

In the Matter of the Compensation of  
**MARC R. JOHNSTON, Claimant**  
WCB Case No. 15-04241, 15-01330  
**ORDER ON RECONSIDERATION**  
Jodie Phillips Polich, Claimant Attorneys  
Reinisch Wilson Weier, Defense Attorneys

Reviewing Panel: Members Weddell and Johnson.

On January 25, 2017, we issued our Order on Review that, among other decisions, reversed that portion of an Administrative Law Judge's (ALJ's) order insofar as it upheld the self-insured employer's denial of claimant's new/omitted medical condition claim for combined lumbar degenerative disc disease and L2-3 through L5-S1 disc bulge conditions. The employer seeks reconsideration of our order, objecting to our analysis under a "combined condition" theory and contending that the medical evidence does not allow claimant to satisfy his burden to prove that the July 10, 2014 work injury was a material contributing cause of his need for treatment of the claimed combined conditions. The employer also asserts that the otherwise compensable injury was not the major contributing cause of claimant's need for treatment of the claimed combined conditions. Having received claimant's response, we proceed with our reconsideration. Based on the following reasoning, we adhere to our previous determinations, as supplemented and modified below.

First, the employer contends that we misunderstood its position at hearing; *i.e.*, that it did not agree that the case should be evaluated as a "combined condition." We acknowledge, as did our prior order, that the employer did not concede that a "combined condition" analysis applies. Nonetheless, we determined that the parties litigated the new/omitted medical condition claim under a "combined condition" theory (based on their discussion of the disputed issues and positions taken at the hearing level). Furthermore, we applied a "combined condition" analysis based on our review of the medical evidence, specifically, the opinions of Drs. Rosenbaum and Ferguson that the work injury combined with preexisting conditions (including the claimed conditions) and was the major contributing cause of the need for treatment of the combined condition for a period of time. *Marc R. Johnson*, 69 Van Natta 164, 169 (2017).

We continue to conclude that a "combined condition" analysis applies to the claimed conditions. At hearing, claimant, in effect, claimed that his work injury combined with lumbar degenerative disc disease and L2-3 through L5-S1 disc

bulges. (Tr. 1). In addition, for the reasons expressed in our previous order, we are persuaded that the medical evidence established that claimant's work-related injury incident (which the physicians described as a lumbar strain) combined with preexisting lumbar degenerative disc disease and L2-3 through L5-S1 disc bulges to cause/prolong disability/need for treatment of a combined condition. (Exs. 20-7, 24). On review, claimant contended that, despite this evidence, the employer "only accept[ed] a lumbar strain – not as a combined condition." (App. Br. at 3). As such, he asserted that the record supported the existence and compensability of the claimed combined condition. *See Dibrito v. SAIF*, 319 Or 244, 248 (1994) (it is the Board's obligation as a factfinder to apply the appropriate legal standards to determine the compensability of a worker's claim); *SAIF v. Allen*, 193 Or App 742, 749 (2004) ("combined condition" analysis proper because the carrier's "denial was issued in the context of its awareness that the claimant had a combined condition involving his preexisting spondylosis and his workplace injury"); *see also Michael J. Johnson*, 52 Van Natta 1052 (2000) (consideration of combined condition required, even though not raised by parties).

The employer argues on reconsideration that claimant did not satisfy his initial burden of proving that the work injury was a material contributing cause of his need for treatment of the lumbar degenerative disc disease and L2-3 through L5-S1 disc bulges. We disagree with that assertion.

To prevail on a new/omitted medical condition claim, the claimant must prove that the claimed condition exists and that the work injury is a material contributing cause of his disability/need for treatment of the condition. *See Betty J. King*, 58 Van Natta 977 (2006); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005). Moreover, where a claimant seeks acceptance of a "combined condition" as a new/omitted medical condition, he must prove the existence of the combined condition. *Rick L. Langton*, 67 Van Natta 704 (2015) (because the claimant chose to initiate and pursue a "combined condition" claim, he was required to establish the existence of a "combined condition").

Therefore, if claimant had requested acceptance of the disputed conditions as independently compensable new/omitted medical conditions (as his initial request appeared to do), he would be obligated to prove that the work injury was a material contributing cause of the disability/need for treatment for those conditions.<sup>1</sup> *See*

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<sup>1</sup> Dr. Rosenbaum opined that the work injury incident was not a material contributing cause of the need for treatment for the lumbar degenerative disc disease or L2-3 through L5-S1 disc bulges. (Exs. 48-4, -5, 57-3).

