
In the Matter of the Compensation of
JULIE HADLEY, Claimant
WCB Case No. 09-01429
ORDER ON REVIEW
Kryger Et Al, Claimant Attorneys
Mark P Bronstein, Defense Attorneys

Reviewing Panel: Members Langer and Biehl.

The self-insured employer requests review of Administrative Law Judge (ALJ) Brown's order that set aside its denials of claimant's new/omitted medical condition claim for her current bilateral knee conditions. In her respondent's brief, claimant contests the ALJ's \$5,000 attorney fee award. On review, the issues are compensability and attorney fees. We reverse.

FINDINGS OF FACT

Claimant was compensably injured in June 2008 when she tripped on a rug and fell to the floor, first striking her right knee. The employer accepted a nondisabling right knee strain. (Ex. 5). In August 2008, claimant reported that her right knee felt "well," but that she had some left knee pain. (Ex. 6). Dr. Petersen, claimant's family physician, diagnosed a resolved on-the-job right knee strain, as well as a mild left knee strain. (*Id.*)

On October 22, 2008, Dr. Petersen noted that claimant continued to have right knee pain, and that she had "multiple episodes of locking with excruciating pain for several minutes." (Ex. 7). Dr. Petersen noted that "recent plain film showed mild degenerative arthritis in the right knee." (*Id.*)

On October 31, 2008, claimant reported that her right knee "gave out on" her while walking up the stairs at work. (Tr. 9-10; Ex. 8). She fell down hard on both knees, but mostly on the left knee. (Tr. 10).

Claimant was referred to Dr. Pennington, an orthopedic surgeon. (Ex. 9-1). He noted both workplace falls and that, before the falls, claimant "had no pain in her knees whatsoever." (*Id.*) He diagnosed bilateral knee osteoarthritis and bilateral meniscus tears. (Ex. 9-2). Dr. Pennington believed that both falls were the major cause of the meniscal tears and an aggravation of the preexisting arthritis. (Ex. 12). In February 2009, Dr. Pennington performed left knee surgery. (Ex. 18A).

In response to this medical treatment, the employer denied claimant's current right knee condition. Thereafter, claimant requested acceptance of her bilateral knee meniscus tears and bilateral knee osteoarthritis. (Ex. 21-1). In reply, the employer denied the new/omitted medical conditions claim. (Ex. 22A). Claimant requested a hearing, contesting the employer's denials.

Dr. Matteri, an orthopedic surgeon, examined claimant at the employer's request. (Ex. 22). He concluded that claimant's preexisting arthritic knee conditions were the major contributing cause of claimant's disability/need for treatment for the claimed conditions. (Exs. 22-9 through 11, 23, 26). Dr. Pennington disagreed, principally relying on the absence of knee symptoms before the workplace fall. (Ex. 25).

CONCLUSIONS OF LAW AND OPINION

Finding the opinion expressed by Dr. Matteri to be unpersuasive, the ALJ set aside the employer's denials of claimant's bilateral knee conditions. Describing its appeal as a "combined condition case," the employer contends that it has satisfied its burden of proving that claimant's injury was not the major contributing cause of her need for treatment/disability for her combined bilateral knee conditions. In response, claimant argues that Dr. Matteri's opinion does not meet the "combined condition" test.

After conducting our review, we find Dr. Matteri's opinion to be more persuasive than the opinion expressed by Dr. Pennington. We reason as follows.

To begin, because there is no dispute regarding a "combined condition," the sole issue is whether the employer met its burden of establishing that the otherwise compensable injury was not the major contributing cause of the disability/need for treatment of the combined bilateral knee conditions. *See* ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010); *Jack G Scoggins*, 56 Van Natta 2534, 2535 (2004). Because the employer has the burden of proof under ORS 656.266(2)(a), the medical evidence supporting its position must be persuasive. *Kasey D. Brown*, 62 Van Natta 1192, 1193 (2010); *Jason J. Skirving*, 58 Van Natta 323, 324 (2006), *aff'd without opinion*, 210 Or App 467 (2007).

