
In the Matter of the Compensation of
WCB Case No. 13-05787

DON R. HOWARD, Claimant

ORDER ON REVIEW

Hooton Wold & Okrent LLP, Claimant Attorneys

Maher & Tolleson LLC, Defense Attorneys

Reviewing Panel: Members Weddell, Johnson, and Somers

The insurer requests review of Administrative Law Judge (ALJ) Otto's order that: (1) set aside its denial of claimant's new/omitted medical condition claim for right knee degenerative traumatic arthritis; and (2) awarded a \$17,500 assessed attorney fee. On review, the issues are compensability and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation regarding the compensability issue. We do not adopt the fourth through seventh sentences of the final paragraph on Page 8 (and continuing onto Page 9). We also do not adopt that part of the first sentence of the final paragraph on Page 11 regarding "bowleggedness."

On July 17, 2006, while claimant was working as a rigging installer, a 400-pound stage unit fell, hitting him on the right side, and slamming him to the floor. (Tr. 5, 10). The left side of his head and body hit the floor, and a steel strut of the stage unit struck his right lower leg, breaking it. (Tr. 13-14; Exs. 9-1, 15-2). Claimant's right knee was pinned to the ground. (Tr. 14). He was taken to a hospital.

The following day, claimant sought treatment at an emergency room. Fractures of the mid right tibia and right fibula were diagnosed. (Ex. 2). An examination noted tenderness and mild swelling in the right mid leg. (Ex. 2-2).

On July 19, 2006, claimant underwent right leg surgery to repair the fractured right tibia fibula. (Ex. 4-1). During that surgery, a 4-cm incision was made medial to the patellar tendon in order to insert the anterior point of a nail into the tibia. (Ex. 4-2). Thereafter, claimant was placed in a cast brace and used crutches, with partial weight bearing for about two months. (Ex. 9-1). He then used a cane. (*Id.*)

In August 2008, Dr. Puziss, an orthopedist, diagnosed preexisting "moderate to moderately severe right medial knee degenerative arthritis" and a painful

surgical rod. (Ex. 33-1-2). At that time, Dr. Puziss did not believe that claimant's right knee degenerative arthritis was due to the July 17, 2006 injury, describing it as "longstanding and pre-existing." (Ex. 33-2).

In November 2008, claimant underwent further surgery to address symptoms in his patellar femoral joint, which were thought to be due to the tip of the tibia nail. The tibia nail was removed and an osteophyte of the right distal tibia was excised. (Exs. 35, 37).

Thereafter, claimant complained of anterior knee pain and soreness. However, in April 2009, when Dr. Puziss declared him medically stationary, such symptoms had resolved. (Exs. 40 through 43).

In August 2013, claimant sought treatment from Dr. Puziss for anteromedial posterior and lateral right knee pain. (Ex. 46-2). X-rays showed basically bone-on-bone (severe arthritis) with medial right knee joint narrowing. (Ex. 46-3). Based on the rapid collapse of claimant's right knee joint space between 2008 and 2013 (from 70 percent collapsed to bone-on-bone severe arthritis), Dr. Puziss concluded that the July 17, 2006 work injury was the major contributing cause of claimant's degenerative traumatic right knee arthritis. (Exs. 46-3, 54-1-2).

In November 2013, at the insurer's request, Dr. Dewing, an orthopedic surgeon, examined claimant. (Ex. 48). He concluded that, although the work injury and its treatment (including the nailing of the right tibia and subsequent hardware removal) may have contributed to the further deterioration of the right knee, he did not believe that the work injury was the major contributing cause of the need for treatment of the advanced osteoarthritis. (Ex. 48-10, -12). Dr. Dewing reasoned that claimant already had moderate joint space narrowing and degenerative right knee changes at the time of the work injury. (Ex. 48-10). He also believed that claimant's disability and need for treatment for his severe right knee arthritis resulted from multiple factors, including the aging process and his continued high activity level. (Ex. 48-14).

The insurer denied claimant's new/omitted medical condition claim for degenerative traumatic arthritis right medial knee joint. (Ex. 49). Claimant requested a hearing.

