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

Reviewing Panel: Members Weddell and Johnson.

Claimant requests review of Administrative Law Judge (ALJ) Poland's order that: (1) upheld the self-insured employer's denial of claimant's aggravation claim for a low back strain; (2) upheld the employer's denial of claimant's new/omitted medical condition claim for lumbar degenerative disc disease and L2-3 through L5-S1 disc bulges; and (3) upheld the employer's denial of claimant's occupational disease claim for lumbar arthritis and degenerative disc disease. On review, the issues are aggravation and compensability. We affirm in part and reverse in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" and provide the following summary.

On July 10, 2014, claimant, a truck driver, compensably injured his low back. (Ex. 1; Tr. 22). On July 14, 2014, he was seen by Dr. Swan, an occupational medicine specialist, who requested an MRI to determine the source of claimant's low back pain. (Ex. 7-3).

A July 15, 2014 lumbar MRI revealed multilevel degenerative spondylosis and L2-3, L3-4, L4-5, and L5-S1 disc bulges. (Ex. 9-2). Reasoning that there were extensive preexisting degenerative changes, Dr. Swan recommended an "independent medical examination." (Ex. 11-1).

On August 15, 2014, Dr. Rosenbaum, a neurosurgeon, performed an examination at the employer's request. Dr. Rosenbaum diagnosed preexisting lumbar spondylosis/degenerative arthritis and a lumbar strain, as a combined condition. (Ex. 20-6, -7). He opined that the work injury was the major contributing cause of claimant's disability/need for treatment of the combined condition. (Ex. 20-7). Dr. Swan concurred with Dr. Rosenbaum's findings and opinions. (Ex. 24).

On August 26, 2014, the employer accepted a lumbar strain. (Ex. 22).

On November 24, 2014, Dr. Swan determined that claimant was medically stationary and released him to return to regular work, without restrictions. (Ex. 30).

A Notice of Closure closed the claim on December 12, 2014, without a permanent disability award. (Ex. 33).

On January 5, 2015, claimant returned to Dr. Swan for worsened low back pain that he attributed to recent work activity as a truck hostler. (Ex. 34). Noting that there was no history of another injury or objective findings of a strain or sprain and that claimant's pain was greatest with lower lumbar facet loading, Dr. Swan concluded that claimant's back pain was probably due to his preexisting degenerative changes. (*Id.*)

On January 7, 2015, claimant submitted an aggravation claim, which the employer denied. (Exs. 37, 38). Claimant requested a hearing.

On March 31, 2015, claimant was seen by Dr. Ferguson, an occupational medicine specialist in the same clinic as Dr. Swan. (Ex. 40). Dr. Ferguson opined that claimant's 2014 low back injury was superimposed on degenerative disc disease. (*Id.*) He stated that claimant was unable to continue working due to his "severely aggravated" back. (*Id.*)

On July 2, 2015, claimant initiated a new/omitted medical condition claim for lumbar degenerative disc disease and L2-3, L3-4, L4-5, and L5-S1 disc bulges. (Ex. 47). The employer denied the claim, asserting that the conditions were not compensably related to the injury. (Ex 47A). Claimant requested a hearing on the denial.

On July 20, 2015, Dr. Ferguson opined that the strain associated with the 2014 injury had fully resolved and that claimant's continued complaints were likely related to degenerative disc disease and L2-3 through L5-S1 disc bulges, which developed gradually over time due to an underlying degenerative process. (Ex. 49-2).

Claimant then filed an occupational disease claim for lumbar arthritis and degenerative disc disease, which the employer denied, contending that claimant's work activities were not the major contributing cause of those conditions. (Exs. 50, 51). Claimant requested a hearing on that denial.

In a deposition, Dr. Ferguson opined that the 2014 injury combined with "all of his conditions" and was the major contributing cause of claimant's need for treatment until December 2014. (Ex. 55-14). Regarding the occupational disease claim, Dr. Ferguson identified work activity, genetics, and aging as the causal factors. (Ex. 55-16). He concluded that a combination of genetics and aging outweighed work activity and was the major contributing cause of claimant's lumbar arthritis and degenerative disc disease. (Ex. 55-23, -28).

