IN THE SUPREME COURT OF THE STATE OF OREGON

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| In the Matter of the Compensation of Royce L. Brown, Claimant. | ) | |
| ROYCE L. BROWN, | ) | Agency No. 11-02146 |
| Petitioner, Respondent on Review, | ) | CA A151889 |
| | ) | SC S062420 |
| v. | ) | |
| SAIF CORPORATION AND HARRIS TRANSPORTATION LLC., | ) | |
| Respondents, Petitioners on Review. | ) | |

# PETITIONERS ON REVIEW BRIEF ON THE MERITS

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

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## STATEMENT OF THE CASE

Nature of the Proceeding and Relief Sought

Petitioners on review, SAIF Corporation and Harris Transportation Company, LLC (SAIF) seek affirmance of an order of the Workers' Compensation Board in which the Board concluded that because the claimant's compensable injury, a lumbar strain, had ceased to be the major contributing cause of his combined condition, SAIF's denial of the combined condition was correct. Respondent on review appealed the board's decision, and the Court of Appeals reversed. *Brown v. SAIF,* 262 Or App 640, 325 P3d 834 (2014). Petitioners ask that the Court of Appeals' decision be reversed and that the board's Order on Review be reinstated.

Questions Presented on Judicial Review and Proposed Rules of Law

First Question Presented

Under ORS 656.262(6)(c), which allows an insurer to deny an accepted combined condition when "the otherwise compensable injury" ceases to be the major contributing cause of the combined condition,

does “the otherwise compensable injury” refer to the acute accepted condition that is part of the combined condition that was accepted and denied?

First Proposed Rule of Law

A carrier may deny a previously-accepted combined condition under ORS 656.262(6)(c) when “the otherwise compensable injury,” which is defined as the condition or conditions established to have been caused by the work accident and included in the notice of acceptance, is no longer the major contributing cause of the need for treatment of the combined condition.

Second Question Presented

In requiring insurers to “specify what conditions are compensable” in ORS 656.262(6)(b) and in requiring workers to “clearly request formal written acceptance of a new medical condition or an omitted medical condition” in ORS 656.267(1), did the legislature intend to define the scope of the “compensable injury” for claims processing purposes, including the denial of an accepted combined condition under ORS 656.262(6)(c)?

Second Proposed Rule of Law

In an accepted workers' compensation claim, the insurer's notice of acceptance under ORS 656.262(6)(b) specifies what conditions are compensable, thereby defining the scope of the compensable injury, subject to a worker's request for expansion under ORS 656.267(1). The notice of acceptance also defines "the otherwise compensable injury" and the "accepted injury" for purposes of a combined condition denial under ORS 656.262(6)(c) and ORS 656.262(7)(b), respectively.

Summary of Argument

In a workers' compensation claim, the notice of acceptance signifies the scope of a compensable injury, tells the worker and medical providers what conditions are compensable, and provides the basis for payment of benefits. To accept any claim, an insurer must issue a notice of acceptance, which is required to "[s]pecify what conditions are compensable." ORS 656.262(6)(b)(A). Once a claim is accepted, workers may "clearly request formal written acceptance of a new medical condition or an omitted medical condition" "at any time," under ORS 656.267(1).

Generally, an accepted condition may not later be denied, but if an otherwise compensable injury combines with a preexisting condition,

the combined condition may be denied under ORS 656.262(6)(c) when "the otherwise compensable injury" ceases to be the major contributing cause of the combined condition.[1] A combined condition is two or more conditions existing simultaneously: an acute condition, and a preexisting condition. *Multifoods Specialty Distribution v. McAtee*, 333 Or 629, 631, 43 P3d 1101 (2002).

In the context of the denial under ORS 656.262(6)(c) of an accepted combined condition, the "otherwise compensable injury" is the acute condition that was accepted to have been caused by the accident. It is not the accidental event that gave rise to the injury. An "injury" is a "hurt, damage, or loss sustained." *Webster's Third New Int'l Dictionary* 1164 (unabridged ed 2002). The "otherwise compensable

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[1] ORS 656.262(6)(c) provides:

> "An insurer's or self-insured employer's acceptance of a combined or consequential condition under ORS 656.005(7), whether voluntary or as a result of a judgment or order, shall not preclude the insurer or self-insured employer from later denying the combined or consequential condition if the otherwise compensable injury ceases to be the major contributing cause of the combined or consequential condition."

injury" does not include the preexisting condition or other conditions that have not been established to be part of the otherwise compensable injury. This is so because the text of related statutes refer to "the accepted injury," and "conditions accepted in the claim" to signify what may or may not be denied once accepted. ORS 656.262(7)(b), ORS 656.262(10). Another statute refers to "the current accepted condition" to signify what may receive a permanent disability award after a combined condition denial has issued. ORS 656.268(1)(b).

Text and context remain the primary focus in judicial interpretation of a statute, and must be given primary weight in the analysis of a statute's meaning. *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). The fact that a notice of acceptance, "Specif[ies] what conditions are compensable," is plain on its face. ORS 656.262(6)(b)(A). Thus, "the otherwise compensable injury" referred to in ORS 656.262(6)(c) is the medical condition that was accepted and denied as part of the combined condition.

A full and careful analysis of the text and context of the relevant statutes, along with prior appellate decisions and a full examination of relevant legislative history, leads inexorably to the conclusion that a notice of acceptance establishes the scope of the compensable injury

claim, and that a combined condition ceases to be compensable when the acute accepted condition is no longer its major contributing cause.

Summary of Facts

The facts are as stated in the Opinion and Order. (ER in Court of Appeals Pet Br at 15-19). Claimant had a lengthy pre-injury history of low back problems, including facet hypertrophy and grade 1 spondylolisthesis, with a fusion surgery for an L4-5 disc herniation in 2006. By April 2007, claimant had returned to regular work and his symptoms were manageable without medical intervention. In December, 2008, while at work, claimant experienced sudden pain in his low back when hanging tire chains under a truck. Claimant was diagnosed with a lumbar strain, which SAIF subsequently accepted.

In August, 2009, claimant's attending physician reported that the accepted lumbar strain was medically stationary with no impairment, and SAIF closed the claim. Later in 2009, claimant underwent additional surgery for his back pain, without relief. Claimant requested acceptance of "lumbar strain combined with lumbar disc disease and spondylolisthesis," and, after litigation, SAIF was ordered to accept that condition, based on evidence that the strain combined with the preexisting condition, and that, for some period of time, the strain was

the major contributing cause of claimant's need for treatment of the combined condition. Subsequently, SAIF denied the continued compensability of the lumbar strain combined with preexisting lumbar disc disease and preexisting spondylolisthesis, based on evidence that the lumbar strain had resolved, and claimant's continued need for treatment was due to the preexisting spondylolisthesis at L4-5, the fusion-related pseudoarthrosis at L4-5 and the scarring of the nerve root, all of which were unrelated to the work injury.

## ARGUMENT

### Introduction.

This case presents an occasion to address an important definition in Workers' Compensation law – "the otherwise compensable injury" – by examining the statutory terms in context. SAIF contends that an analysis that emphasizes the words of ORS 656.262(6)(c) in the context of the statutory scheme, as supported by a thorough evaluation of the legislative history, will result in reinstatement of the board's decision. *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009).

The definition addressed by the Court of Appeals appears in ORS 656.005(7)(a), the primary compensability statute for work injuries in Oregon.[2] The "compensable injury" is the gateway for the payment of benefits for work injuries. *Schleiss v. SAIF*, 354 Or 637, 645, 317 P3d 244 (2013) ("After an injury is determined to be compensable, benefits are payable under specific statutes," including temporary disability, medical services, permanent disability, and vocational services for retraining.)

At issue here is the meaning of the phrase "otherwise compensable injury," which comes up in the context of combined conditions. The meaning of this phrase is critical in determining what is at issue when a carrier denies a combined condition under ORS 656.262(6)(c).

