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WCB CASE NO. 75-2547 JANUARY 2, 1976

ROBERT THURSTON, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
ORDER OF DISMISSAL

A REQUEST FOR REVIEW, HAVING BEEN DULY FILED WITH THE WORKMEN'S COMPENSATION BOARD IN THE ABOVE ENTITLED MATTER BY THE CLAIMANT, AND SAID REQUEST FOR REVIEW NOW HAVING BEEN WITHDRAWN,

IT IS THEREFORE ORDERED THAT THE REQUEST FOR REVIEW NOW PENDING BEFORE THE BOARD IS HEREBY DISMISSED AND THE ORDER OF THE REFEREE IS FINAL BY OPERATION OF LAW.

WCB CASE NO. 75-354 JANUARY 2, 1976

BRENDA S. GRISSO, CLAIMANT

FRANKLIN, BENNETT, OFELT AND JOLLES,
CLAIMANT'S ATTYS.
PHILIP A. MONGRAIN, DEFENSE ATTY.
ORDER OF DISMISSAL

A REQUEST FOR REVIEW, HAVING BEEN DULY FILED WITH THE WORKMEN'S COMPENSATION BOARD IN THE ABOVE ENTITLED MATTER BY THE EMPLOYER, AND SAID REQUEST FOR REVIEW NOW HAVING BEEN WITHDRAWN,

IT IS THEREFORE ORDERED THAT THE REQUEST FOR REVIEW NOW PENDING BEFORE THE BOARD IS HEREBY DISMISSED AND THE ORDER OF THE REFEREE IS FINAL BY OPERATION OF LAW.

WCB CASE NO. 74-1069 JANUARY 2, 1976

RAYMOND MADISON, CLAIMANT

VANDENBERG AND BRANDSNESS,
CLAIMANT'S ATTYS.
COLLINS, FERRIS AND VELURE,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

THE EMPLOYER REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH HELD THAT CLAIMANT'S OCTOBER 20, 1969 INJURY WAS COMPENSABLE AND AWARDED CLAIMANT 128 DEGREES FOR 40 PER CENT UNSCHEDULED LOWER ABDOMINAL DISABILITY.

CLAIMANT WAS INJURED WHILE RIDING A HORSE = THE SADDLE HORN STRUCK HIM IN THE GROIN. CLAIMANT SAW DR. KATUL, A UROLOGIST, APPROXIMATELY ONE MONTH LATER COMPLAINING OF GENITAL PROBLEMS. DR. KATUL FELT CLAIMANT HAD PEYRONIE'S DISEASE (SCAR TISSUE AT THE BASE OF THE PENIS). DR. KATUL INDICATED IN HIS FIRST REPORT OF JANUARY 15, 1970 THAT PEYRONIE'S DISEASE IS ASSOCIATED WITH TRAUMA TO THE PENIS AND HE FELT THAT WHEN CLAIMANT HIT THE SADDLE HORN IT PROBABLY LED TO HEMATOMA THAT BECAME FIBROTIC.

CLAIMANT'S CLAIM WAS CLOSED ON MARCH 27, 1970, WITH NO AWARD FOR EITHER TEMPORARY TOTAL DISABILITY OR PERMANENT PARTIAL DISABILITY.

ON AUGUST 20, 1973, DR. RUDD'S REPORT INDICATED CLAIMANT'S PROSTRATE PROBLEM APPEARED TO BE SECONDARY TO HIS ACCIDENT AND THAT THIS PROBLEM MADE IT IMPOSSIBLE FOR CLAIMANT TO DO ANY HEAVY LIFTING OR TO RIDE IN BUMPY VEHICLES. THE CLAIM WAS THEN CLOSED BY A DETERMINATION ORDER MAILED SEPTEMBER 12, 1973 WHEREBY CLAIMANT WAS AWARDED SOME TIME LOSS AND 48 DEGREES FOR 15 PER CENT UNSCHEDULED LOW ABDOMINAL DISABILITY.

AT THE REQUEST OF THE EMPLOYER, DR. PORTO, A UROLOGIST, EXAMINED CLAIMANT - HIS DIAGNOSIS WAS RECURRENT PROSTATITIS AND PEYRONIE'S DISEASE BUT HE DID NOT FEEL THESE PROBLEMS WERE RELATED TO THE INDUSTRIAL ACCIDENT.

THE REFEREE FOUND THAT ONE OF CLAIMANT'S PROBLEMS WAS FREQUENCY OF URINATION WHICH HAS PERSISTED SINCE THE OCTOBER 1969 INCIDENT. CLAIMANT HAD TRIED SEVERAL JOBS BUT WAS UNABLE TO SUCCEED BECAUSE OF THE NEED FOR FREQUENT URINATION. THE REFEREE FOUND THAT LIFTING AND STRAINING WORSENED CLAIMANT'S PROBLEM, AS DID DRIVING A VEHICLE. CLAIMANT HAS A HIGH SCHOOL EDUCATION (GED) PLUS ONE AND HALF YEARS AT OTI, STUDYING IN DIESEL MECHANICS, HOWEVER, MOST OF HIS ADULT WORKING LIFE HAD BEEN AS A RANCH HAND AND IN EQUIPMENT OPERATION, INCLUDING TRUCKS AND TRACTORS.

THE REFEREE CONCLUDED THAT THE DEFENDANT'S CROSS-APPEAL CONTENDING THAT PEYRONIE'S DISEASE AND PROSTATITIS WERE NOT RELATED TO THE ACCIDENT, SHOULD BE DENIED AS THE WEIGHT OF THE EVIDENCE WAS THAT CLAIMANT'S PRESENT PHYSICAL CONDITION IS THE RESULT OF A COMPENSABLE INJURY SUFFERED ON OCTOBER 20, 1969.

DR. RUDD, IN HIS AUGUST 7, 1974 REPORT INFERRED THAT CLAIMANT WAS MEDICALLY STATIONARY AS OF JUNE 1974. THE REFEREE CONCLUDED THAT CLAIMANT WAS ENTITLED TO TEMPORARY TOTAL DISABILITY, LESS TIME WORKED, TO JUNE 1974 - ALSO CLAIMANT WAS ENTITLED TO CONTINUED INJURY RELATED MEDICAL CARE, WHETHER STATIONARY OR NOT, UNDER ORS 656.245. HE DIRECTED THE EMPLOYER TO PAY FOR SUCH MEDICAL TREATMENT IF IT HAD NOT DONE SO.

ON THE ISSUE OF THE EXTENT OF PERMANENT DISABILITY, HAVING DETERMINED THAT CLAIMANT WAS MEDICALLY STATIONARY, THE REFEREE FOUND THAT THE MEDICAL EVIDENCE INDICATED CLAIMANT SHOULD AVOID HEAVY OR BUMPY WORK AND THAT HIS URINARY FREQUENCY WAS A HANDICAP TO CLAIMANT'S RETURN TO THE LABOR MARKET. TAKING INTO ACCOUNT HIS AGE, EDUCATION, TRAINING AND ADAPTABILITY TOGETHER WITH THE RESIDUAL OF HIS INJURY, THE REFEREE CONCLUDED THAT CLAIMANT HAD LOST APPROXIMATELY 40 PER CENT OF HIS WAGE EARNING CAPACITY.

THE BOARD, ON DE NOVO REVIEW, CONCURS IN THE FINDINGS AND CONCLUSIONS OF THE REFEREE. THE BOARD FEELS THAT DR. RUDD'S

OPINION IS ENTITLED TO AS MUCH WEIGHT AS THAT OF DR. PORTO ALTHOUGH THE LATTER MAY HAVE HAD MORE EXPERIENCE AND IS BOARD CERTIFIED WHILE DR. RUDD WAS NOT BOARD CERTIFIED AS OF JANUARY 1975.

ORDER

THE ORDER OF THE REFEREE DATED JULY 17, 1975 IS AFFIRMED.

CLAIMANT'S ATTORNEY IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 300 DOLLARS, PAYABLE BY THE EMPLOYER.

WCB CASE NO. 75-693 JANUARY 2, 1976

DALVIN EHRMANTROUT, CLAIMANT

MULDER, MORROW AND MCCREA,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH REMANDED TO IT CLAIMANT'S CLAIM FOR ACCEPTANCE AND PAYMENT OF COMPENSATION AS PROVIDED BY LAW UNTIL CLOSURE IS AUTHORIZED PURSUANT TO ORS 656.268, AND AWARDED CLAIMANT'S ATTORNEY A FEE OF 800 DOLLARS.

CLAIMANT, A 29 YEAR OLD CONSTRUCTION CARPENTER JOURNEYMAN, COMMENCED WORKING FOR THE EMPLOYER IN MID-OCTOBER, 1972. CLAIMANT ALLEGED THAT WHILE CUTTING STANDING PILINGS WITH A CHAIN SAW HE BEGAN TO HAVE ACHING LOW BACK MUSCLES WHICH HE ATTRIBUTED TO THIS WORK. HE FIRST SAW A CHIROPRACTOR WHO MASSAGED AND 'POPPED' CLAIMANT'S BACK. SUBSEQUENTLY, CLAIMANT HAD INFLUENZA AND WAS OFF WORK FOR MORE THAN A WEEK. WHEN HE RETURNED TO WORK HE WAS LAYING AND CUTTING DECKING WHICH INVOLVED CARRYING THE DECKING - WHILE CARRYING A 20 FOOT LONG PIECE OF DECKING, HE ALLEGED HIS BACK WENT OUT AND AFTER THAT HE COULD NOT COMPLETE THE JOB.

HE ALLEGES IT WAS DIFFICULT FOR HIM TO BEND AND LIFT THE DECKING AND WHEN HE DID SO, IT CAUSED HIM CONSIDERABLE TROUBLE ARISING TO A STANDING POSITION. A FELLOW WORKER OBSERVED CLAIMANT CUTTING PILINGS WITH THE SAW - HE WORKED WITH CLAIMANT ABOUT 20 DAYS BUT HE IS NOT SURE WHETHER ANY OF THIS PERIOD WAS SUBSEQUENT TO DECEMBER 1.

THE CONSTRUCTION SUPERINTENDENT TESTIFIED THAT THERE WAS NO ORAL OR WRITTEN REPORT OF ANY JOB INJURY UNTIL THE FORM 801 WAS RECEIVED ON DECEMBER 16, 1974. THE EVIDENCE INDICATES THAT CLAIMANT LOST SOME TIME FROM WORK BETWEEN THE ALLEGED INCIDENT IN OCTOBER AND DECEMBER 13, 1974.

DR. SCHACHNER EXAMINED CLAIMANT AND SUBMITTED A WRITTEN REPORT TO THE REFERRING DOCTOR ON MARCH 24, 1975.

THE REFEREE FOUND THE CLAIM TO BE COMPENSABLE BUT WITH CONSIDERABLE MISGIVINGS AS TO CLAIMANT'S CREDIBILITY. THE REFEREE RELIED PRIMARILY ON THE TESTIMONY OF MR. TERWILLIGER WHO WAS WORKING WITH CLAIMANT ON THE DECK CUTTING, MOVING AND NAILING DOWN THE DECKING. HE WAS NOT, HOWEVER, ON THE SAME WORK CREW AS

CLAIMANT DURING THE TIME CLAIMANT WAS CUTTING THE PILINGS. TERWILLIGER TESTIFIED THAT ON THE LAST DAY CLAIMANT WORKED, CLAIMANT HAD TOLD HIM THAT HE HAD 'BUGGERED HIS BACK.' THE REFEREE CONCLUDED THE CLAIM WAS COMPENSABLE, BASED UPON THIS TESTIMONY.

THE BOARD, ON DE NOVO REVIEW, FINDS IT DIFFICULT TO UNDERSTAND WHY THE REFEREE GAVE SO MUCH WEIGHT TO THE TESTIMONY OF MR. TERWILLIGER - IT WAS BASED, SOLELY, ON STATEMENTS MADE TO HIM BY THE CLAIMANT, WHOM THE REFEREE FOUND TO BE LACKING IN CREDIBILITY. THE BOARD IS BOTHERED BY THE ABSENCE OF ANY MEDICAL REPORTS IN THE RECORD OR ANY EXPLANATION FOR THEIR ABSENCE. CLAIMANT WAS EXAMINED BY DR. SCHACHNER TO WHOM HE HAD BEEN REFERRED BY DR. THOMASHEFSKY AND CLAIMANT HAD TESTIFIED THAT HE SAW A CHIROPRACTOR ABOUT THE LATTER PART OF NOVEMBER 1972, BUT NO REPORTS WERE RECEIVED FROM ANY OF THESE PHYSICIANS.

THE BOARD CONCLUDES THAT REPORTS, NOT HAVING BEEN OFFERED, MUST NOT HAVE BEEN FAVORABLE TO CLAIMANT'S CONTENTIONS.

THE BOARD FURTHER CONCLUDES THAT THE CLAIMANT'S CREDIBILITY LEAVES MUCH TO BE DESIRED AND IT IS NOT CONVINCED THAT CLAIMANT SUFFERED A COMPENSABLE INJURY.

ORDER

THE ORDER OF THE REFEREE DATED JULY 25, 1975 IS REVERSED.

SAIF CLAIM NO. A 801099 JANUARY 2, 1976

WILMA WAITS, CLAIMANT

DEPT. OF JUSTICE, DEFENSE ATTY.
OWN MOTION PROCEEDING REFERRED
FOR HEARING

ON JULY 23, 1975 CLAIMANT REQUESTED THE BOARD TO EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 AND REOPEN HER CLAIM FOR AN INDUSTRIAL INJURY WHICH SHE SUFFERED ON MAY 30, 1960.

CLAIMANT HAD SUFFERED A CERVICAL SPINE FRACTURE OF THE ODONTOID PROCESS, WITH A FRACTURE OF THE ENDS OF THE 8TH AND 9TH RIBS. THE CLAIM WAS CLOSED ON JULY 24, 1961 WITH AN AWARD OF 21 AND THREE FOURTHS DEGREES FOR 15 PER CENT LOSS OF FUNCTION OF AN ARM FOR UNSCHEDULED DISABILITY.

AFTER A REHEARING, A DETERMINATION ORDER, MAILED OCTOBER 18, 1961, GRANTED CLAIMANT AN ADDITIONAL 10 PER CENT MAKING A TOTAL AWARD OF 25 PER CENT LOSS FUNCTION OF AN ARM FOR UNSCHEDULED DISABILITY.

THE CLAIMANT HAS FURNISHED THE BOARD MEDICAL REPORTS AND OPINIONS FROM DR. ROCKEY AND DR. COHEN. THE FUND FURNISHED THE BOARD A REVIEW OF CLAIMANT'S MEDICAL HISTORY BY DR. PARCHER AND EXPRESSED ITS OPINION THAT CLAIMANT'S PRESENT STATUS AND CONDITION IS FROM AN UNDERLYING METABOLIC CONDITION WHICH HAS NO RELATIONSHIP TO HER 1960 INJURY OR THE TREATMENT SHE RECEIVED FOR SUCH INJURY.

THE BOARD CONCLUDES THAT THE MATTER OF WHETHER CLAIMANT'S PRESENT CONDITION IS RELATED TO HER MAY 30, 1960 INJURY SHOULD BE REFERRED TO THE HEARINGS DIVISION WITH INSTRUCTIONS TO HOLD A

HEARING AND TAKE EVIDENCE ON THE ISSUE OF WHETHER CLAIMANT'S CONDITION AT THE PRESENT TIME IS RELATED TO HER 1960 INJURY OR THE TREATMENT SHE RECEIVED FOR THAT INJURY.

UPON CONCLUSION OF THE HEARING, THE REFEREE SHALL CAUSE A TRANSCRIPT OF THE PROCEEDING TO BE PREPARED AND SUBMITTED TO THE BOARD TOGETHER WITH HIS RECOMMENDATIONS ON THE ISSUE BEFORE HIM.

IT IS SO ORDERED.

WCB CASE NO. 75-1201 JANUARY 2, 1976

BETTY JEAN WALKER, CLAIMANT

HAROLD W. ADAMS, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH DIRECTED IT TO ACCEPT CLAIMANT'S CLAIM, PROVIDE CLAIMANT BENEFITS TO WHICH SHE IS ENTITLED BY LAW AND AWARDED CLAIMANT'S ATTORNEY A FEE OF 800 DOLLARS.

CLAIMANT SUFFERED A FRACTURE OF HER LEFT LEG ON FEBRUARY 20, 1975 AT APPROXIMATELY 5-15 P.M. WHILE WALKING FROM THE MARION COUNTY SHERIFF'S OFFICE TO HER CAR. CLAIMANT HAD BEEN EMPLOYED FOR SEVERAL YEARS IN THE SHERIFF'S OFFICE AS A DEPUTY SHERIFF, CLERK-MATRON II. THE ISSUE BEFORE THE REFEREE WAS WHETHER OR NOT CLAIMANT WAS A 'POLICE OFFICER' AND, THEREFORE, ENTITLED TO THE EXCEPTION TO THE 'GOING AND COMING' RULE.

CLAIMANT WAS REQUIRED TO TAKE AN OATH OF OFFICE, SHE WAS CHARGED WITH LAW ENFORCEMENT RESPONSIBILITIES INCLUDING HAVING THE AUTHORITY TO MAKE ARRESTS AND SERVE CIVIL PROCESS. SHE ALSO COULD ISSUE WARRANTS OF ARRESTS AND TAKE CUSTODY OF PRISONERS. HER GENERAL WORKING HOURS WERE 8 A.M. TO 5 P.M., HOWEVER, SHE WAS 'ON CALL' 24 HOURS A DAY AND SHE GENERALLY WORE HER UNIFORM.

NO PRIVATE PARKING WAS PROVIDED FOR CLAIMANT OR FOR ANY OTHER PERSONNEL IN THE SHERIFF'S OFFICE. CLAIMANT USUALLY PARKED ON ONE OF THE PARKING PLACES ON THE STREET. WHEN CLAIMANT LEFT WORK SHE WAS NOT REQUIRED TO ADVISE THE SHERIFF'S OFFICE OF HER WHEREABOUTS, HOWEVER, IF SHE WAS CALLED AND WAS AT HOME SHE WAS EXPECTED TO GO ON DUTY IN WHATEVER CAPACITY WAS REQUIRED AT THAT TIME. IN THE PAST YEARS CLAIMANT HAD PARTICIPATED IN SEVERAL EMERGENCIES DURING HER 'OFF DUTY' HOURS.

THE REFEREE FOUND THIS TO BE A CASE OF FIRST IMPRESSION IN OREGON AND, IN A WELL WRITTEN OPINION, CITED CASES IN WHICH RULINGS HAD BEEN MADE ON FACTS SIMILAR TO THOSE IN THIS INSTANT CASE.

THE REFEREE CONCLUDED THAT CLAIMANT WAS A 'POLICE OFFICER' FOR THE PURPOSE OF APPLYING THE VARIOUS CASES WHICH HE CITED IN HIS OPINION AND ORDER. THE REFEREE FURTHER CONCLUDED THAT CLAIMANT'S INJURY WAS IN THE COURSE AND SCOPE OF HER EMPLOYMENT BECAUSE SHE WAS IN UNIFORM AND WAS SUBJECT TO A 24 HOUR DUTY CALL AND THESE WERE THE CONTROLLING ELEMENTS.

THE BOARD, ON DE NOVO REVIEW, BELIEVES THAT THE REFEREE HAS

MADE A VERY COMPREHENSIVE STUDY OF THE SPECIFIC QUESTION BEFORE HIM, TO-WIT - WAS CLAIMANT A 'POLICE OFFICER' AND, IF SO, WAS HER INJURY COMPENSABLE AS EXCEPTION TO THE 'GOING AND COMING' RULE IN OREGON? THE BOARD AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 5, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 400 DOLLARS PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

SAIF CLAIM NO. HC 142897 JANUARY 2, 1976

STEPHEN L. BOZAK, CLAIMANT

OWN MOTION DETERMINATION

CLAIMANT SUSTAINED A COMPENSABLE INJURY ON AUGUST 26, 1968. THE INJURIES SUFFERED TO HIS HEAD AND RIGHT ARM WERE MINOR AND HEALED WITH NO RESIDUAL DISABILITY - HOWEVER, THE INJURY TO CLAIMANT'S LEFT LOWER LEG WAS MORE SEVERE. IT EVENTUALLY HEALED AND THE CLAIM WAS CLOSED BY DETERMINATION ORDER MAILED MARCH 18, 1969 WHICH AWARDED CLAIMANT SOME TIME LOSS BUT NO PERMANENT PARTIAL DISABILITY.

THE FUND REOPENED THE CLAIM FOR TREATMENT TO RELIEVE CHRONIC INFECTION ON THE SCAR TISSUE ON THE ANTERIOR SHIN. ON JUNE 16, 1972 DR. STRONG EXCISED THE SCAR, SINUS TRACT AND OSTEOPHYTE AND, ON AUGUST 8, 1975, PERFORMED A SPLIT-THICKNESS SKIN GRAFT FROM THE LEFT THIGH TO THE ULCERATED SCAR. COMPLETE HEALING NOW HAS TAKEN PLACE AND THE CLAIM IS READY TO BE CLOSED ALTHOUGH THERE IS A POSSIBILITY CLAIMANT MAY HAVE TROUBLE IN THE FUTURE.

