
In the Matter of the Compensation of
JORGE A. RODRIGUEZ, Claimant
WCB Case No. 15-00687
ORDER ON REVIEW
Preston Bunnell LLP, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Curey and Weddell.

The self-insured employer requests review of Administrative Law Judge (ALJ) Marshall's order that set aside its denial of claimant's new/omitted medical condition claim for left knee meniscus tears. On review, the issue is compensability.

We adopt and affirm the ALJ's order with the following supplementation.

In August 2013, claimant sustained a work-related injury to his right knee. (Ex. 2). The employer accepted a right knee strain, right ankle sprain, and right medial and lateral meniscus tears. (Exs. 6, 16).

In December 2013, Dr. Bell, an orthopedic surgeon, performed a right knee arthroscopy with a partial medial and lateral meniscectomy. (Ex. 10-2).

Claimant's claim was closed by a May 19, 2014 Notice of Closure that awarded 5 percent whole person permanent impairment. (Ex. 17-1).

On August 8, 2014, claimant's right knee claim was reopened for an aggravation. (Ex. 22). On August 11, 2014, he was descending the stairs at his home when he felt "like a tear" behind his left knee. (Tr. 10).

Dr. Bell diagnosed a left knee strain. (Ex. 23). A subsequent left knee MRI showed evidence of a "radial tear involving the posterior root of the medial meniscus." (Ex. 27-1). In October 2014, Dr. Bell diagnosed an acute left medial meniscus tear and recommended surgery. (Ex. 29-1).

In November 2014, Dr. Bell performed a left knee arthroscopy with partial lateral and partial medial meniscectomy to repair partial tears of the medial and lateral meniscus. (Ex. 33).

On December 24, 2014, the employer denied claimant's new/omitted medical condition claim for left knee meniscus tears. (Ex. 36). Claimant requested a hearing.

In setting aside the employer's denial, the ALJ reasoned that Dr. Bell's opinion persuasively established that claimant's compensable right knee injury, including the December 2013 surgery, was the major contributing cause of his left knee condition.

On review, the employer contends that Dr. Bell's opinion is unpersuasive. Based on the following reasoning, we disagree with that contention.

It is uncontested that the claimed left knee meniscal tears must be analyzed as consequential conditions. As such, claimant must establish that the compensable injury (*i.e.*, the work-related injury incident) is the major contributing cause of the condition. *See* ORS 656.005(7)(a)(A); ORS 656.266(1); *English v. Liberty Northwest Ins. Co.*, 271 Or App 211, 215 (2015).

The determination of major contributing cause involves the evaluation of the relative contribution of the different causes of claimant's condition and a decision as to which is the primary cause. *Deitz v. Ramuda*, 130 Or App 397, 401 (1994), *rev dismissed*, 321 Or 416 (1995). Because of the possible alternative causes of claimant's condition, expert medical opinion must be used to resolve the question of causation. *Barnett v. SAIF*, 122 Or App 279, 282 (1993); *Linda Patton*, 60 Van Natta 579, 582 (2008). In evaluating the medical evidence, we rely on those opinions that are both well reasoned and based on accurate and complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

Here, Dr. Bell concluded that the compensable right knee injury was the major contributing cause of the left knee meniscal tears due to claimant's compensation of the right knee injury by putting more weight on his left leg. (Ex. 42-2). Dr. Bell explained that claimant favored his right leg after his right knee injury, surgery, and aggravation. (*Id.*) He based this opinion on his personal observations over time and his treatment of claimant's right and left knees, including surgery. (*Id.*)

Dr. Bell's opinion supports the compensability of the claimed left knee meniscal tears as "consequential conditions." *See* ORS 656.005(7)(a)(A); *English*, 271 Or App at 215; *see also Barrett Bus. Servs. v. Hames*, 130 Or App 190, *rev den*, 320 Or 492 (1994) (when treatment for a compensable injury is the major

contributing cause of a new injury, the compensable injury itself is properly deemed the major contributing cause of the consequential condition). We find Dr. Bell's opinion persuasive for the reasons expressed in the ALJ's order. In addition, we disagree with the employer's contention that Dr. Bell's opinion was based on an unreliable history. We reason as follows.

