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In the Matter of the Compensation of  
**THOMAS A. SCHMID, Claimant**  
WCB Case No. 01-04397  
ORDER ON REVIEW  
Gatti Gatti Et Al, Claimant Attorneys  
Johnson Nyburg & Andersen, Defense Attorneys

Reviewing Panel: Members Phillips Polich, Bock, Lowell, Langer, and Biehl.<sup>1</sup>

Claimant requests review of Administrative Law Judge (ALJ) Howell's order that: (1) upheld the insurer's denial of his claim for a right shoulder injury; and (2) declined to assess a penalty for an allegedly unreasonable denial. On review, the issues are compensability of a right shoulder condition and penalties. We reverse in part and affirm in part.

FINDINGS OF FACT

We adopt the ALJ's findings of fact.

CONCLUSIONS OF LAW AND OPINION

Compensability

Claimant is a metal fabricator who works primarily with stainless steel. (Tr. 5). On January 23, 2001, claimant worked about four hours polishing a large tank by hand using a Scotch Brite pad. (Tr. 6). Claimant primarily used his right hand and arm to perform that work. (*Id.*) At the end of day, claimant felt soreness in the right shoulder area. (Tr. 7).

On January 25, 2001, claimant worked about three hours hand polishing another large tank. (Tr. 9). At the end of that work operation, claimant again experienced right shoulder pain. (Tr. 10). The shoulder pain persisted. (Tr. 11).

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<sup>1</sup> On June 7, 2002, pursuant to a notice of public meeting, the Board decided to sit together as a panel of five to review a designated group of cases. This case was one of that limited group. Although reviewed by all of the members, this case does not involve an issue of first impression that has a profound impact on the workers' compensation system.

On January 29, 2001, claimant sought medical treatment from Dr. Moll. (Ex. 10). Dr. Moll found inflammation and spasm in the supraspinatus muscle around claimant's right shoulder, and diagnosed overuse sprain/strain of the right shoulder associated with tendonitis. (Ex. 11). On February 6, 2001, claimant filed a claim for a right shoulder stain condition. (Ex. 12).

In March 2001, Dr. Moll referred claimant to Dr. Stringham for treatment. (Ex. 13). Dr. Stringham diagnosed "right shoulder strain/tendonitis/bursitis" resulting from claimant's tank polishing activities. (Ex. 13-2).

In April 2001, claimant was evaluated by Drs. Green and Courogen at the insurer's request. (Ex. 18). Drs. Green and Courogen diagnosed: (1) degenerative right acromioclavicular joint arthrosis and rotator cuff tendinosis; (2) cervical spine degenerative disease; and, (3) possible bilateral ulnar neuropathy. (Ex. 18-4). Drs. Green and Courogen opined that all of those conditions preexisted claimant's work exposure (tank polishing). (Ex. 18-5). Drs. Green and Courogen further opined that claimant's tank polishing duties had combined with the preexisting degenerative changes, and that (at the time of their evaluation) a combined condition was no longer present; *i.e.*, claimant's "current" symptomatology was the direct result degenerative changes of his shoulder and neck. (*Id.*)

The insurer denied the claim. (Ex. 19). Claimant requested a hearing.

Relying on the medical opinion of Drs. Courogen and Green, the ALJ concluded that claimant had a preexisting right shoulder degenerative condition that "combined" with his January 2001 work injury. The ALJ further concluded, based on their opinions, that the major contributing cause of claimant's need for treatment of the right shoulder condition was the preexisting right shoulder degenerative condition. On this basis, the ALJ upheld the insurer's denial of claimant's right shoulder condition.

On review, claimant points out that Dr. Stringham (attending physician) did not agree with Dr. Green and Dr. Courogen that claimant suffered from a preexisting condition. More specifically, claimant asserts that, according to Dr. Stringham, there was no evidence in the history, clinical examination, plain x-rays or MRI that claimant had a preexisting right shoulder condition. Relying on Dr. Stringham's opinion, claimant contends that his right shoulder condition is not a "combined" condition. Therefore, claimant reasons that the denial of his right shoulder condition should be set aside.

