

Agenda

Rulemaking Advisory Committee Meeting

Oregon Workers' Compensation Division Rules
OAR 436-035, Disability Rating Standards

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| Type of meeting: | Rulemaking advisory committee |
| Date, time, & place: | Aug. 9, 2022, 9 a.m. until noon Room F, Labor & Industries Building, 350 Winter St. NE, Salem, <i>or</i> ZoomGov connection: https://www.zoomgov.com/j/1615702294?pwd=Q0F5SGpSWGJnU0JUa0ZGcFYzNEFodz09 Meeting ID: 161 570 2294 Passcode: 394120 Dial in: 1 833 568 8864 US Toll-free |
| Facilitator: | Fred Bruyns, Workers' Compensation Division |
| 9:00 to 9:10 | Welcome and introductions; meeting objectives |
| 9:10 to 10:30 | Discussion of issues |
| 10:30 to 10:45 | Break |
| 10:45 to 11:45 | Discussion of issues continued |
| 11:45 to 11:55 | Summing up – next steps – thank you! |

Attached: [Issues document](#)

Oregon Administrative Rule Revision
Chapter 436, Division 035
Issues Document

Stakeholder Rulemaking Advisory Committee Meeting
Aug. 9, 2022

Issue # 1

Short Title: Temporary rules/*Johnson* case. Apportionment of impairment or reduction of residual functional capacity benefits for a denied condition without a major contributing cause denial

Rules: OAR 436-035-0007, -0012, -0013, -0014.

Issue: [Temporary rules](#) were issued on June 7, 2022, to align the process for rating permanent disability described in OAR 436-035 with the Oregon Supreme Court's decision in [Johnson v. SAIF, 369 Or 577](#) (2022). The temporary rules will expire on Dec. 3, 2022.

The rules (prior to temporary rulemaking) provide for apportionment of permanent impairment and reduction of a work disability award, by adjusting the worker's residual functional capacity, when an outright denied condition (not a major contributing cause denied condition) and the accepted condition or sequela contribute to the impairment. This is inconsistent with *Johnson* which requires a statutory exception allowing apportionment of impairment or reduction in work disability only in certain circumstances when the compensable injury materially contributes to the impairment.

Also, rule language did not address entitlement to an award for permanent disability due entirely to a combined condition denied in its entirety, nor due in part to the accepted condition and sequela in combination with a combined condition denied in its entirety. Combined conditions can be denied in their entirety or as part of an accepted combined condition with major contributing cause denial. The rules must allow for both as apportionment is appropriate for both types.

Background: On April 21, 2022, the Oregon Supreme Court published its decision in *Johnson v. SAIF, 369 Or 579* (2022). The facts of *Johnson* involved entitlement for a worker's permanent partial disability award when deemed to be due to a combination of factors, including contribution from the accepted condition, as well as an outright unrelated denied condition. The denied condition was not a major contributing cause denial, as described in statute. The Supreme Court first determined the worker's accepted condition was a material contributing cause to the worker's permanent impairment. Further, the court determined that the Court of Appeals, which overturned the Appellate Review Unit's (ARU) order and Oregon Workers' Compensation Board hearings and board level decisions, had correctly disallowed apportionment (a reduction in the worker's permanent disability benefits) deemed to be due to the worker's unrelated denied condition. The court determined that when a worker's accepted condition materially contributes to permanent disability, no apportionment of disability is allowed, regardless of an outright denied condition contribution to the disability, unless the insurer follows the statutory major

contributing cause denial process involving claims with a pre-existing condition identified in ORS 656.005(7)(a)(B) and 656.266(2)(a).

Following the issuance of this decision, the Workers' Compensation Division issued temporary rules, effective on June 7, 2022. The purpose of the temporary rules was to align the Disability Rating Standards with the Oregon Supreme Court's decision. These temporary rules will expire on December 3, 2022.

Temporary rule language provides that once the accepted condition or sequela materially contribute to an impairment finding or reduction in the worker's work capacity, apportionment of impairment or adjustment in work disability (residual functional capacity) for contribution from a denied condition is no longer allowed unless the denied condition is a combined condition denied for a major contributing cause ("ceases" denial) or a combined condition denied in its entirety. Refer to options under rules 0007, 0012, and 0013 below.

