

In the Matter of the Compensation of
WCB Case No. 14-04218
VINCENT O. ROBISON, Claimant
ORDER ON REVIEW
Philip H Garrow, Claimant Attorneys
Sheridan Levine LLP, Defense Attorneys

Reviewing Panel: Members Curey and Lanning.

The self-insured employer requests review of Administrative Law Judge (ALJ) Wren's order that found certain medical services provided to claimant were compensably related to his work injury. On review, the issue is medical services.

We adopt and affirm the ALJ's order with the following supplementation regarding the employer's procedural challenge to claimant's medical services claim.¹

On August 4, 2014, claimant requested review from the Workers' Compensation Division (WCD) regarding the employer's non-payment for Dr. Saddoris's medical services. (Ex. 130A) Thereafter, WCD transferred the dispute regarding the causal relationship regarding these medical services to the Hearings Division. (Ex. 131A).

The ALJ found that Dr. Saddoris's opinion persuasively established that the disputed medical services were directed to claimant's bronchial reactivity/occupational asthma, which was materially related to his May 2012 work exposure. The ALJ applied *SAIF v. Carlos-Macias*, 262 Or App 629, 636-37 (2014), and determined that the need for the disputed medical services was caused in material part by claimant's May 2012 work exposure.

On review, the employer contends that the relationship of the medical services to claimant's bronchial reactivity/occupational asthma condition cannot be

¹ We do not adopt those portions of the ALJ's order beginning with the second full paragraph of Page 15 through the second paragraph of Page 17. We conclude that Dr. Saddoris's opinion is more responsive than those of the other examiners regarding claimant's burden of proof to establish compensability to a reasonable degree of medical certainty. See *Robinson v. SAIF*, 147 Or App 157, 160 (1997) (medical certainty not required; a preponderance of evidence may be shown by medical probability). Moreover, because we find no persuasive reason to do otherwise, we defer to Dr. Saddoris's opinion as the attending physician. See *Darwin B. Lederer*, 53 Van Natta 974, 974 n 2 (2001) (absent persuasive reasons to the contrary, the Board generally gives greater weight to the opinion of the claimant's attending physician).

considered because those conditions were not accepted. In doing so, the employer notes that it withdrew its denial of those conditions because claimant had not made a claim for them. Considering claimant's actions, the employer argues that his bronchial reactivity/occupational asthma cannot be considered as part of the "compensable injury." Based on the following reasoning, we disagree.

ORS 656.245(1)(a) provides:

"For every compensable injury, the insurer or 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."

The relevant inquiry is whether claimant has established a causal relationship between the work-related injury incident (compensable injury) and the disputed medical services, rather than the accepted condition. *Carlos-Macias*, 262 Or App at 637.

Here, on January 15, 2013, the employer issued a denial of "bronchial reactivity/occupational asthma." (Ex. 95). On January 24, 2013, claimant's attorney asserted that claimant had not made a claim for those conditions, and therefore, the denial was invalid. (Ex. 96). Subsequently, the employer rescinded its denial. (Ex. 109).

Thereafter, when the employer did not pay for medical services provided by Dr. Sadoris, claimant requested WCD review. Pursuant to WCD's transfer of the "causal relationship" portion of the dispute, we address the employer's objection to the ALJ's determination that the medical services directed toward claimant's unaccepted bronchial reactivity/occupational asthma are causally related to his May 2012 work exposure.

The issue for resolution is claimant's right to medical services for his compensable injury under ORS 656.245. The employer contends that claimant's actions regarding the "withdrawn" denial of bronchial reactivity/occupational asthma constitutes an acknowledgment that such conditions were not part of the compensable/work-related injury. We disagree. Because a determination

regarding the compensability of medical services is a separate inquiry from the compensability of new/omitted medical conditions under ORS 656.267, the fact that an invalid denial is rescinded does not mean that conditions subject to the rescinded denial cannot be considered to determine the compensability of medical services. See *Fernando Javier-Flores*, 67 Van Natta 2245, 2248 (2015); *Sandra L. Read*, 67 Van Natta 2238, 2240 (2015).

Based on our review of the record, the parties' actions concerning the withdrawal of the employer's denial of the bronchial reactivity/occupational asthma condition were confined to whether a new/omitted medical condition claim had been made for those conditions, and nothing more.

The employer argues further that the disputed medical services are not compensable because they are not actually related to claimant's accepted conditions. However, consistent with the *Carlos-Macias* rationale, the determinative issue is whether the medical services are due in material part to the work-related injury/incident. See 262 Or App at 637; *Troy D. Hubbard*, 67 Van Natta 1992, 1993 (2015). Based on the adopted portions of the ALJ's order, we agree with the ALJ's conclusion that the aforementioned standard has been satisfied.

Claimant's attorney is entitled to a "contingent" assessed fee for services on review regarding the medical services issue. ORS 656.382(2).² See *Antonio L. Martinez*, 58 Van Natta 1814 (2006), *aff'd*, *SAIF v. Martinez*, 219 Or App 182 (2008). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this issue, we find that a reasonable "contingent" fee for claimant's attorney's services on review is \$4,500, 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), the complexity of the issue, the value of the interest involved, and the risk that counsel may go uncompensated.³

² If a "propriety" dispute is currently pending before WCD, or if a request to resolve such a dispute is filed with WCD within 30 days of this order, our attorney fee award will remain "contingent" until WCD resolves the "propriety" dispute subject to its jurisdiction. However, if no such dispute is currently pending with WCD or no request to resolve such a dispute is filed with WCD within 30 days of this order, claimant will have finally prevailed against the denial, and our attorney fee award shall become payable. See *Stephen H. Moore*, 66 Van Natta 812, 817 n 7 (2014).

³ Although we have disagreed with the employer's "preclusion" argument, we do not consider its defense to this medical services claim to have been frivolous.

Finally, we make a similar “contingent” award of reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the medical services denial, to be paid by the employer in the event that claimant finally prevails against all aspects of the medical services dispute. *See* ORS 656.382(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 August 12, 2015, as amended September 11, 2015, is affirmed. For services on review, claimant’s attorney is awarded an assessed attorney fee of \$4,500, payable by the employer, contingent on claimant prevailing over all aspects of the medical services dispute as described in this order. Claimant is also awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the medical services denial, to be paid by the employer, contingent on claimant prevailing over all aspects of the medical services dispute as described in this order.

Entered at Salem, Oregon on February 19, 2016