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In the Matter of the Compensation of  
**TIMOTHY C. GUILD, Claimant**  
Own Motion No. 15-00066OM  
OWN MOTION ORDER REVIEWING CARRIER CLOSURE  
Ransom Gilbertson Martin et al, Claimant Attorneys  
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Weddell and Curey.

Claimant requests review of the August 21, 2015 Own Motion Notice of Closure that did not award permanent total disability (PTD) benefits for his “post-aggravation rights” new/omitted medical condition (post traumatic arthritis of the right shoulder).<sup>1</sup> Claimant seeks PTD benefits. Based on the following reasoning, we affirm the Notice of Closure.

FINDINGS OF FACT<sup>2</sup>

Claimant’s date of birth is May 13, 1956. (Ex. 57-1). In November 1980, he was treated for right shoulder acute traumatic bursitis, which eventually improved. (Ex. 16-3, -4). In December 2001, he sought treatment for right shoulder pain and underwent an MRI, which indicated a “suspected” injury to the anterior superior glenoid labrum. (Exs. 1, 2). However, Dr. Dietrich, his attending physician at that time, considered this relatively small, if it existed. (Ex. 16-5). Claimant continued to perform his regular work at a meat packing plant and required no further right shoulder treatment until after the April 2004 compensable right shoulder injury. (Ex. 57-7-9).

On April 19, 2004, claimant sustained a compensable right shoulder injury while working as a shipping floor supervisor at a meat packing plant, a job that required physical labor and supervising 35 workers. (Ex. 57-7-9). In August 2004,

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<sup>1</sup> Claimant’s April 19, 2004 claim was accepted as a disabling claim and was first closed on November 17, 2004. Thus, claimant’s aggravation rights expired on November 17, 2009. Therefore, when claimant sought claim reopening in June 2014, the claim was within our Own Motion jurisdiction. ORS 656.278(1). On July 10, 2014, the SAIF Corporation voluntarily reopened claimant’s Own Motion claim for a “post-aggravation rights” new/omitted medical condition (traumatic arthritis of the right shoulder). On August 21, 2015, SAIF issued its Notice of Closure.

<sup>2</sup> In addition to the record submitted by SAIF, claimant submitted three additional documents, which are numbered as follows. An April 22, 2015 conversation summary from claimant’s attorney to his attending physician, Dr. Fry, is numbered as Exhibit 51A. An October 16, 2015 affidavit from claimant’s wife is numbered as Exhibit 56. An October 16, 2015 affidavit from claimant (with an attached, undated transcript of a statement from claimant taken by his attorney) is numbered as Exhibit 57.

Dr. Dietrich performed surgery (arthroscopy, debridement of labrum, debridement of unstable chondromalacia, open resection of distal clavicle). (Ex. 7). Operative findings included “marked degenerative post-traumatic arthrosis of the AC joint,” and the post-operative diagnosis was “torn labrum right shoulder, deep unstable chondromalacia right shoulder, AC joint arthrosis”. (Ex. 7-1). After recovering from surgery, claimant self-limited for a period and eventually returned to full duty work as a meat packer. (Exs. 34-2, 57-9).

The SAIF Corporation accepted a “complex tear of the anterior portion of the glenoid, right shoulder.” (Exs. 8, 11). A November 17, 2004 Notice of Closure awarded no permanent partial disability (PPD) benefits. (Ex. 10). Claimant’s aggravation rights regarding the 2004 injury claim expired on November 17, 2009.

On July 14, 2010, claimant sustained another compensable right shoulder injury while working at the same meat packing plant, this time in his capacity as “kitchen manager,” which included both physical labor and supervisory duties. (Ex. 57-10, -11). SAIF remained the insurer for the at-injury meat packing plant and accepted a “right shoulder strain” regarding the 2010 work injury. (Ex. 21).

On December 23, 2010, claimant underwent surgery for the July 2010 work injury (arthroscopy with posterior Bankart repair, anterior capsulorrhaphy, SLAP reconstruction, biceps tenodesis, arch decompression, and rotator interval closure). (Exs. 22-1, 23-1, -3).

