IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Elvia Garcia-Solis, Claimant.

Elvia GARCIA-SOLIS,
Petitioner,

v.

FARMERS INSURANCE COMPANY;
and Yeaun Corporation,
dba Green Papaya and Sunset Deli,
Respondents.

Workers' Compensation Board
1203622; A156734

Argued and submitted March 17, 2016.

Julene M. Quinn argued the cause and filed the briefs for petitioner.

Vera Langer argued the cause for respondents. On the answering brief were Theodore P. Heus and Lyons Lederer, LLP. With her on the reply brief was Lyons Lederer, LLP.

Before Armstrong, Presiding Judge, and Egan, Judge, and Shorr, Judge.

ARMSTRONG, P. J.

Affirmed.

Egan, J., dissenting.

ARMSTRONG, P. J.

In this workers' compensation case, claimant, who suffered serious compensable injuries when she was hit by a tent pole during a wind storm, seeks review of an order of the Workers' Compensation Board upholding employer's refusal to authorize a consultation with a psychologist to address symptoms possibly related to post-traumatic stress disorder (PTSD). Employer denied the claim for the reason that PTSD is not an accepted condition. We conclude that the board did not err and therefore affirm.

The facts are undisputed. Claimant was compensably injured when she was struck on the head by a tent pole that fell in the wind, sustaining a large laceration to her scalp, and other injuries. Claimant was hospitalized for almost a month. Employer ultimately accepted a claim for a concussion, a closed head injury, chronic headache syndrome, facial scarring, and right supraorbital nerve injury.

Claimant's attending physician sought to refer her to a counselor or psychologist to address her fear of going outside when it is windy, which the doctor described as "PTSD like symptoms." Claimant's physician offered the opinion that the referral was necessitated in material part by claimant's work injury. Employer declined to authorize the requested referral for the reason that the service was not directed toward an accepted condition.

Claimant requested a hearing. The administrative law judge (ALJ) found that there was "no reasonable doubt that the denied psychology referral was caused in material part by the [work-related] accidental injury." But the ALJ also upheld employer's refusal to authorize the psychological evaluation, because it was not necessitated in material part by the *accepted* conditions.

The board affirmed the ALJ's order and adopted his findings, with supplementation. Citing ORS 656.245(1)(a) ("For every compensable injury, the insurer or the self-insured employer shall cause to be provided medical services for conditions caused in material part by the injury for such period as the nature of the injury or the process of recovery requires[.]"); *SAIF v. Swartz*, 247 Or App 515, 525,

270 P3d 335 (2011); and *Counts v. International Paper Co.*, 146 Or App 768, 934 P2d 526 (1997), the board reasoned that diagnostic services are compensable only if they relate to an already-accepted injury or condition.

That conclusion is correct. In *Counts*, 146 Or App at 771, we said that, in light of the requirement in ORS 656.245(1) that employers pay for "medical services for conditions caused in material part by the injury," diagnostic services are compensable only if they are "necessary to determine the cause or extent of a compensable injury." We adhered to that analysis in *Swartz*, 247 Or App at 526-27. *See also SAIF v. Martinez*, 219 Or App 182, 191, 182 P3d 873 (2008) ("[T]o establish the compensability of a medical treatment under ORS 656.245(1)(a), the condition for which treatment is sought need not be the accepted condition; however, the treatment must be necessitated in material part by the 'compensable injury,' which, we said in *Sprague [v. United States Bakery*, 199 Or App 435, 112 P3d 362, *adh'd to as modified on recons*, 200 Or App 569, 116 P3d 251 (2005), *rev den*, 340 Or 157 (2006)], is the condition previously accepted.").

On judicial review, citing this court's recent opinions in *Easton v. SAIF*, 264 Or App 147, 331 P3d 1035 (2014), and *SAIF v. Carlos-Macias*, 262 Or App 629, 325 P3d 827 (2014),[1] claimant contends that, to be compensable, diagnostic services need only relate to the work injury, not the accepted conditions. Therefore, claimant contends, the board applied an incorrect standard in determining that the services were not compensable because claimant had failed to prove that they were causally related to an accepted condition.[2]

Both *Easton* and *Carlos-Macias* relied on our opinion in *Brown v. SAIF*, 262 Or App 640, 325 P3d 834 (2014)

[1] The Supreme Court has held a petition for review in *Carlos-Macias* in abeyance since 2014 until further order and pending the court's decision in *Brown v. SAIF*, 361 Or 241, 391 P3d 773 (2017).

