
In the Matter of the Compensation of
CLARA A. ZEHRT-SHAY, DCD, Claimant
WCB Case No. 15-04673
ORDER ON REVIEW
Scott M McNutt Sr, Claimant Attorneys
MacColl Busch Sato PC, Defense Attorneys

Reviewing Panel: Members Ousey and Woodford.

The self-insured employer requests review of Administrative Law Judge (ALJ) Poland's order that set aside its denial of claimant's combined right knee condition.¹ On review, the issue is compensability. We affirm.

FINDINGS OF FACT

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

On July 14, 2008, the worker sustained a compensable right knee injury. (Ex. 16). Her claim was accepted for right knee medial and lateral meniscus tears and a right knee anterior cruciate ligament (ACL) tear. (Ex. 22).

In September 2008, Dr. Barbour, an orthopedic surgeon, performed a right ACL reconstruction, partial lateral meniscectomy, a medial meniscectomy with removal of approximately 90 percent of the posterior third of the medial meniscus, and debrided the areas of chondromalacia on the patella, interochlear groove, and medial and lateral femoral condyles. (Ex. 27). He diagnosed a complete rupture of the ACL, tearing of the posterior half of the medial meniscus, minor tearing of the middle part of the lateral meniscus, and preexisting grade 3 chondromalacia on the lateral femoral condyles. (*Id.*)

On March 10, 2009, Dr. Barbour performed a closing examination. (Ex. 39).

In November 2009, a Notice of Closure awarded 19 percent permanent impairment. (Ex. 63). In February 2010, an Order on Reconsideration awarded 20 percent permanent impairment based on a medical arbiter examination conducted by Dr. James, an orthopedic surgeon. (Exs. 66, 68).

¹ For purposes of this order, "claimant" refers to the decedent's daughter, Samantha Richardson, who is the claiming successor of the decedent's estate. In addition, "worker" refers to the decedent, Clara A. Zehrt-Shay.

On May 21, 2012, we affirmed an ALJ's order that set aside the employer's denial of the worker's new/omitted medical condition claim for right knee chondromalacia. In doing so, we found that the record established that the condition was compensable as a combined condition. *Clara A. Zehrt-Shay*, 64 Van Natta 961 (2012).

On May 23, 2012, Dr. McLean, an orthopedic surgeon, performed a right total knee arthroplasty (knee replacement surgery). (Ex. 101).

In July 2012, the employer modified its acceptance to include "right knee medial meniscus tear, right knee lateral meniscus tear, and right ACL tear combined with pre-existing, noncompensable, chondromalacia of the right knee." (Ex. 154).

On July 2, 2013, a Notice of Closure did not award additional permanent impairment. (Ex. 174).

On July 18, 2013, the worker began to have symptoms attributed to a worsening of her accepted conditions. (Exs. 175, 179). Dr. Vallier, an orthopedic surgeon, noted that the worker had underwent a knee replacement with good pain relief and increased function for the first three or four months and developed mechanical symptoms (that had worsened). (Ex. 175-1). Dr. Vallier submitted an 827 Form for an aggravation, and also provided a "status report" diagnosing a right knee replacement with locking and restricted the worker from work due to a pending surgery. (Exs. 176, 177).

On September 18, 2013, the employer accepted an aggravation claim of "right knee medial meniscus tear, right knee lateral meniscus tear, and right ACL tear combined with pre-existing, noncompensable, chondromalacia of the right knee."² (Ex. 180).

In July 2015, Dr. Fuller, an orthopedic surgeon who performed a record review at the employer's request, opined that the preexisting chondromalacia was the major contributing cause of the worker's need for treatment/disability for the right knee as of March 10, 2009. (Exs. 381-21, 392-2).

² According to the Workers' Compensation Division's records, this aggravation claim was closed by a Notice of Closure on December 28, 2015, which was affirmed by an Order on Reconsideration on February 1, 2016 (which modified the "qualifying" date for claim closure).

On September 30, 2015, the employer issued a “ceases” denial of the combined condition. (Ex. 385). The denial stated:

“based upon medical evidence in our file, [the worker’s] current right knee condition and need for treatment and disability thereof, are no longer related in major part to your work-related injury incident or your accepted right knee medial meniscus tear, right knee lateral meniscus tear, or right ACL tear, but rather are due to pre-existing non-compensable conditions. We are therefore denying your current condition and need for treatment.” (*Id.*)

Dr. McLean ultimately concluded that the preexisting chondromalacia became the major contributing cause of the need for treatment/disability for the combined right knee condition on March 10, 2009, when the worker was declared medically stationary. (Ex. 388-1).

