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In the Matter of the Compensation of  
**KAREN A. HUFFMAN, Claimant**  
WCB Case No. 03-02693, 03-02692, 03-00250  
**ORDER ON REVIEW**  
Fontana & Takaro, Claimant Attorneys  
Terrall & Terrall, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

The self-insured employer requests review of those portions of Administrative Law Judge (ALJ) Riechers' order that: (1) set aside its denial of claimant's new medical condition claim for left shoulder AC joint irritation; (2) awarded interim compensation; and (3) awarded penalties and attorney fees for allegedly unreasonable claim processing. In her respondent's brief, claimant challenges those portions of the ALJ's order that: (1) upheld the employer's denial of claimant's occupational disease claim for left shoulder AC joint irritation; and (2) did not award interim compensation through the date of hearing.<sup>1</sup> On review, the issues are compensability, interim compensation, penalties and attorney fees. We affirm in part and modify in part.

FINDINGS OF FACT

We adopt the ALJ's findings, with the following supplementation.

The employer did not deny claimant's claim for left shoulder AC joint irritation until the hearing convened on July 10, 2003.

CONCLUSIONS OF LAW AND OPINION

Compensability

We adopt and affirm the ALJ's "Conclusions of Law and Opinion" regarding the compensability of claimant's left shoulder AC joint irritation, with the following supplementation.

Claimant's claim is properly analyzed as an injury, rather than an occupational disease, because the condition arose suddenly, rather than gradually.

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<sup>1</sup> Claimant also challenges the ALJ's decision to exclude proposed Exhibit 45 (a "post-hearing" report from claimant's attending physician). We need not address this issue because we would reach the same result if we considered proposed Exhibit 45. We would also reach the same result if we considered the employer's "rebuttal report," proposed Exhibit 46 (a "post-hearing" report from an examining physician).

(See Ex. 10A-1). See *Smirnoff v. SAIF*, 188 Or App 438, 449 (2003) (the determining factor in deciding if a claim is for an injury or a disease “is whether the condition itself, not its symptoms, occurred gradually, rather than suddenly.”); *James M. Poole*, 56 Van Natta 2118, 2220 (2004).

In addition, because claimant was injured on August 23, 2003, ORS 656.266(2)(a)(2001) applies. See *James R. Laycock*, 54 Van Natta 2348 (2002). Accordingly, if claimant establishes that she suffered “an otherwise compensable injury,” the burden shifts to the employer to prove that the “otherwise compensable injury” is not the major contributing cause of claimant’s need for treatment or disability of his combined condition. See *Jack G. Scoggins*, 56 Van Natta 2534 (2004).

With these standards in mind, we agree with the ALJ’s evaluation of the medical evidence and conclude that claimant suffered a compensable left shoulder injury on August 23, 2001, and that the employer has not established that her “otherwise compensable injury” is not the major contributing cause of the need for treatment or disability of her combined condition (preexisting degeneration, a type III acromion, and AC joint irritation). Consequently, we also agree with the ALJ that claimant’s injury claim for a left shoulder AC joint irritation condition is compensable.

#### Interim Compensation/Penalties and Attorney Fees

The ALJ awarded interim compensation from February 26, 2003 through April 27, 2003 (60 days later). We find claimant entitled to interim compensation until July 10, 2003, the date of hearing, based on the following reasoning.

A worker is entitled to interim compensation if he or she has suffered a loss of earnings as a result of a work-related injury or occupational disease. *RSG Forest Products v. Jansen*, 127 Or App 247 (1994). To trigger a worker’s entitlement to interim compensation, the attending physician’s authorization must relate the worker’s inability to work to a job-related injury or occupational disease. *Gustavo B. Barajas*, 51 Van Natta 613, 614 (1999) *aff’d mem Nike, Inc. v. Barajas*, 166 Or App 237 (2000); *Robert W. Fagin*, 50 Van Natta 1680 (1998).

Here, when the March 7, 2003 Notice Closure closed claimant’s initial injury claim (for a disabling right paracervical and trapezeus strain), it established her substantive entitlement to temporary disability compensation, including temporary partial disability compensation through February 13, 2003. Thus, on January 23, 2003, claimant was already partially disabled, when Dr. Edelson,

claimant's then-current attending physician, stated that claimant would "be kept on light duty, no use of her left upper extremity," due to her injury-related AC joint irritation. (See Exs. 31-2-3, 31A).

