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In the Matter of the Compensation of  
**BARBARA J. DEBOARD, Claimant**  
WCB Case No. 14-03132  
ORDER ON REVIEW  
Moore Jensen, Claimant Attorneys  
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Weddell, Johnson, and Somers. Member Johnson dissents.

Claimant requests review of Administrative Law Judge (ALJ) Lipton's order that upheld the self-insured employer's denial of claimant's new/omitted medical condition claim for several thoracic disc protrusion/bulge conditions. On review, the issues are preclusion and compensability. We reverse in part and affirm in part.

#### FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," which we supplement and summarize as follows.

On November 21, 2012, claimant, a baker, experienced an acute onset of mid-back pain at work. (Tr. 77B-8; Ex. 21). On November 26, 2012, she consulted Dr. Akita, a chiropractor, who diagnosed an acute left costovertebral and thoracic sprain/strain. (Ex. 7-6).

Claimant had previously treated with Dr. Akita. In 2001, she treated for about three weeks, for a thoracic strain that she sustained while working for the employer. (Ex. 3). The employer accepted a nondisabling thoracic strain. (Ex. 5). Between 2002 and 2012, she treated occasionally for upper, middle, and lower back pain that she attributed to various work and nonwork activities. (Ex. 7).

In 2008, claimant filed a claim for right shoulder blade pain, radiating into her elbow and hand, that she attributed to 20 years of cake decorating. (Ex. 8). The employer accepted "winging of the [right] scapula." (Ex. 12). A 2009 Notice of Closure did not award any permanent disability benefits. (Ex. 17).

In July 2012, claimant treated for about two weeks, for a thoracic strain that occurred when she pulled bread rolls from a freezer. (Ex. 7-4). In late August 2012, she treated twice for thoracic subluxation with myofascitis, which caused severe pain and a deep ache in her mid-thoracic spine. (Ex. 7-5, -6). She did not receive treatment between August 31, 2012 and November 26, 2012. (Ex. 7-6).

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On November 29, 2012, claimant consulted Dr. Bolstad, an occupational health specialist, who became her attending physician. (Exs. 20, 22). Dr. Bolstad diagnosed a thoracic sprain. (Ex. 21-3).

The employer accepted a thoracic strain. (Ex. 36). Subsequently, claimant's March 2013 thoracic MRI showed a mild central T6-7 disc protrusion with mild spinal cord compression, a moderate right paracentral T7-8 disc protrusion with moderate spinal cord compression, and a slight right paracentral T8-9 disc protrusion with no spinal cord compression. (Ex. 46).

On March 7, 2013, claimant initiated a new/omitted medical condition claim for a T6 disc protrusion, T7-8 disc protrusion with cord compression, and T8-9 disc protrusion. (Ex. 50).

On May 1, 2013, claimant consulted Dr. Russo, a specialist in physical medicine, rehabilitation, and pain medicine. (Exs. 58, 77A-2). Dr. Russo diagnosed a thoracic strain and thoracic spondylosis with multilevel disc bulges. (Ex. 58-2).

On May 2, 2013, Dr. Arbeene, an orthopedic surgeon, performed an examination at the employer's request. Dr. Arbeene concluded that claimant's thoracic strain was the major cause of her need for treatment. (Ex. 59-7). He also opined that claimant's multilevel thoracic spondylosis was a preexisting nonwork-related condition. (Ex. 59-6).

On May 9, 2013, the employer denied the new/omitted thoracic disc claims based on Dr. Arbeene's report.<sup>1</sup> (Ex. 60).

In responding to Dr. Arbeene's report, Dr. Bolstad agreed that the 2012 work injury was the major cause of claimant's symptoms, but she attributed the thoracic disc conditions to claimant's work activities. (Exs. 69-2, 69A-1). In doing so, Dr. Bolstad acknowledged that claimant had degenerative changes, but concluded that the 2012 work injury was the major contributing cause of the need for treatment because "[claimant] was not having these severe symptoms of stabbing ongoing mid back pain radiating to the right" before the injury. (Ex. 69A-1).

