Written testimony of SAIF to MLAC
HB 3022
David Barenberg, government relations director
Elaine Schooler, trial attorney
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Thank you for the opportunity to provide testimony regarding changes to Oregon's workers' compensation system proposed by the Oregon Trial Lawyers Association (OTLA). SAIF respectfully urges caution as MLAC reviews these sweeping changes to a system that is nationally acknowledged as successful for both workers and employers.

You heard a presentation two weeks ago about this proposal. Both the oral and written testimony presented by the OTLA suggested the 1990 reforms were intended to only reduce employer costs. SAIF respectfully disagree. The changes proposed by the Mahonia Hall workgroup were comprehensive, but were intended to stabilize the system. Oregon's workers' compensation system was the sixth most expensive nationally for employers, but it provided some of the worse benefits for workers. Labor and management were mired in litigation at every turn.[i] Safety was an after-thought, and worker reinstatement rights were nonexistent.

The original Labor Management Advisory Committee report was crafted by the seven labor representatives and seven business representatives charged with creating a "system that is fair and affordable: fair to the injured workers and affordable for Oregon employers." On pages 1 and 2 of the letter to the Governor, the committee listed some of the benefits their proposed compromise offered to both workers and employers.

Not only did the Mahonia Hall reforms increase benefits for injured workers; it also included:

- Disabilities rated by the worker's own attending physician, with a non-adversarial appeal process
- Reinstatement rights
- Settlement rights for indemnity issues while retaining the right for continued medical treatment
- Improved return to work benefits
- Less litigation

This is not an exhaustive list. The report also recognized that safety is a critical component to a successful workers' compensation system; among the reforms adopted during the 1990 special session was the establishment of mandatory safety committees.

To summarize, the main reasons for the 1990 reforms (as reinforced in 1995), were to reduce the high cost of the system for employers, increase the low benefit rates for workers, make the system more procedurally efficient, and reduce litigation. On all fronts, the reforms were a phenomenal success. Worker benefits could not be increased without reducing employer costs. And the system could not be made more efficient without reducing and streamlining litigation.

The key to the entire package, as expressly stated by Senate President Kitzhaber in a 1990 floor speech, was the major contributing cause limitation on preexisting conditions. That had the effect of limiting responsibility for non-work-related conditions, which, prior to the reforms, were inevitably included in the workers' compensation system via the material contributing cause standard of compensability.

Under pre-1990 law, that material cause standard applied not only to initial work injuries, but also to preexisting conditions in the form of what we now know as "combined conditions," as well as consequential conditions, medical services, aggravations, among others. Prior to 1990, therefore, the workers' compensation system was required to absorb medical and other costs related almost entirely to non-work-related medical conditions.

Mahonia Hall provided a principal of balance and a framework for achieving that balance. SAIF acknowledges and agrees that measured changes to improve the system are appropriate and it has supported those changes over the years. In the last two years SAIF has supported increased access to WRMEs for injured workers, and a restoration of a more complicated average weekly wage calculations to provide an increased, but fair mechanism for calculating time loss benefits.

SAIF has been and remains a proponent of MLAC and the process that brings labor and management together to review and consider changes to the system to which they are both beneficiaries. We welcome and appreciate the opportunity to provide our perspective and experience, and if it is available, data. This proposed legislation impacts the current system more significantly than any proposed changes to the system in the past 29 years. SAIF urges MLAC to give these proposals the same careful consideration it gives all proposed workers' compensation system changes.

HB 3022 makes sweeping changes and SAIF is currently analyzing both the what it proposes changing and the extent of the proposed changes. SAIF has heard suggestions that Brown v. SAIF, decided in 2017 by the Oregon Supreme Court, "reversed course;" Brown v. SAIF reinstated established case law that had been overturned in Brown v. SAIF at the Oregon Court of Appeals in 2014. In response to OTLA's top four changes as described in its presentation to MLAC on February 8:

1. Entitlement to diagnostic services

OTLA proposes changing the definition of "compensable injury" to encompass the "accidental injury and all results requiring medical services". The "compensable injury" would not be limited to the conditions listed in the notice of acceptance. Changing the definition of a phrase that is a term of art in workers' compensation law brings about unintended consequences.

In ORS Chapter 656, the phrase "compensable injury" is used more than forty times. By changing the definition of compensable injury, a ripple effect will occur in other areas of workers' compensation.

For example, ORS 656.005(7)(a)(B) states that if a compensable injury combines with a preexisting condition, the combined condition is not compensable unless the compensable injury is the major contributing cause of the disability and need to treat the combined condition. Employers and insurers would be required to show that the "injury event"—and not the work-related condition—was not (or no longer was) the major contributing cause of the need to treat the combined condition. This is a reversal

of the Supreme Court's decision in *Brown v. SAIF*, where it concluded that the insurer had to show that the work-related condition was no longer the major contributing cause of the need to treat the accepted and subsequently denied combined condition. "Compensable injury" also appears in the temporary disability provisions (i.e. time loss provisions) where a worker may receive temporary disability if they are required to leave work for four or more hours to receive medical treatment regarding the "compensable injury" according to ORS 656.210(4). It creates a challenge for an adjuster to determine whether temporary disability benefits are due when they are looking at an injury event as opposed to an accepted condition.

Under ORS 656.214(2), permanent disability benefits shall be awarded when the disability "results from a compensable injury." Following the Court of Appeals first decision in *Brown* where it interpreted "compensable injury" to mean the injury event, employers and insurers observed the ripple effect of that decision in determining permanent impairment. On March 1, 2015, the department amended the rules regarding permanent disability. Permanent disability was no longer awarded only for the accepted conditions. Instead, under OAR 436-035-0007(1)(a), a worker was eligible for an award if the permanent loss was caused in any part by the compensable injury. Prior to the Court of Appeals *Brown* decision in 2014, the rule stated that a worker was eligible for an impairment award if the loss was caused by the accepted compensable condition and direct medical sequela. The result of this rule change was that impairment was rated for the injury event and not for the accepted conditions, leading to increased impairment awards.

