IN THE SUPREME COURT OF THE STATE OF OREGON

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' REPLY 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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JULIE MASTERS, OSB #963549
Appellate Counsel
400 High Street SE
Salem, OR 97312-1000
Email: julmas@saif.com
Telephone: 503.373.8620
Of Attorneys for Respondents, Petitioners on Review
SAIF Corporation and Harris Transportation LLC

04/01/2015

JULENE M. QUINN, OSB #893408
Julene M. Quinn LLC
PO Box 820087
Portland, OR 97282
Email: julene.m.quinn@gmail.com
Telephone: 971.259.8141
Of Attorneys for Petitioner, Respondent on Review,
Royce L. Brown

JERALD P. KEENE, OSB #812757
Oregon Workers Comp Inst LLC
PO Box 338
Oceanside, OR 97134
Email: jerryk@oregoncomp.com
Telephone: 503.310.5087
Of Attorneys for Amicus Curiae,
Associated Oregon Industries and
Oregon Self Insured Association

JAMES S. COON, OSB #771450
Swanson Thomas Coon & Newton
820 SW 2nd Ave, Suite 200
Portland, OR 97204
Email: jcoon@stc-law.com
Telephone: 503.228.5222
Of Attorneys for Amicus Curiae,
Oregon Trial Lawyers Association

TABLE OF CONTENTS

Brief

TABLE OF AUTHORITIES

Cases

Statutes

Rules

REPLY BRIEF

Summary of Argument

When a preexisting condition "causes or prolongs" the disability or need for treatment for a compensable injury, *e.g.*, the preexisting condition makes the worker's condition worse than it otherwise would have been, a combined condition occurs. Only the effect of the preexisting condition on the condition caused by the accident is considered under the wording of ORS 656.005(7)(a)(B).

Respondent and *amicus curiae* Oregon Trial Lawyers Association (OTLA) argue, however, that if an accident also makes a preexisting condition worse,[1] the worsening of the preexisting condition becomes part of the combined condition. This was not properly put at issue here. The worker can make a claim at any time for acceptance of his preexisting condition, but until he has done so, it is not at issue. In this case, claimant requested the acceptance of his lumbar strain combined with his preexisting lumbar degenerative disease. He did not request to have his preexisting condition itself or its alleged worsening accepted.

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[1] Whether that happened in this case is a disputed question of fact which was not resolved below because it was not at issue, and which SAIF has never conceded. *Cf Brown v. SAIF,* 262 Or App 640, 656, 325 P3d 834 (2014).

The statutory scheme is designed for an orderly process of acceptance or denial of medical conditions, usually triggered by requests for acceptance, as was the case here. The legislative intent was not to make unclaimed conditions part of the accepted compensable injury absent some affirmative action by either the insurer or the worker.

Claimant and OTLA both argue, however, that the phrase "compensable injury" does not equate to medical conditions or the accepted condition. An injurious incident or accident is a sudden temporal event that, after it occurs, is over. If it leaves a worker injured, the worker's condition, if established, is the "compensable injury." To assume that the event itself is the compensable injury is to be forever looking backwards rather than addressing the worker's condition. The worker's condition is the reason that benefits are required.

The bulk of the argument from claimant and OTLA fails to focus either on the particular kind of denial before the court, or the legislative history that SAIF presented in its brief on the merits. Because this is the denial of an accepted combined condition, the proper test to determine its viability must be whether the worker's condition that was accepted meets the test to support its denial.

ARGUMENT

The worsening of claimant's preexisting condition was not put at issue in this litigation.

Both claimant and OTLA contend that the injury worsened claimant's preexisting condition, and that the worsening is necessarily included in the combined condition that was accepted and denied. This question was addressed at the hearing: the ALJ correctly reasoned that since claimant had not made a claim for his lumbar degenerative disease, the compensability of that condition was not at issue. (ER 21, REC 47). Claimant may, at any time, request the acceptance of any condition, and its compensability will be determined under the applicable standard. Whilst claimant and OTLA's arguments tend to expand the scope of what the court must decide to include the meaning of the phrase "compensable injury" as it appears throughout Chapter 656, it is important to remember that the only thing at issue is what the insurer must prove to establish that the otherwise compensable injury ceased to be the major contributing cause of the combined condition that was originally accepted. ORS 656.262(6)(c).

Claimant correctly points out that the definition of a preexisting condition does not include the potential effects of a work injury on such a condition. (R BOM 14, 40-41). The worsening of a preexisting

condition is not, in itself, preexisting. When an injury combines with a preexisting condition, the worsening of the preexisting condition is not automatically part of that combined condition.

