MEMORANDUM

February 21, 2019

To: Management-Labor Advisory Committee

From: Cathy Ostrand-Ponsioen, Legal Issues Coordinator
Julia Hier, Claims Policy Analyst

Subject: HB 3022 (LC 696)

This memo provides an overview of the four areas of the law raised by the Oregon Trial Lawyers Association at your Feb. 8, 2019, meeting. We want to provide you with a general framework as you begin discussions of HB 3022 (LC 696). There are a few points we want to emphasize:

- This memo is a simplified discussion of very complicated areas of the law; it does not get into the nuances and possible legal arguments. As discussions of HB 3022 become more focused, we can provide more detail and data to inform the discussion.

- The memo focuses primarily on injury claims, although changes made by HB 3022 would also extend to occupational disease claims.

- The memo does not include discussion of Section 13, which appears to have a different intent than the rest of the sections. As more is learned about the intent behind including Section 13 in HB 3022, we will provide updated information.

- These areas of the law are controlled by statutory language and how the appellate courts interpret that language. Any changes to chapter 656 as a result of HB 3022 would also be subject to future litigation and interpretation.

"Compensable injury"

One overarching issue addressed by HB 3022 affects the scope of a compensable injury. The issue is whether the compensable injury refers only to the specific medical conditions listed in the Notice of Acceptance, or whether the compensable injury includes the effects of the injury event, not limited to the conditions that have been accepted in the claim.

How the term "compensable injury" is defined in the statute affects several areas, including: whether medical services, including diagnostics, must be paid; claim closure; entitlement to

permanent disability benefits; availability of future benefits in the event of a worsening after the worker's aggravation rights have expired; and eligibility for the Preferred Worker Program.

The *Brown v. SAIF* case changed the scope of a compensable injury. *Brown* involved a combined condition, which occurs when a compensable injury combines with a worker's preexisting condition to cause or prolong disability or a need for treatment (see discussions of combined conditions and preexisting conditions below). The Court of Appeals' 2014 decision[1] expanded the scope of the compensable injury to include the effects of the injury incident and not just the accepted conditions. In 2017, the Supreme Court's decision[2] reversed course, limiting the scope of the compensable injury to the accepted conditions.

HB 3022 broadens the definition of "compensable injury" as that term is used throughout chapter 656 to include the accidental injury and all results, not limited by the conditions specified in the notice of acceptance. (Page 2, lines 16-18)

Diagnostic services

Services to diagnose a worker's condition are compensable if the purpose is to determine the cause or extent of the compensable injury. After the Supreme Court's decision in *Brown*, cases have confirmed that the compensable injury in this context is the accepted condition, not the injury incident.[3]

Diagnostic services for the purpose of establishing the compensability of a new or consequential condition are currently not compensable.

HB 3022 does not contain specific language addressing diagnostic services. Rather, the compensability of diagnostic services will be broadened as a result of the new definition of "compensable injury." (Page 13, lines 25-28.) Diagnostic services will be compensable if the purpose is to determine the cause or extent of the accidental injury and all results, not just the accepted condition.

Combined conditions

An accidental work injury[4] is compensable if it requires medical services or results in disability or death. The worker has the burden to prove that the injury is a material contributing cause of disability or need for treatment. The worker does not need to establish a specific diagnosis.

---

[1] *Brown v. SAIF*, 262 Or App 640 (2014).
[2] *Brown v. SAIF*, 361 Or 241 (2017).
[3] *SAIF v. Carlos-Macias*, 290 Or App 801 (2018) (this decision is final); *Garcia-Solis v. Farmers Ins. Co.*, 288 Or App 1 (2017), *rev allowed*, 363 Or 390 (2018) (this case was argued before the Oregon Supreme Court in January 2019).
[4] The injury must arise out of and in the course of employment. This memo does not address that analysis.

The burden is different in the case of a combined condition. A combined condition occurs when a compensable injury combines with a worker's preexisting condition (see discussion of preexisting conditions below) to cause or prolong disability or a need for treatment. The combined condition is compensable only if and as long as the compensable injury is the major contributing cause (more than 50% of the cause) of the disability or need for treatment.

In the case of a combined condition, the insurer has the burden to establish that the worker has a legally recognizable preexisting condition, that there is a combined condition, and that the otherwise compensable injury is not, or is no longer, the major contributing cause of the disability or need for treatment. Under the Supreme Court's decision in *Brown*, the "otherwise compensable injury" in this analysis is the accepted condition, not the injury incident.

When the compensable injury is no longer the major contributing cause of the disability or need for treatment because of a change in the worker's condition or circumstances, the insurer can deny the combined condition and close the claim.

HB 3022, except for Section 13[5], completely removes combined conditions from the law.

Preexisting conditions

A preexisting condition is defined as a condition that:

- Contributes to disability or need for treatment. A condition does not contribute to disability or need for treatment if it "merely renders the worker more susceptible to the injury." A condition "merely" renders the worker more susceptible to injury if it increases the likelihood that the affected body part will be injured by some other action or process but does not actively contribute to damaging the body part.[6] In that case, the condition would not be a factor in determining the cause of disability or need for treatment.

