
In the Matter of the Compensation of
DANIEL B. SLATER, Claimant
WCB Case Nos. 12-03369, 12-00682
ORDER ON REVIEW
Julene M Quinn LLC, Claimant Attorneys
Holly O'Dell, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Langer, Lanning, and Somers. Member Lanning dissents in part.

The SAIF Corporation requests review of those portions of Administrative Law Judge (ALJ) Fulsher's order that: (1) set aside its denial of claimant's combined left knee condition; (2) set aside its denial of claimant's medical services claim for a left knee MRI; and (3) awarded a penalty and related attorney fee for SAIF's allegedly unreasonable combined condition denial. In his respondent's brief, claimant seeks an increased attorney fee award. On review, the issues are compensability, medical services, penalties, and attorney fees. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact." We provide the following summary of the pertinent facts.

Claimant compensably injured his left knee on October 27, 2005. He was treated by Dr. Di Paola, who performed left knee surgery on February 8, 2006. (Ex. 16). SAIF accepted a left knee medial collateral ligament strain and a left medial meniscus tear. (Exs. 14, 21). The claim was closed on June 26, 2006, with an award of 2 percent whole person permanent impairment. (Ex. 21).

In October 2011, claimant filed a new/omitted medical condition claim for "prominent medial compartment degenerative changes-left knee." (Ex. 35).

On December 8, 2011, SAIF modified the acceptance to include a "combined condition as of October 27, 2005 consisting of left medial collateral ligament strain and left medial meniscus tear combined with pre-existing left knee osteoarthritis." (Ex. 36). On the same date, SAIF issued a Notice of Voluntary Reopening Own Motion Claim for the post-aggravation rights new/omitted medical condition claim for the combined condition. (Ex. 37).

On February 3, 2012, SAIF denied the combined condition on the basis that, as of July 22, 2011, the accepted injury was no longer the major contributing cause of the combined left knee condition. (Ex. 39). Claimant requested a hearing.

On February 21, 2012, Dr. Di Paola performed a closing examination regarding the reopened claim. (Ex. 40). A March 12, 2012 Notice of Closure: Own Motion Claim did not award any permanent disability.¹ (Ex. 43).

On February 29, 2012, claimant sought treatment from Dr. Koon, who recommended a new left knee MRI. (Ex. 41). Dr. Koon became claimant's attending physician on April 9, 2012. (Ex. 45). After SAIF denied the request for a left knee MRI, claimant sought administrative review of the medical services dispute with the Workers' Compensation Division (WCD). (Exs. 55-58, 58A). A July 2, 2012 Transfer Order referred the medical services dispute to the Hearings Division for a determination of whether the left knee MRI is causally related to the accepted conditions.

CONCLUSIONS OF LAW AND OPINION

Combined Condition Denial

The ALJ set aside SAIF's combined condition denial, reasoning that claimant did not have a statutory "preexisting" or "combined" condition. Specifically, the ALJ found that claimant was not diagnosed with or treated for osteoarthritis of the left knee before the October 2005 injury. Furthermore, the ALJ determined that the medical evidence was not sufficient to establish that claimant had "arthritis" or an "arthritic condition" under ORS 656.005(24)(a)(A).

On review, SAIF argues that the medical evidence establishes the presence of a statutory preexisting condition ("arthritis"). Alternatively, it contends that the record establishes the presence of an "arthritic condition." SAIF also asserts that the statutory preexisting condition is the major contributing cause of the disability or need for treatment of the combined left knee condition. For the following reasons, we find SAIF's argument persuasive with respect to the presence of "arthritis." Thus, we need not address its contentions regarding the alleged "arthritic condition."

¹ Claimant requested review of the March 2012 Notice of Closure. (Ex. 49). The Own Motion review has been deferred pending resolution of the compensability issue. (See Exs. 51, 53).