The general compensability statute, ORS 656.005(7)(a), provides:

> "A 'compensable injury' is an accidental injury, or accidental injury to prosthetic appliances, arising out of and in the course of

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[2] Occupational diseases are different from injuries, and they are defined, and their compensability determined, under ORS 656.802. Once determined compensable, however, an occupational disease is treated the same as a compensable injury for purposes of benefits delivery. ORS 656.804.

> employment requiring medical services or resulting in disability or death; an injury is accidental if the result is an accident, whether or not due to accidental means, if it is established by medical evidence supported by objective findings, subject to the following limitations:
>
> "(A) No injury or disease is compensable as a consequence of a compensable injury unless the compensable injury is the major contributing cause of the consequential condition.
>
> "(B) 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."

(Emphasis added).

Here, it is undisputed that the worker's "otherwise compensable injury" combined with a preexisting condition. The claimant requested acceptance of a combined condition: "lumbar strain combined with preexisting lumbar disc disease and spondylolisthesis," (Ex. 65) and after initially denying that claim, SAIF was ordered to accept the combined condition, which it signified by issuing a modified notice of

acceptance that included that combined condition as part of the worker's compensable injury claim. (Ex. 69).

A specific notice of acceptance is required under ORS 656.262(6)(b), which provides,

> "The notice of acceptance shall:
> (A) Specify what conditions are compensable[.]"

Under this statute, when a combined condition is found compensable, as it was here, the carrier must issue a notice of acceptance to specify the combined condition that is compensable.

Based on medical evidence that the lumbar strain had resolved, SAIF subsequently denied the continued compensability of the combined condition that was accepted. (Ex. 74). This action implicates two other statutes:

> "An insurer's or self-insured employer's acceptance of a combined or consequential condition under ORS 656.005(7), whether voluntary or as a result of a judgment or order, shall not preclude the insurer or self-insured employer from later denying the combined or consequential condition if the otherwise compensable injury ceases to be the major contributing cause of the combined or consequential condition."

ORS 656.262(6)(c).

> "Once a worker's claim has been accepted, the insurer or self-insured employer

> must issue a written denial to the worker when the accepted injury is no longer the major contributing cause of the worker's combined condition before the claim may be closed."

ORS 656.262(7)(b).

These two statutes provide the mechanism by which a carrier may deny a combined condition that it previously accepted. The wording of these statutes illustrates that the legislature found no meaningful distinction between the "otherwise compensable injury" in ORS 656.262(6)(c) and the "accepted injury" in ORS 656.262(7)(b).

Finally, ORS 656.266 provides a shifting burden of proof for litigation of combined condition claims:

> "(1) The burden of proving that an injury or occupational disease is compensable and of proving the nature and extent of any disability resulting therefrom is upon the worker. The worker cannot carry the burden of proving that an injury or occupational disease is compensable merely by disproving other possible explanations of how the injury or disease occurred.
>
> "(2) Notwithstanding subsection (1) of this section, for the purpose of combined condition injury claims under ORS 656.005(7)(a)(B) only:
>
> "(a) Once the worker establishes an otherwise compensable injury, the employer shall bear the burden of proof to establish the otherwise compensable injury is not, or is no longer, 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."

To summarize, under ORS 656.005(7)(a) and ORS 656.266(1) a worker initially must prove a "compensable injury." After acceptance of the compensable injury, an employer may obtain medical evidence to establish under ORS 656.005(7)(a)(B), ORS 656.262(6)(c), and ORS 656.262(7)(b) that "the otherwise compensable injury" is no longer the major contributing cause of "the combined condition." Petitioners on review intend to show the court how these statutes work together when a carrier denies an accepted combined condition under ORS 656.262(6)(c) because "the otherwise compensable injury" has ceased to be the major contributing cause of the combined condition, and why this means that the accepted acute condition is no longer the major contributing cause of the combined condition.

To reach the correct interpretation of "the otherwise compensable injury" as used in ORS 656.262(6)(c), this brief will begin with the meaning of the word "injury," and will address how that meaning informs the proper construction of the phrase "compensable injury," as defined in ORS 656.005(7)(a). After addressing the statutory elements of a "compensable injury" in ORS 656.005(7)(a), the argument will define a

"combined condition," explain where "the otherwise compensable injury" fits in this scheme, and show how the notice of acceptance functions to identify the otherwise compensable injury that is being denied when a carrier issues a combined condition denial under ORS 656.262(6)(c). Finally, SAIF bolsters its analysis with complete passages of the relevant legislative history, which supports the proffered interpretation of the statutory provisions at issue and will allow the court to see that the legislative intent was consistent with the words enacted in the statutes at issue.

**1. The text and context of ORS 656.262(6)(c) show that "the otherwise compensable injury" is an acute medical condition.**

As will be explained, SAIF contends that the "otherwise compensable injury" is necessarily a) a condition, because an injury is the result of an accident, not its cause; and, b) in the context of an accepted combined condition, it is an accepted condition, because "the otherwise compensable injury" is the same acute condition that claimant previously established to be compensable and was, as required by

ORS 656.262(6)(b), accepted and specified to be compensable by the insurer in the notice of acceptance. [3]

The Court of Appeals reasoned that "there is no statutory provision that expressly links the compensability of a combined condition to its relationship to an 'accepted condition'; rather, the compensability of the combined condition depends on its relationship to the 'otherwise compensable injury,'" which it concluded, consisted of a "work-related injury incident." *Brown v. SAIF*, 262 Or App 640, 648, 656, 325 P3d 834 (2014). The focus of a compensable injury, however, is on the result and not the incident that caused the result, and the

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[3] An employer also may deny that the otherwise compensable injury was ever the major contributing cause of the combined condition, without issuing any acceptance. This would happen in the context of an initial claim for an injury. In that case, there would not be an accepted condition, but, in litigating a denial of the claim, once the worker established that work was the material contributing cause of some hurt, the burden would shift to the employer to prove that the otherwise compensable injury combined with a preexisting condition, but was never the major contributing cause of the combined condition. *See, e.g., Hopkins v. SAIF Corp.,* 349 Or 348, 365, 245 P3d 90 (2010) (determining legal meaning of "arthritis" for purpose of determining whether worker's injury combined with a "preexisting condition" and was never the major contributing cause of her combined condition). Here, the denial at issue is a denial of an accepted combined condition under ORS 656.262(6)(c).

notice of acceptance defines the scope of an accepted compensable injury, including a claim involving a combined condition.

**a. An injury is a hurt to the person or to a prosthetic appliance, and not the incident that gave rise to the hurt.**

To determine the meaning of a "compensable injury" in ORS 656.005(7)(a) and "the otherwise compensable injury" in ORS 656.262(6)(c), initially it is helpful to define an "injury."

The statutory definition contains clues. ORS 656.005(7)(a) begins by defining a "compensable injury" as "an accidental injury, or accidental injury to prosthetic appliances[.]" By including injury to prosthetic appliances, the statute focuses on the effects of an incident, rather than the incident itself.

Prior caselaw supports this view. *Halperin v. Pitts,* 352 Or 482, 491-92, 287 P3d 1069 (2012) (the court's analysis includes an examination of prior cases interpreting the provision or provisions at issue). This court has observed that "workers make claims for *accidental injuries or occupational diseases*, not for the *causes* of those accidental injuries or occupational diseases." *Mathel v. Josephine County*, 319 Or 235, 242, 875 P2d 455 (1994) (emphasis in original). *Mathel* involved a claim for a heart attack caused in material part by mental stress from work, and the issue was whether the claim was

properly analyzed as an injury or an occupational disease. The court determined that it was an injury, based in part on the ordinary meaning of the term "injury" as "an act that damages, harms, or hurts"; "hurt, damage, or loss sustained." *Mathel,* 319 Or at 40, *citing Webster's Third New Int'l Dictionary* 1164 (unabridged ed 1991). In rejecting the employer's argument that the court should conclude the heart attack was a disease because it was caused by mental stress, the court focused on the injury or hurt, rather than its cause. The decision is clear that the injury itself is the hurt that was sustained.