Here, we are persuaded by the opinion of Dr. Matteri, who concluded that preexisting degenerative arthritic conditions were the major cause of claimant's bilateral knee symptoms, conditions, and need for treatment. After personally

reviewing MRI studies of claimant's knees, Dr. Matteri concluded that claimant had "obvious advanced tricompartmental arthritis, bony spurs, and chondromalacia of the patella of both knees." (Ex. 23-1). He also noted that the "menisci in both knees appeared to be extremely macerated, which is the product of [claimant's] longstanding and severe osteoarthritis." (*Id.*) Dr. Matteri did not identify anything that would indicate an acute meniscal tear in either knee. (*Id.*) Dr. Matteri concluded that the tears preexisted the workplace falls and were a component and natural result of preexisting degenerative osteoarthritis. (*Id.*)

Dr. Pennington agreed with Dr. Matteri's interpretation of the MRI, and that claimant had preexisting knee arthritis. (Ex. 25). Dr. Pennington also agreed that the maceration of both menisci was "not new." (*Id.*) Nevertheless, Dr. Pennington disagreed with Dr. Matteri concerning the major contributing cause of claimant's disability/need for treatment, reasoning that claimant did not have knee symptoms before the workplace fall. (Ex. 25).

Given the extensiveness of claimant's preexisting bilateral knee pathology, Dr. Matteri stated that he would be surprised if claimant did not have previous episodes of knee pain before the work injury. (Exs. 23, 26). Dr. Matteri added that if claimant had experienced pre-injury knee symptoms, it would be less likely that the workplace fall played any significant role in causing or exacerbating the symptomatology associated with her bilateral osteoarthritis and meniscal tears. (*Id.*) However, even assuming the absence of previous symptoms, Dr. Matteri concluded that the workplace incidents were not the major contributing cause of claimant's symptomatology and resulting surgical treatment. (Ex. 23-2).

In relying on Dr. Pennington's opinion over that of Dr. Matteri, the ALJ noted claimant's testimony of no knee symptoms before the work injury. Consequently, the ALJ discounted Dr. Matteri's opinion, which "doubted" the absence of such "pre-injury" symptoms. In doing so, the ALJ found claimant's testimony credible, based both on claimant's demeanor while testifying and the substance of the competing testimony.

Although we acknowledge the ALJ's demeanor-based credibility determination, we nevertheless conclude that the substance of the testimony does not support claimant's contention that her knee was previously asymptomatic. *See Erck v. Brown Oldsmobile*, 311 Or App 519, 528 (1991) (on *de novo* review, it is a good practice for an agency or court to give weight to the factfinder's credibility assessments); *Coastal Farm Supply v. Hultberg*, 84 Or App 282, 285 (1987) (where the issue involves the substance of a witness's testimony, the Board is equally qualified to make its own determination of credibility). Claimant testified

that she did not have or complain about previous knee symptoms. (Tr. 16-19). Two coworkers and a former coworker turned supervisor, however, testified that claimant routinely complained about knee pain before the work injury. (Tr. 24-25, 38-39, 45-50, 54-56). The testimony of the coworkers and supervisor included specific accounts of discussing claimant's knee pain with her, including a discussion about the benefits of potential knee surgery. (Tr. 45-50). Those witnesses also observed claimant demonstrate pain behavior related to her knees. (Tr. 24, 25, 33, 45, 52, 58). Moreover, those witnesses specifically testified that they could and did distinguish between "leg/ankle" complaints and "knee" complaints. (Tr. 29-30, 38-39, 50-51, 56-57).

The testimony of claimant's coworkers was consistent with Dr. Matteri's opinion that "pre-injury" knee pain would be expected, given the extensiveness of claimant's preexisting degenerative arthritic knee conditions. Dr. Pennington did not dispute the extensiveness of that condition or that previous knee pain would be expected.

Under such circumstances, the record persuasively establishes that claimant experienced knee pain before the work injury. Consequently, we find that Dr. Matteri had a more accurate understanding than Dr. Pennington concerning claimant's bilateral knee history. Moreover, we find Dr. Matteri's opinion concerning the major contributing cause of claimant's disability/need for treatment for the combined bilateral knee conditions to be more thoroughly explained and more persuasive. Consequently, we reverse the ALJ's order and reinstate the employer's denials.¹

ORDER

The ALJ's order dated June 7, 2011 is reversed. The self-insured employer's denials are reinstated and upheld. The ALJ's \$5,000 attorney fee award is reversed.

Entered at Salem, Oregon on January 12, 2012

¹ In light of this conclusion, claimant's contentions regarding the ALJ's attorney fee award has become moot.