Temporary rule language also allows for reduction of disability benefits for a combined condition denied in its entirety. If a worker has a combined condition denied in its entirety, the worker is not eligible for an award for permanent disability that is not due in any part to the accepted condition(s) and direct medical sequela(e); and, if the permanent disability is due in part to the accepted condition(s) and direct medical sequela(e), then the worker is not eligible for an award for the portion of the permanent disability due to the denied combined condition. Refer to options under rule 0014 below.

The division needs to adopt permanent rules prior to the temporary rules expiring on Dec. 3, 2022, or rule language will be inconsistent with *Johnson*. The division is interested in hearing from stakeholders if temporary rule language should be adopted as permanent, or if there is a better way to incorporate the *Johnson* decision in the rules.

Options:

- OAR 436-035-0007(1)(b)(B)(ii) – Adopt the temporary rule language as permanent. The temporary amendments are shown below.

(ii) The worker is not eligible for an award for impairment for the portion of the loss caused by:

~~(I) A denied condition;~~

~~(II) A superimposed condition; or~~

~~(III) A pre-existing condition, as defined by OAR 436-035-0005(11) and ORS 656.005(24), if the pre-existing condition was accepted as part of a combined condition and there is a subsequent denial of the combined condition, unless the pre-existing condition is otherwise compensable under ORS 656.225; or~~

(III) A combined condition denied in its entirety.

- OAR 436-035-0012(10)(c) and (e) - Adopt the temporary rule language as permanent. The temporary amendments are shown below.

(c) Work capacity diminished **in part** by a superimposed **condition, a pre-existing condition that is part of a combined condition denial, or a combined condition denied in its entirety, or denied condition**. Residual functional capacity is a measure of the extent to which the worker's capacity to perform work is diminished by the compensable injury. If the worker's capacity to perform work is diminished **in part** by a superimposed **condition, or denied condition, or a pre-existing condition that is part of a combined condition denial, or a combined condition denied in its entirety**, the worker's residual functional capacity must be adjusted based on an estimate of what the worker's capacity to perform work would be if it had not been diminished by the superimposed **condition, the pre-existing condition that is part of a combined condition denial, or the combined condition denied in its entirety, pre-existing, or denied condition**.

(e) When the worker is not medically stationary and work capacity is diminished **in part by a superimposed condition, a pre-existing condition that is part of a combined condition denial, or a combined condition denied in its entirety by a superimposed, pre-existing, or denied condition**. Except for a claim closed under ORS 656.268(1)(c), if a worker is not medically stationary and the worker's capacity to perform work is diminished **in part** by a superimposed **condition, or denied condition, or a pre-existing condition that is part of a combined condition denial, or a combined condition denied in its entirety**, residual functional capacity is determined based on an estimate of what the worker's capacity to perform work would be if measured at the time the worker is likely to become medically stationary and if the worker's capacity to perform work had not been diminished by the superimposed **condition, the pre-existing condition that is part of a combined condition denial, or the combined condition denied in its entirety, pre-existing, or denied condition**.

- OAR 436-035-0013(2)(a) – Adopt the temporary rule's corrected example as permanent. The temporary amendments are shown below.

Accepted condition: Low back strain combined with pre-existing lumbar degenerative disc disease

~~Superimposed condition: pregnancy (mid-term)~~

~~Denied condition: major contributing cause denial of the combined condition lumbar disc herniation~~

In the closing examination, the attending physician describes range of motion findings and states that 10% of the range of motion loss is due to the accepted condition; and 90~~50~~% of the loss is due to lumbar degenerative disc disease~~a lumbar disc herniation, and 40% of the loss is~~

~~due to the pregnancy~~. The worker is eligible for an impairment award for the 10% of the range of motion loss that is due to the low back strain. Under these rules, the range of motion loss is valued at 10%. 10% x .10 equals 1% impairment.