After the deposition, claimant's counsel asked Dr. Ferguson to apportion contribution from lifelong work activities/work injuries to claimant's lumbar arthritis and degenerative disc disease, if aging or genetics were excluded. (Ex. 56). In comparing lifelong work activities/injuries only to aging or only to genetics, Dr. Ferguson opined that work activities/injuries outweighed genetics, as well as aging, in causing, accelerating, or pathologically worsening claimant's lumbar arthritis and degenerative disc disease. (*Id.*)

On January 27, 2016, Dr. Rosenbaum opined that: (1) claimant did not sustain a worsening of his accepted condition; (2) the 2014 injury caused a strain, which combined with preexisting degenerative disc disease and facet joint arthritis to prolong the need for treatment of the strain, and the injury was the major contributing cause of the need for treatment of the combined condition until the strain healed; and (3) claimant's work as a truck driver was not the major contributing cause of his lumbar arthritis and degenerative disc disease. (Ex. 57-2, -4).

At the outset of the hearing, claimant identified the issues as: (1) an aggravation of the 2014 injury; (2) "compensability of new or omitted conditions as a combined condition of lumbar degenerative disc disease, L5-S1 disc bulge [through L2-3] disc bulge"; and (3) compensability of degenerative disc disease and arthritis as an occupational disease. (Tr. 1, 2).

In responding to the new/omitted medical condition issue, the employer conceded the "existence" of the claimed conditions, but not that a "combined condition" analysis applied. (Tr. 2). Instead, contending that an "occupational disease" analysis applied (because the conditions developed gradually over time), the employer asserted that preexisting arthritic changes had always been the major contributing cause of the disability/need for treatment associated with those conditions, and the injury was not even a material contributing cause of the conditions or their disability or need for treatment. (Tr. 2, 13).

During closing argument, claimant asserted that the employer had only accepted a lumbar strain, not a combined condition, despite Dr. Rosenbaum's opinion that the injury was the major contributing cause of claimant's need for treatment of his "combined condition." (Hearing File). Claimant contended that the opinions of Drs. Rosenbaum and Ferguson were sufficient to establish the new/omitted conditions as a "combined condition" under ORS 656.005(7)(a)(B). (*Id.*) In response, the employer contended that the conditions, which were requested "outright" and not as a "combined condition," were not independently compensable; *i.e.*, the work injury was never a material contributing cause of the need for treatment of claimant's degenerative lumbar disc disease or L2-3 through L5-S1 disc bulges. (Hearing File).

CONCLUSIONS OF LAW AND OPINION

The ALJ upheld the employer's denials. In doing so, the ALJ determined that the medical evidence did not establish a worsening of the accepted lumbar strain after the claim closure. In upholding the denial of the new/omitted medical condition claim, the ALJ found that there was insufficient medical evidence to prove that the injury materially contributed to the disability/need for treatment of the claimed degenerative disc disease and disc bulges. Finally, the ALJ concluded that the medical evidence did not establish that claimant's work activities were the major contributing cause of the claimed occupational disease.

On review, relying on the objective findings, diagnosis, and statement by Dr. Ferguson that his low back was "severely aggravated," claimant contends that he sustained a compensable aggravation. Claimant also asserts that Dr. Rosenbaum's opinion proves the compensability of his new/omitted medical condition claim as a combined condition under ORS 656.005(7)(a)(B). Lastly, claimant argues that Dr. Ferguson's opinion establishes that his work exposure was the major contributing cause of his occupational disease.

We affirm the ALJ's compensability decisions regarding the aggravation and occupational disease claims. However, we reverse the ALJ's decision regarding the compensability of the new/omitted medical condition claim. Our reasoning follows.

Aggravation

To establish a compensable aggravation, claimant must prove by medical evidence an actual worsening of the compensable condition, supported by objective findings, since the last award or arrangement of compensation. ORS

656.266(1); ORS 656.273(1). The "compensable condition" is the condition identified in the Notice of Acceptance. *Nacoste v. Halton Co.*, 275 Or App 600, 609 (2015); *Evelyn Crossman*, 56 Van Natta 1076, 1078-79 (2004). The determination of whether there was an "actual worsening" is a complex medical question that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 282 (1993); *Michael E. DeRoest*, 65 Van Natta 2542, 2543 (2013), *aff'd*, *DeRoest v. Keystone RV Co.*, 276 Or App 698 (2016).