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<sup>1</sup> On August 2, 2013, the employer amended its denial to include an occupational disease claim, based on insufficient evidence that the claimed thoracic disc conditions were related to occupational factors. (Ex. 75).

Dr. Russo opined that claimant's "modest" preexisting disease was prolonging her need for treatment, but concluded that the 2012 injury was the major cause of her need for treatment because her symptoms exceeded what would be expected from a preexisting degenerative process.<sup>2</sup> (Ex. 77A-2).

In November 2013, Dr. Arbeene opined that claimant did not have disc protrusions, but, rather, degenerative disc bulges, at each of the three claimed levels.<sup>3</sup> (Ex. 82-2). He conceded that claimant's work activities may have contributed to her symptoms, but opined that the major cause of the disc bulges was the degenerative process resulting from her abnormal spinal curvatures ("kyphoscoliosis") because she had had the same thoracic and parascapular pain since 2001. (Ex. 82-4).

On February 6, 2014, a prior ALJ's order upheld the employer's denials. (Ex. 88-8). The prior ALJ declined to find that a disc "bulge" was the same condition as a disc "protrusion" and determined that claimant had not established the existence of the claimed disc protrusions. (Ex. 88-7).

On review, we adopted and affirmed the ALJ's order. *Barbara J. DeBoard*, 66 Van Natta 978, 979 (2014). We also stated that, even if claimant had established an "otherwise compensable injury,"<sup>4</sup> we would still conclude, based on Dr. Arbeene's opinion, that the otherwise compensable injury was not the major contributing cause of the combined thoracic disc conditions. Claimant's appeal of our decision is currently pending before the Court of Appeals.

In March 2014, Dr. Lorber, a physiatrist, performed a closing examination at the employer's request. Dr. Lorber confirmed the existence of T6-7, T7-8, and T8-9 disc bulges on claimant's 2013 thoracic MRI. (Ex. 91-10). He attributed claimant's permanent impairment findings to those disc conditions, which he described alternately as "bulges" and "protrusions." (Ex. 91-11, -12).

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<sup>2</sup> Claimant's 2008 thoracic MRI showed mild degenerative change with disc space narrowing at the T6-7 and T7-8 spinal levels and minimal posterior disc bulge. (Ex. 10).

<sup>3</sup> Dr. Arbeene differentiated a disc "bulge" (the length of the bulging disc is much greater than its height) from a disc "protrusion" (the height of the "bulge or abnormality is basically equal to the base of the disc bulge"). (Ex. 82-3). He also acknowledged that "if [he] ask[ed] five different doctors what they mean by 'disk bulging' versus 'disk protrusions,' [he] might get five different answers." (Ex. 82-2, -3).

<sup>4</sup> Claimant had argued that the ALJ should not have accepted Dr. Arbeene's differentiation between disc "protrusions" and disc "bulges." She asserted that the physicians used the terms interchangeably and, therefore, she established the existence of the claimed protrusions. She also argued that her compensable November 2012 injury was a material contributing cause of the claimed conditions and that the employer did not prove that the otherwise compensable injury was not the major contributing cause of the disability/need for treatment of the combined thoracic disc conditions. *Id.* at 978.

Dr. Bolstad agreed with Dr. Lorber's report and reiterated her opinion that the claimed thoracic disc protrusions were the main cause of claimant's symptoms. (Ex. 94).

A June 4, 2014 Notice of Closure awarded no permanent disability. (Ex. 97). Claimant requested reconsideration and a medical arbiter examination. (Ex. 104).

On June 11, 2014, claimant initiated a new/omitted medical condition claim for a T6 disc protrusion, T7-8 disc protrusion with cord compression, T8-9 disc protrusion, T6 disc bulge, T7-8 disc bulge, and T8-9 disc bulge. (Ex. 99). On June 18, 2014, the employer denied the new/omitted medical condition claim on the basis that the claimed conditions were previously denied/litigated and not related to the compensable work injury or occupational factors. (Ex. 100).