On April 5, 2011, Dr. Fry became claimant’s attending physician. (Ex. 24). He opined that, considering the severity of the 2010 injury and the extent of the surgical repair, it was very unlikely that claimant would ever return to his previous employment, and that he would need job retraining. (Ex. 23-3).

On April 8, 2011, SAIF denied several conditions as not compensably related to the 2010 work injury, including a Snyder type II SLAP lesion, right shoulder. (Ex. 25).

An August 12, 2011 Notice of Closure awarded no PPD for the accepted right shoulder strain regarding the 2010 work injury. (Ex. 27). A November 17, 2011 Order on Reconsideration modified that award to 12 percent whole person impairment regarding the 2010 work injury. (Ex. 31).

On September 28, 2012, we adopted and affirmed a February 2012 Administrative Law Judge's order that addressed SAIF's April 2011 denial regarding the 2010 injury claim. (Exs. 25, 34). Pursuant to these orders, SAIF's denial of the Snyder type II SLAP lesion was set aside and its denial of the remaining conditions (recurrent transient subluxation, grade 3 anterior inferior predominant instability, grade 1 instability, rotator interval disruption, anterior posterior Bankart lesion, subluxation biceps tendon with severe tendonitis, and subacromial impingement) was upheld. (*Id.*)

Subsequently, SAIF accepted the SLAP lesion condition, and issued a March 16, 2012 Notice of Closure that increased the 2010 work injury PPD award to 16 percent whole person impairment and 26 percent work disability. (Exs. 35, 36). The whole person impairment award was based on the following combined values: a 7 percent value for loss of range of motion (ROM); a 5 percent value for surgery (acromioplasty); and a 5 percent value for chronic condition impairment. (Ex. 35-3). The social-vocational factors included an adaptability value of 5 based on a base functional capacity (BFC) of "heavy" compared to a residual functional capacity (RFC) of "light." (*Id.*)

On June 15, 2012, the parties entered into a Claim Disposition Agreement (CDA), whereby claimant fully released all benefits regarding the 2010 injury claim, except medical service-related benefits.<sup>3</sup>

On June 19, 2012, Dr. Fry noted that claimant had stopped working and was retraining himself. He also indicated that typing and keyboarding created a significant amount of difficulty for claimant. (Ex. 38-3).

In December 2013, Dr. Brenneke examined claimant on behalf of SAIF and noted that he was currently "off work." (Ex. 41-10). Dr. Brenneke opined that the cause of claimant's right shoulder degenerative changes was the arthritic changes of the glenohumeral joint. (Ex. 41-15). He explained that these changes were present at the time of Dr. Dietrich's 2004 surgery and that they had progressed since that time. (*Id.*)

In March 2014, Dr. Fry discussed the effect of claimant's injuries and surgeries on his right shoulder arthritis condition. (Ex. 45-3). He noted that the only additional treatment available for the right shoulder condition was a complete

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<sup>3</sup> Although the record does not include a copy of this June 15, 2012 CDA, as a Board order, a CDA is subject to "administrative notice." See *Brian M. Eggman*, 49 Van Natta 1835 (1997) (we may take administrative notice of agency orders involving the same claimant).

shoulder replacement, which claimant may have to consider at some point in the future. (*Id.*) Dr. Fry stated that claimant was trying to manage without such surgery and the non-narcotic pain management was at least moderately effective. (*Id.*) He also noted that claimant had a permanent right shoulder condition and would never be able to use that shoulder for his previous employment. (*Id.*)

In June 2014, Dr. Brenneke opined that claimant's right shoulder traumatic arthritis condition developed as a consequence of the 2004 work injury, which was the major contributing cause of that condition. (Ex. 46-4). Dr. Fry concurred with Dr. Brenneke's opinion. (Ex. 49-3).

On July 10, 2014, SAIF accepted and voluntarily reopened claimant's Own Motion claim for a "post-aggravation rights" new/omitted medical condition (traumatic arthritis of the right shoulder). (Exs. 47, 48).