Claimant relies on Dr. Ferguson's March 31, 2015 statement that he "severely aggravated his back." (Ex. 40). Yet, Dr. Ferguson later explained that, on March 31, 2015, he had not reviewed claimant's medical records. (Ex. 55-7). Upon reviewing the records, Dr. Ferguson determined that "this was really a flare of [claimant's] preexisting degenerative changes." (Ex. 55-8). Dr. Ferguson also stated that he did not treat claimant for a continuation of the 2014 injury; rather, there was "something new going on[.]" (Ex. 55-14).

Dr. Swan also attributed claimant's "post-closure" disability/need for treatment to preexisting degenerative changes. (Ex. 34-1). He opined that there was no objective evidence of a pathologic worsening of the accepted claim. (Ex. 52-2).

Lastly, based on his review of claimant's medical records, Dr. Rosenbaum opined that the lumbar strain had fully resolved, and there was no pathological worsening of the work injury/lumbar strain after the December 12, 2014 claim closure. (Ex. 48-3). He concurred with Dr. Ferguson's opinion that claimant returned to treatment for a flare of preexisting spondylosis (degenerative disc disease and facet joint arthritis). (Ex. 57-2).

These opinions do not establish a worsening of claimant's accepted lumbar strain. Accordingly, we affirm that portion of the ALJ's order that upheld the employer's denial of the aggravation claim. *See Nacoste*, 275 Or App at 607-08 (an aggravation claim must be based on the worsening of the accepted condition, and not on the development of a new condition); *DeRoest*, 65 Van Natta at 2544 (compensable aggravation claim was not established given physician's express statement regarding the absence of any worsening of the accepted condition).

<u>New/Omitted Medical Conditions</u>

In initiating the new/omitted medical condition claim, claimant did not expressly refer to a combined condition. (Ex. 47). However, in opening remarks at hearing, his counsel described the new/omitted medical conditions as a

"combined condition." (Tr. 1). In its response, the employer did not concede that a "combined condition" analysis applied, but did not object to litigating the compensability of such a claim. (Tr. 2, 5). Furthermore, claimant's closing argument addressed the compensability of the claimed new/omitted medical conditions as a "combined condition" under ORS 656.005(7)(a)(B). (Hearing File). The employer disputed claimant's premise that the conditions were requested as a "combined condition." (*Id.*) Contending that the conditions were requested "outright," the employer argued that they were not independently compensable. (*Id.*) The employer also observed that a preexisting condition is only compensable so long as the injury remains the major contributing cause of the need for treatment of the combined condition. (*Id.*)

Based on their discussion of the disputed issues and positions taken at the hearing level, the record establishes that the parties litigated the new/omitted medical condition claim under a "combined condition" theory. In any event, it is our obligation to review the medical evidence and apply the appropriate legal standard to determine the compensability of the claim. *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); *Daniel S. Field*, 47 Van Natta 1457, 1458 (1995) (applying a "combined condition" analysis where medical evidence indicated that the work incident combined with a preexisting condition).

Here, the opinions of Drs. Rosenbaum and Ferguson support the application of a "combined condition" analysis. Before the employer's acceptance, Dr. Rosenbaum diagnosed preexisting conditions (lumbar spondylosis and degenerative disc disease resulting in L2-3, L3-4, L4-5, and L5-S1 disc bulges) and a lumbar strain, as a combined condition. (Ex. 20-6, -7). After the employer's new/omitted medical condition claim denial, Dr. Rosenbaum maintained that the work injury superimposed on, or combined with, preexisting spondylosis (arthritis, degenerative joint disease, degenerative disc disease, L2-3 through L5-S1 disc bulges) and was the major contributing cause of the need for treatment of the combined condition for a period of time after the injury. (Exs. 48-2. 57-2). Likewise, Dr. Ferguson considered the "2014 injury combined with all of [claimant's] conditions" to be the major contributing cause of the need for treatment until December 2014. (Ex. 55-14).

