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In the Matter of the Compensation of  
**OCTAVIO NEGRETE, Claimant**  
WCB Case No. 15-02701  
ORDER ON REVIEW  
Miller Law, Claimant Attorneys  
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lanning and Curey.

Claimant requests review of Administrative Law Judge (ALJ) Fisher's order that: (1) declined to award additional temporary disability benefits; and (2) declined to award penalties and attorney fees for allegedly unreasonable claim processing. On review, the issues are temporary disability, penalties, and attorney fees. We reverse.

FINDINGS OF FACT

Claimant was compensably injured in a work-related motor vehicle accident (MVA) on February 19, 2013. (Ex. 4). The SAIF Corporation accepted a right knee strain, among other conditions. (Ex. 19).

In April 2013, claimant was evaluated by Dr. Lorber, who assumed care as the attending physician. (Exs. 25, 26). Dr. Lorber noted asymmetric swelling of the right knee, as well as a popping sensation over the lateral aspect with McMurray's testing. (Ex. 26-3). He diagnosed an "[i]ndustrially-related (MVA)" and noted that the claim had been accepted for a right knee strain. (Ex. 26-4). Dr. Lorber recommended an MRI for further evaluation of the right knee. (*Id.*)

In May 2013, Dr. Desai, a radiologist, interpreted an MRI as showing a "[q]uestionable tear/band like signal abnormality involving the posterior horn of the lateral meniscus \* \* \* Likely normal or small vessel. If symptoms persist, reimaging with arthrography would provide a more definitive evaluation." (Ex. 29). Dr. Desai also noted a "small effusion." (*Id.*)

On May 24, 2013, after viewing the MRI films, Dr. Lorber stated that there was no "obvious meniscus tear" and that the films were "indeed equivocal." (Ex. 31). He diagnosed "[p]ersistent right knee pain with no evidence of meniscal tear." (Ex. 31-2). Dr. Lorber recommended physical therapy. (*Id.*)

In July 2013, Dr. Lorber noted that claimant's right knee symptoms had not improved. (Ex. 44). His physical examination showed "patellofemoral clunking" with active range of motion. (Ex. 44-2). Dr. Lorber recommended an evaluation by Dr. Bowman, an orthopedic surgeon, and suggested that a diagnostic arthroscopy might be necessary. (Ex. 44-2).

In August 2013, claimant was evaluated by Dr. Bowman. (Ex. 47). He noted a "trace effusion, tenderness on the undersurface of the patella, patellofemoral crepitus, and reproducible clicking within the patellofemoral joint." (*Id.*) Dr. Bowman opined that claimant "has some patellofemoral chondromalacia that is traumatic and has flared up and [is] worsening. [Claimant] probably has some unstable fissuring of the articular cartilage, which is difficult to evaluate on MRI in most cases." (*Id.*) He recommended a diagnostic arthroscopy. (*Id.*)

In September 2013, Dr. Lorber opined that claimant's right knee strain was medically stationary. (Ex. 55-2). He had "doubt" that there was any impairment due to the right knee strain, but commented that claimant's knee pathology "mask[ed]" the findings. (*Id.*) Dr. Lorber stated that claimant was capable of returning to his job at injury with respect to the right knee strain (and other accepted conditions). (*Id.*)

On September 27, 2013, claimant initiated a new/omitted medical condition claim for "post-traumatic" right knee chondromalacia. (Ex. 56). On the same day, Dr. Lorber examined claimant and noted that he had no work restrictions for the accepted conditions, however "overall [claimant's] work restrictions still pertain." (Ex. 57-3). He stated that claimant's right knee posttraumatic chondromalacia was not medically stationary, "as this is contingent on an arthroscopic evaluation." (*Id.*)

In November 2013, claimant was evaluated by Dr. Baldwin at SAIF's request. (Ex. 58). Dr. Baldwin reviewed the May 2013 right knee MRI and opined that "[t]he lateral meniscus looks intact. The so-called tear that is read by the radiologist is obviously a vessel." (Ex. 58-10). Dr. Baldwin did not diagnose chondromalacia of the right knee, explaining that his physical examination and the MRI findings were not consistent with such a diagnosis. (Ex. 58-23). While Dr. Baldwin did not recommend further treatment, he stated that a high resolution MRI would be reasonable before proceeding with a diagnostic arthroscopy. (Ex. 58-24).