On July 17, 2014, Dr. Fry opined that claimant had complete disability of his right shoulder. (Ex. 49-1). In addition, he noted that, although claimant had been advised of the possible option of a complete shoulder replacement, it was not clear that surgery would improve his function or allow him to return to work. Dr. Fry observed that a shoulder replacement might improve claimant's discomfort, but he would still have complete disability of the shoulder. (*Id.*) Dr. Fry concurred with Dr. Brenneke's opinion that claimant's shoulder disability was due in major part (about 75 percent) to the 2004 injury, with 15 percent contribution from non-work activities and 10 percent from the 2010 injury. (Ex. 49-3). He stated that claimant had complete and permanent disability of the right shoulder and would be permanently off work due to "this injury." (*Id.*) Finally, Dr. Fry measured claimant's range of motion and noted that he did not have significant pain behaviors. (*Id.*)

On October 2, 2014, Ms. Berkovitch, physical therapist, performed a work capacity evaluation (WCE). (Ex. 50). She noted that claimant had not worked since closure of the 2010 injury claim. (Ex. 50-2). Ms. Berkovitch reported multiple inconsistencies and pain behavior during the WCE. (Ex. 50). Notwithstanding these inconsistencies, she reported that claimant's performance was a "valid representation of the amount of activity he can *at least* perform." (Ex. 50-2 (emphasis in original)). She concluded that claimant had the ability to work in more than the light category, but not quite in the light-medium category. (Ex. 50-5). She also reported that he had the following abilities: unrestricted tolerances for left forward reaching, trunk rotation, and sitting; frequent to occasional tolerances for walking; and frequent left hand coordination. (*Id.*)

On February 9, 2015, Dr. Fry referred to the 2004 and 2010 injuries in noting claimant's ongoing right shoulder problems. (Ex. 51-1). He stated that claimant "is not on any narcotic pain medication on a regular basis, although [he] occasionally uses hydrocodone." (Ex. 51-3). Dr. Fry opined that claimant's right shoulder (his dominant side) was completely disabled and there was no correction possible. (*Id.*) He stated that, because of chronic pain, atrophy, and loss of range of motion, claimant had distracting pain that made other work impossible. (*Id.*) He noted that claimant had tried job retraining for a more sedentary job and this had failed. He concluded that claimant was completely disabled. (*Id.*)

In April 2015, Dr. Fry agreed with a conversation summary that claimant's newly accepted arthritis condition rendered him totally permanently disabled, and he was unable to seek gainful employment. (Ex. 51A-1). He agreed that claimant had a regular narcotic prescription that prevented him from concentrating on the job. Also, he agreed that claimant "cannot sit at a desk in a manner that would be consistent with his work restrictions because of the increased pain and pressure from his arthritic condition." (*Id.*) He agreed that he had not released claimant to work and, even if he was released to work, he would have good days and bad days and would be unable to maintain a work schedule to enable him to work. Dr. Fry agreed that claimant had tried to return to school in an effort to find employment, but the continued progression of his arthritis condition rendered a job search futile. (*Id.*) Given claimant's age, education, and his injury, Dr. Fry did not believe that there were any jobs that claimant could perform. (*Id.*)

An August 21, 2015 Own Motion Notice of Closure did not award PTD benefits or any additional unscheduled PPD benefits for the "post-aggravation rights" new/omitted medical condition (post traumatic arthritis of the right shoulder) concerning claimant's 2004 injury claim. (Ex. 54).

Claimant requested review, seeking PTD. He submitted affidavits from himself and his wife. (Exs. 56, 57). Claimant's wife attested that his plan was to retrain himself or find another job and continue working until an appropriate retirement age of 65. (Ex. 56-1).

Claimant summarized his work history, which included physical labor as well as supervisory work. He also detailed education, which included high school graduation, a year of community college, a criminal arts degree, and an "associates arts transferable degree, science degree." (Ex. 57-2, -6, -13). After his surgery for the 2010 injury, claimant was released to light duty and worked for a year and a half rewriting catalogs for the "at-injury" meat packing company. (Ex. 57-11-12). Thereafter, he was terminated. (Ex. 57-12).