SAIF does not concede, however, that where an accident worsens a preexisting condition, the worsening may be considered alone. *See Lecangdam v. SAIF,* 185 Or App 276, 59 P3d 528 (2002), *citing Wantowski v. Crown Cork Seal*, 164 Or App 214, 991 P2d 574 (1999) (claimant may not extract out the portion of hearing loss caused by work and claim that only that part is caused in major part by work); *Stacy v. Corrections Division*, 131 Or App 610, 886 P2d 1085 (1994), *rev den* 320 Or 567 (1995) (claimant may not establish a compensable worsening of a preexisting disease without establishing work is the major contributing cause of the entire condition).

Here, the worsened status of claimant's preexisting conditions are not part of the combined condition that was accepted and denied. Whether claimant may segregate the worsened portion of his preexisting condition is not before the court.[2] (R BOM 14).

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[2] ORS 656.225 addresses worsened preexisting conditions, requiring that if there is a compensable preexisting condition, medical services for it are not compensable unless "work conditions or events constitute the major contributing cause of a pathological worsening of the preexisting condition." *See, Arms v. SAIF,* 268 Or App 761, 767, 343 P3d 659

Had claimant requested acceptance of his preexisting condition, the carrier would have investigated the claim to determine whether the condition was impacted by work and what compensability standard applies. That is, whether the lumbar degenerative disease was part of a gradual disease process and might properly be analyzed as an occupational disease,[3] whether the worsening of the preexisting condition is an indirect consequence of the lumbar strain under ORS 656.005(7)(a)(A), or whether the accident directly caused a worsening of the preexisting condition. If the latter, it may have combined with the preexisting condition in its pre-injury state, and if the worsened preexisting condition was the major contributing cause of the need for treatment and disability of that overall combined condition, it would be accepted. These are questions that an insurer must address by soliciting expert medical evidence after a worker submits a request for acceptance of a condition. That request was not made here.

An otherwise compensable injury must be a medical condition, because an incident is a temporal event that is over by

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(2015) (holding that ORS 656.225 creates limits on, rather than entitlement to, benefits for preexisting conditions).

[3] *See*, *Aquilano Orozco,* 60 Van Natta 2716, 2721 (2008) (finding an occupational disease claim for lumbar degenerative changes compensable, while affirming a combined condition denial of strain combined with preexisting degenerative disc disease).

the time the worker seeks medical treatment.

Both claimant and OTLA contend that an otherwise compensable injury is not an accepted condition, and not a condition at all. The basis of their concern is that here, claimant presented medical evidence stating that the injury worsened his preexisting condition, and he wants that to be part of his accepted claim.

If claimant and OTLA are correct, then the "injury-incident," although it is over by the time a worker has filed a claim for it, combines with a preexisting condition, resulting in a "combined condition." This is logically untenable. An incident is an event, in a different class from a condition. An injury to a person requiring medical services is the result of an incident, and can be diagnosed, treated, and recovered from. An incident never changes, and can only be viewed retrospectively.

OTLA argues that a condition does not cause another condition, and thus the major contributing cause of a combined condition must be an incident. (OTLA Br 11). SAIF respectfully disagrees. OTLA overlooks that ORS 656.005(7)(a)(B) requires evaluating the cause of disability or need for treatment of a combined condition. Conditions cause disability or need for treatment. An incident may cause or contribute to the genesis of a condition, but the condition is the cause of the worker's need for treatment, and one condition may be a greater

cause of the need for treatment of the combined condition than the other condition. Thus, determining what is the major contributing cause of the disability or need for treatment of the combined condition is done by weighing the contribution from the acute condition against that of the preexisting condition.

Consistent with this notion, the relevant statutes don't ask what *was* the cause of the combined condition, but address what *is* its cause:

> "[T]he 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). An "injury-incident" cannot "cease" to be the cause of a condition, rather, the resulting condition itself heals sufficiently that the *condition* ceases to be the major cause of the combined condition and its need for treatment.

The words of the statutes establish that an injury is the result of an accident.

OTLA argues that the legislature could have used the words, "accepted condition" instead of "otherwise compensable injury" to establish what ceases to be the major contributing cause of a combined condition. (OTLA Br 5). The words "accepted injury" are used in ORS 656.262(7)(b), which unambiguously indicates that acceptance is a

factor in the analysis. Claimant and OTLA respond that "accepted injury" is not the same as "accepted condition." Part of the answer to these concerns lies in the words of ORS 656.005(7)(a)(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."

