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In the Matter of the Compensation of  
**DENNIS E. REYNOLDS, Claimant**  
WCB Case No. 12-04682  
ORDER ON REVIEW  
J Michael Casey, Claimant Attorneys  
MacColl Busch Sato PC, Defense Attorneys

Reviewing Panel: Members Langer and Weddell.

The self-insured employer requests review of Administrative Law Judge (ALJ) Sencer's order that set aside its denial of claimant's new/omitted medical condition claim for an L5-S1 disc herniation. On review, the issues are claim preclusion and, potentially, compensability. We reverse.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW AND OPINION

As a result of claimant's compensable January 28, 2011 injury, the employer accepted a lumbar strain. Claimant filed a new/omitted medical condition claim for an L5-S1 disc herniation, which the employer denied on June 3, 2011. Claimant did not challenge that denial.

In July 2012, claimant filed another new/omitted medical condition claim for an L5-S1 disc herniation, which the employer denied on August 21, 2012. Claimant requested a hearing.

The ALJ reasoned that the June 2011 denial did not preclude the July 2012 claim because claimant's condition had changed and, therefore, his claim was supported by new facts that could not have been presented earlier. The ALJ further concluded that the medical evidence supported compensability. Accordingly, the ALJ set aside the employer's denial.

On review, the employer contends that claim preclusion bars claimant from establishing the compensability of his L5-S1 disc herniation. Based on the following reasoning, we agree.

Claim preclusion bars the litigation of a claim based on the same factual transaction that was, or could have been, litigated between the parties in a prior proceeding that has reached a final determination. *Drews v. EBI Cos.*, 310 Or 134, 142-43 (1990). Because a new/omitted medical condition claim may be initiated “at any time,” claim preclusion does not apply merely because of a claimant’s failure to initiate a claim for a new/omitted medical condition at an earlier time. ORS 656.262(6)(d); ORS 656.267(1); *Evangelical Lutheran Good Samaritan Soc’y v. Bonham*, 176 Or App 490, 497-98 (2001). However, an unappealed denial precludes a later claim for that denied condition. *Brian D. Downing*, 65 Van Natta 577, 579 (2013); *Stacy Frierson*, 59 Van Natta 399, 400 (2007).

In *Frierson*, we noted that claim preclusion may not be a bar “[i]f claimant’s condition has changed and the claim is supported by new facts that could not have been presented earlier.” 59 Van Natta at 400 (citing *Ahlberg v. SAIF*, 199 Or App 271, 275 (2005)). Nevertheless, in that case, we concluded that an unappealed denial precluded the claimant’s subsequent new/omitted medical condition claim for the same conditions. *Id.* As explained below, we reach the same conclusion in this case.

To prevent serial litigation, “courts employ a broad definition of what could have been litigated.” *Drews*, 310 Or at 141. For purposes of claim preclusion, a “claim” “does not mean a particular form or proceeding by which a certain kind of relief is sought but, rather, a group of facts which entitled plaintiff to relief.” *Troutman v. Erlandson*, 287 Or 187, 201 (1979).

Because this is a claim for a new/omitted medical condition, claimant must prove that the condition exists and that his January 2011 work injury was a material contributing cause of his disability or need for treatment of the claimed L5-S1 disc herniation. See ORS 656.005(7)(a); ORS 656.266(1); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005). Yet, the existence of the L5-S1 disc herniation, and the cause of claimant’s disability and need for treatment of that condition, were at issue when claimant filed his earlier new/omitted medical condition claim for the same condition. After the June 2011 denial became final, it precluded claimant from asserting a new claim based on the same “factual transaction”/“group of facts.” Thus, it effectively established that the L5-S1 disc herniation was not compensable at that time.

