

In the Matter of the Compensation of  
**MARTHA V. BLAND, Claimant**

WCB Case No. 01-03113

ORDER ON REVIEW

Mustafa T Kasubhai PC, Claimant Attorneys

Hornecker Cowling Et Al, Defense Attorneys

Reviewing Panel: Members Phillips Polich and Langer.

The insurer requests review of those portions of Administrative Law Judge (ALJ) Mongrain's order that: (1) found that claimant's occupational disease claim for bilateral carpal tunnel syndrome was timely filed; (2) set aside the insurer's *de facto* denial of the claim; and (3) awarded a \$4,000 insurer-paid attorney fee under ORS 656.386(1). On review, the issues are claim filing, compensability and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation.<sup>1</sup>

Claimant worked at a variety of lumber mill jobs from 1985 to 2000. In August 1996, she was diagnosed with mild bilateral carpal tunnel syndrome. In September 1996, claimant filed a claim for ongoing right arm, hand and shoulder pain against her former employer. The claim was denied. Claimant did not request a hearing.

From September 1996 until January 2001, claimant worked for the insured's lumber company, a successor to her former employer. On December 5, 2000, she was diagnosed with moderate to severe bilateral carpal tunnel syndrome. A claim for bilateral carpal tunnel syndrome was filed on December 8, 2000. When the insurer did not timely respond to the claim, claimant requested a hearing.

The ALJ found that the claim was timely filed. The ALJ further found that the opinions of Drs. Amstutz and Hartman were the most persuasive and established that claimant's employment for the insured was the major contributing cause of claimant's combined condition or a pathological worsening of her combined occupational disease. Consequently, the insurer's *de facto* denial of

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<sup>1</sup> The carrier has moved for postponement of Board review until such time as a member representing the concerns of employers is available to participate in the review process. *See* ORS 656.712(1). Because such a member has served on this reviewing panel, the carrier's request is moot.

claimant's occupational disease claim was set aside. Claimant's counsel was also awarded a \$4,000 insurer-paid attorney fee under ORS 656.386(1).

On review, the insurer asserts that the December 2000 occupational disease claim for bilateral carpal tunnel syndrome was not timely filed and that, in any event, the persuasive medical evidence does not support compensability. The insurer also contends that the ALJ's \$4,000 attorney fee award was excessive. We affirm.

### Timeliness of Claim

ORS 656.807 provides in relevant portion:

“(1) All occupational disease claims shall be void unless a claim is filed with the insurer \* \* \* by whichever is the later of the following dates:

“(a) One year from the date the worker first discovered, or in the exercise of reasonable care should have discovered, the occupational disease; or

“(b) One year from the date the claimant \* \* \* is informed by a physician that the claimant is suffering from an occupational disease.

“ \* \* \* \* \* ”

In this instance, although claimant testified that she was personally satisfied that the right hand problem for which she filed a claim in 1996 was work related, this was not supported by the medical evidence. In 1996, claimant was examined by Drs. Casey and Button. Dr. Button opined that claimant suffered longstanding idiopathic mild bilateral carpal tunnel syndrome. (Ex. 3-4). Dr. Casey agreed that claimant's carpal tunnel symptoms were mild and unrelated to any particular activity. (Ex. 4). There is no evidence that, from the onset of symptoms to the moment of diagnosis in December 2000, any physician informed claimant that she was suffering from an occupational disease. Therefore, claimant had a one-year period beginning from December 5, 2000 within which to file her occupational

disease claim based on her “post-August 31, 1996 work activities.”<sup>2</sup> *See Curtis A. Mulford*, 54 Van Natta 986 (July 24, 2002) (time for filing of occupational disease claim did not begin to run until the claimant was told by a physician simply and directly that he had an employment-related condition); *Ralph T. Masuzumi*, 45 Van Natta 361 (1993); *Leone S. Christ*, 43 Van Natta 1140 (1991) (time for filing of occupational disease claim did not begin to run until the claimant learned of physician’s diagnosis of occupational disease). She met that deadline.

### Compensability

The parties agree that the medical evidence establishes that claimant was diagnosed with “mild” or “early” bilateral carpal tunnel syndrome in 1996, and that her 1996 condition was noncompensable. Because claimant now seeks compensation for the same condition, the current claim is properly characterized as a claim for a pathological worsening of a preexisting noncompensable condition. *See Linda D. Lang*, 53 Van Natta 956 (2001); *Douglas L. Tugg*, 48 Van Natta 1590 (1996).

Under these circumstances, ORS 656.802(2)(b) requires that claimant demonstrate that her work activities were the major contributing cause of the combined condition and pathological worsening of the disease. (*Id.*); *see also Colleen P. Smith*, 50 Van Natta 2219 (1998). The major contributing cause analysis requires evaluation of the relative contribution of the different causes of claimant’s disease and a decision as to which is the primary cause. *See Dietz v. Ramuda*, 130 Or App 397 (1994). Claimant’s disease is compensable only if she establishes that her work activity contributed more to causation than all other causative agents combined. *See McGarrah v. SAIF*, 296 Or 154, 166 (1983).