On November 25, 2013, SAIF issued a denial of post-traumatic chondromalacia of the right knee. (Ex. 60). The same day, SAIF asked Dr. Lorber whether he agreed with Dr. Baldwin's opinion regarding the chondromalacia diagnosis. (Ex. 61-1). Dr. Lorber deferred to Dr. Bowman regarding that diagnosis, and considered claimant to have a patellofemoral tracking issue. (*Id.*) Dr. Lorber opined that claimant was released to regular work with regard to the accepted right knee strain and other accepted conditions. (Ex. 61-4).

On November 26, 2013, Dr. Lorber indicated that he was waiting for a determination of whether the arthroscopic knee evaluation would be authorized. (Ex. 62-2). Dr. Lorber noted that claimant's right knee post-traumatic chondromalacia was not yet medically stationary. (*Id.*) He stated that claimant had ongoing work restrictions due to his "knee condition," but was released to regular work regarding the accepted conditions. (*Id.*)

In January 2014, Dr. Lorber diagnosed "[p]ossible right knee post-traumatic patellofemoral chondromalacia, per Dr. Bowman," and commented that claimant had ongoing work restrictions for that condition. (Ex. 63-4, -5).

On January 22, 2014, SAIF issued a Notice of Closure concerning the right knee strain claim, awarding no permanent impairment. (Exs. 64, 65).

In March 2014, Dr. Bowman reiterated that claimant had acute chondromalacia, and that the MVA was a consistent mechanism of injury for that condition. (Ex. 66B).

In April 2014, a high resolution MRI was interpreted as normal by Dr. Pearson, a radiologist. (Ex. 67).

On April 2, 2014, claimant was re-evaluated by Dr. Bowman. Noting that claimant continued to have pain, recurrent swelling, and effusion since his August 2013 examination, Dr. Bowman recommended proceeding with a diagnostic arthroscopy to determine "what, if anything, is going on inside of his knee." (Ex. 69).

In May 2014, an Order on Reconsideration affirmed the January 2014 Notice of Closure. (Ex. 74).

On May 16, 2014, claimant was evaluated by Dr. Lorber and requested a regular work release. Dr. Lorber diagnosed "[c]hronic right knee pain with diagnosis of chondromalacia." (Ex. 75-2). Dr. Lorber released claimant to regular work with advice to minimize kneeling "as much as possible." (*Id.*)

On July 24, 2014, a prior ALJ determined the compensability of claimant's new/omitted medical condition claim for right knee post-traumatic chondromalacia, and the compensability of the diagnostic arthroscopy procedure recommended by Dr. Bowman. (Ex. 77A). The prior ALJ upheld SAIF's denial of post-traumatic chondromalacia, reasoning that claimant did not establish the existence of the condition. (Ex. 77A-14). Regarding the medical services dispute, the prior ALJ concluded that the proposed diagnostic arthroscopy was causally related to the work injury because it was needed to determine the extent of the compensable injury.

In February 2015, Dr. Bowman performed a diagnostic arthroscopy of the right knee. (Ex. 87). Post-operatively, he diagnosed a lateral meniscal tear and partial anterior cruciate ligament (ACL) injury. (Ex. 87-1).

In April 2015, claimant requested acceptance of a "vertical lateral meniscal tear" and a "partial ACL tear" as new/omitted medical conditions. (Ex. 90).

On April 15, 2015, Dr. Baldwin opined that claimant's mechanism of injury was not consistent with either the diagnosed lateral meniscus tear or an ACL injury. (Ex. 91-1). He also did not consider claimant's physical examinations to be consistent with the diagnosed and claimed conditions. (*Id.*)

On April 23, 2015, Dr. Bowman opined that vertical meniscal tears are generally traumatic, and he considered the MVA to be a consistent mechanism of injury for the postoperatively diagnosed right knee conditions. (Ex. 93).

In May 2015, claimant was evaluated by Dr. James at SAIF's request. (Ex. 95). He diagnosed a "probable acute" vertical tear of the lateral meniscus, caused by the February 2013 MVA, and a preexisting partial ACL tear, related to a 2008 soccer injury. (Ex. 95-16). Dr. James opined that claimant had mediolateral joint line tenderness consistent with a lateral meniscus tear, and though the MRI imaging did not show a meniscus tear, the surgical findings were the "gold standard" and, therefore, established the diagnosis. (Ex. 95-18, -19).

In June 2015, SAIF accepted a right knee vertical lateral meniscal tear. (Ex. 96). SAIF issued a denial of the right knee partial ACL tear. (Ex. 97).

Following its June 2015 acceptance, SAIF did not pay any accrued temporary disability benefits between November 26, 2013 and May 16, 2014 while claimant was on work restrictions. (Exs. 62-2, 104-1, -2). Claimant requested a hearing seeking those benefits.

