MEMORANDUM

November 24, 2015

To: Management Labor Advisory Committee


Subject: WCB Update/“Noteworthy” Cases

SECTION 1: “Brown v. SAIF”

“Otherwise Compensable Injury” Means “Work-Related Injury Incident” - Not “Accepted Condition”

Brown v. SAIF, 262 Or App 640 (May 7, 2014). (Supreme Court petition granted). Applying ORS 656.005(7)(a)(B), and ORS 656.262(6)(c), the court held that, to satisfy its burden of proof under ORS 656.262(2)(a) to deny a worker’s combined low back condition, a carrier must establish that the “otherwise compensable injury” (i.e., the work-related injury incident, rather than the “accepted condition”) was no longer the major contributing cause of the disability or need for treatment of the combined condition. After reviewing the statutory scheme, the court noted that the “injury-based-definition” of “compensable injury” in ORS 656.005(7)(a) did not make the compensability of a worker’s injury dependent on a carrier’s acceptance of particular conditions. Further referring to 1990 and 1995 legislative history concerning statutory amendments concerning the phrase “otherwise compensable injury” (as used in ORS 656.005(7)(a)(B)) (which used phrases such as the “work injury,” the “industrial injury,” the “injury incident,” or the “work incident”), the court found no indication of an intention to change the incident-based focus of “compensable injury” and also determined that there was no legislative intention that a carrier’s obligation to specify the accepted conditions would have an adverse effect on a worker’s rights to benefits as a result of a compensable injury. Consequently, the court concluded that the “injury-incident-based” statutory definition of “compensable injury” did not make the compensability of an injury dependent on the carrier’s acceptance of particular
conditions. The court reasoned that, to do otherwise, would give a carrier the ability
to define and limit the scope of a compensable injury by specifically articulating the
“accepted condition,” which would be inconsistent with the legislative history.

“Brown” Standard Applied to “New/Omitted Medical Condition” Claims

Jean M. Janvier, 66 Van Natta 1827 (November 4, 2014). (Appealed to Court of Appeals). Applying ORS 656.266(2)(a), the Board held that a worker’s new/omitted medical condition claim for a combined cervical disc condition was compensable because she had proven the existence of the claimed “combined condition” (i.e., an otherwise compensable injury combined with a preexisting arthritic cervical disc condition) and that the carrier had not established that the “otherwise compensable injury” (i.e., the work-related injury/incident) was not the major contributing cause of the disability/need for medical treatment for the combined condition. Although acknowledging that some earlier Court of Appeals decisions had described a “combined condition” as “two conditions that merge or exist harmoniously,” the Board noted that the Court of Appeals (in the Brown v. SAIF decision) had subsequently defined a “combined condition” as the “work-related injury/incident,” which was consistent with the Supreme Court’s reference to a “combined condition” as “two medical problems simultaneously.”

Consequently, the Board applied the Brown standard (which had addressed a carrier’s “ceases” denial of a combined condition under ORS 656.262(6)(c)) when analyzing the worker’s new/omitted medical condition claim involving a “combined condition” under ORS 656.266(2)(a). Furthermore, noting that the worker had claimed a “combined condition,” the Board reiterated that the burden of proving the existence of that claimed condition rested with the worker and, if so proven, the burden then shifted to the carrier to prove under ORS 656.266(2)(a) that the “otherwise compensable injury” (i.e., the work-related injury/incident) was not the major contributing cause of the disability/need for medical treatment for the combined condition. Finding that the persuasive medical evidence established the worker’s burden of proving the existence of the claimed combined condition, but not the carrier’s burden of disproving the claim’s compensability under ORS 656.266(2)(a), the Board set aside the carrier’s new/omitted medical condition denial.
“Brown” Standard Applied to “Diagnostic” Medical Services

SAIF v. Carlos-Macias, 262 Or App 629 (May 7, 2014). Applying ORS 656.245(1)(a), the court held that a worker’s diagnostic medical service claim to discover the cause of his left shoulder complaints were the responsibility of the carrier because the diagnostic procedure was necessary to determine the extent of the worker’s compensable left shoulder injury, even if the proposed medical services were not due to an accepted condition. Reasoning that diagnostic services related to the discovery of the cause of the worker’s pain complaints can be reasonable and necessary expenses borne by the carrier even if the results of the testing revealed that the condition was unrelated to his compensable condition, the court rejected the carrier’s contention that the proposed medical services must derive from the worker’s “accepted conditions.” Explaining that the terms “compensable injury” and “accepted condition” as used in the statutory scheme are not interchangeable, the court concluded that, in accordance with ORS 656.245(1)(a), the term “compensable injury” was applicable to define compensable medical services, which necessarily included diagnostic procedures for conditions not yet discovered.

