



# Effective Oregon IME Communication - Part One: After *Schleiss*

By Michael H. Jones and Matt Fisher • December 9, 2014

Precise communication with independent medical examiners (“IME”) in Oregon has never been so important. *Schleiss*,<sup>1</sup> *Brown*,<sup>2</sup> and their progeny underscore the importance of preparing targeted IME questions designed to elicit medical analysis consistent with the appropriate legal standards. Our effective measures can help you develop expert medical evidence in line with the requirements set forth in *In re Compensation of Schleiss*.<sup>3</sup>

*Schleiss* requires a “legally cognizable” preexisting condition in order to apportion permanent impairment to conditions other than those accepted under the claim. In the absence of precise language in the medical evidence, even an obvious arthritic condition may be deemed not “legally cognizable” for apportionment purposes.



For example, in a recent case, *Joseph Wagner*,<sup>4</sup> the Oregon Workers’ Compensation Board held a worker was entitled to permanent impairment value for his preexisting spondylosis because there was insufficient evidence in the reconsideration record to support a finding that his lumbar spondylosis was a “legally cognizable” preexisting condition. Because the record did not contain evidence demonstrating spondylosis that either met the *Hopkins* definition of “arthritis,” “arthritic condition”<sup>5</sup> or was diagnosed or treated prior to the work injury,<sup>6</sup> the insurer was liable for permanent impairment attributable to the preexisting spondylosis condition.

*Wagner* highlights the importance of developing and submitting evidence that comports with requirements of *Schleiss*. As an illustration, the following is an example of an IME question designed to meet the *Schleiss* standard for establishing a “legally cognizable” preexisting condition:

Oregon workers’ compensation law regarding injury claims limits preexisting conditions to those that have been previously treated or diagnosed, or are considered “arthritis” or “arthritic conditions.” The Oregon Supreme Court defined arthritis to have three separate elements:

- a. The inflammation of one or more joints, which is

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## Oregon IME communication - Part 1 (continued)

- b. Due to infectious, metabolic, or constitutional causes, and which
- c. Results in breakdown, degeneration, or structural change.

Taking these limitations into consideration, please discuss whether this worker has any relevant preexisting conditions. In your answer, please identify the records that reference prior diagnosis or treatment, as well as fully discuss why any condition may meet the three elements that define “arthritis” or “arthritic condition,” to include specific identification of any joints that may be considered arthritic (including, but not limited to, how such conclusion may be corroborated by this patient’s examination finding or imaging studies).

In sum, when *Schleiss* is implicated, one can greatly increase the chance of a favorable employer outcome through carefully worded IME questions. ■

## ***Coming in Part 2: Effective Oregon IME Communication (regarding combined conditions) - Part 2: After Brown.***



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- <sup>1</sup> *Schleiss v. SAIF*, 364 OR 637 (2013)
  - <sup>2</sup> *Brown v. SAIF*, 262 Or App 640 (2014)
  - <sup>3</sup> 354 Or 637 (2013)
  - <sup>4</sup> *Joseph Wagner*, 66 Van Natta 485 (2014)
  - <sup>5</sup> See *Hopkins v. SAIF Corp.*, 349 Or 348, 364 (2010)
  - <sup>6</sup> See ORS 656.005(24)

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