THE MEDICAL REPORTS WERE SUBMITTED TO THE EVALUATION DIVISION OF THE BOARD WHICH WAS REQUESTED TO GIVE ITS ADVISORY RATING OF CLAIMANT'S DISABILITY.

BASED UPON THE ADVISORY RATING RECEIVED, THE BOARD AWARDS THE FOLLOWING COMPENSATION UNDER ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 -

ORDER

CLAIMANT IS AWARDED TEMPORARY TOTAL DISABILITY COMPENSATION FROM JUNE 16, 1975 THROUGH SEPTEMBER 7, 1975 AND IS AWARDED 13.5 DEGREES OF THE MAXIMUM OF 135 DEGREES FOR LOSS OF THE LEFT FOOT.

WCB CASE NO. 74-4667 JANUARY 2, 1976

JACOB N. BECKMAN, CLAIMANT
POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

THE CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 224 DEGREES FOR 70 PER CENT UNSCHEDULED DISABILITY AND ELIMINATED A PREVIOUS AWARD OF 19.2 DEGREES FOR 10 PER CENT LOSS OF THE RIGHT ARM. CLAIMANT CONTENDS HE IS IN THE 'ODD-LOT' CATEGORY AND ENTITLED TO AN AWARD OF PERMANENT TOTAL DISABILITY.

CLAIMANT WAS A 51 YEAR OLD FALLER WHEN HE SUFFERED A COMPENSABLE INJURY ON AUGUST 20, 1973 WHICH RESULTED IN A COMPRESSION FRACTURE OF THE 12TH DORSAL VERTEBRA, FRACTURES OF THE RIGHT 9TH, 10TH, AND 11TH RIBS AND PROBABLE CONTUSIONS OF THE LEFT LUNG, RIGHT KIDNEY AND THE LIVER. CLAIMANT WAS IMMEDIATELY HOSPITALIZED AND HAS BEEN UNDER THE CARE OF MANY DOCTORS SINCE THAT TIME.

IN FEBRUARY 1974 CLAIMANT WAS ENROLLED AT THE DISABILITY PREVENTION DIVISION WHERE HE WAS EXAMINED BY DR. TROMMALD AND GIVEN A PSYCHOLOGICAL EVALUATION BY DR. HICKMAN. THE BOARD REFERRED CLAIMANT TO THE DIVISION OF VOCATIONAL REHABILITATION IN FEBRUARY 1974 AND ON SEPTEMBER 23, 1974 A DETERMINATION ORDER WAS MAILED AWARDING CLAIMANT 112 DEGREES FOR 35 PER CENT UNSCHEDULED DISABILITY TO HIS LOW BACK AND RIBS AND 19.2 DEGREES FOR 10 PER CENT LOSS OF THE RIGHT ARM.

CLAIMANT HAS WORKED 'IN THE WOODS' SINCE HE WAS 15 YEARS OLD - FOR A PERIOD OF FOUR YEARS HE ALSO WORKED AS A PAINTER.

CLAIMANT CONTENDS HE IS UNABLE TO SIT IN ONE POSITION FOR A VERY LONG PERIOD AND IS UNABLE TO LIE ON HIS BACK OR HIS STOMACH - HE IS UNABLE TO BEND OVER AND LIFT ANYTHING AND HE HAS PAIN WHICH IS INCREASED WITH EXERCISE. WHILE WORKING AS A FALLER, HE ALWAYS CARRIED HIS TOOLS, SUPPLIES AND EQUIPMENT WEIGHING APPROXIMATELY 90 POUNDS - AT THE PRESENT TIME HE IS UNABLE TO LIFT MORE THAN 15 OR 20 POUNDS WITHOUT INCREASING HIS PAIN. HE HAS A GOOD GRIP IN HIS RIGHT HAND BUT THE REFLEXES OF HIS RIGHT ARM ARE IMPAIRED AND HIS FINGERS CRAMP.

THE REFEREE FOUND THAT ALTHOUGH CLAIMANT HAS BEEN AWARDED 19.2 DEGREES FOR 10 PER CENT RIGHT ARM DISABILITY, THERE WAS NO EVIDENCE OF ANY INJURY TO HIS RIGHT ARM - THAT DR. PASQUESI FOUND CLAIMANT'S RIGHT ARM COMPLAINTS WERE NOT CAUSALLY RELATED TO HIS COMPENSABLE INJURY. HE CONCLUDED THAT THE RIGHT ARM AWARD WAS GRANTED IN ERROR AND SHOULD BE REVERSED.

WITH RESPECT TO CLAIMANT'S UNSCHEDULED DISABILITY, THE REFEREE, AFTER GIVING CONSIDERATION TO CLAIMANT'S AGE, EDUCATION, INTELLIGENCE, ADAPTABILITY AND PHYSICAL IMPAIRMENT RESULTING FROM HIS INJURY AND ALSO TO THE SIGNIFICANT PSYCHOPATHOLOGY WHICH WAS LARGELY RELATED TO THE INJURY, FOUND CLAIMANT'S EARNING CAPACITY HAD BEEN IMPAIRED 70 PER CENT. THE REFEREE INCREASED CLAIMANT'S AWARD FOR UNSCHEDULED DISABILITY TO 224 DEGREES BUT ELIMINATED THE 19.2 DEGREES FOR THE RIGHT ARM DISABILITY THEREBY MAKING A NET INCREASE OF 92.8 DEGREES.

THE BOARD, ON DE NOVO REVIEW, FINDS THAT THE EVIDENCE INDICATES CLAIMANT HAS BEEN ABLE TO DO QUITE A FEW THINGS OTHER THAN WORK SINCE HIS INJURY AND HAS MADE NO GREAT ATTEMPT TO SEEK EMPLOYMENT - HOWEVER, THERE IS NO QUESTION THAT HE HAS LOST A SUBSTANTIAL PORTION OF HIS WAGE EARNING CAPACITY. THE BOARD CONCLUDES THAT THIS LOSS HAS BEEN ADEQUATELY COMPENSATED BY THE AWARD OF 224 DEGREES.

ORDER

THE ORDER OF THE REFEREE DATED MAY 29, 1975 IS AFFIRMED.

WCB CASE NO. 73-2292 JANUARY 2, 1976

VERNA BARNES, CLAIMANT

COREY, BYLER AND REW,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

THE CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH DENIED HER CLAIM FOR AGGRAVATION.

CLAIMANT HAD SUFFERED A COMPENSABLE ACCIDENT IN 1968. BY COMPROMISE, ENTERED ON APRIL 6, 1972, CLAIMANT'S AWARD WAS INCREASED TO 48 DEGREES FOR UNSCHEDULED DISABILITY AND 40.5 DEGREES FOR PARTIAL LOSS OF THE LEFT FOOT.

THE ISSUE BEFORE THE REFEREE AT THE 1973 HEARING WAS WHETHER CLAIMANT'S DISC DEVELOPMENT WAS AN AGGRAVATION OF THIS 1968 INJURY OR WHETHER THERE HAD BEEN AN INTERVENING INJURY.

THE REFEREE FOUND THAT CLAIMANT'S BACK PROBLEMS DID NOT ARISE UNTIL 1972 AND THE LONG PASSAGE OF TIME FROM THE 1968 INJURY TILL THE DATE THE DISC WAS DISCOVERED IN 1973 MADE IT DIFFICULT TO BELIEVE THERE WAS ANY CAUSAL RELATIONSHIP.

THE REFEREE CONCLUDED THAT CLAIMANT HAD NOT PROVEN SHE HAD PRECIPITATED THE COMMENCEMENT OF A DISC AT THE TIME OF THE ORIGINAL INJURY. HE FOUND IT MORE REASONABLE TO BELIEVE THAT IF THERE HAD BEEN COMPLAINTS OR INDICATIONS OF A LUMBAR SYNDROME DR. DONALD D. SMITH, DR. DONALD T. SMITH, DR. STORINO AND DR. CHERRY WOULD HAVE DISCOVERED IT - ALL OF THESE DOCTORS HAD EXAMINED AND-OR TREATED CLAIMANT.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE. NO BRIEFS WERE FILED IN THIS CASE, HOWEVER, THE REFEREE'S OPINION AND ORDER VERY CLEARLY SETS FORTH THE ISSUES AND ADEQUATELY DISPOSES OF THEM.

ORDER

THE ORDER OF THE REFEREE DATED JUNE 10, 1975 IS AFFIRMED.

GERALD L. LEATON, CLAIMANT

BABCOCK, ACKERMAN AND HANLON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF
CROSS REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON, MOORE AND SLOAN.

THE STATE ACCIDENT INSURANCE FUND HAS REQUESTED BOARD REVIEW OF THAT PART OF A REFEREE'S ORDER (1) SETTING ASIDE A DETERMINATION ORDER AND (2) ORDERING THE FUND TO PROVIDE CLAIMANT REHABILITATION.

THE CLAIMANT HAS REQUESTED BOARD REVIEW OF THAT PART OF THE ORDER GRANTING AN ATTORNEY'S FEE PAYABLE OUT OF THE TIME LOSS COMPENSATION - SEEKING INSTEAD, PENALTIES AND AN ATTORNEY'S FEE PAYABLE BY THE STATE ACCIDENT INSURANCE FUND FOR ITS ALLEGEDLY UNREASONABLE CONDUCT IN PROCESSING CLAIMANT'S CLAIM.

CLAIMANT IS A NEW 25 YEAR OLD MAN WHO, WHILE EMPLOYED AT THE WEYERHAEUSER PLYWOOD MILL IN NORTH BEND, OREGON, SUFFERED AN INJURY TO HIS LEFT FOOT AND ANKLE FOR WHICH HE WAS AWARDED 20 DEGREES FOR PARTIAL LOSS OF THE LEFT FOOT ON AUGUST 23, 1971. AS A CONSEQUENCE OF THE FOOT DISABILITY, CLAIMANT STUMBLED WHILE DESCENDING A STAIRWAY AT HOME ABOUT FEBRUARY 1, 1972 AND WRENCHED HIS BACK, CAUSING A HERNIATION OF THE NUCLEUS PULPOSUS OF THE L4-5 INTERVERTEBRAL DISC.

A LUMBAR LAMINECTOMY WAS PERFORMED AND, ALTHOUGH HIS CONDITION IMPROVED, A CHANGE OF OCCUPATIONS WAS RECOMMENDED. AFTER AN EVALUATION BY THE WORKMEN'S COMPENSATION BOARD'S DISABILITY PREVENTION DIVISION STAFF, A PROGRAM OF VOCATIONAL REHABILITATION WAS AUTHORIZED BY THE WORKMEN'S COMPENSATION BOARD IN JUNE, 1972 AND IMPLEMENTED UNDER THE BOARD'S AUSPICES BY THE VOCATIONAL REHABILITATION DIVISION OF THE DEPARTMENT OF HUMAN RESOURCES. THE PROGRAM CONSISTED OF SIX TERMS OF TRAINING AT LANE COMMUNITY COLLEGE. CLAIMANT EARNED AN ASSOCIATE DEGREE IN BUSINESS MANAGEMENT IN DECEMBER, 1973. WHILE ATTENDING COLLEGE AND FOR AWHILE AFTERWARDS, HE WORKED FOR HOLIDAY INNS AS A DESK CLERK - AUDITOR. HOWEVER, HE FOUND THE PAY IN THAT POSITION - 2.75 DOLLARS PER HOUR- UNSATISFACTORY, AND HE LOOKED FOR OTHER, BETTER PAYING MANAGEMENT TRAINEE POSITIONS. HE CONTACTED FIRST NATIONAL BANK, SEVERAL FINANCE COMPANIES AND J.C. PENNEY BUT WAS NOT ACCEPTED. HE THEN GAVE UP LOOKING FOR A BUSINESS MANAGEMENT POSITION AND INSTEAD, RETURNED TO A LABORING POSITION FABRICATING ROOF TRUSSES FOR WOOD COMPONENTS COMPANY OF EUGENE, IN APRIL 1974, AT A WAGE OF 4.09 DOLLARS PER HOUR.

WHILE SO EMPLOYED ON MAY 20, 1974, HE SUFFERED ANOTHER LOW BACK INJURY, CAUSING A HERNIATED NUCLEUS PULPOSUS OF THE INTERVERTEBRAL DISC AT L5-S1. ON MAY 24, A LUMBAR LAMINECTOMY WAS AGAIN PERFORMED. HIS TREATING PHYSICIAN, DR. ARTHUR HOCKEY, FELT HE SHOULD DEFINITELY NOT RETURN TO HEAVY LABOR AGAIN AND THOUGHT THAT THE VOCATIONAL REHABILITATION DIVISION SHOULD HELP HIM WITH FURTHER SCHOOLING SO THAT HE WOULD NOT RETURN TO HEAVY LABOR AGAIN.

ON AUGUST 22, 1974, CLAIMANT CONTACTED A LOCAL VOCATIONAL REHABILITATION DIVISION OFFICE WHERE IT WAS QUICKLY DECIDED, ALTHOUGH CLAIMANT HAD ALREADY BEEN VOCATIONALLY REHABILITATED ONCE, THAT BECAUSE CLAIMANT WISHED TO BE MORE INDEPENDENT AND SELF-

SUFFICIENT THAN THE FIRST TRAINING PROGRAM PERMITTED, AND BECAUSE HE HAD HAD ANOTHER INJURY FOLLOWING THE FIRST PROGRAM, THAT THE VOCATIONAL REHABILITATION DIVISION WOULD SPONSOR HIM, REGARDLESS OF THE WORKMEN'S COMPENSATION BOARD'S ELIGIBILITY DECISION, FOR SIX TERMS OF TRAINING AT THE UNIVERSITY OF OREGON TO EARN A BACHELOR'S DEGREE IN ACCOUNTING.

ON AUGUST 27, 1974, THE VOCATIONAL REHABILITATION DIVISION SENT A NOTIFICATION OF REFERRAL FOR VOCATIONAL REHABILITATION TO THE WORKMEN'S COMPENSATION BOARD AND, WITHOUT WAITING FOR THE BOARD TO DECIDE WHETHER CLAIMANT WAS VOCATIONALLY HANDICAPPED OR NOT, WROTE A VOCATIONAL REHABILITATION TRAINING PLAN ON SEPTEMBER 9, 1974 UNDER WHICH CLAIMANT ENROLLED AS A STUDENT AT THE UNIVERSITY OF OREGON. UNDER THIS PROGRAM CLAIMANT'S TUITION, BOOKS AND INCIDENTAL EXPENSES WERE PROVIDED BY THE VOCATIONAL REHABILITATION DIVISION BUT CLAIMANT RECEIVED NO STIPEND FOR LIVING EXPENSES.

IN THE MEANTIME, ON SEPTEMBER 5, 1974, THE STATE ACCIDENT INSURANCE FUND SOLICITED DR. HOCKEY'S OPINION ON WHETHER CLAIMANT'S CONDITION WAS MEDICALLY STATIONARY. DR. HOCKEY'S REPLY INDICATED CLAIMANT WAS MEDICALLY STATIONARY WHEN HE SAW HIM ON AUGUST 22, 1974 AND THAT HE WAS ABLE TO START SCHOOL. ALTHOUGH THE RECORD IS NOT COMPLETELY CLEAR ON THIS POINT, IT APPEARS THAT THE STATE ACCIDENT INSURANCE FUND THEN SOUGHT, IN ACCORDANCE WITH OAR 436-61-050(1)(B) AND (2), A 'MEDICALLY STATIONARY DATE' FROM THE WORKMEN'S COMPENSATION BOARD, ANTICIPATING CLAIMANT'S ENROLLMENT IN AN AUTHORIZED PROGRAM OF VOCATIONAL REHABILITATION. ON SEPTEMBER 17, 1974, A MEDICALLY STATIONARY DATE OF AUGUST 22, 1974 WAS ESTABLISHED BY USE OF A WORKMEN'S COMPENSATION BOARD FORM LETTER 1255 WHICH INDICATED TO THE STATE ACCIDENT INSURANCE FUND THAT ALTHOUGH THE CLAIMANT'S CONDITION WAS MEDICALLY STATIONARY, THE CLAIM REMAINED IN AN OPEN STATUS AND THE CLAIMANT WAS ENTITLED TO FURTHER TIME LOSS BENEFITS BECAUSE -

> '(X) THE WORKER HAS NOT COMPLETED OR BEEN TERMINATED FROM HIS AUTHORIZED COURSE OF VOCATIONAL REHABILITATION...'

THE CLAIMANT WAS NOT ACTUALLY ENROLLED IN A BOARD AUTHORIZED PROGRAM OF VOCATIONAL REHABILITATION BUT THE WORKMEN'S COMPENSATION BOARD WAS CONSIDERING HIS ELIGIBILITY BECAUSE OF THE VOCATIONAL REHABILITATION DIVISION REFERRAL AND DR. HOCKEY'S LETTER OF AUGUST 22, 1974 AND THE FORM 802 DATED AUGUST 28, 1974 WHICH SUGGESTED THAT CLAIMANT NEEDED VOCATIONAL REHABILITATION ON ACCOUNT OF THE INJURY IN QUESTION.

A COPY OF THE WORKMEN'S COMPENSATION BOARD'S FORM 1255, WAS SENT TO CLAIMANT AND FROM IT HE ASSUMED THE WORKMEN'S COMPENSATION BOARD HAD FOUND HIM ELIGIBLE FOR VOCATIONAL REHABILITATION ASSISTANCE AND THAT HE WOULD THEREFORE RECEIVE TIME LOSS BENEFITS WHILE ATTENDING SCHOOL.

IN RESPONSE TO THE VOCATIONAL REHABILITATION DIVISION REFERRAL OF AUGUST 27, 1974, RUSS CARTER, AN ASSISTANT VOCATIONAL REHABILITATION COORDINATOR IN THE BOARD'S DISABILITY PREVENTION DIVISION, EVALUATED CLAIMANT'S NEED FOR VOCATIONAL REHABILITATION. HE CONCLUDED THAT BECAUSE CLAIMANT HAD ALREADY LEARNED AND POSSESSED SUFFICIENT BUSINESS MANAGEMENT SKILLS TO SECURE ENTRY LEVEL EMPLOYMENT IN THAT FIELD, THAT HE WAS NOT VOCATIONALLY HANDICAPPED WITHIN THE MEANING OF OAR 436-61-005(4). ON OCTOBER 3, 1974 HE ADVISED THE VOCATIONAL REHABILITATION DIVISION THAT CLAIMANT WAS NOT ELIGIBLE FOR AN 'AUTHORIZED PROGRAM OF VOCATIONAL REHABILITATION' AND THAT THE BOARD WOULD NOT SPONSOR THE VOCATIONAL REHABILITATION DIVISION PROGRAM.

ON OCTOBER 7, 1974, THE COORDINATOR ADVISED THE CLAIMANT THAT IN THE BOARD'S OPINION HE SHOULD BE ABLE TO RETURN TO SOME SORT OF WORK FOR WHICH HE HAD ALREADY HAD TRAINING OR EXPERIENCE, IMPLYING BUT NOT ACTUALLY STATING THAT CLAIMANT WAS NOT VOCATIONALLY HANDICAPPED AND THAT HIS PROGRAM WOULD NOT BE SPONSORED BY THE WORKMEN'S COMPENSATION BOARD.

WHEN THE STATE ACCIDENT INSURANCE FUND RECEIVED THIS INFORMATION IT REQUESTED A DETERMINATION ORDER.

ON NOVEMBER 22, 1974, A DETERMINATION ORDER ISSUED FINDING CLAIMANT MEDICALLY STATIONARY ON AUGUST 22, 1974 AND GRANTING HIM TIME LOSS FROM MAY 21, 1974 TO OCTOBER 7, 1974 TOGETHER WITH AN AWARD OF 48 DEGREES OR 15 PER CENT OF THE MAXIMUM ALLOWABLE FOR UNSCHEDULED DISABILITY.

ON DECEMBER 5, 1974, CLAIMANT REQUESTED A HEARING SEEKING RECISSION OF THE DETERMINATION ORDER AND REINSTATEMENT OF TEMPORARY TOTAL DISABILITY PAYMENTS, CONTENDING HE HAD BEEN UNREASONABLY TERMINATED FROM HIS VOCATIONAL REHABILITATION PROGRAM WITHOUT CAUSE AND WITHOUT PROPER NOTICE.

HE WAS NOT IN FACT 'TERMINATED' FROM ANY PROGRAM BUT IS CONTINUING TO RECEIVE TRAINING AT THE VOCATIONAL REHABILITATION DIVISION'S EXPENSE UNDER THE VOCATIONAL REHABILITATION DIVISION'S SPONSORED PROGRAM. HOWEVER HIS TIME LOSS PAYMENT OF 23.18 DOLLARS PER DAY CEASED EFFECTIVE OCTOBER 7, 1974.

UPON HEARING, THE REFEREE FOUND THAT NEITHER THE STATE ACCIDENT INSURANCE FUND NOR THE DISABILITY PREVENTION DIVISION OF THE WORKMEN'S COMPENSATION BOARD HAD PROPERLY PROCESSED THE CLAIM BUT HE CONCLUDED THAT THE FUND WAS NOT SUBJECT TO THE PAYMENT OF PENALTIES AND ATTORNEY'S FEE SINCE IT ACTED IN RELIANCE UPON THE BOARD'S ACTION OF ISSUING THE DETERMINATION ORDER.