In observing that workers make claims for injuries rather than the causes of those injuries, the court echoed an earlier decision, *Olson v. State Indus. Acc. Comm'n*, 222 Or 407, 352 P2d 1096 (1960). There, the court examined the words in ORS 656.005(7)(a) that provide, "an injury is accidental if the result is an accident, whether or not due to accidental means," which were added to the statute in 1957. Interpreting the meaning of the amendment, this court stated that the words were

> "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."

22 Or at 413. These authorities establish that an "injury" is not an "accidental injury incident," a phrase that was coined in the pleadings and decision below, but rather is a "hurt, damage, or loss sustained," that is, a medical condition.[4] When such a condition meets the other elements of ORS 656.005(7)(a), it will be a "compensable injury."

The legislative history from 1990 and 1995 is not contrary. In 1990, the definition of a "compensable injury" was slightly amended, by addition of the words, "if it is established by medical evidence supported by objective findings, subject to the following limitations." Or Laws 1990, ch 2, § 3. ORS 656.005(7)(a) was not otherwise touched in either 1990 or 1995. Comments made by legislators or witnesses in those years concerning whether a "compensable injury" was intended to be an "injury incident" or otherwise, are, therefore, arguably irrelevant, because that section was not enacted at the time.

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[4] Although the word "injury" sometimes is used to refer to an accident or incident, as will be shown, it primarily means the hurt that results from such an event, and in the context of a combined condition, that is what it means.

To determine precisely what the insurer must prove after denying an accepted combined condition requires an analysis of the meanings of the phrases "compensable injury," "the otherwise compensable injury," and "the combined condition," which appear repeatedly in the statutes quoted above in the introduction.

**b. Statutory text and context show that a compensable injury is a medical condition that arises out of and in the course of employment. It is not an incident.**

The court below relied on the general definition of a "compensable injury" in ORS 656.005(7)(a) to conclude that "the otherwise compensable injury" referred to in subsection (B), the combined condition statute, and ORS 656.262(6)(c), is an "injury incident." The first clue to the contrary is that a "compensable injury" only exists to the extent that it "is established by medical evidence supported by objective findings." ORS 656.005(7)(a). Medical evidence does not establish an incident, but it may establish an injury to a person. The medical profession treats injuries by determining a diagnosis and then providing treatment for the diagnosed condition. Thus, a "compensable injury" is some kind of condition caused by unintentional means.

A "compensable injury" must be established under ORS 656.005(7)(a). Until it is has been established to be compensable, it is

just an injury. A compensable injury "encompasses an application of the criteria found in ORS 656.005(7)(a), including the limitations found in subparagraphs (A) and (B) of that statute, in making an initial determination of compensability." *SAIF v. Drews*, 318 Or 1, 8, 860 P2d 254 (1993).

Because the limitations in subparagraphs (A) and (B) are part of the overall criteria in establishing a compensable injury, an examination of the wording of ORS 656.005(7)(a)(A), the consequential condition statute, is also germane. That provision states:

> "No injury or disease is compensable as a consequence of a compensable injury unless the compensable injury is the major contributing cause of the consequential condition."

ORS 656.005(7)(a)(A). This provision establishes that the legislature equates an "injury or disease," as used at the beginning of the sentence, with a "condition," as used at the end of the sentence.

In the consequential condition statute, "the compensable injury" refers to an accepted condition. For purposes of consequential conditions, the courts have determined that "a compensable injury" means a compensable condition or an accepted condition. In *Robinson v. Nabisco*, *Inc*.,, the court observed that,

> "The phrase 'compensable as a consequence of a compensable injury' indicates that the major contributing cause standard in that limitation applies only if the compensability determination depends on a showing that the injury or disease is a consequence of *a compensable condition*."

331 Or 178, 185, 11 P3d 1286 (2000) (emphasis added).

In *Albany Gen. Hosp. v. Gasperino*, 113 Or App 411, 415, 833 P2d 1292 (1992), the court explained the how ORS 656.005(7)(a)(A) is different from ORS 656.005(7)(a):

> "The distinction is between a condition or need for treatment that is caused by the *industrial accident*, for which the material contributing cause standard still applies, and a condition or need for treatment that is caused in turn by the *compensable injury*. It is the latter that must meet the major contributing cause test."

*See also, Roseburg Forest Products v. Zimbelman,* 136 Or App 75, 79, 900 P2d 1089 (1995) (stating that under ORS 656.005(7)(a), "the compensable injury is the medical condition that results from the accidental injury" and a consequential condition must be caused in major part by that condition).

The text of ORS 656.005(7)(a)(A), as interpreted in these cases, illustrates that the "compensable injury" as defined in ORS 656.005(7)(a), and repeated throughout ORS chapter 656, is not an "injury incident," but, rather, it is an injury that happens *as a result of* an

incident or industrial accident. In other words, the basic definition of compensable injury as, "an accidental injury, or accidental injury to prosthetic appliances, arising out of and in the course of employment," is not a mere accidental event. It is a condition caused by some event at work, established by medical evidence, which either has been determined to be compensable, or is capable of being determined to be compensable, once all the elements of proof to establish a compensable injury have been met.

Having established that a compensable injury is a condition, the next matter to be addressed is the nature of a combined condition.

**c. The combined condition consists of an acute condition existing simultaneously and combining with a preexisting condition.**

This court has not expressly analyzed the meaning of the phrase "the combined condition," but has had occasion to apply it.

In *Multifoods Specialty Distribution v. McAtee*, 333 Or 629, 43 P3d 1101 (2002), this court determined whether an employer properly denied a combined condition consisting of a lumbar strain combined with a preexisting condition. The preexisting condition in that case included "earlier compensable injuries and a resulting degenerative condition," which the court described as having "existed simultaneously

with the lumbar strain." 333 Or at 631. This statement logically expresses the idea, explained more fully in the Court of Appeals' decision that was being affirmed, that a combined condition consists of two conditions: "a combined condition may constitute either an integration of two conditions or the close relationship of those conditions, without integration." *Multifoods Specialty Distribution v. McAtee*, 164 Or App 654, 662, 993 P2d 174 (1999) *aff'd*, 333 Or 629, 43 P3d 1101 (2002). Thus, a combined condition is two conditions, the acute condition caused by the work accident, and the preexisting condition.

On that background, this court concluded that,

> "employer accepted the prior degenerative condition only as part of a combined condition. Given that, employer could deny the claim when the lumbar strain that claimant suffered was no longer the major contributing cause of claimant's need for treatment."

*Multifoods,* 333 Or at 631.

That statement is in accord with the purpose of the combined condition statute: when a combined condition is accepted, the preexisting portion is not unconditionally accepted. The acute portion of the combined condition is an accepted, compensable condition, entitled to benefits, including when it combines with a preexisting condition. But

the entire combined condition, including the accepted acute condition, is only compensable as long as "the otherwise compensable injury" is the major contributing cause of the combined condition or its need for treatment. ORS 656.005(7)(a)(B). The preexisting condition of the combined condition is compensable only as part of the accepted combined condition. When the accepted acute accident-related condition – the "otherwise compensable injury" – is no longer the major contributing cause of the combined condition, the combined condition as a whole is no longer compensable.

The Court of Appeals revisited *Multifoods* in *Brown,* stating, "It would appear that the court's reference to the lumbar strain was a reference to the accidental injury incident," because medically in that case, "there was no other reason for pain except the degenerative condition." *Brown,* 262 Or App at 655.

SAIF does not agree with the Court of Appeals' reading of *Multifoods.* In SAIF's view, when weighing the major contributing cause of a combined condition, the acute accepted condition is weighed against the preexisting condition, and that is what this court was expressing when stating that the employer could deny the claim when

the lumbar strain was no longer the major contributing cause of the claimant's need for treatment. *Multifoods,* 333 Or at 631.