If a carrier asserts the presence of a “combined condition,” it has the burden of proving the existence of a “preexisting condition,” as defined by ORS 656.005(24), and that the claimant’s condition is a “combined condition.” ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010). Unless the carrier makes that showing, an acceptance of a “combined condition” is invalid. *Dezi Meza*, 63 Van Natta 67, 69-70 (2011) (where the conditions described by the carrier’s acceptance as “preexisting conditions” were not “preexisting conditions” under ORS 656.005(24), the carrier’s denial of the accepted “combined condition” was set aside because there was no valid “combined condition”).

After a carrier accepts a combined condition, it may deny the combined condition if the otherwise compensable injury ceases to be the major contributing cause of the combined condition. ORS 656.262(6)(c), (7)(b). In combined condition injury claims, the carrier bears the burden to prove such a cessation. ORS 656.266(2)(a); *Washington County-Risk v. Jansen*, 248 Or App 335 (2012); *Wal-Mart Stores, Inc. v. Young*, 219 Or App 410, 419 (2008).

SAIF contends that claimant has a statutory “preexisting condition” because the record reflects that his left knee osteoarthritis was symptomatic and had been the subject of medical services before the 2005 work injury. However, we do not address this assertion because the record establishes the presence of “arthritis.”

For purposes of determining a “preexisting condition” under ORS 656.005(24)(a)(A), the Supreme Court has determined that the legislature intended the term “arthritis” to mean the “inflammation of one or more joints, due to infectious, metabolic, or constitutional causes, and resulting in breakdown, degeneration, or structural change.” *Schleiss v. SAIF*, 354 Or 637, 652-53 (2013); *Hopkins v. SAIF*, 349 Or 348, 364 (2010).

The Supreme Court has explained that, to establish the existence of a preexisting arthritis, a carrier must adduce expert testimony that the claimant suffers from “inflammation of whatever joint or joints it contends are affected by the arthritic condition.” *Schleiss*, 354 Or at 653; *Hopkins*, 349 Or at 363; *see Staffing Services, Inc. v. Kalaveras*, 241 Or App 130, 137-38, *rev den*, 350 Or 423 (2011) (“despite the existence of medical opinions in the record that [the] claimant’s condition is arthritis or arthritic, the board was required to determine in the first instance whether the record was sufficient to establish that [the] claimant suffers from that condition as legally defined”); *Michael Kelson*, 65 Van Natta 32

(2013) (interpreting *Kalaveras* to mean that there is no “arthritis” or “arthritic condition” without evidence of joint inflammation); *Paul D. Beer*, 63 Van Natta 975, *recons*, 63 Van Natta 1191 (2011) (same).

SAIF cites the opinion of Dr. Di Paola to establish that claimant has “arthritis.” In a concurrence letter from SAIF’s attorney, Dr. Di Paola agreed that claimant “has a classic case of arthritis in his left knee involving the inflammation of one or more joints, due to infectious, metabolic, or constitutional causes, and resulting in breakdown, degeneration or structural change.” (Ex. 38). Moreover, this conclusion was based on his findings on examination, imaging and at surgery. (Ex. 38-2). As for what joint(s) was inflamed, the prior page in his report referred to a “worn out joint.” From the context of the discussion and prior references to the left knee, it is apparent that Dr. Di Paola was referring to the left knee joint. (Ex. 38-1).

Thus, we conclude that Dr. Di Paola’s opinion is sufficient to satisfy the *Hopkin*’s criteria and, thus, to establish the presence of a statutory “preexisting condition” (osteoarthritis).²

We acknowledge that, in *Meza*, we found that two doctors’ opinions that arthritic changes involved “inflammation” were insufficient to establish “arthritis” under *Hopkins* because neither of them provided an explanation of what joints were inflamed or how those physicians reached their conclusion. Here, in contrast to *Meza*, Dr. Di Paola’s opinion provides a persuasive explanation that claimant’s osteoarthritis in his left knee involves joint inflammation. Moreover, *Meza* involved multilevel degenerative disc disease in the cervical spine, so it was reasonable to require more specificity in identifying the specific joint involved. By contrast here, only one joint is involved, the knee joint. Therefore, we find *Meza* distinguishable on its facts.