To support his present claim, claimant relies on the opinion of Dr. Hansen, his treating surgeon. Dr. Hansen opined that the L5-S1 disc herniation arose contemporaneously as a result of the January 2011 injury and worsened with time as a natural progression of that injury. (Exs. 109-1-2; 113-2). Thus, Dr. Hansen opined that the work injury had already caused the L5-S1 disc herniation, and claimant's disability and need for treatment, at the time of the June 2011 denial.

Notwithstanding any change in claimant's condition after the June 2011 denial, the present claim is based on the same operative facts that were put at issue by that denial (causation of the L5-S1 disc herniation by the January 2011 work injury, alleged to have occurred contemporaneously with that injury). Accordingly, it is precluded.

*Yi v. City of Portland*, 258 Or App 526 (2013) is illustrative. There, a carrier had previously twice denied a combined condition on the ground that the otherwise compensable injury had ceased to be the major contributing cause of the claimant's combined condition. See ORS 656.262(6)(c) (allowing a carrier to deny an accepted combined condition if the otherwise compensable injury ceases to be the major contributing cause of the combined condition); ORS 656.262(2)(a) (if an otherwise compensable injury is established, the carrier bears the burden to establish that the otherwise compensable injury is not, or is no longer, the major contributing cause of the disability or need for treatment of the combined condition). However, the previous denials had been set aside by litigation orders, which had become final. The carrier subsequently denied the combined condition a third time, based on the same grounds, with an "immediate" effective date.

The carrier contended that claim preclusion did not apply because the previous litigation could not have addressed the compensability of the combined condition as of the effective date of the third denial, which was subsequent to the previous litigation. The *Yi* court examined the asserted facts on which the denial was based, which were that the claimant was injured at work, the injury combined with a preexisting condition, and the injury later resolved and thus was no longer the major contributing cause of the claimant's disability or need for treatment. 258 Or App at 530. The court noted that the evidence of the resolution of the otherwise compensable injury indicated that it had resolved during the same period that the earlier denials had addressed. *Id.* The court concluded that, although the third denial was based on new medical evidence and had an "effective date" subsequent to the litigation of the earlier denials, the asserted facts on which the third denial was based were the same asserted facts on which the earlier denials had been based. *Id.*

In reaching its conclusion, the *Yi* court reasoned that although the earlier litigation could not have specifically addressed the compensability of the combined condition as of the *date* of the third denial, there was no evidence of a change in the condition after the period addressed by the previous litigation such that the otherwise compensable injury had ceased to be the major contributing cause of the disability or need for treatment of the combined condition. *Id.* at 531. In the absence of such a change, the court characterized the later denial as merely an effort by the carrier to “relitigat[e] the medical issues that it did not prevail on in the earlier proceedings,” which was “precisely the sort of serial relitigation that preclusion principles aim to prevent.” *Id.* The court concluded, “Because the [carrier’s] third denial did not rest on any facts that could not have been litigated in the earlier proceedings, the denial was barred by claim preclusion.”

Here, as in *Yi*, the present litigation addresses the same medical issues that could have been addressed had claimant challenged the employer’s denial of his initial new/omitted medical condition claim for the same condition. Further, although the *Yi* court indicated that claim preclusion could have been escaped if a change in the claimant’s condition had been shown, it explained why only a change in the “the medical issues that [the carrier] did not prevail on in the earlier proceedings” would have provided such an escape.

In this case, as claimant’s L5-S1 herniation worsened over time, the evidence of its existence became stronger, and claimant’s disability and need for treatment progressed. (Ex. 109-1-2). However, new evidence, without new operative facts, does not allow a party to escape claim preclusion. *Yi*, 258 Or App at 530-31; *see also Liberty Northwest Ins. Corp. v. Bird*, 99 Or App 560, 564 (1989), *rev den*, 309 Or 645 (1990) (“A claimant is not entitled to relitigate the issue just because he finds new evidence in support of his claim”). Further, claimant’s present claim does not rest on any “post-denial” progression of his L5-S1 disc herniation, but rather on the assertion that the January 2011 work injury caused the condition at that time. That causal relationship had been denied in June 2011 by an unappealed denial, and this claim does not present new operative facts. Under such circumstances, claim preclusion applies.