A plain reading of the words "combined condition" implies two conditions that have combined. This view is supported by reasoning offered in the court's recent decision in *Schleiss v. SAIF,* where, in surveying the workers' compensation statutes concerning combined conditions, the court stated that analysis of a combined condition denial,

> "does not require an analysis of what, in some general sense, has caused an injured worker to become impaired or need treatment. Rather, it requires identification of the major cause of any disability or need for treatment of the combined condition, suggesting that *the board should compare only the contributions of the component parts of the combined condition*. To confirm the point, ORS 656.262(6)(c) refers simply to whether the otherwise compensable injury is the major contributing cause of the combined condition itself."

*Schleiss v. SAIF*, 354 Or 637, 653-54, 317 P3d 244 (2013) (emphasis added). Here, the board did exactly that: a comparison of the component parts of the combined condition. (App Br ER at 23). The acute-accepted lumbar strain had resolved, leaving only the preexisting portions of the combined condition. Thus, the board correctly concluded that the otherwise compensable injury was no longer the major contributing cause of the combined condition.

A brief discussion of *Schleiss* is in order to establish that the decision is not contrary to SAIF's position here. In *Schleiss*, the court reversed a decision that affirmed an apportionment of the worker's disability. Observing that the record did not establish the preexisting causes of the worker's disability were either previously diagnosed or treated, the court reasoned that the contributions from these causes would not have qualified to be weighed in determining the major contributing cause of a "true" combined condition. 354 Or at 653. In so holding, the court made the observation quoted above, that when evaluating a combined condition, the board should look only at the contributions of the component parts of the combined condition. *Id.* By holding that the contributions from the non-qualified preexisting conditions could not be considered and apportioned out of claimant's award, the court's decision supports the arguments here: that a combined condition consists of an acute condition and a qualified preexisting condition, and does not include other things not established to be part of that combined condition.

Furthermore, the legislature used the definite article "the" to identify the particular combined condition that the employer denies when asserting that the otherwise compensable injury is no longer the

major contributing cause of the combined condition. ORS 656.005(7)(a)(B), ORS 656.262(6)(c); ORS 656.262(7)(b) and ORS 656.266(2). Here, the combined condition that SAIF accepted was, "lumbar strain combined with preexisting lumbar disc disease and preexisting spondylolisthesis." (Ex. 69). The lumbar strain is what combined with the worker's preexisting conditions to result in the particular combined condition that was accepted and then denied.

General principles of issue preservation in litigation support the notion that the same combined condition that was in the denial that claimant appealed was at issue, rather than an undefined "injury incident" combined with a preexisting condition.

But in the Court of Appeals' view, the question was "whether claimant's work-related injury incident is the major contributing cause of the combined condition." *Brown*, 262 Or App at 656. The court appeared to write the acute accepted condition out of the equation. For reasons that will be explained, with evidence that the accepted strain had ceased to be the major contributing cause of the worker's combined condition or its need for treatment, the denial should have been affirmed.

**d. In the context of a claim accepted for a combined condition, the "otherwise compensable injury" is distinguished from a "compensable injury," because it has been established to be compensable.**

There is one more statutory phrase that requires closer examination in the overall analysis of this dispute, and that is "the otherwise compensable injury," which is referenced in ORS 656.005(7)(a)(B) and ORS 656.262(6)(c). In its analysis, the Court of Appeals adopted claimant's argument that "the otherwise compensable injury" was the same as "a compensable injury" as defined generally in ORS 656.005(7)(a). The court then concluded that the "compensable injury" is a "work-related injury incident." *Brown,* 262 Or App at 656. This was incorrect for several reasons.

The legislature provided in ORS 656.262(6)(c) that a carrier may deny an accepted combined condition when "the otherwise compensable injury" ceases to be the major contributing cause, but referred to the same thing as "the accepted injury" in ORS 656.262(7)(b). There, the issuance of a written denial is required when "the accepted injury is no longer the major contributing cause of the worker's combined condition." ORS 656.262(7)(b). Thus, the legislature equates the words "otherwise compensable" with "accepted" in this context.

Again, in ORS 656.268(1)(b), the legislature provided for the carrier to close the claim when, "The accepted injury is no longer the major contributing cause of the worker's combined or consequential condition or conditions pursuant to ORS 656.005(7)." Significantly, this provision also instructs that once the "accepted injury" is no longer the major contributing cause of the combined condition and the claim is being closed, "the likely permanent disability that would have been due to the *current accepted condition* shall be estimated." ORS 656.268(1)(b) (emphasis added). That is, after the accepted injury is no longer the major contributing cause of the combined condition, what remains, for purposes of impairment rating, is the original *accepted condition*.

This provision establishes that when a combined condition occurs in an accepted claim, an *accepted condition combines with a preexisting condition*. Thus, "the otherwise compensable injury" is not an incident, but, more precisely, describes the worker's accepted condition. That acute accepted condition may be denied when it is no longer the major contributing cause of the combined condition, as was done in this case.

In addition, "the otherwise compensable injury" in ORS 656.262(6)(c) is distinct from "a compensable injury" as defined in ORS 656.005(7)(a). It is "otherwise compensable" because it has been *established* to be compensable.[5]

The legislature provided that a combined condition is compensable "only if, so long as, and to the extent that the *otherwise* compensable injury is the major contributing cause..." ORS 656.005(7)(a)(B) (emphasis added). The word "otherwise" means, "1 : in a different way or manner: DIFFERENTLY 2 : in different circumstances : under other conditions 3 : in other respects 4 : if not[.]" *Webster's Third New Int'l Dictionary* 1598 (unabridged ed 2002) (usage examples omitted). By inserting that word, the legislature meant to distinguish the concept of a compensable injury from "the otherwise compensable

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[5] As noted above at n. 3, in the initial injury claim context, there will not be an accepted condition, but the worker must first establish the elements of an otherwise compensable injury before an employer is required to establish that the injury was never the major contributing cause of a combined condition. ORS 656.266(2). *See, SAIF v. Kollias,* 233 Or App 499, 227 P3d 188 (2010) (holding that once a worker establishes an "otherwise compensable injury," the burden of proving a preexisting condition and a combined condition to establish that the injury was never the major contributing cause of the combined condition shifts to the insurer, for which the insurer is entitled to the last presentation of evidence).

injury" that must be weighed to prove a combined condition under subsection (B) of ORS 656.005(7)(a).

The otherwise compensable injury arises in different circumstances, only for purposes of weighing the major contributing cause of a combined condition. The idea of comparing only the component parts of the combined condition in determining its major contributing cause was recently explained in *Vigor Indus., LLC v. Ayres*, 257 Or App 795, 310 P3d 674, 678 (2013) *rev den*, 355 Or 142, 326 P3d 1207 (2014). There, the court reasoned that finding the major contributing cause of a combined condition is akin to solving a mathematical equation in which, "one need compare only the contributions of the otherwise compensable injury and the preexisting condition to see which is greater." *Vigor Industrial,* 257 Or App at 800.

In *Vigor Industrial*, the court expressly did not decide the scope of the "otherwise compensable injury" for purposes of the major contributing cause analysis. *Id.* at 807. Nonetheless, the court's view of the weighing of the "otherwise compensable injury" against the preexisting condition to see which is greater supports SAIF's view of how to determine the major contributing cause of a combined condition. It does not leave room to weigh the extent to which the accident may

have impacted the preexisting condition, because the preexisting condition is being weighed against the "otherwise compensable" condition to determine which is the major contributing cause. Yet in *Brown*, the court cited to an exacerbation of the worker's preexisting condition as the basis to remand the case to the board to determine whether the otherwise compensable injury had ceased to be the major contributing cause of the claimant's combined condition. *Brown,* 262 Or App at 656.