In summary, we conclude that the medical evidence is sufficient to establish the existence of a statutory “preexisting condition.” Moreover, the medical evidence establishes that the preexisting condition is the major contributing cause of the disability or need for treatment of a combined left knee condition. (Exs. 38, 44). Accordingly, SAIF has satisfied its burden of proving

² Dr. Lawlor opined that “osteoarthritis is considered a non-inflammatory condition.” (60-1). Nevertheless, that opinion was not explained. Consequently, we do not find it as persuasive as Dr. Di Paola’s thorough opinion. See *Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (little weight given to a physician’s unexplained conclusion).

that the otherwise compensable injury is not the major contributing cause of the disability or need for treatment of the combined condition under ORS 656.266(2)(a). Thus, we reverse.

Medical Services

A July 2, 2012 Transfer Order referred the medical services dispute to the Hearings Division for a determination of whether claimant's proposed left knee MRI is causally related to the accepted conditions. The ALJ determined that, because no combined condition was established, the material contributing cause standard applied to the medical services issue. The ALJ concluded that claimant's left knee MRI was compensable because it was for conditions caused in material part by the injury.

However, as explained above, we have concluded that claimant has a statutory "preexisting condition" and a "combined condition." Therefore, the second sentence of ORS 656.245(1)(a) governs this medical services dispute.³ *SAIF v. Sprague*, 346 Or 661, 673 (2009); *Cameron J. Horner*, 62 Van Natta 2904, 2905 (2010), *affd*, 248 Or App 120 (2012).

As such, we must determine whether claimant's proposed MRI is a medical service directed to a medical condition caused in major part by the injury. Because the record does not satisfy that standard, we reverse that portion of the ALJ's order that set aside SAIF's medical services denial, as well as the related attorney fee.

Penalty/Attorney Fee

The ALJ reasoned that SAIF's "combined condition" denial was unreasonable based on the lack of evidence establishing a statutory "preexisting" condition. The ALJ awarded a penalty for SAIF's unreasonable combined left knee condition denial, as well as a penalty-related attorney fee.

³ ORS 656.245(1)(a) provides, in part:

"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."

On review, SAIF argues that the penalty and related attorney fee should be reversed because it had a reasonable basis for understanding that osteoarthritis was a statutory preexisting condition. Because we have concluded that the osteoarthritis was a statutory preexisting condition, it follows that SAIF's claim processing was not unreasonable.

Under these circumstances, we conclude that claimant is not entitled to a penalty or an attorney fee under ORS 656.262(11)(a). Therefore, we also reverse those portions of the ALJ's order.

ORDER

The ALJ's order dated December 13, 2012, as reconsidered March 6, 2013, is reversed. SAIF's denials are reinstated and upheld. The ALJ's \$6,500 attorney fee and costs award, the 25 percent penalty, and the \$500 penalty-related attorney fee award are also reversed.

Entered at Salem, Oregon on February 24, 2014

Member Lanning dissenting in part.

The majority reverses the ALJ's order and upholds the SAIF Corporation's denials of claimant's combined left knee condition and medical services claim for a left knee MRI. Because I disagree with the majority's reasoning on those issues, I respectfully dissent.⁴

I begin with the issue of whether SAIF's "combined condition" denial was procedurally valid, which in turn depends on whether the record establishes the presence of a statutory "preexisting condition." SAIF asserts that claimant has a statutory "preexisting condition" because the record reflects that his left knee osteoarthritis was symptomatic and had been the subject of medical services before the 2005 work injury. I am not persuaded by SAIF's argument for the following reasons.

