

In the Matter of the Compensation of
RUBEN A. CORTEZ-GARCIA, Claimant

WCB Case No. 12-01858

ORDER ON REVIEW

Lourdes Sanchez PC, Claimant Attorneys
David Runner, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lowell, Weddell, and Herman. Member Lowell dissents.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Donnelly's order that set aside its denial of claimant's new/omitted medical condition claim for right knee chondral damage femoral sulcus grade IV. On review, the issue is compensability.

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

After claimant's work injury, SAIF accepted a right knee MCL sprain, right knee posterior horn medial meniscus tear, and right knee partial tear of the medial patellar retinaculum. When Dr. Lantz, claimant's treating surgeon, performed surgery to address the meniscal tear, he also found chondral damage femoral sulcus, grade IV, which he treated at that time.

Claimant requested acceptance of the chondral damage as a new/omitted medical condition, which SAIF denied. Claimant requested a hearing.

Reasoning that the medical evidence did not establish that the chondral damage that existed before the work injury was a legally cognizable "preexisting condition," the ALJ analyzed the claim under a "material contributing cause" standard. Finding that the work injury was a material contributing cause of claimant's disability and need for treatment of the chondral damage condition, the ALJ set aside SAIF's denial.

On review, SAIF contends that the work injury was not a material contributing cause of the disability or need for treatment of claimant's chondral damage condition.¹ As explained below, we disagree with SAIF's contention.

¹ Alternatively, SAIF contends that this claim should be evaluated under the "major contributing cause" standard applicable to combined conditions. We adopt the ALJ's reasoning and conclusion that the medical evidence does not establish the presence of a "preexisting condition" under ORS 656.005(24)(a).

To prove the compensability of his new/omitted medical condition claim, claimant must establish that his work injury was a material contributing cause of his disability or need for treatment of his chondral damage condition.² ORS 656.005(7)(a); ORS 656.266(1); *Olson v. State Indus. Accident Comm'n*, 222 Or 407, 414-15 (1960). The causation issue presents a complex medical question that must be resolved by expert medical evidence. *Uris v. State Comp. Dep't*, 247 Or 420, 426 (1967); *Barnett v. SAIF*, 122 Or App 279, 283 (1993).

The only medical expert to render a causation opinion is Dr. Lantz. The dissent reasons that Dr. Lantz's opinion does not establish that the work injury was probably, rather than merely possibly, a material contributing cause of claimant's disability or need for treatment of claimant's chondral damage condition. *See Gormley v. SAIF*, 52 Or App 1055, 1060 (1981) (evidence of possibility, rather than probability, of causation was insufficient to establish compensability); *Ruth N. Mena*, 65 Van Natta 255, 256 n 3 (2013) (same). However, based on the following reasoning, we conclude that his opinion supports compensability to a degree of medical probability, rather than mere possibility.

As noted above, claimant need not prove that the work injury caused the chondral damage itself, but need only prove that the work injury was probably a material contributing cause of his disability or need for treatment of the chondral damage condition. In evaluating this question, "magic words" are not determinative, and we consider Dr. Lantz's opinion in context and based on the record as a whole. *See Benz v. SAIF*, 170 Or App 22, 28 (2000); *SAIF v. Strubel*, 161 Or App 516, 521-22 (1999).

Dr. Lantz opined that the work injury was at least a material contributing cause of the disability and need for treatment of claimant's chondral damage condition. (Ex. 11-1). He later opined that it was "not a material contributing cause for the need for medical treatment or disability in regard to the chondral damage," but, at the same time, opined that the work event "probably did cause an increase in symptoms and may have prolonged his disability." (Ex. 17-1-2).

Dr. Lantz offered his final opinion in a deposition. He was asked whether the work injury was "the material contributing cause of [claimant's] need for treatment or of the condition." (Ex. 26-10). Dr. Lantz replied, "Those are two

² SAIF does not dispute the existence of the chondral damage condition. *See Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005) (proof of the existence of the condition is a fact necessary to establish the compensability of a new/omitted medical condition).

separate questions. You asked two separate questions. The material contributing cause for his need for treatment, including surgery, is his on-the-job injury, yes.” (*Id.*)

Thus, Dr. Lantz ultimately distinguished between the question of whether the work injury had materially contributed to the chondral damage “condition,” which he had previously stated was “impossible to know,” and the question of whether the work injury had materially contributed to claimant’s “need for treatment,” which he answered in the affirmative.³

In this respect, the present case is distinguishable from *Ronald Orians*, 60 Van Natta 2749 (2008). In that case, the surgeon who addressed several claimed new/omitted medical conditions opined that those conditions preexisted the work injury, and that the work injury was not a material contributing cause of the need for treatment of the claimed conditions. 60 Van Natta at 2750. Here, although Dr. Lantz did not opine that the work injury caused the chondral damage itself, he opined that the work injury was a material contributing cause of claimant’s need for treatment of the condition.

Although Dr. Lantz had earlier opined that the work incident was not a material contributing cause of the disability or need for treatment of claimant’s chondral damage, that statement was qualified by his opinion that the work incident increased symptoms, as well as possibly prolonging disability. Thus, this opinion was, itself, somewhat inconsistent, and we interpret Dr. Lantz’s deposition opinion as a clarification, rather than an unexplained change in opinion. See *Kirsten Smith*, 65 Van Natta 1259, 1261 (2013).