Barbara A. Easton, 67 Van Natta 526 (March 27, 2015). Applying ORS 656.245(1)(a), the Board held that a carrier was responsible for a worker’s proposed medical service (discogram) because the procedure was due in material part to her compensable low back injury and was necessary to determine the cause and extent of that injury, even if the procedure eventually revealed that any disc condition was unrelated to the injury. Reasoning that the “compensable injury” for purposes of ORS 656.245(1)(a) was not limited to the worker’s accepted lumbar strain, the Board was persuaded by a physician’s opinion that the discogram was a diagnostic test that would confirm whether a particular disc was painful and that such information, in combination with the mechanism of the worker’s injury and the nature of her symptoms, would help determine whether the work-related injury/incident had involved a disc injury. Under such circumstances, the Board held that the diagnostic procedure was due in material part to the worker’s compensable injury, regardless of whether she was ultimately determined to have a compensable disc injury.

A dissenting opinion was persuaded by other physicians’ opinions that the worker’s symptoms were “highly inconsistent” with a disc injury and that earlier MRI findings did not indicate any nerve root encroachment. Based on those opinions, the
dissent considered the worker’s injury to have been limited to an accepted lumbar strain and, therefore, further evaluation of the worker’s disc would not determine the cause or extent of her compensable injury, regardless of the results of the diagnostic testing.

“Brown” Standard Applied to “Consequential Conditions”

“Brown” Standard Not Applied to Permanent Disability Evaluation
ORS 656.268(15); OAR 436-035-0007(1). Under such circumstances, the Board declined to extend the Brown holding to the evaluation of permanent impairment/work disability awards.

A dissenting opinion asserted that the relevant statutes regarding permanent disability compensation consistently referred to “compensable industrial injury,” rather than to the accepted injury or conditions. Because the Brown decision had interpreted such a phrase to mean “work-related injury incident,” the dissent contended that such a rationale was likewise applicable to the rating of permanent impairment. Reasoning that an emphasis on “accepted condition” would limit a worker’s entitlement to permanent disability compensation, the dissent believed that such a position would be inconsistent with the Brown court’s rationale to avoid negative consequences to the worker, as well as contrary to the legislative objectives prescribed in ORS 656.012(b) and (c) to provide appropriate compensation in a timely and efficient manner.

**SECTION 2: “Schleiss v. SAIF”**

*Impairment Findings - “Apportionment” Rule - “Non-Legally Cognizable” Contributing Cause*

Schleiss v. SAIF, 354 Or 637 (December 27, 2013). Analyzing ORS 656.214 and ORS 656.268, the Supreme Court held that a Workers’ Compensation Division rule (OAR 436-035-0013), which provided for the apportionment of a worker’s impairment findings between his accepted low back condition and impairment attributable to non-legally cognizable contributing causes (a degenerative joint disease and accelerated aging from smoking, which did not constitute “preexisting conditions” in a “combined condition” claim) was inconsistent with the statutory scheme. Reasoning that contributing causes that are neither encompassed within the worker’s compensable injury nor are legally cognizable “preexisting conditions” under ORS 656.005(24) play no role in the impairment calculus of a combined condition claim, the court concluded that application of the “apportionment” rule to consider non-legally cognizable conditions as contributing causes of the worker’s permanent impairment was not statutorily authorized. Because, apart from the compensable injury, there were no other legally cognizable contributing causes that the worker’s impairment was “due to” under either ORS 656.214 or ORS 656.268, the court reasoned that all of his impairment was “due to” his compensable injury for purposes of evaluating his permanent disability award.
“Schleiss” Applied - No “Preexisting Condition” - “Apportionment” Not Justified

