In the Matter of the Compensation of
STEVEN BARBAS, Claimant
WCB Case No. 12-06298
ORDER ON REVIEW
Schoenfeld & Schoenfeld, Claimant Attorneys
MacColl Busch Sato PC, Defense Attorneys

Reviewing Panel: Members Curey and Lanning.

The self-insured employer requests review of Administrative Law Judge (ALJ) Jacobson's order that: (1) set aside its denial of claimant's new/omitted medical condition claim for a right knee lateral meniscus tear; (2) set aside its denial of claimant's medical services claim for right knee lateral meniscus surgery; and (3) awarded a $12,500 assessed attorney fee. On review, the issues are compensability, medical services, and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation regarding the new/omitted medical condition claim.[1]

In setting aside the employer's denial, the ALJ found that the opinion of Dr. Di Paola, claimant's treating physician, was more persuasive than the contrary opinions of Drs. Tesar and Fuller, who examined claimant at the employer's request. On review, the employer contests the ALJ's evaluation of the medical evidence. Specifically, it argues that Dr. Di Paola's opinion is unpersuasive. For the following reasons, we disagree with the employer's contention.

To prevail on his new/omitted medical condition claim as an occupational disease, claimant must establish that his employment conditions were the major contributing cause of his right knee lateral meniscus tear condition.[2] ORS 656.266(1); ORS 656.802(2)(a). The determination of major contributing cause involves the evaluation of the relative contribution of the different causes of claimant's disease and a decision as to which is the primary cause. *Dietz v. Ramuda*, 130 Or App 397, 401 (1994), *rev dismissed*, 321 Or 416 (1995); *Linda E. Patton*, 60 Van Natta 579, 581 (2008). Because of the possible alternate causes of claimant's conditions, expert medical opinion must be used to resolve the question

[1] The parties agree that if claimant's new/omitted medical condition claim is compensable, his medical services claim is also compensable.

[2] There is no dispute that the claimed right knee lateral meniscus tear exists. *See Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005).

of causation. *Uris v. Comp. Dep't*, 247 Or 420 (1967); *Barnett v. SAIF*, 122 Or App 279 (1993). We give more weight to those opinions that are well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986); *Patton*, 60 Van Natta at 582.

Dr. Di Paola opined that claimant's work activities over the last six years with the employer were the major contributing cause of the right knee lateral meniscus tear. He understood that claimant's work activities required constant climbing, squatting, kneeling, squatting, and twisting. Dr. Di Paola's opinion was also based on claimant's lack of degenerative changes in his knees, and the consideration of claimant's off-work activities. Dr. Di Paola further explained how claimant's work activities over the years involved repetitive micro-trauma which caused shear forces that delaminated the coating of the meniscus that resulted in degeneration and the type of attritional tear that claimant had. (*See* Exs. 18, 22, 26, 34, 36, 43, 44, 45).

The employer argues that Dr. Di Paola's biomechanical explanation that kneeling results in additional pressure in the meniscus is not supported by medical literature. Specifically, it notes that the medical literature cited by Dr. Di Paola does not support a conclusion that kneeling and squatting results in additional pressure to the *lateral* meniscus. (Ex. 43-1, -22). Instead, the employer asserts that a different medical study found that occupational kneeling would only lead to damage of the *medial* meniscus. (Ex. 44-53-60).

Referring to an attached medical article, Dr. Di Paola explained:

> "[w]hen the knee is flexed, as it is when kneeling, stair climbing or squatting, the load to the meniscus is significant. Similarly, flexion of the knee when rising and squatting down to kneel, or when stair climbing will also exert pressure to the meniscus[.]" (Ex. 43-1).