[2] We reject SAIF's contention that claimant did not preserve that issue for our review. We also reject SAIF's contention, raised as a cross-assignment of error, that the board erred in determining that the proposed psychological referral was for diagnostic services. The ALJ found that "[t]he doctor's choice of words suggests that claimant needs a psychological evaluation to determine the appropriate diagnosis and treatment plan for her mental health problem." The board adopted the ALJ's order with supplementation and implicitly found that the services were diagnostic. We conclude that the finding is supported by substantial evidence.

(*Brown I*), in which we held that, in the workers' compensation statutory scheme, the term "compensable injury" refers to the accidental work injury or the "work-related injury incident," and is not limited to an accepted condition. In both *Carlos-Macias*, 262 Or App at 637, and *Easton*, 264 Or App at 149, we held that diagnostic services are compensable if they are related to the injury incident.

After oral argument in this case, the Supreme Court reversed our decision in *Brown I*, rejecting our "injury incident" definition of "compensable injury" and holding that the compensability of a combined condition claim depends on its relationship to a previously accepted condition. *Brown v. SAIF*, 361 Or 241, 283, 391 P3d 773 (2017) (*Brown II*). The question that we must address here is whether the Supreme Court's reversal of our decision in *Brown I* also implicitly reverses our decisions in *Carlos-Macias* and *Easton* and requires affirmance of the board's order upholding employer's denial of the claimed diagnostic services.

We conclude that it does. In *Brown II*, the Supreme Court addressed the meaning of the term "compensable injury," as defined in ORS 656.005(7)(a), concluding that it refers to a particular medical condition and not, as the dissent suggests, to an injury incident. The effect of the Supreme Court's opinion in *Brown II* was to overturn our holdings in *Carlos-Macias* and *Easton* and to reinvigorate our holdings in *Counts* and *Swartz* that diagnostic services are compensable only if they are necessary to determine the cause or extent of an accepted compensable injury. *Counts*, 146 Or App at 771. Additionally, we have separately held in *Roseburg Forest Products v. Langley*, 156 Or App 454, 463, 965 P2d 477 (1998), that diagnostic services for the purpose of establishing the compensability of a new or consequential condition are not compensable. That is essentially what claimant is seeking here. The board therefore did not err in upholding employer's refusal to authorize the requested diagnostic services. If claimant's psychological condition is ultimately determined to be compensable, then the diagnostic services will be compensable as well.

Affirmed.

EGAN, J., dissenting.

The majority opinion holds that this court's decision in *SAIF v. Carlos-Macias*, 262 Or App 629, 325 P3d 827 (2014), relied on this court's opinion in *Brown v. SAIF*, 262 Or App 640, 325 P3d 834 (2014) (*Brown I*), which defined a "compensable injury" as a "work related injury incident" rather than an "accepted condition." The majority reasons that because the Supreme Court overturned *Brown I*, the underlying reasoning in *Carlos-Macias* must have been faulty and, therefore, the principle of payment for diagnostic services outside of an accepted condition cannot be upheld. I disagree. Because I believe that the majority is mistaken about the breadth of the Supreme Court's decision in *Brown v. SAIF*, 361 Or 241, 391 P3d 773 (2017) (*Brown II*), I respectfully dissent.

I first acknowledge that this court's decision in *Brown I*, reversed by the Supreme Court, was perceived as a sweeping decision about the analysis of workers' compensation claims. Under the terms of this court's decision, all decisions concerning compensability had to be made based on the result of the original incident of injury rather than on the basis of the condition "accepted" by the insurance carrier. *Brown* dealt with a condition accepted by the carrier as a lumbar strain. The carrier later expanded that accepted condition to include "lumbar strain combined with lumbar disc disease and spondylolisthesis." *Brown II*, 361 Or at 245. The Supreme Court reversed this court on the narrow issue of whether an "accepted condition" or "injury incident" analysis applied to combined condition claims under ORS 656.005(7)(a)(B), and the distinction between the focus on "injury incident" versus the "accepted condition" that necessarily arises in the interpretation of that statute. *Brown II*, 361 Or at 247-48. The Supreme Court landed squarely on the side of an "accepted condition" analysis in the interpretation of ORS 656.005(7)(a)(B) and combined conditions.

Nevertheless, the Supreme Court reserved judgment on implementing its "accepted condition" analysis in cases involving medical diagnoses. Specifically, the high court reserved judgment on the correction of *Carlos-Macias*.