Claimant attested that he continued to look for work, and he developed a retraining program for himself, earning an “associates arts transferable degree, science degree.” (Ex. 57-13). He declared that he was advised that he would not be able to do any of the jobs for which he had been training. (Ex. 57-15). He stated that Dr. Fry told him that he was permanently disabled, his condition would not improve, and he was not available for any kind of work because of his “scattered ability to keep a schedule.” (Ex. 57-15-16). He recounted that Dr. Fry also told him that continuing with training was futile. (Ex. 57-16). Claimant attested that he would still be working if not for his shoulder injury and that he had planned to work until he was 65 to 70 years old. (Ex. 57-17).

### CONCLUSIONS OF LAW AND OPINION

Claimant’s 2004 injury claim was reopened for the processing of a “post-aggravation rights” new/omitted medical condition (traumatic arthritis of the right shoulder). Such claims may qualify for payment of permanent disability compensation, including PTD. ORS 656.278(1)(b); *Goddard v. Liberty Northwest Ins. Corp.*, 193 Or App 238 (2004); *James S. Daly*, 58 Van Natta 2355 (2006); *Sherlee M. Samel*, 56 Van Natta 931, 938 (2004).

Because the claim is in Own Motion status, the Notice of Closure issued under ORS 656.278(6), not ORS 656.206 or ORS 656.268. Nevertheless, where consistent with the provisions of ORS 656.278, the 2005 amendments to ORS 656.206 apply to Own Motion Notices of Closure that issue on or after January 1, 2006. *David C. Drader*, 58 Van Natta 3093, 3098 (2006). Thus, because this Own Motion Notice of Closure issued after January 1, 2006, the 2005 amendments to ORS 656.206 apply. *Boyd W. Jensen*, 65 Van Natta 2156, 2162 (2012).

ORS 656.206(1)(d) (2005) provides that PTD “means, notwithstanding ORS 656.225, the loss, including preexisting disability, of use or function of any portion of the body which permanently incapacitates the worker from regularly performing work at a gainful and suitable occupation.” “Regularly performing work” means “the ability of the worker to discharge the essential functions of the job” and “[s]uitable occupation’ means one that the worker has the ability and the training or experience to perform, or an occupation that the worker is able to perform after rehabilitation.” ORS 656.206(1)(e), (f) (2005). Claimant has the burden of proving PTD status and must establish that he is “willing to seek regular gainful employment” and that he has “made reasonable efforts to obtain such employment.” ORS 656.206(3) (2005).<sup>4</sup>

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<sup>4</sup> *SAIF v. Stephen*, 308 Or 41, 47-48 (1989), interpreted statutory language in ORS 656.206(3) that remains unchanged and held that “before a claimant is entitled to PTD he or she must establish that,

In *Daly*, we awarded the claimant PTD for a “post-aggravation rights” new/omitted medical condition. 58 Van Natta at 2374. Our analysis of ORS 656.206, in conjunction with ORS 656.278, resulted in the following conclusions. First, disability for a previously accepted condition<sup>5</sup> is considered as it existed at the last claim closure that preceded the expiration of the claimant’s 5-year aggravation rights.<sup>6</sup> *Daly*, 58 Van Natta at 2361. Second, any disability that predates the initial compensable injury is also considered. *Id.* at 2364-65. Third, when such disabilities exist, they are considered with any disability from the “post-aggravation rights” new/omitted medical condition to determine whether the claimant has established entitlement to PTD. *Id.* at 2371.

Considering those factors, claimant may establish entitlement to PTD by proving that: (1) he is completely physically disabled and therefore precluded from gainful employment; or (2) his physical impairment, combined with a number of social and vocational factors, effectively prevents gainful employment under the “odd lot” doctrine. *Id.* at 2368; *see also Elsea v. Liberty Mutual Ins.*, 277 Or App 475, 478-79 (2016); *Clark v. Boise Cascade*, 72 Or App 397, 399 (1985); *Nancy J. Ferguson*, 64 Van Natta 2315 (2012); *Drader*, 58 Van Natta at 3099.

