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In the Matter of the Compensation of  
**THOMAS J. HAMMOND, DCD, Claimant**  
WCB Case No. 13-02871  
ORDER ON REVIEW  
Hooton Wold & Okrent LLP, Claimant Attorneys  
Law Offices Of Kathryn R Morton, Defense Attorneys

Reviewing Panel: Members Lanning and Curey.

Claimant<sup>1</sup> requests review of Administrative Law Judge (ALJ) Mills's order that upheld the insurer's denial of the deceased worker's left leg injury and death benefit claim. On review, the issues course and scope of employment and compensability. We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" with the following summary.

The worker was diagnosed with advanced lung cancer in August 2012. (Exs. 11, 13, 14). CT scans showed pathologic fractures of the left clavicle and left seventh rib in November 2012. (Ex. 17).

The worker flew to Japan for a business trip on February 3, 2013, and fell while walking in his hotel on February 7, 2013. (Tr. 7, 9). Before the fall, the worker and his wife both heard a "crack," and the worker felt severe left femur pain. (Tr. 9; Ex. 28-1). An x-ray revealed that the femur was broken, the leg was put in a cast, the worker returned to Oregon, and he was admitted to a hospital on February 9, 2013. (Tr. 10-12; Ex. 27-1).

The worker underwent surgery for his left femur fracture on February 11, 2013, and remained dependent on a ventilator in the intensive care unit (ICU) after the surgery. (Exs. 37-1, 40-7). He was extubated on February 13, 2013. (Ex. 42-8). His condition deteriorated, and he died February 14, 2013. (Ex. 45-7).

Claimant filed a workers' compensation claim, which the insurer denied. (Exs. 48, 49, 53). Claimant requested a hearing.

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<sup>1</sup> Claimant, Cheryl Hammond, is the deceased worker's surviving spouse.

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## CONCLUSIONS OF LAW AND OPINION

The ALJ concluded that the worker was a “traveling employee” who was in the course of his employment at the time of his left femur fracture and fall.<sup>2</sup> However, the ALJ reasoned that the fracture and fall were wholly caused by an idiopathic cause (*i.e.*, the worker’s cancer). Therefore, the ALJ concluded that the injury did not arise out of the worker’s employment.

On review, claimant contends that the worker’s work-related walking was a material contributing cause of his disability and need for treatment of his femur fracture and of his subsequent death. Claimant further contends that the “major contributing cause” standard does not apply because the worker’s cancer was not a legally cognizable “preexisting condition” and because his injury resulted in his death.

As explained below, we find that the worker’s femur fracture “arose out of” a risk of his employment, but that his cancer was a legally cognizable “preexisting condition” that combined with an otherwise compensable injury and was the major contributing cause of the need for treatment and disability of the combined condition. Accordingly, the femur fracture is not compensable, and claimant is not entitled to death benefits.

A compensable injury must “arise out of” employment, a requirement that concerns the causal relationship between employment and the worker’s injury. ORS 656.005(7)(a); *Fred Meyer, Inc. v. Hayes*, 325 Or 592, 596 (1997).<sup>3</sup> A worker’s injury “arises out of” employment if it “results from the nature of his or her work or when it originates from some work to which the work environment exposes the worker.” *Hayes*, 325 Or at 601. An injury resulting from a risk that is personal to the worker is not compensable. *Panpat v. Owens-Brockway Glass Container, Inc.*, 334 Or 342 (2002). Because the worker was a traveling employee, an injury resulting from the nature of the travel, or originating from some other risk to which the travel exposed the worker, would be compensable. *SAIF v. Scardi*, 218 Or App 403, 408 (2008).

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<sup>2</sup> A worker becomes a “traveling employee” when an employee’s work entails travel away from an employer’s premises, even if the travel is local and of limited duration. *SAIF v. Scardi*, 218 Or App 403, 409 (2008).

<sup>3</sup> There is no dispute that the worker’s injury arose “in the course of employment,” a requirement that concerns the time, place, and circumstances of the injury. ORS 656.005(7)(a); *Norpac Foods, Inc., v. Gilmore*, 318 Or 363, 366 (1994). The “arising out of” and “in the course of employment” inquiries are two prongs of a unitary work-connection test, each of which must be satisfied to some degree; neither is dispositive. *Hayes*, 325 Or at 596.

