



Formal rulemaking process to address both apportionment and the redefinition of “compensable injury” following court rulings

By Vincci W. Lam and Trisha D. Hole • September 26, 2014

In order to resolve the outcomes of two very impactful court rulings, the Oregon Workers' Compensation Division (WCD) conducted a Rulemaking Advisory Committee Meeting on August 27, 2014, to discuss the impact of *Schleiss v. SAIF*¹ and *Brown v. SAIF*² on the existing Oregon Administrative Rules.³ This meeting sheds light on how the WCD intends to address these new cases regarding apportionment and the redefinition of “compensable injury,” both of which reach almost every set of Rules used in day-to-day claims processing.

***Schleiss v. SAIF* and the Oregon Administrative Rules**

The WCD identified OAR 436-035, which addresses how (PPD) awards are determined/calculated, as the most heavily-impacted by *Schleiss* because this case addressed what impairment is “due to” a work injury and whether impairment can be apportioned for certain preexisting or unrelated conditions. The primary change will be a specific statement in the impairment rules that only “qualified” preexisting conditions (i.e. those where there is evidence of prior treatment or that meet the definition of “arthritis” under Oregon law) are eligible for apportionment. To ensure apportionment is allowed, the record must contain evidence of prior treatment for the preexisting condition, and/or that experts address why the degenerative condition meets the definition of “arthritis” under Oregon law.⁴ **The WCD will be implementing a rulemaking process soon to comply with the Court’s ruling in *Schleiss* because *Schleiss* is a final Oregon Supreme Court decision.**

At the August meeting, claimants’ attorneys voiced their position that *Schleiss* requires an employer to formally accept a combined condition and issue a major cause/ceases denial before apportionment is permissible. A SAIF representative pointed out that altering the Rules to require combined condition processing before apportionment would be going beyond the scope of *Schleiss* because the Court expressly stated that the necessity of combined condition processing before apportionment was not the issue before them. As you can imagine, if a major cause/ceases denial were required before apportionment, this would result in litigation costs that may outweigh the benefits of apportionment in some cases. This could very well be the next debate in this post-*Schleiss* era.

This Rule Advisory Committee meeting sheds light on how the Oregon WCD intends to address these new cases

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Formal rulemaking to address court rulings (con't)

For additional background on *Schleiss*, please see "[New Oregon Supreme Court Decision Has Potentially Far-Reaching Effects on Workers' Compensation.](#)"

Brown v. SAIF and the Oregon Administrative Rules

The Court of Appeals in *Brown* held that the scope of the "otherwise compensable injury" portion of a combined condition should be defined under an "incident based" approach, and not by the conditions specifically accepted by the employer/insurer (as was the case before *Brown*). The WCD identified *Brown* as having a potential impact on OAR 436-010, 030, 035, 060, 105, 110, and 120 because those Rules reference "accepted conditions" or "compensable conditions," which is contrary to the *Brown* incident-based approach.

With such a widespread impact, it's no wonder **the majority of the full-day Rulemaking meeting was spent discussing whether the WCD should engage in a rulemaking process now to address *Brown v. SAIF* or if such an undertaking would be premature because the *Brown* decision is not final as a matter of law.** Unlike *Schleiss* (an Oregon Supreme Court decision), *Brown* was a Court of Appeals decision and could be overturned by the Oregon Supreme Court on review or the legislature may amend the statutes in order to clarify what they actually meant when they wrote "compensable injury" throughout ORS Chapter 656. Somewhat surprisingly, a number of claimants' attorneys agreed that overhauling the Rules would be premature because *Brown* has not yet become final.

The WCD stated that it was not able to process reconsideration proceedings or decide medical treatment disputes without a definitive change to the Rules because looking at the compensable injury under an "incident based" approach or under the specifically-accepted conditions significantly alters the outcome of a dispute. **For this reason, the WCD advised that, at least prior to the rulemaking meeting, it was leaning towards engaging in a rulemaking process to implement the *Brown* holding, but had not made a final determination one way or the other.** From the tone of the WCD representatives, it appears we may soon be seeing a completely-overhauled OAR.

For additional background on *Brown*, please see "[Brown v. SAIF: The Oregon Court of Appeals overhauls legal precedent on definition of "compensable injury" in ORS Chapter 656.](#)"

The WCD has scheduled a follow-up meeting for September 29, 2014, to introduce the first draft of proposed rules. Stay tuned for an update shortly!

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¹ *Schleiss v. SAIF*, 364 OR 637 (2013)

² *Brown v. SAIF*, 262 OR App 640 (2014)

³ Fred Bruyns and other members of the WCD presided over the meeting, with attendance by various stakeholders: attorneys representing insurers/employers and workers, employer representatives, the Workers' Compensation Board's Ombudsman's office, employer/insurer associations, medical treatment providers, and others.

⁴ The legal definition of "arthritis" or "arthritic condition" is set out in *Hopkins v. SAIF*, 349 OR 348 (2010).



UPDATES

The WCD Rulemaking Advisory Committee held an additional meeting on September 29, 2014 to present the first draft of the proposed Oregon Administrative Rules amendments. It was clear from the drafts that the WCD intends to implement both the Schleiss and Brown decisions in the OAR. A rulemaking proceeding is set to begin this fall, with the period for public comments concluding on December 1, 2014.

However, on October 2, 2014, the Oregon Supreme Court announced it has accepted review of the Brown v. SAIF case, with oral arguments set for May 2015. This may cause the WCD to re-visit whether an extensive rulemaking proceeding to implement Brown is advisable given the Supreme Court's decision to grant review.

The WCD held a third advisory rulemaking meeting on October 29, 2014, to discuss the proposed revisions to the OAR based on recent Oregon Supreme and Appeals court rulings on Schleiss and Brown respectively. There was again discussion of whether the proposed rulemaking was timely or advisable in light of the Supreme Court's forthcoming review of Brown v. SAIF. The WCD acknowledged these concerns and proceeded to discuss the draft edits to the Rules to implement Brown and Schleiss.

At the October 29th meeting, the WCD advised it had not yet made a final decision as to whether it will proceed with a rulemaking proceeding. Notice of a formal rulemaking process would be issued by mid-November 2014 if the WCD intends to move forward. Thereafter, the public comment period for the formal rulemaking process would commence on November 24, 2014. The effective date of any revised rules has not been determined.

For audio recordings of the meetings, complete agendas, and drafts of the proposed amendments to the Rules, visit: http://www.cbs.state.or.us/wcd/policy/rules/rulemaking_hearings_and_advisory_committee_meetings.html . ■

Read this blog online at:

<http://rwwcomplaw.com/formal-rulemaking-to-address-court-ruling/>



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