THE REFEREE ALSO FOUND THAT BECAUSE THE INJURY IN QUESTION OCCURRED AFTER (UNDERSCORED) THE TRAINING HE RECEIVED AT LANE COMMUNITY COLLEGE, THE CLAIMANT WAS NOT 'VOCATIONALLY STATIONARY' AND THAT HE WAS THEREFORE ENTITLED TO VOCATIONAL REHABILITATION AT BOARD EXPENSE. HE ORDERED TIME LOSS REINSTATED FROM OCTOBER 7, 1974 UNTIL HIS TRAINING WAS COMPLETED, SUSPENDED OR TERMINATED AS PROVIDED BY THE STATUTE AND BOARD RULES.

THE STATE ACCIDENT INSURANCE FUND REQUESTED BOARD REVIEW CONTENDING THE CLAIMANT IS 'VOCATIONALLY STATIONARY' AND THEREFORE NOT ENTITLED TO FURTHER TRAINING OR CONTINUED TIME LOSS AT BOARD EXPENSE.

CLAIMANT CONTENDS, IN SEEKING PENALTIES AND AN ATTORNEY'S FEE ON REVIEW, THAT NEITHER THE FUND NOR THE BOARD FOLLOWED PROPER PROCEDURES IN ATTEMPTING TO TERMINATE CLAIMANT FROM HIS VOCATIONAL REHABILITATION PROGRAM.

CLAIMANT ALSO CONTENDS THAT BECAUSE THE EARLIER TRAINING HE RECEIVED PRODUCED EARNINGS OF ONLY 2.75 DOLLARS PER HOUR AS OPPOSED TO THE 4.09 DOLLARS HE WAS EARNING FOR HEAVY LABOR, THAT HE IS ENTITLED TO ADDITIONAL TRAINING TO 'ENABLE THE WORKER TO FUNCTION AT AN EMPLOYMENT LEVEL COMPARABLE TO HIS PRE-INJURY LEVEL', OAR 436-61-010(2) AND THAT HE IS NOT THEREFORE, 'VOCATIONALLY STATIONARY'. BOTH THE STATE ACCIDENT INSURANCE FUND AND CLAIMANT'S ATTORNEY, IN THEIR BRIEFS ON REVIEW, AGREE THAT THE SUBSTANTIVE ISSUE ON APPEAL IS - 'WAS CLAIMANT VOCATIONALLY STATIONARY ON OCTOBER 7, 1974?'"

WE THINK IT APPROPRIATE, BEFORE GOING ANY FURTHER, TO COMMENT ON THE USE OF THE TERM 'VOCATIONALLY STATIONARY', WHICH HAS CREPT INTO THE JARGON OF WORKMEN'S COMPENSATION SINCE THE PASSAGE OF SENATE BILL 251. (CHAPTER 634, O.L. 1973) THE TERM IS NOT DEFINED NOR IS IT USED ANYWHERE IN THE RULES. IT HAS NOT, SO FAR AS WE KNOW, ANY AGREED MEANING. IT APPEARS THAT THE CONCEPT MANY PEOPLE HAVE OF ITS MEANING RELATES IT TO THE CONCEPT OF BECOMING MEDICALLY (UNDERSCORED) STATIONARY FOLLOWING AN INJURY. THE ANALOGY IS FAULTY. WHILE A CONVALESCENCE PERIOD NECESSARILY FOLLOWS EVERY PHYSICAL INJURY, A VOCATIONAL HANDICAP NECESSITATING VOCATIONAL REHABILITATION DOES NOT. THE REFEREE IN FINDING THE TRAINING RECEIVED BEFORE THE INJURY IN QUESTION IRRELEVANT, APPEARS TO HAVE ASSUMED THAT EACH INJURY PRODUCES A VOCATIONAL HANDICAP WHICH MUST BE OVERCOME BY CONVALESCENCE OR RETRAINING. WITHIN THE MEANING OF THE BOARD RULES, A VOCATIONAL HANDICAP EXISTS ONLY WHEN THE PERMANENT (UNDERSCORED) RESIDUALS OF AN INJURY PREVENT THE WORKER FROM RETURNING TO HIS REGULAR, GAINFUL EMPLOYMENT FOR WHICH HE IS SUITED BY REASON OF TRAINING, EXPERIENCE OR INNATE ABILITY.

TO DETERMINE WHETHER A WORKMAN IS ELIGIBLE FOR VOCATIONAL REHABILITATION, THE CASE MUST BE EXAMINED TO SEE WHETHER A VOCATIONAL HANDICAP (UNDERSCORED) EXISTS - NOT WHETHER THE WORKMAN IS 'VOCATIONALLY STATIONARY'. THE TERM CONVEYS AN ERRONEOUS CONCEPT OF THE SITUATION WHICH GIVES RISE TO THE NEED FOR VOCATIONAL REHABILITATION ITS USE INVITES CARELESS ANALYSIS. WE THEREFORE SUGGEST ITS USE BE DISCARDED FORTHWITH.

THE REAL ISSUE IN THIS CASE IS NOT "WHETHER CLAIMANT WAS VOCATIONALLY STATIONARY ON OCTOBER 7, 1974', IT IS RATHER - WAS CLAIMANT RENDERED VOCATIONALLY HANDICAPPED (UNDERSCORED) BY THE INJURY IN QUESTION?

SIMPLY BEING UNABLE TO RETURN TO THE LINE OF WORK ONE REGULARLY ENGAGED IN BEFORE THE INJURY IS NOT SUFFICIENT TO RENDER A PERSON VOCATIONALLY HANDICAPPED WITHIN THE MEANING OF OAR 436-61-005(4). THAT RULE DEFINES A VOCATIONALLY HANDICAPPED WORKER AS '... A WORKER WHO HAS AN OCCUPATIONAL HANDICAP CAUSED BY A COMPENSABLE INJURY WHICH PREVENTS HIS RETURNING TO HIS REGULAR EMPLOYMENT AND WHO HAS NO OTHER SKILLS WHICH WOULD ENABLE HIM READILY TO RETURN TO FULL-TIME EMPLOYMENT.' AT THE TIME OF THE INJURY IN QUESTION, CLAIMANT POSSESSED TRAINING AND SKILLS WHICH WOULD HAVE ENABLED HIM TO READILY RETURN TO FULL-TIME EMPLOYMENT AS A MANAGEMENT TRAINEE.

CLAIMANT ARGUES HOWEVER, THAT UNDER 61-010(2) HE SHOULD NEVER-THE-LESS BE CONSIDERED VOCATIONALLY HANDICAPPED ON ACCOUNT OF THE EARNINGS DISPARITY BETWEEN WORKING AS A LABORER AND AS A MANAGEMENT TRAINEE.

IT CAN BE PLAINLY SEEN WHEN THE WHOLE OF SECTION 61-010(2) IS READ, THAT THE POLICY STATEMENT IS THERE TO LIMIT THE KIND OF TRAINING ORDINARILY CONSIDERED. IT IS THERE TO DEAL WITH THE SITUATION, FOR EXAMPLE, OF A WORKMAN WITH THE INTELLECT AND APTITUDE TO BECOME A MECHANICAL ENGINEER WHO, AS A YOUNG MAN, BEGAN WORKING IN A SERVICE STATION SIMPLY FOR THE CHANCE TO TINKER WITH CARS AND TRUCKS, WHO THEN FINDS HIMSELF UPON MARRIAGE AND THE ARRIVAL OF A FAMILY, 'LOCKED INTO' WORKING IN A SERVICE STATION IN ORDER TO PROVIDE A STEADY INCOME. WHEN AN INJURY NECESSITATING VOCATIONAL REHABILITATION OCCURS HE MAY ARDENTLY DESIRE TRAINING AS A MECHANICAL ENGINEER RATHER THAN AS A TUNE-UP MAN BECAUSE HE WOULD BE 'MORE INDEPENDENT AND SELF SUFFICIENT' AND IT WOULD BE IN HIS 'BEST INTEREST'. TRANSCRIPT PAGE 15, LINES 12 TO 15. THE WORKMEN'S COMPENSATION BOARD POLICY ENNUNCIATED IN SUBSECTION (2) OF 61-010

IS TO TRAIN THE MAN TO BE REASONABLY SELF SUFFICIENT AND THEN LEAVE THE UPGRADING OF HIS VOCATIONAL POSITION IN LIFE TO HIMSELF RATHER THAN HIS FORMER EMPLOYER OR THE WORKMEN'S COMPENSATION BOARD.

THE MANAGEMENT TRAINING AND SKILLS ALREADY POSSESSED BY THE WORKMAN AT THE TIME OF THE MAY 1974, INJURY WERE SUFFICIENT FOR AN ENTRY LEVEL POSITION IN THE FIELD OF BUSINESS ADMINISTRATION. CLAIMANT'S EARNINGS OF 2.75 DOLLARS PER HOUR AT HOLIDAY INN REPRESENT ENTRY LEVEL PAY. IT SEEMS TO US THAT GIVEN A REASONABLE AMOUNT OF TIME, THE CLAIMANT'S TRAINING AT LANE COMMUNITY COLLEGE SHOULD HAVE PERMITTED CLAIMANT TO EITHER HAVE ADVANCED WITHIN THE HOLIDAY INN ORGANIZATION OR ELSE HAVE FOUND OTHER EMPLOYMENT WHERE HIS SKILLS AND EXPERIENCE WOULD HAVE EARNED HIM MORE THAN THE 4.09 DOLLARS PER HOUR HE WAS EARNING AS A LABORER. HOWEVER, CLAIMANT CONTENDS IN EFFECT, THAT ANY REHABILITATION WHICH DOES NOT RESULT IN INSTANT AND TOTAL RESTORATION OF EARNINGS IS LESS THAN IS DUE HIM. IT SHOULD BE POINTED OUT AT THIS STAGE THAT NOTHING IN THE OREGON WORKMEN'S COMPENSATION LAW OR RULES GIVES THE WORKMAN A 'RIGHT' TO VOCATIONAL REHABILITATION.

PRIOR TO THE PASSAGE OF SENATE BILL 251, ORS 656.728, RELATING TO THE VOCATIONAL REHABILITATION OF INJURED WORKERS PROVIDED -

> '(1) THE BOARD MAY (UNDERSCORED) PROVIDE UNDER UNIFORM RULES AND REGULATIONS FOR THE VOCATIONAL REHABILITATION OF MEN AND WOMEN INJURED BY ACCIDENTS ARISING OUT OF AND IN THE COURSE OF THEIR EMPLOYMENT WHILE WORKING UNDER PROTECTION OF ORS 656.001 TO 656.794.'
>
> '(2) THE BOARD MAY (UNDERSCORED) EXPEND AS MUCH OF THE REHABILITATION RESERVE AS MAY BE NECESSARY TO ACCOMPLISH THE VOCATIONAL REHABILITATION OF MEN AND WOMEN INJURED AS DESCRIBED IN SUBSECTION (1) OF THIS SECTION.' (EMPHASIS ADDED)

THE OREGON STATE BAR'S 1968 HANDBOOK ON WORKMAN COMPENSATION PRACTICE IN OREGON (UNDERSCORED) (SIC), IN SECTION 15.6 OF THE REHABILITATION CHAPTER, POINTED OUT THAT IN VIEW OF THE EMPHASIZED LANGUAGE IN ORS 656.728, ENTITLEMENT TO VOCATIONAL REHABILITATION WAS 'ABSOLUTELY DISCRETIONARY'.

WITH THE PASSAGE OF SENATE BILL 251 MANY PEOPLE APPARENTLY CONCLUDED THAT THEY NOW HAVE AN INDIVIDUAL ENFORCEABLE RIGHT (UNDERSCORED) TO VOCATIONAL REHABILITATION. SUCH IS NOT THE CASE. CHAPTER 634 O.L. 1973, MERELY PROVIDED THAT THOSE PEOPLE IN A BOARD AUTHORIZED PROGRAM (UNDERSCORED) OF VOCATIONAL REHABILITATION WOULD CONTINUE TO RECEIVE TIME LOSS AND THEIR CLAIMS WOULD NOT BE CLOSED UNTIL THE PROGRAM WAS COMPLETED. ORS 656.728(1) AND (2) WERE NOT AMENDED IN ANY WAY. THE ONLY AMENDMENT TO ORS 656.728 PROVIDED FOR THE REIMBURSEMENT OF TIME LOSS PAYMENTS MADE AFTER THE WORKMAN BECAME MEDICALLY STATIONARY WHILE HE OR SHE WAS IN AN AUTHORIZED PROGRAM OF VOCATIONAL REHABILITATION. THE ONLY NEW 'RIGHT' CREATED BY CHAPTER 634 O.L. 1974, WAS TO HAVE THE CLAIM LEFT OPEN AND TEMPORARY TOTAL DISABILITY CONTINUED WHILE IN AN AUTHORIZED PROGRAM.

AT FIRST GLANCE IT MIGHT APPEAR THAT THAT IS ALL CLAIMANT IS SEEKING. HE IS, AFTER ALL, IN A PROGRAM AUTHORIZED BY THE VOCATIONAL REHABILITATION DIVISION. THIS IS WHERE THE CONFUSION SETS IN. ACCORDING TO THE RULES ADOPTED PURSUANT TO ORS 656.728, CLAIMANT WAS CONSIDERED TO BE IN AN 'AUTHORIZED PROGRAM OF VOCATIONAL REHABILITATION' UNTIL OCTOBER 7, 1974 ONLY FOR THE PURPOSE OF RECEIVING TIME LOSS WHILE HIS NEED FOR VOCATIONAL REHABILITATION

WAS BEING EVALUATED. THE REASON FOR THAT POSITION IS THIS =

SUBSECTION (1) OF ORS 656.268 PROVIDES AMONG OTHER THINGS THAT = 'CLAIMS SHALL NOT BE CLOSED NOR TEMPORARY DISABILITY COMPENSATION TERMINATED UNTIL THE WORKMEN'S CONDITION BECOMES MEDICALLY STATIONARY AND THE WORKMAN HAS COMPLETED ANY AUTHORIZED PROGRAM OF VOCATIONAL REHABILITATION THAT HAS BEEN PROVIDED ACCORDING TO RULES ADOPTED PURSUANT TO ORS 656.728...'. THE BOARD RECOGNIZED THAT IN SOME CASES THE WORKMAN WOULD BECOME MEDICALLY STATIONARY BEFORE THE AGENCY OR, AFTER HAVING BEEN REFERRED FOR ELIGIBILITY EVALUATION, BEFORE THE EVIDENCE COULD BE GATHERED AND THE DECISION MADE.

IN THOSE CASES THE BOARD WAS FACED WITH THE PROBLEM, IN PROMULGATING RULES, OF WHAT TO DO ABOUT CONTINUING TIME LOSS OR CLOSING THE CLAIM OF A WORKMAN WHO VERY WELL MIGHT SHORTLY BE FOUND ELIGIBLE FOR VOCATIONAL REHABILITATION. THE BOARD CONCLUDED THAT WHEN A WORKMAN HAD BEEN REFERRED FOR A REHABILITATION ELIGIBILITY DETERMINATION, THAT THE LEGISLATIVE INTENT BEHIND CHAPTER 634 O.L. 1973, REQUIRED LEAVING HIS CLAIM OPEN AND CONTINUING TIME LOSS WHILE ELIGIBILITY WAS BEING DETERMINED, EVEN THOUGH HE WAS THEN MEDICALLY STATIONARY AND WAS NOT, STRICTLY SPEAKING, IN AN 'AUTHORIZED PROGRAM OF VOCATIONAL REHABILITATION'. IF THE MAN IN FACT, NEEDED VOCATIONAL REHABILITATION THE STATUTE CLEARLY INDICATED HIS CLAIM WAS NOT TO BE CLOSED UNTIL THE REHABILITATION HAD BEEN ACCOMPLISHED. IF IT DEVELOPED THAT HE DID NOT, THE ADDITIONAL INQUIRY NOT ONLY PROVIDED USEFUL INFORMATION FOR EVALUATING THE EXTENT OF UNSCHEDULED DISABILITY CLAIMS, BUT ALSO PROVIDED AN ECONOMIC INCENTIVE FOR EARLY REFERRAL OF ALL POSSIBLE REHABILITATION CANDIDATES, A FACTOR WHICH THE BOARD HAS FOUND IS AN IMPORTANT ELEMENT IN THE SUCCESSFUL REHABILITATION OF VOCATIONALLY HANDICAPPED WORKERS.

THE BOARD ACCORDINGLY PROVIDED IN THE RULES, OAR 436-61-055 (3)(B), THAT AN INSURER WOULD BE REIMBURSED FOR SUMS PAID A WORKER WHO WAS MEDICALLY STATIONARY BUT UNDERGOING EVALUATION OF REHABILITATION ELIGIBILITY UNTIL HE WAS REJECTED FOR TRAINING.

MECHANICALLY, THE INSURER (IN THIS CASE, THE STATE ACCIDENT INSURANCE FUND) IS ORDINARILY SIGNALED TO CONTINUE MAKING TIME LOSS WHICH WILL EVENTUALLY BE REIMBURSED, BY THE COMPLETION AND MAILING OF A WORKMEN'S COMPENSATION BOARD FORM 1255. NONE OF THE THREE PREPRINTED REASONS FOR DELAYING DETERMINATION FIT THE SITUATION EXACTLY AND IT APPEARS THE BOARD'S REPRESENTATIVE MR. FALK, ATTEMPTED TO CHOOSE THE REASON THAT CAME CLOSEST TO FITTING. MR. FALK'S ADVICE TO THE STATE ACCIDENT INSURANCE FUND THAT A DETERMINATION ORDER WOULD NOT BE ISSUED BECAUSE 'THE WORKER HAS NOT COMPLETED OR BEEN TERMINATED FROM HIS AUTHORIZED COURSE OF VOCATIONAL REHABILITATION', DID NOT CONSTITUTE A FINDING BY THE WORKMEN'S COMPENSATION BOARD THAT CLAIMANT WAS ELIGIBLE FOR VOCATIONAL REHABILITATION AT BOARD EXPENSE. IT MERELY ADVISED THE STATE ACCIDENT INSURANCE FUND THAT CLAIMANT'S CLAIM MUST REMAIN OPEN AND TIME LOSS PAYMENTS CONTINUED UNTIL FURTHER NOTICE. TECHNICALLY CLAIMANT WAS NEVER IN 'AN AUTHORIZED PROGRAM OF VOCATIONAL REHABILITATION' SO THE FACT THAT THE BOARD DID NOT ALLEGE GROUNDS FOR SUSPENSION OR TERMINATION, (OAR 436-61-030) OR FOLLOW PROCEDURES APPROPRIATE THERETO, (OAR 436-61-035) IS IRRELEVANT. WHAT ACTUALLY OCCURRED IS THAT CLAIMANT WAS FOUND INELIGIBLE FOR VOCATIONAL REHABILITATION IN THAT HE WAS NOT VOCATIONALLY HANDICAPPED WITHIN THE MEANING OF OAR 436-61-005(4) AND HE WAS THEREFORE 'REJECTED' FOR TRAINING. NOT HAVING BEEN ADMITTED INTO AN AUTHORIZED PROGRAM OF VOCATIONAL REHABILITATION HE COULD NOT BE 'TERMINATED'.

CLAIMANT WAS UNDOUBTEDLY MISLED BY THE FORM 1255 REGARDING

HIS ELIGIBILITY FOR VOCATIONAL REHABILITATION AT BOARD EXPENSE, BUT IT DOES NOT FORM THE BASIS FOR AN ESTOPPEL AS THE CLAIMANT SUGGESTS. THE RECORD IS CLEAR THAT CLAIMANT INTENDED TO CONTINUE HIS EDUCATION WITH THE HELP OF VOCATIONAL REHABILITATION DIVISION REGARDLESS OF BOARD ASSISTANCE. CLAIMANT STARTED HIS VOCATIONAL REHABILITATION PROGRAM ON SEPTEMBER 9, 1974. THE WORKMEN'S COMPENSATION BOARD FORM 1255 WAS ISSUED ON SEPTEMBER 17, 1974. NOT HAVING CHANGED HIS POSITION TO HIS DETRIMENT IN RELIANCE UPON THE INFORMATION CONTAINED IN THE FORM 1255, NO ESTOPPEL ARISES.

WE DO NOT BELIEVE THE STATE ACCIDENT INSURANCE FUND WAS UNDER ANY DUTY TO ANTICIPATE AND CORRECT THE ERRONEOUS IMPLICATION OF ACCEPTANCE CONVEYED IN THE WORKMEN'S COMPENSATION BOARD FORM 1255. FOR ITS PURPOSES THE INFORMATION WAS CLEAR. 'CLAIMANT'S ELIGIBILITY FOR VOCATIONAL REHABILITATION WAS BEING STUDIED AND THE CLAIM SHOULD REMAIN OPEN' IS WHAT THE FORM TOLD THEM AND THEY DID AS THEY WERE TOLD. WHEN RUSS CARTER'S OCTOBER 7, 1974 REJECTION MEMORANDUM WAS RECEIVED THEY AGAIN ACTED PROPERLY. THE CLAIM WAS SUBMITTED FOR EVALUATION AND THE DETERMINATION ORDER ISSUED IN DUE COURSE ON NOVEMBER 22, 1974. THE STATE ACCIDENT INSURANCE FUND IS NOT GUILTY OF ANY UNREASONABLE CONDUCT IN THE HANDLING OF THIS CLAIM.

