
In the Matter of the Compensation of
TERRY B. JIGGAR, Claimant
WCB Case No. 15-05137, 15-03331
ORDER ON REVIEW
James W Moller, Claimant Attorneys
City Of Portland-City Attys Office, Defense Attorneys

Reviewing Panel: Members Weddell, Curey, and Somers. Member Curey dissents.

The self-insured employer requests review of Administrative Law Judge (ALJ) Fulsher's order that: (1) set aside its denial of a new/omitted medical condition claim for a left medial meniscus tear as related to an October 2014 work injury; and (2) set aside the employer's denial of a new/omitted medical condition claim for a right medial meniscus tear as related to a December 2014 work injury. On review, the issue is compensability.

We adopt and affirm the ALJ's order with the following supplementation.

In setting aside the employer's denials for bilateral knee conditions, the ALJ found the opinion of Dr. Rask, claimant's treating surgeon, more persuasive than the opinions of Dr. James, who examined him at the employer's request, and Dr. DiPaola, his treating orthopedic surgeon who concurred with Dr. James's opinion. Specifically, the ALJ reasoned that Dr. Rask provided the most persuasive and complete opinion, and that he addressed and adequately rebutted the contrary physicians' opinions. In addition, as the surgeon who performed surgery on the left knee, the ALJ concluded that Dr. Rask was in a better position to address the cause of a left knee condition.

On review, the employer contends that Dr. Rask's opinion is insufficient to establish that the October and December 2014 work injuries were a material contributing cause of the need for treatment/disability for the claimed conditions. Specifically, the employer argues that Dr. Rask based his opinion on an inaccurate history. For the following reasons, we disagree with the employer's contention.

To establish the compensability of his new/omitted medical condition claims, claimant must establish that his work injuries were each a material contributing cause of the disability/need for treatment for the respective claimed conditions.¹

¹ The parties do not dispute the existence of the claimed conditions. *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005).

ORS 656.005(7)(a); ORS 656.266(1); *Betty J. King*, 58 Van Natta 977, 977 (2006). If claimant meets that burden and the medical evidence establishes that the “otherwise compensable injury” combined 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” (*i.e.*, the “work-related injury incident”) was not the major contributing cause of the disability or need for treatment of the combined conditions. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *Brown v. SAIF*, 262 Or App 640, 652 (2014); *SAIF v. Kollias*, 233 Or App 499, 505 (2010); *Jean M. Janvier*, 66 Van Natta 1827, 1832-33 (2014), *aff’d without opinion*, 278 Or App 447 (2016).

Because of the disagreement regarding the possible alternative causes of claimant’s claimed conditions, expert medical opinion must be used to resolve the question of causation. *Barnett v. SAIF*, 122 Or App 279, 282 (1993); *Linda E. Patton*, 60 Van Natta 579, 582 (2008). In evaluating the medical evidence, we rely on those opinions that are both well reasoned and based on accurate and complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

The employer contends that Dr. Rask relied on an inaccurate history that the October 2014 injury concerning the left medial meniscus tear condition involved a twisting mechanism. Yet, claimant testified that he twisted at the time of injury. (Tr. 10). The ALJ found that claimant testified credibly based on his demeanor. We find no persuasive reasons not to defer to the ALJ’s demeanor-based credibility finding. *See Erck v. Brown Oldsmobile*, 311 Or 519, 526 (1991); *Coastal Farm Supply v. Hultberg*, 84 Or App 282, 285 (1987); *Humphrey v. SAIF*, 58 Or App 360, 363 (1982).

In addition, even if claimant had not twisted his left knee in October 2014, Dr. Rask persuasively explained that it was unnecessary to have a twisting mechanism to cause a medial meniscus tear. (Ex. 129-7). Rather, he concluded that a blunt trauma was sufficient to cause claimant’s knee conditions. (Ex. 129-7-8). He explained that such a mechanism forces back the tibia or the femur causing the medial meniscus to tear. (Ex. 129-7). Thus, whether the “tuck and roll” involved a “twisting” mechanism is not determinative. Under such circumstances, we find Dr. Rask’s explanation to be persuasive.