The "otherwise compensable injury" can combine *at any time* with a preexisting condition. This supports SAIF's reading that the compensable injury consists of the conditions resulting from an accident or incident, because the incident is a temporal event. Otherwise, the combination could happen only at the time of the incident. Furthermore, temporal incidences and physical conditions logically do not result in *combined conditions.* Claimant and OTLA studiously avoid the fact that a combined condition is a *condition*. An injury – that is, a hurt to a worker – is the thing that extends beyond the instant of the accident, and which is capable of combining with a preexisting condition and being, for some period of time, the major contributing cause of the worker's combined condition. It is best understood, as explained in SAIF's opening brief, as the acute condition resulting from the accident.

There are some disputed questions of fact.

SAIF hesitates to discuss factual issues at this point. Still, both claimant and OTLA repeat the Court of Appeals' misstatement that SAIF conceded that "the medical record supports claimant's contention that the compensable injury exacerbated the preexisting condition." (R BOM 8-9, citing *Brown v. SAIF,* 262 Or App at 645). SAIF has been unable to locate such a concession in the record. Rather, there is conflicting medical evidence in the record, and the board found SAIF's evidence to be more persuasive.

Claimant correctly indicates that SAIF's evidence established "that the combined condition had resolved and the work injury had ceased to be the major contributing cause of claimant's disability and need for treatment," (R BOM 4), but also asserts that evidence showed the "work injury" "caused" "acute narrowing of the already-narrowed foramen and injury to the nerve root." (R BOM 8). Claimant's expert expressed this opinion in a deposition, but the board did not find his opinions persuasive. (ER-21, REC 47). The ALJ noted that the experts agreed claimant's lumbar strain had resolved by the time of a closing examination in August, 2009, but claimant's expert nonetheless opined that he was still treating, "the combined condition of 'lumbar strain combined with preexisting lumbar disc disease and preexisting

spondylolisthesis'." (ER 20-21, REC 46-47). The ALJ affirmed the denial of the combined condition, noting that SAIF's expert had "even consider[ed] the delayed recovery caused by the accompanying lumbar disease" in determining that the combined condition had resolved. (O & O, 7). This was the proper analysis of a "combined condition." There was evidence proffered to support both parties' positions and the board found SAIF's evidence to be more persuasive, a conclusion that claimant has not challenged on review.

Claimant also asserts that his preexisting condition was work-related, based on his testimony that he fell in the bathroom of a McDonald's and later thought he "probably should've filed a claim." (R BOM 2, Tr. 7). SAIF asks the court to decline to speculate that claimant's preexisting conditions are work-related, when no such facts were ever developed.

The legislative history SAIF presented is dispositive and neither claimant nor OTLA have refuted it.

Neither claimant nor OTLA have meaningfully addressed the legislative history set forth in SAIF's brief. The legislative history relied on at the Court of Appeals did not address precisely the issue presented in this case, but the history that SAIF has presented is on point and supports the decision of the board and prior appellate

decisions that when there is a strain and a preexisting condition, the combined condition will no longer be compensable when the strain ceases to drive claimant's need for treatment of the combined condition.

The statutory scheme works as an integrated whole, with the acceptance of medical conditions as its centerpiece.

Claimant asks the court to view the statutes that govern this dispute in isolation from each other, and then to minimize their effects because they are for "notice" and "process." (R BOM 19-21). The various provisions of ORS 656.005(7), ORS 656.262(6) and (7), and ORS 656.266 work together to establish the elements for medical conditions to be compensable as the result of a work accident. ORS 656.262(6) and (7) are all about acceptance; they are not mere notice or process provisions. *See Palmrose v. Oregon Ins. Guar. Ass'n,* 205 Or App 613, 617, 135 P3d 370 (2006) ("That the requirement [expressing that an insurer's insolvency will not be covered by the state] is embedded in notice statutes does not rob it of its meaning.") All of the statutes together inform the scope and limits of compensability of injuries and payment of benefits for them.

The table below offers a concise summary of the sections of ORS 656.262 that figure in the court's analysis, and illustrates that they

establish substantively together the effect and limits of claim acceptance.

