



MEMORANDUM

January 16, 2014

To: MLAC

From: Roger Pearson, WCB Managing Attorney

Subject: *Schleiss v. SAIF* Case Summary

Schleiss v. SAIF, ___ Or __ (December 27, 2013). The Supreme Court reversed a Court of Appeals decision, 250 Or App 458 (2012), which had affirmed a Board order that, in awarding permanent disability benefits, had apportioned a worker's permanent impairment between his accepted low back condition and impairment attributable to "non-preexisting conditions" (*i.e.*, degenerative joint disease and accelerated aging from smoking). The court framed the issue as whether OAR 436-035-0013 (2009), the Director's "apportionment" rule on which the Board had relied, was inconsistent with the statutory scheme.

Based on ORS 656.214(1)(a), the court stated that, in defining "impairment," the legislature used the term "due to" to describe the necessary causal relationship between a compensable injury and the loss of use or function of a body part or system. The court summarized the parties' competing arguments regarding the meaning of "due to" as follows: (1) the worker asserted that the phrase meant "caused in material part by" the compensable injury, so that, if the compensable injury materially contributed to the total impairment, all the impairment was "due to" the compensable injury; and (2) the carrier asserted that the phrase referred to the percentage of the worker's total impairment that was caused by the compensable injury, so that the percentage of the total impairment "due to" any other contributing cause must be excluded from the permanent disability award.

Reasoning that either party's proposed meaning of "due to" as used in ORS 656.214(1)(a) was plausible, the court determined that the resolution of the dispute required a detailed examination of the pertinent statutory framework to discern the

MLAC

Re: *Schleiss v. SAIF* Case Summary

January 16, 2014 – Page 2

meaning of the term in its context. After conducting that examination of the statutory framework, the court stated that the legislature has generally authorized the Director to “determine the extent of the worker’s permanent disability” in either of two circumstances: (1) when the worker is medically stationary and there is sufficient information to determine permanent disability (ORS 656.268(1)(a)); or (2) where a combined condition exists, the compensable injury is no longer the major contributing cause of the disability and any need for treatment, and there is sufficient information to determine permanent disability (ORS 656.268(1)(b)).

Thus, based on its analysis of ORS 656.268(1)(a), the court reasoned that when a combined condition becomes medically stationary and the accepted injury remains the major contributing cause of the combined condition, the entire combined condition (*i.e.*, the effect of the work injury and the preexisting condition) remain compensable. *See* ORS 656.005(7)(a)(B). Likewise, because the combined condition makes up the compensable injury under ORS 656.214(1)(c), the court added that the entire condition is rated for impairment at claim closure because there is no other legally cognizable cause whose contribution may be considered and, therefore, all of the impairment is “due to” the compensable injury pursuant to ORS 656.214(1)(a).

On the other hand, under ORS 656.268(1)(b) (where a combined condition exists, and the compensable injury is no longer its major contributing cause), the court explained that the legislature had implicitly provided for an apportionment of causes contributing to a worker’s impairment, so that the impairment “due to” the compensable injury is limited to the percentage of the total impairment to which the injury contributed. *See* ORS 656.005(7)(a)(B); ORS 656.214(1)(c); ORS 656.268(1)(b).

Turning to the case at hand, the court found no evidence that either “non-compensable” contributing cause (*i.e.*, accelerated aging or a mild degenerative condition) constituted a legally cognizable preexisting condition that would authorize the apportionment of claimant’s permanent impairment in a combined condition claim. Specifically, the court reasoned that the record did not establish that either “condition” had been diagnosed or treated before the worker’s compensable injury or that either “condition” constituted “arthritis” or an “arthritic condition.” ORS 656.005(24)(a)(A); *Hopkins v. SAIF*, 349 Or 348, 363-64 (2010).

Because the worker’s accelerated aging and mild degenerative condition were not legally cognizable “preexisting conditions,” the court concluded that they also could not trigger the apportionment of his impairment in a *true* combined condition claim. *See*

MLAC

Re: *Schleiss v. SAIF* Case Summary

January 16, 2014 – Page 3

ORS 656.266(2)(a). In this respect, the court interpreted ORS 656.266(2)(a) to suggest that only the contributions of the component parts of the combined condition (*i.e.*, the otherwise compensable injury and the preexisting condition) should be compared in identifying the major cause of any disability (including impairment) of the combined condition.

Consequently, the court determined that other contributing causes that are neither encompassed within the compensable injury nor are legally cognizable preexisting conditions play any role in the impairment calculus of a combined condition claim. Reasoning that the Board's application of the "apportionment" rule (OAR 436-035-0013(1)) to consider non-legally cognizable preexisting conditions (accelerated aging from smoking and mild degenerative condition) as contributing causes of claimant's permanent impairment (when those conditions would not constitute "preexisting conditions" in a combined condition claim) was inconsistent with the statutory scheme, the court held that the Board's reliance on the Director's rule was erroneous.