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In the Matter of the Compensation of  
**WILLIAM R. SWEETLAND, Claimant**  
WCB Case Nos. 15-00950, 15-00068, 14-05836  
ORDER ON REVIEW  
Moore Jensen, Claimant Attorneys  
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Curey and Lanning.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Jacobson's order that upheld the SAIF Corporation's denial of his new/omitted medical condition claim for a right knee lateral meniscus tear. On review, the issue is compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," which are summarized below.

On January 9, 2009, claimant was injured when the forklift he was driving fell off a trailer. (Tr. 5). Before the injury, he reported no right knee symptoms. (Tr. 6). Claimant felt right knee pain immediately after the accident. (Tr. 8).

About four days later, Dr. Carver reported claimant's complaint of "catching" and "giving way" in his right knee and noted tenderness of the patella and a positive apprehension sign. (Ex. 7). A right knee strain was diagnosed. (*Id.*)

In February 2009, SAIF accepted an occipital scalp laceration, concussion, cervical strain, thoracic strain, bilateral hip strains, right knee strain, right elbow abrasion, and right elbow strain. (Ex. 10).

A March 2009 right knee MRI showed tears of the posterior and anterior horn of the lateral meniscus of the right knee, as well as degenerative changes, and subcutaneous edema involving the tissues anterior to the patellar tendon. (Ex. 14).

In a June 2009 chart note, Dr. Lorber, a physiatrist who had begun to treat claimant in May 2009, indicated that claimant's right knee "does not collapse as much," and "only collapses now if he does activities on uneven terrain." (Ex. 18-1). Dr. Lorber further reported that: "In the future will consider right knee surgery only if symptoms do not continue to improve especially after a cervical decompression that may allow for improved lower extremity strength." (Ex. 18-2).

Claimant's initial treatment was focused on his neck, spine, shoulder, and head conditions. He had cervical fusion surgery in November 2009, and right shoulder surgery in September 2010. (Exs. 23, 35).

In February 2011, Dr. Lorber, recorded a loss of range of motion in the right knee that was not related to his right knee strain. (Ex. 43-7). Dr. Lorber attributed these findings to meniscal changes and degeneration. (*Id.*)

In August 2014, claimant returned to Dr. Lorber with complaints of progressive right knee pain and buckling in the knee, with focal pain in the infrapatellar region. (Ex. 52-1). Dr. Lorber noted diffuse tenderness with no particular crepitus with movement. (*Id.*)

In September 2014, an MRI showed an oblique tear involving the posterior horn of the medial and lateral menisci and mild osteoarthritic changes in the right knee. (Ex. 55).

In October 2014, Dr. Lorber reviewed the MRI and, in addition to the MRI report findings, diagnosed a tear of the anterior horn of the lateral meniscus. (Ex. 60-1). At that time, Dr. Lorber reviewed claimant's prior medical records, noting right knee complaints as early as four days after the accident. (*Id.*) He also reviewed the 2009 MRI report, "showing a tear of the posterior horn and anterior horn of the lateral meniscus" and "what appear to be acute changes on top of mild chronic changes." (*Id.*) Dr. Lorber believed that "it seems reasonable that the right knee condition would be related to his industrial accident." (*Id.*)

In January 2015, at SAIF's request, Dr. James, an orthopedic surgeon, examined claimant. (Ex. 61C-11). He opined that the tears appeared chronic on the MRI, complex in nature, and largely horizontally-oriented, consistent with chronic tearing and claimant's age (62). (Ex. 61C-12). After reviewing the 2009 MRI, Dr. James found nothing attributable to an acute injury. (*Id.*) Dr. James concluded that claimant's right knee lateral meniscal tears were likely caused by degeneration and that the January 2009 work injury was not a material contributing cause of the disability/need for treatment of the right knee meniscal tears. (Ex. 62).

Claimant requested the acceptance of lateral meniscus tears as new/omitted medical conditions.<sup>1</sup> (Ex. 61). SAIF denied the claim and claimant requested a hearing. (Ex. 65).

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<sup>1</sup> Claimant also requested acceptance of a medial meniscus tear and osteoarthritis as new/omitted medical conditions, which SAIF also denied. (Ex. 61). However, claimant challenges the denial only as to the lateral meniscus tears. (08/07/15 Tr. 1).

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## CONCLUSIONS OF LAW AND OPINION

In upholding the denial, the ALJ found that Dr. Lorber's opinion did not persuasively establish that claimant's work injury was a material contributing cause of the need for treatment or disability for the claimed right knee lateral meniscus tears. Thus, the ALJ concluded that the claimed conditions were not compensable.

On review, claimant contends that Dr. Lorber's opinion persuasively establishes the compensability of his claim. Moreover, he argues that Dr. James's opinion was based on an inaccurate history. For the following reasons, we find the right knee lateral meniscus tears compensable.

To prevail on his new/omitted medical condition, claimant must prove that his claimed condition exists, and that the work injury was a material contributing cause of his disability/need for treatment of that condition.<sup>2</sup> ORS 656.005(7)(a); ORS 656.266(1); *Betty J. King*, 58 Van Natta 977 (2006); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005). If he meets that burden and the medical evidence establishes that the "otherwise compensable injury" combined at any time with a "preexisting condition" to cause or prolong disability or a need for treatment, the employer has the burden to prove that the "otherwise compensable injury" is not the major cause of the disability/need for treatment of the combined right knee condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *SAIF v. Kolia*s, 233 Or App 499, 505 (2010); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004).