Joseph Wagner, 66 Van Natta 485 (March 14, 2014). Analyzing OAR 436-035-0013(1), the Board held that a worker was entitled to a low back permanent impairment award based on his entire reduced range of motion findings because, even though a medical arbiter had attributed 50 percent of those findings to preexisting lumbar spondylosis, the record did not establish that the spondylosis constituted a legally recognizable “preexisting condition” under ORS 656.005(24)(a). Relying on a Supreme Court decision (Schleiss v. SAIF), the Board stated that only the contributions of the component parts of a 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 a combined condition.

Based on the Supreme Court’s rationale, the Board further observed that the Director’s “apportionment” rule (OAR 436-035-0013(1)) was inconsistent with the statutory scheme to the extent that it excluded non-legally cognizable conditions (i.e., conditions that were not “preexisting conditions” under ORS 656.005(24)) from being rated for permanent disability purposes. Finding that the record did not establish that the worker’s lumbar spondylosis constituted a “preexisting condition” (i.e., he had neither received treatment nor received a diagnosis for lumbar spondylosis before his injury nor was there a medical opinion establishing that it was arthritis or an arthritic condition), the Board concluded that his impairment findings were not subject to “apportionment” and should be fully included in rating his permanent impairment for his compensable injury.

“Schleiss” Distinguished - No “Compensable Injury” Impairment - “Apportionment” Rule Not Applicable

Paula Magana-Marquez, 66 Van Natta 1300 (July 25, 2014). (Appealed to Court of Appeals). Analyzing ORS 656.214, and OAR 436-035-0013(1), the Board held that a worker was not entitled to a permanent disability award for her accepted low back strain condition because she had not sustained any permanent impairment related to her compensable injury, but rather all of her impairment was attributable to conditions (body habitus and spondylosis) that were non-legally cognizable preexisting conditions. The Board recognized that the Supreme Court has held that all of a worker’s permanent impairment should be considered due to the compensable injury when some of the impairment findings were attributable to non-legally cognizable preexisting conditions. Nonetheless, in contrast to the Supreme Court decision, the Board reasoned that
the medical record in the present case did not relate any of the worker’s permanent impairment to her compensable injury, but rather solely attributed her impairment to causes unrelated to her injury.

“Schleiss” Distinguished - “Denied” & “Post-Closure” Accepted Conditions Not Ratable - Apportionment Rule Applied

Marisela Johnson, 67 Van Natta 1458 (August 12, 2015). In rating a worker’s permanent impairment for a worker’s accepted hand condition, the Board applied the “apportionment” rule (OAR 436-035-0013) because a portion of her “grip strength loss” was attributable to shoulder conditions (which had either been denied or accepted after closure of the claim). Reasoning that the reconsideration proceeding regarding the current claim was limited to the worker’s accepted finger/hand conditions, the Board concluded that any “grip strength” impairment attributable to the denied or “post-closure” accepted shoulder conditions would be subsequently evaluated when the claim for the “post-closure” accepted conditions was closed (as well as the claim for the denied conditions if they were subsequently accepted or eventually found compensable). Under such circumstances, the Board determined that apportionment of the worker’s “grip strength” impairment between her accepted finger/hand conditions and the denied/“post-closure” accepted shoulder conditions was appropriate.

“Schleiss” Distinguished - No Impairment Due to Accepted Conditions - “Apportionment” Rule Not Applicable

Eugene Walters, 67 Van Natta 1439 (August 10, 2015). (Appealed to Court of Appeals.) In rating the extent of a worker’s permanent impairment for accepted cervical/lumbar strains, the Board held that the “apportionment” rule (OAR 436-035-0013) did not apply because, even though a medical arbiter’s findings attributed the worker’s permanent impairment to a non-legally cognizable preexisting “arthritic” condition, the arbiter’s findings did not relate any of the worker’s impairment to his accepted conditions. Reasoning that a permanent disability award must be based on impairment caused by the worker’s accepted conditions or a direct medical sequela of an accepted condition, the Board concluded that the medical arbiter’s findings (which attributed all of the worker’s impairment to a preexisting “arthritic” condition) did not establish that he had sustained any permanent impairment due to his accepted conditions. Consequently, even though the arbiter’s reference to “arthritis” was insufficient to
establish a “preexisting condition” (in the absence of medical evidence supporting an inflammation of the joints), the Board determined that a permanent impairment award for the worker’s accepted conditions was not warranted.