Because the preexisting condition is not otherwise compensable, it was error to suggest that the preexisting condition should be weighed against itself. Rather, it is correct to weigh the otherwise compensable condition against the preexisting condition to determine the major contributing cause of the combined condition.

**2. The notice of acceptance determines the scope of the compensable injury in an accepted claim, and the compensable injury is the accepted conditions in any accepted claim.**

The most far-reaching import of the decision being reviewed was its conclusion that the notice of acceptance does not define the scope of the compensable injury, even though ORS 656.262(6)(b)(A) provides plainly that the notice shall "[s]pecify what conditions are compensable."

There is compelling statutory context to support the view that the notice of acceptance is what establishes that an "otherwise compensable injury" is compensable and defines the scope of the "compensable injury." First, an insurer or employer is required to furnish "[w]ritten notice of acceptance or denial of the claim * * * within 60 days after the employer has notice or knowledge of the claim." ORS 656.262(6)(a). Acceptance may not be revoked except for fraud, misrepresentation or other illegal activity by the worker, or if revoked based on later-obtained evidence, the carrier has the burden to prove that the claim is not compensable. *Id.*

Importantly, the worker may, at any time, object to the notice of acceptance and request that a new or omitted medical condition be added. ORS 656.262(6)(d), ORS 656.262(7)(a), and ORS 656.267. This is a frequently-utilized mechanism, and was what triggered the acceptance (albeit after litigation) of the combined condition in this case. If the notice did not define the scope of the compensable injury, then there would be little utility in providing workers with a mechanism to have the notice expanded with additional compensable conditions.

It is well established that acceptance of conditions does not occur without a formal notice. *Johnson v. Spectra Physics,* 303 Or 49, 733

P2d 1367 (1987) (holding that the specific acceptance in writing of only one of several conditions is not a specific acceptance of other conditions allegedly related to the claim, and allowing partial denial). The legislature also provided that "[m]erely paying or providing compensation shall not be considered acceptance," nor does payment of permanent disability for a condition prevent the carrier from contesting the compensability of the condition, "unless the condition has been formally accepted." ORS 656.262(10).[6] These authorities tell us that formal acceptance is what signifies that a compensable injury is

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[6] ORS 656.262(10) provides:

> "Merely paying or providing compensation shall not be considered acceptance of a claim or an admission of liability, nor shall mere acceptance of such compensation be considered a waiver of the right to question the amount thereof. Payment of permanent disability benefits pursuant to a notice of closure, reconsideration order or litigation order, or the failure to appeal or seek review of such an order or notice of closure, shall not preclude an insurer or self-insured employer from subsequently contesting the compensability of the condition rated therein, unless the condition has been formally accepted."

compensable, and that the acceptance of particular conditions is what creates the contours of the compensable claim.

ORS 656.262(10) makes it clear that without acceptance, a condition is not compensable. Although the Court of Appeals expressed concern that this interpretation "gives the insurer the ability to define and limit the scope of a compensable injury by specifically articulating the 'accepted condition,'" (*Brown*, 262 Or App at 640), that result is precisely what the legislature intended.

At claim closure, the carrier is required to issue an updated notice of acceptance, which, like other acceptance notices, "specifies which conditions are compensable." ORS 656.262(7)(c).[7] And like other

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[7] ORS 656.262(7)(c) provides:

> "When an insurer or self-insured employer determines that the claim qualifies for claim closure, the insurer or self-insured employer shall issue at claim closure an updated notice of acceptance that specifies which conditions are compensable. The procedures specified in subsection (6)(d) of this section apply to this notice. Any objection to the updated notice or appeal of denied conditions shall not delay claim closure pursuant to ORS 656.268. If a condition is found compensable after claim closure, the

acceptance notices, the worker may object to the updated notice of acceptance at closure, but closure is not delayed, because if a condition is found compensable after closure, the carrier is required to, "reopen the claim for processing regarding that condition." *Id*. This provision, like ORS 656.262(6)(b), is plain on its face. The acceptance notice specifies what conditions are compensable. Those conditions not specified in the acceptance are not compensable, until they have been established to be compensable, which is reflected in the notice of acceptance. If conditions are added to the notice, they become compensable conditions, entitling the worker to benefits, including reopening of the claim if it was closed prior to acceptance.

All of these provisions unequivocally establish that the acceptance of conditions establishes the contours of the compensable injury for purposes of claim processing, delivery of benefits, and determining the major contributing cause of a combined condition after denial under ORS 656.262(6)(c). The legislative history, set forth infra at 43, also supports this reading.

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> insurer or self-insured employer shall reopen the claim for processing regarding that condition."

This court appeared to acknowledge this view, in the context of a medical services dispute. Medical services are available "[f]or every compensable injury" under ORS 656.245(1)(a). In *SAIF v. Sprague*, 346 Or 661, 672, 217 P3d 644 (2009), this court observed, for purposes of determining the compensability of medical treatment under ORS 656.245(1)(a), that, "[t]he 'compensable injury' here is claimant's original meniscus tear, caused by a workplace accident in 1976."

That statement has led the Court of Appeals and the board to conclude that the "compensable injury" means, for the purposes of medical services under ORS 656.245(1)(a), the accepted conditions. *SAIF v. Swartz*, 247 Or App 515, 270 P3d 335 (2011); *see also, Bonita E. Dunne,* 63 Van Natta 853, 855 (2010). Medical services are only available for a compensable injury, which is formally defined by the notice of acceptance under ORS 656.262(6)(b).

In, *SAIF v. Swartz, supra,* citing *Sprague,* the court noted,

> "to the extent that the Supreme Court addressed the issue, it stated, 'The "compensable injury" here is claimant's original meniscus tear, caused by a workplace accident in 1976.' That definition is seemingly coterminous with the 'accepted condition.'"

*Swartz,* 247 Or App at 515, 525 n. 6 (internal citation omitted). [8]

In *Swartz,* the court affirmed a denial of medical services where substantial evidence did not support a causal relationship between the need for treatment and the "compensable injury," because the only accepted condition, a strain, had resolved.

The express purpose of an acceptance notice is to, "reasonably apprise[] the claimant and the medical providers of the nature of the compensable conditions." ORS 656.267(1). It would be impractical for medical providers to evaluate whether an undefined "accidental injury incident" continues to be the major contributing cause of a combined condition. The combined condition that is accepted and then denied is clearly defined by the formal notice of acceptance and the notice

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[8] In *Brown*, the Court of Appeals distinguished the analysis in *Sprague* and *Swartz* as *dicta,* while also observing that in those cases, "we had not examined the legislative history that we now find so persuasive of the legislature's intentions." *Brown,* 262 Or App at 653. Based on its reasoning in *Brown,* the court held, in *SAIF v. Carlos-Macias,* 262 Or App 629, 637, 325 P3d 827 (2014), *petition for review in abeyance* (S062422), that the acceptance has no bearing on defining the "compensable injury" for purposes of entitlement to medical benefits in ORS 656.245(1)(a). As the arguments in this brief illustrate, the analyses in *Sprague* and *Swartz* were correct, and as will be shown, the legislative history is supportive of those interpretations.

denying the same. ORS 656.262(6)(b) and ORS 656.262(7)(b). Medical providers know how to evaluate and weigh the contributions to a formally-defined combined condition, and parties know the scope of the issue to be litigated on appeal of such a denial.

**3. When an accepted combined condition is denied under ORS 656.262(6)(c), the acute accepted condition is weighed against the preexisting condition to determine the major contributing cause of the combined condition.**

The ultimate issue for the court to decide is whether, in a case involving the denial of an accepted combined condition under ORS 656.262(6)(c), the otherwise compensable injury is the acute accepted condition or is something else. Based on the foregoing review of the text and context of the statutes along with the caselaw interpreting it to date, it is apparent that:

- an “injury” is a medical condition and not the incident that caused it;
- a “compensable injury” is a medical condition that meets the elements of ORS 656.005(7)(a);
- an “otherwise compensable injury” that combines with a preexisting condition is a medical condition that has been established to meet the basic criteria for compensability but

may or may not be the major contributing cause of the combined condition; and

- when an insurer is denying an accepted combined condition, “the otherwise compensable injury” is the acute part of the combined condition that was accepted as having been caused by the work accident.