In September 2014, a medical arbiter panel performed an examination. The arbiter panel reported that claimant did not have scoliosis or abnormal kyphosis. (Ex. 105A-6). The panel identified tenderness and decreased range of motion in claimant's thoracic spine, but, reasoning that a thoracic strain is expected to resolve in eight to 12 weeks, concluded that these findings were not due to the accepted thoracic strain. (Ex. 105A-7).

In response to claimant's inquiry, Dr. Bolstad had never heard of the differentiation that Dr. Arbeene made between disc "bulge" and disc "protrusion." (Ex. 106-1). Stating that she used the terms interchangeably, Dr. Bolstad opined that claimant had disc pathology, "either a disc bulge or a disc protrusion," at T6, T7-8, and T8-9, that was symptomatic and causing claimant's disability and need for treatment. (Ex. 106-1, -2).

In September 2014, Dr. Arbeene reviewed claimant's updated medical records and concluded that the thoracic disc bulges/protrusions had not changed or worsened since May 2013. (Ex. 107-1). Dr. Arbeene maintained that the terms "bulge" and "protrusion" describe slightly different disc shapes, but he acknowledged that both terms describe abnormal disc pathology (*i.e.*, extruding disc material) and, "more often than not," are used interchangeably. (Ex. 107-1).

#### CONCLUSIONS OF LAW AND OPINION

Reasoning that either the prior litigation was preclusive or claimant did not prove compensability of the claimed condition, the ALJ upheld the employer's denial. On review, citing *Evangelical Lutheran Good Samaritan Soc'y v. Bonham*,

176 Or App 490, 498 (2001), claimant contests the preclusive effect of the prior ALJ's order. Claimant also asserts that the opinions of Drs. Bolstad and Russo are sufficient to carry her burden to prove an "otherwise compensable injury."

The employer responds that the claimed three-level disc condition, whether labeled as "protrusions" or "bulges," was previously litigated, and that the current new/omitted medical condition claim is precluded. The employer also argues that Dr. Arbeene's opinion persuasively establishes that the preexisting condition is the major contributing cause of claimant's disability/need for treatment.

We conclude that the prior litigation precludes claimant's new/omitted disc "protrusion" claim, but not the new/omitted disc "bulge" claim. We reason as follows.

"Issue preclusion" provides that, if a claim is litigated to a final judgment, a decision on a particular issue of fact or law is conclusive in a later action between the same parties if the determination was essential to the final decision reached. *Drews v. EBI Cos.*, 310 Or 134, 139-40 (1990). "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. *Id.* at 142-43.

Because a new/omitted medical condition claim may be initiated "at any time," claim preclusion does not apply merely because a claimant failed to initiate a claim for a new/omitted medical condition at an earlier time. *See* ORS 656.262(6)(d); ORS 656.267(1); *Bonham*, 176 Or App at 497-98. Additionally, claim preclusion may not bar a claim if the claimant's condition has changed and the claim is supported by new facts that could not have been presented earlier. *See Stacy Frierson*, 59 Van Natta 399, 400 (2007) (citing *Ahlberg v. SAIF*, 199 Or App 271, 275 (2005)).

Here, the prior ALJ's order identified the issue that was litigated as the "compensability of T6 disc protrusion, T7-8 disc protrusion with cord compression, and T8-9 disc protrusion." (Ex. 88-1). The prior ALJ concluded that claimant did not establish the existence of disc protrusions at the three claimed levels. (Ex. 88-7). We adopted and affirmed the ALJ's order. *DeBoard*, 66 Van Natta at 978.