⁴ I do agree, however, with the majority's determination that SAIF's combined condition denial was not unreasonable. Dr. Di Paola's opinion, while ultimately not sufficient in my opinion to establish a statutory "preexisting condition," did provide SAIF with a reasonable basis for its combined condition denial.

Except for claims in which a preexisting condition is “arthritis or an arthritic condition,” for there to be a “preexisting condition,” the worker must have been diagnosed with such condition or obtained medical services for symptoms of the condition, regardless of diagnosis, before the initial injury. ORS 656.005(24)(a)(A). In *White v. Boldt Co.*, 212 Or App 59, 64 (2007), the court explained that the question whether a claimant’s condition is “preexisting,” for purposes of ORS 656.005(24)(a), is not dependent on a preinjury history of symptoms but, rather, on whether the claimant has been diagnosed with the condition, or received medical services for the symptoms of the condition, before the date of the injury.

SAIF cites Dr. Eusterman’s October 28, 2005 chart note, which explained that claimant “[s]ays both knees have been hurting for years, left worse than right; four to six months of orthotic measures have been helping; present symptoms in the same general area as before work incident.” (Ex. 3). SAIF also refers to Dr. Di Paola’s November 10, 2005 chart note, which explained that claimant “relates no prior injury to either knee, although he states he did have some ill-defined anterior medial compartment left knee pain which has improved with some orthotic adjustments in his shoes.” (Ex. 7-1). Dr. Di Paola’s diagnoses included medial compartment degenerative arthrosis and he stated that claimant had “some preexisting degenerative arthrosis in the knee which may prolong his recovery to a degree.” (Ex. 7-4).

SAIF also notes the January 4, 2006 report of Dr. Baldwin, who examined claimant on its behalf. He reported that claimant had right foot fractures in “2002”⁵ and explained:

“During the course of treatment and recovery from those conditions, he developed difficulty with his left knee. There was no specific injury. He was initially diagnosed with a sprain of the left knee which was slow to recover and was accompanied by swelling. Because of this, his treating physician ordered an MRI which showed a large effusion and old Osgood-Schlatter disease but normal menisci and ligaments.

“The MRI of [claimant’s] left knee was performed on August 17, 2000. It was read by Robert W. Seapy, M.D., radiologist at Meridian Park Hospital. Dr. Seapy noted mild thinning of the

⁵ Claimant testified that he broke his right foot in 2000. (Tr. 12-13).

patellar cartilage along the medial patellar aspect and some small spurs on the patella. There was an extensive bone bruise involving the medial tibial plateau. No mention is made of osteoarthritis in the left knee on this study.” (Ex. 12-1, -2).

Dr. Baldwin explained that claimant initially denied any previous difficulty with the left knee before the October 2005 injury, but then recalled that approximately 30 years ago, he had seen a doctor for “grinding in both of his knees that was considered to be very mild.” (Ex. 12-2). Claimant indicated that he had seen a specialist, but was told there was nothing that could be done, although the doctor indicated that his weight was a significant part of the problem. (*Id.*) Dr. Baldwin’s diagnoses included “osteoarthritis, medial compartment, [l]eft knee, moderate, preexisting OTJ injury of 10/27/05.” (Ex. 12-9, -10, -11).

I acknowledge that after the October 2005 work injury, Drs. Baldwin and Di Paola opined that claimant had preexisting osteoarthritis in the left knee. But the medical evidence does not establish that claimant was diagnosed with left knee osteoarthritis *before* the October 2005 injury. *See White*, 212 Or App at 64. Dr. Baldwin explained that there was no mention of osteoarthritis in the left knee based on the 2000 left knee MRI. (Ex. 12).