IN SUMMARY WE CONCLUDE THAT -

(1) CLAIMANT IS NOT VOCATIONALLY HANDICAPPED WITHIN THE MEANING OF OAR 436-61-005(4).

(2) CLAIMANT PROPERLY RECEIVED TIME LOSS AFTER BECOMING MEDICALLY STATIONARY ON AUGUST 22, 1974 WHILE HIS ELIGIBILITY FOR VOCATIONAL REHABILITATION WAS BEING DETERMINED.

(3) CLAIMANT'S TIME LOSS WAS PROPERLY TERMINATED AS OF OCTOBER 7, 1974 UPON HIS REJECTION FOR AN AUTHORIZED PROGRAM OF VOCATIONAL REHABILITATION.

(4) THE STATE ACCIDENT INSURANCE FUND ACTED REASONABLY IN PROCESSING CLAIMANT'S CLAIM.

THEREFORE, THE REFEREE'S ORDER SETTING ASIDE THE DETERMINATION ORDER, FINDING CLAIMANT ELIGIBLE FOR VOCATIONAL REHABILITATION UNDER THE AUSPICES OF THE WORKMEN'S COMPENSATION BOARD AND GRANTING CLAIMANT TIME LOSS COMPENSATION DURING THAT PERIOD AND PROVIDING AN ATTORNEY'S FEE PAYABLE THEREFROM SHOULD BE REVERSED.

THE STATE ACCIDENT INSURANCE FUND IS AUTHORIZED TO TREAT ALL PAYMENT OF TIME LOSS PAID PURSUANT TO THE ORDER OF THE REFEREE AS PAYMENTS OF THE PERMANENT DISABILITY COMPENSATION LIABILITY CREATED BY THE DETERMINATION ORDER DATED NOVEMBER 22, 1974.

IT IS SO ORDERED.

WCB CASE NO. 74-1982 JANUARY 6, 1976

JOHN R. POTTER, CLAIMANT
BABCOCK, ACKERMAN AND HANLON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 48 DEGREES FOR 15 PER CENT UNSCHEDULED LOW BACK DISABILITY.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON JULY 6, 1973 WHILE WORKING AS A ROOFER. THE ORIGINAL DIAGNOSIS WAS CHRONIC LUMBOSACRAL STRAIN. CLAIMANT RETURNED TO PART TIME WORK IN DECEMBER, 1973 AND REGULAR WORK ON FEBRUARY 18, 1974. ON MARCH 7, 1974 DR. MALEY STATED CLAIMANT WAS RELEASED TO RETURN TO WORK ON OCTOBER 23, 1973. HIS LOW BACK STRAIN WAS RESOLVED. A DETERMINATION ORDER WAS ISSUED MAY 3, 1974 AWARDING CLAIMANT TEMPORARY TOTAL DISABILITY COMPENSATION FROM JULY 6, 1973 TO JULY 15, 1973 AND TEMPORARY PARTIAL DISABILITY FROM JULY 1973 TO NOVEMBER 22, 1973 - NO PERMANENT PARTIAL DISABILITY COMPENSATION WAS AWARDED CLAIMANT.

DR. KIEST, ON JUNE 13, 1974, STATED CLAIMANT HAD A CHRONIC LUMBOSACRAL STRAIN - HE WAS ALSO VERY OBESE. DR. KIEST FELT THAT REPEATED BENDING AND LIFTING, MOVEMENTS REQUIRED IN ROOFING, FOR A MAN CLAIMANT'S SIZE WOULD LIKELY DEVELOP BACK STRESS. CLAIMANT WAS LATER SEEN BY DR. GILSDORF WHO FELT CLAIMANT SHOULD LOSE WEIGHT TO LIMIT THE STRESS ON HIS BACK AND FELT THAT HIS DISABILITY WAS MILD BUT THAT HE SHOULD AVOID HEAVY LIFTING AND ACTIVITIES REQUIRING SUSTAINED WORKING IN A FLEXED OR STOOPED POSITION.

CLAIMANT HAS A SEVENTH GRADE EDUCATION AND NO SPECIAL SKILLS OTHER THAN ROOFING WHICH HE HAS DONE FOR APPROXIMATELY 17 YEARS.

CLAIMANT CONTENDS THAT HE IS ENTITLED TO ADDITIONAL TEMPORARY TOTAL DISABILITY COMPENSATION AND AN AWARD OF PERMANENT PARTIAL DISABILITY COMPENSATION.

THE REFEREE FOUND THAT CLAIMANT WAS NOT ENTITLED TO ANY ADDITIONAL TEMPORARY TOTAL DISABILITY. DR. MALEY HAD RELEASED CLAIMANT FOR WORK ON OCTOBER 23, 1973.

WITH RESPECT TO CLAIMANT'S ENTITLEMENT TO AN AWARD FOR PERMANENT PARTIAL DISABILITY, THE REFEREE FOUND THAT ALTHOUGH CLAIMANT WAS OVERWEIGHT AND HAD BEEN ADVISED BY DOCTORS TO REDUCE SO AS TO LESSEN THE IMPACT OF HIS WEIGHT ON HIS LUMBOSACRAL SYNDROME, NEVERTHELESS, THE MEDICAL EVIDENCE SUPPORTED A CONCLUSION THAT CLAIMANT HAS SOME MILD RESIDUAL DISABILITY RESULTING FROM HIS INDUSTRIAL INJURY. THE REFEREE, TAKING INTO CONSIDERATION CLAIMANT'S OBESITY AND HIS ATTEMPTS TO FOLLOW THE ADVICE OF THE DOCTOR TO REDUCE HIS WEIGHT, TOGETHER WITH CLAIMANT'S AGE, EDUCATION, TRAINING AND POTENTIAL, CONCLUDED THAT CLAIMANT HAD SUFFERED A LOSS OF EARNING CAPACITY OF 15 PER CENT.

THE BOARD, ON DE NOVO REVIEW, CONCURS IN THE FINDINGS AND CONCLUSIONS OF THE REFEREE - HOWEVER, IT NOTES THAT IN THE THIRD COMPLETE PARAGRAPH OF PAGE TWO OF THE OPINION AND ORDER IT IS INDICATED THAT DR. MALEY RELEASED CLAIMANT FOR WORK ON OCTOBER 23, 1974. THIS MUST BE CORRECTED TO READ - 'OCTOBER 23, 1973.'

ORDER

THE ORDER OF THE REFEREE DATED MAY 14, 1975, AS AMENDED BY HIS ORDER DATED NOVEMBER 7, 1975, AND AS FURTHER AMENDED BY THE BOARD, ON REVIEW, WITH RESPECT TO THE DATE OF CLAIMANT'S RELEASE TO RETURN TO WORK, IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 300 DOLLARS PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 75-1271 JANUARY 6, 1976

GLORIA BROOKS, CLAIMANT

BODIE, MINTURN, VAN VOORHEES AND LARSON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS WILSON, SLOAN AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT COMPENSATION FOR PERMANENT TOTAL DISABILITY EFFECTIVE JUNE 11, 1975.

CLAIMANT, 36 YEARS OF AGE AT THE TIME, SUFFERED A COMPENSABLE INJURY ON OCTOBER 2, 1970. HER CLAIM WAS FIRST CLOSED BY A DETERMINATION ORDER MAILED APRIL 25, 1972, WHEREBY SHE WAS AWARDED 32 DEGREES FOR 10 PER CENT UNSCHEDULED LOW BACK DISABILITY. SUBSEQUENTLY, THE CLAIM WAS REOPENED AND CLOSED AGAIN BY A SECOND DETERMINATION ORDER MAILED JUNE 5, 1973, WHICH AWARDED CLAIMANT NO ADDITIONAL PERMANENT PARTIAL DISABILITY. THE CLAIMANT REQUESTED A HEARING AND, AS A RESULT OF THE HEARING, THE REFEREE REMANDED THE CLAIM TO THE FUND. THE CLAIM WAS AGAIN CLOSED BY A THIRD DETERMINATION ORDER MAILED MARCH 24, 1975, WHICH AWARDED CLAIMANT AN ADDITIONAL 128 DEGREES FOR 40 PER CENT UNSCHEDULED DISABILITY RESULTING FROM CONVERSION REACTION, GIVING CLAIMANT AN AGGREGATE OF 160 DEGREES FOR 50 PER CENT UNSCHEDULED DISABILITY.

CLAIMANT AGAIN REQUESTED A HEARING AND THE MATTER WAS HEARD BY THE SAME REFEREE WHO CONDUCTED THE HEARING ON JANUARY 29, 1974, WHICH RESULTED IN THE REOPENING OF CLAIMANT'S CLAIM TO ALLOW EVERY POSSIBLE AVENUE OF TREATMENT WHICH COULD BE OF HELP TO CLAIMANT TO BE EXPLORED. AT THE TIME THE CLAIM WAS REOPENED, THE DOCTORS HAD INDICATED THAT THERE WAS NO HELP FOR CLAIMANT.

THE REFEREE FOUND THAT THERE WAS NOTHING INTRODUCED AT THE JUNE 11, 1975 HEARING, EITHER BY THE ALMOST IDENTICAL TESTIMONY OF THE CLAIMANT OR BY THE TESTIMONY OF DR. HENSON, A BEND PSYCHIATRIST, WHICH TENDED TO CHANGE HIS FORMER OPINION. HE FOUND THAT ALL POSSIBLE EFFORTS HAD BEEN MADE AND, UNFORTUNATELY, THERE STILL WAS A LACK OF SUCCESS IN AFFORDING CLAIMANT THE TREATMENT SHE REQUIRED. CLAIMANT DID NOT WISH TO GO BACK TO DR. PARVARESH, WHO HAD ORIGINALLY GIVEN HER PSYCHIATRIC TREATMENT, THEREFORE SHE WAS TREATED BY DR. HENSON, WHO TESTIFIED AT THE HEARING THAT CLAIMANT'S PSYCHIATRIC DISABILITY WAS TOTAL AND PERMANENT - HER INDUSTRIAL INJURY, ALTHOUGH MINOR, WAS, IN HIS OPINION, RESPONSIBLE FOR AMPLIFYING HER PREEXISTING PERSONALITY DISORDER TO THE POINT WHERE IT WAS NOT POSSIBLE FOR HER TO DO ANY TYPE OF PHYSICAL WORK. HE FURTHER TESTIFIED THAT CLAIMANT COULD NOT MAKE A VOLUNTARY CHOICE TO ACCEPT PSYCHIATRIC HELP AND BECAUSE OF THIS HE COULD NOT HELP HER - DR. HENSON FELT THAT CLAIMANT HAD USED THE ACCIDENT AS A CRUTCH

UPON WHICH TO BLAME ALL OF HER STRESS SITUATIONS WHICH WERE NUMEROUS.

THE REFEREE FOUND THAT CLAIMANT'S WORK BACKGROUND CONSISTED SOLELY OF MENIAL, MANUAL LABOR. SHE HAS AN 11TH GRADE EDUCATION, HOWEVER, THE COMBINATION OF HER SEX AND RACE HAS UNDOUBTEDLY FORECLOSED MANY JOB OPPORTUNITIES TO HER AND VERY PROBABLY CONTRIBUTES TO HER FRUSTRATIONS AND STRESS SITUATIONS DISCUSSED BY DR. HENSON.

BASED UPON DR. HENSON'S TESTIMONY, THE REFEREE CONCLUDED THAT CLAIMANT HAD CARRIED HER BURDEN OF PROOF AS REQUIRED. DEATON V. SAIF (UNDERSCORED), 13 OR APP 298, AND THAT HER DISABILITIES, ALTHOUGH ALMOST EXCLUSIVELY PSYCHIATRIC IN NATURE, WERE COMPENSABLE. PATITUCCI V. BOISE CASCADE CORP. (UNDERSCORED), 8 OR APP 503. HE FURTHER CONCLUDED THAT CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED AS OF JUNE 11, 1975, THE DATE OF THE HEARING.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE OPINION AND ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED JULY 11, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 400 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

DISSENT

COMMISSIONER GEORGE A. MOORE DISSENTS AS FOLLOWS -

I RESPECTFULLY DISSENT FROM THE OPINION OF THE MAJORITY. THIS LADY SUSTAINED A MINIMAL INJURY AS A RESULT OF A SLIP AND TWIST INCIDENT. SHE HAS NEVER HAD MORE THAN CONSERVATIVE TREATMENT PHYSICALLY SUCH AS THERAPY, TRACTION, BRACE, ANALGESICS AND MEDICATION. ON THE OTHER HAND SHE HAS UNDERGONE FEMALE SURGERY AND IS DIAGNOSED AS SUFFERING HYPERTENSIVE CARDIOVASCULAR DISEASE WHICH IS NOT RELATED TO THE INCIDENT. IT IS INTERESTING TO NOTE THAT TWICE SHE HAS CHECKED OUT OF HOSPITALS AGAINST MEDICAL ADVICE AND RESISTS PSYCHIATRIC HELP AND HAS ENDURED THE TRAUMA OF MARITAL SEPARATION FROM A UNION OF SOME 20 YEARS.

FROM THE ABOVE, IT IS SUGGESTED THAT HER EMPLOYER SHOULD BE CHARGED WITH A LIFE TIME PENSION BECAUSE THE EMPLOYER TAKES THE WORKER AS HE FINDS HIM. A MINISCULE INCIDENT OCCURRED WHICH LEFT THIS PERSON WITH NO OBJECTIVE PHYSICAL RESIDUALS, BUT WHICH IN THE OPINION OF ONE PSYCHIATRIST MIGHT HAVE TO AN EXTENT INFLUENCED HER PREEXISTING PSYCHOPATHOLOGY. A CAREFUL REVIEW OF DR. HENSON'S TESTIMONY PERSUADES ME THAT IT IS MORE BELIEVABLE THAT HER PSYCHOLOGICAL RESPONSES ARE NOT RESIDUALS OF THE INJURY. THEY SPRING FROM THE PREEXISTING PSYCHOPATHOLOGY UNRELATED TO THE INDUSTRIAL INCIDENT. THIS PROBLEM BELONGS TO SOCIETY AS A WHOLE RATHER THAN HER EMPLOYER.

THIS REVIEWER WOULD REVERSE THE REFEREE AND RESTORE THE DETERMINATION ORDER OF MARCH 24, 1975.

-S- GEORGE A. MOORE, COMMISSIONER

WCB CASE NO. 75-289 JANUARY 6, 1976

CARMA ANDERSON, CLAIMANT

GALTON AND POPICK, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT
CROSS REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

THE CLAIMANT REQUESTS BOARD REVIEW OF THAT PORTION OF THE REFEREE'S ORDER WHICH AFFIRMED THE DENIAL OF CLAIMANT'S CLAIM FOR AGGRAVATION. THE FUND CROSS REQUESTS REVIEW OF THAT PORTION OF THE ORDER WHICH INSTRUCTED IT TO PAY CLAIMANT TEMPORARY TOTAL DISABILITY COMPENSATION BETWEEN NOVEMBER 18, 1974 AND MARCH 5, 1975 - TO PAY, IN ADDITION, 25 PER CENT OF SUCH COMPENSATION AS A PENALTY FOR UNREASONABLE DELAY IN ACCEPTING OR DENYING HER CLAIM AND FOR UNREASONABLE DELAY IN PAYMENT OF COMPENSATION AND AWARDING CLAIMANT'S ATTORNEY THE SUM OF 600 DOLLARS AS ATTORNEY'S FEE.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON SEPTEMBER 2, 1969 INJURING HER LOW BACK WHILE REMOVING SOME FOOD CARTS FROM AN ELEVATOR. THE CLAIM WAS ACCEPTED AND, AFTER CONSERVATIVE TREATMENT, WAS CLOSED BY A DETERMINATION ORDER, DATED AUGUST 13, 1971, WHICH AWARDED CLAIMANT PERMANENT TOTAL DISABILITY. AFTER A HEARING REQUESTED BY THE FUND, THE REFEREE CONCLUDED IN AN OPINION AND ORDER MAILED MARCH 14, 1972, THAT, ALTHOUGH CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED, ONLY 40 PER CENT OF SUCH DISABILITY WAS ATTRIBUTABLE TO THE INDUSTRIAL INJURY AND HE REDUCED THE AWARD TO 128 DEGREES. CLAIMANT REQUESTED REVIEW BY THE BOARD WHICH AFFIRMED THE REFEREE'S ORDER. NO FURTHER APPEAL WAS TAKEN.

ON OCTOBER 30, 1974, DR. CHERRY, AFTER HE EXAMINED CLAIMANT, OPINED THAT CLAIMANT HAD A CHRONIC LOW BACK STRAIN DUE TO HER ACCIDENT AND HER DISABILITY AT THAT TIME WAS GREATER THAN 40 PER CENT - THE INCREASED DISABILITY WAS DUE TO AGGRAVATION OF HER PREVIOUS INJURY. ON NOVEMBER 18, 1974 THIS REPORT WAS RECEIVED BY THE FUND. THE FUND DID NOTHING UNTIL JANUARY 24, 1975 AT WHICH TIME IT ADVISED CLAIMANT THAT SHE HAD BEEN SCHEDULED TO BE EXAMINED BY THE ORTHOPEDIC CONSULTANTS ON FEBRUARY 6, 1975. THE REPORT RESULTING FROM THAT EXAMINATION, RECEIVED BY THE FUND ON FEBRUARY 19, 1975, INDICATED THAT NO FURTHER TREATMENT WAS NECESSARY. THEREAFTER, THE MATTER WAS REFERRED TO THE EVALUATION DIVISION OF THE BOARD AND A DETERMINATION ORDER, MAILED MARCH 5, 1975, DID NOT AWARD ANY ADDITIONAL PERMANENT PARTIAL DISABILITY. CLAIMANT THEN AMENDED HER REQUEST FOR HEARING TO INCLUDE THE ISSUE OF PERMANENT DISABILITY.

THE REFEREE FOUND THAT A COMPARISON OF THE MEDICAL REPORTS REVEALED THAT CLAIMANT'S CONDITION DID NOT MATERIALLY CHANGE BETWEEN THE EXAMINATIONS CONDUCTED IN 1971 AND THE EXAMINATION BY DR. CHERRY IN OCTOBER 1974. THE REFEREE CONCLUDED THAT, WHILE DR. CHERRY'S REPORT WAS SUFFICIENT TO CONFER JURISDICTION UPON HIM TO HOLD THE HEARING, THE EVIDENCE DID NOT JUSTIFY A FINDING THAT THE PERMANENT DISABILITY CLAIMANT SUFFERED AS A RESULT OF HER INJURY OF SEPTEMBER 2, 1969 HAD BECOME AGGRAVATED SUBSEQUENT TO THE LAST AWARD OR ARRANGEMENT OF COMPENSATION WHICH WAS MARCH 14, 1972.

THE REFEREE FOUND THAT, ALTHOUGH CLAIMANT'S CONDITION HAD NOT WORSENED, THE FUND HAD A DUTY WHEN IT RECEIVED CLAIMANT'S REQUEST FOR BENEFITS, TOGETHER WITH DR. CHERRY'S REPORT ON NOVEMBER 18, 1972, TO DO SOMETHING. AN AGGRAVATION CLAIM IS TO BE CONSTRUED AS

A CLAIM IN THE FIRST INSTANCE AND THE FUND HAD 60 DAYS WITHIN WHICH TO EITHER ACCEPT OR DENY THE CLAIM, FURTHERMORE, PAYMENT OF COMPENSATION FOR TEMPORARY TOTAL DISABILITY MUST COMMENCE WITHIN 14 DAYS AFTER NOTICE OF THE CLAIM.

THE REFEREE CONCLUDED THAT THE FUND NEITHER COMMENCED PAYMENT OF COMPENSATION FOR TEMPORARY TOTAL DISABILITY WITHIN 14 DAYS AFTER BEING NOTIFIED OF THE CLAIM, NOR DID IT ACCEPT OR DENY THE CLAIM WITHIN THE 60 DAYS PROVIDED BY STATUTE - THEREFORE, IT WAS PROPER TO IMPOSE PENALTIES UNDER THE PROVISIONS OF ORS 656.262(8) AND AWARD AN ATTORNEY'S FEE UNDER THE PROVISIONS OF ORS 656.382(1) FOR UNREASONABLE DELAY IN THE PAYMENT OF COMPENSATION AND UNREASONABLE RESISTANCE IN THE PAYMENT OF COMPENSATION.

