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In the Matter of the Compensation of  
**ROBERT SWART, Claimant**  
WCB Case No. 15-00216  
ORDER ON REVIEW  
Welch Bruun & Green, Claimant Attorneys  
Radler Bohy et al, Defense Attorneys

Reviewing Panel: Members Johnson and Weddell.

The self-insured employer requests review of Administrative Law Judge (ALJ) Kekauoha's order that: (1) set aside its denial of claimant's injury claim for a left knee condition; and (2) awarded a \$12,000 employer-paid attorney fee. On review, the issues are compensability and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation regarding the compensability issue.<sup>1</sup>

Claimant has a significant history of left knee problems since July 1996. (Ex. 1). On October 27, 2014, three days before the current injury, he was examined by Dr. Adams, an orthopedic surgeon, who diagnosed left knee osteoarthritis and provided an injection. (Ex. 22).

On October 30, 2014, claimant began his regular shift as a sales associate for the employer. (Tr. 7). Store surveillance footage showed him beginning to limp as he assisted a customer. (*Id.*) Claimant testified that he had developed a sharp pain in the left knee, although he could not state exactly when the pain began or what movement caused it. (Tr. 9-10, 24). He could neither finish his shift nor work the next day. (Tr. 31-32). Claimant and the employer completed an 801 form on October 31, 2014. (Ex. 25).

On December 29, 2014, the employer denied a left knee injury claim. (Ex. 39). Claimant requested a hearing.

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<sup>1</sup> Claimant contends that the employer is precluded from contesting the ALJ's attorney fee award because it did not specify its objections to his counsel's request at the hearing level. Yet, the record indicates that the employer raised a challenge to claimant's counsel's attorney fee request before the ALJ. (II-Tr. 6). *See also Terilyn McNiel-Dane*, 67 Van Natta 246, 253, n 5 (2015) (carrier's lack of objection to the claimant's counsel's attorney fee request at hearing level did not preclude it from contesting ALJ's attorney fee award on review).

The ALJ set aside the employer's denial. In doing so, the ALJ reasoned that claimant's work injury was at least a material contributing cause of the disability/need for treatment. Further, the ALJ concluded that claimant's knee injury was a combined condition, but the employer had not established that the otherwise compensable injury was not the major contributing cause of claimant's disability/need for treatment. In reaching these conclusions, the ALJ found the opinion of Dr. Anderson, the attending physician, more persuasive than the opinions of Dr. Kitchel, who examined claimant at the employer's request, and Dr. Adams.

On review, the employer contends that claimant did not establish that the work injury was a material cause of his disability/need for treatment and, alternatively, that it met its "major contributing cause" burden under ORS 656.266(2)(a) regarding the combined condition. Based on the following reasoning, we affirm.

Claimant must prove that the October 30, 2014 work injury was a material contributing cause of the disability/need for treatment related to his claimed condition. ORS 656.005(7)(a); ORS 656.266(1); *Tricia A. Somers*, 55 Van Natta 462, 463 (2003). If claimant establishes an "otherwise compensable injury," and a "combined condition" is present, the employer must prove that the otherwise compensable injury was not the major contributing cause of his disability or need for treatment of the combined condition. 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).

The "otherwise compensable injury" means the "work-related injury incident." See *Brown v. SAIF*, 262 Or App 640, 652 (2014); see also *Jean M. Janvier*, 66 Van Natta 1827, 1832-33 (2014) (applying the *Brown* definition of an "otherwise compensable injury" to ORS 656.005(7)(a)(B) and ORS 656.266(2)(a)). Because the employer has the burden of proof under ORS 656.266(2)(a), the medical evidence supporting its position must be persuasive. *Jason V. Skirving*, 58 Van Natta 323, 324 (2006), *aff'd without opinion*, 210 Or App 467 (2007).

Because of the disagreement between medical experts regarding the cause of claimant's condition, this claim presents a complex medical question that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 282 (1993); *Mathew C. Aufmuth*, 62 Van Natta 1823, 1825 (2010). 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); *Linda Patton*, 60 Van Natta 579, 582 (2008).

After reviewing the surveillance footage of claimant's work activities before and after he began limping, as well as a left knee MRI, Dr. Kitchel concluded that claimant's work activities on October 30, 2014 were neither a material nor the major cause of the left knee condition, disability, or need for treatment. (Ex. 42-2). He reasoned that the physical findings from claimant's pre-injury October 27, 2014 examination with Dr. Adams were consistent with a medial meniscal tear, that the MRI findings were more consistent with a preexisting degenerative condition, and that the surveillance video did not show any evidence that any injury actually occurred. (*Id.*) He concluded that the preexisting left knee osteoarthritis was the cause of claimant's left knee condition and need for treatment. (*Id.*) In the alternative, Dr. Kitchel opined that if claimant suffered a combined condition, the preexisting left knee osteoarthritis would be the major contributing cause.

