

In the Matter of the Compensation of  
**WILLIAM M. KING, Claimant**

WCB Case No. 08-06881

ORDER ON REVIEW

Scott M McNutt Jr, Claimant Attorneys  
Andersen & Nyburg, Defense Attorneys

Reviewing Panel: Members Biehl, Langer, and Herman. Member Langer dissents.

The insurer requests review of those portions of Administrative Law Judge (ALJ) Brown's order that: (1) found that claimant was not barred from filing a new/omitted medical condition claim for a right rotator cuff tear; and (2) set aside the insurer's *de facto* denial of that condition. On review, the issues are preclusion and, potentially, compensability.

We adopt and affirm the ALJ's order.

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 \$4,000, payable by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief and his counsel's uncontested fee request), 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 the insurer. *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 February 23, 2009 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$4,000 payable by the insurer. 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 insurer.

Entered at Salem, Oregon and copies mailed to:

Member Langer dissenting.

I disagree with the majority's decision to affirm the ALJ's order holding that claimant's new or omitted medical condition claim for a right rotator cuff tear claim was not precluded. Specifically, I would conclude that the parties' February 2008 stipulation precluded claimant from asserting a claim for the right rotator cuff tear. Therefore, I respectfully dissent.

On April 18, 2007, claimant was injured in a motor vehicle accident (MVA) while working as a truck driver. (Ex. 3). The next day, he sought medical treatment for right arm and shoulder pain and was diagnosed with a right bicep tendon rupture. (Ex. 1).

In May 2007, Dr. Colville, his treating physician, released claimant to regular work, noting that he would recommend an MRI of the right shoulder if claimant still had residual problems. (Ex. 4-3). On July 20, 2007, claimant complained of ongoing weakness with overhead work. (Ex. 5). Dr. Colville believed it was "relatively unlikely" that claimant had a rotator cuff tear, but, nonetheless, recommended an MRI to evaluate the rotator cuff and shoulder structures before declaring claimant's right shoulder condition medically stationary. (*Id.*)

A radiologist interpreted a July 26, 2007 MRI as showing an "old complete rupture of the long head biceps tendon," "severe diffuse thinning of supraspinatus tendon with superimposed ventral full-thickness tearing and perhaps some retraction," and thinning of the infraspinatus and subscapularis tendons. (Ex. 6).

On August 3, 2007, Dr. Colville acknowledged that the radiologist had interpreted the biceps tendon rupture as "old," but he attributed the rupture to the work injury. (Ex. 7-1). Based on the MRI, Dr. Colville also diagnosed "a probable full-thickness rotator cuff tear involving the supraspinatus tendon." (*Id.*) He did not believe, however, that the MVA caused the rotator cuff changes. Dr. Colville further stated that, "It is impossible to tell whether all of the findings on the MRI are pre-existing, or whether some of them are acute, including the injury to the supraspinatus and infraspinatus and subscapularis tendons." (*Id.*)

On October 16, 2007, the insurer denied claimant's injury claim on the basis that there were no objective residuals from the MVA. (Ex. 8). On October 29, 2007, claimant was further evaluated for residual shoulder pain. (Ex. 8A). Claimant requested a hearing on the October 16, 2007 denial.

On February 11, 2008, a prior ALJ approved a stipulation between the parties and dismissed claimant's hearing request with prejudice. (Ex. 9-3-4). The stipulation provided:

“Claimant filed a claim \* \* \* alleging an injury to his right arm, sustained on 4/18/2007.

“[The insurer] issued a denial of right arm condition by letter of 10/16/07.

“Claimant filed a Request for Hearing to appeal the denial and raise other issues.

“The parties agree to settle all issues raised or raisable as of the time this Stipulation is approved by the [ALJ] as follows:

“[The insurer] shall rescind the denial and issue a Notice of Acceptance for biceps tendon rupture and pay compensation according to law.

“\* \* \*

“The Request for Hearing is dismissed with prejudice.”  
(Ex. 9-1-2).

The order approving the settlement agreement described it as “designed to fully and finally resolve the issues between the parties in the above-captioned case and claim.” (Ex. 9-3).