THE BOARD, ON DE NOVO REVIEW, NOTES THAT THE REFEREE DISTINGUISHES HIS RULING IN THIS CASE FROM THAT MADE BY THE BOARD IN THE MATTER OF COMPENSATION OF PAULINE MORGAN, CLAIMANT (UNDERSCORED), WCB CASE NO. 74-853, WHEREIN THE BOARD STATED THAT THE REFEREE HAVING HELD THAT THE MEDICAL REPORT WAS NOT SUFFICIENT TO CONFER JURISDICTION COULD NOT AWARD TEMPORARY TOTAL DISABILITY COMPENSATION, PENALTIES OR ATTORNEY'S FEES ON THE GROUND THAT IN THIS CASE DR. CHERRY'S REPORT WAS SUFFICIENT TO CONFER JURISDICTION. THE DISTINCTION IS WELL MADE - HOWEVER, OREGON LAWS 1975, CH 497, SEC 1 AMENDED ORS 656.273 AND ADEQUACY OF A PHYSICIAN'S REPORT IS NO LONGER JURISDICTIONAL.

THE BOARD CONCURS IN THE FINDINGS AND CONCLUSIONS MADE BY THE REFEREE WITH RESPECT TO AFFIRMING THE DENIAL OF CLAIMANT'S CLAIM FOR AGGRAVATION AND ALSO WITH HIS IMPOSITION OF PENALTIES AND AWARD OF ATTORNEY'S FEES.

ORDER

THE ORDER OF THE REFEREE DATED JULY 8, 1975 IS AFFIRMED.

WCB CASE NO. 74-2779 JANUARY 6, 1976

HAROLD AYER, CLAIMANT

EVOHL MALAGON, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH GRANTED CLAIMANT AN AWARD OF PERMANENT TOTAL DISABILITY EFFECTIVE MAY 3, 1974.

CLAIMANT WAS INVOLVED IN A CAR ACCIDENT AND SUFFERED A COMPENSABLE INJURY ON JUNE 6, 1970 - AT THAT TIME HE WAS 60 YEARS OLD. THE CLAIM WAS INITIALLY CLOSED ON NOVEMBER 6, 1970 WITH NO AWARD OF PERMANENT PARTIAL DISABILITY.

ON OCTOBER 17, 1972 CLAIMANT FILED A CLAIM FOR AGGRAVATION WHICH WAS DENIED BY THE FUND ON NOVEMBER 3, 1972. AFTER A HEARING REQUESTED BY CLAIMANT, THE REFEREE REMANDED THE CLAIM TO THE FUND, BASED ON A REPORT FROM DR. BROWN, A PSYCHIATRIST, AND THE OTHER MEDICAL AND LAY EVIDENCE WHICH INDICATED THAT CLAIMANT'S CONDITION HAD WORSENED. IT WAS DR. BROWN'S OPINION THAT BECAUSE

OF CLAIMANT'S DEPRESSION, HIS LEVEL OF ANXIETY INDICATED BY TREMOR, A DISTURBED SPEECH PATTERN AND DIFFICULTY IN CONCENTRATION CLAIMANT SHOULD RECEIVE PERIODIC AND SUPPORTIVE PSYCHOTHERAPEUTIC INTERVENTION.

THE FUND REQUESTED BOARD REVIEW AND THE BOARD AFFIRMED THE REFEREE'S ORDER.

DR. PARVARESH EXAMINED CLAIMANT ON JANUARY 10, 1974 AND HIS CONCLUSION WAS THAT CLAIMANT COULD RETURN TO SOME EMPLOYMENT, HE DID NOT BELIEVE CLAIMANT WAS MALINGERING AS THERE WAS ENOUGH CLINICAL EVIDENCE TO INDICATE ON-GOING NERVOUS TENSION. HE FELT THAT THE DEGREE OF PSYCHIATRIC PROBLEMS WAS APPARENTLY OF SUCH GRAVITY THAT WOULD PRECLUDE CLAIMANT FROM ENGAGING IN HIS PREVIOUS OCCUPATION.

ON MAY 1, 1974, DR. BROWN, CLAIMANT'S TREATING PSYCHIATRIST, AFTER REVIEWING DR. PARVARESH'S REPORT OF JANUARY 15, 1975, REITERATED HIS OPINION STATED IN HIS REPORT OF MAY 1, 1974 THAT HE CONSIDERED CLAIMANT TO BE TOTALLY, AND FOR THE FORESEEABLE FUTURE, DISABLED AND UNABLE TO WORK.

THE FUND REQUESTED CLOSURE ON MAY 7, 1974, BASED UPON AN EXAMINATION OF CLAIMANT BY DR. HARWOOD, MEDICAL EXAMINER FOR THE FUND. DR. HARWOOD, WHO EXAMINED CLAIMANT ON JULY 8, 1974, FELT THAT HIS CONDITION WAS MEDICALLY STATIONARY AND HAD BEEN FOR SOME TIME AND THAT ALTHOUGH CLAIMANT'S PROBLEMS WERE NUMEROUS, NONE WERE RELATED TO HIS ACCIDENT AND THE CLAIM COULD BE CLOSED WITHOUT ANY AWARD FOR PERMANENT PARTIAL DISABILITY. ON JULY 26, 1974 THE CLAIM WAS AGAIN CLOSED WITH A SECOND DETERMINATION ORDER WHICH AWARDED CLAIMANT NO PERMANENT PARTIAL DISABILITY BUT SOME ADDITIONAL TEMPORARY TOTAL DISABILITY COMPENSATION.

THE CLAIMANT REQUESTED A HEARING ON THE SECOND DETERMINATION ORDER - AT THIS HEARING, BASICALLY THE SAME MEDICAL EVIDENCE WAS RECEIVED AS HAD BEEN RECEIVED AT THE PREVIOUS HEARING INSOFAR AS IT RELATED TO CLAIMANT'S PSYCHOPATHOLOGY. THE DEPOSITION OF DR. BROWN INDICATES NO CHANGE IN HIS OPINION THAT CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED AND WOULD BE SO FOR THE FORESEEABLE FUTURE - THIS, IN SPITE OF VIGOROUS CROSS-EXAMINATION BY THE COUNSEL FOR THE FUND. DR. BROWN REITERATED HIS FORMER OPINION THAT ALTHOUGH CLAIMANT HAD PREEXISTING PSYCHIATRIC CONDITIONS THOSE CONDITIONS WERE AGGRAVATED BY THE INDUSTRIAL INJURY AND, AS A RESULT THEREOF, CLAIMANT WAS INCAPABLE OF FUNCTIONING AND HOLDING DOWN A GAINFUL OCCUPATION.

THE REFEREE FOUND THAT THE MEDICAL EVIDENCE INDICATED CLAIMANT HAD NOT SUFFERED A GREAT AMOUNT OF ORGANIC DISABILITY BUT THAT HE HAD SEVERE PSYCHOGENIC CONDITIONS WHICH WERE DIRECTLY RELATED TO HIS INDUSTRIAL INJURY. HE CONCLUDED THAT THIS MEDICAL EVIDENCE WAS SUFFICIENT TO INDICATE THAT FROM A PSYCHIATRIC CONDITION ALONE CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED AND INCAPABLE OF REGULARLY PERFORMING WORK IN A GAINFUL AND SUITABLE OCCUPATION. CLAIMANT IS MENTALLY UNABLE TO PERFORM ANY TYPE OF WORK. THE FUND OFFERED NO EVIDENCE TO SHOW THAT SOME TYPE OF SUITABLE WORK WAS AVAILABLE TO CLAIMANT ON A REGULAR AND CONTINUED BASIS.

THE REFEREE FURTHER CONCLUDED THAT, ALTHOUGH THE EVIDENCE ESTABLISHED THAT THE PSYCHOGENIC CONDITION PREEXISTED THE INDUSTRIAL INJURY, THE INJURY HAD AGGRAVATED THE CONDITION AND LED TO THE PRESENT OVERALL CONDITION OF CLAIMANT. HE FOUND THAT CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED MAY 21, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 300 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 75-1117 JANUARY 6, 1976

PAUL BALEY, CLAIMANT

DYE AND OLSON, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
ORDER SETTING ASIDE ORDER OF DISMISSAL

ON DECEMBER 17, 1975 AN ORDER OF DISMISSAL WAS ENTERED IN THE ABOVE MATTER BECAUSE THE REQUEST FOR REVIEW APPARENTLY WAS UNTIMELY. SUBSEQUENTLY, IT WAS DISCOVERED THAT THE AMENDED OPINION AND ORDER RECITED THAT THE PARTIES HAD 30 DAYS FROM THE DATE OF THAT ORDER WITHIN WHICH TO REQUEST REVIEW.

THE BOARD CONCLUDES THAT THE PARTIES HAD 30 DAYS FROM THE ENTRY OF THE AMENDED ORDER RATHER THAN THE ENTRY OF THE ORIGINAL OPINION AND ORDER WITHIN WHICH EITHER MIGHT REQUEST REVIEW.

THE BOARD FURTHER CONCLUDES THAT THE SECOND PARAGRAPH OF THE MOTION TO DISMISS FILED BY THE STATE ACCIDENT INSURANCE FUND SHOULD BE CONSTRUED AS A REQUEST BY THE FUND TO CROSS APPEAL THE OPINION AND ORDER AND WILL TREAT IT AS SUCH.

ORDER

THE ORDER OF DISMISSAL ENTERED ON DECEMBER 17, 1975 IS HEREBY SET ASIDE AND THE REQUEST FOR REVIEW MAILED BY THE CLAIMANT ON DECEMBER 8, 1975 IS ACCEPTED AS A TIMELY REQUEST AND THE REQUEST MADE BY THE STATE ACCIDENT INSURANCE FUND FOR CROSS REVIEW IS ALSO ACCEPTED.

WCB CASE NO. 74-2898 JANUARY 6, 1976

ROBERT MEADER, CLAIMANT

BUSS, LEISHNER, LINDSTEDT, BARKER AND BUONO,
CLAIMANT'S ATTYS.
GEARIN, CHENEY, LANDIS, AEBI AND KELLEY,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

THE CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH FOUND THAT CLAIMANT'S CLAIM FOR A HEARING LOSS WAS NOT COMPENSABLE.

CLAIMANT IS A 44 YEAR OLD TRUCK DRIVER. HE COMMENCED DRIVING DIESEL TRUCKS IN MARCH 1968 FOR THE DEFENDANT EMPLOYER. CLAIMANT

CONTENDS THAT PRIOR TO THAT TIME HE WAS AWARE OF NO HEARING PROBLEM – HE ALSO CONTENDS THAT THE TRUCK WHICH HE DROVE FOR THE EMPLOYER WAS NOISIER THAN ANY OTHER DIESEL TRUCK HE HAD EVER DRIVEN. THIS STATEMENT WAS CONFIRMED BY A FELLOW EMPLOYEE WHO HAD DRIVEN THE SAME TRUCK FOR APPROXIMATELY A YEAR AND A HALF.

CLAIMANT WAS REQUIRED BY THE DEPARTMENT OF TRANSPORTATION TO TAKE A PHYSICAL EXAMINATION EVERY TWO YEARS. IN 1970 HE PASSED THE HEARING TEST – HOWEVER, IN FEBRUARY 1972, HE FLUNKED THE EXAMINATION AND WAS ORDERED TO OBTAIN A HEARING AID. HE DID SO AND WAS THEN ABLE TO MEET THE REQUIREMENTS AND CONTINUED DRIVING DIESEL TRUCKS.

IN DECEMBER 1973 CLAIMANT WAS SEEN BY DR. DEWEESE WITH REGARD TO A HEARING LOSS – THE TEST REVEALED A LIGHT LOSS OF HEARING IN BOTH EARS BETWEEN 50 AND 70 DECIBELS BELOW NORMAL – THE DOCTOR NOTED THAT THE PATTERN OF HEARING LOSS WAS NOT THAT NORMALLY SEEN FOLLOWING NOISE DAMAGE, NEVERTHELESS, HE ADVISED CLAIMANT TO OBTAIN EAR PLUGS WHILE DRIVING DIESELS. THIS IS NOT ALLOWED UNDER THE DEPARTMENT OF TRANSPORTATION REGULATIONS, SO CLAIMANT TERMINATED HIS JOB. HE WAS SEEN LATER BY DR. METTLER COMPLAINING THAT HIS HEARING LOSS HAD INCREASED. DR. METTLER'S OPINION WAS THAT CLAIMANT HAD A SENSONEURAL HEARING LOSS, THAT THE CURVE REFLECTING THIS LOSS WAS NOT A TYPICAL NOISE INDUCED HEARING LOSS CURVE.

ON MAY 29, 1974 SOUND LEVEL MEASUREMENTS WERE CONDUCTED INVOLVING SEVERAL OF THE DIESEL TANKERS USED BY THE EMPLOYER AND, AFTER TAKING INTO CONSIDERATION ALL OF THE FACTORS INVOLVED IN THE TEST, IT WAS FOUND THAT THE 'DAILY NOISE DOSE' WAS WITHIN THE LIMITS SET BY FEDERAL AND STATE REGULATORY AGENCIES.

THE REFEREE FOUND THAT THE GREATER WEIGHT OF THE EVIDENCE INDICATED THAT CLAIMANT'S HEARING LOSS DID NOT ARISE OUT OF AND IN THE COURSE AND SCOPE OF HIS EMPLOYMENT. THE REFEREE CONCLUDED THAT ALTHOUGH CLAIMANT HAD HONESTLY FELT HIS HEARING LOSS WAS CAUSED BY DRIVING DIESEL TRUCKS BECAUSE HE HAD BEEN UNAWARE OF ANY HEARING PROBLEM UNTIL HE FAILED THE 1972 TEST, THERE WAS NO MEDICAL EVIDENCE RELATING THIS HEARING LOSS TO HIS JOB. THEREFORE, THE REFEREE FOUND THE CLAIM NOT COMPENSABLE.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE AS ITS OWN.

ORDER

THE ORDER OF THE REFEREE DATED JUNE 6, 1975 IS AFFIRMED.

SAIF CLAIM NO. B 53689 JANUARY 6, 1976

CHARLES L. PECK, CLAIMANT

COONS, COLE AND ANDERSON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
OWN MOTION PROCEEDING REFERRED FOR HEARING

ON DECEMBER 17, 1975 CLAIMANT REQUESTED THE BOARD TO EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 AND REOPEN HIS CLAIM FOR THE INDUSTRIAL INJURY WHICH HE SUFFERED SOME TIME DURING THE EARLY PART OF 1964.

THE REQUEST WAS SUPPORTED BY 25 ITEMS, MOSTLY MEDICAL REPORTS DATING FROM APRIL 22, 1964 TO JULY 26, 1975 AND AN AFFIDAVIT FROM THE CLAIMANT.

ON DECEMBER 30, 1975 THE STATE ACCIDENT INSURANCE FUND RESPONDED IN ACCORDANCE WITH RULE 83-810, RULES OF PRACTICE AND PROCEDURE, AND INDICATED IT AGREED THAT THE CLAIM WAS FAIRLY COMPLEX AND SHOULD BE REFERRED TO THE HEARINGS DIVISION FOR THE TAKING OF TESTIMONY AND THE MAKING OF A RECOMMENDATION BY THE REFEREE, BASED UPON SUCH TESTIMONY, ON THE EXTENT OF CLAIMANT'S PRESENT DISABILITY AS IT RELATES TO THE 1964 INDUSTRIAL INJURY.

AT THE PRESENT TIME CLAIMANT HAS RECEIVED AWARDS IN AGGREGATE OF 80 PER CENT LOSS FUNCTION OF AN ARM FOR UNSCHEDULED DISABILITY OF THE BACK.

THE BOARD CONCLUDES THAT THE ISSUE OF THE EXTENT OF CLAIMANT'S DISABILITY AT THE PRESENT TIME AND ITS RELATIONSHIP TO HIS 1964 IDUSTRIAL INJURY SHOULD BE REFERRED TO THE HEARINGS DIVISION WITH INSTRUCTIONS TO HOLD A HEARING AND TAKE EVIDENCE ON THIS ISSUE. UPON CONCLUSION OF THE HEARING, THE REFEREE SHALL CAUSE A TRANSCRIPT OF THE PROCEEDINGS TO BE PREPARED AND SUBMITTED TO THE BOARD TOGETHER WITH HIS RECOMMENDATION ON THE ISSUE BEFORE HIM.

IT IS SO ORDERED.

WCB CASE NO. 74-1974 JANUARY 6, 1976

ALFRED PARKER, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF
CROSS REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH GRANTED CLAIMANT AN AWARD OF 192 DEGREES FOR 60 PER CENT UNSCHEDULED LOW BACK DISABILITY. CLAIMANT CROSS REQUESTS REVIEW, CONTENDING HE IS PERMANENTLY AND TOTALLY DISABLED.

CLAIMANT SUFFERED A LOW BACK INJURY ON SEPTEMBER 1, 1970. ON OCTOBER 23, DR. HIESTAND PERFORMED A LAMINECTOMY L4-L5. FOLLOWING THIS SURGERY, CLAIMANT IMPROVED AND ATTEMPTED TO RETURN TO WORK AS A MECHANIC BUT WAS UNABLE TO CONTINUE. ON JULY 15, 1971 A LUMBAR LAMINECTOMY WITH EXCISION OF HERNIATED INTERVERTEBRAL DISC L4-L5 WAS PERFORMED BY DR. HIESTAND. WHEN THE DOCTOR AGAIN SAW CLAIMANT ON AUGUST 27, THERE WAS MARKED IMPROVEMENT AND ONLY MINIMAL COMPLAINTS OF LOW BACK AND RIGHT EXTREMITY PAIN. DR. HIESTAND PASSED AWAY ON OCTOBER 30, AND ON DECEMBER 15, CLAIMANT WAS SEEN BY DR. BAKER.

ON FEBRUARY 2, 1972, CLAIMANT WAS REFERRED TO THE DISABILITY PREVENTION DIVISION IN PORTLAND. A JOB CHANGE WITH NO HEAVY LIFTING, REPETITIVE BENDING OR STOOPING WAS RECOMMENDED AND ARRANGEMENTS WERE MADE FOR CLAIMANT TO BE SEEN BY A COUNSELOR FROM THE DIVISION OF VOCATIONAL REHABILITATION. A PSYCHOLOGICAL EVALUATION FOUND CLAIMANT TO HAVE EXCELLENT RESOURCES INDICATIVE OF ADAPTABILITY TO RADIO SERVICE AND REPAIR AND ALSO IN OTHER AREAS OF WORK.

THE BACK EVALUATION CLINIC ON APRIL 19, FOUND THAT CLAIMANT'S SYMPTOMS WERE RELATIVELY MINIMAL AT THAT TIME - IT WAS FELT THAT CLAIMANT PROBABLY COULD RETURN TO HIS FORMER OCCUPATION, DEPENDING UPON THE PARTICULAR DEMANDS OF THE PLACE WHERE HE WAS WORKING WITH RESPECT TO THE NECESSITY OF BENDING AND LIFTING. THEY FOUND LOSS OF FUNCTION OF THE BACK TO BE MILDLY MODERATE. DR. BAKER AGREED WITH THIS CONCLUSION.

CLAIMANT'S CLAIM WAS CLOSED BY DETERMINATION ORDER MAILED SEPTEMBER 20, 1972 WHICH AWARDED HIM 48 DEGREES FOR 15 PER CENT UNSCHEDULED LOW BACK DISABILITY.

CLAIMANT ENROLLED AT LANE COUNTY COMMUNITY COLLEGE FOR TRAINING AS A RADIO AND TV REPAIRMAN. HE DID WELL, HOWEVER, HE WAS UNABLE TO ATTEND CLASSES REGULARLY BECAUSE OF HIS WIFE'S HEALTH AND HIS DIFFICULTY IN DRIVING BACK AND FORTH TO SCHOOL.

ON JUNE 18, 1973 CLAIMANT SAW DR. BAKER STILL COMPLAINING OF ACHING AND SORENESS WHICH HAD INCREASED IN SEVERITY IN THE MID AND LOWER LUMBAR BACK, RADIATING INTO THE RIGHT THIGH. DR. BAKER FELT CLAIMANT'S CONDITION HAD NOT CHANGED SUBSTANTIALLY SINCE HE HAD SEEN HIM IN SEPTEMBER 1972, BUT HE REFERRED HIM TO DR. SERBU, A NEUROSURGEON WHO, ON SEPTEMBER 11, 1973, PERFORMED THE THIRD LUMBAR LAMINECTOMY AND A FORAMINOTOMY OF THE L4-L5 INTERSPACE OF CLAIMANT'S LUMBAR SPINE. CLAIMANT HAS NOT RETURNED TO ANY WORK SINCE THIS SURGERY.

ON MARCH 5, 1974 A SECOND DETERMINATION ORDER AWARDED CLAIMANT AN ADDITIONAL 16 DEGREES.