Another unintended effect of the Court of Appeals decision in *Brown* was the evaluation of vocational benefits. As with the permanent impairment determination, the rules regarding entitlement to vocational services were rewritten to reflect the new definition of "compensable injury" whereas previously vocational benefits were determined based on the physical limitations due to the accepted conditions.

Furthermore, here is an excerpt from the department's March 1, 2015 summary of its proposed rule changes to OAR 436-120.

"The division has amended OAR 436-009, Oregon Medical Fee and Payment Rules, 436-010, Medical Services, 436-030, Claim Closure and Reconsideration, 436-035, Disability Rating Standards, 436-105, Employer-at-Injury Program, 436-110 Preferred Worker Program, and 436-120, Vocational Assistance to Injured Workers, to reflect the decision of the Oregon Court of Appeals in *Brown v. SAIF* (262 Or. App. 640 (2014)). The court found that the legislative history established that an insurer's obligation to specify the accepted conditions for a claim was not intended to have a negative impact on the injured worker's right to benefits resulting from the compensable injury; specifically, the legislature did not mean to equate "compensable injury" with an "accepted condition." Revised rules distinguish definitions and actions that are relevant to compensable injuries from those definitions and actions that are relevant to accepted conditions." https://wcd.oregon.gov/Rules/div_120/120_15056ub_2.pdf

Workers' compensation is a merge of law and medicine. Benefits are determined based on a statutory scheme that injured workers, employers, medical providers, and insurers function under. By shifting the standard from the accepted conditions, the system is eroded as the basis for the benefits moves from evidence-based medicine to forensic science where workers, employers and doctors are expected to determine benefits based on an injurious event or series of events. This is problematic for all and creates uncertainty.

SAIF is concerned that, by changing the statutory definition of "compensable injury," the system will be impacted beyond diagnostic services. The redefinition of compensable injury is overbroad if it is just supposed to make diagnostic services compensable in more circumstances. It will make everything tangentially related or possibly related compensable for medical services.

2. Burden of Proof in Combined Condition Denials

First, OTLA's proposed changes eliminate ORS 656.005(7)(a)(B), which allows an insurer to deny an initial combined condition claim and ORS 656.262(6)(c) and (7)(a), which allows an insurer to deny an accepted combined condition. Thus, the argument that a change in the definition is needed to clarify the combined condition statutes is misleading because the proposal eliminates the existing combined condition statutes.

In addition, there is no reason to redefine a combined condition after *Brown* to be consistent between a combining in the initial compensability context and that in the ceases denial context. There is a distinction because the worker need not establish a specific diagnosis to meet their burden of proving an otherwise compensable injury. A worker need only show that the injury was a material contributing cause of their disability and need for treatment. If a worker meets their burden of proof then an insurer has the burden of proving there is a combined condition with a preexisting condition and the preexisting condition is more than fifty percent the cause of the condition. For an accepted combined condition, there is the compensable injury, which insurers typically define as a specific condition, and there is a preexisting condition. The Supreme Court in *Brown* found that the comparison is between the compensable injury, in that case a lumbar strain, and preexisting arthritis. The courts and Workers' Compensation Board have been able to apply these standards rather consistently except for the Court of Appeal's decision in Brown, which was subsequently reversed. More recently the board reaffirmed this interpretation of the combined condition statutes in *Margarret Y. Interiano*, 71 Van Natta 111 (2019) and *Mario Carillo*, 70 Van Natta 1815 (2018).

3. Preexisting conditions

The purpose of workers' compensation is to cover work-related conditions, and when an injury combines with a preexisting condition, only cover that which is attributable in major part to the work injury. In essence, OTLA is asking employers to become responsible for much more than what was work related. That is not fair to the employers who often hire individuals who have preexisting conditions that they bring forward to the job. It would be bad policy to transfer that much liability to Oregon employers.

Eliminating the preexisting condition provision of the 1990 reforms will cause employers and insurers to be liable for some very expensive conditions and treatment when their contribution to those situations was minor. The fact that some workers are unaware of the presence of arthritis doesn't mean that a minor work injury caused a major disability and need for treatment. The result would be medical services and other benefits for the non-work-related conditions, likely resulting in increased reserves and costs to policyholders.

4. Specificity of Claims for New or Omitted Conditions

New or omitted condition claims need to be specific so that all parties understand what was requested and must be processed. Changing the standard to one of "reasonably apprises" is an invitation to litigation, which is against the policy of the chapter. By having workers clearly request acceptance of a condition, ambiguity and uncertainty in interpreting the new condition claim is almost eliminated. By moving to a "reasonably apprises" standard, insurers are left to interpret any correspondence from a worker or their representative and determine whether there is any language that may "reasonably apprise" the insurer of a possible new claim. This would not only increase litigation but also increase requests for attorney fees and penalties for alleged unreasonable claims processing when it is unclear whether a request "reasonably apprised" the insurer of a new condition claim.

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[i] In the years leading up to the 1990 reforms, there were consistently more than 20,000 requests for hearing per year. The peak was 27,549 in 1989. Since the 1990 reforms, the number of hearing requests has steadily declined throughout the 1990s and 2000s to the present day. The latest figure available data shows 7,165 hearing requests in 2015. See Oregon Department of Consumer and Business Services, 2016 Report on the Oregon Workers' Compensation System (13th edition, December 2016).