Based on those opinions, we conclude that that a "combined condition" analysis applies. *See SAIF v. Allen*, 193 Or App 742, 749 (2004) (where the denial issued in the context of the carrier's awareness that the claimed condition was a

combined condition involving the claimant's preexisting disease and compensable injury, a "combined condition" analysis applied); *Jean M. Janvier*, 66 Van Natta 1827, 1830 (2014), *aff'd without opinion*, 278 Or App 447 (2016) (under *Brown v. SAIF*, 262 Or App 640, 656 (2014), a "combined condition" exists when a "work-related injury incident" combines with a "preexisting condition"); *Javier H. Patino*, 61 Van Natta 777, 780-82 (2009) (finding that the claimant requested acceptance of new/omitted medical conditions as "preexisting condition" components of a "combined condition"; *i.e.*, the previously accepted strain combined with the claimed preexisting conditions).

To prevail on a new/omitted medical condition claim for a "combined condition," claimant must prove the existence of the "combined condition." ORS 656.005(7)(a); *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"); *see also De Los-Santos v. Si Pac Enters.*, 278 Or App 254, 257 (2016) (proof of the existence of the condition is a fact necessary to establish the compensability of a new/omitted medical condition); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005) (same).

If claimant establishes the existence of the claimed "combined condition," the employer has the burden of proving that the "otherwise compensable injury" is 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); *Langton*, 67 Van Natta at 705 (2015). The "otherwise compensable injury" is defined by the work-related injury incident. *Brown*, 262 Or App at 652-53 (2014), *rev allowed*, 356 Or 397 (2014); *Janvier*, 66 Van Natta at 1829.

Here, Dr. Rosenbaum consistently opined that claimant's lumbar strain combined with preexisting conditions and was, at least for a period of time after the injury, the major contributing cause of the need for treatment of the combined condition. He initially diagnosed preexisting lumbar spondylosis and lumbar strain as a combined condition and opined that the injury continued to be the major contributing cause of the disability/need for treatment of the combined condition. (Ex. 20-7). He later confirmed that preexisting spondylosis (composed of degenerative joint disease and degenerative disc disease resulting in L2-3 through L5-S1 disc bulges) combined with the lumbar strain to cause or prolong treatment and, for a period of time, the injury was the major contributing cause of the need for treatment of the combined condition. (Exs.48-3, 57-2, -3).

Dr. Rosenbaum concluded that claimant's preexisting condition was "arthritis"; *i.e.*, "involves inflammation of the lumbar facet joints, is due to constitutional causes, and results in the breakdown, degeneration, and structural change of the facet joints, the vertebrae, the intervertebral discs and surrounding structures." (Exs. 20-7, 48-2). *See* ORS 656.005(24)(a)(A) (a "preexisting condition" includes "arthritis"); *Schleiss v. SAIF*, 354 Or 637, 653 (2013) ("arthritis" means the "inflammation of one or more joints, due to infectious, metabolic, or constitutional causes, and resulting in breakdown, degeneration, or structural change"); *Hopkins v. SAIF*, 349 Or 348, 364 (2010) (same). Noting that the preexisting condition was evident on the July 15, 2014 MRI, Dr. Rosenbaum opined that it was in existence at the time of the injury. (Ex. 20-7).

Dr. Swan concurred with Dr. Rosenbaum's assessment. (Exs. 24, 25). Likewise, Dr. Ferguson opined that the "injury combined with all of his conditions" was the major contributing cause of the need for treatment until December 2014. (Ex. 55-14).

Therefore, based on the foregoing reasoning, persuasive medical evidence supports the proposition that claimant's work-related injury incident combined with "preexisting conditions" to cause/prolong disability/need for treatment. Thus, claimant established the existence of the claimed "combined condition."

We turn to whether the employer met its burden to prove that the "otherwise compensable injury" (*i.e.*, the work-related injury incident), was not the major contributing cause of the disability/need for treatment of the combined condition. *See* ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *Janvier*, 66 Van Natta at 1832.[1] For the following reasons, we are not persuaded that the employer has satisfied its statutory burden.

The employer asserts that Dr. Rosenbaum opined that the major contributing cause of the need for treatment was always the preexisting spondylosis. We disagree with that assessment of Dr. Rosenbaum's opinion.

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[1] The employer argues that claimant cannot rely on the already accepted condition (lumbar strain) as an "otherwise compensable injury" to shift the burden of proof pursuant to ORS 656.266(2)(a). *See, e.g.*, *Betty J. King*, 58 Van Natta 977 (2006) (for purposes of establishing a new/omitted medical condition claim for a left knee condition, the claimant could not rely on a previously accepted lumbar strain as an "otherwise compensable injury" to shift the burden of proof under ORS 656.266(2)(a) to the carrier). Under *Brown*, the "otherwise compensable injury" is not limited to the accepted condition, but is defined by the "work-related injury incident." 262 Or App at 652; *Janvier*, 66 Van Natta at 1832 (applying *Brown* standard in the context of new/omitted medical condition claims).