The employer further argues that Dr. Rask relied on an inaccurate history because he based his opinion concerning the bilateral knee conditions on an immediate onset of pain that persisted. However, Dr. Rask ultimately based his opinion on examination findings following each injury, the lack of prior symptoms,

the type of trauma, surgical observations of the left knee, review of the medical record, claimant's imaging studies, and his training and experience as a physician with a history treating numerous patients in similar situations. (Ex. 129-10). Consequently, we decline to discount Dr. Rask's opinion.

In sum, for the reasons expressed above, and those expressed in the ALJ's order, we conclude that Dr. Rask's opinion is the most persuasive and, therefore, establishes the material and major contributing cause of the need for treatment/disability for the claimed conditions. Accordingly, claimant has established compensability of his bilateral medial meniscus tear conditions. Consequently, we affirm.

Claimant's counsel is entitled to an assessed fee for services on review. ORS 656.382(2). 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 is \$5,500, 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 and his counsel's uncontested fee submission), the complexity of the issues, the values of the interests involved, the risk that counsel may go uncompensated, and the contingent nature of the practice of workers' compensation law.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denials, to be paid by the employer. 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 May 23, 2016 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$5,500, payable by the employer. Claimant is awarded reasonable expenses for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denials, to be paid by the employer.

Entered at Salem, Oregon on March 6, 2017

Member Curey dissenting.

In finding claimant's bilateral medical meniscal tear conditions compensable, the majority relies on Dr. Rask's opinion. Because I disagree with that assessment, I respectfully dissent.

Dr. Rask, claimant's treating surgeon who initially treated him in May 2015, is the only physician to support the compensability of the claimed conditions as related to the October and December 2014 work injuries. (Ex. 93). However, I am not persuaded that Dr. Rask rendered his causation opinion based on a complete and accurate history or that his opinion is well-reasoned.

Concerning the left knee, Dr. Rask documented a history that claimant had left medial knee pain, beginning in October 2014 when he stepped off a paving machine. (Ex. 93-1). Dr. Rask noted that claimant came down awkwardly, twisting his knee, falling to the ground, and hitting both of his knees on the pavement. (*Id.*) Dr. Rask indicated that claimant had initially noticed his knee pain the following day, but that his back pain was worse than his knee pain. (*Id.*) He reported noticing increased knee pain after returning to light duty following one month of physical therapy. (*Id.*) Finally, Dr. Rask understood that, regardless of treatment, claimant had persistent left knee pain. (Exs. 93, 129-4).

Dr. Rask ultimately concluded that claimant sustained bilateral medial meniscus tears related to his October and December 2014 work injuries. (Exs. 94, 118, 123, 129). His opinion that the meniscus tears were traumatic in etiology was "purely based on the history and timing and that he had some awkward, twisting falls" and a significant trauma with an onset of pain "immediately afterwards and persisting." (Ex. 118). He further stated that, although claimant had significant osteoarthritis, the work injury was the major contributing cause of the left knee tear based on the "impaction and twisting type of injury." (Ex. 123). He subsequently clarified that he relied on the following factors: (1) claimant did not have symptoms before the work injuries; (2) the mechanisms of injury were consistent with significant trauma with swelling and then pain that *persisted*; (3) there was blunt force trauma and "probable twisting of the knee as supported by the tuck and roll"; (4) blunt trauma without twisting will also cause a medial meniscus tear because it forces back the tibia or femur; and (5) observations at the time of surgery. (Ex. 129).

However, several physicians documented a different history, noting resolution of knee symptoms, rather than *persistent* pain. Specifically, two weeks after the October 2014 injury, claimant advised Dr. Douglas that his knee pain had

completely resolved. (Ex. 19-1). Likewise, on January 7, 2015, claimant reported to Dr. Arbeene, who examined him at the employer's request, that he had no residual knee pain. He was able to do a full squat, and Dr. Arbeene did not find evidence of instability. (Ex. 53). It was not until January 27, 2015, approximately three months after the initial work injury, that claimant renewed his left knee complaints. (Ex. 60). On January 28, 2015, Dr. Janzen documented that claimant had experienced a worsening of left knee pain with new clicking symptoms five days earlier after crouching down to pick up a bolt, and that he had been icing his left knee to keep the pain under control. (Ex. 61). Dr. Jantzen also referenced claimant's "right leg" injury resulting in right anterior thigh pain, but noted that the pain had substantially bothered him over the past several weeks. (*Id.*) Dr. Jantzen did not make a right knee diagnosis. (*Id.*) Similarly, in February 2015, Dr. DiPaola characterized claimant's situation as a "spontaneous" onset of left knee symptoms, which began approximately one month earlier. (Ex. 72).

