

In the Matter of the Compensation of
SHERRI L. ROBERTSON, Claimant

WCB Case No. 12-00503

ORDER ON REVIEW

Kryger et al, Claimant Attorneys

Chad A Kosieracki, Defense Attorneys

Reviewing Panel: Members Weddell and Langer.

The self-insured employer requests review of Administrative Law Judge (ALJ) Ogawa's order that: (1) set aside its denial of claimant's aggravation claim concerning the "second Lisfranc right tarsometatarsal dislocation"; (2) awarded additional temporary disability benefits; and (3) assessed a penalty and a related attorney fee for the employer's allegedly unreasonable failure to pay temporary disability benefits. On review, the issues are aggravation, temporary disability, penalties, and attorney fees. We reverse.

FINDINGS OF FACT

We adopt the ALJ's findings of fact with the following changes. In the fourth paragraph on page 4, we delete the second sentence. In the fifth paragraph on page 4, we change the second date to "July 31, 2012." We provide the following summary of the pertinent facts.

On April 23, 2009, claimant compensably injured her right foot. On May 6, 2009, Dr. Krumrey performed surgery, which included inserting a screw across the second tarsometatarsal joint. (Ex. 9). The employer initially accepted a second Lisfranc right tarsometatarsal dislocation and third Lisfranc right tarsometatarsal dislocation, as well as first, second, third, and fourth right metatarsal fractures. (Exs. 11, 19, 25).

Claimant was released to regular work without restrictions on November 30, 2009. (Ex. 20). A March 23, 2010 Notice of Closure did not award any permanent disability. (Ex. 24). A May 17, 2010 Order on Reconsideration awarded 6 percent whole person impairment for a chronic condition and reduced ankle range of motion. (Ex. 28).

In November 2011, claimant sought treatment from Dr. Pederson, who reported that her symptoms had worsened. (Ex. 35). He referred claimant to Dr. Krumrey, who did not have a good explanation for her continued pain, other than the severity of the injury. (Ex. 36). Dr. Pederson signed an aggravation claim form on December 1, 2011. (Ex. 38).

In January 2012, claimant was examined by Dr. Sandell, orthopedic surgeon, on behalf of the employer. (Ex. 39). After the employer denied the aggravation claim on January 26, 2012 (Ex. 40), claimant requested a hearing.

Dr. Krumrey referred claimant to Dr. Lin, a foot and ankle specialist. (Ex. 36). In February 2012, Dr. Lin explained that x-rays showed a malunion of the third metatarsal. (Ex. 43). He recommended a CT scan of the right foot, which showed osteoarthritic changes of the third, fourth and fifth metatarsals. (Ex. 44). In March 2012, Dr. Lin explained that claimant's primary pain was over the third, fourth, and fifth metatarsals. He recommended surgery to remove hardware from the right foot. (Exs. 45, 46). In April 2012, he performed surgery to remove the screw crossing the second tarsometatarsal joint. (Ex. 47A).

On July 31, 2012, the employer modified its acceptance to include a malunion of the third metatarsal right foot, osteoarthritis right foot, posttraumatic arthritis of the right midfoot, and right foot post traumatic neuralgia involving a branch of the superficial peroneal nerve. (Ex. 52).

CONCLUSIONS OF LAW AND OPINION

The ALJ rejected claimant's argument that her malunion and posttraumatic arthritis were "worsened" conditions resulting from the original injury, reasoning that because the employer had accepted the malunion and posttraumatic arthritis post-closure as new medical conditions, those conditions could not form the basis for an aggravation claim of the initially accepted conditions. However, the ALJ determined that Dr. Lin's opinion established that claimant's increased symptoms constituted an "actual worsening" of the second tarsometatarsal dislocation and resulting 2009 surgery, which exceeded the range anticipated by the previous permanent disability award.

On review, the employer argues that the medical evidence does not establish an actual worsening of the second metatarsal dislocation (or any other initially accepted conditions).