Here, the board weighed the contribution from the accepted condition against the contribution from the preexisting condition to determine which was the major contributing cause of the combined condition. (App Br ER at 23). The Court of Appeals, however, reached an incorrect outcome, focusing on the “injury incident,” which is not a statutory phrase. As a result, the court included the effect of the accident on the preexisting condition as a component of the “otherwise compensable injury.” In doing so, the *Brown* court ventured into an area that should have been reserved for determining the compensability of the preexisting condition itself. The compensability of the preexisting condition could be raised at any time pursuant to a claim for acceptance of the preexisting condition, but it was not at issue in the litigation.

The preexisting condition is a conditionally accepted condition, to the extent it has combined with a compensable injury. It is not part of

"the otherwise compensable injury." In accepting the combined condition, SAIF "accepted the prior degenerative condition only as part of a combined condition." *Multifoods*, 333 Or at 631. "Given that, [SAIF] could deny the claim when the lumbar strain that claimant suffered was no longer the major contributing cause of claimant's need for treatment." *Id.* This is the correct view because SAIF accepted the lumbar strain, but the preexisting conditions are not outright accepted and their inclusion in the combined condition is dependent on their relationship to the accepted condition.

It also is a formula that works in practical terms. If the "otherwise compensable injury" were not defined by the acceptance notice, when a carrier denied an accepted combined condition, the lack of definition of what was being denied could disadvantage the worker in a subsequent attempt to have other conditions added to the claim.

This was precisely the concern raised by the claimant in *Reid v. SAIF,* 241 Or App 496, 503, 250 P3d 444, *rev den*, 351 Or 216 (2011). In *Reid*, the Court of Appeals affirmed a combined condition denial when substantial evidence established that the cervical strain had ceased to be the major contributing cause of the worker's need for treatment. The court affirmed that the combined condition denial did

not affect the compensability of the accepted disc herniation in the same body part, because the disc injury was not a part of the actual combined condition that was accepted and denied. 241 Or App at 503.

In *Reid,* the court stated that, "the combined condition acceptance, as reasonably construed by the board, only referred to the 2004 cervical strain," and it did not include an accepted cervical disc herniation. *Reid,* 241 Or App at 503. Thus the denial could be affirmed when the strain ceased to be the major contributing cause of the combined condition.

The *Brown* court distinguished *Reid*. The *Brown* court reasoned that the denial in *Reid* was affirmed because the cervical disc injury was not part of the combined condition, and the court's statement that it was correct to focus on "the actual combined condition that was accepted and then denied," was "*dicta*." *Brown,* 262 Or App at 651-652.

In SAIF's view, this reasoning is not consistent with the facts of *Reid*. If a combined condition denial cannot be affirmed when the "injury incident" continues to be the major contributing cause of the worker's combined condition, then the court in *Reid* would have had to remand that case back to the Board to determine whether the "disc injury," which was acknowledged to have been part of the worker's

injury, had or had not combined with her preexisting condition, and whether the injury, including the disc injury, continued to be the major contributing cause of her condition or its need for treatment. That was the very concern that claimant raised for the court to determine, but the court affirmed the board's decision that the combined condition only consisted of the accepted strain combined with degenerative disc disease. *Reid,* 241 Or App at 503.

A combined condition consists of an acute condition and a preexisting condition, and the full legislative history, set forth below, confirms the legislature's intent that the compensability of the combined condition ceases when the acute condition is no longer the major contributing cause of the combined condition

By presenting the above analysis of the text and context of the statutes, and a more complete survey of the relevant legislative history below, SAIF intends to show the court that the board's decision in this case was, in fact, a correct application of the intent of the legislature when it created the major contributing cause test to limit the compensability of combined conditions.

**4. The legislative history establishes that the accepted condition is weighed against the preexisting condition when a combined condition is denied.**

Under this court's current model for interpreting statutes, the court's examination of the text and context of statutes may be informed by legislative history. *State v. Gaines,* 346 Or 160, 171, 206 P3d 1042 (2009). The court's role is to interpret statutes consistently with the words that the legislature used and the meaning that the legislature understood those words to have, if that meaning is consistent with the words themselves. *State v. Walker*, 356 Or 4, 22-23, 333 P3d 316, 327 (2014).

**a. The statute providing for a notice of acceptance was the subject of several amendments in 1990, among them the requirement to specify what conditions are compensable.**

The 1990 special session saw the enactment of the provision that became ORS 656.262(6)(b), requiring the notice of acceptance to specify the compensable conditions. Or Laws 1990, ch. 2, § 15. The notice of acceptance requirement in ORS 656.262(6)(b) has not been subsequently altered or amended. The proper inquiry focuses on what the legislature intended at the time of enactment, and discounts later events. *Arken v. City of Portland*, 351 Or 113, 133, 263 P3d 975 *opinion adhered to on recons sub nom. Robinson v. Pub. Employees Ret. Bd*., 351 Or 404, 268 P3d 567 (2011), *citing Holcomb v. Sunderland*, 321 Or 99, 105, 894 P2d 457, 460 (1995). The comments

of legislators or witnesses who, in 1995, discussed the purpose of having a notice of acceptance that specifies the compensable conditions, is, therefore, of no relevance to ascertaining the legislative intent behind a prior legislature's enactment of that provision. *Cf., Brown,* 262 Or App at 260 (quoting various statements of Rep. Kevin Mannix in 1995, regarding the meaning of the acceptance notice required under ORS 656.262(6)(b), enacted in 1990).

At the relevant time, in 1990, Ross Dwinnel of United Grocers in Portland, was, with Rep. Bob Shiprack, a co-chair of the Governor's Workers' Compensation Labor Management Advisory Committee, or MLAC (a.k.a. the Mahonia Hall group), the proponents of SB 1197. Dwinnel testified to a legislative "Interim Special Committee on Workers' Compensation" on May 3, 1990. (App. at 1). Dwinnel was explaining how the bill addressed and partially codified this court's decision in *Bauman v. SAIF,* 295 Or 788, 794, 670 P2d 1027 (1983), which held that once a claim has been accepted, the insurer or self-insured employer may not withdraw the acceptance except with a showing of fraud, misrepresentation, or other illegal activity. *Tape Recording*, Interim Special Committee on Workers' Compensation, SB 1197, May 3, 1990, Tape 1, Side B (Statement of Ross Dwinnel). Mr. Dwinnel

explained that the bill extended from 60 to 90 days the period in which the carrier must accept or deny a claim, to discourage denials of claims "because they know they can never turn around and deny them if evidence comes in on a later date." *Id.* He then explained,

> "On page 26 is some recommendations again that came from some other legislation to specify what conditions are compensable. That, I think, came up last session to be specific about what condition the insurer is accepting and what ones they're not."

*Id.*

Cecil Tibbetts, of the American Federation of State, County, and Municipal Employees, another member of MLAC, then commented,

> "Yes, one other thing I want to say about the back up claim denial – we also changed the initial period for acceptance or denial of a claim from 60 to 90 days to give a little more time for the insurance company to take a look. What we're trying to do with these changes is create more acceptances and less denials that are just nervous denials about the insurance company being concerned that they might later not want to accept this claim."

*Tape Recording*, Interim Special Committee on Workers' Compensation, SB 1197, May 3, 1990, Tape 1, Side B (Statement of Cecil Tibbetts). What these statements tell us is that the specific acceptances added to ORS 656.262(6)(b) in 1990 were considered part

of a more extensive revision of ORS 656.262(6), which allowed back-up denials for later obtained evidence or fraud and extended the time a carrier had to evaluate a claim. The discussion above establishes that the requirement to specify what conditions are accepted was part of a larger effort to encourage acceptances generally. The specific acceptance would make it unnecessary to later attempt to back-up deny a condition, because unless it was specifically accepted, it never was compensable.

