

In the Matter of the Compensation of
MURRY NACOSTE, JR., Claimant
WCB Case Nos. 13-01056, 13-00653
ORDER ON REVIEW

Jodie Phillips Polich, Claimant Attorneys
Wallace Klor & Mann PC, Defense Attorneys

Reviewing Panel: Members Lanning and Lowell.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Naugle's order that affirmed an Order on Reconsideration that awarded 2 percent whole person permanent impairment for his right knee condition. The self-insured employer cross-requests review of those portions of the ALJ's order that: (1) affirmed the Order on Reconsideration's temporary disability award; and (2) awarded a \$2,500 employer-paid attorney fee under ORS 656.382(2). On review, the issues are temporary disability, permanent disability (impairment and work disability), and attorney fees. We modify in part and affirm in part.

FINDINGS OF FACT

Claimant compensably injured his right knee in 2008. (Ex. 7). The employer accepted a right knee medial meniscus tear. (Ex. 18). On February 9, 2009, a Notice of Closure awarded 2 percent whole person impairment for loss of right knee range of motion. (Exs. 40, 42).¹

On March 28, 2011, claimant began treating with Dr. Yoshinaga for his right knee. (Ex. 73). Diagnosing right knee pain and right medial meniscus tear, Dr. Yoshinaga authorized modified work. (Ex. 74-1). On June 21, 2011, the employer denied an aggravation claim, stating, "Please note that once you have undergone repair of the [medial] meniscus tear in your right knee, we will voluntarily reopen your claim for aggravation at that time." (Exs. 74A, 82-1).

On September 28, 2011, Dr. DiPaola performed a right knee partial medial meniscectomy. (Ex. 95). Beneath the torn meniscus, Dr. DiPaola found an area of grade 3 chondromalacia. (*Id.*)

¹ The May 27, 2009 Order on Reconsideration reduced the permanent impairment award to 0. (Ex. 58-3). On November 25, 2009, an ALJ's order reinstated the 2 percent award granted by the Notice of Closure. (Ex. 68A-6).

On April 25, 2012, claimant initiated a new/omitted medical condition claim for chondromalacia. (Ex. 104). On June 26, 2012, the employer amended its acceptance to include chondromalacia. (Ex. 109-1). The employer submitted a Form 1502 to the Workers' Compensation Division (WCD) reporting payment of temporary disability benefits from September 28, 2011 through June 12, 2012, for "this open period."² (Ex. 108-3). In acknowledging its receipt of the form, WCD asked the employer if "new time loss [had] been paid since reopening for [the] new condition?" (Ex. 115). In responding, the employer noted the September 28, 2011 surgery and temporary disability dates from September 28, 2011 to August 8, 2012 "and continu[ing]." (*Id.*)

On May 31, 2012, Dr. Yodlowski examined claimant for the employer. Dr. Yodlowski opined that claimant's resected medial meniscus tear, diffuse degenerative arthritic changes, and chondromalacia could be considered medically stationary. (Ex. 105-26). Dr. Yoshinaga concurred. (Ex. 111). On July 17, 2012, he performed a closing examination. (Exs. 112, 117).

Meanwhile, on July 2, 2012, finding that claimant had not established an actual worsening of the medial meniscus tear, an ALJ upheld the employer's June 21, 2011 aggravation denial. (Ex. 110). However, the ALJ awarded interim compensation benefits from March 28, 2011 until June 21, 2011. (*Id.*) On review, we affirmed those portions of the ALJ's order. *Murry Nacoste, Jr.*, 65 Van Natta 548 (2013).

On September 12, 2012, the employer issued a Notice of Closure that awarded: (1) temporary disability benefits from September 28, 2011 through May 31, 2012; (2) 9 percent whole person impairment (using Dr. Yoshinaga's findings for right knee range of motion loss, surgery, strength loss, and chronic condition); and (3) 15 percent work disability. (Exs. 112, 120-1, 121-1). An Updated Notice of Acceptance at Closure listed the following accepted conditions: "medial meniscus tear of the right knee and right knee chondromalacia of the medial tibial plateau." (Ex. 122-1). On a Form 1503, the employer checked "no" when asked if the claim was being closed after reopening for an accepted new medical condition. (Ex. 121-2).

² The employer paid temporary disability benefits from September 28, 2011 until it closed the claim in September 2012. (Exs. 95K, 108-3, 118).

