

In the Matter of the Compensation of
DUANE G. BISHOP, Claimant

WCB Case No. 11-01979

ORDER ON REVIEW

Ransom Gilbertson Martin et al, Claimant Attorneys
Cummins Goodman et al, Defense Attorneys

Reviewing Panel: Members Lowell and Weddell.

The self-insured employer requests review of Administrative Law Judge (ALJ) Brown's order that: (1) set aside its denial of claimant's medical services claim for left knee surgery; and (2) awarded a \$9,000 assessed attorney fee under ORS 656.386(1). On review, the issues are medical services and attorney fees. We reverse.

FINDINGS OF FACT

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

Claimant was compensably injured in November 2010. The employer ultimately accepted a left knee contusion, left knee strain, and left ankle "small avulsion fracture of the medial malleolus at the distal tip." (Ex. 52).

In January 2011, Dr. Davis noted that a left knee MRI was "essentially negative." (Ex. 40). He further observed that "[t]hat there was a signal change at the medial meniscus; however, no obvious tear." (*Id.*)

In February 2011, Dr. Davis noted that claimant's left knee symptoms had worsened. (Ex. 42). At that point, Dr. Davis diagnosed a "[l]eft knee injury with MCL sprain and possible medial meniscus tear." (*Id.*) Dr. Davis further noted that claimant agreed to undergo a "left knee scope with meniscal debridement." (*Id.*)

According to Dr. Davis, the proposed "diagnostic surgery with potential meniscus repair * * * is required in major part by [claimant's] on-the-job injury." (Exs. 49-3, 50-3). Dr. Davis was "not positive" that claimant had a "meniscus tear," but believed that the work "injury itself is a material/major contributing factor in his need for the diagnostic arthroscopic surgery." (*Id.*)

Dr. Coletti examined claimant at the employer's request. (Ex. 50A-1). Dr. Coletti diagnosed a medial collateral ligament sprain and "possible recurrent meniscus tear." (Ex. 50A-5). He further noted that claimant continued to have

left knee symptoms and, “in all likelihood * * *, a recurrent medial meniscus tear.” (Ex. 50A-8). Dr. Colleti stated that the meniscus tear diagnosis could “only be ruled out with arthroscopy.” (*Id.*) He believed that the work injury was the major contributing cause of claimant’s need for the arthroscopic surgery. (*Id.*)

The employer denied claimant’s medical services claim for the aforementioned left knee arthroscopic surgery. Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

The ALJ set aside the employer’s denial, distinguishing *SAIF v. Swartz*, 247 Or App 515, 525 (2011). We find that *Swartz* requires upholding the employer’s denial. We reason as follows.

ORS 656.245(1)(a) provides, in relevant part:

“For every compensable injury, the insurer or the self-insured employer 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, subject to the limitations in ORS 656.225, including such medical services as may be required after a determination of permanent disability. In addition, for consequential and combined conditions described in ORS 656.005(7), the insurer or the self-insured employer shall cause to be provided only those medical services directed to medical conditions caused in major part by the injury.”

If the claimed medical service is “for” an “ordinary” condition, the first sentence of ORS 656.245(1)(a) governs the compensability of medical services. *SAIF v. Sprague*, 346 Or 661, 672 (2009); *Cameron J. Horner*, 62 Van Natta 2904, 2905 (2010), *aff’d*, 248 Or App 120 (2012). If the claimed medical service is “directed to” a consequential or combined condition, the second sentence of ORS 656.245(1)(a) applies. *Sprague*, 346 Or at 673; *Horner*, 62 Van Natta at 2905.

Here, the parties’ dispute is governed by the first sentence of ORS 656.245(1)(a). Thus, we must determine whether the proposed left knee surgery was “for conditions caused in material part by the injury” under ORS 656.245(1)(a). *Swartz*, 247 Or App at 525. As explained by the court, “the

‘conditions’ are the current conditions for which treatment is sought.” *Id.* The “injury” or “compensable injury” is any previously accepted condition, *i.e.*, a left knee contusion, left knee strain, and left ankle “small avulsion fracture of the medial malleolus at the distal tip.” (Ex. 52). Properly reframed, then, the issues are: (1) whether claimant’s left knee contusion, left knee strain, or left ankle avulsion fracture constitutes a material cause of claimant’s current left knee condition; and (2) whether the proposed surgery is “for” that current left knee condition. *See Swartz*, 247 Or App at 525 (citing *Sprague*, 346 Or at 673); *accord James G. Gilliland*, 64 Van Natta 1062, 1066 (2012).

A “material cause” under ORS 656.245(1)(a) is a fact of consequence. *See id.* (citing *Mize v. Comcast Corp-AT & T Broadband*, 208 Or App 563, 569-71 (2006)). “Thus, the compensable injury could constitute a material cause if it makes ‘any contribution’ to claimant’s current condition.” *Id.* at 525-26 (emphasis in original).

Claimant has provided an opinion from Dr. Davis that “the surgery is required in major part by the on-the-job injury.” (Exs. 49-3, 50-3). Likewise, Dr. Coletti agreed that “the occupational injury is a major contributing cause” of claimant’s need for the disputed surgery. (Ex. 50A-8). Neither doctor, however, stated that any of claimant’s *accepted conditions* constituted a material cause of claimant’s current left knee condition, as is required for a compensable medical services claim under *Swartz*, 247 Or App at 525.

Moreover, on this record, we are unable to make such an inference.¹ *See Benz v. SAIF*, 170 Or App 22, 25 (2000) (although the Board may draw reasonable inferences from the medical evidence, it is not free to reach its own medical conclusions in the absence of such evidence); *SAIF v. Calder*, 157 Or App 224, 227-28 (1998) (the Board is not an agency with specialized medical expertise and must base its findings on medical evidence in the record). Specifically, Drs. Davis and Coletti indicated that claimant’s current left knee condition was likely caused

¹ In reaching this conclusion, we acknowledge that the record does not indicate that claimant’s accepted left knee contusion/strain and left ankle fracture had resolved. Similarly, the record supports a conclusion that his left knee/leg complaints persist. Nevertheless, we are unable to determine that any of claimant’s accepted conditions were a material cause of his current left knee condition for which the diagnostic medical services was prescribed. In the absence of the aforementioned evidence, we are unable to find the disputed medical services claim compensable.

by a meniscus tear, an unaccepted condition. (Exs. 49-3, 50-3, 50A-8). Those physicians did not persuasively attribute claimant's accepted left knee strain (or any other accepted condition) to his current left knee condition.²

Consequently, on this record, we are not persuaded that claimant's accepted left knee strain (or any other accepted condition) is a "fact of consequence" regarding his current left knee condition. Therefore, the disputed medical services are not compensable.

ORDER

The ALJ's order dated November 17, 2011, as reconsidered on February 6, 2012, is reversed. The employer's denial is reinstated and upheld. The ALJ's \$9,000 assessed attorney fee and costs award is also reversed.

Entered at Salem, Oregon on October 31, 2012

² Although Dr. Coletti also diagnosed an ongoing medial meniscus *sprain* (Ex.50A-5 through 8), his opinion did not establish that such a *sprain* was the same condition as the accepted left knee *strain*; on this record, we are unable to make that inference. *See Benz*, 170 Or App at 25 (2000); *Calder*, 157 Or App at 227-28.