- OAR 436-035-0014(2)(a) and (b) - Adopt the temporary rule language as permanent (with or without reorganization). The temporary amendments are shown below.

(2) Combined conditions.

(a) If a worker has an accepted combined condition, the worker is eligible for an award for permanent disability caused by the combined condition unless there is a subsequent denial of the combined condition.

(b) If a worker has a combined condition denied in its entirety, the worker is not eligible for an award of permanent disability if the permanent disability is not due in any part to the accepted condition(s) and direct medical sequela(e). If the permanent disability is due in part to the accepted condition(s) and direct medical sequela(e), then the worker is not eligible for an award for the portion of the permanent disability due to the denied combined condition.

- Delete sections (2) and (3) of rule 0014 as redundant, as these are now addressed in the temporary and proposed final rules under OAR 436-035-0007. This would require changing the header title to delete “Combined Conditions”. Section (3) is shown below for reference:

(3) Permanent partial disability awarded after a denial of the combined condition. If a claim is closed under ORS 656.268(1)(b), because the compensable injury 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, the likely permanent disability that would have been due to the current accepted condition must be estimated. The current accepted condition is the component of the otherwise denied combined condition that remains related to the compensable injury.

- Update the rules to better incorporate the *Johnson* decision.
- Other?

Fiscal Impacts, including cost of compliance for small business: The division does not have data available to estimate the possible fiscal impacts. We expect the options listed to have fiscal impacts and welcome the committee’s advice about costs, including costs for small businesses.

Statement identifying how adoption of the rule will affect racial equity in this state: The division invites input from advisory committee members about any unequal impacts of possible rules changes based on race or ethnicity.

Recommendations:

Issue # 2

Short title: Apportionment of irreversible findings (examples: laminectomy, carpal bone fusion)

Rules: OAR 436-035-0005(7) Definition of irreversible finding, OAR 436-035-0013(5) “Irreversible findings of impairment or surgical value,” and OAR 436-035-0015(3)(c) offsets from a prior claim.

Issue: Under the current rules, a worker with an irreversible finding of impairment due in material part to the accepted condition and sequela receives the full value awarded in the rules for the finding, and this may conflict with *Johnson*.

Background: The rules currently do not allow apportionment of irreversible findings of permanent impairment, regardless of contribution from any other factors, including a denied combined condition.

Per the Supreme Court’s decision in *Johnson*, if the compensable injury has a material contribution to impairment, the only available apportionment allowance is through a statutory exception, a combined condition denied for a major contributing cause (“ceases” denial) or a combined condition denied in its entirety. This implies that any impairment value, including irreversible findings, can be apportioned if it falls under a combined condition denial exception. This puts irreversible findings in possible direct conflict with *Johnson*.

The division is interested in hearing from stakeholders if irreversible findings, which are considered a permanent loss of use or function of a body part or system, should be subject to apportionment as any other permanent impairment finding.

Options:

- Allow for apportionment of all permanent impairment described in the rules including irreversible findings, by removing the following from rule:
 - OAR 436-035-0005(7), the definition of “irreversible findings,”
 - OAR 436-035-0013(5) “Irreversible findings of impairment or surgical value,” and
 - OAR 436-035-0015(3)(c) “Irreversible findings and surgical values are not offset.”

- Other?

Fiscal Impacts, including cost of compliance for small business: The division does not have data available to estimate the possible fiscal impacts, but there could be a small fiscal impact. The division invites input from the advisory committee members about costs, including costs to be borne by small businesses.

Statement identifying how adoption of the rule will affect racial equity in this state: The division invites input from advisory committee members about any unequal impacts of possible rules changes based on race or ethnicity.

Recommendations:

Issue # 3

Short title: Presbycusis – age-related hearing loss; reduction of a worker’s hearing loss benefit due to age

Rule: OAR 436-035-0250(4)(b) “Presbycusis”

Issue: Current rule allows for a reduction of a hearing loss award for the portion of the loss due to a worker’s age, and may conflict with *Johnson*.

Background: Presbycusis is the loss of hearing that gradually occurs in most people as they age.