Finally, the Board held that apportionment of the worker’s permanent impairment regarding an accepted left shoulder condition was justified. Noting that the arbiter had apportioned the worker’s left shoulder impairment between his accepted conditions and denied conditions, the Board applied OAR 436-035-0013 and granted him permanent impairment insofar as it was related to his accepted left shoulder condition.


Claudia S. Stryker, 67 Van Natta 1003 (June 4, 2015). (Appealed to Court of Appeals.) Applying former OAR 436-035-0013, the Board held that apportionment of a worker’s permanent impairment for compensable shoulder and low back conditions was appropriate even though the “superimposed and unrelated conditions” that were not considered for rating purposes were legally cognizable “preexisting conditions” that had neither been claimed, accepted, nor denied before claim closure. Reasoning that the statutory scheme does not premise the existence of a legally cognizable “preexisting condition” on its acceptance, the Board disagreed with the worker’s contention that, in the absence of the carrier’s “pre-closure” acceptance and denial of a combined condition, all of the worker’s impairment findings must be attributed to her compensable injury (without apportionment for her preexisting arthritic condition). Instead, consistent with the Appellate Review Unit’s plausible interpretation of its administrative rule, the Board concluded that apportionment of a worker’s permanent impairment was not dependent on a “pre-closure” acceptance/denial of a combined condition, but rather was appropriate when the record supported the existence of a legally cognizable “preexisting condition.”

The dissent contended that, under a Supreme Court decision (Schleiss v. SAIF), impairment attributable to a legally cognizable preexisting condition must be apportioned in a permanent disability award where a combined condition has been established. Reasoning that apportionment only becomes applicable when a combined condition has been “established, the dissent argued that the worker’s impairment should not be apportioned because a “combined condition” had neither been claimed, accepted, nor denied.
SECTION 3: “Spurger v. SAIF”
Extent - Impairment Findings - “Significant Limitation/Repetitive Use”

Spurger v. SAIF, 266 Or App 183 (October 8, 2014). Analyzing OAR 436-035-0019, the court held that, when evaluating a worker’s permanent impairment to determine whether she was “significantly limited in the repetitive use” of her compensable hip (for purposes of a “chronic condition” impairment value), the relevant inquiry is whether the worker’s limitations described in the medical opinion showed that she was significantly limited, not whether a physician described the limitations as “significant” according to the physician’s understanding of that term. Reasoning that the physicians’ opinions do not drive the legal standard announced in the administrative rule (but rather the legal meaning of the rule drives the significance of the physicians’ opinions), the court considered the physicians’ refusal to call a worker’s limitations “significant” to be of little use in a circumstance where the legal principle by which to gauge the evidentiary weight of the physicians’ opinions had been identified. Determining that the Board’s order had not explained why the worker’s physical limitations had not been considered “significant” enough to qualify for a “chronic condition” impairment value under OAR 436-035-0019, the court remanded.

“Significant Limitation/Repetitive Use” - Includes Overall Conditions/Motions

Godinez v. SAIF, 269 Or App 578 (March 11, 2015). Analyzing OAR 436-035-0019(1), the court held that a worker was not entitled to a “chronic condition” impairment value for a shoulder condition because the Appellate Review Unit’s (ARU’s) interpretation of the rule (which found “significant limitation” to mean impairment that must include the worker’s “overall conditions/motions and not just one motion”) was plausible and entitled to deference. Reasoning that ARU was the delegate of the Director (who had adopted the administrative rule), the court determined that deference should be given to ARU’s interpretation of the rule because the worker had not established that ARU’s interpretation was not plausible or inconsistent with the text or context of the rule or any other source of law. The court further observed that the rulemaking history for the rule (which in inserting “significant limitation” into the rule indicated that it was designed to require a higher threshold for receiving an impairment award than the previous rule, which had simply required a partial loss of ability to repetitively use the body part) strengthened the plausibility of ARU’s interpretation. Noting that the worker’s attending physician had only referred to a lifting limitation
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of use over shoulder level, the court concluded that there was substantial evidence
to support the Board’s affirmation of ARU’s finding that the worker did not have a
“limitation on his overall motions/ conditions.”

