

In the Matter of the Compensation of
DANIEL L. DEMARCO, Claimant

WCB Case No. 08-06530

ORDER ON REVIEW

Hitt et al, Claimant Attorneys

David Runner, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lowell and Weddell.

The SAIF Corporation requests review of that portion of Administrative Law Judge (ALJ) Mills's order that set aside its denial of claimant's new/omitted medical condition claims for left foot and lower extremity cellulitis, left foot necrotizing fasciitis and Group A Strep infection, and a "below-the-knee" amputation of the left leg. Claimant cross-requests review, contesting the ALJ's \$9,000 insurer-paid attorney fee award. On review, the issues are compensability and attorney fees. We affirm in part and modify in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

SAIF accepted left foot closed fracture, abrasions, and contusions as a result of claimant's September 6, 2007 work injury. On April 18, 2008, claimant sought emergency room treatment for various symptoms, including fever and swelling and redness in his left foot and calf. He was diagnosed with left foot cellulitis and necrotizing fasciitis, caused by a Group A streptococcal (strep) infection, which ultimately required a "below-the-knee" amputation.

Claimant filed new/omitted medical condition claims for left foot and lower extremity cellulitis, left foot necrotizing fasciitis and Group A Strep infection, and a "below-the-knee" amputation of the left leg, which SAIF denied. Claimant requested a hearing.

Based on claimant's testimony, the ALJ concluded that the strep bacteria entered claimant's foot through an abrasion that had been caused by the work injury and never healed. Relying on *SAIF v. Pepperling*, 237 Or App 79 (2010), the ALJ concluded that the strep infection was a direct result of the work accident and the "material contributing cause" standard applied. Further finding that

claimant had established compensability under either the “material contributing cause” standard or the “major contributing cause” standard, the ALJ set aside SAIF’s denials. Finally, considering that claimant had previously been represented by a different attorney, with whom claimant’s current attorney had negotiated an agreement to divide any attorney fee award, and noting that other attorney fees had been awarded in other orders issued on the same date, the ALJ awarded an assessed attorney fee of \$9,000 for services at the hearing level.

On review, SAIF contends that the new/omitted medical condition claims should be analyzed under the “major contributing cause” standard applicable to consequential conditions, and that they were not caused, in major part, by the accepted conditions. In his cross-request, claimant contends that the ALJ’s assessed attorney fee award should be increased, and submits an attorney fee request in support of that contention.

Compensability

The existence of the claimed new/omitted medical conditions is not disputed. *See Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005) (claimant must prove existence of claimed new/omitted medical condition if compensability is generally denied). If the conditions arose directly from the work injury, claimant must prove that the work injury was a material contributing cause of his disability or need for treatment of the conditions. ORS 656.005(7)(a); ORS 656.266(1); *Albany Gen. Hosp. v. Gasperino*, 113 Or App 411, 115 (1992). However, if the conditions arose as a consequence of a compensable injury, claimant must prove that the compensable injury was the major contributing cause of the consequential conditions. ORS 656.005(7)(a)(A); *Gasperino*, 113 Or App at 415.

The distinction between an injury subject to the “material contributing cause” standard and a consequential condition subject to the “major contributing cause” standard is that the former is directly caused by the industrial accident, whereas the latter is a separate condition that arises from a compensable injury. *Fred Meyer, Inc. v. Crompton*, 150 Or App 531, 536 (1997); *Gasperino*, 113 Or App at 415. For example, a back strain caused by altered gait resulting from a compensable foot injury would be a consequential condition. *Crompton*, 150 Or App at 536; *Gasperino*, 113 Or App at 415 n 2.

Here, as discussed below, the medical evidence indicates that the strep bacteria entered claimant’s foot some time after the September 2007 work injury, and the injury-related swelling, which resulted in reduced blood flow and compromised immune system defenses, caused the strep bacteria to establish an infection, leading to the cellulitis, necrotizing fasciitis, and amputation. Thus, the

new/omitted medical conditions did not arise directly from the work accident, but instead arose as a consequence of compensable conditions directly caused by the work accident.¹

As noted, the ALJ applied *Pepperling* to analyze claimant's strep infection as a direct injury, subject to the "material contributing cause" standard, based on the conclusion that the strep bacteria entered claimant's foot through an accepted abrasion, which he sustained in the original work injury.² We distinguish *Pepperling*.