Dr. Edelson's modified restrictions were ongoing, through February 26, 2003, when claimant asked the employer to accept her "new medical condition" claim for a left shoulder AC joint irritation. (Ex. 34A). Thus, claimant's date of disability for the compensable "new medical condition" claim was February 26, 2003 and claimant's entitlement to interim compensation under that claim began on that date. See *Mario R. Castaneda*, 49 Van Natta 2135 (1997) (worker entitled to procedural time loss for conditions accepted after claim closure, provided ORS 656.262(4) satisfied); *Greg W. Koenig*, 46 Van Natta 977 (1994) (carrier obligated to pay temporary disability on compensable claim as of the claimant's disability date); see also *Candice Marsden*, 50 Van Natta 1361, 1363 n.6 (1998) (if a period of temporary disability for a new medical condition that was accepted post-closure overlaps a period of temporary disability previously awarded at claim closure, an offset could be made to avoid duplicate payment).

The ALJ found that claimant was no longer entitled to interim compensation after April 27, 2003 -- 60 days after her "new medical condition" claim, reasoning that the claim was *de facto* denied at that time. Yet, claimant's entitlement to interim compensation did not end until the employer denied the claim, at the July 10, 2003 hearing.<sup>2</sup> See *Jones v. Emanuel Hospital*, 280 Or 147, 151 (1997) ("ORS 656.262 gives the employer two choices: deny the claim or make interim payments."); *James S. Espinoza*, 43 Van Natta 908, 910 (1991); (if a carrier does not issue a formal denial, its obligation to pay interim compensation continues through the date of hearing unless the claimant has returned to regular work); *Valerie D. Barry*, 41 Van Natta 199, 206 (1989) (same). Consequently, we modify the ALJ's award of interim compensation so that it begins February 26, 2003 and ends July 10, 2003.

Finally, we adopt the portions of the ALJ's order entitled "Penalty and Fees for failure to pay Interim Compensation," "Separate Fee for Failure to Timely

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<sup>2</sup> The employer argues that its March 14, 2003 denials of claimant's claims for biceps and rotator cuff tendinitis also denied the "new medical condition" claim for left shoulder AC joint irritation. (See Exs. 38, 39). We are not persuaded by the employer's argument, because the denial did not address the claim for AC joint irritation. See *Tattoo v. Barrett Business Services*, 118 Or App 348, 351-352 (1993) (carrier bound by the express language of its denial). Instead, we find that the employer first denied the "new medical condition" claim for left AC joint irritation at the July 10, 2003 hearing.

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Accept or Deny Left AC Joint Irritation, and “Attorney Fees Pursuant to ORS 656.386(1),” on pages 14-17, except that the penalty and “out-of-compensation” attorney fee awards are modified based on the modified compensation awarded by this order.

Claimant’s attorney is entitled to an assessed fee for services on review. ORS 656.382(2). After considering the factors 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 compensability and interim compensation issues is \$1,500, payable by the self-insured employer. In reaching this conclusion, we have particularly considered the time devoted to the compensability and interim compensation issues (as represented by claimant’s respondent’s brief), the complexity of the issues, and the value of the interest involved. Claimant is not entitled to an attorney fee for services on review regarding the penalty issue. *Saxton v. SAIF*, 80 Or App 631, *rev den* 302 Or 159 (1986).

#### ORDER

The ALJ’s order dated April 9, 2004 is modified in part and affirmed in part. In lieu of the ALJ’s award of interim compensation, claimant is awarded interim compensation from February 26, 2003 through July 10, 2003, less time worked and less any temporary disability previously paid for this period. The ALJ’s penalty and “out-of-compensation” attorney fee awards based on interim compensation are modified consistent with this order. The remainder of the order is affirmed. For services on review regarding the compensability and interim compensation issues, claimant’s attorney is awarded \$1,500, payable by the self-insured employer.

Entered at Salem, Oregon on November 17, 2004