  AND

- Has been diagnosed or treated before the injury, unless it is "arthritis or an arthritic condition."

Whether a condition is considered to be a "preexisting condition" is relevant in two scenarios:

- When an injury causes a preexisting condition to worsen. Disability that is solely caused by or medical services solely directed to a worker's preexisting condition are

[5] Section 13 retains the concept of combined conditions but would require that a combined condition be accepted and denied before impairment can be divided between the compensable injury and a preexisting condition. This memo does not address the issue of apportionment.
[6] *Vantassel v. SAIF*, 284 Or App 335 (2017); *Corkum v. Bi-Mart*, 271 Or App 411 (2015).

compensable if work conditions or events are the major contributing cause of a pathological worsening of the preexisting condition.

- When an injury combines with a preexisting condition (see discussion of combined conditions above). If a compensable injury combines with a legally recognizable preexisting condition, the combined condition is compensable as long as the compensable injury is the major contributing cause of the disability or need for treatment.

HB 3022 makes several changes regarding preexisting conditions:

1) Adds to the definition of "preexisting condition":

    a. Language stating that a preexisting condition contributes to disability or need for treatment "and does not render a worker more susceptible to an injury." (Page 4, line 26). HB 3022 leaves in place the current language providing that a condition does not contribute to disability or need for treatment if it "merely" renders the worker more susceptible to injury. (Page 4, line 41).

    b. Language stating that a preexisting condition does not include one "that is materially related to a worker's immutable characteristics including, but not limited to, the worker's age, sex, race or ethnicity, or genetic heritage or makeup." (Page 4, lines 42-44.)

2) Removes the language regarding the compensability of combined conditions (except for Section 13).

3) Removes the language regarding the compensability of worsened preexisting conditions. (Page 11 (lines 42-45), Page 12 (lines 1-7), Page 49 (lines 7-15).)

4) Adds language specifying that, except for permanent total disability, a worker's preexisting condition may not be considered if it reduces or eliminates the worker's rights or benefits. (See page 12, lines 8-10.)

5) Adds language specifying that impairment may not be divided between a compensable injury and a preexisting condition. (Page 28, lines 20-21.)[7]

The combined effect of these changes seems to be that preexisting conditions will have a very limited role in workers' compensation claims.

[7] This memo does not discuss the issue of apportionment.

New and omitted condition claims

When the insurer accepts a worker's claim, the insurer issues a notice of acceptance that specifies what conditions are compensable. The accepted conditions are the "compensable injury." If the worker believes a condition has been left out of the notice, the worker can file a claim for an omitted medical condition. The worker can also make a claim for a new medical condition. The worker needs to prove that the new or omitted condition exists; proof of symptoms is not enough.

In response to a claim for a new or omitted condition, an insurer must issue an acceptance or denial within 60 days. The insurer may not issue a denial for a condition unless it has been claimed by the worker. If the claim for a new or omitted condition is denied, the worker may request a hearing on the denial.

If the claim is accepted, the statute provides that the insurer is not required to accept each and every diagnosis or medical condition with particularity, as long as the acceptance "reasonably apprises" the worker and the medical providers of the nature of the compensable conditions.

HB 3022 adds language specifying that, when making a claim for a new or omitted condition, the worker need not request acceptance of each condition with particularity if the request reasonably apprises the insurer of the nature of the medical condition. (See Page 27, line 38-40.) This is the same standard required of the insurer when accepting a new or omitted condition.

Other areas addressed by HB 3022

HB 3022 as drafted addresses other parts of the workers' compensation law not discussed above, including:

- Changes the definition of impairment (from that "due to" to that "caused in material part by" the compensable injury) (Page 10, line 7-8.)

- Limits the ability to settle benefits under Board's Own Motion and requires the director to participate in settlement negotiations (Page 12, lines 13-14 and 20-23.)

- Specifically reserves the worker's rights arising from late or nonpayment of claim disposition agreement proceeds (Page 12, line 19.)

- Requires an insurer or MCO to preauthorize services upon request (Page 13, lines 37-38 and Page 19, lines 38-40.)

- Requires notice to the worker in certain circumstances before the payment of benefits can be stopped (Pages 22-23.)

- Limits apportionment of impairment (Page 28, lines 20-21.)

- Extends the period of substantive time loss (Page 28, lines 44-45 and page 29, lines 28-29.)

- Limits the use of medical arbiter panels (Pages 32-33.)

- Allows a worker to rebut an arbiter report (Page 33, lines 25-26 and 36-37, Page 42, lines 44-45.)

- Allows a worker to request redetermination of permanent disability after training (Page 34, lines 3-4.)

- Creates a presumption regarding wages if the employer does not provide wage records (Page 44, lines 26-27.)

- Does away with worker requested medical exams (WRMEs) and allows the worker an expert exam or opinion for every IME or consulting opinion obtained by the insurer (Page 45, lines 21-32.)

- Provides that the changes made by the concept apply retroactively (Page 50, Section 22.)

- Contains an emergency clause (Page 50, Section 23.)