Here, Dr. Fry took into account claimant’s age and education in opining that he was totally permanently disabled. (Ex. 51A). Under such circumstances, the record does not establish that claimant is completely *physically* disabled. Therefore, we turn to the “odd lot” doctrine. *See Clark*, 72 Or App at 399; *Adolfo Lopez*, 57 Van Natta 1056, 1063 (2005).

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but for the compensable injury, he or she (1) is or would be willing to seek gainful employment and (2) has or would have made reasonable efforts to obtain such employment” unless seeking such work would have been futile.

<sup>5</sup> Here, claimant’s previously accepted condition regarding the “post-aggravation rights” new/omitted medical condition claim (traumatic arthritis of the right shoulder) currently being rated was the “complex unstable tear of the anterior portion of the glenoid, right shoulder,” which was last closed in November 2004 (before the expiration of his 5-year aggravation rights on November 17, 2009). (Exs. 10).

<sup>6</sup> We reasoned that, under this method, the PTD evaluation would include consideration of permanent disability from the accepted conditions occurring before the expiration of aggravation rights, but would not include consideration of permanent disability from any “worsened condition” after the expiration of aggravation rights, which would be contrary to the statutory scheme and the rationale expressed in *Goddard*, *Samel*, and *Jimmy O. Dougan*, 54 Van Natta 1213, *recons*, 54 Van Natta 1552 (2002), *aff’d Dougan v. SAIF*, 193 Or App 767 (2004), *vacated*, 339 Or 1 (2005). *Daly*, 58 Van Natta at 2362.

Under the “odd lot” doctrine, a disabled person, capable of performing work of some kind, may still be permanently disabled due to a combination of his physical condition and certain non-medical factors, such as age, education, adaptability to nonphysical labor, mental capacity, and emotional conditions. *See Clark*, 72 Or App at 399; *Welch v. Banister Pipeline*, 70 Or App 699, 701 (1984); *Stephen H. Johnson*, 55 Van Natta 3074, 3078 (2003).

We begin by determining whether claimant had any “preexisting disability” that may be considered in determining his entitlement to PTD. Resolution of that issue turns on whether the record establishes that his right shoulder condition (or any other condition) caused “disabling effects” before his 2004 compensable injury. *Fimbres v. SAIF*, 197 Or App 613 (2005); *Daly*, 58 Van Natta at 2365. In *Fimbres*, the court explained that the ordinary meaning of “disability” includes a “physical or mental illness, injury, or condition that incapacitates in any way.” 197 Or App at 617 n 1 (quoting *Lecangdam v. SAIF*, 185 Or App 276, 282 n 4 (2002) (internal quotations omitted)).

In November 1980, claimant was treated for right shoulder acute traumatic bursitis, which eventually improved. (Ex. 16-3, -4). In December 2001, he sought treatment for right shoulder pain and underwent an MRI, which indicated a “suspected injury to the anterior superior glenoid labrum.” (Exs. 1, 2). However, Dr. Dietrich considered this “suspected injury” relatively small, if it existed. (Ex. 16-5). Claimant continued to perform his regular work at a meat packing plant. (Ex. 57-7-9). In addition, he required no further right shoulder treatment until his April 2004 work injury.

Therefore, the record does not establish that claimant had a right shoulder condition (or any other condition) that caused “disabling effects” before the 2004 injury. Thus, he had no preexisting disability that may be considered in determining his entitlement to PTD.

The November 17, 2004 Notice of Closure was the last claim closure that preceded the expiration of claimant’s 5-year aggravation rights. (Ex. 10). At that time, the previously accepted condition (complex tear of the anterior portion of the glenoid, right shoulder) resulted in no permanent disability benefits. (*Id.*) Therefore, there is no disability for the previously accepted condition to be considered as it existed at the last claim closure that preceded the expiration of claimant’s 5-year aggravation rights.

