

In the Matter of the Compensation of  
**RONALD L. LUCAS, Claimant**

WCB Case No. 12-02326

**ORDER ON REVIEW**

Hooton Wold & Okrent LLP, Claimant Attorneys  
Law Offices of Kathryn R Morton, Defense Attorneys

Reviewing Panel: Members Weddell and Lowell.

The insurer requests review of those portions of Administrative Law Judge (ALJ) Dougherty's order that: (1) set aside its *de facto* denial of claimant's medical services claim for "transient unresponsiveness;" and (2) awarded an attorney fee of \$8,750. On review, the issues are medical services and attorney fees. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" with the following change. In the second full paragraph on page 4, we replace the sixth paragraph with the following: "Dr. Olbrich opined that this appeared to be an accidental overdose. (Ex. 33-16)."

We provide the following summary of the pertinent facts.

After claimant compensably injured his right shoulder in 2008, the insurer accepted a right pectoral girdle strain and right shoulder adhesive capsulitis. (Exs. 8, 23).

In February 2010, Dr. Ushman determined that claimant's conditions were medically stationary. He explained that claimant took Lyrica, Cymbalta, Cyclobenzaprine, and Trazodone for chronic pain, noting that he also used medical marijuana for pain control. (Ex. 22).

In April 2010, the parties entered into a Claim Disposition Agreement (CDA). (Ex. 23A).

In February 2011, Dr. Seymour became claimant's attending physician and approved the following medications: Lyrica, Cymbalta, Trazodone, and Flexeril. He noted that claimant had a medical marijuana card, which he did not sign. (Ex. 25).

On August 12, 2011, claimant had friends over to his home. (Tr. 11). He smoked marijuana before their arrival. (Tr. 13-14). During the evening, he consumed two Long Island iced teas, which were from a pre-made mix containing 12 percent alcohol. (Tr. 11, 17). When he went to bed that evening, his wife gave him one Lyrica, one Flexeril, and one Trazadone. (Tr. 16). About 30 to 45 minutes later, Ms. Lucas noticed that claimant's snoring did not sound right. When she was unable to wake him, she started CPR and had her daughter call 911. (Tr. 17).

When claimant arrived at the hospital on August 13, 2011, he was still unresponsive. When he was about to be intubated, he woke up. (Ex. 26). He was diagnosed with transient unresponsiveness and admitted to the hospital. (Exs. 26, 27, 29). Claimant was discharged on August 14, 2011. (Ex. 29).

On January 20, 2012, the insurer wrote to the hospital, disputing that claimant's medical services on August 13 and 14, 2011, were related to an accepted condition. (Ex. 29A). Claimant requested a hearing regarding the insurer's *de facto* denial of medical services.

### CONCLUSIONS OF LAW AND OPINION

The ALJ concluded that, because there was no contention that a combined or consequential condition was at issue,<sup>1</sup> the first sentence of ORS 656.245(1)(a) applied and claimant had to prove that the disputed medical services were for a condition caused in material part by the accepted condition. The ALJ determined that the medical evidence established that the treatment for the compensable shoulder conditions was a material contributing cause of the transient respiratory unresponsiveness and, therefore, the medical services were compensable.

On review, the insurer argues that this case involves medical treatment of a consequential condition, which requires a "major contributing cause" standard. Because the medical evidence does not meet that standard, the insurer contends that the medical services are not compensable.

Claimant contends that his medical treatment was not for a new condition, but was simply an unexpected extension of the therapeutic consequences intended by the treatment itself. He argues that the use of prescription medications were

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<sup>1</sup> The ALJ's order also stated that the insurer contended that the "transient respiratory unresponsiveness" for which claimant sought treatment was best analyzed as a consequential condition.

reasonable and necessary treatment for the compensable injury. He contends that his consumption of alcohol was not part of his treatment and was simply a legally and socially acceptable element of a social evening.

ORS 656.245(1)(a) provides:

“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 VanNatta 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 672-73.

In determining the compensability of claimant’s medical service claim, we first determine the “condition” to which the claimed medical services (the August 2011 treatment) relates. *See Sprague*, 346 Or at 672; *SAIF v. Swartz*, 247 Or App 515, 525 (2011) (“the ‘conditions’ [under ORS 656.245(1)(a)] are the current conditions for which treatment is sought”). The “injury” or “compensable injury” is the previously accepted condition. *Swartz*, 247 Or App at 525; *Cameron J. Horner*, 62 Van Natta 2904, 2905 (2010), *aff’d*, 248 Or App 120 (2012). We turn to the record to determine the subject of the medical treatment. *See Charles E. Pharis, Jr.*, 62 Van Natta 406, 408 (2010).

The record establishes that the claimed medical services (the August 13 and 14, 2011 treatment) related to claimant's "transient unresponsiveness."<sup>2</sup> On August 13, 2011, Dr. Nguyen, who treated claimant at the emergency room, reported that his chief complaint was "unresponsiveness." (Ex. 26-1). In an August 14, 2011 "discharge summary," Dr. Nguyen explained that the discharge diagnoses included "transient unresponsiveness." (Ex. 29; *see* Ex. 32). Dr. Olbrich, an addiction medicine specialist, diagnosed "transient unresponsiveness," secondary to a combination of acute alcohol toxicity and ingestion of multiple medications with sedating side effects. (Ex. 30-19).