Therefore, based on Dr. Lantz’s opinion, we conclude that the work injury was a material contributing cause of claimant’s chondral damage condition. Accordingly, we affirm.

³ The dissent reasons that Dr. Lantz’s opinion did not specify whether the work injury was a material contributing cause of claimant’s need for treatment of the chondral damage condition or of the meniscal tear, which was the condition to which the surgery was initially directed and which SAIF has accepted. However, the subject of the deposition was the chondral damage condition, not the meniscal tear. Further, whereas Dr. Lantz’s ultimate answer specifically declined to state that the work injury had caused “the condition,” he had consistently opined that the work injury had caused the meniscal tear. (Exs. 26-6). Under such circumstances, we conclude that Dr. Lantz was referring to claimant’s chondral damage.

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 to this case, we find that a reasonable fee for claimant's attorney's services on review is \$2,500, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief), the complexity of the issue, and the value of the interest involved.

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 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 December 12, 2012, as reconsidered January 23, 2013, is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$2,500, 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 denial, to be paid by SAIF.

Entered at Salem, Oregon on July 26, 2013

Member Lowell dissenting.

In affirming the ALJ's order, the majority relies on Dr. Lantz's opinion. Because I would find Dr. Lantz's opinion insufficient to support the compensability of the claimed chondral damage condition, I respectfully dissent.

Dr. Lantz explained his opinion in a deposition after offering inconsistent opinions regarding the relationship between the work injury and the disability and need for treatment of claimant's chondral damage.⁴ He explained that the work

⁴ In November 2011, Dr. Lantz had opined that the work injury was "the material contributing cause or the major contributing cause for disability and required treatment for both the medial meniscal tear and" the chondral damage. (Ex. 11-2). However, in January 2012, he opined, "The work injury is not a material contributing cause for the medical treatment or disability in regard to" the chondral damage. (Ex. 17-1).

injury had caused claimant's meniscal tear, which SAIF had accepted, and the meniscal tear caused claimant's need for surgery. (Ex. 26-6). He explained that when performing such surgery, it may be appropriate to address any other pathology at the same time. (*Id.*) In claimant's case, he considered it appropriate to address the chondral damage in conjunction with the meniscal tear. (*Id.*)

Nevertheless, Dr. Lantz was unable to opine that the work injury contributed to the chondral damage in any respect.⁵ (Ex. 26-4, -8). He emphasized, "Again, what led to [claimant's] surgery is the meniscal tear. That is what caused most of his pain, his swelling and symptoms and lead to the need for surgery." (Ex. 26-7). The chondral damage was "additional pathology found at the time of surgery." (Ex. 26-7-8).

Thus, the only causal connection between the work injury and the disability or need for treatment of the chondral damage connection, supported by Dr. Lantz's opinion, was that he found the chondral damage, and considered it appropriate to treat that condition, in the course of treating the work-related meniscal tear. In other words, the treatment for the chondral damage was merely incidental to the treatment of a work-related condition.

To be a "material contributing cause," for purposes of establishing compensability, a work injury must be a "substantial" cause, or more than a "minimal" cause, of claimant's disability or need for treatment. *Knaggs v. Allegheny Techs.*, 233 Or App 91, 97 (2008); *Summit v. Weyerhaeuser Co.*, 25 Or App 851, 856 (1976). Because the treatment for the chondral damage was merely incidental to the treatment of the work-related condition, the causal connection between the work injury and the need for treatment of the chondral damage was minimal, not material. *See Ronald Orians*, 60 Van Natta 2749 (2008) (where a surgery addressed conditions that were not related to the work injury, the work injury was not a material contributing cause of the disability or need for treatment of the conditions).

As the majority notes, Dr. Lantz was asked whether "the material contributing cause of [claimant's] need for treatment or of the condition was the work injury." (Ex. 26-10). He answered, "The material contributing cause for [claimant's] need for treatment, including surgery, is his on-the-job injury, yes." (*Id.*)

⁵ Dr. Lantz opined that the work injury could have worsened the chondral damage, thus contributing to claimant's disability or need for treatment of the condition. (Exs. 11-1, 17-2, 25-1, 26-4, -8). However, he could not opine that it was probable, rather than merely possible, that such a contribution had occurred. (Exs. 25-1, 26-4, -8).

Nevertheless, Dr. Lantz had already explained that the work accident caused the meniscal tear had been caused by the work accident, and that he could not opine that the work accident had contributed to the chondral damage. Under such circumstances, it is at least equally likely that the “on-the-job injury” to which he attributed claimant’s need for treatment was the meniscal tear, not the chondral damage.

The majority notes that “magic words” are not determinative, and medical opinions should be determined in context. I agree with that principle, but the context here is a legal deposition, not Dr. Lantz’s chart notes. The context also includes the fact that SAIF had accepted the meniscus tear and paid for the surgery. Under these circumstances, a general inquiry of whether the “material contributing cause of claimant’s need treatment was the work injury” is not precise enough to establish compensability of claimant’s chondral damage.

Accordingly, I would find that Dr. Lantz’s opinion does not establish that the work injury was a material contributing cause of the disability or need for treatment of claimant’s chondral damage. Because the majority finds to the contrary, I respectfully dissent.