Dr. Erkkila, an orthopedic surgeon who performed an examination at the employer’s request, opined that the major contributing cause of the worker’s May 2012 total knee replacement was the preexisting chondromalacia. (Ex. 389-2). He also considered the preexisting chondromalacia to be the major contributing cause of the need for treatment/disability of the combined condition as of March 10, 2009. (Ex. 389-2, -3).

Dr. James likewise concluded that the May 2012 total knee replacement was due to the preexisting chondromalacia condition. (Exs. 66, 390). He opined that the preexisting chondromalacia had become the major contributing cause of the disability/need for treatment for the combined right knee condition as of that surgery. (Ex. 390).

CONCLUSIONS OF LAW AND OPINION

In setting aside the employer’s denial, the ALJ determined that the effective date of the combined condition acceptance was September 18, 2013, the date the employer accepted an aggravation claim of the combined condition. Finding that there was no medical evidence establishing a “change” in the worker’s condition after that date, the ALJ concluded that the employer had not met its burden of proof under ORS 656.266(2)(a).

On review, the employer contends that the effective date of its combined condition acceptance was July 14, 2008, the date of injury. Moreover, the employer asserts that the opinions of Drs. Fuller, McLean, Erkkila, and James persuasively establish the requisite “change” in the worker’s condition or circumstances such that the otherwise compensable injury is no longer the major contributing cause of the need for treatment/disability for the combined right knee condition. For the following reasons, we affirm the ALJ’s order.

A carrier may deny an accepted combined condition if the otherwise compensable injury “ceases” to be the major contributing cause of the combined condition. ORS 656.262(6)(c). The carrier bears the burden to establish a change in claimant’s condition or circumstances such that the otherwise compensable injury was no longer the major contributing cause of the disability or need for treatment of the combined condition. ORS 656.266(2)(a); *Wal-Mart Stores, Inc. v. Young*, 219 Or App 410, 419 (2008).

In analyzing a “ceases” denial under ORS 656.262(6)(c), we evaluate only the contributions of the component parts of the combined condition; *i.e.*, the otherwise compensable injury and the statutory preexisting condition. *Vigor Indus., LLC v. Ayres*, 25 Or App 795, 803 (2013). In *Brown v. SAIF*, 361 Or 241, 282 (2017), the court concluded that the “otherwise compensable injury” is the previously accepted condition, rather than the work-related injury incident. Therefore, a carrier may deny the accepted combined condition if the medical condition that the carrier previously accepted ceases to be the major contributing cause of the combined condition. *Id.*

The effective date of the combined condition acceptance provides the baseline for determining whether there has been a “change” in claimant’s condition or circumstances. *Oregon Drywall Sys. v. Bacon*, 208 Or App 205, 210 (2006). The employer has the burden of proof. ORS 656.262(2)(a); *Young*, 219 Or App at 414.

Here, on July 11, 2012, the employer modified its initial acceptance to include “right knee medial meniscus tear, right knee lateral meniscus tear, and right ACL tear combined with pre-existing, noncompensable, chondromalacia of the right knee.” (Ex. 154). It further stated that the acceptance was “in effect as of, and relates back to July 14, 2008, the date of injury.” (*Id.*) Under such circumstances, July 14, 2008, constitutes the effective date for the acceptance of the combined condition.

In its September 30, 2015, “ceases” denial, the employer did not specify an earlier effective date. (Ex. 385). Rather, the denial stated:

“based upon medical evidence in our file, [the worker’s] current right knee condition and need for treatment and disability thereof, are no longer related in major part to your work-related injury incident or your accepted right knee medial meniscus tear, right knee lateral meniscus tear, or right ACL tear, but rather are due to pre-existing non-compensable conditions. We are therefore denying your current condition and need for treatment.” (*Id.*)

Under such circumstances, September 30, 2015, constitutes the effective date for the “ceases” denial of the combined condition.

Therefore, the employer must prove a change in the worker’s condition or circumstances between July 14, 2008 (the effective date of the combined condition acceptance) and September 30, 2015 (the date of the employer’s “ceases” denial), such that the otherwise compensable injury ceased to be the major contributing cause of the combined right knee condition.