CLAIMANT WAS BORN AND EDUCATED IN NORWAY. HE CAME TO THE UNITED STATES AT THE AGE OF 21 AND HIS EDUCATION IS EQUIVALENT TO MORE THAN A FOUR YEAR HIGH SCHOOL EDUCATION. HE HAS A RATHER DIVERSIFIED WORK BACKGROUND IN AUTO MECHANICS AND MECHANICAL AND FARM MACHINERY WORK - HE HAS ALSO BEEN TRAINED IN DIESEL ENGINEERING AND WORKED AS A DIESEL MECHANIC. HE HAS WORKED AS A LOG TRUCK DRIVER AND MECHANIC AS WELL AS A UTILITY MAN ON A FARM. AFTER HIS SEPTEMBER 1970 INJURY HE ATTEMPTED TO DRIVE A TRUCK FOR A NURSERY BUT COULD NOT DO SO. IN 1971 HE ATTEMPTED TO DRIVE A TAXI BUT HIS BACK PAIN REQUIRED HIM TO QUIT. SINCE 1971 HE HAS BEEN IN CONTACT WITH THE DIVISION OF VOCATIONAL REHABILITATION COUNSELORS WEEKLY BUT WAS REQUIRED TO QUIT SCHOOL IN DECEMBER 1973 BECAUSE OF THE LONG DRIVE BETWEEN HIS HOME IN FLORENCE AND THE COMMUNITY COLLEGE IN EUGENE.

CLAIMANT WAS MOST RECENTLY SEEN BY DR. SERBU ON NOVEMBER 11, 1974. AFTER EXAMINATION, DR. SERBU AGREED WITH CLAIMANT'S CONTENTIONS THAT HE COULD NOT NOW DO HEAVY DIESEL MECHANIC WORK, HOWEVER, DR. SERBU FELT CLAIMANT WAS DEFINITELY EMPLOYABLE BUT LACKED MOTIVATION.

THE REFEREE FOUND THAT THE CLAIMANT'S CONDITION WAS NOT SO SEVERE THAT IT COULD BE SAID THAT, REGARDLESS OF MOTIVATION, CLAIMANT WAS NOT LIKELY TO BE ABLE TO ENGAGE IN A GAINFUL AND SUITABLE OCCUPATION. THE BURDEN OF PROVING ODD-LOT STATUS RESTS UPON THE CLAIMANT - NEITHER DR. BAKER NOR DR. SERBU CONSIDERED CLAIMANT TOTALLY DISABLED. DR. SERBU FELT CLAIMANT WAS DEFINITELY EMPLOYABLE AND DR. BAKER FELT THAT CLAIMANT WOULD BE ABLE TO HANDLE LIGHT WORK.

THE REFEREE CONCLUDED THAT THE DEGREE OF OBVIOUS PHYSICAL IMPAIRMENT COUPLED WITH THE OTHER RELEVANT FACTORS SUCH AS AGE, INTELLIGENCE, EDUCATION, TRAINABILITY AND GENERAL SUITABILITY TO THE EXISTING JOB MARKET, DO NOT PLACE CLAIMANT PRIMA FACIE IN THE ODD-LOT CATEGORY, THEREFORE, IT WAS NECESSARY FOR HIM TO OFFER EVIDENCE THAT HE ACTIVELY SOUGHT WORK.

THE REFEREE FURTHER CONCLUDED THAT CLAIMANT FAILED TO DO THIS - HOWEVER, THE REFEREE, CITING CASES INVOLVING SIMILAR CIRCUMSTANCES AND THE AWARDS MADE IN SUCH CASES FOR THE WORKMAN'S DISABILITY, FOUND THAT THE 20 PER CENT UNSCHEDULED LOW BACK DISABILITY AWARD DID NOT ADEQUATELY COMPENSATE CLAIMANT FOR HIS LOSS OF EARNING CAPACITY AND HE INCREASED THE AWARD TO 60 PER CENT.

THE BOARD, ON DE NOVO REVIEW, AGREES WITH THE REFEREE THAT CLAIMANT'S APPARENT LACK OF MOTIVATION TO RETURN TO WORK AND HIS FAILURE TO OFFER EVIDENCE THAT HE HAS ACTIVELY SOUGHT WORK PRECLUDES HIM FROM ESTABLISHING PRIMA FACIE THAT HE FALLS WITHIN THE ODD-LOT CATEGORY AND, THEREFORE, CLAIMANT CANNOT BE CONSIDERED AS PERMANENT AND TOTALLY DISABLED UNDER THE ODD-LOT DOCTRINE.

THE BOARD FURTHER FINDS THAT, ALTHOUGH THE PROGNOSIS FOR CLAIMANT'S RETURN TO GAINFUL EMPLOYMENT IN LIGHT TYPE WORK IS GOOD, NEVERTHELESS, A LARGE SEGMENT OF THE LABOR MARKET IS NOW FORECLOSED TO CLAIMANT AND HE HAS SUFFERED A SUBSTANTIAL LOSS OF HIS EARNING CAPACITY AS A RESULT THEREOF.

THE BOARD CONCURS IN THE FINDINGS AND CONCLUSIONS OF THE REFEREE AND AFFIRMS HIS ORDER.

ORDER

THE ORDER OF THE REFEREE DATED MAY 9, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 300 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 74-2353 JANUARY 7, 1976

MILTON BUGGE, CLAIMANT

CARLOTTA SORENSEN, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

THE STATE ACCIDENT INSURANCE FUND HAS REQUESTED BOARD REVIEW OF A REFEREE'S ORDER FINDING - (1) CLAIMANT WAS SUFFERING AN OCCUPATIONAL DISEASE AND - (2) THAT HIS CLAIM FOR BENEFITS HAD BEEN TIMELY FILED.

CLAIMANT IS A 56 YEAR OLD MAN WHO, IN THE COURSE OF HIS EMPLOYMENT AT THE OREGON STATE PENITENTIARY OVER THE PAST 21 YEARS WAS CONSTANTLY EXPOSED TO WOOD DUST - FIRST WHILE WORKING AS A VOCATIONAL INSTRUCTOR AND LATER AS SUPERINTENDENT OF THE FURNITURE FACTORY.

OVER THE YEARS CLAIMANT GRADUALLY DEVELOPED AN ALLERGIC REACTION IN HIS LUNGS TO, AMONG OTHER THINGS, WOOD DUST. AS A RESULT HE EVENTUALLY GAVE UP HOBBY WOODWORKING BUT CONTINUED

WORKING AT THE PENITENTIARY, ALL THE WHILE GETTING GRADUALLY WORSE AND WORSE.

CLAIMANT HAD BEEN AWARE OF HIS ALLERGIC CONDITION FROM 1961 AND THAT WOOD DUST WAS CONNECTED WITH ITS CAUSE - BUT NOT UNTIL MARCH 26, 1974 WAS IT SUGGESTED THAT HE REMOVE HIMSELF FROM THE WOOD DUST EXPOSURE AT WORK. AT NO TIME DID ANY OF HIS PHYSICIANS TELL HIM, SIMPLY AND DIRECTLY, THAT HE WAS SUFFERING FROM AN OCCUPATIONAL DISEASE. CLAIMANT FILED A CLAIM FOR WORKMEN'S COMPENSATION BENEFITS ON JUNE 6, 1974 AND MANAGED TO KEEP WORKING UNTIL AUGUST 30, 1974 BEFORE PERMANENTLY QUITTING WORK. AFTER QUITTING, HIS CONDITION IMPROVED.

THE FUND DENIED THE CLAIM ON THE GROUNDS THAT CLAIMANT'S CONDITION DID NOT ARISE OUT OF AND IN THE SCOPE OF EMPLOYMENT AND THAT THE CLAIM WAS VOID BECAUSE IT WAS NOT FILED WITHIN 180 DAYS FROM THE TIME CLAIMANT WAS DISABLED OR INFORMED BY A PHYSICIAN THAT HE WAS SUFFERING AN OCCUPATIONAL DISEASE.

ORS 656.802 DEFINES AN OCCUPATIONAL DISEASE AS -

> 'ANY DISEASE OR INFECTION WHICH ARISES OUT OF AND IN THE SCOPE OF THE EMPLOYMENT, AND TO WHICH AN EMPLOYEE IS NOT ORDINARILY SUBJECTED OR EXPOSED OTHER THAN DURING A PERIOD OF REGULAR ACTUAL EMPLOYMENT THEREIN.'

THE STATE ACCIDENT INSURANCE FUND CONTENDS THAT CLAIMANT WAS ORDINARILY EXPOSED TO WOOD DUST AT TIMES 'OTHER THAN DURING A PERIOD OF REGULAR ACTUAL EMPLOYMENT' AT THE PENITENTIARY AND THEREFORE, BY DEFINITION, CLAIMANT HAS NOT SUFFERED AN 'OCCUPATIONAL' DISEASE.

IT APPEARS FROM THE EVIDENCE THAT CLAIMANT'S PRIMARY EXPOSURE - THE (UNDERSCORED) MATERIAL FACTOR IN CAUSING HIS ALLERGIC REACTION - WAS CONTRIBUTED BY HIS EMPLOYMENT.

THE MEDICAL BOARD OF REVIEW'S FACTUAL DECISION IN BEAUDRY V. WINCHESTER PLYWOOD (UNDERSCORED), 255 OR 504 (1970) DOES NOT DETRACT IN ANY WAY FROM THE COURT'S RULING THAT THE DEFINITIONAL LIMITATION MAY BE MET IF A FAMILIAR HARMFUL ELEMENT IS PRESENT TO AN UNUSUAL DEGREE.

WE CONCLUDE THE CLAIMANT IS SUFFERING AN OCCUPATIONAL DISEASE AS DEFINED BY ORS 656.802.

THE NEXT QUESTION IS WHETHER CLAIMANT'S CLAIM FOR BENEFITS WAS TIMELY.

ORS 656.807 PROVIDES THAT A CLAIM FOR OCCUPATIONAL DISEASE BENEFITS IS VOID UNLESS IT IS FILED '... WITHIN 180 DAYS FROM THE DATE THE CLAIMANT BECOMES DISABLED OR IS INFORMED BY A PHYSICIAN THAT HE IS SUFFERING FROM AN OCCUPATIONAL DISEASE, WHICHEVER IS LATER.'

THE FUND CONTENDS THAT CLAIMANT HAS KNOWN FOR YEARS THAT HIS WORK WAS AGGRAVATING HIS CONDITION AND THAT HE WAS 'DISABLED' AT LEAST EIGHT YEARS BEFORE HE LEFT HIS EMPLOYMENT.

WE HAVE PREVIOUSLY RULED IN ELIZABETH SIMMONS, WCB 73-1070 (UNDERSCORED) (MAY 22, 1974), THAT 'DISABILITY' OCCURS WHEN MEDICAL SERVICES ARE REQUIRED FOR THE CONDITION RATHER THAN RELATING DISABILITY TO INABILITY TO WORK. REGARDLESS OF THE VALIDITY OF THAT RULING, IT APPEARS CLAIMANT'S CLAIM WAS TIMELY FILED IN THIS INSTANCE.

CLAIMANT WAS NEVER INFORMED SPECIFICALLY THAT HE HAD AN 'OCCUPATIONAL DISEASE'. IT WAS ONLY MADE CLEAR TO HIM FOR THE FIRST TIME ON MARCH 26, 1974 THAT HIS WORK EXPOSURE WAS THE MATERIAL FACTOR WHICH WAS CAUSING HIS LUNG PROBLEM.

WE THINK UNDER TEMPLETON V. POPE AND TALBOT, INC. (UNDERSCORED), 7 OR APP 119 (1971), THAT THE 180 DAY PERIOD BEGAN RUNNING ON MARCH 26, 1974. SINCE CLAIMANT FILED HIS CLAIM ON JUNE 6, 1974, THE CLAIM WAS TIMELY FILED AND THE REFEREE'S ORDER SHOULD THEREFORE BE AFFIRMED IN ITS ENTIRETY.

BECAUSE THE CLAIMANT RELIED ON THE BRIEFS FILED WITH THE REFEREE FOR HIS ARGUMENT ON BOARD REVIEW, AN ATTORNEY'S FEE OF ONLY 100 DOLLARS, PAYABLE TO CLAIMANT'S ATTORNEY BY THE STATE ACCIDENT INSURANCE FUND, SHOULD BE AWARDED.

IT IS SO ORDERED.

WCB CASE NO. 74-1690 JANUARY 7, 1976

JAMES KLEATSCH, CLAIMANT

COONS, COLE AND ANDERSON,
CLAIMANT'S ATTYS.
COSGRAVE AND KESTER, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND SLOAN.

CLAIMANT HAS REQUESTED BOARD REVIEW OF A REFEREE'S ORDER WHICH FOUND CLAIMANT HAD SUFFERED NEITHER TEMPORARY OR PERMANENT DISABILITY FROM THE INJURY IN QUESTION.

ON REVIEW, CLAIMANT SEEKS AN AWARD OF TEMPORARY PARTIAL DISABILITY, PENALTIES AND AN ATTORNEY'S FEE PLUS A REFERRAL OF THE CLAIM TO THE BOARD'S EVALUATION DIVISION FOR ASSESSMENT OF THE EXTENT OF PERMANENT DISABILITY. HE OBJECTS TO THE REFEREE'S FINDING THAT NO PERMANENT DISABILITY EXISTS SINCE THE PARTIES SPECIFICALLY AGREED THAT QUESTION WAS NOT AN ISSUE AT THE HEARING AND AS A CONSEQUENCE NO SIGNIFICANT EVIDENCE WAS PRESENTED ON THE SUBJECT. THE EMPLOYER CONCURS WITH THE CLAIMANT'S STATEMENT THAT EXTENT OF PERMANENT DISABILITY WAS NOT AN ISSUE FOR THE REFEREE TO DECIDE.

THE ESSENTIAL FACTS ARE THESE. CLAIMANT, A THEN 35 YEAR OLD SERVICE STATION MANAGER, SUFFERED AN OCCUPATIONAL INJURY ON MAY 7, 1973 WHEN HE WAS RENDERED MOMENTARILY UNCONSCIOUS BY A BLOW TO THE HEAD DURING A ROBBERY OF THE SERVICE STATION.

EXAMINATION AT MERCY HOSPITAL REVEALED ONLY A CONTUSION OF THE SKULL. CLAIMANT WAS ADVISED TO REST A DAY AND THEN RETURN TO WORK.

WHEN HE RETURNED TO THE JOB HE WAS SUMMARILY FIRED, NOT BECAUSE OF ANY PHYSICAL INABILITY TO DO THE WORK, BUT BECAUSE OF THE EMPLOYER'S POLICY OF FIRING ANY STATION MANAGER WHOSE STATION HAD BEEN ROBBED. CLAIMANT EVENTUALLY FOUND OTHER WORK BUT COMPLAINS OF HEADACHES THAT HAVE CAUSED HIM TO LOSE WORK. CLAIMANT SOUGHT TIME LOSS COMPENSATION FROM THE INSURER ON THIS ACCOUNT BUT NONE WAS PAID. THE CLAIM WAS NEVER SUBMITTED TO THE EVALUATION DIVISION OF THE WORKMEN'S COMPENSATION BOARD.

AFTER THE HEARING, THE REFEREE FOUND NO TIME LOSS OR PERMANENT DISABILITY HAD RESULTED FROM THE INJURY AND ISSUED HIS OPINION AND ORDER TO THAT EFFECT, INTENDING IT TO SERVE AS A DETERMINATION ORDER WITHIN THE MEANING OF ORS 656.268.

WE AGREE WITH THE REFEREE'S CONCLUSION THAT CLAIMANT IS NOT ENTITLED TO TEMPORARY TOTAL OR TEMPORARY PARTIAL DISABILITY BECAUSE OF HIS ABILITY TO RETURN TO HIS REGULAR EMPLOYMENT ON MAY 9, 1973. THEREFORE THAT PART OF HIS ORDER SHOULD BE AFFIRMED.

WHETHER THE HEADACHES OF WHICH CLAIMANT NOW COMPLAINS CONSTITUTE A PERMANENT DISABLING CONDITION SHOULD BE DECIDED IN THE FIRST INSTANCE BY THE BOARD'S EVALUATION DIVISION. NO ONE INTENDED THE REFEREE'S ORDER IN QUESTION TO BE A FIRST DETERMINATION ORDER.

THE MATTER SHOULD THEREFORE BE REFERRED TO THE EVALUATION DIVISION FOR ENTRY OF A DETERMINATION ORDER CONCERNING CLAIMANT'S PERMANENT DISABILITY, IF ANY.

SINCE CLAIMANT'S ATTORNEY HAS NOT YET SECURED ANY COMPENSATION FOR CLAIMANT, NO ATTORNEY'S FEE HAS ACCRUED. HOWEVER, HE HAS BEEN INSTRUMENTAL IN GETTING THE MATTER REFERRED TO EVALUATION DIVISION. IF THE DETERMINATION ORDER FINDS CLAIMANT PERMANENT PARTIALLY DISABLED, CLAIMANT'S ATTORNEY SHOULD BE GRANTED 25 PER CENT OF THE PERMANENT DISABILITY COMPENSATION AWARDED, TO A MAXIMUM OF 2,000 DOLLARS AS A REASONABLE ATTORNEY'S FEE.

ORDER

THAT PART OF THE REFEREE'S ORDER FINDING CLAIMANT HAS NOT SUFFERED ANY COMPENSABLE TIME LOSS AS A RESULT OF HIS INJURY OF MAY 7, 1973, IS HEREBY AFFIRMED.

THAT PART OF THE REFEREE'S ORDER FINDING CLAIMANT MEDICALLY STATIONARY WITHOUT PERMANENT DISABILITY AND CLOSING HIS CLAIM PURSUANT TO ORS 656.268(2) IS HEREBY REVERSED AND THE MATTER IS HEREBY REFERRED TO THE EVALUATION DIVISION OF THE WORKMEN'S COMPENSATION BOARD FOR DETERMINATION OF THESE ISSUES.

WCB CASE NO. 74-4192 JANUARY 7, 1976

WILLIAM FERDIG, CLAIMANT

A.C. ROLL, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH REMANDED CLAIMANT'S CLAIM TO IT FOR ACCEPTANCE AND PAYMENT OF COMPENSATION FROM AUGUST 17, 1973 UNTIL TERMINATION IS AUTHORIZED PURSUANT TO ORS 656.268.

CLAIMANT SUSTAINED A COMPENSABLE INDUSTRIAL INJURY ON AUGUST 17, 1973. FOLLOWING THIS INJURY, CLAIMANT SUSTAINED SUBSEQUENT INTERVENING INJURIES, HOWEVER, THE REFEREE AT HEARING, CONCLUDED THAT CLAIMANT'S PRESENT PHYSICAL CONDITION WAS COMPENSABLE AS A DIRECT AND NATURAL RESULT OF THE INDUSTRIAL ACCIDENT OF AUGUST 17, 1973.

THE BOARD, ON DE NOVO REVIEW, CONCURS WITH THE REFEREE'S FINDINGS AND AFFIRMS AND ADOPTS HIS ORDER.

ORDER

THE ORDER OF THE REFEREE DATED APRIL 22, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 300 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 74-2937 JANUARY 8, 1976

GERALD D. HEDEN, CLAIMANT

GALE K. POWELL, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

THE CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED JUNE 27, 1975 WHEREBY CLAIMANT WAS AWARDED TEMPORARY TOTAL DISABILITY FROM NOVEMBER 4, 1973 THROUGH MAY 30, 1974 AND NO PERMANENT DISABILITY.

CLAIMANT SUFFERED A COMPENSABLE VITREOUS HEMORRHAGE ON NOVEMBER 4, 1973 WHILE LIFTING ROCKS. CLAIMANT WAS TREATED BY DR. DELP, AN OPHTHALMOLOGIST, WHO FELT CLAIMANT'S DIABETIC CONDITION AND HIS HYPERTENSION WHEN COMBINED WITH THE HEAVY LIFTING CAUSED THE BLEEDING.

DR. DELP, WHO CONTINUED TO TREAT CLAIMANT THROUGH MAY 6, 1974, TESTIFIED THAT BECAUSE OF CLAIMANT'S CONDITION HE SHOULD NOT DO HEAVY WORK BECAUSE IT WOULD AGGRAVATE HIS BASIC CONDITION - HOWEVER, THE DOCTOR INDICATED THAT THE INJURY DID NOT AGGRAVATE THE CLAIMANT'S DIABETIC CONDITION AND HE SUGGESTED A FURTHER EXAMINATION AND POSSIBLE TREATMENT. HE FELT CLAIMANT WAS MEDICALLY STATIONARY AS OF MAY 6, 1974 INSOFAR AS THE CONDITION CAUSED BY THE INDUSTRIAL ACCIDENT WAS CONCERNED.

CLAIMANT WAS THEN SEEN BY DR. MEYER, ANOTHER OPHTHALMOLOGIST, WHO INDICATED BY HIS REPORT OF JANUARY 30, 1974 THAT CLAIMANT'S TREATMENT WAS NOT CURATIVE BUT WAS PREVENTIVE AND THAT THE RETINA COULD FORM NEW VESSELS IN THE FUTURE. HE ALSO FELT THAT HEAVY LIFTING, STRAINING OR INCREASE IN BLOOD PRESSURE COULD CAUSE THE BLEEDING.

CLAIMANT CONTENDS THAT HE WAS NOT MEDICALLY STATIONARY AS OF MAY 30, 1974 OR, IF HE WAS MEDICALLY STATIONARY AT THAT TIME, THAT HE IS ENTITLED TO AN AWARD OF PERMANENT DISABILITY.

THE REFEREE FOUND THAT THE TOTAL MEDICAL EVIDENCE, ESPECIALLY THAT OF DR. MEYER, INDICATED THAT CLAIMANT WAS MEDICALLY STATIONARY IN MAY 1974. HE CONCLUDED CLAIMANT WAS NOT ENTITLED TO ANY ADDITIONAL TEMPORARY DISABILITY.