ORS 656.005(7)(a)(B) provides that if an injury combines at any time with a preexisting condition to cause or prolong disability or a need for treatment, the combined condition is compensable if the work injury was the major contributing cause of the disability and/or need for treatment of the combined condition. A combined condition occurs when a new injury combines with a preexisting condition to cause or prolong either disability or a need for treatment. *Multifoods Specialty Distribution v. McAtee*, 333 Or 629 (2002). In order for there to be a "combined condition," there must be at least two conditions that merge or exist harmoniously. *Luckhurst v. Bank of America*, 167 Or App 11 (2000).

Therefore, in order to determine whether this claim involves a "combined condition," we examine the medical record for a persuasive medical opinion that the condition suffered by claimant in the January 2001 work injury merged or existed harmoniously with a preexisting condition. In the absence of such an opinion, ORS 656.005(7)(a)(B) is not applicable. ORS 656.005(7)(a); *Beverly Enterprises v. Michl*, 150 Or App 357 (1997); *Frances K. Coney*, 54 Van Natta 176 (2002); *William J. Barabash*, 50 Van Natta 1561 (1998).

Dr. Green and Dr. Courogen indicated that an April 19, 2001 MRI scan demonstrated evidence of degenerative changes in both the shoulder and the neck. (Ex. 18-5). They further believed that claimant's work injury had combined with the preexisting degenerative changes "exacerbating his rotator cuff tendinosis and possibly his cervical spine symptomatology." (Ex. 18-6). They opined that the injury was "no longer" the major contributing cause of claimant's right shoulder condition. (*Id.*)

Dr. Stringham agreed that the April 2001 demonstrated preexisting degenerative changes in claimant's neck.<sup>2</sup> (Ex. 19C-2). However, he did not agree that the MRI showed degenerative changes in the right shoulder. (*Id.*) Explaining that the x-ray from Dr. Craven, a Board Certified Radiologist, did not support the existence of chronic degenerative changes within the shoulder, Dr. Stringham opined that the MRI findings were consistent with the diagnosis of right shoulder "strain/tendonitis/bursitis."<sup>3</sup> (Ex. 19C-1; 19C-2). Based on claimant's history,

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<sup>2</sup> Dr. Stringham did not attribute any portion of claimant's neck condition to work. Ex. 19-2).

<sup>3</sup> Dr. Craven's April 2001 x-ray report is not in the record. According to Dr. Stringham, Dr. Craven reported "[n]o evidence of abnormality in the right shoulder" and "no evidence of soft tissue calcification." (Ex. 19C-2). Dr. Stringham further reported that Dr. Craven found "fluid in the subacromial bursa" and "slightly increased signal in the supraspinatus tendon." (*Id.*)

clinical evaluation, plain x-rays, and the MRI, Dr. Stringham concluded that claimant's right shoulder problem was not a combined condition. (Ex. 19C-2).

Dr. Green addressed Dr. Stringham's opinion in a July 23, 2001 chart review. (Ex. 20). Dr. Green stated that the April 19, 2001 MRI findings of "fluid in the subacromial bursa with increase signal on the supraspinatus tendon" are "most likely" degenerative based on the fast spin echo images. (Ex. 20-2). Dr. Green further stated that such MRI findings suggest chronic degenerative changes that would very likely be present in the opposite shoulder if this were imaged. (Ex. 20-3). Dr. Green reiterated that the symptoms reported by claimant were the result of prior degenerative changes that *may* have combined with the work incident to cause symptomatic worsening, but that in any event, any such worsening would be expected to resolve spontaneously. (*Id.*)

In response to Dr. Green, Dr. Stringham continued to disagree that the MRI findings showed a preexisting right shoulder condition. (Ex. 22). Dr. Stringham further explained that the imaging findings were not the key issue; rather the key was the history and the physiologic findings.<sup>4</sup> (*Id.*) Reasoning that the mechanism of injury (repetitive over-head use of the right shoulder) was consistent with the diagnosis of "strain/tendonitis/bursitis," Dr. Stringham reiterated that work activity was the major contributing cause of claimant's right shoulder condition. (Ex. 22-2).