We distinguish *Ahlberg*, which we cited in *Frierson*. *Ahlberg* addressed a claim under ORS 656.802(2)(b) for an occupational disease that had previously been denied.<sup>1</sup> As such, the relevant causal relationship in *Ahlberg* was between the disease and “any or all working conditions,” regardless of whether such exposure preceded or followed the earlier denial. 199 Or App at 276. On remand, we concluded that the claimant’s conditions had worsened after the earlier denial and that employment conditions were the major contributing cause of both the worsening and the combined condition. *Albert A. Ahlberg*, 57 Van Natta 2840, 2844 (2005).

Thus, in *Ahlberg*, the later claim was supported by facts that could not have been presented at the time of the earlier denial (*i.e.*, the “post-denial” contribution of employment conditions to the disease). Other occupational disease cases have employed similar reasoning. *E.g.*, *Northwest Ins. Corp. v. Rector*, 151 Or App 693, 699 (1997); *Kepford v. Weyerhaeuser Co.*, 77 Or App 363, 366 (1986). In *Liberty Northwest Ins. Corp. v. Bird*, 99 Or App 560 (1989), *rev den*, 309 Or 645 (1990), the court noted that a change in in the claimant’s condition could allow the claimant to escape the preclusive effect of a prior medical services denial if there were new facts that could not have been presented earlier.<sup>2</sup> 99 Or App at 564.

This case is not analogous to occupational disease cases in which a claim may be based on employment conditions that occur after an earlier denial, or medical services cases in which a “post-denial” change in the condition may change a claimant’s need for treatment. Instead, it addresses a claim for the same condition, which is based on the same facts, that the unappealed June 2011 denial addressed.

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<sup>1</sup> ORS 656.802(2)(b) provides:

“If the occupational disease claim is based on the worsening of a preexisting disease or condition pursuant to ORS 656.005(7), the worker must prove that employment conditions were the major contributing cause of the combined condition and pathological worsening of the disease.”

<sup>2</sup> On remand, we concluded that the claimant had not established such a change. *Raymond R. Bird*, 42 Van Natta 1292, 1294 (1990).

In conclusion, the current claim is based on the same operative facts as the earlier, denied new/omitted medical condition claim. That final denial precludes the present claim.<sup>3</sup> *See Downing*, 65 Van Natta at 579, *Frierson*, 59 Van Natta at 400. Accordingly, we reverse.

### ORDER

The ALJ's order dated November 21, 2013 is reversed. The employer's denial is reinstated and upheld. The ALJ's \$10,000 attorney fee and cost awards are also reversed.

Entered at Salem, Oregon on May 23, 2014

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<sup>3</sup> Even assuming that the present claim was not precluded, we would still uphold the employer's August 2012 denial. Specifically, the unappealed June 2011 denial stated that the January 2011 accident did not result in an L5-S1 disc herniation. (Ex. 57). Accordingly, the "law of the case" is that there is no causal relationship between the L5-S1 disc herniation and the compensable injury. Yet, Dr. Hansen opined that claimant injured his L5-S1 disc on January 28, 2011 and that the disc condition had worsened by natural progression of that injury. (Ex. 109-1). Because Dr. Hansen's opinion is contrary to the law of the case, his opinion is unpersuasive and cannot establish the compensability of the disputed L5-S1 disc herniation. *See SAIF v. Kuhn*, 73 Or App 768, 772 (1985) (physician's opinion that the claimant's condition was entirely due to congenital abnormalities was discounted because it conflicted with the award of permanent disability for the condition); *Anna Rembert*, 61 Van Natta 727 (2009) (physician's opinion that a condition was not caused by the work injury was unpersuasive because it conflicted with the acceptance of the condition).