On March 18, 2008, the insurer accepted a right shoulder strain. (Ex. 10). On May 14, 2008, the insurer also accepted a right biceps tendon rupture. (Ex. 11).

Claimant continued to have right shoulder pain. A June 2008 MRI revealed a full thickness rotator cuff tear. (Ex. 13).

On June 18, 2008, Dr. Strum examined claimant at the insurer's request. Based on his review of the July 2007 MRI, he diagnosed a complete tear and retraction of the supraspinatus tendon and degenerative changes in the rotator cuff tendons. (Ex. 14-8). Dr. Strum noted that the June 2008 MRI revealed further retraction of the supraspinatus tendon. (Ex. 14-9). He opined that,

despite claimant's 20-year history of intermittent right shoulder pain, the tear was related to "a more recent event," and concluded that the MVA caused a material pathologic worsening of preexisting degenerative rotator cuff changes. (Ex. 14-10).

On August 27, 2008, claimant requested acceptance of the full thickness rotator cuff tear. (Ex. 15A). When the insurer did not accept or deny the claim, claimant requested a hearing regarding the insurer's *de facto* denial.

Relying on *Evangelical Lutheran Good Samaritan Socy. v. Bonham*, 176 Or App 490 (2001) and *Lori Cornelison*, 54 Van Natta 709 (2002), the ALJ concluded that claim preclusion did not bar claimant's new or omitted medical condition claim for the rotator cuff tear and set aside the denial. The ALJ further concluded that issue preclusion did not apply, because compensability of the rotator cuff tear was not actually litigated and determined. *Drews v. EBI Co.*, 310 Or 134 (1990). Alternatively, the ALJ reasoned that, because the rotator cuff tear was not diagnosed with certainty, the parties could not have negotiated compensability of that condition at the time of the stipulation. *See Good Samaritan Hosp. v. Stoddard*, 126 Or App 69, 73, *rev den*, 319 Or 572 (1994) (in construing a settlement agreement, the correct inquiry is whether the claimant's condition could have been negotiated before approval of the settlement).

On review, the insurer argues that *Bonham* does not establish that a right to file a new or omitted medical condition claim "cannot be bargained away." Claimant counters that ORS 656.262(7)(a), as interpreted in *Bonham*, effectively overruled *Stoddard* and its progeny. I agree with the insurer.

I acknowledge that the judicial doctrine of claim preclusion does not apply to new/omitted medical condition claims because a claimant may bring such claims at any time. ORS 656.262(6)(d); ORS 656.267(1). However, for the following reasons, I find the principles of claim preclusion and issue preclusion inapposite.

The question before us is the construction and effect of the parties' settlement of "all issues raised or raisable." A stipulation containing the "raised or raisable" language is not necessarily ambiguous. *See, e.g., Robuck v. SAIF*, 207 Or App 761, 764 (2006); *Stoddard*, 126 Or App at 72. Here, the parties do not argue that the stipulation itself is ambiguous. They agree that the rotator cuff condition in question was diagnosed before they negotiated the settlement. The parties merely disagree about the effect of the new or omitted condition claim statutes on claimant's post-stipulation claim for that condition. Accordingly, I would

conclude that the stipulation is not ambiguous and its construction is a matter of law.<sup>1</sup> *See Pollock v. Tri-Met, Inc.*, 144 Or App 431, 435 (1996) (when a settlement agreement is unambiguous in its terms, the interpretation of the agreement becomes a question of law to be decided based on an examination of the terms of the agreement as a whole).

Settlement stipulations may resolve any contested matter. ORS 656.236(1); *Trevisan v. SAIF*, 146 Or App 358, 362 (1997); *Marti J. Coleman*, 51 Van Natta 819, 822 (1999). The construction of a stipulation is based on contract law, not the principles of the judicially created doctrine of claim or issue preclusion. *See Pollock*, 144 Or App at 435 (settlement agreements are contracts and, as such, they implicate general principles of contract law). Although an analysis based on the law of issue and claim preclusion may have some benefit, the essential issue is what the parties agreed upon in their resolution of the compensation claim; in other words, “what ‘raised or raisable’ means in the context of the parties’ agreements.” *Weyerhaeuser v. Ellison*, 208 Or App 612, 616, *rev den*, 342 Or 254 (2006).<sup>2</sup> It is possible to waive any statutory right as part of a contractual agreement. *See, e.g., McMillan v. Follansbee*, 194 Or App 145, 154 (2004).

