to rely on the reasoning in our previous order, which also addressed the arguments that SAIF poses in its reconsideration request. Accordingly, we conclude once more that the diagnostic medical services claim is compensable.

In doing so, we emphasize that the fact we upheld the partial denial of claimant's current condition does not extinguish claimant's rights to medical services. ORS 656.245(1). Therefore, we continue to find no contradiction between our action regarding the partial denial and our setting aside the medical services denial.

Finally, we distinguish the court's recent decision in *Swartz v. SAIF*, 247 Or App 515 (2011), which issued after our initial order. In that case, applying ORS 656.245(1)(a), the court reversed our order in *John D. Swartz*, 62 Van Natta 570 (2010), that had set aside a carrier's denial of the claimant's diagnostic medical service claim based on our finding that the diagnostic tests were prescribed to determine the cause or extent of the claimant's compensable injury (his accepted low back contusion). Contending that the prescribed medical service

was for the sole purpose of diagnosing new conditions that were not compensable (a lumbar facet syndrome), the carrier argued that we had erred in attributing the services to the claimant's accepted contusion.

The court agreed with the carrier's contention. Citing *Sprague v. United States Bakery*, 199 Or App 435, *adh'd to as modified on recons*, 200 Or App 569 (2005), *rev den*, 340 Or 157 (2006), and *SAIF v. Martinez*, 219 Or App 182, 188 (2008), the court stated that it had previously concluded that the meaning of "compensable injury" in the context of ORS 656.245(1)(a) is the claimant's medical condition that is accepted for coverage by the carrier. The court acknowledged that the Supreme Court (346 Or 661 (2009)) had ultimately affirmed the court's subsequent *Sprague* decision (221 Or App 413 (2008)), albeit on different grounds. Nonetheless, noting that the Supreme Court had referred to the claimant's "compensable injury" in *Sprague* as his "original meniscus tear, caused by a workplace accident," the court reasoned that such a definition was "seemingly coterminous" with the "accepted condition."

Applying its *Sprague* and *Martinez* standard, the court identified the issues as: (1) whether the accepted low back contusion was a material cause of the claimant's ongoing low back pain; and (2) whether the injections were "for" that ongoing low back pain. Based on the attending physician's opinion, the court determined that there was substantial evidence that the proposed diagnostic injections were "for" the claimant's low back pain. However, the court concluded that there was not substantial evidence to support the Board's finding that the accepted condition was a material cause of the claimant's ongoing pain.

In reaching its conclusion, the court noted that both physicians who had offered opinions believed that the claimant's low back contusion had resolved. In addition, the court referred to the attending physician's statement that the claimant's current symptoms were generated by the facet joints, rather than the soft tissue (where the contusion injury was found).

Finally, reasoning that the compensable injury had completely resolved and no longer contributed to any of the claimant's ongoing conditions, the court concluded that the proposed injections were not necessary to determine the extent of that injury. *See* ORS 656.245(1)(e)(H); *Counts v. Int'l Paper Co.*, 146 Or App 768, 771 (1997). Consequently, the court held that the Board's order was not supported by substantial evidence.

Unlike in *Swartz*, where the accepted low back contusion had resolved, here, as noted in our original order, Dr. Lin opined that the recommended diagnostic testing was reasonable and necessary to determine the extent of the accepted injury. Claimant's attorney's letter to Dr. Lin had listed the accepted conditions due to the accepted injury claim. We continue to equate Dr. Lin's reference to the "accepted injury" with the accepted conditions. Accordingly, we once more conclude that Dr. Lin's opinion supports a conclusion that the accepted conditions constituted a material contributing cause of the proposed diagnostic testing and that the requested diagnostic testing was necessary to determine the extent of the compensable left shoulder injury, which were the accepted left shoulder conditions. Thus, we find *Swartz* distinguishable.

Claimant's attorney is entitled to an assessed fee for services on reconsideration. ORS 656.382(2). 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 on reconsideration is \$2,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's response to SAIF's reconsideration motion), the complexity of the issue, and the value of the interest involved. This award is in addition to the attorney fee granted in our prior order.

Accordingly, on reconsideration, as supplemented herein, we republish our November 4, 2011 order. The parties' rights of appeal shall begin to run from the date of this order.

Entered at Salem, Oregon on February 14, 2012

Member Langer dissenting.

For the reasons expressed in my previous dissent, I continue to disagree with the majority's conclusion that the disputed diagnostic medical services are compensable. Moreover, I cannot agree with the majority's conclusion that *Swartz v. SAIF*, 247 Or App 515 (2011), is distinguishable.

In that case, the court determined that the medical opinions of the only two physicians to address causation established that the claimant's accepted low back contusion had resolved. Finally, reasoning that the compensable injury had completely resolved and was no longer contributing to any of the claimant's ongoing medical conditions, the court concluded that the proposed diagnostic medical services were not necessary to determine the extent of the compensable injury.

This is essentially the same situation that is present in this case. Dr. Lin stated that the pathology in claimant's shoulder was "over, done, healed and treated." (Ex. 87A). Therefore, as in *Swartz*, claimant's compensable injury, *i.e.* the accepted conditions, has resolved. Consequently, the proposed diagnostic service is not necessary to determine the extent of the compensable injury.

The majority infers that Dr. Lin related the proposed diagnostic service to the accepted conditions because those conditions were listed in claimant's letter to Dr. Lin. (Ex. 91). However, given the direct statement from Dr. Lin that the accepted injury had resolved, I would not make this inference.

Accordingly, I submit that the majority's interpretation of Dr. Lin's opinion is not supported by the medical evidence. Consequently, I must continue to dissent.