656.262(6)(a)	Establishes effect of acceptance with limited bases for subsequent denial
656.262(6)(b)	Mandates that notice of acceptance specify compensable conditions, other requirements
656.262(6)(c)	Allows denial of accepted combined condition when injury "ceases" to be the major contributing cause of combined or consequential condition
656.262(6)(d)	Allows worker to object to notice of acceptance if conditions are omitted, limits such objections to written communication, gives insurer 60 days to process, denies worker right to hearing without written objection
656.262(7)(a)	Allows worker to make written request for amendment of acceptance to include new conditions, gives insurer 60 days to accept or deny, denies worker right to hearing without written objection
656.262(7)(b)	Requires denial of accepted combined condition to be in writing
656.262(7)(c)	Requires additional notice of acceptance at claim closure, allows worker objection to notice but mandates that closure not be delayed by objection, provides reopening of claim to process conditions found compensable after closure
656.262(10)	Makes distinction between paying compensation and acceptance of claim, allows denial unless "the condition has been formally accepted."

ORS 656.262(6)(c) provides a substantive ability to deny an accepted combined condition under a particular circumstance: "if the otherwise compensable injury *ceases* to be the major contributing cause of the combined or consequential condition." And ORS

656.262(7)(b) specifies how and when to do so: "issue a written denial to the worker *when the accepted injury is no longer* the major contributing cause of the worker's combined condition." (Emphasis added).

Claimant similarly argues that ORS 656.005(7)(a)(A), the consequential condition statute, which equates an injury or disease with a condition, does not provide context for understanding the "otherwise compensable injury" in ORS 656.005(7)(a)(B). (R BOM 15). SAIF counters that ORS 656.005(7)(a) is a single statement of the necessary elements and limitations in establishing a compensable injury. *SAIF v. Drews,* 318 Or 1, 8, 860 P2d 254 (1993). Moreover, a "consequential condition" and a "combined condition" are both conditions. The court should continue to consider the entire statute in interpreting the meaning of the compensable injury in ORS 656.005(7)(a) and ORS 656.262(6)(c).

The exposure cases are distinguishable.

ORS 656.262(6)(b) expressly requires that the notice of acceptance "specify what conditions are compensable." Nevertheless, claimant proffers some caselaw that did not require that a specific condition be identified for a claimant to meet the initial burden to prove a compensable injury claim, citing *K-Mart v. Evenson,* 167 Or App 46, 1

P3d 477, *rev den* 331 Or 191, 18 P3d 1098 (2000), and *Horizon Air Industries Inc*. *v. Davis-Warren,* 266 Or App 388, 337 P3d 959 (2014). (R BOM 11).

Claimant's reliance on these cases is misplaced. In *K-Mart,* the court affirmed an order finding a compensable injury where a worker was exposed to the bodily fluids of an HIV-positive individual, requiring prophylactic medical services. In *Horizon Air,* the court found a compensable injury where a worker was exposed to cabin depressurization at 14,000 feet, had symptoms, and required medical services both diagnostic and for treatment.

While these cases support the (doubtful) proposition that the requirement of medical services alone can constitute a compensable injury, the *K-Mart* court was able to reach the result it did partly because the employer did not contend that the claim was not supported by objective findings. 266 Or App at n. 3. Objective findings, which are "verifiable indications of injury or disease," are an element in establishing a "compensable injury."

In *Horizon Air,* the court found that claimant's symptoms represented an "injury" because they "hurt" claimant and occurred at work. 266 Or App at 396. The real dispute was whether medical services were required, which the record established they were.

Moreover, following the litigation, these employers were required by ORS 656.262(6)(b) to issue a notice of acceptance specifying the compensable conditions. The fact that neither claimant actually exhibited a condition made the outcome inconsistent with a requirement of the statutory scheme. Because of the unique facts and posture of these cases, neither requires that this court interpret a "compensable injury," as an "injury-incident," rather than a condition that arises out of and in the course of employment.

Another line of cases requires that the worker have some kind of medical condition to prove a compensable claim. *See*, *Brown v. SAIF*, 79 Or App 205, 717 P2d 1289, *rev den* 301 Or 666 (1986) (denying claim for asbestos exposure and stating that exposure alone is not an injury, despite x-rays recommended to monitor for disease); and *Solberg v. Tice Electric*, 212 Or App 430, 433, 157 P3d 1277 (2007) (claimant's pleural plaques were not a "disease" because they were "benign and asymptomatic and do not cause any impairment.")

In *Solberg,* the court relied on *Mathel v. Josephine County*, 319 Or 235, 875 P2d 455 (1994), in which, importantly, the court observed that,

> "Under the Workers' Compensation Law as a whole-that is, with respect to both 'injury' claims and 'occupational disease' claims-workers make claims for

> accidental injuries or occupational diseases, not for the causes of those accidental injuries or occupational diseases."

Mathel, 319 Or at 240.