Because pathological worsening and causation issues involve complex medical questions, we necessarily rely on expert medical opinions. *Uris v. Compensation Dept.*, 24y Or 420 (1967); *Barnett v. SAIF*, 122 Or App 279 (1993). When, as here, there is a dispute between medical experts, more weight is given to those medical opinions that are well reasoned and based on complete and accurate information. *See Somers v. SAIF*, 77 Or App 259, 263 (1986). Absent persuasive reasons to do otherwise, we generally rely on the opinion of a worker’s treating

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<sup>2</sup> Claimant’s “pre-August 31, 1996” work activities pertained to her prior occupational disease claim, the denial of which has become final.

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physician. *See Weiland v. SAIF*, 64 Or App 810 (1983). We find no persuasive reason not to do so in this instance.

Here, we find the opinions of claimant's treating neurologists, Dr. Amstutz and Dr. Hartman, most persuasive. Both physicians concluded that there was a pathological worsening of claimant's carpal tunnel syndrome. Dr. Amstutz opined that the pathological worsening of claimant's carpal tunnel syndrome was caused in major part by claimant's work activities between September 1996 and December 2000, during which she was employed by the insured. Dr. Hartman concluded that the pathological worsening of claimant's carpal tunnel syndrome was more probably than not brought about by her work activities in the same four-year period. Dr. Amstutz further indicated that the major contributing cause of claimant's carpal tunnel syndrome condition was claimant's work activity for the insured. Referring to a description of the "glue spreader" work activities claimant performed from January to December 2000, Dr. Hartman agreed that these activities were the major contributing cause of claimant's carpal tunnel condition.

The opinions of Drs. Hartman and Amstutz were based on an accurate history concerning claimant's previous diagnosis. In addition, each relied on an understanding of claimant's work activities and symptomatology that was consistent with claimant's testimony at hearing. Both were aware of, considered, and discussed claimant's gender, age, weight, previous carpal tunnel syndrome diagnosis and history of treatment for hypothyroidism as potential contributing factors.

Both Dr. Amstutz and Dr. Hartman thoroughly responded to the report prepared by insurer-arranged medical examiners Drs. Fuller and Radecki, which attributed claimant's condition to idiopathic factors. Drs. Amstutz and Hartman explained that while claimant's age, body mass index, wrist ratio, and gender might statistically correlate with a higher incidence of carpal tunnel syndrome, such factors do not cause the disease. Further, each indicated that claimant's hypothyroid condition was unlikely to have been a causative factor.

Based on their clinical experience and evaluation of the literature on which Drs. Radecki and Fuller relied, Drs. Amstutz and Hartman convincingly rebutted the insurer-arranged medical examiners' conclusion that "[t]here is no type of work that has ever been shown to actually cause median nerve injury in the carpal tunnel." (Ex. 12-8).

In conclusion, based on our evaluation of the opinions of Drs. Amstutz and Hartman, we are persuaded that claimant's work activity for the insured was the major contributing cause of both the combined carpal tunnel condition and the pathological worsening of claimant's disease. In addition to the reasons noted in the ALJ's order, we find the opinion of Drs. Fuller and Radecki less persuasive than those of claimant's physicians because it does not explain how the idiopathic factors cited caused claimant's condition. *See Blakely v. SAIF*, 89 Or App 653, 656, *rev den* 305 Or 972 (1988) (physician's opinion lacked persuasive force because it was unexplained). Consequently, we conclude that claimant's occupational disease claim is compensable. ORS 656.802(2)(b).

### Attorney Fees

The insurer argues that the ALJ's \$4,000 attorney fee award was excessive.

We review the attorney fee issue *de novo*, considering the specific contentions raised on review, in light of the factors set forth in OAR 438-015-0010(4), as applied to the circumstances of this case. Our review of the record reveals the following information. The issue in dispute at the hearing was compensability of claimant's bilateral carpal tunnel condition. The hearing lasted approximately two hours, producing a transcript of 70 pages in length. The record consisted of 15 exhibits, four of which were generated by claimant. The case involved an issue of medical and legal complexity slightly higher than most occupational disease claims that are litigated before this forum. The claim's value and the benefits secured are significant, especially considering Dr. Amstutz's recommendation for surgery. The parties' respective counsel presented their positions in a thorough, well-reasoned and skillful manner. No frivolous issues or defenses were advanced. Finally, considering the countervailing evidence and the insurer's vigorous challenge, there was a significant risk that claimant's counsel's efforts might go uncompensated.

Based on our application of the OAR 438-015-0010(4) factors, we conclude that \$4,000 is a reasonable attorney fee for claimant's counsel's services at the hearings level. In reaching this conclusion, we have particularly considered the complexity of the issue, the time devoted to the issue (as represented by the hearing record), the value of the interest, the nature of the proceedings, and the risk that claimant's counsel might go uncompensated.

Claimant's attorney is also 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 \$1,750, payable by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the compensability and timeliness issues (as reflected in claimant's respondent's brief, including her counsel's attorney fee request), the complexity of the issues, and the value of the interest involved. We further note that claimant is not entitled to an attorney fee for services on review devoted to the attorney fee issue. *See Dotson v. Bohemia, Inc.*, 80 Or App 233 (1986).

### ORDER

The ALJ's order dated November 23, 2001 is affirmed. For services on review, claimant's counsel is awarded an assessed attorney fee of \$1,750, payable by the insurer.

Entered at Salem, Oregon on August 6, 2002