We agree with the ALJ's reasoning and determination that the malunion and posttraumatic arthritis, which were accepted post-closure as new medical conditions, could not form the basis for an aggravation claim of the initially accepted conditions.¹ See *Evelyn R. Crossman*, 56 Van Natta 1076, 1079 (2004);

¹ Claimant disagrees with the ALJ's conclusion that an aggravation cannot be based on the effects of consequential conditions that arise from the accepted conditions, although she notes that the ALJ did not base the decision on new medical conditions. We disagree with claimant's argument and adhere to our decision in *Evelyn R. Crossman*, 56 Van Natta 1076 (2004).

see also Stepp v. SAIF, 304 Or 375, 380 (1987) (“The phrase ‘for worsened conditions resulting from the original injury’ refers to the condition resulting from the original injury that gave rise to the initial award or arrangement of compensation.”). For the following reasons, however, we reverse the ALJ’s conclusion that the medical evidence establishes an “actual worsening” of claimant’s accepted second Lisfranc right tarsometatarsal dislocation.

To establish a compensable aggravation claim, claimant must prove an “actual worsening” of her compensable condition since the last award or arrangement of compensation. ORS 656.266(1); ORS 656.273(1); *Crossman*, 56 Van Natta at 1079. The aggravation claim cannot be based on a new/omitted medical condition, but must be based on a worsening of a condition that has been accepted and processed in accordance with ORS 656.262 and ORS 656.268. *Crossman*, 56 Van Natta at 1078-79.

An “actual worsening” may be established either by direct proof of a pathological worsening or through inference of such a worsening based on increased symptoms. In the latter instance, a physician must make the inference. *SAIF v. Walker*, 330 Or 102, 118-19 (2000); *SAIF v. January*, 166 Or App 620, 624 (2000); *Anna L. Johnson*, 57 Van Natta 1396 (2005). In either instance, the finding of an “actual worsening” must be established by medical evidence supported by objective findings. ORS 656.273(1); *Jason A. Hordichok*, 62 Van Natta 410, 411 (2010).

In an April 13, 2012 concurrence letter from claimant’s attorney, Dr. Lin explained that the February 2012 CT scan showed a malunion at the base of the third metatarsal. He stated that this malunion was part of the original injury, which did not heal in the correct position. He noted that there was one screw crossing the second tarsometatarsal joint in a good position, but a screw crossing a joint was abnormal. (Ex. 48-1). He explained that claimant’s pain was more lateral near the malunion and she had pain over the third, fourth, and fifth metatarsal shafts. He noted that she had a previous nerve injury associated with the work injury, but that seemed to be recovering. Regarding the hardware removal surgery, Dr. Lin explained:

“The screw is not necessary and may be limiting movement. This is minimalist approach to address one problem at a time to determine whether it helps her. This is in contrast to a larger surgery to address the mal-union by re-cutting at the fracture site and putting in plates and

screws to re-align the bone. It is not clear that would be beneficial, so it is not recommended at this time. Instead, removal of the screw is recommended presently.” (*Id.*)

According to Dr. Lin, claimant had mild to moderate posttraumatic arthritis of the third tarsometatarsal joint and also possibly of the fourth and fifth tarsometatarsal joints, which developed as a result of the work injury. (Ex. 48-2). He stated that the posttraumatic arthritis “may have progressed and would be considered a pathological worsening of her condition in the third tarsometatarsal joint and possibly the fourth and fifth TMT joints as well.” (*Id.*) However, he did not refer to a symptomatic or pathological worsening of the *second* tarsometatarsal joint. More specifically, he did not refer to a symptomatic or pathological worsening of the accepted “second Lisfranc right tarsometatarsal dislocation.”