Because of the conflicting medical opinions regarding the compensability of the claimed conditions, the causation issue presents a complex medical question that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 282 (1993). In evaluating the medical evidence, we rely on those opinions that are well reasoned and based on accurate and complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

When presented with disagreement among experts, we tend to give more weight to the opinion of the treating physician because of a greater opportunity to evaluate the injured worker over time. *Weiland v. SAIF*, 64 Or App 810, 814 (1983). However, whether we give greater weight to the opinion of the treating physician depends on the record in each case. *Dillon v. Whirlpool Corp.*, 172 Or

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<sup>2</sup> Here, it is undisputed that the conditions exist.

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App 484, 489 (2001); *see also Hammons v. Perini Corp.*, 43 Or App 299, 301 (1979) (no special credit given to treating physician opinion where the case involved expert analysis rather than expert external observation).

Here, Dr. Lorber, claimant's treating physician, opined that claimant's work injury was a material contributing cause of his right knee lateral meniscal tears. In reaching this opinion, Dr. Lorber reasoned that claimant was asymptomatic before the injury, the injury was of significant trauma, and the 2009 MRI supported a conclusion that his right knee suffered an impact injury due to the subcutaneous edema involving tissue anterior to the patellar tendon. (Ex. 63-2).

We acknowledge that Dr. Lorber did not begin treating claimant until some four months after the January 2009 work injury. (Ex. 52). Under such circumstances, we do not accord deference to his opinion based on his status as the treating physician. *See McIntyre v. Standard Utility Contractor's Inc.*, 135 Or App 298, 302 (1995) (a treating physician's opinion is less persuasive when the physician did not examine the claimant immediately after the injury); *Anthony A. Miner*, 62 Van Natta 2538, 2540 (2010) (a physician who treated the claimant after the work injury was in a better position to evaluate his injury-related conditions than physician who examined him three months later). Nonetheless, we consider his opinion to be persuasive because it is well reasoned and based on an accurate history. *Jackson County v. Wehren*, 186 Or App 555, 560 (2003); *Somers*, 77 Or App at 263.

Dr. James's opinion, however, is not based on an accurate history regarding claimant's early right knee symptoms. Therefore, we discount his opinion. We reason as follows.

Dr. James believed that claimant did not have right knee symptoms of "catching" and "giving way" following his work injury. (Ex. 68-8). Based on this premise, Dr. James concluded that the absence of such symptoms was "inconsistent with an acute meniscus tear as you would expect lateral and medial pain with tenderness, catching and locking following his injury." (Exs. 62-2, 68-10-11). However, as early as four days after claimant's work injury, Dr. Carver recorded claimant's complaints of "pain in the right knee and feels like it is catching and giving way and not right." (Ex. 7-1).

Dr. James expressly agreed that, if claimant had right knee tenderness, catching, and locking following his work injury, it would be more probable that he tore his meniscus as an acute injury in 2009. (Ex. 68-10). Thus, because Dr. James's opinion was premised on an inaccurate history (*i.e.*, that claimant did

not experience right knee symptoms consistent with a meniscus tear following the 2009 work injury), his opinion is unpersuasive. *See Miller v. Granite Constr. Co.*, 28 Or App 473, 476 (1977) (medical opinions are only as reliable as the history provided by the claimant); *Latonya M. Bias*, 60 Van Natta 905, 905 (2008) (persuasiveness of medical evidence depends on accuracy of history).

Furthermore, Dr. James concluded that claimant's 2009 work injury was not a material cause of the right knee lateral meniscal tears because the "MRI study in 2009 shows only degenerative tears which are not acute[.]" (Ex. 67-1). However, Dr. James also explained that there are "situations where there has been an acute tear superimposed on a chronic tear, but that's usually not detected on an MRI [because] it's not that sensitive." (Ex. 68-14). Because these statements are somewhat inconsistent, Dr. James's opinion is further discounted.

Finally, while Dr. James believed that claimant's right knee lateral meniscal tears were degenerative, he did not address whether the 2009 work injury was a material contributing cause of claimant's disability/need for treatment of the right knee lateral meniscal tears. In contrast, Dr. Lorber specifically addressed this question. Reporting that claimant's right knee was asymptomatic before the 2009 work injury, and noting that claimant had catching and give away after the injury, Dr. Lorber opined that the work injury was a material contributing cause of claimant's disability/need for treatment of the right knee lateral meniscal tears. (Ex. 63-2).

Under such circumstances, we find that Dr. Lorber's opinion persuasively supports a conclusion that the 2009 work injury was at least a material contributing cause of disability or need for treatment of the claimed right knee lateral meniscal tears. *See SAIF v. Strubel*, 161 Or App 516, 521-22 (1999) (medical opinions are evaluated in context and based on the record as a whole to determine sufficiency). Consequently, we reverse.

Claimant's attorney is entitled to an assessed fee for services at the hearing level and on review regarding the right knee lateral meniscus tears denial. ORS 656.386(1). 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 regarding the aforementioned compensability issue is \$11,000, 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, his counsel's submission, and SAIF's objection), the complexity of the issues, the values of the interest involved, and the risk that claimant's counsel might go uncompensated.

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Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial of claimant's right knee lateral meniscus tears, to be paid SAIF. *See* ORS 656.386(2); OAR 438-015-0019; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

### ORDER

The ALJ's order dated September 8, 2015 is reversed in part and affirmed in part. SAIF's denial of claimant's new/omitted medical condition claim for right knee lateral meniscal tears is set aside and the claim is remanded to SAIF for processing in accordance with law. For services at hearing and on review regarding the right knee lateral meniscus tears denial, claimant's attorney is awarded an assessed fee of \$11,000, payable by SAIF. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the right knee meniscus tears denial, to be paid by SAIF. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on February 9, 2016