The remaining factor that may be considered in determining whether claimant has established entitlement to PTD is disability from the “post-aggravation rights” new/omitted medical condition (post traumatic arthritis of the right shoulder). *Daly*, 58 Van Natta at 2371.

Dr. Fry initially opined that, considering the severity of the 2010 injury and the extent of the surgical repair for that injury, it was very unlikely that claimant would ever return to his previous employment, stating that he would need job retraining. (Ex. 23-3). Subsequently, Dr. Fry discussed the effect of claimant’s *injuries* and *surgeries* on his arthritis condition. (Ex. 45-3). In this regard, we note that claimant sustained work injuries in 2004 and 2010, which resulted in an August 2004 surgery (arthroscopy, debridement of labrum, debridement of unstable chondromalacia, open resection of distal clavicle) and a December 2010 surgery (arthroscopy with posterior Bankart repair, anterior capsulorrhaphy, SLAP reconstruction, biceps tenodesis, arch decompression, and rotator interval closure), respectively. (Exs. 7, 22-1, 23-1, -3). Moreover, in noting claimant’s ongoing right shoulder problems, Dr. Fry referred to the 2004 and 2010 work injuries. (Ex. 51-1). In addition, he agreed with the opinion of Dr. Brenneke, examining physician, which attributed claimant’s right shoulder disability to the following factors: 75 percent due to the 2004 injury; 15 percent due to non-work activities; and 10 percent due to the 2010 injury. (Exs. 46, 49-3). Finally, Dr. Fry subsequently agreed that claimant’s newly accepted arthritis condition rendered him totally permanently disabled. (Ex. 51A-1).

As summarized above, Dr. Fry repeatedly considered the 2010 injury in addressing the cause of claimant’s right shoulder disability. To the extent that he changed his opinion when he agreed that claimant’s newly accepted arthritis condition rendered him totally permanently disabled, he did not explain that change of opinion. Thus, we do not consider Dr. Fry’s opinion to be persuasive. *See Moe v. Ceiling Systems*, 44 Or App 429 (1980) (unexplained change of opinion given little probative weight); *cf. Kelso v. City of Salem*, 87 Or App 630, 634 (1987) (where there was a reasonable explanation in the record for a physician’s change of opinion, that opinion was persuasive).

In addition, Dr. Fry’s opinion does not distinguish between disability which may be considered in evaluating a claimant’s PTD status under *Daly* (*i.e.*, disability for the previously accepted condition as it existed as of the last claim closure before the expiration of claimant’s aggravation rights, disability that preceded the initial compensable injury, and disability from the “post-aggravation rights” new/omitted medical condition) and disability from other causes, such as

his right shoulder injury that occurred after the 2004 work injury. *See Shakur Shabazz*, 65 Van Natta 1551, 1557 (2013) (medical opinion did not establish PTD because it did not distinguish between disability that may be considered in evaluating a claimant's PTD status under *Daly* and disability from other causes); *Patrick S. Holman*, 65 Van Natta 1044, 1051-52 (2013) (medical opinion did not establish PTD status because it considered unaccepted conditions that did not cause disabling effects before the initial compensable injury); *Joseph P. Hapka*, 61 Van Natta 1148, 1159 (2009) (same). Because Dr. Fry's opinion considered conditions that may not be considered in determining claimant's PTD status under this new/omitted medical condition claim for his 2004 injury, we do not find it persuasive.<sup>7</sup>

Consequently, this record does not establish that claimant is PTD.<sup>8</sup> Accordingly, we affirm the August 21, 2015 Notice of Closure.

**IT IS SO ORDERED.**

Entered at Salem, Oregon on May 16, 2016

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<sup>7</sup> There is no other evidence regarding claimant's PTD status.

<sup>8</sup> SAIF also argues that claimant has not established the "work force" element. However, as a result of our decision, we need not address the "work force" element, including determination of whether claimant's affidavit establishes that he is "willing to seek regular gainful employment" and that he has "made reasonable efforts to obtain such employment." ORS 656.206(3) (2005); *Elsea*, 277 Or App at 483; *Holman*, 65 Van Natta at 1052 n 6.