Id. If the reasoning in this court's *Brown I* opinion was so faulty, and extended to *Carlos-Macias*, then the Supreme Court could just as easily have simultaneously disposed of both cases, but it did not. I believe the reason for that hesitation is implied by the decision of the Supreme Court in *Brown II*.

In its opinion, the high court notes that terms within the workers' compensation statute tend to be used inconsistently from provision to provision.

> "There is little that is 'plain' about this state's workers' compensation statutes, certainly with respect to the terminology at issue in this case. In fact, there appears to be a tendency on the part of the legislature to use a number of different terms in not altogether consistent fashion, sometimes treating them as essentially synonymous and at other times treating them as signifying different things."

Brown II, 361 Or at 253. The Supreme Court even pointed out a recent case in which it had interpreted a compensable condition to mean an injury incident. *See* *Schleiss v. SAIF*, 354 Or 637, 648, 317 P3d 244 (2013) (statute requiring apportionment of impairment due to an accepted "condition" refers to the percentage of total impairment to which the compensable "injury" contributed). There are, therefore, variations in the use of terms throughout the workers' compensation statute.

Given these variations, the parties' contentions here require us to address anew the meaning of the term "compensable injury" as used in ORS 656.245(1)(a). That statute provides:

> "For every *compensable injury*, the insurer *** shall cause to be provided medical services for conditions caused in material part by the injury for such period as the nature of the injury or the process of recovery requires, subject to the limitations in ORS 656.225, including such medical services as may be required after a determination of permanent disability. In addition, for consequential and combined conditions described in ORS 656.005(7), the insurer *** shall cause to be provided only those medical services

> directed to medical conditions caused in major part by the injury."[1]

(Emphasis added.) The question presented in the case at hand is whether the term "compensable injury" means the same thing in ORS 656.245 as it does in ORS 656.005 (7)(a)(B).

It is here in the analysis that I believe the Supreme Court means to limit the breadth of its decision in *Brown II*. The majority has simply applied the "rule" of consistency too rigidly. In fact, the high court acknowledged that it may be necessary for the same words to be afforded different meanings within the Workers' Compensation Act in order to effectuate legislative intent. *Brown II*, 361 Or at 260 n 6. It is based on this difference in interpretation of the words "compensable injury" that the Supreme Court distinguished *Schleiss* and *South Lane County Sch. Dist. #45-J3 v. Arms*, 186 Or App 361, 366, 62 P3d 882, *rev den*, 335 Or 578 (2003).

ORS 656.245, concerning medical treatment and diagnosis, explicitly equates "compensable injury" with the incident of injury rather than the condition accepted by the insurance carrier. We have made that clear in our prior cases; diagnostic services related to the *discovery* of the cause of complaints of pain (or by analogy, the *discovery* of a psychological reaction) can be reasonable and necessary expenses required to be borne by the workers' compensation carrier, even if the results of the tests reveal that the condition was unrelated to the worker's compensable condition. *Counts v. International Paper Co.*, 146 Or App 768, 934 P2d 526 (1997); *Faught v. SAIF*, 70 Or App 388, 689 P2d 1038 (1984); *Brooks v. D & R Timber*, 55 Or App 688, 639 P2d 700 (1982).

To conclude otherwise, as the majority does, leaves the injured worker completely without a remedy at the discretion of the carrier rather than as required for the treatment of work-related conditions. An insurance carrier's decision to accept a particular condition, would then preclude

[1] The limitations in ORS 656.225 apply to preexisting conditions and are not at issue in this case.

any subsequent diagnostic procedure outside the confines of reasonable treatment for the accepted condition. For example, a worker who suffered a fall and whose condition was accepted for a back strain would be precluded from diagnostic procedures for head trauma or traumatic brain injury. More to the point in this case, under the majority's holding, an injured worker who suffered a traumatic injury to the head, fractured clavicle, fractured ribs, fractured cervical vertebrae, and multiple lacerations, and whose conditions were accepted as such, would be precluded from doctor-prescribed diagnostic tests for a psychological condition like post-traumatic stress disorder that could have developed from the trauma or injury rather than from the accepted conditions.

To state the matter in the simplest terms, workers must have access to diagnostic procedures arising out of injuries rather than accepted conditions because all undiagnosed conditions arise out of injuries but not all undiagnosed conditions are related to accepted conditions.

For these reasons, I respectfully dissent.