Dr. Stringham also pointed out that, if Dr. Green was correct (that claimant had degenerative changes in both shoulders), the ranges of motion in claimant's shoulders would be equal. Finding "a measurable difference" in the ranges of motion in claimant's right shoulder in comparison to his left shoulder, Dr. Stringham opined that the difference was "clearly" related to claimant's work.<sup>5</sup> (*Id.*)

After reviewing this medical record, especially Dr. Green's use of the word *may* in responding to Dr. Stringham's opinion, and Dr. Green's failure to explain (in light of his opinion that claimant had equal degenerative changes in both

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<sup>4</sup> We note that Dr. Stringham also reported that claimant's plain x-ray study revealed no evidence of any preexisting degenerative changes in claimant's right shoulder. (Exs. 13-2; 19C-2). We also note that Dr. Green does not directly comment on the plain x-ray study (the x-ray study itself is not in the record).

<sup>5</sup> Drs. Courogen and Green reported that claimant's right shoulder range of motion was decreased in comparison to the left shoulder. (Ex. 18-4).

shoulders) why claimant did not exhibit equal ranges of motion in both shoulders, we do not find Dr. Courogen's and Dr. Green's "combined condition" opinion persuasive. Consequently, we conclude that ORS 656.005(7)(a)(B) is not applicable, and that a "material contributing cause" standard applies to this claim. ORS 656.005(7)(a); *Beverly Enterprises*, 150 Or App at 360; *Coney*, 54 Van Natta at 176; *Robert J. Good*, 52 Van Natta 1376 (2000); *Barabash*, 50 Van Natta at 1565.

We turn to causation. When there is a dispute between medical experts, more weight is given to those medical opinions that are well reasoned and based on complete information. *See Somers v. SAIF*, 77 Or App 259, 263 (1986). In evaluating medical opinions we generally give greater weight to the treating physician absent persuasive reasons to the contrary. *See Weiland v. SAIF*, 64 Or App 810 (1983). Here, we find no persuasive reason not to give greater weight to Dr. Stringham's well reasoned opinion.<sup>6</sup> Consequently, we conclude that claimant has established the compensability of a right shoulder "strain/tendonitis/bursitis" condition. Accordingly, we reverse the ALJ's order and remand the right shoulder claim to the insurer for processing according to law.

Claimant's attorney is entitled to an assessed fee for services at hearing and on review regarding the compensability issue. ORS 656.386(1). 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 \$3,500, payable by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the right shoulder (as represented by the hearing record and claimant's appellant's brief), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel may go uncompensated.

### Penalty

A carrier is liable for a penalty when it "unreasonably delays or unreasonably refuses to pay compensation, or unreasonably delays acceptance or denial of a claim." ORS 656.262(11)(a). In determining whether a denial is

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<sup>6</sup> Having concluded that this claim does not involve a "combined condition" and that a material contributing cause is applicable, we do not address the insurer's arguments that Dr. Stringham's opinion is not persuasive because it did not weigh the relative contribution of each cause of disability or need for treatment. *See Richey v. Barrett Business Services*, 173 Or App 29 (2001). Alternatively, even if the shoulder claim involved a "combined condition," Dr. Stringham's "major contributing cause" opinion would persuasively establish the compensability of claimant's right shoulder condition.

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unreasonable, the question is whether the carrier had a legitimate doubt as to its liability at the time of the denial. *Brown v. Argonaut Insurance Company*, 93 Or App 588, 591 (1988). "Unreasonableness" and "legitimate doubt" are to be considered in light of all the evidence available at the time of the denial. *Id.*

Here, at the time it issued its denial, the insurer had the report of Dr. Courogen and Dr. Green that supported the denial. Although the doctors opined that the work exposure was "no longer" the major contributing cause of the combined condition, they never explicitly commented on whether the condition was ever caused in major part by the work exposure. At best, the report is unclear and ambiguous. Under such circumstances, we find that the insurer had a legitimate doubt regarding its liability for the claim at the time it issued the denial.

#### ORDER

The ALJ's order dated September 18, 2001 is reversed in part and affirmed in part. That portion of the ALJ's order that upheld the insurer's right shoulder denial is reversed. The insurer's denial insofar as it pertains to the right shoulder is set aside, and the right shoulder claim is remanded to the insurer for processing according to law. For services at hearing and on Board review, claimant's attorney is awarded a \$3,500 fee, payable by the insurer. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on August 14, 2002