*Bonham* is not dispositive in this case. *Bonham* did not involve a stipulation. Rather, it involved a preclusive effect of prior adjudication on the claimant’s new medical condition diagnosed as a herniated disc. As such, the doctrine of issue and claim preclusion was directly implicated. The court concluded that ORS 656.262(7)(a) bars the application of claim preclusion, but not issue preclusion, to new medical condition claims. The court further reasoned that the issue of whether the claimant’s disc condition was actually litigated in the prior proceeding was an issue of fact and substantial evidence supported our conclusion that the disc condition was not actually litigated and determined in the first hearing. Therefore, issue preclusion did not bar the claimant’s new medical condition claim for the herniated disc. 176 Or App at 498-99.

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<sup>1</sup> Even if the phrase “all issues raised or raisable” is ambiguous and presents a question of fact, the result would be the same. *See, e.g., Richard D. Chick*, 58 Van Natta 91, 98 (2006). As discussed in further detail below, the rotator cuff condition had been diagnosed before the parties entered into the stipulation and its compensability could have been negotiated at that time.

<sup>2</sup> In *Ellison*, the court addressed whether the claimant was precluded by the parties’ stipulation to raise an issue of “date of injury,” which was not raised. The court held that the relevant question was whether the “date of injury” issue was within the category of “raisable” issues that the parties agreed was settled. 208 Or App at 616.

Unlike in *Bonham*, the issue here is what the parties agreed upon in their resolution of the compensation claim and, more narrowly, whether the rotator cuff condition, which had been diagnosed before the insurer issued the denial and before the parties entered into the stipulated agreement, is subject to the “raised or raisable” phrase. *Ellison*, 208 Or App at 616.

The stipulation agreement concerned compensability of claimant’s claim for a right arm injury sustained as a result of the on-the-job MVA, which the insurer had denied. At the time of the denial, the insurer’s position was that, in spite of claimant’s post-MVA treatment for right shoulder and arm pain and diagnoses of a rupture of the biceps tendon and rotator cuff tear, claimant sustained no injury as a result of the MVA. (Exs. 7, 8). Subsequently, the parties agreed that the condition for which the insurer was to provide compensation according to law was the biceps tendon rupture. (Ex. 9-2). The parties expressly and unambiguously waived all other issues raised or raisable. (Ex. 9-1). Accordingly, I would conclude that the waiver encompassed all issues regarding compensability of claimant’s injury that were either raised or raisable.

Claimant argues that his post-stipulation new or omitted condition claim is not precluded, because he had not filed a claim for the rotator cuff tear and the denial did not encompass it. However, this condition was diagnosed before the insurer denied the claim. (Exs. 6, 7). Therefore, the denial may be construed as a complete claim denial of compensability of all right arm and shoulder conditions for which claimant received treatment after the MVA. As such, compensability of the rotator cuff condition was an issue actually raised at the time of the stipulation. *See Robuck*, 207 Or App at 765 (the parties raised compensability of a combined condition at the time of the stipulation, because the condition had been diagnosed, had been raised by the claimant in his initial claim and by the carrier in its denial).

However, even if the denial did not deny compensability of the rotator cuff tear, that issue was raisable at the time of the stipulation. *See Stoddard*, 126 Or App at 73 (a denial is not a legal predicate for settlement; in determining whether the stipulation barred the claimant’s claim, the correct inquiry is whether the claimant’s condition and its compensability could have been negotiated before approval of the settlement).

Here, the ALJ reasoned that there was uncertainty with regard to the diagnosis of a rotator cuff tear and because claimant’s physician did not believe that the condition was work related. I disagree.