Claimant bears the initial burden to show that a work-related injury incident was a material contributing cause of the worker's need for treatment or disability. ORS 656.005(7)(a); ORS 656.266(1); *Brown v. SAIF*, 262 Or App 640, 652 (2014); *Jean M. Janvier*, 66 Van Natta 1827, 1832-33 (2014). If an otherwise compensable injury combined with a preexisting condition to cause or prolong disability or a need for treatment, the combined condition is compensable only if the otherwise compensable injury was the major contributing cause of the disability or need for treatment of the combined condition. ORS 656.005(7)(a)(B). In the case of a "combined condition," the insurer bears the burden to establish the existence of a "preexisting condition," as well as the burden to establish that the "otherwise compensable injury" was not the major contributing cause of the disability or need for treatment of the combined condition. ORS 656.266(1)(a); *Hopkins v. SAIF*, 349 Or 348, 352 (2010); *Steven F. Knight*, 68 Van Natta 751, 752 (2016). In this "major contributing cause" inquiry, only the components of the combined condition (*i.e.*, the "otherwise compensable injury" and the "preexisting condition") may be considered. *Vigor Indus., LLC v. Ayres*, 257 Or App 795, 802-03 (2014).

We turn to the medical evidence to examine the causal relationship between the worker's employment and his disability and need for treatment of his injury.

Dr. Takahashi, who was primarily responsible for the worker's cancer treatment, explained that the lung cancer had metastasized to his femur, which involved the invasion and destruction of the bone's structures by the cancer cells. (Ex. 60-8, -19). Dr. Takahashi opined that the weight bearing involved in walking contributed to the fracture event, because weight bearing stresses the femur bone. (Ex. 60-16). He further opined that the lung cancer was the major contributing cause of the fracture. (Ex. 60-19).

Dr. Beeson, the worker's primary care physician, offered a similar assessment. He opined that weight bearing was a material contributing cause of the fracture, although the lung cancer had weakened the worker's femur. (Ex. 57-2). Dr. Beeson explained the process as "lung cancer cells that have eaten away at the bone, if you will, and have created weakness in the bone, and that would set up a fracture that would not be related to trauma." (Ex. 59A-7). He opined that the fracture was precipitated by stress on the weakened bone, and that weight bearing was a material cause of the fracture based on the worker's history. (Ex. 59A-10). However, he also opined that "cancer was a major contributing cause of the fracture." (*Id.*)

Dr. Riddick, who was primarily responsible for the worker's post-surgery ICU treatment, also opined that weight bearing contributed to the fracture, but that the cancer had weakened the bone and was the major contributing cause of the fracture. (Ex. 62-13-14).

Dr. Mangum, who performed a file review at the insurer's request, opined that the worker's femur fracture was a "pathological" fracture, which is a fracture that results from the "replacement of the area with soft cancer cells." (Ex. 52-3). He explained that such fractures are "relatively common, particularly in weightbearing bones such as the femur or other bones of the lower extremity." (*Id.*) He explained, "The mere act of walking can [cause] the bone to give way due to the cancer-caused weakness." (Ex. 56-2). Considering the nature of the fracture, he concluded that the worker's fracture occurred while walking, before the fall. (Ex. 52-3). He also concluded that the fracture resulted "directly from the cancer diagnosis." (Ex. 52-4).

All of these medical opinions are consistent with the conclusion that the worker's walking (and the associated weight bearing by his femur) in the hotel at the time of the femur fracture was an "injury incident" that was a material contributing cause of the disability and need for treatment of the fracture. Moreover, because the worker's walking at that time resulted from the nature of his travel, we conclude that his fracture "arose out of" employment. *See Scardi*, 218 Or App at 414 (tripping while walking is a risk inherent in travel).

However, all of the aforementioned medical opinions are also consistent with the conclusion that the worker's lung cancer combined with his otherwise compensable injury to cause or prolong disability or a need for treatment. Thus, they support the conclusion that the femur fracture was a "combined condition." *See Liberty Northwest Ins. Corp. v. Cross*, 109 Or App 109, 112 (1991), *rev den*, 312 Or 676 (1992) (the use of "magic words" or statutory language is not required where the record as a whole satisfies the burden of proof); *Amelia A. Westling*, 69 Van Natta 2069, 2074 (2008) (finding "combined condition" based on the substance of the evidence, despite the lack of "magic words" regarding "combining"). Further, the medical evidence unanimously supports the conclusion that the lung cancer was the major contributing cause of the disability and need for treatment of the combined condition.

Claimant contends that the "combined condition" analysis does not apply because the worker's lung cancer was not a legally cognizable "preexisting condition." Specifically, claimant reasons that the cancer that weakened the

worker's femur before the fracture was cancer of the femur, not cancer of the lung, which had not previously been diagnosed or treated. Additionally, claimant asserts that the cancer was not an active cause of the worker's fracture, but merely made his femur more susceptible to injury. We disagree with claimant's contentions.

To establish a preexisting condition, the insurer must demonstrate that the worker was "diagnosed with such condition, or has obtained medical services for the symptoms of the condition," or suffers from "arthritis or an arthritic condition." ORS 656.005(24)(a)(A); *Hopkins*, 349 Or at 352. Additionally, a condition that increases the likelihood that an affected body part will be injured by some other action or process, but does not actively contribute to damaging the body part, is a mere "susceptibility," not a "preexisting condition." ORS 656.005(24)(c); *Corkum v. Bi-Mart Corp.*, 271 Or App 411, 422-23 (2015). As explained below, we conclude that the worker's lung cancer was a legally cognizable "preexisting condition."