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## CONCLUSIONS OF LAW AND OPINION

Reasoning that claimant had been released to work for his accepted right knee strain, the ALJ concluded that no temporary disability benefits were due from November 26, 2013 through May 16, 2014, the date that Dr. Lorber had released him to regular work regarding his right knee condition diagnosed as post-traumatic chondromalacia.

On review, claimant contends that he is entitled to temporary disability benefits for his accepted lateral meniscus tear.<sup>1</sup> Based on the following reasoning, we agree.

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). When an objectively reasonable carrier would understand contemporaneous medical reports to excuse an injured worker from work, a carrier is obligated to pay temporary disability benefits. *Lederer v. Viking Freight, Inc.*, 193 Or App 226, 237, *recons*, 195 Or App 94 (2004). The authorization must relate to the compensable condition. ORS 656.262(4)(d); *Corey J. McEldowney*, 62 Van Natta 1718, 1720 (2010); *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). Temporary disability is payable if the authorization is due in part to the compensable condition, even if the authorization is also directed at unaccepted, or non-compensable conditions. *See Vincent O. Robison*, 67 Van Natta 938, 939 (2015).

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<sup>1</sup> Claimant also contends that the appropriate inquiry is whether his work restrictions were due to the work-related injury incident, rather than to the accepted conditions. However, because SAIF's acceptance of the lateral meniscus tear obligated it to pay additional temporary disability benefits, we need not address this contention. Likewise, it is also unnecessary to address SAIF's argument that claim preclusion applies, because our order only concerns temporary disability due by reason of the accepted right knee meniscal tear, a condition that was accepted after the Notice of Closure issued. In other words, SAIF was required to process the claim for any additional temporary disability benefits attributable to the "post-closure" accepted new/omitted medical condition. *See Candice Marsden*, 50 Van Natta 1361, 1363 (1998).

Here, SAIF contends that Dr. Lorber's chart notes establish that his time loss authorizations were specifically directed at the denied chondromalacia condition, and that claimant's ongoing knee symptoms were unrelated to the lateral meniscal tear diagnosed by Dr. Bowman. Yet, for the following reasons, we are persuaded that temporary disability benefits were authorized by Dr. Lorber, at least in part, for the lateral meniscal tear condition between November 11, 2013 and May 16, 2014.

During the entire period of disputed temporary disability (November 25, 2013 to May 16, 2014) the treatment recommendation of Dr. Lorber, the attending physician, and Dr. Bowman, a consulting orthopedic surgeon, was for a *diagnostic* arthroscopy. (Exs. 44-2, 47). Furthermore, a prior ALJ determined that the diagnostic arthroscopy was necessary to determine the extent of claimant's compensable injury. (Ex. 77A). Additionally, claimant underwent a second MRI in April 2014 in an attempt to further delineate his work injury before surgery. (Ex. 67).

While Dr. Lorber directed work restrictions toward the denied chondromalacia condition, the record also establishes that Dr. Lorber and Dr. Bowman were still attempting to discern the appropriate diagnosis for claimant's knee condition. For example, in his January 3, 2014 chart note, Dr. Lorber diagnosed "*possible* right knee post-traumatic patellofemoral chondromalacia." (Ex. 63-4). We interpret Dr. Lorber's work restrictions to extend beyond the chondromalacia condition, to include the then-undetermined right knee diagnosis.

The issue is whether, following the acceptance of claimant's right knee lateral meniscal tear, SAIF was then obligated to pay the disputed temporary disability benefits because the disability was due, in part, to the newly accepted condition. *See, e.g., Candice Marsden*, 50 Van Natta 1361, 1363 (1998).

Here, we are persuaded that SAIF should have understood that claimant's work restrictions during the disputed period were due, at least in part, to the later accepted right knee lateral meniscal tear. *See Lederer*, 93 Or App at 237; *Robison*, 67 Van Natta at 939. During that period, Drs. Lorber and Bowman were both uncertain of the correct diagnosis regarding claimant's right knee and continued to recommend further diagnostic procedures including a repeat MRI and a diagnostic arthroscopy. (Exs. 67, 69). During the course of the diagnostic arthroscopy, Dr. Bowman diagnosed and surgically addressed a clinically significant lateral meniscus tear. (Ex. 87). While Dr. Bowman also diagnosed a non-work related

ACL tear, the record does not establish that the work restrictions were solely related to that condition, or to any other non-compensable condition. (*Id.*) Moreover, while SAIF contends that Dr. Lorber's work restrictions were directed toward a chondromalacia condition, at the time that SAIF accepted the lateral meniscus tear, the chondromalacia condition had been determined not to exist by the order of a prior ALJ, and had been ruled out by Dr. Bowman's diagnostic arthroscopy. (Exs. 77A-14, 87).