The employer contends that Dr. Bell's opinion is unpersuasive because many of his chart notes following claimant's right knee injury indicate that he had a normal gait and station, which it asserts is inconsistent with claimant having favored his right leg following the right knee injury. We acknowledge that, in several chart notes, Dr. Bell reported that claimant had a normal station and gait. (Exs. 12, 18, 20, 21). We do not conclude, however, that such chart notes are inconsistent with claimant favoring his right leg following the right knee injury. Dr. Bell personally observed claimant compensating for his right knee injury throughout treatment by putting more weight on his left leg. (Ex. 42-2). Moreover, claimant described that, following his right knee injury, he approached weight-bearing activities differently because he "favored" his right leg. For instance, he went up and down stairs using his left leg first and then putting his right leg on the same step; he also used his left leg first when getting in and out of his car, and getting out of bed. (Tr. 9).

The employer also argues that Dr. Bell's opinion is premised on the "gradual onset" of claimant's left knee symptoms following the compensable right knee injury, which it contends is in direct conflict with claimant's testimony. We acknowledge that claimant testified that his left knee did not "begin to bother" him during his recovery from the right knee injury. (Tr. 9). However, we do not agree that Dr. Bell's opinion is based in significant part on that premise. Although Dr. Bell initially understood that claimant's left knee pain arose gradually, he also understood that claimant had a "dramatic" increase in left knee pain in August 2014, when he was going down some stairs. (Ex. 23-1). Thus, we do not find that Dr. Bell had an inadequate understanding of claimant's left knee problems. Moreover, Dr. Bell confirmed that the history of sudden knee symptoms in August 2014 did not change his opinion that claimant's left knee condition was caused in major part by compensating for his right knee injury, surgery, and aggravation. (Ex. 45-8-9).

In addition to relying on an accurate history and a complete medical record, Dr. Bell has served as claimant's treating surgeon since 2013. In the absence of persuasive reasons to do otherwise, we consider it appropriate to give Dr. Bell's opinion greater weight. *See Dillon v. Whirlpool Corp.*, 172 Or App 484, 489

(2001); *Kevin G. Gagnon*, 64 Van Natta 1498, 1500 (2012) (physician's longitudinal history with the claimant rendered his opinion more persuasive); *Darwin B. Lederer*, 53 Van Natta 974, 974 n 2 (2001).

The employer contends that Dr. Weeks, an orthopedist who examined claimant at the employer's request, persuasively opined that claimant's right knee injury is not the major cause of his left knee meniscal tears. For the following reasons, we disagree.

Dr. Weeks concluded that, even if claimant's "favoring" of his right knee for a period of time "caused some degree of increased load on the left knee, it did not contribute more than [claimant's] obesity to the development of the degenerative meniscus tears or need for treatment of those tears." (Ex. 44-4). In reaching that conclusion, Dr. Weeks reasoned that claimant "did not favor his right leg to any significant degree or for any significant length of time during the course of his right knee injury." (Ex. 44-3). However, as noted earlier, based on claimant's testimony, as well as Dr. Bell's personal observations, we find that claimant did significantly favor his right leg following his right knee injury and treatment. Thus, we find Dr. Weeks's opinion unpersuasive because it is based on inaccurate information. *See Miller v. Granite Constr. Co.*, 28 Or App 473, 478 (1977) (a medical opinion that rests on inaccurate information is not persuasive).

In conclusion, based on our review of this record and the aforementioned reasoning, as well as that expressed in the ALJ's order, we agree with the ALJ's determination that Dr. Bell's opinion persuasively establishes the compensability of the claimed left knee meniscal tears. Consequently, we affirm.

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them in this case, we find that a reasonable attorney fee award is \$4,745, to be paid by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief, his counsel's request, and the employer's objection), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel may go uncompensated.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is described in OAR 438-015-0019(3).

ORDER

The ALJ's order dated December 11, 2015 is affirmed. For services on review, claimant's attorney is awarded an assessed attorney fee of \$4,745, payable by the employer. Claimant is awarded reasonable expenses for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer.

Entered at Salem, Oregon on August 12, 2016