Although claimant had increased right shoulder pain on August 13, 2011, the record does not indicate that he sought medical treatment that day for right shoulder pain.<sup>3</sup> Rather, the "condition" to which the claimed August 13, 2011 treatment related was "transient unresponsiveness," which is not an accepted condition. Unlike *Sprague*, 346 Or at 672-73, where the "condition" at issue was the claimant's arthritic knee condition that had been accepted by the carrier, there is no accepted claim for claimant's "transient unresponsiveness."

We next determine whether the "transient unresponsiveness" condition is an "ordinary" or "consequential" condition. The insurer argues that "transient unresponsiveness" is a separate and distinct condition that should be analyzed as a consequential condition, under a major contributing cause standard. A consequential condition under ORS 656.005(7)(a)(A) is "a separate condition that arises from the compensable injury, for example, when a worker suffers a compensable foot injury that results in an altered gait that, in turn results in back strain." *Fred Meyer, Inc. v. Crompton*, 150 Or App 531, 536 (1996).

Based on our review of this particular record, we find that claimant's "transient unresponsiveness" condition constitutes a consequential condition. The medical evidence establishes that the transient unresponsiveness resulted from claimant's ingestion of prescription medications with alcohol and marijuana. (Exs. 29, 30-19, -21, 32). The record establishes that claimant's "transient

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<sup>2</sup> In claimant's closing argument to the ALJ, he described the disputed treatment as "transient unresponsiveness" and noted that his discharge diagnosis from the hospital was "unresponsiveness/decreased level of consciousness." (Claimant's Closing Argument at 1, 3).

<sup>3</sup> Claimant's wife testified that claimant was in pain on August 12, 2011, from a fall he had earlier in the yard. (Tr. 17). Dr. Shertz reported that claimant fell that day, landing on his right shoulder, and that his pain was "markedly worse" than his chronic right shoulder pain. (Ex. 27-1). However, claimant testified that his shoulder pain had nothing to do with his consumption of alcohol. (Tr. 12).

unresponsiveness” was a separate and distinct condition from his accepted right pectoral girdle strain and right shoulder adhesive capsulitis that arose from some treatment for the compensable injury. *See Pharis*, 62 Van Natta at 409 (analyzing the medical services claim for a right tibial plateau fracture as a consequential condition because the “condition” at issue was a separate condition that arose from the compensable 2006 injury and surgery); *Dina A. Ganieany*, 62 Van Natta 17, 19 (2010) (disputed medical services for the current refractured left elbow were for a consequential condition because the medical treatment was for a separate condition that arose from the 2001 compensable fractured left elbow).

Because claimant’s “transient unresponsiveness” is a consequential condition, the second sentence of ORS 656.245(1)(a) governs the compensability of the disputed medical services. Thus, the record must establish that the “transient unresponsiveness” was “caused in major part” by claimant’s compensable right shoulder condition, and that the treatment was “directed to” his “transient unresponsiveness” condition. *See Sprague*, 346 Or at 673. At most, the evidence indicates that the medical treatment was caused in material part by the compensable conditions. However, because the medical evidence does not establish that the medical services were directed to a medical condition caused in major part by the injury, the medical services are not compensable.

In reaching our conclusion, we have considered the holding in *Barrett Business Services v. Hames*, 130 Or App 190, *rev den*, 320 Or 492 (1994). In that case, the court held that when a claimant suffers a new injury as the direct result of reasonable and necessary treatment of a compensable injury, the compensable injury is the major contributing cause of the consequential condition for purposes of ORS 656.005(7)(a)(A). *Id.* at 193.

Here, the record does not establish that claimant’s “transient unresponsiveness” was the direct result of reasonable and necessary treatment for his accepted shoulder conditions. Our conclusion is based on the following reasoning.

Dr. Olbrich explained that the cause of claimant’s transient unresponsiveness was the combined effects of an acute level of alcohol with the effects of multiple prescribed medications. (Ex. 30-21; *see* Ex. 30-19). The record does not include medical evidence rebutting Dr. Olbrich’s opinion. He concluded that claimant’s prescribed medications alone were not the major contributing cause of the transient unresponsiveness. (Exs. 30-22; 33-18). He explained that claimant had taken the prescription medications for almost a year

without any reported lethargy, daytime drowsiness, or similar symptoms. (Ex. 33-14, -15; *see* Ex. 30-22). Dr. Olbrich noted that there was no evidence that a physician had suggested that it was appropriate for claimant to combine alcohol with his prescription medications. (Ex. 30-23). He opined that claimant's use of alcohol was not medically reasonable and necessary.<sup>4</sup> (Ex. 30-25).

Based on Dr. Olbrich's persuasive opinion, the record does not establish that claimant suffered a new injury ("transient unresponsiveness") as the direct result of "reasonable and necessary" treatment of a compensable injury for his accepted shoulder conditions. Therefore, we conclude that the disputed medical services are not compensable. Accordingly, we reverse.<sup>5</sup>

### ORDER

The ALJ's order dated January 31, 2013 is reversed in part and affirmed in part. The insurer's *de facto* denial of claimant's medical services claim is reinstated and upheld. The ALJ's \$8,750 assessed fee and cost awards are also reversed. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on August 27, 2013

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<sup>4</sup> In reaching our conclusion, we are not attributing any "fault" to claimant. *See Andrews v. Tektronix, Inc.*, 323 Or 154, 160 (1996) ("if our workers' compensation law stands for anything, it is that fault is irrelevant in determining a worker's entitlement to compensation"). Instead, in assessing causation, we are merely relying on Dr. Olbrich's medical opinion regarding claimant's consumption of alcohol and its effect on his condition that prompted his medical services claim.

<sup>5</sup> In light of our conclusion, the ALJ's attorney fee and cost awards are also reversed.