Consequently, we conclude that Dr. Lorber's work restrictions, when analyzed within the context of Dr. Bowman's diagnostic and surgical treatment, and the continued development of the actual diagnosis, were related in part to the subsequently accepted lateral meniscus tear. *See, e.g., Robison, 67 Van Natta at 939.* Accordingly, claimant is awarded temporary disability benefits between November 25, 2013 and May 16, 2014.

Claimant's counsel is entitled to an assessed fee for services at hearing and on review for prevailing on the disputed temporary disability issue. ORS 656.383(2) (Or Laws 2015, ch 521, §§ 10, 11). 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 at the hearing level and on review is \$5,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by the record, claimant's appellate briefs, claimant's counsel's fee submission,<sup>2</sup> and SAIF's objection) the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.

### Penalty/Attorney Fee

Claimant contends that SAIF's refusal to pay the disputed temporary disability benefits was unreasonable, and that a penalty and related attorney fee are warranted. Based on the following reasoning, we agree.

Under ORS 656.262(11)(a), if a carrier unreasonably delays or unreasonably refuses to pay compensation, the carrier shall be liable for an additional amount up to 25 percent of the amount "then due." The standard for determining an

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<sup>2</sup> Although not a "request" under OAR 438-015-0029, we may consider this "submission" in reaching our determination of a reasonable attorney fee award. *See Randell D. Plummer, 63 Van Natta 594, 599 (2011).*

unreasonable resistance to the payment of compensation is whether, from a legal standpoint, the carrier had a legitimate doubt about its liability. *Int'l Paper Co. v. Huntley*, 106 Or App 107, 110 (1991). “Unreasonableness” and “legitimate doubt” are to be considered in light of all the evidence available to the carrier. *Brown v. Argonaut Ins.*, 93 Or App 588, 591 (1988).

As explained above, the record does not support SAIF’s contention that claimant’s temporary disability benefits were not due in part to the accepted right knee meniscal tear. Moreover, following its acceptance of claimant’s meniscal tear condition, the record does not establish that SAIF attempted to contact claimant’s attending physician to clarify whether the physician’s temporary disability authorization pertained to the meniscal tear condition. Under these circumstances, we conclude that SAIF unreasonably delayed or refused to pay claimant’s temporary disability benefits. *See Castle & Cook, Inc. v. Porras*, 103 Or App 65, 69 (1990) (whether a penalty is awarded depends on whether the carrier had a legitimate doubt regarding its liability for the benefits); *Randy D. Jackson*, 50 Van Natta 25, 27 (1998) (awarding penalty for failure to pay temporary disability benefits where evidence did not establish that the claimant’s disability was due to non-compensable conditions, and the carrier did not perform a reasonable investigation). Therefore, a penalty based on the “amounts then due,” and a penalty-related attorney fee are warranted.

Consequently, claimant is awarded a penalty equal to 25 percent of the temporary disability benefits awarded by this order.

In addition, claimant’s attorney is entitled to a penalty-related attorney fee for services rendered at the hearing level and on Board review regarding SAIF’s unreasonable claim processing. ORS 656.262(11)(a); *SAIF v. Traner*, 273 Or App 310, 320-21 (2015); *Stanley T. Castle*, 67 Van Natta 2055, 2057 (2015). That attorney fee shall be in a reasonable amount that is proportionate to the benefit to claimant and takes into consideration the factors set forth in OAR 438-015-0010(4), giving primary consideration to the results achieved and the time devoted to the case. *See* OAR 438-015-0110(1), (2). Based on our review of the record and considering these factors (including consideration of claimant’s appellate briefs, his counsel’s submission, and SAIF’s objection), we award \$3,000 as a reasonable penalty-related attorney fee regarding SAIF’s unreasonable claim processing.

ORDER

The ALJ's order dated May 16, 2016 is reversed. Claimant is awarded temporary disability benefits between November 25, 2013 and May 16, 2014. Claimant is also awarded a penalty equal to 25 percent of these increased temporary disability benefits. For a penalty-related attorney fee for claimant's counsel's services at the hearing level and on review regarding SAIF's unreasonable claim processing, claimant's counsel is awarded \$3,000, payable by SAIF. For services at the hearing level and on Board review in obtaining claimant's increased temporary disability benefits, claimant's counsel is awarded \$5,000, to be paid by SAIF.

Entered at Salem, Oregon on December 20, 2016