Dr. Takahashi explained that when cancer cells metastasize from a primary site, they maintain their identity as the type of cell from which they originated. (Ex. 60-8). They establish an area of growth and invade and destroy the structure to which they have attached themselves. (*Id.*) He explained that bony metastasis from lung cancer is very common, although the location of the metastasis in the femur was not a predictable occurrence. (Ex. 60-9). He considered the metastasis in the femur to be a continuation of the lung cancer. (Ex. 60-19). Accordingly, he agreed that the lung cancer was the major contributing cause of the femur fracture. (*Id.*)

Dr. Beeson described the cancer in the worker's femur as "the typical course" of lung cancer. (Ex. 59A-9). He explained, "The cancer cells have spread to another area and invaded that particular area, whether it's brain or the adrenal gland or the bone or whatever." (Ex. 59A-7). He noted that when cancer cells spread in this manner, the cancer cells are identical to the cells at the primary site. (Ex. 59A-13). Accordingly, he explained, "The cancer that [the worker] has in his bone is his lung cancer. He didn't break his hip because of the tumor in his lungs, but he broke his hip because of his lung cancer which had spread to other areas." (Ex. 59A-19).

The opinions of Drs. Takahashi and Beeson persuasively explain the relationship between the worker's previously diagnosed and treated lung cancer and the cancer that was present in his femur at the time of the fracture. They support the conclusion that the lung cancer had spread to the worker's femur and

weakened the bone, ultimately allowing the act of walking to precipitate a fracture. The opinions of Drs. Mangum and Riddick are also consistent with this conclusion. (Exs. 52-4, 62-20). Under such circumstances, we disagree with claimant's contention that the cancer in the worker's femur had not previously been diagnosed or treated.

We also disagree with claimant's assertion that the cancer was not an active cause of the fracture, but merely rendered the femur more susceptible to injury. Granted, Dr. Beeson described the cancer as both a "cause" and a "susceptibility." (Ex. 59A-18). However, as discussed above, he explained how the cancer cells invaded the bone and "have eaten away at the bone, if you will, and have created weakness in the bone." (Ex. 59A-7). His explanation supports the conclusion that the cancer actively damaged the worker's femur and, therefore, was a "cause" of the fracture. *See Corkum*, 271 Or App at 422-23.

Dr. Takahashi's opinion, likewise, described how the worker's lung cancer actively contributed to the femur fracture by destroying the bone structure. (Ex. 60-8). His explanation does not describe the lung cancer as merely making the worker's femur more susceptible to a fracture, but instead supports his ultimate conclusion that the lung cancer was the major contributing "cause" of the fracture. (Ex. 60-19).

Accordingly, we conclude that the worker's lung cancer was a legally cognizable "preexisting condition" and, further, that it was the major contributing cause of the disability and need for treatment of his femur fracture.

Finally, we disagree with claimant's contention that our compensability analysis is not governed by the "major contributing cause" standard for "combined conditions" because the worker's injury resulted in his death. ORS 656.005(7)(a)(B) provides:

"If an otherwise compensable injury combines at any time with a preexisting condition to cause or prolong disability or a need for treatment, the combined condition is compensable only if, so long as and to the extent that the otherwise compensable injury is the major contributing cause of the disability of the combined condition or the major contributing cause of the need for treatment of the combined condition."

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Although ORS 656.005(7)(a)(B) does not mention the death of the worker, it expressly applies the “major contributing cause” standard if an otherwise compensable injury combines with a preexisting condition “to cause or prolong disability or a need for treatment.” Here, as discussed above, the worker’s lung cancer combined with his otherwise compensable injury to cause his disability and need for treatment of his femur fracture. Thus, the “major contributing cause” analysis applies to this disputed claim.

Based on the previously expressed reasoning, the worker’s preexisting condition, not the otherwise compensable injury, was the major contributing cause of the disability and need for treatment of the combined condition. Consequently, his femur fracture injury claim is not compensable. Furthermore, even if the worker’s death “resulted from” the femur fracture, claimant is not entitled to death benefits under ORS 656.204 because the femur fracture claim is not compensable.<sup>4</sup>

### ORDER

The ALJ’s order dated December 2, 2015 is affirmed.

Entered at Salem, Oregon on August 5, 2016

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<sup>4</sup> The parties dispute the causal relationship between the femur fracture and the worker’s death. They also dispute what causal relationship is required between a compensable injury and a subsequent death to support death benefits under ORS 656.204. We need not resolve these disputes because, for the reasons expressed above, the femur fracture claim is not compensable.