

In the Matter of the Compensation of
NATHAN N. PATRICK, Claimant

WCB Case No. 15-02713

ORDER ON REVIEW

Hollander & Lebenbaum et al, Claimant Attorneys
Law Offices of Kathryn R Morton, Defense Attorneys

Reviewing Panel: Members Johnson and Weddell.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Fulsher's order that upheld the insurer's *de facto* denial of certain medical treatment as not causally related to his compensable right knee injury. On review, the issue is medical services. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," with the following summary and supplementation.

On June 4, 2010, claimant sustained a compensable right knee injury, for which the insurer ultimately accepted a right patellar dislocation, right medial femoral condyle tear, right meniscal tear, and right microfracture medial femoral condyle. (Exs. 2, 3, 4, 7). In October 2010, he underwent a partial medial meniscectomy. (Exs. 5-2, 18-2, 20-3).

In August 2012, the insurer accepted claimant's aggravation claim. (Exs. 13, 14, 15). An October 2, 2013 Notice of Closure awarded 11 percent work disability, but no additional whole person impairment beyond the 5 percent previously awarded in a February 2012 Order on Reconsideration. (Ex. 11; Ex. 18). This award was based on the impairment findings of Dr. Edelson, claimant's attending physician. (Ex. 18-2).

A January 8, 2014 Order on Reconsideration increased claimant's permanent disability awards to 13 percent whole person impairment and 22 percent work disability. (Ex. 20-4). The reconsideration order noted that "[o]n October 22, 2012, a second surgery was done which involved arthroscopic lateral retinacular release and removal of chondral loose bodies, open osteoarticular transfer graft, autograft and open distal realignment for patellar instability." (Ex. 20-3).

On August 28, 2014, claimant sought treatment from Dr. Edelson and filled out an 827 Form describing an injury “on 8/16/14 rolled ankle, right knee lost strength causing me to fall.” (Ex. 21-1).¹ Dr. Edelson noted claimant’s complaints of “right retinacular knee pain and recurrent ankle giving away episodes.” (Ex. 21-2). Dr. Edelson documented claimant’s report that his ankle has rolled “about 10 times over the last 6-12 months[,]” and his “most recent episode occurred about a week ago and resulted in him falling on his right knee. He had the immediate onset of anterolateral knee pain along the lateral retinaculum.” (*Id.*) He assessed “Likely tearing of some scar tissue around the lateral retinaculum. Underlying ankle instability is contributing to his falls.” (Ex. 21-3). Dr. Edelson recommended an ankle brace and physical therapy for both the knee and ankle. (*Id.*)

After the insurer declined to pay for certain medical services, claimant requested a hearing, challenging the insurer’s *de facto* denial.

CONCLUSIONS OF LAW AND OPINION

In upholding the insurer’s *de facto* denial of the medical services, the ALJ was not persuaded that the disputed medical services were caused in material part by the 2010 compensable right knee injury. The ALJ reasoned that, while Dr. Edelson’s chart note mentioned claimant’s right ankle rolling and resulting in the fall and need for treatment to the right knee and ankle, there was no accepted ankle condition related to the 2010 compensable injury.

On review, claimant contests the ALJ’s analysis of his medical services claim. For the following reasons, we find the claim compensable.

ORS 656.245(1)(a) provides:

“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.

¹ There is no dispute that the August 2014 accident occurred at home. (Tr. 7).

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.”

Here, the parties do not dispute the ALJ’s determination that this medical services dispute is governed by the first sentence of ORS 656.245(1)(a). Thus, we must determine whether the disputed medical treatment is “for conditions caused in material part by the injury.” ORS 656.245(1)(a); *SAIF v. Sprague*, 346 Or 661, 672 (2009). The phrase “in material part” means a “fact of consequence.” *SAIF v. Swartz*, 247 Or App 515, 525 (2011); *Mize v. Comcast Corp-AT & T Broadband*, 208 Or App 563, 569-71 (2006).

The “compensable injury” is not limited to the accepted condition, but is defined by the work-related injury incident. *See SAIF v. Carlos-Macias*, 262 Or App 629, 637 (2014); *Brown v. SAIF*, 262 Or App 640, 652 (2014). Thus, the medical services need not relate to an accepted condition, but the requisite causal relationship must be shown between the work-related injury incident and the condition that the disputed medical service is “for” or “directed to.” *Fernando Javier-Flores*, 67 Van Natta 2245, 2248 (2015); *Barbara A. Easton*, 67 Van Natta 526, 529 (2015).

Here, claimant contends that the disputed medical service (the August 28, 2014 treatment) was “for” his compensable right knee condition (*i.e.*, the likely tearing of scar tissue around the lateral retinaculum from his October 2012 surgery). The insurer, by contrast, contends that the need for medical services was attributable to claimant’s unrelated ankle condition. Accordingly, we must determine what condition the disputed medical service was “for,” and whether that condition was caused in material part by the compensable injury (*i.e.*, the work-related injury incident).