Both parties requested reconsideration. Claimant contested the temporary disability award, seeking additional benefits from March 28, 2011 to September 28, 2011. (Ex. 126). The employer contested claimant's permanent impairment findings and requested a medical arbiter panel examination. (Ex. 123).

In January 2013, WCD's Appellate Review Unit directed the medical arbiter panel to obtain impairment findings regarding only the newly accepted right knee chondromalacia condition and any direct medical sequelae. (Ex. 130-1). In response, the arbiter panel reported decreased range of motion in right knee flexion and extension, but opined that 100 percent of the loss was due to the medial meniscus tear and surgery and 0 percent to chondromalacia. (Exs. 131-8, 132). The panel also opined that claimant was not prevented from being on his feet for more than two hours in an 8-hour period or significantly limited in repetitive use of the right knee due to chondromalacia. (Ex. 131-7). Finally, the panel reported that strength could not be tested in the knee flexors and extensors, due to claimant's "inability to obtain full motor recruitment." (Ex. 131-6)

On January 30, 2013, reasoning that the employer had denied an aggravation of the initially accepted medial meniscus tear and reopened the claim on June 25, 2012 to process a newly accepted condition, the Order on Reconsideration limited its review to the chondromalacia condition. (Ex. 134-1). Based on Dr. Yoshinaga's release to modified work on March 28, 2011, the order awarded temporary disability benefits from March 28, 2011 through May 31, 2012, the medically stationary date.³ (Ex. 134-3). Finding no basis for redetermining "range of motion" loss under OAR 436-035-0007(3),⁴ the order retained the 2 percent value established at the last arrangement of compensation. (*Id.*) Reasoning that the proceeding was limited to the newly accepted chondromalacia

³ The Order on Reconsideration's award of temporary disability benefits from March 28, 2011 through September 28, 2011 was in addition to the temporary disability benefits awarded by the Notice of Closure.

⁴ OAR 436-035-0007(3) provides:

"When a new or omitted medical condition has been added to the accepted conditions since the last arrangement of compensation, the extent of permanent disability must be redetermined.

- (a) Redetermination includes the rating of the new impairment attributed to the new or omitted medical condition and the re-evaluation of the worker's social-vocational factors.

* * *

condition, the order awarded 0 percent for the meniscectomy. (*Id.*) Relying on the arbiters' report, the reconsideration order also awarded zero percent for motor strength and chronic condition. (*Id.*) In sum, the order converted the retained value for range of motion to two percent whole person impairment and awarded 8 percent work disability, in lieu of the awards granted by the September 2012 Notice of Closure. (Ex. 134-3, -4).

Both parties requested a hearing. Claimant sought increased permanent impairment and work disability awards, penalties, and attorney fees. (Ex. 137). The employer sought a reduction in claimant's temporary disability award. (Ex. 135).

CONCLUSIONS OF LAW AND OPINION

The ALJ affirmed the Order on Reconsideration's temporary disability award and granted a \$2,500 assessed attorney fee under ORS 656.382(2). Concluding that the claim had not been reopened for an aggravation, the ALJ also affirmed the Order on Reconsideration's permanent disability awards.

On review, claimant asserts that the insurer reopened his claim for an aggravation based on his September 2011 surgery, entitling him to temporary and permanent disability benefits. He seeks reinstatement of the September 12, 2012 Notice of Closure permanent impairment and work disability awards, contending that Dr. Yoshinaga's closing examination findings should be used in lieu of the medical arbiter panel's findings.

Arguing that Dr. Yoshinaga did not authorize time off work for the new medical condition (chondromalacia), the employer asserts that claimant was not entitled to temporary disability benefits before the September 28, 2011 surgery. The employer also seeks reversal of the ALJ's assessed attorney fee award under ORS 656.382(2).

Permanent Disability

First, we determine whether the employer's claim reopening also included an aggravation of the medial meniscus tear based on the September 28, 2011 surgery. To answer that question, we consider the following circumstances. The employer's June 21, 2011 aggravation denial letter unequivocally declared

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- (b) Impairment values for conditions that are not actually worsened, unchanged, or improved are not redetermined and retain the same impairment values established at the last arrangement of compensation."

that the employer would voluntarily reopen the claim once the meniscal surgery was performed. (Ex. 82-1). Thereafter, the employer began paying temporary disability benefits (effective September 28, 2011, the date of the surgery), and continued to do so until the September 2012 claim closure. (Exs. 95K, 108-3, 118).

