IN THE SUPREME COURT OF
THE STATE OF OREGON

In the Matter of the Compensation of Royce L. Brown, Claimant.	
ROYCE L. BROWN,	WCB No. 11-02146 CA A151889 N 004619
Petitioner/Respondent on Review.	SC 062420
v.	
SAIF CORPORATION and HARRIS TRANSPORTATION COMPANY, LLC.,	
Respondents/Petitioners on Review.	

AMICUS CURIAE BRIEF OF OREGON SELF-INSURERS ASSOCIATION AND ASSOCIATED OREGON INDUSTRIES IN SUPPORT OF PETITION FOR REVIEW

Petition for Review of the Decision of the Court of Appeals on Judicial Review of an Order on Review of the Workers' Compensation Board

Opinion filed: May 7, 2014
Author of Opinion: Egan, J.
Before: Armstrong, P.J, Nakamoto, J., and Egan, J

(Attorneys on Reverse)

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STATEMENT OF THE CASE

Amicus Curiae Oregon Self-Insurers Association and Associated Oregon Industries (hereafter the Associations) urge the court to allow SAIF Corporation's petition for review of the Court of Appeals decision in *Brown v. SAIF*, 262 Or App 640 (2014). The Associations join in those statements in SAIF Corporation's petition for review which describe the facts of the case, the legal questions presented and its proposed rules of law.

Reasons for Allowing Review and Argument

The Court of Appeals has abruptly announced that for 25 years participants in the workers' compensation system have been weighing the wrong components to determine the compensability of "otherwise compensable injuries" that combine with "preexisting conditions" to cause disability or treatment under ORS 656.005(7)(a)(B). In so doing, it set aside 25 years of tortuously evolved case law principles and correspondingly intricate processing guidelines designed to evaluate and, where necessary, litigate the major contributing cause issue posed by the statute. Instead, the Court of Appeals has ruled that the compensability of a combined condition entails a comparison of the contribution by the "incident injury" to that of the statutory "preexisting conditions" to determine major

causation. The prospect of adapting to this vague and problematic standard has elicited surprise and concern from every sector of the system as they prepare to face the resulting disruption in the processing, litigation and payment of benefits for such conditions.

The Associations endorse and join in SAIF's cogent discussion of how the compensability standard announced in *Brown* decision conflicts with the formulation consistently prescribed in previous Supreme Court and Court of Appeals decisions when applying ORS 656.005(7)(a)(B). In addition, the Court of Appeals decision merits review for the following reasons.

The *Brown* court premised its analysis on this observation regarding the decades-old, core-definition of a "compensable injury" in ORS 656.005(7)(a):

> "A compensable injury is an 'accidental injury *** arising out of and in the course of employment requiring medical services or resulting in disability or death.' [*quoting* ORS 656.005(7)(a)] Thus, the definition of a compensable injury is injury-incident focused. It requires a determination that there was an *injury incident* that caused disability or required treatment – i.e. an accidental injury – arising out of and in the course of the employment.

Id. at 646. It then observed that proponents of the 1990 enactment of ORS 656.005(7)(a)(B) and ensuing amendments in 1995 retained that historical "focus" when identifying the standards for determining the compensability of an "otherwise compensable injury" that combines with a preexisting condition.[1] *Id*. at

[1] ORS 656.005(7)(a)(B) provides:

648. Accordingly, the *Brown* court reasoned, "The question is whether claimant's work-related *injury incident* is the major contributing cause of the [disability or need for treatment of the] combined condition (*emphasis added*)." *Id.* at 656.

The *Brown* analysis cited no authority for its threshold interpretation of ORS 656.005(7)(a). Instead, it derived this critical foundation for its decision from the clause in the statute that states: "A compensable injury is an '*accidental injury*' *** arising out of and in the course of employment requiring medical services or resulting in disability or death." *Id*. at 646. Significantly, however, *Brown* omitted any reference to the second clause of that same sentence, which reads: "[A]n injury is accidental if the *result* is an accident, whether or not due to accidental means *** (*emphasis added*)." This latter phrase, added to *former* ORS 656.002(19) [currently ORS 656.005(7)(a)] in 1957[2], changed the "focus" of the compensable injury definition from "incidents" to "conditions" decades ago.