The only other mention on the specific acceptance of conditions was on the floor of the senate by Senator Grensky, who began by explaining that the bill extended the period for an insurer to accept or deny a claim from 60 to 90 days. *Tape recording,* Special Session, Senate, May 7, 1990, Tape 4 side A (Statement of Senator Grensky). After explaining that the bill introduced a provision that allowed parties to compromise and release all matters regarding a claim except for medical services, he then stated, "Under Section 15, an insurer shall specify what conditions are compensable. A notice of acceptance and it eliminates the denial." *Id.* There was no further comment or discussion on this provision either in the Senate or the House, and although Senator Grensky's comments are terse, they are consistent

with the earlier comments quoted above showing the intent that a specific notice of acceptance would eliminate the likelihood that many of these claims would be denied *ab initio*, out of concern that the acceptance might include conditions that are not compensable.

The legislature's intent that accepted conditions drive the claim is effectuated by the plain wording of ORS 656.262(6)(b), mandating that the acceptance specifies what conditions are compensable. Nothing about the words of this provision or the discussion in 1990 would lead to the understanding that acceptances are only for notice purposes, and otherwise do not signify anything. Given the context of other statutes as set forth in the earlier sections of this brief, the court must conclude that an accepted condition is a compensable condition, and, conversely, an unaccepted condition has not been established to be compensable, is not entitled to benefit payments, and is not part of the otherwise compensable injury that is weighed in the determination of the major contributing cause of a combined condition.

**b. The combined condition was introduced in 1990, with the understanding that it would only be compensable as long as the acute condition was the major contributing cause.**

The concept of an injury combining with a preexisting condition and being subject to the major contributing cause standard was first

introduced in 1990, as a result of the Mahonia Hall agreements, which were passed in a special legislative session that year. *See*, Or Laws 1990, ch 2, § 3.[9] This was accomplished by the addition of subsections (A) and (B) to ORS 656.005(7)(a), which introduced the major contributing cause standard for consequential and combined conditions. Or Laws 1990, ch 2, § 3.

In the 1990 special session there were, understandably, concerns registered from various witnesses that the standard to prove any work injury was being raised to a major contributing cause standard. Testifying before the special committee, Jerry Keene explained that he had been involved in drafting "some reform legislation that, by coincidence or otherwise, turned up with language that is remarkably similar, if not word for word identical to what showed up in this bill," and

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[9] ORS 656.005(7)(a)(B) was amended again in 1995, but following the 1990 amendments it read:

> "If a compensable injury combines with a preexisting disease or condition to cause or prolong disability or a need for treatment, the resultant condition is compensable only to the extent the compensable injury is and remains the major contributing cause of the disability or need for treatment."

therefore he was appearing to explain, "what my intent was when we came up with the words." *Tape Recording*, Joint Special Committee on Workers' Compensation, SB 1197, May 3, 1990, Tape 8, Side B (Statement of Jerry Keene).

Part of what Mr. Keene said is quoted in *Brown* to support the court's conclusion that a compensable injury is not defined by the acceptance*,* (262 Or App at 649), but his statement that the intent was not to change "the basic industrial injury definition" was taken out of its context. Mr. Keene's statement had nothing to do with whether an acceptance notice would define the scope of an accepted compensable injury. To give the court a better understanding of this, more of his statement is set forth here:

> "I would like to tell you that this language is far from ambiguous and uncertain as has been represented to you today. In fact, it does not change in one iota the standard of causation for the initial industrial injury. That language is arising out of and in the course of employment, which the courts translate as material contributing cause. More than negligible, less than half, but significant. That's the standard. Material contributing cause. It means any partial cause. That has not changed in the basic industrial injury definition. The only things we tried to do, or at least I did in a similar effort, was to attack conditions that were coming into the system that were there before the injury and things that were coming in after." *Id.*

Mr. Keene's comments about the "basic industrial injury definition" were made to reaffirm that the material contributing cause standard of proof continued to be in effect for simple initial injury claims. It was not about the acceptance notice, nor was he addressing the scope of the injury in a combined condition situation.

In fact, the legislative history supports a conclusion that only the accepted condition defines the otherwise compensable injury. In the same 1990 hearing, Rep. Mannix testified concerning how the major contributing cause standard would be applied in a "resultant condition" context. Because his comments are directly applicable to the dispute in this case, and establish what the limitation means when an injury is not the major contributing cause of a combined condition, they are provided here at length. He said,

> "It doesn't say that that incident has to be the major contributing cause of the overall condition. It says that that incident, take a look at it carefully, if it combines with a preexisting disease, degenerative disc disease, to cause or prolong disability, the resultant condition is compensable only to the extent the compensable injury is and remains the major contributing cause. What's going to happen in that situation? The worker's bad back for that day and whatever needs to be done to take care of that day is covered. But what happens right now is that old degenerative disc disease which

> is often sucked into the workers' comp system will be separated out[.] * * * You take care of that acute episode and that is covered, but the underlying disease process is not."

*Id*., Tape 8, side A (statement of Rep. Kevin Mannix). Two observations can be made about this testimony. First, the intention behind the legislation was to cover the "acute episode" and to exclude coverage for the preexisting condition. That is precisely what the denial of "lumbar strain combined with preexisting lumbar disc disease and preexisting spondylolisthesis" did in this dispute. Once the accepted, acute lumbar strain had ceased to be the major contributing cause of the combined condition or its need for treatment, the combined condition was no longer compensable. By saying that the incident did not have "to be the major contributing cause of the overall condition," Rep. Mannix was speaking to the very dispute that is before the court in this case. The question is not, "Is the injury event the major contributing cause of the overall condition?" The question is, "Is the acute condition the major contributing cause of the need to treat the combined condition?"

The second thing that this testimony shows is the references Rep. Mannix made to the "incident" are not an indication that a notice of acceptance was not intended to define the scope of an accepted claim.

The comments had nothing to do with that concern. What his comments imply, to the contrary, is that the "incident," in the context of a combined condition, is the acute effects of what happened, rather than the accidental event, or the ongoing penumbral effects on the preexisting condition. Thus, a denial of the combined condition is appropriate when the acute accepted condition is no longer driving the need for treatment.

Further discussion in the hearings confirms this. Later on in the same 1990 hearing, Mr. Keene answered a question about a worker whose back goes out when picking up an object, and the worker has degenerative arthritis. The question from Senator Shoemaker was, under the bill, "would the traumatic injury itself be compensable?" *Id.,* Tape 8, side B (statement of Senator Shoemaker). Mr. Keene answered,

> "Absolutely. It would be what's called the lit up arthritic condition. And lighting up goes away. The trouble is, once you get even a partial contribution to a condition that degenerative arthritis is part of, any treatment directed at the arthritis stays in the system forever. There are lifetime medical rights. But under this scenario of this statute – what happens in most situations, the case never drops out of the system until the doctor is willing to say that that past injury plays absolutely no causal role in the treatment that he's rendering. And most doctors are very, very

> reluctant to say that. But in this scenario, once the doctor is willing to say well, that sprain, in and of itself, has receded, and at this point what we've got is arthritis. That was going to be there."

*Id., Tape Recording*, Joint Special Committee on Workers' Compensation, SB 1197, May 3, 1990, Tape 8, Side B (Statement of Jerry Keene). Again, this testimony establishes the intent that when the accepted sprain or strain has receded, the combined condition is no longer compensable.