Dr. Rosenbaum stated that the injury was never the major contributing cause of the need for treatment of the *disc bulges* or the *degenerative disc disease*; *i.e.*, the injury was never the major contributing cause of the need for treatment of the preexisting conditions. (Exs. 48-4, -5, 57-3). Yet, because claimant has established the existence of a "combined condition," the relevant inquiry under ORS 656.005(7)(a)(B) is whether the injury was the major contributing cause of the disability/need for treatment of the *combined condition*. As described above, Dr. Rosenbaum opined that the injury was the major contributing cause of the need for treatment of the combined condition for a period of time after the injury. (Ex. 48-3, 57-2, -3).

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 lumbar condition, not any subsequent matters. *See* ORS 656.005(7)(a)(B) ("if an otherwise compensable injury combines *at any time* with a preexisting condition to cause or prolong disability or a need for treatment, the combined condition is compensable * * * so long as and to the extent that the otherwise compensable injury is the major contributing cause" of the disability/need for treatment of the combined condition) (emphasis added); *Braden v. SAIF*, 187 Or App 494, 500 (2003) (the Board was not authorized to find a claim compensable for a discrete period of time at the initial claim stage, because it may not bypass statutory requirements for claim processing); *Janvier*, 66 Van Natta at 1834 (same).

In conclusion, the record does not persuasively establish that the "otherwise compensable injury" (*i.e.*, the work-related injury incident) was not, at least initially, the major contributing cause of claimant's disability/need for treatment of his combined condition. Consequently, we reverse that portion of the ALJ's order that upheld the employer's denial of claimant's new/omitted medical condition claim and set aside the denial.

Occupational Disease

To establish a compensable occupational disease, claimant must prove that employment conditions, which may include work-related injuries, were the major contributing cause of his claimed lumbar arthritis and degenerative disc disease. ORS 656.266(1); ORS 656.802(2)(a); *Hunter v. SAIF*, 246 Or App 755, 760 (2011).

In determining the major contributing cause of a condition in the context of an occupational disease claim, the relative contribution of all contributing causes must be considered, and persuasive medical opinion must explain why a particular work exposure or injury contributes more to the claimed condition than all other causes or exposures combined. *Bowen v. Fred Meyer Stores*, 202 Or App 558, 563-64 (2005), *rev den*, 341 Or 140 (2006). A condition does not contribute to a disease if the condition merely renders the worker more susceptible to the disease. *See* ORS 656.005(24)(c); *Corkum v. Bi-Mart Corp.*, 271 Or App 411, 423 (2015) (a susceptibility is passive, while a cause is an active, ongoing contributor).

Whether claimant's work exposure is the major contributing cause of his disease is a complex medical question that must be resolved by expert medical opinion. *Uris v. Comp. Dep't.*, 247 Or 420 (1967); *Barnett v. SAIF*, 122 Or App 279 (1993). We rely on opinions that are well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986); *Patton*, 60 Van Natta at 582.

Here, Dr. Ferguson identified three causal factors for claimant's lumbar degenerative disc disease and arthritis: work activity, genetics, and aging. (Ex. 55-16). He opined that a combination of genetics and aging outweighed work activity as the major contributing cause of claimant's conditions. (Ex. 55-22, -23). Dr. Rosenbaum also considered the primary causal factors for claimant's lumbar arthritis and degenerative disc disease to be genetics and aging, not claimant's work exposure. (Ex. 57-4).

Clamant argues that genetics and aging are susceptibilities, rather than active contributors, and, as such, cannot be considered in determining the major contributing cause of his disease. We disagree with claimant's position for the following reasons.