In *Pepperling*, we had found a methicillin resistant staphylococcus aureus (MRSA) infection compensable as a direct injury. In doing so, we relied on medical evidence that MRSA bacteria existed on the claimant's skin, that a compensable laceration provided a portal for the bacteria to infect the subcutaneous tissue, and that the bacteria and the laceration were equal causes of the infection. 237 Or App at 82. We interpreted such evidence to establish a direct relationship between the work accident and the MRSA infection. *William T. Pepperling*, 61 Van Natta 186, 188, *recons*, 61 Van Natta 770 (2009).

On appeal, the *Pepperling* court considered the carrier's contention that the work injury had directly caused only the laceration, and the MRSA infection was insufficiently direct because the MRSA bacteria simply used the work injury as a portal to enter the claimant's subcutaneous tissue. 237 Or App at 85. Nevertheless, the court affirmed our interpretation of the evidence as establishing a direct injury. *Id.*

In *Pepperling*, we did not reason that the direct relationship between the work accident had been established by the entry of the MRSA bacteria through the portal caused by the work accident. Rather, we reasoned that the MRSA infection was not caused by a subsequent and superseding event, but arose directly from the work accident when the laceration occurred. 61 Van Natta at 188, 771. In doing so, we recognized the general principle that a condition occurring subsequent to the compensable injury is a consequential condition subject to the "major contributing

¹ It is undisputed that the strep infection was the major contributing cause of the cellulitis, necrotizing fasciitis, and amputation.

² Claimant's attending physician, Dr. Ballard, opined that claimant's accepted abrasions had resolved by March 2008. (Ex. 69-1). However, claimant testified that an abrasion on the top of his foot never healed. (Tr. 34). As discussed below, we find that claimant's accepted conditions were the major contributing cause of the strep infection regardless of whether a work-related abrasion was the "portal."

cause” standard. *Id.* at 188; *see also Hicks v. Spectra Physics*, 117 Or App 293, 297 (1992) (consequential condition provision is for injuries that occur subsequent to the compensable injury).³

In affirming our order, the court did not reason that the “direct” nature of the injury was established solely by the fact that the work injury caused the portal through which the infection occurred. Rather, the court considered the carrier’s contention that the mechanism of injury described a consequential, rather than direct, injury and concluded, “Based on the medical evidence, that subtle distinction is not one that the board was compelled to adopt.” *Pepperling*, 237 Or App at 85.

We likewise distinguish *William J. Merrill*, 63 Van Natta 2498 (2011). There, the claimant had suffered a work-related burn, which provided a portal by which methicillin-susceptible staphylococcus aureus (MSSA) bacteria entered the claimant’s body, causing an infection. We acknowledged that the MSSA infection developed subsequently to the industrial accident. *Id.* at 2500. However, we also reasoned that the persuasive medical evidence explained the delay between the burn and the development of the infection and did not indicate that the causal relationship between the work accident and the infection was “indirect” or “attenuated.” *Id.*

In this case, by contrast, even if the strep bacteria entered claimant’s foot through an accepted abrasion, it did not do so until significantly after the work accident and did not do so as a direct result of the work accident. In reaching this conclusion, we find the opinion of Dr. Bong, an infectious disease specialist, to be persuasive.

Dr. Bong explained that claimant suffered from a variety of strep that moves very rapidly to begin destroying tissue within hours of infection and spreads within days. (Exs. 51, 67-1-2). He noted that claimant had described new symptoms a few days before the April 18, 2008 hospitalization, and concluded that the strep bacteria probably entered claimant’s body at that time. (Ex. 67-2). Although, as discussed below, we do not rely on Dr. Bong’s opinion regarding the major causation issue, we consider his opinion regarding the timing of claimant’s strep

³ The onset of a direct injury need not be immediate. *Gasparino*, 113 Or App at 414 (“material contributing cause” standard applicable to “condition that arose directly, though belatedly” from the work accident). Nevertheless, the causal relationship must be “directly” to the work accident, rather than to a compensable injury.

infection to be persuasive for the reasons expressed above.⁴ Therefore, regardless of the portal of entry, to establish compensability, claimant's accepted conditions must be the major contributing cause of the strep infection and resulting cellulitis, necrotizing fasciitis, and amputation. *See* ORS 656.005(7)(a)(A); *Gasperino*, 113 Or App at 415.