Claimant's current new/omitted medical condition claim, insofar as it pertains to thoracic disc "protrusions," requires her to prove that those "protrusions" exist. *See Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005)

(persuasive proof of the existence of the condition is a fact necessary to establish the compensability of a new or omitted condition). Yet, the prior ALJ/Board orders determined that those protrusions did not exist. Moreover, Dr. Arbeene's unrebutted medical opinion establishes that claimant's thoracic disc condition has not worsened since May 2013. (Ex. 107-1). Under these circumstances, claimant is precluded from relitigating the thoracic disc "protrusion" claim.

Next, the employer argues that the currently claimed thoracic disc "bulge" condition is the same condition that was previously litigated and, therefore, also precluded. Based on the following reasoning, we disagree.

Although claimant argued that the "bulge" and "protrusion" labels were interchangeable, the prior ALJ's order specifically declined "to find that a disc 'bulge' is equivalent to a disc 'protrusion,' or 'protrusion with cord compression'" in reaching his final determination. (Ex. 88-7). We adopted the prior ALJ's order. *DeBoard*, 66 Van Natta at 978. We acknowledge that our reasoning addressed medical "causation." Nevertheless, we did so on an alternative, conditional basis that was not essential to our final decision on the merits; *i.e.*, that the claimed "protrusion" did not exist. Thus, for purposes of issue preclusion, the disc "bulge" compensability issue was not actually litigated or essential to a final decision on the merits in the prior proceeding.

Moreover, because a new/omitted medical condition claim may be initiated "at any time," claimant's new/omitted disc "bulge" claim is not precluded (by principles of "claim preclusion") merely because she did not initiate a new/omitted medical condition claim for the disc "bulge" condition at the prior proceeding. ORS 656.262(6)(d); ORS 656.267(1); *Bonham*, 176 Or App at 497-98.

We turn to the merits of the thoracic disc bulge condition. Because claimant has made a claim for a new/omitted medical condition, she must prove that the claimed disc bulges exist and that her 2012 work injury was a material contributing cause of her disability/need for treatment of the claimed condition. *See* ORS 656.005(7)(a); ORS 656.266(1); *Betty J. King*, 58 Van Natta 977 (2006); *Graves*, 57 Van Natta at 2381. If claimant satisfies her burden and the medical evidence establishes that the "otherwise compensable injury" combined at any time with a preexisting condition to cause or prolong disability or a need for treatment of the "combined condition," the burden shifts to the insurer to prove that the "otherwise compensable injury" is not the major contributing cause of claimant's disability/need for treatment of the combined condition. *See* ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505

(2010); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004). The “otherwise compensable injury” means the “work-related injury incident.” *Brown v. SAIF*, 262 Or App 640, 652 (2014); *see also Jean M. Janvier*, 66 Van Natta 1827, 1832-33 (2014) (applying the *Brown* definition of an “otherwise compensable injury” to initial claims under ORS 656.266(2)(a)).

Because of the disagreement between medical experts, this claim presents a complex medical question that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 282 (1993). In evaluating the medical evidence, we rely on those opinions that are both well reasoned and based on accurate and complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

Here, there is no dispute concerning the existence of the claimed disc bulges. In reviewing claimant’s 2013 thoracic MRI, both Dr. Arbeene and Dr. Lorber observed disc bulges at each of the three claimed levels. (Exs. 82-2, 91-10). There is no contrary evidence regarding the existence of these disc bulges.

The record also establishes that the 2012 work injury was at least a material contributing cause of claimant’s disability/need for treatment of the claimed thoracic disc conditions. Dr. Bolstad, claimant’s attending physician, opined that the work injury was the major cause of claimant’s need for treatment. (Ex. 69A-1). In doing so, Dr. Bolstad acknowledged that claimant had degenerative changes, but related treatment to the 2012 work injury because “[claimant] was not having these severe symptoms of stabbing ongoing mid back pain radiating to the right prior to this work related incident.” (*Id.*) Dr. Russo also concluded that claimant’s 2012 work injury was the major cause of the need for treatment, explaining that claimant’s “pain, spasm, and symptom interference” was in excess of what would be expected from a preexisting degenerative process. (Ex. 77A-2).

