

April 17, 2017

Workers' Compensation Division
Attn: Fred H. Bruyns, Policy analyst/rules coordinator
Department of Consumer and Business Services
Workers' Compensation Division
Email: fred.h.bruyns@oregon.gov

Re: Temporary rules relative to
Brown v. SAIF, 361 Or 241 (2017)

Dear Mr. Bruyns,

Thank you for asking for comment on the proposed rules.

First, it is important to note that claimant has requested additional time to request reconsideration of the court. The decision has not become final, and so any rules interpreting it should not be finalized until we have a final decision.

Relative to OAR 436-010-0280 and 436-030-0020, it is appropriate to capture all permanent disability related in any part to the accepted conditions. Claimants continue to argue that all permanent disability must be rated in the injured body part where the compensable injury is a material contributing cause of the disability (loss or function or use) of the injured body part of system. The *Brown* decision only confirms further claimants' argument that apportionment is *only* allowed when a claim is properly closed under ORS 656.268(1)(b), *i.e.*, when a combined condition is accepted and then denied and then the appropriate closure issued. *Brown*, 361 Or 241, 279-81 and 282 (2017).

Thus, the rules should be amended to include that all permanent disability in the injured body part should be rated when the accepted condition is a material contributing cause of the loss of use or function in that body part. ORS 656.726(4)(f).

Comments regarding OAR 436-030-0035:

ORS 656.268(1)(a) indicates that the claim is closed when the "worker" is medically stationary, not the conditions or compensable injury. Thus, tying medically stationary status to the accepted condition is not appropriate.

Note that in *Brown*, the court took pains to state that the *Carlos-Macias* decision had not been overturned or decided. *Brown*, 361 Or

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at 282. *SAIF v. Carlos-Macias*, 262 Or App 629, 325 P3d 827, *rev pending* (2014) and other cases like *Easton v. SAIF*, 264 Or App 147 (2014), hold that diagnostic services are available to injured workers. When a worker continues to suffer from the work accident and the doctors are continuing to attempt to obtain diagnostic services to determine complete conditions that need to be accepted in the claim, then the worker is not medically stationary for purposes of closure. Allowing the insurer to close a claim before all diagnostics are done only limits the worker's ability to capture all conditions on the acceptance. If *Brown* stands, then it is even more important that workers get those diagnostics before the claim is closed.

One of the problems in this area is that the MCO contracts control attending physicians very strictly. This causes immense difficulty when a claim is closed. It is almost impossible to find a doctor who will continue to treat a worker after closure and so every care must be taken to ensure that the worker is medically stationary from the work accident and that all compensable conditions are identified and added to the notice of acceptance before claim closure. This is a very common occurrence, and so protection of unrepresented workers to provide benefits for the full scope of the work accident is important.

Please note that ORS 656.262(1) and 656.262(6)(b)(F) give full responsibility to the insurer to process the claim and review the notice of acceptance to reflect new medical and other information. ORS 656.245(1)(a) requires the insurer to "cause to be provided" medical services "for such period as the nature of the injury or the process of recovery requires." Thus, an insurer needs to determine that it has, in fact, accepted all conditions and provided all diagnostic services to determine the nature of the injury and provide treatment for recovery from the work accident. If the administrative rules allow closure as soon as that one accepted scratch has healed, then the law has not been adhered to in order for the worker to recover from the accident and receive all compensation she or he is entitled to under the chapter.

The policies underlying the chapter require the delivery of medical and financial benefits, to restore the injured worker physically and economically "in an expeditious manner and to the greatest extent practicable." ORS 656.012(2). Thus, the medically stationary rule must require that the insurer has reviewed the claim file to determine that it has accepted all conditions reflected as related to the work accident, that the insurer has provided all diagnostics recommended by the attending physician, and that those diagnostics have been completed to determine whether there are any further conditions to accept, before the claim is closed.

The rules implementing closure when the "worker" is medically stationary is one of the places where the department can ensure that the worker has received benefits. The rule should be amended to reflect that:

- the “worker” must be medically stationary from all conditions caused by the work accident;
- that the insurer is required to review the medical records to be sure it has investigated and accepted all appropriate medical conditions;
- that the insurer has approved and “caused to be provided” all recommended diagnostic medical services;
- that the insurer has reviewed the results of diagnostic services and communicated with the attending physician regarding those additional conditions that should be added to the notice of acceptance.

I am sure there are more protections necessary given the *Brown* decision, but that is what I can envision now.

Lastly, injured workers look to the department as the regulator of insurers to make sure that an injured worker is receiving 100% of the benefits allowed under statute (limited as they now are). Claimants’ attorneys attempt to assist in this area, trying to advise the department where we can. However, our time is fairly limited. Because there are so few of us anymore, and because of the very limited system, the department needs to have rules that protect the unrepresented workers as well.

Thus, we look to the department in its role as regulator to advance an administrative system that protects workers. If I am not able to be at the upcoming meeting, because of a conflict with an appearance in a case, I leave it to the director to advance the cause for injured workers.

Thank you for your time and consideration.

Sincerely,

/s/ Julene M. Quinn

Julene M. Quinn, Attorney at Law

cc: Jennifer Flood, Ombudsman for Injured Workers
Keith Semple, Chair, Policy Committee, OTLA