Dr. Puziss continued to conclude that the work injury was the major contributing cause of a worsening of claimant's preexisting right knee arthritis. (Exs. 51a, 54). Dr. Puziss reasoned that claimant's right knee had been

asymptomatic (since a 1966 exploratory surgery) for more than 40 years, while he was working jobs requiring a high-level of activity before the July 2006 work injury. (Exs. 51a, 54). Moreover, Dr. Puziss explained that claimant had a complete, accelerated collapse of the right knee joint after the work injury, which was very traumatic. (Exs. 51a, 54-1-2).

In February 2014, at the insurer's request, claimant's medical records were reviewed by Dr. McNeill, an orthopedic surgeon. (Ex. 52). Dr. McNeill agreed with Dr. Dewing that the progression of claimant's osteoarthritis was not due to the work injury. (Ex. 52-12). Dr. McNeill concluded that claimant's 1966 arthrotomy along with his bowleggedness, which led to abnormal stress on the inner knee, had contributed to the progression of his osteoarthritis. (Ex. 52-9-11).

Dr. Dewing disagreed with Dr. Puziss's "major contributing cause" analysis. (Ex. 57). Dr. Dewing acknowledged that the work injury was a material contributing cause of claimant's combined condition and increased knee symptoms. (*Id.*) Nonetheless, Dr. Dewing continued to believe that the preexisting arthritis was the major cause of the disability and persistent arthritic symptoms, noting that, based upon the 2006 imaging of the knee, he would have expected claimant's knee symptoms to worsen over time independent of any further trauma or injury. (*Id.*)

In setting aside the insurer's denial, the ALJ found that the July 2006 work injury was a material contributing cause of claimant's disability/need for treatment. The ALJ then concluded that the insurer had not met its burden of proving that the work injury was not the major contributing cause of disability/need for treatment of the combined condition. *See* ORS 656.266(2)(a).

On review, the insurer contends that the medical evidence does not persuasively establish that the work injury was a material contributing cause of claimant's disability/need for treatment of his right knee degenerative arthritis. The insurer asserts that Dr. Puziss's opinions are inconsistent and there is no explanation for the change in his opinions. The insurer also argues that, even if the work injury was a material cause, it was not the major contributing cause of claimant's disability/need for treatment of the combined condition. Based on the following reasoning, we affirm.

To prevail on his new/omitted medical condition claim, claimant must prove that the condition exists, and that the work injury was a material contributing cause of his disability or need for treatment for the condition. 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 claimant 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 insurer has the burden to prove that the “otherwise compensable injury” (*i.e.*, the “work-related injury incident”) was not the major contributing cause of the disability or need for treatment of the combined right knee condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *SAIF v. Kollias*; 233 Or App 499, 505 (2010); *Brown v. SAIF*, 262 Or App 640, 652 (2014); *Jean M. Janvier*, 66 Van Natta 1827 (2014). The “major contributing cause” is the cause, or combination of causes, that contributed more than all other causes combined. *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 133 (2001).

In August 2008, Dr. Puziss stated: “It does not seem likely that his knee degenerative arthritis is related to this accident, as it is longstanding and pre-existing.” (Ex. 33-2). However, in June 2014, Dr. Puziss subsequently opined that claimant’s 2006 work injury was a material cause (and the major contributing cause) of claimant’s current disability/need for treatment for the right knee traumatic degenerative arthritis and for its rapid acceleration/worsening. (Ex. 54-2). In doing so, Dr. Puziss explained that his opinion changed because, between 2008 and 2013, claimant’s right knee joint completely collapsed to bone-on-bone, representing a rapid advancement of the arthritis beyond normal expectations. Further noting claimant’s “post-2006 injury” records (which detailed claimant’s ongoing right knee symptoms following the work injury), Dr. Puziss observed that claimant’s right knee had been asymptomatic before the “very traumatic” 2006 injury. (Ex. 54).