> "If an otherwise compensable injury combines at any time with a preexisting condition to cause or prolong disability or a need for treatment, the combined condition is compensable only if, so long as and to the extent that the otherwise compensable injury is the major contributing cause of the disability of the combined condition or the major contributing cause of the need for treatment of the combined condition."

[2] Or Laws 1957, ch 718. *See discussion in Olson v. SIAC*, 222 Or 407, 411 (1960), *and Grable v. Weyerhaeuser,* 291 Or 387, 393, n 5 (1981). Elsewhere, the court has noted that the current definition of "compensable injury" was introduced in 1965. *Errand v. Cascade Rolling Mills, Inc*., 320 Or 509, 520 (1995).

These 1957 amendments resolved a heated mid- 20th century debate over whether Oregon's workers' compensation law should provide coverage narrowly for "accidents" caused by "violent and external means" or more broadly for the injurious *results* of "accidental means." *See Dondeneau v. SIAC,* 119 Or 357 (1926) (majority and dissenting opinions). As this Court noted in *Olson v. SIAC,* 222 Or at 413, the amendment changed the focus of the definition from the *cause* of an injury to injurious *effects*.

> [The amendment was] clearly intended to set aside the previous rule—that the cause of the injury must be accidental—and provide that any workman who undesignedly and unexpectedly suffered a hurt, without reference to whether the cause of the injury itself was accidental, was to be included within the orbit of the act, insofar as the act requires the injury to be by accident.

After this legislative clarification, wherever it mattered, discussions of the term "compensable injury" consistently referred to it in terms of the condition resulting from an injury, not the incident or exposure that caused it. For example, in *O'Neal v. Sisters of Providence,* 22 Or App 9, 14 (1975), the court observed:

> "Legislative amendments to the Occupational Disease Law (Oregon Laws 1973, ch. 543) have brought occupational disease claims fully within the Workmen's Compensation Law and, as ORS 656.802 to 656.824 reveal, in general, treat occupational disease claims in the same manner as injury claims. In addition, the definitions of 'occupational disease' and 'compensable injury' are similar in several respects. *Both relate to a condition arising out of and in the scope or course of employment* (*emphasis and underscoring added*).[3]

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[3] This same contextual focus on the nature and onset of the claimed *conditions* has survived as an essential guideline for processing into recent times. *See Smirnoff v.*

By 1988, the parameters of the terms "compensable injury" and "accepted condition" were so firmly linked that the courts ruled the scope of a "compensable injury" was determined by the *medical conditions* listed in an insurer's Notice of Acceptance – regardless of the actual causes of such conditions. *Compare Johnson v. Spectra Physics,* 303 Or 49 (1987) (insurer's acceptance of specified conditions does not preclude subsequent partial denial of separate conditions) *with Georgia-Pacific v. Piwowar,* 305 Or 494 (1988) (insurer's acceptance of a "sore back" condition effectuated acceptance of subsequently diagnosed, non-work-related ankylosing spondylosis condition that caused the accepted symptoms). These highly publicized and closely followed case law developments contradict the *Brown* court's threshold assumption that the phrase "accidental injury" in ORS 656.005(7)(a) reflects or establishes some historical, "injury-incident"-based focus underlying the concept of "compensable injury.

The Associations also note that *Brown* failed to consider the *third* clause in this same sentence in ORS 656.005(7)(a) – the one that requires a "compensable injury" to "be established by medical evidence supported by objective findings." That term is then defined in ORS 656.005(19), which references various medical

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SAIF, 188 Or App 438 (2003), *(classifying a claim as a "compensable injury" or an "occupational disease" must be based on whether the condition arises suddenly or gradually, not its symptoms)*.

criteria and tests designed to verify the existence of a medical condition. *See generally SAIF v. Lewis,* 335 Or 92, 98 (2002). This requirement clearly posits an analysis of the claimed condition, not of an "injury incident."