THE REFEREE ALSO FOUND THAT, BASED ON DR. MEYER'S REPORTS, THE LIFTING INCIDENT DID NOT HAVE ANYTHING TO DO WITH CLAIMANT'S DIABETIC PROCESS BUT ONLY PRODUCED THE VISUAL BLEEDING AND WHEN DR. MEYER EXAMINED CLAIMANT ON JANUARY 27, 1975, CLAIMANT NO

LONGER HAD ANY EYE PROBLEMS, NOR WAS THERE ANY EVIDENCE OF BLEEDING.

THE REFEREE CONCLUDED THAT CLAIMANT'S PHYSICAL WORKING LIMITATIONS WERE IMPOSED BY THE UNDERLYING DIABETIC EYE CONDITION NOT BY THE INDUSTRIAL INCIDENT AND, THEREFORE, CLAIMANT WAS NOT ENTITLED TO AN AWARD FOR PERMANENT DISABILITY. THERE WAS NO EVIDENCE THAT CLAIMANT SUFFERED ANY COMPENSABLE LOSS OF VISION BECAUSE OF THE INJURY OF NOVEMBER 4, 1973.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE OPINION AND ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED JULY 7, 1975 IS AFFIRMED.

WCB CASE NO. 74-4168 JANUARY 8, 1976

THE BENEFICIARIES OF
HAROLD M. PADDEN, JR., DECEASED
GALTON AND POPICK, CLAIMANT'S ATTYS.
JONES, LANG, KLEIN, WOLF AND SMITH,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY BENEFICIARIES
CROSS REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

THE CLAIMANT (WIDOW OF THE WORKMAN) REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH GRANTED AN AWARD OF 256 DEGREES FOR 80 PER CENT UNSCHEDULED LOW BACK DISABILITY AFTER FIRST RULING THAT THE DECEASED WORKMAN'S CAUSE OF ACTION SURVIVED HIM.

THE WORKMAN SUSTAINED A COMPENSABLE INJURY ON JUNE 4, 1974 AND BY DETERMINATION ORDER DATED OCTOBER 13, 1974, HE RECEIVED AN AWARD OF 192 DEGREES FOR 60 PER CENT UNSCHEDULED LOW BACK DISABILITY. ON NOVEMBER 18, 1974 THE WORKMAN REQUESTED A HEARING BUT ON JANUARY 28, 1975, HE DIED AS A RESULT OF A CEREBRAL VASCULAR ACCIDENT DUE TO ARTERIOSCLEROSIS, UNRELATED TO HIS INDUSTRIAL INJURY.

THE REFEREE, RELYING UPON ORS 656.218(3), AS AMENDED BY OREGON LAWS 1973, CH 355, SEC 1, CONCLUDED THAT A WORKMAN'S CAUSE OF ACTION IN WORKMEN'S COMPENSATION CASES SURVIVES HIS DEATH, AT LEAST TO A SPECIFIED CLASS OF PERSONS AND THAT THE WORKMAN'S WIDOW FELL WITHIN THIS CLASSIFICATION. THE REFEREE CONCLUDED THAT CLAIMANT HAD A RIGHT TO HAVE THE EXTENT OF HER LATE HUSBAND'S DISABILITY EVALUATED AND DETERMINED.

WITH RESPECT TO THE EXTENT OF THE WORKMAN'S DISABILITY PRIOR TO HIS DEATH, THE REFEREE FOUND THAT THE WORKMAN COULD NOT HAVE BEEN CONSIDERED AS PERMANENTLY AND TOTALLY DISABLED AS THE CLAIMANT CONTENDED - HOWEVER, HE DID FIND THAT THE LOSS OF WAGE EARNING CAPACITY WHICH CLAIMANT HAD SUFFERED PRIOR TO HIS DEMISE WAS GREATER THAN THAT FOR WHICH HE HAD BEEN AWARDED.

THE REFEREE CONCLUDED THAT ALTHOUGH THE WORKMAN HAD MADE A DECISION TO RETIRE BECAUSE OF THE BACK PAIN, THE EVIDENCE INDICATED THAT PRIOR TO THE INDUSTRIAL INJURY OF JUNE 4, 1974, CLAIMANT HAD BEEN ABLE TO DO HEAVY WORK INVOLVING LIFTING AND BENDING

BUT THAT SUBSEQUENT TO THAT INJURY HE WAS NO LONGER ABLE TO TOLERATE SUCH ACTIVITY. HE FURTHER CONCLUDED THAT TAKING INTO CONSIDERATION THE WORKMAN'S PHYSICAL DISABILITY, HIS AGE, WHICH WAS APPROXIMATELY 58, HIS WORK BACKGROUND AND EDUCATION, CLAIMANT HAD SUFFERED A LOSS OF WAGE EARNING CAPACITY EQUAL TO 80 PER CENT.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE REFEREE'S OPINION AND ORDER AND ADOPTS THE FINDINGS AND CONCLUSIONS CONTAINED THEREIN AS ITS OWN.

ORDER

THE ORDER OF THE REFEREE DATED MAY 9, 1975 IS AFFIRMED.

WCB CASE NO. 75-1669 JANUARY 8, 1976

JOANN ROHRS, CLAIMANT
BUSS, LEICHNER, LINDSTEDT, BARKER AND BUONO,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

THE CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH DENIED HER CLAIM FOR WORKMEN'S COMPENSATION BENEFITS.

CLAIMANT, A COCKTAIL WAITRESS EMPLOYED AT OLIVER'S, ON DECEMBER 18, 1974, FELL STRIKING THE BACK OF HER HEAD WHILE IN A PARKING LOT WHERE SHE HAD PARKED HER CAR. CLAIMANT HAD PUNCHED OUT ON THE TIME CLOCK AND WAS PREPARING TO DRIVE HOME WHEN THE INCIDENT OCCURRED.

CLAIMANT FILED A CLAIM WHICH WAS DENIED BY THE FUND. THE MATTER WAS SUBMITTED TO THE REFEREE UPON A STIPULATION OF FACTS.

THE REFEREE FOUND THAT NONE OF THE EMPLOYEES OF OLIVER'S WERE REIMBURSED FOR THEIR PARKING FEES, CLAIMANT HAD THE OPTION OF PARKING WHEREVER SHE WISHED DURING HER WORKING HOURS AND THERE WAS NO DESIGNATED AREA WHERE THE EMPLOYEES HAD TO PARK ACCORDING TO COMPANY REGULATIONS.

THE REFEREE CONCLUDED CLAIMANT DID NOT FALL WITHIN THE EXCEPTIONS TO THE 'GOING AND COMING' RULE BECAUSE THE EMPLOYER HAD NO CONTROL OVER WHERE CLAIMANT PARKED HER CAR, NOR DID IT CONTRIBUTE IN ANY WAY TO ANY TYPE OF HAZARD TO WHICH CLAIMANT MIGHT BE EXPOSED AS A RESULT OF PARKING HER CAR IN THE GARAGE. HE CONCLUDED THAT CLAIMANT HAD NOT SUFFERED A COMPENSABLE INJURY, THEREFORE, THE DENIAL OF HER CLAIM WAS PROPER.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED JULY 29, 1975 IS AFFIRMED.

WCB CASE NO. 75-1062 JANUARY 8, 1976

JIMMY H. MORGAN, CLAIMANT

EMMONS, KYLE, KROPP AND KRYGER,
CLAIMANT'S ATTYS.
JAQUA AND WHEATLEY, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF A REFEREE'S ORDER WHICH AFFIRMED A DETERMINATION ORDER ISSUED MARCH 6, 1975 AWARDING CLAIMANT 112 DEGREES FOR 35 PER CENT UNSCHEDULED LOW BACK DISABILITY.

CLAIMANT, A 46 YEAR OLD DIESEL MECHANIC, SUSTAINED A COMPENSABLE INJURY ON FEBRUARY 15, 1974 WHEN HE FELL FROM A CATERPILLAR TRACTOR. DR. PETER J. COOKSON DIAGNOSED ACUTE SCIATIC NERVE PAIN AND PRESCRIBED REST AND PAIN MEDICATION. THE PAIN PERSISTED AND CLAIMANT RECEIVED CHIROPRACTIC TREATMENTS WHICH DID NOT IMPROVE HIS CONDITION.

CLAIMANT SAW DR. THOMAS J. MARTENS, WHO, ON JUNE 18, 1974, PERFORMED A LUMBAR LAMINECTOMY AND DISCOIDECTOMY, BILATERALLY, AT L4-5.

CLAIMANT RETURNED TO WORK ON SEPTEMBER 23, 1974 BUT QUIT ON DECEMBER 18, 1974 BECAUSE OF PAIN AND DISCOMFORT AND ALSO BECAUSE HE WAS BEING SO ADVISED BY HIS DOCTOR. SINCE LEAVING HIS EMPLOYER, CLAIMANT HAS ASSISTED IN LIGHT WORK IN A TAVERN WHICH HE AND HIS WIFE PURCHASED IN JULY 1974.

THE REFEREE FOUND THAT ALTHOUGH CLAIMANT WAS PRECLUDED FROM RETURNING TO HEAVY WORK, HE HAD NOT SOUGHT ANY WORK EXCEPT THE TAVERN WORK, THEREFORE, IT HAD NOT BEEN ESTABLISHED WHAT HE COULD OR COULD NOT DO. WHEN CONTACTED BY A VOCATIONAL REHABILITATION COUNSELOR, CLAIMANT APPARENTLY EXPRESSED LITTLE INTEREST IN RETRAINING TO HER AND HER FILE WAS CLOSED, (EX. A-13).

THE REFEREE CONCLUDED THE AWARD OF 35 PER CENT ADEQUATELY COMPENSATED CLAIMANT FOR HIS LOSS OF EARNING CAPACITY.

THE BOARD, ON DE NOVO REVIEW, CONCURS WITH THE FINDINGS OF THE REFEREE. THE BOARD NOTES THAT CLAIMANT'S DISABILITY WAS EVALUATED FOLLOWING A PERSONAL INTERVIEW WITH CLAIMANT BY THE EVALUATION DIVISION.

ORDER

THE ORDER OF THE REFEREE DATED JULY 15, 1975 IS AFFIRMED.

WCB CASE NO. 74-2173 JANUARY 9, 1976

HARRY W. ROBERTS, CLAIMANT

GALTON AND POPICK, CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE DECEMBER 20, 1974 DENIAL BY THE EMPLOYER OF CLAIMANT'S CLAIM FOR AGGRAVATION OF HIS BACK INJURY OF DECEMBER 29, 1969. CLAIMANT ALSO, IN THE ALTERNATIVE, REQUESTS THE BOARD TO EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 AND AWARD CLAIMANT EITHER A SUBSTANTIAL INCREASE IN PERMANENT PARTIAL DISABILITY OR AWARD PERMANENT TOTAL DISABILITY.

THE HEARINGS BEFORE THE REFEREE INVOLVED TWO SEPARATE AGGRAVATION CLAIMS - (1) A NERVE ENTRAPMENT OPERATION RELATED TO A 1967 HERNIORRHAPHY, IN TURN RELATED TO A COMPENSABLE INJURY SUFFERED ON JULY 14, 1967, AND (2) AN ALLEGED INCREASED LOW BACK DISABILITY RELATED TO A COMPENSABLE INJURY SUFFERED ON DECEMBER 29, 1969.

CLAIMANT'S CLAIM FOR AGGRAVATION OF HIS BACK INJURY, BASED UPON THE REPORT OF DR. CHERRY, WAS DENIED ON DECEMBER 20, 1974. AT THE HEARING ON JANUARY 13, 1975, ONLY THE MERITS OF THE BACK CLAIM WERE LITIGATED AS IT WAS ANTICIPATED THAT THE NERVE ENTRAPMENT OPERATION CLAIM WOULD BE RESOLVED BY A STIPULATION - HOWEVER, THIS WAS NOT ACCOMPLISHED. ON MARCH 4, 1975 THE EMPLOYER AND ITS CARRIER ADMITTED ERROR IN PAST HANDLING OF THE NERVE ENTRAPMENT OPERATION CLAIM AND INDICATED THAT THEY WOULD MAKE FULL RESTITUTION BY ACCEPTING THE CLAIM AND PAYING ALL TEMPORARY TOTAL DISABILITY COMPENSATION TO WHICH CLAIMANT WAS ENTITLED PLUS A 25 PER CENT PENALTY ON SUCH COMPENSATION PAID BETWEEN JULY 1, 1973 AND SEPTEMBER 17, 1973.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON JULY 14, 1967 TO HIS LOW BACK AND TO THE RIGHT INGUINAL AREA WHICH REQUIRED A RIGHT INGUINAL HERNIORRHAPHY ON AUGUST 15, 1967. SINCE THE OPERATION CLAIMANT HAS INTERMITTENTLY COMPLAINED TO THE PHYSICIANS ABOUT PAIN IN THIS AREA. THE CLAIM WAS CLOSED BY DETERMINATION ORDER MAILED OCTOBER 16, 1970 WHICH AWARDED CLAIMANT NO PERMANENT PARTIAL DISABILITY.

ON DECEMBER 29, 1969 CLAIMANT HAD SUFFERED A FURTHER COMPENSABLE INJURY TO HIS LOW BACK WHILE WORKING AS A TRUCK DRIVER AND HE HAS NOT WORKED SINCE THAT DATE. THE BACK EVALUATION CLINIC DIAGNOSED A CHRONIC LUMBAR STRAIN AND PROGRESSING PREEXISTING DEGENERATIVE ARTHRITIS AND OSTEOARTHRITIS IN THE LUMBAR SPINE AND THE SKELETAL SYSTEM WITH MILD PERMANENT DISABILITY AS A RESULT OF THE INDUSTRIAL INJURY. THIS CLAIM WAS CLOSED BY DETERMINATION ORDER MAILED OCTOBER 16, 1970 WHEREBY CLAIMANT WAS AWARDED 64 DEGREES FOR 20 PER CENT UNSCHEDULED LOW BACK DISABILITY PLUS 64 DEGREES FOR PERMANENT LOSS OF WAGE EARNING CAPACITY, A TOTAL OF 128 DEGREES FOR 40 PER CENT UNSCHEDULED DISABILITY.

ON FEBRUARY 21, 1973 DR. GIANELLI ADVISED THE EMPLOYER AND ITS CARRIER THAT MEDICAL CARE MIGHT BE NEEDED FOR CLAIMANT'S GROIN COMPLAINTS - EVENTUALLY IT WAS VERIFIED, THROUGH A NEUROLOGICAL CONSULTATION, THAT AN OPERATION TO FREE ENTRAPPED NERVES

IN THE AREA OF THE HERNIA OPERATION WAS NECESSARY. THE SURGERY WAS DONE ON JULY 31, 1973 BY DR. GIANELLI WHO LATER ADVISED THE CARRIER THAT CLAIMANT WAS PROBABLY ENTITLED TO TEMPORARY TOTAL DISABILITY COMPENSATION FOR A PERIOD OF ABOUT SIX WEEKS AFTER THE SURGERY AND THAT CLAIMANT WAS FREE OF SIGNIFICANT PAIN BY SEPTEMBER 17, 1973 AND WOULD HAVE BEEN ALLOWED TO RESUME WORK THE FOLLOWING DAY. AS STATED EARLIER IN THIS ORDER, THE CARRIER DID AGREE TO PAY TEMPORARY TOTAL DISABILITY COMPENSATION FROM JULY 1, 1973 THROUGH SEPTEMBER 17, 1973. ON FEBRUARY 6, 1975 IT REQUESTED A DETERMINATION OF THE CLAIM. DR. CHERRY HAD EXAMINED CLAIMANT PRIOR TO THIS REQUEST AND, BASED ON HIS EXAMINATION, FILED A REPORT ON DECEMBER 2, 1974 WITH RESPECT TO BOTH THE GROIN CONDITION AND THE BACK CONDITION.

THE REFEREE FOUND THAT CLAIMANT HAD FAILED TO SHOW BY A PREPONDERANCE OF THE EVIDENCE THAT THIS BACK CONDITION HAD BECOME COMPENSABLY AGGRAVATED SINCE HIS CLAIM WAS CLOSED IN 1970. DR. CHERRY FELT THAT THIS CONDITION WAS WORSE, HOWEVER, DR. FITCH, WHO HAD EXAMINED CLAIMANT SEVERAL TIMES IN 1970 AND AGAIN IN 1972, COULD DETECT LITTLE OBJECTIVE EVIDENCE OF ANY WORSENING. DR. ROBINSON, WHO HAD EXAMINED CLAIMANT IN 1970 AND AGAIN ON MAY 13, 1974, FOUND X-RAY EVIDENCE OF GRADUALLY INCREASED OSTEOARTHRITIC LIPPING THROUGHOUT THE LUMBAR SPINE BUT, IN HIS OPINION, THE SUBJECTIVE AND OBJECTIVE CHANGES IN CLAIMANT'S CONDITION WERE BASICALLY DUE TO A PROGRESSION OF THE OSTEOARTHRITIC CONDITION RATHER THAN THE INDUSTRIAL INJURY OF 1969.

THE REFEREE CONCLUDED THAT CLAIMANT HAD FAILED TO PROVE THAT THE DENIAL OF HIS CLAIM FOR AGGRAVATION TO HIS BACK WAS IMPROPER AND IN VIEW OF THAT CONCLUSION THE ISSUE OF AN AWARD OF AN ATTORNEY'S FEE BECAME MOOT.

WITH RESPECT TO THE CLAIM FOR NERVE ENTRAPMENT OPERATION, THE REFEREE FOUND THAT THE FIRST EFFORT MADE ON BEHALF OF CLAIMANT FOR FURTHER CONSIDERATION OF HIS CHRONIC SYMPTOMS WAS ON FEBRUARY 21, 1973, AND THAT THE EVIDENCE DID NOT SHOW THAT THE OPERATION WAS DELAYED BY THE CARRIER'S HANDLING OF THIS MATTER. IT WAS, IN FACT, DELAYED UNTIL THE NEUROLOGICAL CONSULTATION CONFIRMED THE NEED FOR THE SURGERY. THE REFEREE FURTHER FOUND THAT CLAIMANT WAS ALREADY BURDENED WITH HIS SORE BACK AND GROIN SYMPTOMS WHEN HE SAW DR. GIANELLI ON FEBRUARY 21, 1973 AND COULD NOT HAVE WORKED THEN EVEN HAD HE DESIRED TO DO SO. ALSO DR. GIANELLI'S REPORT OF NOVEMBER 6, 1973 WAS SUFFICIENT TO JUSTIFY THE CARRIER'S TERMINATION OF TEMPORARY TOTAL DISABILITY PAYMENTS AS OF SEPTEMBER 17, 1973. THE REFEREE CONCLUDED THAT THE TEMPORARY TOTAL DISABILITY PAYMENTS SHOULD HAVE COMMENCED ON FEBRUARY 21, 1973 RATHER THAN JULY 1, 1973.

THE REFEREE FURTHER FOUND THAT THE FULL AMOUNT OF THE BILL DUE TILLAMOOK COUNTY GENERAL HOSPITAL HAD NOT BEEN PAID NOR HAD CLAIMANT BEEN REIMBURSED FOR CERTAIN TRAVEL EXPENSES AND MEDICINES, OR FOR DR. CHERRY'S REPORT OF DECEMBER 2, 1974. WITH RESPECT TO THE IMPOSITION OF PENALTIES AND AN ATTORNEY'S FEE, THE REFEREE CONCLUDED THAT CLAIMANT WAS ENTITLED TO A REASONABLE ATTORNEY'S FEE PAYABLE BY THE EMPLOYER AND PENALTIES FOR UNREASONABLE RESISTANCE AND DELAY SHOULD BE ASSESSED IN THE AMOUNT OF 25 PER CENT OF THE ADDITIONAL TEMPORARY TOTAL DISABILITY AWARDED BY HIS ORDER, THE AMOUNT OF DR. GIANELLI'S TWO BILLINGS, BOTH OF WHICH WERE PAID LATE, AND THE FULL AMOUNT OF THE BILL FROM THE TILLAMOOK HOSPITAL. THERE WAS NO EVIDENCE THAT THE CARRIER HAD EVER BEEN ADVISED OF THE TRAVEL EXPENSES AND MEDICINES, THEREFORE, ALTHOUGH IT HAD TO REIMBURSE CLAIMANT FOR SUCH EXPENSES AND MEDICINES, NO PENALTY WOULD BE ASSESSED THEREUPON. THE EMPLOYER WAS

REQUESTED TO REIMBURSE MEDICARE FOR THE SUM IT PAID TO THE TILLAMOOK HOSPITAL.

THE BOARD, ON DE NOVO REVIEW, CONCURS IN THE FINDINGS AND CONCLUSIONS SET FORTH IN THE WELL WRITTEN OPINION BY THE REFEREE. THE ASSESSMENT OF PENALTIES AND THE REASONS THEREFOR ARE SPECIFICALLY STATED AND CERTAINLY JUSTIFIED. THE CARRIER HAS HELD INCONSISTENT AND MISLEADING POSITIONS WHICH REQUIRED DETAILED PERSISTENCE ON BEHALF OF CLAIMANT AND CAUSED THE FINAL DISPOSITION OF THE ENTIRE MATTER TO BE DELAYED LONGER THAN NECESSARY.