The medical article cited by Dr. Di Paola found an increase in the compressive load "transmitted through the *menisci*[.]" (Ex. 43-22) (emphasis added). That portion of the medical article did not find that the increased compressive load was limited to the *medial* meniscus. (*Id.*)

We acknowledge that the medical literature cited by the employer concluded that occupational kneeling "increases the risk of degenerative tears in the medial, but not the lateral, menisci of both knees." (Ex. 44-53, -60). That study found that

occupational kneeling involved the medial meniscus "more often" than the lateral, and that pressure in the medial compartment was "greater than" pressures in the lateral compartment. (Ex. 44-58). However, that medical study did not conclude that there was *no* risk of degenerative tears in the lateral meniscus.

Furthermore, the medical literature cited by the employer stated that "getting from kneeling to standing position many times a day may theoretically predispose to knee twists and subclinical meniscal tears" and that "accumulated exposures to kneeling work tasks may predispose to the development of degenerative meniscal tears through multiple micro-trauma or cumulative mechanical strain." (Ex. 44-57-58). This statement supports Dr. Di Paola's opinion that claimant's work activities of kneeling, which involves squatting down then rising up to standing position numerous times a day over a period of years, contributes to meniscal tears. (Ex. 43-1-2). Under these particular circumstances, we do not find that the medical literature necessarily contradicts Dr. Di Paola's biomechanical explanation.

The employer next argues that Dr. Di Paola's opinion was based on an incorrect understanding of claimant's work activities that involved kneeling. In particular, it notes that claimant did not perform regular kneeling until he joined the visual sales team in approximately 2009. We disagree with the employer's contention.

Dr. Di Paola understood that claimant's job involved a lot of climbing, lifting, crawling, and kneeling. (Exs. 18, 22, 34, 36, 43-1-6, 44-7-10, -38-39, 45-21-23, -34-39). He testified that, to his knowledge, claimant had been performing the same "warehousing" activities, which involved unloading trucks, kneeling, and climbing ladders, during the course of employment. (Ex. 45-31-39). Dr. Di Paola also stated that he discussed claimant's work activities numerous times during the course of treatment, and found claimant to be a reliable historian. (Ex. 45-34-39).

Claimant testified that his job on the visual sales team required more work on ladders to replenish stock than his job on the sales team. (Tr. 47-48). According to claimant, the biggest change with performing visual sales work was building wall displays, which involved kneeling. (Tr. 14, 29, 47). However, he also testified that all of his jobs since he began working for the employer required him to unload trucks and place products on shelves, which required him to kneel and reach, as well as climb ladders. (Tr. 12-18, 40-44, 47). Claimant discussed his work activities with Dr. Di Paola "quite a bit," and more than just at the first examination. (Tr. 24, 39, 46).

After considering this evidence, we are persuaded that, although claimant's job changed from sales to visual sales, Dr. Di Paola's opinion was based on a sufficiently accurate understanding of claimant's work activities that involved kneeling, squatting, and climbing ladders. *See Jackson County v. Wehren*, 186 Or App 555, 561 (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); *see also Claire L. Saeger*, 60 Van Natta 829, 831-32 (2008) (same).

Based on the aforementioned reasoning, in addition to the reasons expressed in the ALJ's order, we find that Dr. Di Paola's opinion persuasively establishes the compensability of claimant's right knee lateral meniscus tear condition. ORS 656.266(1); ORS 656.802(2)(a); *Somers*, 77 Or App at 263; *Patton*, 60 Van Natta at 582. Consequently, we affirm.

Claimant's attorney is entitled to an assessed fee for services on review regarding the compensability and medical services issues.[3] 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 regarding the aforementioned issues is $4,500, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to these issues (as represented by claimant's respondent's brief and his counsel's fee submission), the complexity of the issues, the values of the interests 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 denials, to be paid by the employer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary 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 August 1, 2014 is affirmed. For services on review regarding the compensability and medical services issues, 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 denials, to be paid by the employer.

Entered at Salem, Oregon on January 16, 2015

[3] Claimant's attorney is not entitled to an attorney fee for services on review related to the attorney fee issue. *Dotson v. Bohemia, Inc*., 80 Or App 233 (1986).