Furthermore, I am not persuaded that claimant received medical services for the symptoms of left knee osteoarthritis before the date of the injury. The aforementioned chart notes referred to claimant’s orthotic adjustments in his shoes, which apparently helped his prior left knee pain. (Exs. 3, 7). However, the record does not establish that the orthotics constituted medical services for the symptoms of left knee osteoarthritis. Although I may draw reasonable inferences from the medical evidence, I am not free to reach medical conclusions in the absence of such evidence. *Benz v. SAIF*, 170 Or App 22, 25 (2000); *see also SAIF v. Calder*, 157 Or App 224, 227-28 (1998) (the Board is not an agency with specialized medical expertise and must base its findings on medical evidence in the record).

Dr. Baldwin referred to claimant’s prior knee treatment about 30 years ago for “grinding” of both knees. (Ex. 12-2). But the medical evidence is not sufficient to establish that the prior treatment was for symptoms of left knee osteoarthritis. Instead, Dr. Baldwin’s report indicated that claimant’s prior left knee treatment was related to his weight. (*Id.*)

After reviewing the record, I am not persuaded that the medical record is sufficient to establish that claimant was diagnosed with left knee osteoarthritis before the 2005 work injury or that he received medical services for the symptoms

of the condition before 2005. *See Bradford White*, 59 Van Natta 2483, 2488 (2007) (on remand) (medical evidence did not establish that, based on a physician’s chart note, the claimant was provided with “medical services” or “treatment” for symptoms of the claimed condition); *cf. Douglas C. Smith*, 64 Van Natta 1256, 1258 (2012) (based on the claimant’s diagnosis and treatment of a right Achilles tendon tear before the work incident, he had a statutory “preexisting condition”).

I now turn to SAIF’s argument that claimant’s osteoarthritis qualified as “arthritis” or an “arthritic condition.”⁶

For purposes of determining a “preexisting condition” under ORS 656.005(24)(a)(A), the Supreme Court has determined that the legislature intended the term “arthritis” to mean the “inflammation of one or more joints, due to infectious, metabolic, or constitutional causes, and resulting in breakdown, degeneration, or structural change.” *Schleiss v. SAIF*, 354 Or 637, 652-53 (2013); *Hopkins v. SAIF*, 349 Or 348, 364 (2010).

SAIF argues that the uncontested diagnosis of “osteoarthritis” is sufficient to satisfy the definition of “arthritis” or an “arthritic condition” under ORS 656.005(24)(a)(A). But the Supreme Court has explained that, to establish the existence of a preexisting arthritic condition, a carrier must adduce expert testimony that the claimant suffers from “inflammation of whatever joint or joints it contends are affected by the arthritic condition.” *Schleiss*, 354 Or at 653; *Hopkins*, 349 Or at 363; *see Staffing Services, Inc. v. Kalaveras*, 241 Or App 130, 137-38, *rev den*, 350 Or 423 (2011) (“despite the existence of medical opinions in the record that [the] claimant’s condition is arthritis or arthritic, the board was required to determine in the first instance whether the record was sufficient to establish that [the] claimant suffers from that condition as legally defined”); *Michael Kelson*, 65 Van Natta 32 (2013) (interpreting *Kalaveras* to mean that there is no “arthritis” or “arthritic condition” without evidence of joint inflammation); *Paul D. Beer*, 63 Van Natta 975, *recons*, 63 Van Natta 1191 (2011) (same).

In a concurrence letter from SAIF’s attorney, Dr. Di Paola agreed that claimant “has a classic case of arthritis in his left knee involving the inflammation of one or more joints, due to infectious, metabolic, or constitutional causes, and resulting in breakdown, degeneration or structural change.” (Ex. 38).

⁶ SAIF argues that the term “arthritic condition” should be interpreted more broadly than “arthritis” and cites extensive legislative history in support of that contention. As explained below, however, the courts have not interpreted the phrase “arthritis or arthritic condition” in the manner in which SAIF suggests. I would decline to do so here.