The rule allows for a reduction of the worker’s award for hearing loss when the accepted condition and sequela materially contributes to the loss, as well as the worker’s age. Per the Supreme Court’s decision in *Johnson*, if the compensable injury has a material contribution to impairment, the only available apportionment is available through a statutory exception, a combined condition denied for a major contributing cause (“ceases” denial) or a combined condition denied in its entirety. This implies that any impairment value, inclusive of hearing loss, can only be apportioned if it falls under a combined condition denial exception. And, current rule language that allows for a reduction of the hearing loss findings if a portion of the loss is due to the worker’s age (i.e. presbycusis) is possibly in conflict with *Johnson* and other cases.

The division is interested in hearing from stakeholders if a reduction for presbycusis is allowed.

Options:

- Disallow a reduction of the hearing loss findings if a portion of the loss is due to the worker’s age (i.e. presbycusis) by removing subsection (b) that provides for a reduction of hearing loss benefits due to a worker’s age and related age table.
- Other?

Fiscal Impacts, including cost of compliance for small business: The division does not have data available to develop a reliable estimate of the possible fiscal impacts. Presbycusis impacts

very few cases, but there could be a small fiscal impact. The division invites input from the advisory committee members about costs, including costs to be borne by small businesses.

Statement identifying how adoption of the rule will affect racial equity in this state: The division invites input from advisory committee members about any unequal impacts of possible rules changes based on race or ethnicity.

Recommendations:

HOUSEKEEPING

Update language in four rules to ensure language is gender neutral, consistent with other divisions in chapter 436. The changes to all other divisions in chapter 436 were effective July 1, 2022. The changes are:

- **OAR 436-035-0230 Other Lower Extremity Findings**
 - (14) When the worker cannot be on ~~his or her~~their feet for more than two hours in an 8-hour period, the award is 15% of the leg.

- **OAR 436-035-0380 Cardiovascular System**
 - (3) Coronary Heart Disease: Impairment resulting from work related coronary heart disease is rated according to the following classes:
 - ...
 - Class 2 (20% Impairment)** The worker has history of a myocardial infarction or angina pectoris that is documented by appropriate laboratory studies, but at the time of evaluation the worker has no symptoms while performing ordinary daily activities or even moderately heavy physical exertion; and
 - The worker may require moderate dietary adjustment or medication to prevent angina or to remain free of signs and symptoms of congestive heart failure; and
 - The worker is able to walk on the treadmill or bicycle ergometer and obtain a heart rate of 90% of ~~his or her~~their predicted maximum heart rate without developing significant ST segment shift, ventricular tachycardia, or hypotension; or
 - The worker has recovered from coronary artery surgery or angioplasty, remains asymptomatic during ordinary daily activities, and is able to exercise as outlined above. If the worker is taking a beta adrenergic blocking agent, ~~he or she~~the worker should be able to walk on the treadmill to a level estimated to cause an energy expenditure of at least 10 METS* as a substitute for the heart rate target.
 - *METS is a term that represents the multiples of resting metabolic energy used for any given activity. One MET is 3.5ml/(kg x min).

- **OAR 436-035-0385 Respiratory System**

(3) Lung cancer - All persons with lung cancers as a result of a compensable industrial injury or occupational disease are to be considered Class 4 impaired at the time of diagnosis. At a re-evaluation, one year after the diagnosis is established, if the person is found to be free of all evidence of tumor, then ~~he or~~ she ~~the person~~ should be rated under the physiologic parameters in OAR 436-035-0385(2). If there is evidence of tumor, the person is determined to have Class 4 impairment.

- **OAR 436-035-0390(10)(e)(D) Cranial Nerves/Brain**

- CLASS 2 (30% Impairment) – Last paragraph**

- The fundamental intent of this class is as follows: (1) ADL: The worker is independent in all ADL, but may require significant adaptations or modifications in normal patterns or means of ADL in order to achieve ADL-independence; (2) Work capacity: The residuals result in some type of limitation on the worker's employment capacity, restricting the range of employment options that were previously available to the worker, but the worker remains employable in most jobs for which ~~s/he~~ the worker was qualified prior to injury.