Before the insurer's October 16, 2007 denial, a July 2007 MRI had revealed, and Dr. Colville had reported, a probable full-thickness supraspinatus tendon tear. (Exs. 6, 7). In August 2007, Dr. Colville did not believe "it would be possible to differentiate between an old and new rupture" of the biceps tendon, or know "whether *all* of the findings on the MRI are pre-existing, or whether some of them are acute," including the injury to the supraspinatus tendon. (Ex. 7-1) (emphasis added). Although he did not believe "that the recent accident caused the rotator cuff changes seen on the MRI[.]" Dr. Colville found it impossible to tell whether the biceps tendon rupture and the supraspinatus tear were preexisting or acute. (*Id.*) His causation opinion concerning the biceps tendon rupture was based on claimant's report of an acute injury. (*Id.*)

Under these circumstances, I would find that the phrase in the February 2008 stipulation referring to "all issues raised or raisable" included the claimed rotator cuff tear. Claimant's treating physician diagnosed this condition before the stipulation was approved. (Ex. 6, 7). Claimant concedes that "the existence of a probable rotator cuff pathology was known at the time of the stipulation[.]" (Respondent's Brief at 7). Like the biceps tendon rupture, there was uncertainty as to whether the tear was preexisting or acute. (Ex. 7). The tear, however, was potentially an "objective residual" from the April 18, 2007 MVA. Moreover, claimant received follow-up treatment for his right shoulder residuals after the claim was denied and before the stipulation was approved. (Ex. 8A).

Thus, the compensability of the rotator cuff tear could have been negotiated before approval of the settlement.<sup>3</sup> *Stoddard*, 126 Or App at 73; *Safeway Stores Inc., v. Seney*, 124 Or App 450, 454 (1993). The compensability of claimant's

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<sup>3</sup> Claimant relies on *Cornelison*. In *Cornelison*, the claimant requested that the insurer accept an L5-S1 disc condition. 54 Van Natta at 709. The insurer argued that the claimant's claim for that condition was precluded by an earlier stipulation because the claimed condition was diagnosed before the stipulation was signed and the claimant had the opportunity to obtain a causation opinion related to that condition. *Id.* at 711. The stipulation provided that the insurer would rescind its compensability denial and accept the claimant's claim for an L4-5 disc condition and hernia related to the claimant's work injury. *Id.* at 710. The parties agreed that the stipulation resolved "all issues raised or raisable prior to its date of approval." *Id.* We noted that the treating physician's findings, before the stipulation was signed, may have indicated a problem with the L5-S1 disc, but that he indicated that the source of the claimant's problems was at L4-5. *Id.* at 712. (Emphasis added). We found "no evidence that [the] claimant was diagnosed with an L5-S1 disc condition before the stipulation was signed." *Id.* (Emphasis added). Thus, we concluded that the compensability of the L5-S1 disc condition could not have been negotiated before approval of the settlement. Therefore, a claim for that condition was not precluded. *Id.*

Here, unlike the claimed condition in *Cornelison*, claimant's right rotator cuff tear was diagnosed before the stipulation was approved. Therefore, *Cornelison* is distinguishable.

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rotator cuff tear was “raisable” at the time the February 2008 stipulation was approved, and disposed of through that stipulation. *See McGrew v. Express Services, Inc.*, 147 Or App 257 (1997) (before the stipulation was approved, a physician had indicated that the claimant had reactive depression related to a 1987 injury; because the stipulation dismissed with prejudice the request for hearing as to all issues raised or raisable as of the date of the stipulation’s approval, the stipulation and order encompassed the reactive depression); *see also SAIF v. Wolff*, 148 Or App 296, 299-300, *adhered to on recons*, 151 Or App 398 (1997) (stipulation dismissing all issues raised or raisable with respect to the claimant’s accepted knee condition barred him from seeking compensation for a related knee condition that was diagnosed before the settlement).

Based on the aforementioned reasoning, I would conclude that the stipulation barred claimant from seeking compensation for the rotator cuff tear. Because the majority concludes otherwise, I respectfully dissent.