In his August 28, 2014 chart note, Dr. Edelson reported that claimant’s recent ankle rolling episode resulted in him falling on his right knee, and that he experienced the immediate onset of anterolateral knee pain along the lateral retinaculum. (Ex. 21-2). Assessing likely tearing of scar tissue around the lateral retinaculum, Dr. Edelson prescribed therapy for the knee. (Ex. 21-3).

We consider this case to be analogous to *Beck v. James River Corp.*, 124 Or App 484 (1993). There, the claimant sustained a compensable left shoulder injury, which resulted in a permanent disability award. *Id.* at 486.

Thereafter, he received a diagnostic EMG for an unrelated neck condition, which caused muscle contractions in his left shoulder and resulted in the need for further treatment of his shoulder condition. *Id.* Finding that the claimant's unrelated EMG event intervened to require further medical treatment to repair damage to his compensable left shoulder condition, the court held that such treatment was compensable if "the need for medical services bears a material relationship to the compensable injury." *Id.* at 488. On remand, we found that the medical evidence attributing the claimant's need for left shoulder treatment, in part, to his compensable left shoulder injury established that the compensable injury was a material contributing cause of the need for treatment of the left shoulder following the EMG. *Donald E. Beck*, 46 Van Natta 1259 (1994) (on remand).

Here, claimant sustained a 2010 compensable right knee injury, for which he underwent a right knee lateral retinacular release surgery. Similar to *Beck*, claimant's 2014 unrelated "ankle rolling" event intervened to require further treatment of his right knee condition. Accordingly, claimant's August 28, 2014 medical treatment is compensable if it is materially related to his 2010 compensable injury. *See* ORS 656.245(1)(a); *Carlos-Macias*, 262 Or App at 637; *Mize*, 208 Or App at 569-71; *Beck*, 124 Or App at 488.

Considering Dr. Edelson's reference to claimant's right lateral retinacular knee pain and tearing of the scar tissue around the lateral retinaculum, we interpret his assessment to support a conclusion that the medical service was "for" claimant's compensable right knee condition (*i.e.*, the likely tearing of scar tissue around the lateral retinaculum from his October 2012 surgery), as well as claimant's underlying ankle instability. (Ex. 21-2-3). Additionally, the fact that claimant underwent a lateral retinacular release surgery in October 2012 as a result of his compensable injury, particularly in the absence of contrary evidence, further supports a conclusion that the work-related injury incident was a fact of consequence to the likely tearing of the scar tissue around the lateral retinaculum. (*See* Ex. 20-3). Therefore, we find that the August 28, 2014 medical treatment was for conditions caused in material part by the 2010 compensable injury. ORS 656.245(1)(a); *Carlos-Macias*, 262 Or App at 637; *Mize*, 208 Or App at 569-71.

In reaching this conclusion, we acknowledge the insurer's argument that the August 28, 2014 reports clearly indicated "that the acute ankle roll episode caused the fall, and this fall resulted in a medical service that happened to address the compensable knee." (Respondent's Brief at page 3). However, ORS 656.245(1)(a) does not limit the compensability of medical services simply because those services *also* provide incidental benefits or help to treat other

medical conditions that were not caused by the compensable injury. *Sprague*, 346 Or at 675; *see also Beck*, 46 Van Natta at 1260 (on remand) (medical opinion that attributed the claimant’s need for treatment to both a previous noncompensable injury and the compensable injury sufficiently established the compensability of the disputed medical services).²

In sum, based on the foregoing reasons, we find that the disputed medical services are “for conditions caused in material part by the injury.” ORS 656.245(1)(a). Consequently, we reverse.

Claimant’s attorney is entitled to an assessed fee for services at hearing and on review regarding the medical services issue. 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 is \$4,000, payable by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by the record and claimant’s appellate briefs),³ the complexity of the issue, the value of the interest involved,⁴ 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 medical services denial, to be paid by the insurer. *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).

² Moreover, ORS 656.245(1) does not provide an “off work/major contributing cause” defense, as in “aggravation” claims under ORS 656.273(1). *Cf. Fernandez v. M&M Reforestation*, 124 Or App 38 (1993). There is no requirement that a claimant prove an aggravation of the compensable injury under ORS 656.273(1) to establish entitlement to medical services under ORS 656.245(1). *Bowser v. Evans Prod. Co.*, 270 Or 841, 844 (1974). Rather, the entitlement to additional medical services under ORS 656.245(1) is independent of the entitlement to compensation for medical services for an aggravation under ORS 656.273. *Evans v. SAIF*, 62 Or App 182, 186 (1983).

³ Claimant’s counsel did not request a specific fee and did not provide a statement of services nor an estimate of time expended.

⁴ The bill for the disputed medical service is \$134.50. (Ex. 26-2).

ORDER

The ALJ's order dated October 13, 2105 is reversed in part and affirmed in part. The disputed medical services are causally related to claimant's compensable injury. For services at hearing and on review regarding the medical services dispute, claimant's counsel is awarded an assessed fee of \$4,000, to be paid by the insurer. Claimant is 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 insurer. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on March 18, 2016