In addition, Drs. Douglas, Arbeene, Grattan, DiPaola, Bremner, and James documented a history that claimant fell directly onto his knees and that he tucked and rolled, without mention of a twisting mechanism. (Exs. 10, 53, 60, 72, 110, 124). Dr. James, an orthopedic surgeon who examined claimant at the employer's request, specifically asked claimant whether the incident involved "twisting" and he responded that there was none that he could recall. (Ex. 124-1). Mr. Brady and Ms. Hahn, physical therapists that treated claimant close in time to the October 2014 work injury, also documented a history without twisting. (Exs. 12, 17).

Furthermore, the record supports the proposition that claimant's examination had changed from October 10, 2014, where Dr. Douglas found no concern for internal derangement on examination, to January 2015, when Dr. Grattan documented "pain with varus McMurray's testing" and diagnosed a left medial meniscus tear. (Exs. 10-2, 60). Dr. Jantzen did not find a positive McMurray's on the day after Dr. Grattan's examination, but claimant had mild left knee pain with moderate left knee crepitus with squatting and was diagnosed with a possible meniscus tear. (Ex. 61-2). There were no right knee findings or complaints.

The histories and evaluations of these providers directly contradict Dr. Rask's history that claimant had an immediate onset of knee pain that persisted after the respective work injuries, and that claimant's October 2014 mechanism of injury involved a twisting event. I would find the contemporaneous record more persuasive than Dr. Rask's alternate history. Because Dr. Rask's opinion is based on an incomplete and inaccurate history, his opinion is unpersuasive. *See Jackson County v. Wehren*, 186 Or App 555, 559 (2003) (a history is complete if it includes

sufficient information on which to base the physician's opinion and does not exclude information that would make the opinion less credible); *Miller v. Granite Construction Co.*, 28 Or App 473, 478 (1977) (medical opinion that is based on an incomplete or inaccurate history is not persuasive).

I find the opinion of Dr. James, as supported by the opinions of Drs. DiPaola and Douglas, most persuasive. (Exs. 78, 124, 126, 128). As stated above, their opinions are based on an accurate history of lapses in claimant's symptomatology and direct impact on the knees, rather than a twisting mechanism. Dr. James specifically asked claimant whether there was a twisting mechanism, which claimant denied. (Ex. 124-8-9). There is no evidence that Dr. Rask ever directly asked claimant whether this twisting occurred.

Dr. James opined that claimant's bilateral medial meniscus tears were degenerative and preexisting conditions. On review of the record and Dr. Rask's surgical report, Dr. James explained that there was no evidence to support an acute left knee meniscus tear. (Ex. 124-7, -12). He noted that findings of a complex tear of the posterior horn of the medial meniscus with mostly horizontal cleavage component were "absolutely consistent with a chronic tear of the medial meniscus." (*Id.*) Further, after comparing the bilateral MRI films, he opined that those findings were similar and supported a conclusion that the tears were not caused or worsened by the October and December 2014 work injuries. (Ex. 128). Dr. Rask responded that the delay from the October 2014 work injury to the June 2015 left knee surgery would not support acute findings at the time of surgery. Yet, Dr. Rask based his opinion that the left knee condition was traumatic or acute, in part, on his surgical findings. Consequently, I disagree with the majority that Dr. Rask should receive deference based on his surgical findings, and instead conclude that the findings support the presence of a degenerative condition.

Because I find Dr. James's opinion, as supported by the opinions of Drs. DiPaola and Douglas, to be thorough, well reasoned, and based on complete information, I find it most persuasive. *See Somers v. SAIF*, 77 Or App 259, 263 (1986) (more weight given to opinions that are well reasoned and based on complete information). Consequently, I conclude that claimant has not established the compensability of his bilateral medial meniscus tear conditions. Accordingly, I would reverse the ALJ's opinion. Because the majority concludes otherwise, I respectfully dissent.