In contrast, Dr. Arbeene opined that the major cause of the disk bulges was the degenerative process resulting from claimant’s kyphoscoliosis. (Ex. 82-4). In doing so, Dr. Arbeene did not address either the material contributing cause standard or the cause of claimant’s disability/need for treatment for the condition. In the absence of such an analysis, we discount Dr. Arbeene’s opinion. *See Jaymin Nowland*, 63 Van Natta 1377, 1382 n 3 (2010) (the claimant need not prove that the work injury caused the claimed condition itself; rather the relevant inquiry is whether it was a material contributing cause of the disability/need for treatment for the condition). Moreover, Dr. Arbeene acknowledged that claimant had an increase in symptoms after doing repetitive work on the date of injury, which supports a conclusion that the work injury was a material contributing cause of her

disability/need for treatment. (Ex. 82-3). *See Jason Griffin*, 64 Van Natta 1954, 1955 (2012) (physician's opinion that the work incident caused a "symptomatic flare" and precipitated symptoms from preexisting chronic mechanical back pain was sufficient to establish material contributing cause).

Based on the aforementioned reasoning, the record persuasively establishes that the 2012 work injury was a material contributing cause of claimant's disability/need for treatment of her thoracic disc bulges. Therefore, claimant has established an "otherwise compensable injury."

Consequently, the burden shifts to the employer to establish that: (1) claimant suffers from a statutory "preexisting condition;" (2) claimant's condition is a "combined condition; and (3) the "otherwise compensable injury" is not the major contributing cause of the disability/need for treatment of the combined condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *Brown*, 262 Or App at 652; *Kollias*, 233 Or App at 505; *Janvier*, 66 Van Natta at 1832-33.

Assuming (without deciding) that claimant suffers from a statutory "preexisting condition" and that her condition is a "combined condition," we find the record insufficient to satisfy the employer's burden under ORS 656.266(2)(a). We reason as follows.

Dr. Arbeene opined that the major cause of the thoracic disc bulges was the degenerative process resulting from claimant's kyphoscoliosis. (Ex. 82-4). Yet, in providing his opinion, Dr. Arbeene did not address claimant's "otherwise compensable injury" (*i.e.*, the work-related injury incident) or the cause of the disability/need for treatment of the combined condition, as opposed to the cause of the condition itself. Therefore, we do not find his opinion to be sufficient to meet the employer's burden of proof. *See James L. Burch*, 58 Van Natta 2450, 2451 (2006) (a physician's opinion, that a disc herniation was not caused by the work injury but was a manifestation of disc degeneration, did not address the appropriate legal standard).

There are no other opinions that support the employer's position. Consequently, the record does not persuasively establish that claimant's 2012 work-related injury/incident was not the major contributing cause of her disability/need for treatment of her combined thoracic disc bulges. Accordingly, we reverse that portion of the ALJ's order that upheld the employer's denial of the new/omitted three-level thoracic disc bulge condition and set aside that portion of the denial.

Claimant's attorney is entitled to an assessed fee for services at hearing and on review for prevailing over the employer's denial of the thoracic disc bulges. 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 at hearing and on review for the denied thoracic disc bulges is \$12,500, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by the record, claimant's appellate briefs, and her attorney's fee submission), the complexity of the issue, the value of the interest involved, and the risk that counsel may go uncompensated.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the employer's denial of the thoracic disc bulge condition, to be paid by the employer. See ORS 656.386(2); OAR 438-015-0019; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

### ORDER

The ALJ's order dated October 6, 2014 is reversed in part and affirmed in part. The employer's denial insofar as it pertained to claimant's new/omitted medical condition claim for a thoracic disc bulge condition is set aside and the claim is remanded to the employer for processing according to law. The remainder of the ALJ's order is affirmed. For services at hearing and on review concerning the thoracic disc bulge condition, claimant's attorney is awarded an assessed fee of \$12,500, payable by the employer. Claimant is also awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial of the thoracic disc bulge condition, to be paid by the employer.