“Significant Limitation”/“Repetitive Use” - Higher Threshold Than Partial Loss of
Inability to Repetitively Use Body Part

Angelica M. Spurger, 67 Van Natta 1798 (October 6, 2015). Analyzing OAR
436-035-0019(1)(i), the Board held that, in order to meet the requirements for a “chronic
condition” permanent impairment award, the worker must establish the existence of a
“significant limitation” (“meaningful,” “important,” or other synonymous word) of her
ability in the repetitive use of her body part, which constitutes a “higher threshold” than a
partial loss of ability to repetitive use the body part. Considering the intentions expressed
by the Workers’ Compensation Division (WCD) during the adoption of the applicable
version of its “chronic condition” rule, the Board determined that the rule was designed
to establish a “higher threshold” for receiving a permanent impairment award than merely
a partial loss of ability to repetitively use a body part (which was an interpretation of an
earlier version of the “chronic condition” rule that had been endorsed by prior case law).
Reasoning that a physician’s statement that the worker would experience “difficulty”
with repetitive squatting, walking long distances and static standing for long periods did
not represent a meaningful or important limitation in the repetitive use of the hip and
noting that the physician’s modification of the worker’s work schedule (to a two days on,
one day off pattern) did not refer to a “repetitive use” limitation, the Board concluded that
the worker had not met her burden of establishing that WCD’s decision not to grant a
“chronic condition” award had been in error.

In reaching its conclusion, the Board determined that a WCD “Industry Notice”
(which concerned its interpretation of the “chronic condition” rule) had no bearing on the
present case. In doing so, the Board observed that the Notice of Closure in the case at
hand had issued several years before WCD’s notice.

A dissenting opinion agreed with the majority’s interpretation of “significant”
under WCD’s rule. However, persuaded that the worker’s difficulties and restrictions
constituted significant limitations in her repetitive use of her hip, the dissent asserted
that the worker had established her entitlement to a “chronic condition” award.
SECTION 4: “U.S. Bank v. Pohrman”  
“Course & Scope” of Employment -  
“Personal Comfort Doctrine”/“Going & Coming” Rule

_U.S. Bank v. Pohrman_, 272 Or App 31 (June 24, 2015). (Petition for review denied). Citing ORS 656.005(7)(b)(B), the court held that a worker’s injury, which occurred when she slipped and fell while walking to a coffee shop in the lobby of the building where the employer’s office was located to meet a friend during her paid break, was not excluded from compensability because she was not injured while performing a social/recreational activity primarily for her personal pleasure. Reasoning that the personal nature of the worker’s meeting with her friend was incidental or secondary to her work-related reason for her break activity (_i.e._, her mandatory paid break at her employer’s direction), the court rejected the carrier’s assertion that her injury was _per se_ noncompensable under ORS 656.005(7)(b)(B) because she was injured while engaging in a social activity primarily for her personal pleasure.

Addressing the relationship between the “personal comfort” doctrine and the “going and coming” rule, the court explained that the “going and coming” rule generally does not apply when the worker, although not engaging in an appointed work activity at a specific moment in time, still remains in the course of employment and, therefore, has not left work; _e.g._, when a worker is “still ‘on duty’ and otherwise subject to the employer’s direction and control.” In other words, the court clarified that the “personal comfort” doctrine may apply in such a situation, depending on the activity in which the worker was involved when the injury occurred. Conversely, the court explained that, if it was determined that the worker had not engaged in a “personal comfort” activity, but rather was injured while on a “personal mission of his own,” or it was determined that the “personal comfort” activity did not bear a sufficient connection to the employment, then the “going and coming” rule (as well as any of the exceptions to that rule) would become applicable in determining the compensability of the worker’s injury.