*Jeremiah Smith*, 62 Van Natta 1294, (2010) (where the claimant requested acceptance of a disc protrusion as an independently compensable new/omitted medical condition, separate and distinct from the condition as a preexisting component of a combined lumbar strain condition, he had the initial burden of proving that his work injury was a material contributing cause of the disability/need for treatment of the claimed condition).

However, in this particular case, claimant asserted the compensability of the new/omitted conditions as “a combined condition of lumbar degenerative disc disease, L5-S1 [through L2-3] disc bulge.” Because he is seeking the acceptance of “combined conditions” as new/omitted medical conditions, he must prove their existence. ORS 656.005(7)(a)(B); ORS 656.266(1); *Langton*, 67 Van Natta at 704. Under *Brown v. SAIF*, 262 Or App 640, 652 (2014), a combined condition exists when a “work-related injury incident” (*i.e.*, the “otherwise compensable injury”) combines with a “preexisting condition.” See *Jean M. Janvier*, 66 Van Natta 1827, 1829 (2014), *aff’d without opinion*, 278 Or App 447 (2016) (applying the *Brown* definition of an otherwise compensable injury to new/omitted medical condition claims under ORS 656.266(1)(a)).

Here, Dr. Rosenbaum opined that claimant’s work injury caused a lumbar strain, which combined with preexisting degenerative disc disease and L2-3 through L5-S1 disc bulges, and was the major contributing cause of the need for treatment until the lumbar strain healed. (Exs. 20-7, 48-2, -3, 57-2). We conclude that his uncontroverted opinion establishes that the lumbar strain was the work-related injury incident that combined with preexisting conditions (*i.e.*, L2-3 through L5-S1 disc bulging and lumbar degenerative disc disease) and that the work-related injury incident was at least a material contributing cause of the need for treatment for the lumbar strain. *Janvier*, 66 Van Natta at 1833 n 8 (physician’s use of the terms “work injury” and “cervical strain” interchangeably satisfied *Brown*).

Thus, claimant has satisfied his requisite burden of proving an otherwise compensable injury and the existence of a combined condition. Consequently, the burden of proof shifts to the employer to establish that the otherwise compensable injury (*i.e.*, the work-related injury incident) was not the major contributing cause of claimant’s disability/need for treatment for his combined condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010); *Langton*, 67 Van Natta at 705.

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As described above, Dr. Rosenbaum's uncontroverted opinion establishes that the work injury was the major contributing cause of the need for treatment of the combined lumbar strain condition for at least a period of time. Therefore, the employer has not satisfied its statutory burden.<sup>2</sup>

Consequently, based on the aforementioned reasoning, as well as that expressed in our prior decision, we continue to conclude that the new/omitted medical combined condition claim is compensable. Therefore, we adhere to our previous decision, which set aside the employer's denial of claimant's new/omitted medical condition claim.

Claimant's counsel is entitled to an additional fee for services on reconsideration. ORS 656.382(2); *Antonio L. Martinez*, 61 Van Natta 1892 (2009) (a carrier's request for reconsideration of a Board order awarding compensation constituted a "request for review," entitling the claimant's counsel to an attorney fee award under ORS 656.382(2) when the Board's compensation award was not disallowed or replaced). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable attorney fee award is \$500, to be paid by the employer. In reaching this conclusion, we have particularly considered the time devoted to the issues disputed on reconsideration (as represented by claimant's response to the employer's reconsideration motion), the complexity of the issues, the value of the interest involved, the risk that claimant's counsel may go uncompensated, and the contingent nature of the practice of workers' compensation law.

Accordingly, we withdraw our January 25, 2017 order. On reconsideration, as supplemented and modified herein, we republish our January 25, 2017 order. The parties' 30-day statutory rights of appeal shall begin to run from the date of this order.

**IT IS SO ORDERED.**

Entered at Salem, Oregon on February 24, 2017

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<sup>2</sup> Although Drs. Swan and Ferguson attributed claimant's later disability/need for treatment to preexisting conditions, the issue presented to us pertains to the *initial* compensability of claimant's combined condition, not any subsequent matters. See ORS 656.005(7)(a)(B); *Braden v. SAIF*, 187 Or App 494, 500 (2003) (the Board was not authorized to find a claim compensable for a discrete period at the initial stage, because it may not bypass statutory claim processing requirements).