Entered at Salem, Oregon on May 27, 2015

Member Johnson dissenting.

The majority concludes that the prior litigation precludes claimant's new/omitted disc "protrusion" claim, but not her disc "bulge" claim. Because I find that the compensability of the claimed disc conditions, whether labeled "protrusions" or "bulges," was litigated in the prior proceeding, I conclude that issue preclusion applies to the new/omitted medical condition claim. Therefore, I respectfully dissent.

On March 7, 2013, claimant initiated a new/omitted medical condition claim for a T6 disc protrusion, T7-8 disc protrusion with cord compression, and T8-9 disc protrusion. (Ex. 50). On May 9, 2013, the employer denied the new/omitted thoracic disc conditions claim. (Ex. 60). Claimant requested a hearing.

The prior hearing record reflects multiple opinions regarding the labeling and compensability of the thoracic disc conditions. For instance, Dr. Russo assessed “thoracic spondylosis [with] multilevel disc bulges at T7-8, T8-9.” (Ex. 58-2). Dr. Arbeene diagnosed multilevel thoracic spondylosis that was unrelated to the work injury. (Ex. 59-6, -7). Dr. Bolstad diagnosed thoracic disc protrusions at the three claimed levels, made symptomatic by claimant’s work injury. (Ex. 69A-1). Dr. Arbeene did not “see” disc protrusions at the three claimed levels. (Ex. 82-2). Instead, he described claimant’s thoracic disc condition as “degenerative bulges.” (*Id.*)

On February 6, 2014, a prior ALJ’s order upheld the employer’s denial. (Ex. 88-8). In doing so, the prior ALJ found Dr. Arbeene’s opinion the most persuasive regarding the “existence” of the claimed disc protrusion condition. Because the prior ALJ found that the disc protrusions did not “exist” as a medical and legal matter, claimant failed to meet her burden of proof. (Ex. 88-7).

We adopted and affirmed the ALJ’s order. *Barbara J. DeBoard*, 66 Van Natta 978, 979 (2014). In doing so, we considered claimant’s assertions that: (1) the medical record established that the terms disc “protrusions” and disc “bulges” had been used interchangeably and the prior ALJ should not have drawn a distinction between disc “protrusions” and disc “bulges;” (2) the medical record established the existence of the claimed thoracic disc conditions and that the compensable November 2012 injury was a material contributing cause of the disability/need for treatment of the claimed conditions; and (3) the employer had not established that the otherwise compensable injury was not the major contributing cause of the disability/need for treatment of the combined thoracic disc conditions. After conducting our review, we concluded that, even assuming that claimant had established the existence of the claimed conditions and proved an “otherwise compensable injury,” the “otherwise compensable injury” was not the major contributing cause of the disability/need for treatment of the combined thoracic disc conditions. *Id.* at 979. Claimant’s appeal of our decision is currently pending before the Court of Appeals.<sup>5</sup>

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<sup>5</sup> We have long held that, for purposes of administrative efficiency, we give precedential value to our prior non-final litigation orders. *Gary L. Blackburn*, 52 Van Natta 1867 (2000); *Elmer F. Knauss*, 47 Van Natta 826, 827, *recons*, 47 Van Natta 949, *recons*, 47 Van Natta 1064 (1995).

On June 11, 2014, claimant initiated a new/omitted medical condition claim for a T6 disc protrusion, T7-8 disc protrusion with cord compression, T8-9 disc protrusion, T6 disc bulge, T7-8 disc bulge, and T8-9 disc bulge. (Ex. 99). On June 18, 2014, the employer denied the new/omitted medical condition claim on the basis that the claimed conditions were previously denied/litigated and not related to the compensable work injury or occupational factors. (Ex. 100).

