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In the Matter of the Compensation of  
**STEVE E. GARNER, Claimant**  
WCB Case No. 15-03166  
ORDER ON REVIEW  
Law Offices Of James T Guinn, Claimant Attorneys  
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Lanning and Johnson.

The self-insured employer requests review of those portions of Administrative Law Judge (ALJ) Fulsher's order that: (1) set aside its denial of claimant's new/omitted medical condition claim for a sacroiliac joint condition; (2) set aside its denial of claimant's current combined low back condition; and (3) awarded a \$19,000 assessed attorney fee. On review, the issues are compensability and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation concerning the current combined condition denial.

The ALJ found Dr. Rosenbaum's opinion supporting the combined condition denial to be unpersuasive because Dr. Rosenbaum considered only claimant's accepted lumbar strain and not the additional conditions caused by the work injury-incident.

On review, the employer argues that, based on *Brown v. SAIF*, 361 Or 241 (2017), Dr. Rosenbaum was correct in considering only the accepted condition, rather than other conditions resulting from the work-related injury incident. Based on the following reasoning, even in light of the *Brown* decision, we find Dr. Rosenbaum's opinion to be unpersuasive.

A carrier may deny an accepted combined condition if the otherwise compensable injury "ceases" to be the major contributing cause of the combined condition. ORS 656.262(6)(c). To do so, the carrier must establish that there is a "preexisting condition" as defined by ORS 656.005(24), and that claimant's condition is a "combined condition." ORS 656.266(3)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010); *Dezi Meza*, 63 Van Natta 67, 70 (2011). The carrier also bears the burden to establish a change in claimant's condition or circumstances such that the otherwise compensable injury was no longer the major contributing cause of the disability or need for treatment of the combined condition. ORS 656.266(2)(a); *Wal-Mart Stores, Inc. v. Young*, 219 Or App 410, 419 (2008).

In analyzing a “ceases” denial under ORS 656.262(6)(c), we evaluate only the contributions of the component parts of the combined condition; *i.e.*, the otherwise compensable injury and the statutory preexisting condition. *Vigor Indus., LLC v. Ayres*, 25 Or App 795, 803 (2013). In *Brown*, the court concluded that the “otherwise compensable injury” is the previously accepted condition, rather than the work-related injury incident. 361 Or at 282. Therefore, a carrier may deny the accepted combined condition if the medical condition that the carrier previously accepted ceases to be the major contributing cause of the combined condition. *Id.*

Here, Dr. Rosenbaum was the only physician to opine that claimant’s accepted lumbar strain had combined with his preexisting spondylosis. Dr. Rosenbaum’s explanation for that opinion was that claimant “had a pre-existing spondylosis and then developed a lumbar strain. They are acting harmoniously in the same location.” (Ex. 32-9).

Dr. Rosenbaum opined that the initial injury was the major contributing cause of the need for treatment of the combined condition because claimant was without symptoms prior to the work injury. (*Id.*) He stated that the work injury was no longer the major contributing cause of the need for treatment of the combined condition because there was adequate passage of time for resolution of claimant’s symptoms. (*Id.*) In doing so, however, he stated “there is such a prominent functional overlay in this individual that \* \* \* it is difficult to assess whether there really was a true injurious event of any significance or whether his functional overlay is the major contributing cause of his need for treatment.” (*Id.*)

Based on Dr. Rosenbaum’s varying opinions, as well as his uncertainty concerning whether an injurious event initially occurred (and therefore whether a combined condition ever existed), we consider his opinion to be insufficiently persuasive to support the employer’s combined condition denial. *See Somers v SAIF*, 77 Or App 259, 263 (1986); *Eun S. Cho*, 69 Van Natta 1168, 1172 (2017) (rejecting as unpersuasive physician’s opinion based on physician’s belief that the work injury did not occur); *Sean Remington*, 67 Van Natta 1732, 1738 (2015) (finding internally inconsistent physician’s opinion to be unpersuasive); *Robert Prabucki*, 61 Van Natta 1877, 1881-82 (2009) (where the claimant has established an “otherwise compensable injury,” physician’s opinion that his symptoms were not due to the work injury, when discussing a hypothetical “combined condition,” did not persuasively weigh the contribution of the work injury), *aff’d DS Water of AM., L.P. v. Prabucki*, 240 Or App 384 (2011). Consequently, we affirm.

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Claimant's attorney is entitled to an assessed fee for services on review. 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 on review is \$4,500, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief and his counsel's uncontested fee submission), the complexity of the issues, the value of the interests involved, the risk that counsel may go uncompensated, and the contingent nature of the practice of workers' compensation law.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denials, to be paid by the employer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

#### ORDER

The ALJ's order dated March 27, 2017 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$4,500, payable by the employer. 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 the employer.

Entered at Salem, Oregon on August 17, 2017