Practical Ramifications beyond the Instant Case

SAIF's petition for review correctly warns that the Court of Appeals decision compromises the legislative goal of the combined condition statute, which was to preserve the financial stability of the workers' compensation system by according employers the ability to manage and tailor their liability for preexisting conditions. *See SAIF v. Belden,* 155 Or App 568 (1998), *rev den* 328 Or 330 (1999) (summarizing the goals and effects of the 1990 and 1995 combined condition statutes). For more than two decades, the legislature, system participants, regulators, the board and the courts have been engaged in a grueling process to hammer out practical steps for implementing that policy. Its centerpiece has been the principle that the notice of acceptance delineates the conditions for which an insurer will be liable, while workers have an unfettered ability to seek expansion of those accepted conditions "at any time." *See Johnson v. Spectra Physics,* 303 Or at 56; *Evangelical Lutheran Good Samaritan Society v. Bonham,* 176 Or App 490 (2001) (claim preclusion does not operate to bar workers from demanding acceptance of new conditions "at any time"). Importantly, in an explicit response to decisions such as *Johansen v. SAIF*, 158 Or App 672 (1999),

and *Labor Ready, Inc. v. Mann*, 158 Or App 666 (1999), the legislature *required* workers to avail themselves of this new/omitted medical condition claim process as a precondition to requesting a hearing to litigate the scope of the accepted conditions on a claim.

Building on this principle, this court and the Court of Appeals have repeatedly endorsed the practice by which an insurer advises workers of the components of the combined condition it has accepted pursuant to ORS 656.262(6)(b)[4] in a notice that the worker may challenge at any time the insurer's formulation makes a difference in terms of medical benefits or compensation. That process has been forged and refined in response to appellate decisions that have shaped and guided its evolution for over two decades.[5]

If left to stand, the Court of Appeals decision undermines that process by relegating notices of acceptance to the status of a paperwork tiger. *Brown* itself provides a telling example. In it, the parties engaged in the process of acceptance

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[4] ORS 656.262(6)(b) provides, in pertinent part:

> "*****The insurer shall also furnish the employer a copy of the notice of acceptance.
>
> (b) The notice of acceptance shall:
>
> (A) Specify what conditions are compensable. *****"

[5] SAIF Corporation's petition for review lists a number of these decisions at page 13, footnote 13.

and challenge outlined by the case law and statutes to arrive at a claim accepted for "lumbar strain combined with preexisting lumbar disc disease and preexisting spondylolisthesis." *Brown,* 262 Or App at 644. When the insurer subsequently followed the steps necessary to deny the ongoing compensability of that combined condition, claimant objected that the acceptance failed to capture or include the compensable effects of the work injury on the preexisting conditions themselves. Instead of pursuing his option to request modification of the notice of acceptance to include outright acceptance of the worsened underlying condition, claimant requested a hearing on the denial. On review, the Court of Appeals has endorsed this end-run around the available process and has remanded for an after-the-fact review to identify and weigh the contribution of conditions or factors that were *never* accepted or denied, but merely referenced in physician reports generated in preparation for litigation.

The practical impact of *Brown* will be a system in which neither workers nor their insurers can ever be clear during the claims process about which medical conditions must be considered and/or weighed when determining the compensability of a combined condition, the conditions that qualify for treatment, or the impairment that is ratable for purposes of permanent disability compensation. Instead, such issues will be subject to clarification by litigation – and worse, subject to litigation in which assertedly contributory conditions need

only be referenced in the medical evidence generated for the hearing during discovery without prior submission under the new/omitted claim process that was prescribed by ORS 656.262(6) and (7) specifically to preclude7 such processing by litigation.

CONCLUSION

For the reasons outlined above and in SAIF Corporation's review, the Associations respectfully urge this court to accept review of the Court of Appeals decision below.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 1978 words.

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I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

DATED: July 28, 2011

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I certify that I filed the original of this document on the date that appears above by submitting it electronically in compliance with the rules of the Oregon Judicial Department EFile system to:

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