Dr. Rosenbaum opined that claimant has spondylosis and degenerative disc disease throughout his lumbar spine, resulting in L2-3 through L5-S1 degenerative disc bulges. (Ex. 48-2). He explained that over time, as part of the aging process, with active contribution from genetics, the discs, which act as shock absorbers between the vertebrae, begin to dry out, crack/tear, and bulge. (Exs. 48-2, 57-5). He observed that this process reduces the space and padding between the vertebrae, resulting in degeneration and inflammation of the facet joints, and subjecting the spine to more stress from lifting, flexion, and torsion. (Ex. 48-2). In reviewing claimant's July 2014 lumbar MRI, he observed degenerative disc signals, disc space narrowing, and facet degeneration. (Ex. 20-15).

Dr. Rosenbaum's opinion is supported by that of Dr. Ferguson, who opined that aging and genetics are active contributors in the development of degenerative disc disease and spondylosis. (Ex. 55-27). Dr. Ferguson did not know specifically how genetics contributed, but he opined that genes play a significant part in the aging process. (Ex. 55-26). He explained that aging causes a loss of elasticity and drying of the disc, which puts the disc at increased risk of injury as the disc narrows and the facets are "jammed more together" and develop inflammation. (Ex. 55-24, -25). He observed that the facets may or may not be symptomatic at that point (but "they're there") and "then some injury sets it off and makes you acutely aware that you have back pain and issues." (Ex. 55-25, -26). He reasoned that claimant's 2014 injury combined with preexisting degenerative changes to prolong disability/need for treatment, but that the injury did not accelerate the degenerative process or preponderate in the cause of claimant's conditions. (Ex. 55-8, -9, -23, -24). He determined that claimant's need for treatment after he returned to work in 2015, was "because the facet joints are there and the degenerative changes are there * * * and he's bouncing around on these inflamed joints." (Ex. 55-10).

Dr. Rosenbaum's opinion is also supported by that of Dr. Swan, who opined that claimant's lumbar arthritis and degenerative disc disease were not caused in major part by his work activities. (Ex. 54-1, -2).

Having reviewed these opinions, we conclude that they establish that claimant's aging process, contributed to by his genetics, was an active, ongoing contributor to the development of his lumbar arthritis and degenerative disc disease, and was not merely a passive risk factor or susceptibility. *Corkum*, 271 Or App at 423.

Moreover, we do not find Dr. Ferguson's opinion regarding the causal effect of claimant's work activities to be sufficiently persuasive. In explaining how claimant's work exposure contributed to his condition, Dr. Ferguson stated that truck drivers are at known risk for increased degenerative disc disease and "*may* develop some of this at an earlier age." (Ex. 55-16). (Emphasis added). He identified prolonged sitting and bouncing/vibration as contributing to lumbar degenerative disc disease and arthritis, but he acknowledged that he did not have any "data" to support that and reasoned that "it just makes sense that if you have got pressure on something, that it *may* wear out sooner." (Ex. 55-17, -18, -19). (Emphasis added). In addition, when asked if claimant's work "accelerated" his lumbar arthritis or degenerative disc disease, Dr. Ferguson responded that it was "impossible to say." (Ex. 55-19).

Accordingly, based on the aforementioned reasoning, as well as the reasons expressed in the ALJ's order, we are not persuaded that claimant satisfied his burden of proving a compensable occupational disease. Therefore, we affirm that portion of the ALJ's order that upheld the employer's denial of the occupational disease claim.

Attorney Fees/Costs

Claimant's attorney is entitled to an assessed fee for services at the hearing level and on review regarding the new/omitted combined condition claim. ORS 656.386(1). After considering the factors set forth in OAR 438-010-0040(4) and applying them to this issue, we find that a reasonable fee for claimant's attorney's services at the hearing level and on review is $11,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as demonstrated by the hearing record, claimant's appellate briefs, his counsel's fee request, and the employer's response), the nature of the proceedings, the complexity of the issue, the value of the interest involved, the experience of counsel, the risk that claimant's counsel might 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 denial of the new/omitted "combined condition" claim, 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 June 1, 2016 is reversed in part and affirmed in part. That portion of the ALJ's order that upheld the employer's denial of claimant's new/omitted medical condition claim for lumbar degenerative disc disease and L2-3 through L5-S1 disc bulges is reversed. The employer's denial is set aside and the claim is remanded to the employer for processing in accordance with law. For services at the hearing level and on review regarding the new/omitted medical condition claim denial, claimant's attorney is awarded an assessed fee of $11,000, to be paid 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 new/omitted medical condition claim denial, to be paid by the employer. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on January 25, 2017