**c. The 1995 amendments reaffirm and expand on the combined condition concept introduced in 1990.**

In 1995, the combined condition statute was reworded to its current form, and a mechanism was provided for carriers to deny previously-accepted combined and consequential conditions when the contribution from the "otherwise compensable injury" falls below major. Or Laws 1995, ch 332, §§ 1, 28. (Current ORS 656.262(6)(c) and ORS 656.262(7)(b)). In addition, a provision barring litigation of *de facto* denials of conditions without a written claim was enacted. In tandem, workers were given the ability to request that conditions be added to the notice of acceptance. Or laws 1995, ch 332, § 28. (Current ORS 656.262(6)(d) and ORS 656.262(7)(a)). These provisions built on the primacy of the notice of acceptance that was introduced in 1990.

When introducing ORS 656.262(6)(c), Rep. Mannix, a proponent of SB 369 stated,

> ".262, sub (6)(c): Permits a claim denial when preexisting conditions are the major cause of the need for treatment. This gets back to where we were in our discussion before: the major contributing cause, preexisting conditions and how long you have to keep providing care for those when you had an industrial injury. This permits a denial of further responsibility after the *work-related condition* has been treated to the extent that the work event is no longer the major cause of disability or the need for treatment."

Tape recording, Senate Committee on Labor and Gov't Operations, Jan 30, 1995, Tape 15, side B (Statement of Rep. Kevin Mannix) (emphasis added). This excerpt shows that, although he used the phrases "industrial injury" and "work event," Rep. Mannix equated those things with "the work-related condition."

In a later hearing in 1995, explaining the reason for the proposed changes to the combined condition statute, (ORS 656.005(7)(a)(B)), Rep. Mannix stated:

> "some fine distinctions have been made in court decisions so we came back and said "well, I guess they are starting to say 'when did it combine, how did it combine, are we talking about pathology,'" and so we've gone back and tried to be very precise. If it's otherwise compensable and it combines at any time with that preexisting condition to cause or prolong

> disability, the resultant condition is compensable only if, so long as, and to the extent that. In other words when that combination is over you are no longer at major contributing cause -- it drops off again. There was some arguments once you had the combination -- the combination was there -- then that resultant condition was compensable forever even if doctors later say "well, no the effect of the injury has dissipated, we're back to something where maybe the injury had some impact but is not the major contributing cause."

*Tape Recording*, March 1, 1995, House Committee on Labor, SB 369, Tape 39 side A (statement of Rep. Kevin Mannix). When asked to give some examples of how this would be applied, Mannix replied,

> "say you have degenerative disc disease -- and everybody does at some point in life, usually after the age of 40 and discs are wearing down – and you suffer a strain and the strain combined with your degenerative disc disease .... But eventually the strain resolved or becomes a very minimal strain, it's still interacting some with the degenerative disc disease. There are some that would argue that 'well, at that point degenerative disc disease remains compensable because there's still some interaction.' ...The point would be to say 'well, wait a minute.' The strain that you had -- the lifting incident which is usually a soft tissue -- has basically resolved. You might have some residuals of that -- the strain will remain compensable but the degenerative disc disease is no longer going to be eligible for treatment as part of your claim because the injury is not the major contributing cause of that degenerative disc disease.'"

*Id.* This excerpt, like the others provided above, supports the board's resolution of this claim. It gives no support to the view that the otherwise compensable injury is an incident considered to include either the preexisting condition or other conditions not accepted and acknowledged to be part of the claim. *Cf., Brown,* 262 Or App at 649-650.

This was echoed in another hearing, in which Rep. Mannix stated,

> "If the physician says 'no, this is the aging process, work may have had some impact but it's mainly the aging process,' then it won't be covered and the fact that you have a strain unless the two combine and stay combined so that the strain is the major contributing cause of some element of that degenerative disc disease. There'll be -- the point of the combination ending will be when *the strain is no longer the major contributing cause*."

*Tape recording,* House Committee on Labor, March 1, 1995, Tape 38 side B (Testimony of Kevin Mannix) (emphasis added).

In reaching its disposition concerning the notice of acceptance, the *Brown* court quoted comments made by Rep. Mannix in 1995 in which he stated that,

> "The acceptance itself does not have any negative consequences for the worker. The negative consequences are if something is not paid. If later on there is an issue about whether

> or not there is a new injury, it is important to go back and see what was accepted on the claim."

*Brown,* 262 Or App at 650, *quoting Tape Recording*, House Committee on Labor, SB 369, Mar 6, 1995, Tape 46, Side A (Statements of Rep Kevin Mannix). The court reasoned that this meant the insurer's obligation to specify the accepted conditions "was not intended to have an adverse effect on a worker's right to benefits," and thus a compensable injury is not defined by the notice of acceptance. 262 Or App at 650.

SAIF disagrees with this reading of Rep. Mannix's comment. He was saying that the carrier's acceptance of a condition or conditions does not have a negative effect on the worker, because benefits flow from accepted conditions. The negative consequences are when something is not paid – that is, when the worker has a condition that is not part of the accepted claim. Moreover, his comment cannot be relied on as legislative history regarding the purpose of acceptances because his comment was not in the context of legislation regarding required notices of acceptance. The context of the comment is that between 1990 and 1995, after acceptance notices began specifying the scope of the accepted claim, workers' attorneys began requesting hearings and alleging that anything not listed in the acceptance was *de facto* denied:

> "We wanted workers to have notice about what was covered. That was going fine until the last year or two when some attorneys started filing requests for hearing saying, ah, you missed a diagnosis. That's a de facto denial. I'm requesting a hearing; you denied my claim."

*Tape Recording*, House Committee on Labor, SB 369, Mar 6, 1995, Tape 46, Side A (Statements of Rep. Kevin Mannix). Because of the proliferation of these requests for hearing, the 1995 bill introduced the requirement that the worker make a written request to amend the acceptance before alleging a *de facto* denial.

> "We were trying to make employers and insurers be more forthright about telling people in 1990 what was accepted, and it boomeranged, because it has turned into another handle for litigation and now we're saying don't turn it into litigation unless you write a letter."

*Id.,* Tape 45, Side B. Rather than express that acceptances do not define the scope the compensable claim, this legislation reaffirmed the function of the acceptance notice, which is evident in the plain wording of ORS 656.262(6)(b).

**5. Summation.**

A proper analysis of the text of the interrelated statutes that govern the initial and ongoing compensability of a work injury leads to the conclusion that when an acute accepted condition that has

combined with a preexisting condition is no longer the major contributing cause of that combined condition, the insurer may issue a denial.

The denial of an accepted combined condition is allowed when "the otherwise compensable injury" or "the accepted injury" "ceases to be" or "is no longer" the major contributing cause of "the combined condition." ORS 656.005(7)(a)(B), ORS 656.262(6)(c), and ORS 656.262(7)(b). The "accepted injury" or "the otherwise compensable injury" in the context of a combined condition is the acute condition that was accepted by the insurer as having been established with medical evidence to have arisen out of employment. This is because the combined condition consists of "the otherwise compensable injury" and the "preexisting condition." Weighing the major contributing cause of the combined condition consists of weighing the "otherwise compensable injury," a medical condition, against the contribution from the 'preexisting condition," another medical condition, to see which is the major contributing cause.

## CONCLUSION

For the reasons set forth above, the decision of the Court of Appeals should be reversed and, if necessary, the case should be remanded for reconsideration.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

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 is approximately 11343 words and does not exceed the maximum allowed.

Type size

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).

## CERTIFICATE OF FILING

I HEREBY CERTIFY that I electronically filed the foregoing PETITIONERS' BRIEF ON THE MERITS with the Appellate Court Administrator on the 26th day of November, 2014.

Appellate Court Administrator
Appellate Court Records Section
1163 State Street
Salem, OR 97301-2563

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served the foregoing PETITIONERS' BRIEF ON THE MERITS upon the other party by causing to be mailed in the United States Post Office at Salem, Oregon, on the 26th day of November, 2014, two certified, true, exact and full copies thereof, enclosed in an envelope with postage thereon prepaid, addressed to:

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