We turn to the causation issue, which presents a complex medical question that must be resolved by expert medical evidence. *See Uris v. State Comp. Dep't*, 247 Or 420, 426 (1967); *Barnett v. SAIF*, 122 Or App 279, 283 (1993). When presented with disagreement between medical experts, we give more weight to those opinions that are well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986). To persuasively establish the major contributing cause of a condition, a medical opinion must weigh the relative contribution of all causes and determine which cause, or combination of causes, contributed more than all other causes combined. *Dietz v. Ramuda*, 130 Or App 397, 401-02 (1994), *rev dismissed*, 321 Or 416 (1995).

Dr. VanDerHeyden, claimant's treating surgeon, opined that claimant's strep infection was related to his work injury. (Ex. 62). She explained that his presentation and clinical findings in April 2008 indicated that the injured area was the initial site of the infection. (*Id.*) She acknowledged that the strep bacteria probably did not originate from the work injury, but opined that claimant would probably not have developed his new/omitted medical conditions "without being predisposed by his underlying trauma to his left foot." (*Id.*) She concluded that claimant's strep infection was "not an infection that was present at the time of the initial injury but rather a secondary infection, *i.e.* complication of the original injury." (*Id.*)

Although Dr. VanDerHeyden did not use the "magic words" of "major contributing cause," such magic words are not required. *See SAIF v. Strubel*, 161 Or App 516 (1999); *Freightliner Corp. v. Arnold*, 142 Or App 98 (1996); *McClendon v. Nabisco Brands, Inc.*, 77 Or App 412 (1986). Dr. VanDerHeyden explained that claimant would probably not have developed the new/omitted medical conditions if he had not suffered his work injury. She further described the infection as a "secondary infection" and a "complication of the original injury," and did not identify another cause as similarly significant. Under such circumstances, we interpret Dr. VanDerHeyden's opinion as support for the

⁴ We further note that there is no persuasive contrary opinion regarding the relatively immediate development of serious infection following the entry of the strep bacteria.

conclusion that the compensable left foot injury was the major contributing cause of the new/omitted medical conditions. *See McClendon*, 77 Or App at 417 (description of the claimant's condition as "due to or aggravated by her occupation" and "occupational disease type involvement" established that work activities were the major contributing cause of the condition or its worsening).

Dr. Selinger, an infectious disease specialist who reviewed the medical records at claimant's request, stated that claimant suffered chronic swelling as a result of his work injury and fracture, and that such swelling can be a significant predisposing cause of subsequent infection. (Ex. 88-2). Dr. Selinger explained, "It has been postulated that the swollen extremity is a perfect culture medium for bacteria to grow and that host defenses are impaired." (*Id.*) He opined that the strep bacteria may have originated from numerous sources, including small breaks in the skin due to chronic fungus infection of the foot or minor trauma in the face of swelling. (Ex. 88-3). Regardless of the original source of the strep bacteria, Dr. Selinger opined that "it would be extremely unlikely for this sequence of events to have occurred without the initial work injury and fractured foot." (*Id.*)

Dr. Selinger explicitly stated that the work injury was a material contributing cause of the new/omitted medical conditions and, like Dr. VanDerHeyden, did not use the "magic words" of "major contributing cause." (Ex. 88-2). Nevertheless, he emphasized how the swelling impaired claimant's defenses and allowed the bacteria, which could have come from numerous sources, to thrive. Further, he did not identify any other cause as significant. In this context, we conclude that Dr. Selinger's opinion supports a conclusion that claimant's accepted fracture, with its attendant swelling, was the major cause of his infection. *See Arnold*, 142 Or App at 105 (medical opinion explicitly addressed only material causation, but established that the claimant's occupational exposure was the major cause of his need for treatment).

Dr. Rabinovitch, another infectious disease specialist who reviewed the medical records at claimant's request, offered a similar opinion. She noted that strep infection can occur without a clear portal of entry and spread to a site of blunt trauma. (Ex. 89-2). She opined that the entry of strep bacteria combined with the underlying edema and impaired vascularity to allow the infection to ensue and lead to the other new/omitted medical conditions. (Ex. 89-1). She concluded, "It is highly likely that the infection occurred as a result of the original trauma." (Ex. 89-2).

Like Drs. VanDerHeyden and Selinger, Dr. Rabinovitch did not use the “magic words” of “major contributing cause.” Nevertheless, for the reasons previously discussed, we also interpret her opinion to support such a relationship.