We acknowledge that “magic words” are not required to satisfy medical causation. *Liberty Northwest Ins. Corp. v. Cross*, 109 Or App 109 (1991), *rev den*, 312 Or 676 (1992). However, Dr. Lin’s opinion does not persuasively establish that claimant’s right second tarsometatarsal dislocation “actually worsened” either by direct proof of a pathological worsening or through inference of such a worsening based on increased symptoms.²

Claimant also relies on Dr. Pederson’s opinion to establish her aggravation claim. Dr. Pederson opined that claimant had suffered a “worsened condition resulting from the original injury” because she had developed arthritis as a result of the work injury. (Ex. 49-1). He also explained that claimant was “symptomatically worse, and this is probably from the malunion that developed at the fracture of the base of her third metatarsal, as well as from the developing arthritis.” (Ex. 49-1, -2). However, as with Dr. Lin, Dr. Pederson did not refer to a symptomatic or pathological worsening of the “second Lisfranc right tarsometatarsal dislocation.” Thus, his opinion likewise does not establish that claimant’s right second tarsometatarsal dislocation had “actually worsened” either by direct proof of a pathological worsening or through inference of such a worsening based on increased symptoms.

² Based on that conclusion, it necessarily follows that the medical evidence is also not sufficient to establish that claimant had an “actual worsening” of the accepted second right tarsometatarsal dislocation that was more than waxing and waning of symptoms of the condition contemplated by the previous permanent disability award. ORS 656.273(8); *see Melissa A. Salo*, 64 Van Natta 2222 (2012) (aggravation not proven where medical evidence did not establish that the alleged worsening of symptoms was more than a waxing and waning of the symptoms contemplated by the previous permanent disability award).

The only other medical opinion is from Dr. Sandell, who concluded that there was no pathological worsening of claimant's accepted conditions since claim closure. (Ex.39-11).

In summary, we conclude that the medical evidence is insufficient to establish an "actual worsening" of claimant's "second Lisfranc right tarsometatarsal dislocation" condition since the last award or arrangement of compensation. *See* ORS 656.273(1); *Crossman*, 56 Van Natta at 1079. Therefore, we reverse that portion of the ALJ's order that set aside the employer's aggravation denial insofar as it related to that condition.

We turn to the temporary disability issue. At hearing, claimant requested temporary disability benefits from April 2, 2012, the date of her hardware removal surgery, through April 30, 2012, when she returned to modified work. The ALJ determined that Dr. Lin had authorized temporary disability for that period. The ALJ also assessed a penalty and a related attorney fee under ORS 656.262(11)(a) for the employer's unreasonable failure to pay temporary disability for that period.³

On review, the employer argues that if we uphold the aggravation denial, no temporary disability benefits are due because the claim remains closed.

The employer denied the aggravation claim on January 26, 2012, before the April 2, 2012 surgery. (Exs. 40, 47A). Because we have determined that the aggravation claim is not compensable, claimant is not entitled to temporary disability benefits from April 2, 2012 through April 30, 2012. *See James E. Harper*, 54 Van Natta 852 (2002), *aff'd without opinion*, 191 Or App 148 (2003) (temporary disability not awarded, because time loss authorization was not related to the compensable condition). Furthermore, because the claim is not compensable, claimant is not entitled to a penalty or related attorney fee for the employer's allegedly unreasonable failure to pay temporary disability for that period. *See Jackie A. Scott*, 63 Van Natta 2375, 2377 (2011). Therefore, we reverse those portions of the ALJ's order that awarded additional temporary disability benefits, a penalty, and a penalty-related attorney fee.

³ Claimant does not challenge the ALJ's conclusion that she was not entitled to a penalty or related attorney fee for the employer's aggravation denial.

ORDER

The ALJ's order dated August 31, 2012 is reversed. The employer's aggravation denial is reinstated and upheld in its entirety. The ALJ's \$5,000 assessed attorney fee and associated cost awards are reversed. Those portions of the ALJ's order that awarded temporary disability benefits, an "out-of-compensation" attorney fee, a penalty, and a \$1,000 penalty-related attorney fee for failure to pay temporary disability, are also reversed.

Entered at Salem, Oregon on July 2, 2013