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In the Matter of the Compensation of  
**JOSEPH A. CLARK, Claimant**  
WCB Case No. 14-04400  
ORDER ON REVIEW  
Jodie Phillips Polich, Claimant Attorneys  
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Johnson and Weddell.

Claimant requests review of Administrative Law Judge (ALJ) Mills's order that affirmed an Order on Reconsideration that awarded 5 percent whole person permanent impairment for low back conditions. On review, the issue is permanent disability (impairment).

We adopt and affirm the ALJ's order with the following supplementation.

On review, claimant contends that, under *Schleiss v. SAIF*, 354 Or 637 (2013), and based on the preclusive effect of prior litigation, his permanent impairment findings should not have been apportioned.

Based on the reasoning expressed in *Claudia S. Stryker*, 67 Van Natta 1003 (2015), we adopt the ALJ's conclusion that the *Schleiss* holding is distinguishable.

Referring to issue/claim preclusion principles, claimant also contends that the apportionment of his permanent impairment findings is not appropriate because the SAIF Corporation did not raise the existence of a "preexisting condition" or "combined condition" in a prior litigation concerning a new/omitted medical condition claim. Based on the following reasoning, we disagree with claimant's contention.

Here, the issue that was actually litigated in the prior proceeding was the compensability of claimant's new/omitted medical condition claim for a L5-S1 disc herniation. During that proceeding, there was neither a contention raised, nor any findings reached, regarding a "preexisting condition" or "combined condition." See *Joseph A. Clark*, 65 Van Natta 1112, 1117 (2013) (concluding that the claimant's 2007 work injury was at least a material contributing cause of his disability/need for treatment of the L5-S1 disc herniation). Under such circumstances, the prior compensability litigation has no preclusive effect on this proceeding. See *Jason C. Griffin*, 67 Van Natta 978, *recons.*, 67 Van Natta 1794, 1794-95 (2015) (Member Weddell dissenting) (a prior litigation order finding that

the carrier did not prove that a work injury was not the major contributing cause of an unspecified combined condition under ORS 656.266(2)(a) did not preclude the subsequent apportionment of permanent impairment findings at claim closure between the accepted condition and legally cognizable preexisting conditions).

Accordingly, based on the aforementioned reasoning, as well as the reasons expressed in the ALJ's order, we affirm.

ORDER

The ALJ's order dated September 2, 2015 is affirmed.

Entered at Salem, Oregon on February 9, 2016