Dr. Puziss, a consulting physician, opined that foot swelling related to the accepted fracture compromised claimant’s immune function locally, which allowed the strep bacteria to become more active in that area. (Ex. 82-10). He opined that the infection was probably caused by a combination of the injury, resultant chronic foot swelling, loss of integrity of the local immune system, and strep bacteria. (*Id.*) Considering that combination, Dr. Puziss opined that the major contributing cause of the strep infection was the original foot injury, without which the infection would not have occurred. (Ex. 82-11).

Drs. VanDerHeyden, Selinger, Rabinovitch, and Puziss explained that regardless of the “portal” through which the strep bacteria entered claimant’s body, it probably infected claimant’s left foot, and caused the cellulitis, necrotizing fasciitis, and amputation, because the foot was swollen as a result of the original injury, which reduced blood flow and locally compromised claimant’s immune system locally. Based on that mechanism, they attributed the new/omitted medical conditions to swelling attributable to claimant’s accepted left foot conditions. They did not indicate that there were off-work contributors to the new/omitted medical conditions. Their reasoning persuasively establishes that the accepted conditions were the major contributing cause of the new/omitted medical conditions.

The contrary medical evidence is less persuasive. Dr. Ballard, who treated claimant’s accepted conditions, and Dr. Sabahi, who reviewed claimant’s medical records on SAIF’s behalf, opined that the new/omitted medical conditions were not related to the work injury. (Exs. 49-8, 54-1). However, in reaching their conclusions, they considered only whether the *work injury* directly caused the strep infection, not whether it was a consequential condition caused by *injury-related swelling* in the *accepted fractured left foot*. (*Id.*) Their opinions are, therefore, not as persuasive as those expressed by Drs. VanDerHeyden, Selinger, Rabinovitch, and Puziss.

As noted above, Dr. Bong explained that strep is a fast acting bacteria that will spread throughout the system within days of infection. (Ex. 67-1). Based on the length of time between the work accident and claimant’s hospitalization, he opined that the work accident did not cause the infection. (*Id.*) He could not

identify the portal through which the strep bacteria entered claimant's system, but opined that it was probably a few days before claimant sought treatment in April 2008. (Ex. 67-2).

Dr. Bong opined that the bacteria would tend to grow most actively in the part of the body that produces the least resistance, and that the swelling could have made him more susceptible to the growth of bacteria in that location. (*Id.*) Nevertheless, he opined that the swelling merely made claimant more susceptible to infection, which was caused by the entry of the bacteria. (*Id.*) Therefore, he concluded that the work injury was not the major contributing cause of the new/omitted medical conditions. (*Id.*)

We do not rely on Dr. Bong's opinion concerning this "major causation" issue. Rather than weighing the relative contribution of claimant's post-injury left foot swelling and the entry of the strep bacteria into his system, Dr. Bong simply stated that the swelling was not a cause because the infection was initiated by the bacteria instead. (*Id.*) However, claimant's claim is not for the mere entry of the strep bacteria into his system, but for the subsequent infection, cellulitis, necrotizing fasciitis, and amputation. Thus, Dr. Bong's opinion does not address the precise compensability analysis. Furthermore, Dr. Bong explained how claimant's post-injury left foot swelling could have contributed to the development of these new/omitted medical conditions, and he did not opine that such contribution did not occur. (*Id.*)

Under such circumstances, we find Dr. Bong's opinion regarding causation of claimant's new/omitted medical conditions less probative than those of Drs. VanDerHeyden, Selinger, Rabinovitch, and Puziss.

Dr. Hook, claimant's rehabilitation physician after his April 2008 hospitalization, explained that swelling in the foot would decrease blood flow, which, in turn, would decrease the body's immune response and provide the strep bacteria a suitable host environment. (Ex. 64-1). Based on that process, he opined that the foot fracture was "the initial event in a medically probable sequence that culminated with necrotizing fasciitis." (Ex. 64-3).