Under these circumstances, we find that Dr. Puziss adequately explained the change in his opinion. *See Kelso v. City of Salem*, 87 Or App 630, 634 (1987) (where there was a reasonable explanation in the record for a physician’s change of opinion, that opinion was persuasive); *Donna C. Miller*, 61 Van Natta 836, 839 (2009) (physician’s changed opinion was reasonably explained where the subsequent opinions were based on new information obtained after the physician’s initial examination). We further note that Dr. Puziss treated claimant’s right knee condition from his 2006 injury through 2009, and then again from 2013. (Exs. 9, 10, 15, 18 through 26, 28 through 31, 33, 34, 39, 41 through 43, 46, 47, 51a, 54; Tr. 15). Considering Dr. Puziss’s ongoing treatment of claimant’s right knee condition, we find that he was in an advantageous position for assessing the effects of the 2006 injury on claimant’s right knee condition. *See Cornelio Garcia*, 67 Van Natta 893, 896 (2015) (more persuasive opinion from physician who had greater opportunity to observe the claimant’s condition over time); *Diana G. Hults*,

61 Van Natta 1886, 1888 (2009) (more weight accorded to diagnostic opinions of physicians who had greater opportunity to observe the claimant's condition over time). Consequently, based on Dr. Puziss's opinion, we find that claimant has proven that his July 17, 2006 work-related injury incident was a material contributing cause of his disability/need for treatment of the right knee degenerative traumatic arthritis condition. (Exs. 48-10, 54-2).

The medical record further establishes that claimant's work-related injury incident combined with his preexisting right knee osteoarthritis. (Exs. 48-10, 51a-2). Thus, the insurer must prove that the otherwise compensable injury (*i.e.*, the work-related injury incident) was not the major contributing cause of his need for treatment/disability of the combined condition right knee osteoarthritis. ORS 656.266(2)(a); *Brown*, 262 Or App at 652; *Janvier*, 66 Van Natta at 1829.

To meet its statutory burden of proof, the insurer relies on the opinions of Dr. McNeill and Dr. Dewing. For the following reasons, we find those opinions unpersuasive.

Dr. McNeil did not examine claimant, but rather reviewed the medical records. There is no indication that Dr. McNeil reviewed any of claimant's imaging studies. Moreover, Dr. McNeil's opinion is based on assumptions related to claimant's 1966 surgery and "4 F" military status that are not otherwise supported in the record. (Ex. 52-5).

For the aforementioned reasons, we consider Dr. McNeil's opinion conclusory and not well explained. *See Moe v. Ceiling Systems, Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory medical opinion). Thus, we find Dr. McNeil's opinion unpersuasive.

Dr. Dewing acknowledged that the work injury and consequences of the tibia nailing and subsequent hardware removal may have contributed to the further deterioration of the right knee. (Ex. 48-11-12). Nonetheless, Dr. Dewing did not consider these factors to be the major cause of claimant's need for treatment for his right knee osteoarthritis condition. (Ex. 48-12). In expressing this opinion, Dr. Dewing did not adequately address claimant's asymptomatic right knee during the 40 years of heavy work preceding the 2006 work injury, nor his significantly increased symptoms after the injury, and his rapidly collapsed knee joint space from 70 percent to 100 percent following the injury. (Ex. 57-1). Because Dr. Puziss persuasively addressed these factors in rendering his opinion, we discount Dr. Dewing's opinion. *See Janet Benedict*, 59 Van Natta 2406, 2409

(2007), *aff'd without opinion*, 227 Or App 289 (2009) (opinion less persuasive when it did not address contrary opinions).

Consequently, based on the aforementioned reasoning, we conclude that the insurer has not met its requisite burden of proof under ORS 656.266(2)(a). Accordingly, we affirm the ALJ's decision finding claimant's new/omitted medical condition claim compensable.

Claimant's counsel is entitled to an attorney fee for services on review. ORS 656.382. 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 on review \$4,500, to be paid by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief), the value of the interest involved, and the risk that claimant's counsel might go uncompensated.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the insurer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated is August 20, 2015 is affirmed. For services on review, claimant's attorney is awarded \$4,500, payable by the insurer. Claimant is also awarded reasonable expenses and expenses for records, expert opinions and witness fees, if any, incurred in finally prevailing over the insurer's denial, to be paid by the insurer.

Entered at Salem, Oregon on March 4, 2016