While some caselaw holds that a diagnosis is not always necessary to prove an initial injury claim, this case does not involve an initial claim for injury under the material contributing cause standard articulated in *Olson v. State Ind. Acc. Com*., 222 Or 407, 414, 352 P2d 1096 (1960). The fact-bound exposure cases claimant relies on are not helpful to determine whether an otherwise compensable injury is a condition or an incident, and the court should not rely on them.

"The scope of acceptance corresponds to the condition specified in the acceptance notice."

This court long ago determined that an acceptance notice establishes the scope of a compensable injury claim. *Georgia-Pacific v. Piwowar,* 305 Or 494, 501, 753 P2d 948 (1988) ("the scope of acceptance corresponds to the condition specified in the acceptance notice"). If claimant's contrary view is correct, and the specifically accepted and denied combined condition is not the matter at issue during litigation of a combined condition denial, how are the parties to prepare for hearing?

To brush the claim acceptance aside as a "notice" relegates it to a one-sided exercise that binds insurers and self-insured employers but

places no limitations on the scope of the worker's claim. That view is inconsistent with the statute that places the burden on the worker to prove the compensability of an injury or occupational disease. ORS 656.266(1). The burden includes establishing the existence of conditions that a worker seeks to have added to the acceptance. *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005) (persuasive proof of the existence of the condition is a fact necessary to establish the compensability of a new or omitted condition).

Marginalizing the notice of acceptance also is contrary to the declaration in ORS 656.262(10) that an insurer is not precluded from contesting the compensability of a condition either by its payment of compensation, or its failure to appeal certain orders, "unless the condition has been formally accepted." That statute manifests the intent that conditions are not part of a claim until accepted.

The provision of ORS 656.267(1) that the insurer "is not required to accept each and every diagnosis or medical condition with particularity" does not mean, as claimant suggests, that the acceptance does not identify the full scope of the work injury. (R BOM 23). Rather, it means that objections to the notice of acceptance must be substantively distinguished from the conditions already accepted. It has

the function of making the process of requesting and responding to claims for new and omitted medical conditions meaningful.

The argument that insurers are required to modify the notice of acceptance from time to time as medical information changes, (ORS 656.262(6)(b)(F)), does not go so far as claimant contends. It does not also mandate or even authorize the carrier to continuously investigate or assume that every chart note is a claim for a new condition.[4] Quite the contrary. Medical information, without more, expressly is *not* considered a claim requiring investigation and acceptance. ORS 656.262(6)(d) and (7)(a), ORS 656.267(1).

Claimant's plaintive objection to the burden the statutes impose on workers to make written requests to have conditions added to their claims is exaggerated and beside the point. (R BOM 23-25). Yes, workers must put their requests in writing, which can be as insignificant as signing their name to a form filled out by their doctor, OAR 436-060-0140(3), or sending an email to the claims adjuster. Carriers have the right and obligation to investigate those requests before making a decision. ORS 656.262(14), ORS 656.325(1). Claimant's assertion that this process "results in making the worker litigate" assumes wrongly

[4] ORS 656.262(14), providing that workers have a duty to cooperate with an insurer's "investigation of claims for compensation," assumes that there is a claim before an investigation is allowed.

that every claim is denied. The point, however, is not to debate the merits of the statutory scheme put in place by the legislature, but to reach a well-supported interpretation, based on the words of the statutes and the legislative history, in the context of a fairly rational scheme.

CONCLUSION

The court should reinstate the board's order as requested in the Petitioner's Brief.

Respectfully submitted,

s/ Julie Masters, OSB #963549
JULIE MASTERS, OSB #963549
Appellate Counsel
400 High Street SE
Salem, OR 97312-1000
Email: julmas@saif.com
Telephone: 503.373.8620
Of Attorneys for SAIF Corporation and
Harris Transportation Company LLC

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 3786 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' REPLY BRIEF ON THE MERITS with the Appellate Court Administrator on the 1st day of April 2015.

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' REPLY BRIEF ON THE MERITS upon the other party by causing to be mailed in the United States Post Office at Salem, Oregon, on the 1st day of April, 2015, two certified, true, exact and full copies thereof, enclosed in an envelope with postage thereon prepaid, addressed to:

Julene M. Quinn, OSB #893408
Julene M. Quinn LLC
PO Box 820087
Portland, OR 97282

Jerald P. Keene, OSB #812757
Oregon Workers Comp Inst LLC
PO Box 338
Oceanside, OR 97134

James S. Coon, OSB #771450
Swanson Thomas Coon & Newton
820 SW 2nd Ave, Suite 200
Portland, OR 97204

/s/ Julie Masters, OSB #963549

JULIE MASTERS, OSB #963549
Appellate Counsel