In response to further inquiry from SAIF, Dr. Hook offered additional explanation of his opinion. He noted that the swelling associated with claimant's foot fracture resulted in "a kind of 'petrie dish,'" increasing the likelihood of the strep infection flourishing in that location, leading to cellulitis and necrotizing fasciitis. (Ex. 75-2). However, he also stated that the work injury did not directly cause claimant's strep infection, which was caused by the entry of the strep

bacteria months later. (Ex. 75-1). Because “there were multiple causes,” including the entry of the strep bacteria, he concluded that the foot fracture was not the major contributing cause of the new/omitted medical conditions. (*Id.*)

Although Dr. Hook explained that the new/omitted medical conditions would not have occurred without the entry of the strep bacteria, he also opined that the foot fracture was the initial cause of the new/omitted medical conditions, based on the sequence of events that included the swelling and impaired immune response. In both cases, his opinions explained how each cause (the foot fracture and the entry of strep bacteria) could be considered to have begun the process resulting in the new/omitted medical conditions. However, determination of the major contributing cause requires weighing all causes, not just identifying the precipitating cause. *See Deitz*, 130 Or App at 401-02. Considering his opinion as a whole, we do not find that Dr. Hook persuasively explained why other causes contributed more to the new/omitted medical conditions than the accepted conditions, which created the suitable host environment for the strep bacteria to flourish. Absent further explanation, we do not rely on his ultimate “major contributing cause” opinion.

Finally, we address SAIF’s contention that the accepted conditions did not contribute to the strep infection, but merely rendered claimant more susceptible to the strep infection by compromising his local immune response, and therefore could not have been the major contributing cause of the new/omitted medical conditions. We disagree with this contention.

ORS 656.005(24)(c) provides that “for the purpose of industrial injury claims, a condition does not contribute to disability or need for treatment if the condition merely renders the worker more susceptible to the injury.”

SAIF also cites *Murdoch v. SAIF*, 223 Or App 144 (2008), and *Merrill*. The *Murdoch* court held that a condition that rendered the claimant “[un]able to mount as strong of a response” to the claimed occupational disease “merely render[ed]” the claimant “more susceptible” to the disease, and therefore was not weighed against employment conditions in determining whether the occupational disease was compensable. 223 Or App at 149-50 (citing *Webster’s Third New Int’l Dictionary* 2303 (unabridged ed. 2002), defining “susceptible” to mean, among other things, “having little resistance to a specific infectious disease”). In *Merrill*, we held that a condition that rendered the claimant “unable to mount as strong of a response,” such that he had “little resistance” to the claimed injury, was not a

statutory “preexisting condition” and, therefore, the “major contributing cause” standard applicable to “combined condition” injuries did not apply. 63 Van Natta at 2502.

Here, in contrast to the conditions that were deemed to “merely render the worker more susceptible” to the claimed conditions in *Murdoch* and *Merrill*, claimant’s left foot swelling was a residual of the accepted left foot fracture. As noted above, a consequential condition is compensable if it is caused in major part by the compensable injury. ORS 656.005(7)(a)(A). Thus, the conclusion that a compensable injury is not a “cause” because it “render[s] the worker more susceptible” to the consequential condition is not consistent with the statutory framework, which requires the compensable injury to be weighed in determining the major contributing cause of the consequential condition. Therefore, even if the left foot swelling could be characterized as a susceptibility, it was not a “mere” susceptibility, but rather was a component of the accepted condition. Consequently, we consider the contribution of the injury-related left foot swelling in determining the major contributing cause of the new/omitted medical conditions.

Under such circumstances, we conclude that the accepted conditions were the major contributing cause of the new/omitted medical conditions.

Attorney Fees

We review the attorney fee issue *de novo*, considering the specific contentions raised on review, in light of the factors set forth in OAR 438-015-0010(4) as applied to the particular circumstances of this case. *See Schoch v. Leupold & Stevens*, 325 Or 112 (1997). Those factors are: (1) the time devoted to the case; (2) the complexity of the issues(s) involved; (3) the value of the interest involved; (4) the skill of the attorneys; (5) the nature of the proceedings; (6) the benefit secured for the represented party; (7) the risk in a particular case that an attorney’s efforts may go uncompensated; and (8) the assertion of frivolous issues or defenses. At the hearing level, claimant’s counsel did not submit an affidavit, statement, or request regarding a reasonable attorney fee if claimant successfully prevailed over SAIF’s denial. As previously noted, the ALJ awarded a \$9,000 insurer-paid attorney fee.