In its June 2012 Form 1502, the employer reported its acceptance of claimant's new/omitted chondromalacia condition, as well as payment of temporary disability for "this open period," from September 28, 2011 to June 12, 2012. (Ex. 108-3). Yet, conversely, in its September 2012 Form 1503, the employer check "no" when asked if the claim was being closed after reopening for an accepted new medical condition. (Ex. 121-2). In addition, in its September 2012 Updated Notice of Acceptance at Closure, the employer represented that it had accepted the claim for medial meniscus tear and chondromalacia of the right knee, without specifying which conditions were the basis for the claim reopening.⁵ (Ex. 122). Finally, in its September 2012 Notice of Closure, the employer awarded permanent impairment based on the partial meniscectomy. (Ex. 120-1).

Together, these documents support the proposition that the claim was reopened for both an aggravation of claimant's previously accepted right knee meniscus tear and a new/omitted chondromalacia condition. In reaching this conclusion, we acknowledge that the payment of compensation does not constitute an acceptance or admission of liability. *See* ORS 656.262(10). Nonetheless, our determination is not merely based on the employer's payment of compensation. Rather, we note that the employer's subsequent actions are entirely consistent with its express intent to voluntarily reopen the claim once claimant underwent meniscus surgery. *See Lana L. Runkel*, 48 Van Natta 1712, 1713 n 2 (1996) (the carrier's claim processing, including payment of all bills related to a disputed condition, was evidence that the carrier accepted the condition).

We disagree with the employer's contention that the "law of the case" precludes a finding that it reopened the claim. The "law of the case" doctrine is a general legal principle that, when a decision is made in a case by an appellate body, the decision is binding and conclusive in any further steps or proceedings in the same litigation or on subsequent review. *See Steven J. Depue*, 61 Van Natta 799, 800 (2009). Here, when the employer denied claimant's aggravation claim, it declared that it would reopen the claim once claimant had surgery, and

⁵ It is incumbent upon the employer to clarify the conditions being closed. *See* OAR 436-030-0020(7)(d) (the Notice of Closure must be accompanied by an Updated Notice of Acceptance at Closure, which clearly identifies all accepted conditions in the claim and specifies those conditions which were the basis for reopening the claim); *see also* Amended Bulletin No. 139 (Rev.) (November 16, 2009).

then did so. Our prior order adopting and affirming the ALJ's approval of the "pre-surgery" aggravation denial does not establish the "law of the case" concerning the employer's "post-surgery" claim reopening.

Accordingly, we conclude that the reopened claim included claimant's right knee medial meniscus tear and surgery. Consequently, impairment concerning that condition may be evaluated from this claim closure.

We turn to an evaluation of claimant's permanent impairment. On reconsideration, where a medical arbiter is used, impairment is established by the medical arbiter, except where a preponderance of the medical evidence demonstrates that different findings made or concurred with by the attending physician at the time of claim closure are more accurate. OAR 436-035-0007(5). Where the attending physician has provided an opinion of impairment, and we do not expressly reject that opinion, OAR 436-035-0007(5) permits us to prefer the attending physician's impairment findings, if the preponderance of the medical evidence establishes that they are more accurate. *SAIF v. Banderas*, 252 Or App 136, 144-45 (2012).

Here, Dr. Yoshinaga, claimant's attending physician, reported permanent impairment findings for both the medial meniscus and the chondromalacia conditions. (Ex. 112-1, -2). In contrast, the medical arbiter panel limited its examination to the chondromalacia condition. As such, the panel's findings are insufficient to determine permanent impairment for the "reopened" medial meniscus tear claim. Consequently, we consider the attending physician's impairment findings to be more accurate.

Because it is undisputed that Dr. Yoshinaga's impairment findings represent 9 percent whole person impairment, we reinstate and affirm the Notice of Closure whole person impairment award and 15 percent work disability award, in lieu of the ALJ's order and Order on Reconsideration.⁶

Temporary Disability

Finding that Dr. Yoshinaga authorized modified work from June 21, 2011 through September 28, 2011, the ALJ affirmed the Order on Reconsideration's award of the disputed temporary disability benefits. Arguing that Dr. Yoshinaga did not attribute the work restrictions to the new chondromalacia condition, the employer seeks a reduction in the award. We affirm the temporary disability award, reasoning as follows.