Because of the possible alternative causes of the worker’s current combined condition and need for medical treatment, resolution of this matter is a complex medical question that must be resolved by expert medical opinion. *Uris v. Comp. Dep’t*, 247 Or 420, 424-36 (1967); *Barnett v. SAIF*, 122 Or App 279 (1993). We rely on medical opinions that are well reasoned and based on complete information. *See Somers v. SAIF*, 77 Or App 259, 263 (1986).

The employer relies on the opinions of Drs. Fuller, McLean, Erkkila, and James to establish that the “otherwise compensable injury” was no longer the major contributing cause of the worker’s need for treatment/disability for her combined condition. Those opinions arguably support that the change of circumstances occurred on March 10, 2009, or May 23, 2012. (Exs. 381, 388, 389, 390, 392). For the following reasons, we find those opinions insufficient to meet the employer’s burden of proof.

As previously mentioned, the employer accepted a right knee combined condition as of July 14, 2008. (Ex. 154). In September 2013, the employer specifically accepted an aggravation (*i.e.*, a worsening) of the accepted combined condition. (Ex. 180). Consequently, as of that acceptance, the employer, in effect,

acknowledged that the combined condition was in existence and it had worsened. *See* ORS 656.273(1) (a worsened condition resulting from the original injury is established by medical evidence of an actual worsening of the compensable condition supported by objective findings); *Diane M. McGuire*, 64 Van Natta 194, 195 (2012) (because the acceptance was specific and unambiguous, it was not necessary to resort to contemporaneous medical records to determine what condition was accepted).

Under these particular circumstances, the opinions of Drs. Fuller, Erkkila, McLean, and James supported a “change” in the worker’s condition either on March 10, 2009, or May 23, 2012, which are dates that precede the employer’s September 18, 2013, acceptance of the worker’s aggravation claim, which effectively conceded that her combined condition remained accepted and had worsened. Thus, even though some of the physicians’ opinions acknowledged the accepted aggravation claim, they have not adequately addressed how the accepted right knee medial meniscus, lateral meniscus, and ACL tears had ceased to be the major contributing cause of the worker’s combined condition as of a date that preceded its acceptance of an aggravation claim for that same combined condition. Consequently, these opinions do not persuasively support the employer’s burden to establish the requisite “change” in circumstances. *See Moe v. Ceiling Sys. Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion); *Daniel J. Wilson*, 62 Van Natta 381, 385 (2010) (when analyzing the persuasiveness of a medical opinion, the following factors are considered: the source of the opinion, its factual basis, and its logical force); *Earl M. Brown*, 41 Van Natta 287, 291 (1989) (same); *see also Wilson*, 62 Van Natta at 385 (the factual basis of the opinion includes completeness and correctness of the information upon which it is based, and logical force involves the depth, clarity and cogency of analysis); *Barbara J. Brown*, 42 Van Natta 779, 780 (1990) (same).

In sum, because we find the aforementioned opinions unpersuasive, we conclude that the employer has not established the requisite change in condition or circumstances pursuant to ORS 656.262(6)(c).³ *See Jason V. Skirving*, 58 Van Natta 323, 324 (2006), *aff’d without opinion*, 210 Or App 467 (2007) (where the

³ We further note that Dr. McLean weighed the “work-related injury incident” and the preexisting chondromalacia. (Ex. 388-1). However, the appropriate consideration is the previously accepted conditions (*i.e.*, right knee medial meniscus tear, right knee lateral meniscus tear, and right ACL tear). Consequently, his opinion is unpersuasive. *See Brown*, 361 Or at 282; *Julie E. Nakandakare*, 71 Van Natta 130, 133-34 (2019) (finding physician’s opinion that was focused on the “work incident” insufficient to establish a “change” in the claimant’s circumstances to support a combined condition denial).

carrier has the burden of proof under ORS 656.266(2)(a) the medical evidence supporting its position must be persuasive). Therefore, the employer has not persuasively established that the otherwise compensable injury ceased to be the major contributing cause of the worker's disability/need for treatment for the combined right knee condition. Accordingly, we affirm.

Claimant's attorney 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 in this case, we find that a reasonable 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 demonstrated by claimant's respondent's brief and her counsel's uncontested submission), the complexity of the issue, the value of the interest involved, the risk that claimant's counsel might 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 denial, to be paid by the employer. 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 December 21, 2016 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$4,500, payable by the employer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, payable by the employer.

Entered at Salem, Oregon on April 30, 2019