Although Dr. Di Paola referred to the definition in *Hopkins*, he did not persuasively explain how claimant's osteoarthritis constituted joint inflammation.⁷ Absent an adequate explanation, Dr. Di Paola's opinion is not sufficient to sustain SAIF's burden of proving that claimant has a statutory "preexisting condition." See *Moe v. Ceiling Systems, Inc.*, 44 Or App 429, 433 (1980); *Meza*, 63 Van Natta at 68-69 (medical opinions did not satisfy the "joint inflammation" component of the "arthritis" definition under *Hopkins*). In addition, Dr. Di Paola's opinion is not persuasive because he did not respond to Dr. Lawlor's opinion that osteoarthritis was not an "inflammatory" condition. (Ex. 60-1). See *Janet Benedict*, 59 Van Natta 2406, 2409 (2007) (medical opinion unpersuasive when it did not address contrary opinions).

Dr. Baldwin diagnosed left knee osteoarthritis that preexisted the 2005 work injury. (Ex. 12-9). But Dr. Baldwin's opinion is not sufficient to establish, as the Supreme Court has instructed, the necessary expert evidence that claimant suffers from "inflammation of whatever joint or joints [the carrier] contends are affected by the arthritic condition." *Schleiss*, 354 Or at 653; *Hopkins*, 349 Or at 363.

SAIF also contends that Dr. Lawlor's deposition testimony supports its argument. Dr. Lawlor testified that claimant's osteoarthritis was a "degenerative type of arthritis" that, by definition, was an "arthritic condition." (Ex. 61-7, -8). However, Dr. Lawlor did not testify that claimant's osteoarthritis involved the necessary inflammation of a joint. To the contrary, in a concurrence letter from claimant's attorney, Dr. Lawlor specifically addressed this issue and concluded that "osteoarthritis is considered a non-inflammatory condition." (Ex. 60-1). Neither Dr. Di Paola nor Dr. Baldwin provided a persuasive contrary explanation in response to Dr. Lawlor's opinion.

In summary, I would conclude that the medical evidence is insufficient to establish the existence of a statutory "preexisting condition." See *Yvonne K. Heimark*, 63 Van Natta 805, 806 (2011) (medical evidence did not establish that the claimant had an arthritic condition that involved inflammation of a joint due to infectious, metabolic, or constitutional causes and resulting in breakdown, degeneration, or structural change); *Meza*, 63 Van Natta at 68-69. Although SAIF purportedly accepted a "combined condition," there was no "combined condition" because there was no statutory "preexisting condition." Consequently, I would conclude that SAIF's "combined condition" acceptance was invalid.

⁷ Dr. Di Paola also opined that claimant had "grade 2-3 chondromalacia, which indicates that the degenerative process had already begun prior to the injury because this type of change generally takes years to develop." (Ex. 38). However, SAIF's combined condition acceptance did not refer to a preexisting chondromalacia condition.

ORS 656.262(6)(c) contemplates the denial of a “combined condition” when an otherwise compensable injury “ceases” to be the major contributing cause of the combined condition, but only if there was a valid combined condition acceptance. Because SAIF’s “combined condition” acceptance was procedurally invalid, it follows that the “combined condition” denial under ORS 656.262(6)(c) was also invalid. Consequently, I agree with the ALJ’s conclusion that SAIF’s denial of the combined condition must be set aside.

I now turn to the medical services issue. A July 2, 2012 Transfer Order referred the medical services dispute to the Hearings Division for a determination of whether claimant’s proposed left knee MRI is causally related to the accepted conditions. The ALJ determined that, because no combined condition was established, the material contributing cause standard applied to the medical services issue. The ALJ concluded that claimant’s left knee MRI was compensable because it was for conditions caused in material part by the injury.

SAIF contends that the major contributing cause standard applies and that the medical evidence is not sufficient to satisfy that standard. However, given my conclusion that SAIF’s “combined condition” denial was invalid and, thus, the major contributing cause standard does not apply, I would further conclude that the medical services claim is compensable. Thus, I would affirm this portion of the ALJ’s order as well.