In September 2014, Dr. Arbeene reviewed claimant's updated medical records and concluded that the thoracic disc bulges/protrusions had not changed or worsened since May 2013. (Ex. 107-1).

Reasoning that either the prior litigation was preclusive or claimant had not proven compensability, the ALJ upheld the employer's denial. On review, claimant contests the preclusive effect of the prior ALJ's order and argues that her claimed condition is compensable. For the following reasons, I conclude that the prior litigation is preclusive.

"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, 139-40 (1990). Because a new/omitted medical condition claim can 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); 656.267(1); *Evangelical Lutheran Good Samaritan Soc. v. Bonham*, 176 Or App 490, 497-98 (2001), *rev den*, 334 Or 75 (2002); *Darnell M. Lucas*, 57 Van Natta 799, 802 n 3 (2005), *aff'd without opinion*, 205 Or App 111 (2006).

ORS 656.262(6)(d) and ORS 656.267(1) do not overrule the doctrine of "issue preclusion." *Id.* "Issue preclusion" provides that, if a claim is litigated to final judgment, a decision on a particular issue of fact or law is conclusive in a later action between the same parties if the determination was essential to the final decision reached. *Drews*, 310 Or at 139-40. There are five requirements that must be met for issue preclusion to apply: (1) the issue in the two proceedings must be identical; (2) the issue must have been actually litigated and essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded must have had a full and fair opportunity to be heard; (4) the party sought to be precluded must have been a party, or in privity with a party in the prior proceeding; and (5) the prior proceeding must be the type of proceeding to which the court will give preclusive effect. *Nelson v. Emerald People's Util. Dist.*, 318 Or 99, 104 (1993).

Claimant contends that the prior litigation established only that the claimed disc protrusions did not exist. She argues that compensability was not litigated and the Board's determination that the otherwise compensable injury was not the major contributing cause of the disability/need for treatment of the combined thoracic disc condition was not essential to its final decision. I do not agree.

The prior proceeding concerned the compensability of claimant's new/omitted condition claim for a three-level thoracic disc protrusion condition. To prevail, claimant had to prove that the condition existed and that the work injury was a material contributing cause of the disability/need for treatment of the condition. ORS 656.005(7)(a); ORS 656.266(1); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005). If claimant satisfied her burden and the medical evidence established that the "otherwise compensable injury" combined at any time with a preexisting condition to cause or prolong disability or a need for treatment of the combined condition, the burden shifted to the employer to prove that the "otherwise compensable injury" was not the major contributing cause of claimant's disability/need for treatment of the combined condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004).

The prior ALJ determined that claimant had not established the existence of her claimed condition. Yet, on review, claimant not only argued that she had established the existence of the claimed conditions, but also that her compensable 2012 injury was a material contributing cause of the conditions and that the employer had not proved that the otherwise compensable injury was not the major contributing cause of the disability or need for treatment of the combined thoracic disc conditions. *DeBoard*, 66 Van Natta at 978, 979. After conducting our review, we concluded that the employer had met its burden of proof.

Claimant now seeks to relitigate the compensability of her same thoracic disc conditions.<sup>6</sup> The requirements for compensability (listed above) are the same, whether the conditions are labeled "protrusions" or "bulges." In particular, the issue regarding the major contributing cause of the disability/need for treatment of the combined thoracic disc conditions is identical, was actually litigated, and was essential to our prior decision on the merits. Further, claimant had a full and fair

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<sup>6</sup> Dr. Arbeene's opinion that claimant's thoracic disc conditions had not changed or worsened was not controverted. (Ex. 107-1).

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opportunity to be heard regarding the compensability of her claimed thoracic disc conditions and was a party in the prior proceeding, which was the type of proceeding to which a court will give preclusive effect.

Under these circumstances, I would find that claimant is precluded from re-arguing the compensability of her thoracic disc conditions.