On review, claimant’s attorney submits an attorney fee request, detailing his services performed at the hearing level. SAIF objects to the request, noting that claimant’s attorney did not submit a similar statement of services to the ALJ at the hearing level. Citing OAR 438-015-0029, claimant’s counsel contends that the request may be considered. Based on the following reasoning, we disagree with such a contention.

OAR 438-015-0029(1) allows a claimant's attorney to file with the Board a request for a specific fee for services at hearing.⁵ However, as we explained in our Order of Adoption, that rule was intended to address the need for information to determine a reasonable attorney fee awardable at the Board level, "Either in awarding a reasonable attorney fee under ORS 656.386(1) for services at both the Hearings and Board level for finally prevailing on Board review or in awarding a reasonable attorney fee under ORS 656.382(2) for services on Board review for successfully defending a Referee's order awarding compensation." WCB Admin. Order 1-1992, eff. April 6, 1992, Order of Adoption, page 2. We further noted that such a need was not apparent at the Hearings Division, where, "In those cases where a claimant's attorney wishes to submit additional information or the Referee desires further input for assistance in determining the amount of a reasonable carrier-paid fee, such information is being provided on an informal basis." *Id.*

Thus, the purpose of OAR 438-015-0029 is to allow a claimant's attorney to assist the Board to determine a reasonable assessed fee under ORS 656.386(1), for services at both hearing and Board review for finally prevailing on Board review, or under ORS 656.382(2), for services on Board review for successfully defending an ALJ's order. It is not designed to allow the parties to submit additional information on review that was not previously presented at the hearing level, where the ALJ found the claim compensable and awarded a reasonable attorney fee award based on the record developed at the hearing level.

To consider information submitted under OAR 438-015-0029 for the first time on Board review of an ALJ's attorney fee award would be to base our review of an ALJ's attorney fee determination on information that was not available for consideration by the ALJ. We interpret our rule in a manner that encourages parties to submit "attorney fee-related" information at the earlier stage of the process, where the ALJ may consider it, after finding a claim compensable, in determining a reasonable attorney fee award.

Therefore, our review of the ALJ's attorney fee award is based on the record as it was developed at the hearing, and our consideration of the factors listed in OAR 438-015-0010(4) is based on that record, as supplemented by the parties' arguments regarding the application of those factors to the record developed at the hearing level. Applying that analysis, we proceed with our review.

⁵ OAR 438-015-0029(1) provides that "[o]n Board review of an [ALJ's] order, to assist the Board in determining the amount of a reasonable assessed fee for services at the hearing level and/or for services on Board review, a claimant's attorney may file a request for a specific fee, which the attorney believes to be reasonable."

In explaining the \$9,000 attorney fee award, the ALJ discussed the factors listed in OAR 438-015-0010(4), but also “[took] into account” other fee awards made to claimant’s attorney in other orders issued on the same date, as well as claimant’s previous legal representation. In contrast, we confine our review to the legal services provided at the hearing level in successfully prevailing over the claim denial in this particular case.⁶ Additionally, claimant’s attorney is entitled to an assessed fee for services on review regarding the compensability issue. 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 at hearing and on review regarding the compensability issue is \$18,500, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by the hearing record, which included 147 exhibits and a two-hour hearing, followed by submission of supporting legal authorities, and claimant’s respondent’s brief), the medical complexity of the issue, the substantial value of the interest involved, the nature of the proceedings, and the significant risk that claimant’s counsel might go uncompensated. Claimant’s attorney is not entitled to an attorney fee award for services on review devoted to the attorney fee issue. *See Eric V. Orchard*, 58 Van Natta 2574 (2006), *aff’d without opinion*, 218 Or App 229 (2008); *Amador Mendez*, 44 Van Natta 736 (1992).

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 SAIF. *See* ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008).

ORDER

The ALJ’s order dated December 13, 2012 is affirmed in part and modified in part. In lieu of the ALJ’s \$9,000 attorney fee award, for services at the hearing level and on review regarding the compensability issue, claimant’s counsel is awarded an \$18,500 attorney fee, payable by SAIF. The remainder of the ALJ’s order is affirmed. 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 SAIF.

Entered at Salem, Oregon on September 20, 2013

⁶ The attorney fee award is granted to claimant’s current attorney of record, with the specific distribution of that award to be resolved by claimant’s current and former counsels. *See Orlando M. Gongova*, 63 Van Natta 1003, *recons.*, 63 Van Natta 1127, 1128 (2011).