Dr. Anderson diagnosed a left knee medial meniscal tear and a grade 1 MCL tear based on MRI findings, and clinical findings including a positive McMurray's test, reduced range of motion and reproducible tenderness. (Ex. 43-4). Dr. Anderson considered claimant's work injury to be a combined condition due to contribution from his preexisting osteoarthritis and chondromalacia. However, in contrast to Dr. Kitchel's opinion, Dr. Anderson considered the work injury to be the major contributing cause of the meniscus tear and need for treatment. (Ex. 43-5).

Dr. Anderson reviewed the surveillance video and identified three of claimant's movements performed as he assisted a customer that were capable of causing a medial meniscal tear. (Ex. 43-5). He commented that Dr. Adams's October 27 finding of a negative McMurray's test was further evidence that claimant likely did not have a meniscal tear on that date. (*Id.*) Dr. Anderson did not think that the etiology of the meniscal tear could be discerned from the MRI, and disagreed with Dr. Kitchel's conclusion that it suggested a degenerative tear. (Ex. 43-6).

In response, Dr. Kitchel reiterated that he saw no evidence of an injury based on the surveillance video and that he considered the left knee MRI to be more consistent with a degenerative meniscal tear than an acute injury. (Ex. 44-1) Dr. Kitchel disagreed with Dr. Anderson regarding the significance of the October 27, 2014 negative McMurray's test, noting that the test is not 100 percent accurate and that the results can vary between examiners. (Ex. 44-1, -2).

While Dr. Kitchel stated that the surveillance footage showed no evidence of an acute injury, he did not address Dr. Anderson's identification of specific actions on the part of claimant that were consistent with a meniscal injury. Given that Dr. Anderson specifically identified potential mechanisms of injury that would account for the sudden change in claimant's gait, Dr. Kitchel's lack of response regarding those specific actions diminishes the persuasiveness of his opinion. *See Janet Benedict*, 59 Van Natta 2406, 2409 (2007), *aff'd without opinion*, 227 Or App 289 (2009) (medical opinion less persuasive when it did not address contrary opinions).

Furthermore, Dr. Adams concluded that the major contributing cause of claimant's need for treatment/disability was his preexisting left knee osteoarthritis. (Ex. 45-2). However, he did not consider it necessary to review the surveillance video. (*Id.*) The employer contends that medical opinions are frequently given in the absence of surveillance footage, and therefore, we should not discount the persuasiveness of his opinion. Based on this particular record, we do not consider Dr. Adams's opinion to be persuasive.

While arriving at different conclusions, both Drs. Kitchel and Anderson based their medical opinions, in part, on the surveillance video. Because Dr. Adams declined to consider evidence that was significant to the other examiners, we discount Dr. Adams's opinion. *Somers*, 77 Or App at 263; *Joseph Martinez*, 67 Van Natta 1307, 1310 (2015); *Leticia Garcia*, 61 Van Natta 1758, 1760 (2009) (physician's opinion, which did not address other information that other physician considered probative, found unpersuasive). Additionally, Dr. Adams's opinion is further diminished because he did not respond to Dr. Anderson's opinion that claimant's movements identified by Dr. Anderson on the surveillance video were consistent with the body mechanics for a meniscal tear. *See Maria Santana*, 61 Van Natta 840, 850 (2009) (medical opinion that did not address the mechanism of the claimant's injury found unpersuasive in light of contrary opinion that discussed it); *Benedict*, 59 Van Natta at 2409.

Based on the aforementioned reasoning, we find Dr. Anderson's opinion more persuasive than the other physicians' opinions. Because Dr. Anderson opined that claimant's work activities on the day of injury were both a material cause, and the major cause, of claimant's disability/need for treatment, we conclude that claimant has met his burden to establish the occurrence of an "otherwise compensable injury." ORS 656.005(7)(a); ORS 656.266(1).

We turn to whether the employer met its burden of proof under ORS 656.266(2)(a). The employer contends that the opinions of Drs. Kitchel and Adams satisfy its burden to establish that the work-related injury/incident is not the major contributing cause of claimant's disability/need for treatment for the combined left knee condition. *See* ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *Janvier*, 66 Van Natta at 1832-33. Yet, as previously explained, we have discounted the persuasiveness of the opinions expressed by Drs. Kitchel and Adams.

Accordingly, based on this reasoning, the employer has not sustained its burden of proof to show that the work-related injury incident was not the major contributing cause of claimant's need for treatment/disability for his combined left knee condition. *See* ORS 656.266(2)(a). Consequently, the ALJ's order is affirmed.

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382. After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review is \$6,000, payable 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 and his counsel's uncontested submission), the complexity of the issues, the value of the interest involved, and the risk that claimant's counsel might 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 July 13, 2015 is affirmed. For services on review, claimant's attorney is awarded \$6,000, payable by the employer. 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.

Entered at Salem, Oregon on February 9, 2016