⁶ This award includes, and is not in addition to, the 2 percent permanent impairment award made in 2009. (Ex. 68A-6).

Claimant has the burden of establishing entitlement to temporary disability. ORS 656.266(1); *Lisa M Guerrero*, 62 Van Natta 1805, 1821 (2010). Only an attending physician may authorize the payment of temporary disability compensation. ORS 656.262(4)(a), (h). Temporary disability compensation is not due and payable after the attending physician ceases to authorize it or for any period not authorized. ORS 656.262(4)(g). The authorization must relate to the compensable condition. ORS 656.262(4)(d); *James E. Harper*, 54 Van Natta 852 (2002), *aff'd without opinion*, 191 Or App 148 (2003) (temporary disability not awarded where time loss authorization was not related to the compensable condition).

Thus, claimant is entitled to the disputed temporary disability benefits if Dr. Yoshinaga's contemporaneous temporary disability authorizations related to a compensable condition. Here, Dr. Yoshinaga's authorizations preceded the discovery of chondromalacia, which was not established until Dr. DiPaola observed it on September 28, 2011. Yet, between June 21, 2011 and September 28, 2011, Dr. Yoshinaga authorized temporary disability for medial meniscus tear, among other conditions. (Exs. 79-2, 85, 86-2, 87, 90-2). To the extent that these authorizations pertained to denied or unaccepted conditions, such authorizations would not be effective. Nevertheless, Dr. Yoshinaga's temporary disability authorizations were not solely attributable to noncompensable conditions, but rather included the accepted medial meniscus tear (a condition for which the claim was also eventually reopened). *See Kenneth L. Culp*, 62 Van Natta 798, 803-04 (2010) (temporary disability awarded where attending physician's authorization, while pertaining in part to noncompensable conditions, also pertained to the accepted condition).

In sum, as previously explained, the employer voluntarily reopened the claim to process claimant's aggravation of his previously accepted medial meniscus tear and his new/omitted "chondromalacia" condition. Accordingly, regardless of whether Dr. Yoshinaga's temporary disability authorizations were attributable to either the medial meniscus tear or the new/omitted "chondromalacia" condition, we conclude that the employer was obligated to pay temporary disability compensation from June 21, 2011 through September 28, 2011. Thus, we affirm the ALJ's and Order on Reconsideration's temporary disability award.⁷ *See Candice Marsden*, 50 Van Natta 1361, 1363 n.6 (1998) (where a carrier reopened a new medical condition claim, the carrier was obligated

⁷ Likewise, we affirm the ALJ's attorney fee award under ORS 656.382(2).

to pay temporary disability benefits under that claim irrespective of benefits awarded by a prior claim closure, subject to the authorization to offset any temporary disability benefits otherwise payable for the same period).

Attorney Fees

Because our decision results in increased permanent disability compensation from that awarded by the ALJ's order, claimant's counsel is awarded an "out-of-compensation" attorney fee equal to 25 percent of the increased compensation created by our order, not to exceed \$6,000. ORS 656.386(4); OAR 438-015-0055(2).

Finally, claimant's counsel is entitled to an assessed attorney fee for services on review concerning the temporary disability issue.⁸ ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable assessed attorney fee for claimant's counsel's services on review is \$1,500, to be paid by the employer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by claimant's reply brief and his counsel's uncontested request), the complexity of the issue, the value of the interest involved, and the risk that counsel may go uncompensated.

ORDER

The ALJ's July 1, 2013 order is modified in part and affirmed in part. In addition to the 2 percent whole person impairment and 8 percent work disability awards granted by the Order on Reconsideration, claimant is awarded an additional 7 percent whole person impairment and 7 percent work disability, for total awards of 9 percent whole person impairment and 15 percent work disability. Claimant's counsel is awarded 25 percent of the increased compensation created by this order, not to exceed \$6,000, payable directly to claimant's attorney. The remainder of the ALJ's order is affirmed. For services on review regarding the temporary disability issue, claimant's attorney is awarded an assessed fee of \$1,500, to be paid by the employer.

Entered at Salem, Oregon on December 10, 2013

⁸ Claimant's attorney is not entitled to an attorney fee award for services on review devoted to the attorney fee issue. *Saxton v. SAIF*, 80 Or App 631, *rev den*, 320 Or 159 (1986); *Dotson v. Bohemia, Inc.*, 80 Or App 233, *rev den*, 302 Or 35 (1986).