THE BOARD DECLINES AT THIS TIME TO EXERCISE ITS "OWN MOTION" JURISDICTION PURSUANT TO ORS 656.278.

ORDER

THE ORDER OF THE REFEREE ENTERED MAY 6, 1975, AS AMENDED BY AN ORDER ENTERED MAY 28, 1975, IS AFFIRMED.

WCB CASE NO. 74-2508 JANUARY 9, 1976

LONNIE O. WADE, CLAIMANT

MERTEN AND SALTVEIT, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE DENIAL OF HER CLAIM FOR WORKMEN'S COMPENSATION BENEFITS.

CLAIMANT, WHO WAS EMPLOYED BY COAST JANITORIAL SERVICE, ALLEGES THAT WHILE SHE WAS CLEANING THE BONNEVILLE ADMINISTRATION BUILDING ON DECEMBER 24, 1973, A SATURDAY AND THE HEAT HAD BEEN TURNED OFF, HER FEET BECAME SO COLD THAT SHE DEVELOPED SYMPTOMS OF FROSTBITE WHICH ULTIMATELY BECAME DISABLING. CLAIMANT LATER SOUGHT MEDICAL ATTENTION AND WAS ADVISED BY THE DOCTOR TO STOP WORK. CLAIMANT SO INFORMED HER SUPERVISOR - SHE ALSO CALLED THE OFFICE AND WAS TOLD THAT SHE COULD BRING IN THE DOCTOR'S SLIP WHEN SHE RETURNED TO WORK. AT THAT TIME CLAIMANT MADE NEITHER A WRITTEN NOR AN ORAL CLAIM FOR WORKMEN'S COMPENSATION BENEFITS BUT SHE DID APPLY FOR AND RECEIVED HEALTH AND ACCIDENT POLICY BENEFITS.

ON JANUARY 7, 1974 AN EXAMINATION AT THE PERMANENTE CLINIC REVEALED SCATTERED TENDER RED PATCHES ON THE SOLES OF HER FEET AND BETWEEN HER TOES, THE EXAMINING PHYSICIAN TOOK A HISTORY FROM CLAIMANT INDICATING SHE HAD HAD TROUBLE WITH COLD TOLERANCE OF HER HANDS AND FEET FOR YEARS. THE PHYSICIAN'S REPORT TO THE PRIVATE CARRIER INDICATED HE THOUGH THE NATURE OF CLAIMANT'S SICKNESS OR INJURY TO BE REYNAUDS DISEASE AND THAT SHE HAD BEEN TREATED BY HIM FROM JANUARY 7 THROUGH MAY 7, 1974.

ON MAY 9, 1974 CLAIMANT FILED A CLAIM FOR WORKMENS' COMPENSATION BENEFITS, CONTENDING THE WORK EXPOSURE TO THE COLD ON DECEMBER 24, 1973 WAS THE CAUSE OF HER PRESENT CONDITION. ON JULY 16, 1974 THE FUND DENIED THE CLAIM ON THE GROUNDS THAT THE DIAGNOSED CONDITION FOR WHICH CLAIMANT WAS BEING TREATED WAS NOT WORK RELATED IN CAUSATION OR IN AGGRAVATION OF A PREEXISTING PATHOLOGY.

ON MAY 29, 1974 CLAIMANT WAS ADMITTED TO THE HOSPITAL AT PERMANENTE WITH A DIAGNOSIS OF POSSIBLE ALLERGIC RESPONSE TO THE MEDICATION WHICH CAUSED PAINFUL BLISTERING IN HER FEET AND FINGERS. SHE WAS SEEN AT THE UNIVERSITY OF OREGON MEDICAL SCHOOL IN THE DERMATOLOGY DEPARTMENT ON DECEMBER 4, 1974. IT WAS DISCOVERED THAT CLAIMANT HAD A LONG HISTORY OF REYNAUD'S PHENOMENON AND THE IMPRESSION, BASED ON THE EXAMINATION, WAS THAT OF VASCULITIS AND REYNAUDS, COMPLICATED BY OTHER PROBLEMS.

THE REFEREE FOUND THAT CLAIMANT HAD FAILED TO MEET HER BURDEN OF PROOF THAT THE WORK CONDITIONS MATERIALLY CONTRIBUTE TO HER FEET PROBLEM. HE FURTHER FOUND THAT CLAIMANT COMPLAINED OF LEG AND FEET PROBLEMS EVEN DURING THE HOT MONTHS OF JULY AND AUGUST AND WORE STOCKINGS TO HELP THIS PROBLEM.

THE REFEREE FURTHER FOUND THAT CLAIMANT WAS INCONSISTENT IN THE HISTORIES SHE RELATED TO THE VARIOUS PHYSICIANS WHO EXAMINED HER - ALSO HER TESTIMONY WITH RESPECT TO THE HOURS SHE WORKED ON DECEMBER 24, 1973 AND THE DURATION SHE WORKED WHILE THE BUILDING WAS UNHEATED WAS NOT SUPPORTED BY THE EVIDENCE. A WITNESS TESTIFIED THAT CLAIMANT HAD SOUGHT MEDICAL ATTENTION PRIOR TO DECEMBER 1973 WITH REGARD TO POOR CIRCULATORY PROBLEMS.

THE REFEREE CONCLUDED THAT THE HISTORIES RELATED TO THE DOCTORS WHO DID THINK THERE WAS SOME RELATIONSHIP BETWEEN THE COLD AND CLAIMANT'S CONDITION WERE SO INACCURATE AND ERRONEOUS AS TO RENDER THEIR OPINIONS UNRELIABLE. HE FURTHER CONCLUDED THAT CLAIMANT HAD HAD CONTINUING CIRCULATORY PROBLEMS WITH HER LEGS AND FEET FOR MANY YEARS - THAT CLAIMANT'S TESTIMONY WAS WHOLLY UNRELIABLE AND THAT HER CLAIM SHOULD BE DENIED. THIS CONCLUSION MADE UNNECESSARY A DETERMINATION OF THE ISSUE OF TIMELINESS OF FILING THE CLAIM.

THE BOARD, ON DE NOVO REVIEW, AGREES WITH THE FINDINGS AND CONCLUSIONS OF THE REFEREE. AFTER THE CLAIMANT HAD REQUESTED A HEARING AND THE REFEREE HAD BEEN DIVESTED OF JURISDICTION, CLAIMANT REQUESTED RECONSIDERATION BASED ON AN ALLEGATION THAT NEW EVIDENCE WAS AVAILABLE. THE REQUEST FOR RECONSIDERATION WAS DENIED BUT THE NEW EVIDENCE WAS CONSIDERED BY THE BOARD TOGETHER WITH THE FULL RECORD UPON REVIEW. THE BOARD CONCLUDES THAT THE NEW EVIDENCE IS NOT SUFFICIENT TO JUSTIFY OVERTURNING THE CONCLUSIONS REACHED BY THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED JULY 9, 1975 IS AFFIRMED.

WCB CASE NO. 74-4412 JANUARY 9, 1976

JOSEPH BOOTH, CLAIMANT

CASH PERRINE, CLAIMANT'S ATTY.
JONES, LANG, KLEIN, WOLF AND SMITH,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS MOORE AND WILSON.

THE CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 64 DEGREES FOR 20 PER CENT UNSCHEDULED MID BACK DISABILITY BUT DISALLOWED HIS CLAIM FOR VISION PROBLEMS.

CLAIMANT IS 40 YEARS OLD AND HAS A SIXTH GRADE EDUCATION - HIS ENTIRE WORK EXPERIENCE HAS BEEN AS A HEAVY MANUAL LABORER ON FARMS, AND IN CONSTRUCTION AND SAWMILL WORK. HE SUFFERED A COMPENSABLE INJURY ON FEBRUARY 13, 1974 WHEN THE TRACTOR HE WAS OPERATING TURNED OVER AND KNOCKED CLAIMANT UNCONSCIOUS FOR A BRIEF PERIOD OF TIME.

CLAIMANT SUSTAINED LACERATIONS OVER HIS LEFT EYEBROW AND A CONTUSION OF THE CHEST. HE RECEIVED CONSERVATIVE OUT PATIENT HOSPITAL CARE FOR RIB FRACTURES AND PULMONARY CONTUSION AND SUBSEQUENTLY WAS HOSPITALIZED WITH PNEUMONIA THOUGHT TO BE SECONDARY TO HIS CHEST INJURY. ON MARCH 29, 1974 DR. GEBHARDT, CLAIMANT'S TREATING PHYSICIAN, RELEASED CLAIMANT TO RETURN TO HIS REGULAR JOB AND INDICATED, AT THAT TIME, THAT CLAIMANT HAD SUFFERED NO PERMANENT IMPAIRMENT.

CLAIMANT WAS SEEN IN MAY OF 1974 BY DR. MACCLOSKEY, STILL COMPLAINING OF BACK PAIN. DR. MACCLOSKEY FELT CLAIMANT WAS CONSIDERABLY OVERWEIGHT - HE ALSO DIAGNOSED A THORACIC COMPRESSION FRACTURE AT T-12. ON JULY 11, 1974, CLAIMANT WAS AGAIN RELEASED TO DO ALL TYPES OF WORK EXCEPT EXTREMELY HEAVY WORK. ON NOVEMBER 11, 1974 DR. MACCLOSKEY REPORTED THE ONLY DISABILITY CLAIMANT HAD FROM THE COMPRESSION FRACTURE WAS MODERATE ACHING AND PAIN WHILE LIFTING HEAVY OBJECTS - HE FELT CLAIMANT WAS IN POOR PHYSICAL CONDITION AND OVERWEIGHT AND THAT THIS AGGRAVATED CLAIMANT'S PROBLEM. THE CLAIM WAS THEN CLOSED WITH AN AWARD OF 10 PER CENT UNSCHEDULED BACK DISABILITY.

ON MAY 8, 1974 CLAIMANT HAD BEEN EXAMINED BY AN OPTOMETRIST AS HE WAS COMPLAINING THAT HIS VISION WAS LESS SHARP THAN PRIOR TO HIS INJURY. THROUGH CORRECTION THE RIGHT EYE VISUAL ACUITY WAS 20-25, HOWEVER, THE LEFT EYE WAS ONLY 20-200 AND CLAIMANT WAS REFERRED TO DR. DELP, AN OPTHALMOLOGIST, WHO DIAGNOSED AN OPTIC ATROPHY OF THE LEFT EYE. HE SAID THAT SUCH ATROPHY HAS BEEN KNOWN TO BE SECONDARY TO A HEAD TRAUMA, HOWEVER IT IS VERY RARE - HE HAD NO WAY OF KNOWING WHETHER THE ATROPHY WAS CAUSED BY THE INDUSTRIAL INJURY.

THE REFEREE FOUND THAT CLAIMANT HAD FAILED TO SHOW THE REQUISITE CAUSAL CONNECTION BETWEEN THE INDUSTRIAL INJURY AND HIS PRESENT VISION PROBLEMS. DR. DELP HAD SAID SUCH A CONDITION HAS BEEN KNOWN TO BE SECONDARY TO TRAUMA BUT IT WAS QUITE RARE. THE OPTOMETRIST RELATED THE ACCIDENT TO CLAIMANT'S VISUAL CONDITION ONLY BECAUSE OF SEQUENCE BUT HE REFERRED IT TO THE OPTHALMOLOGIST FOR AN OPINION - THAT OPINION FAILED TO RELATE THE CONDITION TO THE INDUSTRIAL INJURY.

WITH RESPECT TO CLAIMANT'S UNSCHEDULED DISABILITY, THE REFEREE FOUND THAT CLAIMANT HAS TROUBLE LIFTING ONLY 20 POUNDS WHEREAS PRIOR TO HIS INJURY HE WAS ABLE TO LOAD HAY BALES WEIGHING AS MUCH AS 80 TO 100 POUNDS, THEREFORE, CLAIMANT DOES HAVE A DEFINITE LIFTING LIMITATION AND HE CANNOT RETURN TO HEAVY FARM LABOR BECAUSE OF IT. THERE WAS NO EVIDENCE, HOWEVER, THAT HE COULD NOT OPERATE A TRACTOR OR DO LIGHT OR EVEN MODERATELY HEAVY FARM WORK OR SUCH TYPE WORK AROUND SAWMILLS AND ON CONSTRUCTION JOBS.

THE REFEREE CONCLUDED THAT PRIOR TO HIS INJURY THE ONLY THING OF VALUE CLAIMANT HAD TO OFFER AN EMPLOYER WAS A STRONG BACK - SINCE HIS INJURY, HIS BACK IS NOT AS STRONG, NEVERTHELESS, THERE ARE MANY LABORING TYPE JOBS WHICH HE CAN HANDLE IN HIS PRESENT PHYSICAL CONDITION. THE REFEREE FURTHER FOUND THAT IT WOULD BE UNREALISTIC TO ATTEMPT A RETRAINING PROGRAM FOR CLAIMANT BASED UPON HIS EDUCATION AND WORK BACKGROUND AND, CONSIDERING ALL FACTS,

FOUND THAT HIS LOSS OF EARNING CAPACITY WOULD BE ADEQUATELY COMPENSATED BY AN AWARD OF 20 PER CENT.

THE BOARD, ON DE NOVO REVIEW, CONCURS IN THE FINDINGS AND CONCLUSIONS OF THE REFEREE. THE BOARD NOTES THAT THE REFEREE WAS REQUESTED BY CLAIMANT TO REOPEN THE CLAIM FOR THE PURPOSE OF SUBMITTING ADDITIONAL EVIDENCE - THIS WAS OBJECTED TO BE THE EMPLOYER. INITIALLY, THE REFEREE ISSUED AN ORDER REOPENING THE CLAIM, HOWEVER, ON JULY 28, 1974, HE REINSTATED HIS OPINION AND ORDER ENTERED FEBRUARY 27, 1975. THE TOTALITY OF THE EVIDENCE OFFERED BY CLAIMANT AS A BASIS FOR THE REOPENING DID NOT SHOW A RELATIONSHIP OF THE LEFT EYE PROBLEM TO THE INDUSTRIAL INJURY - THE OPINION EXPRESSED BY DR. SORNSON, WHEN CONSIDERED IN CONJUNCTION WITH THE OPINION EXPRESSED BY DR. DELP, STILL LEFT THE CAUSAL QUESTION IN THE AREA OF CONJECTURE.

THE REQUEST FOR REOPENING WAS BASED SOLELY ON THE ISSUE OF VISUAL DISABILITY, THEREFORE, THE REFEREE CORRECTLY REFUSED TO ALLOW CLAIMANT TO PUT INTO THE RECORD 'EXHIBIT D' WHICH DEALT SOLELY WITH CLAIMANT'S UNSCHEDULED DISABILITY.

THE AUTHORITY OF THE REFEREE TO REOPEN A HEARING FOR THE PURPOSE OF RECEIVING ADDITIONAL EVIDENCE IS DISCRETIONARY. IN THIS CASE THE BOARD FEELS THAT THERE HAS BEEN NO ABUSE OF DISCRETION BY THE REFEREE.

ORDER

THE ORDER OF THE REFEREE ENTERED FEBRUARY 27, 1975 IS AFFIRMED.

WCB CASE NO. 75-159 JANUARY 9, 1976

DONNA SCHULTZ, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS BOARD REVIEW OF AN ORDER OF THE REFEREE WHICH AFFIRMED THE DETERMINATION ORDER MAILED JANUARY 2, 1974 WHEREBY CLAIMANT WAS GRANTED NO ADDITIONAL PERMANENT PARTIAL DISABILITY AND ALSO DIRECTED THE EMPLOYER TO REIMBURSE CLAIMANT THE SUM OF 179.38 DOLLARS FOR TRAVEL EXPENSE.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON MARCH 24, 1972 FOR WHICH SHE FILED A CLAIM. INITIALLY, THE CLAIM WAS CLOSED BY A DETERMINATION ORDER MAILED JUNE 5, 1973 AWARDING CLAIMANT 16 DEGREES FOR 5 PER CENT UNSCHEDULED LOW BACK DISABILITY. THE CLAIM WAS REOPENED PURSUANT TO STIPULATION DATED MAY 13, 1974 AND CLAIMANT RECEIVED ADDITIONAL MEDICAL CARE AND TREATMENT AND TEMPORARY TOTAL DISABILITY COMPENSATION FROM MAY 13, 1974 THROUGH DECEMBER 17, 1974. THE CLAIM WAS AGAIN CLOSED BY A SECOND DETERMINATION ORDER MAILED JANUARY 2, 1974 WHEREBY CLAIMANT WAS NOT AWARDED AN ADDITIONAL PERMANENT PARTIAL DISABILITY.

THE EMPLOYER REFUSED TO REIMBURSE CLAIMANT FOR TRAVEL EXPENSES INCURRED IN OBTAINING MEDICAL CARE AND TREATMENT OF HER COMPENSABLE INJURY AND A HEARING WAS REQUESTED ON BOTH THE ISSUE OF

THE EXTENT OF PERMANENT DISABILITY AND CLAIMANT'S RIGHT TO BE REIMBURSED FOR TRAVEL EXPENSES INCURRED PURSUANT TO ORS 656.245.

CLAIMANT HAS A TENTH GRADE EDUCATION, SHE COMMENCED WORKING AT THE AGE OF 14 - SINCE DROPPING OUT OF SCHOOL CLAIMANT HAS UNDERTAKEN ADDITIONAL TWO YEARS OF EDUCATION THROUGH EVENING COURSES BUT SHE HAS NOT YET OBTAINED A HIGH SCHOOL DIPLOMA. MUCH OF CLAIMANT'S WORK HAS INVOLVED PROLONGED STANDING OR CONTINUAL BENDING, TWISTING AND LIFTING, HOWEVER, SHE HAS ALSO WORKED IN RELATIVELY LIGHT WORK SUCH AS FILE CLERK, SALES CLERK, ASSEMBLING LOCKS AND DOING ASSEMBLY LINE WORK FOR A DRUG COMPANY. HER WORK BACKGROUND IS NOT VERY STABLE.

CLAIMANT'S TREATING PHYSICIAN, DR. CADDY, WAS OF THE OPINION THAT THE INJURY SUFFERED BY CLAIMANT WAS NOT GREAT, THAT SHE DID NOT EXHIBIT MUCH MUSCLE SPASM AND HAD FULL RANGE OF MOTION AT THE LUMBOSACRAL JOINT. HE RELEASED HER TO RETURN TO WORK ON MAY 3, 1972. CLAIMANT CONTINUED TO COMPLAIN ABOUT HER BACK AND SHE, EVENTUALLY, WAS HOSPITALIZED BY DR. CADDY FOR BED REST. ACCORDING TO DR. CADDY AFTER SEVERAL DAYS ALL OF HER PAIN DISAPPEARED AND HE BELIEVED THAT, DESPITE CLAIMANT'S COMPLAINTS THERE WAS NOTHING TO KEEP HER FROM WORKING AND, IN HIS OPINION, CLAIMANT SHOULD BE EXAMINED BY AN ORTHOPEDIC SPECIALIST AS HE WAS UNABLE TO FIND ANY OBJECTIVE SUPPORT FOR CLAIMANT'S COMPLAINTS.

DURING AUGUST 1972 DR. PASQUESI EXAMINED CLAIMANT AND FOUND NOTHING OBJECTIVE EXCEPT A CONGENITAL ANOMALY BUT ON A SUBJECTIVE BASIS FELT CLAIMANT HAD SYMPTOMS CONSISTENT WITH A RIGHT SACROILIAC STRAIN AND HE RECOMMENDED FURTHER TREATMENT.

IN MARCH 1973, DR. CADDY AGAIN REPORTED CLAIMANT WAS AS WELL AS SHE WOULD EVER BE AND DR. PASQUESI REPORTED NO OBJECTIVE FINDINGS EXCEPT MUSCLE SPASM IN THE LUMBOSACRAL AREA AND IN THE RIGHT SACROILIAC JOINT AREA. HE FELT THAT PALLIATIVE TREATMENT RATHER THAN CURATIVE TREATMENT WAS INDICATED AND HE RECOMMENDED CLAIM CLOSURE STATING CLAIMANT WAS ABLE TO DO CERTAIN TYPES OF WORK.

THE BACK EVALUATION CLINIC, TO WHICH CLAIMANT WAS REFERRED, FOUND ZERO LOSS OF FUNCTION.

THE REFEREE CONCLUDED THAT THE PREPONDERANCE OF THE MEDICAL EVIDENCE WAS THAT CLAIMANT WAS MILDLY, IF AT ALL, DISABLED AND THEREFORE THE AWARD OF 16 DEGREES FOR 5 PER CENT UNSCHEDULED LOW BACK DISABILITY WHICH CLAIMANT HAD RECEIVED BY THE DETERMINATION ORDER OF JUNE 5, 1973, ADEQUATELY COMPENSATED HER FOR ANY LOSS OF EARNING CAPACITY.

A SUBSEQUENT HEARING WAS HELD ON THE SOLE ISSUE OF CLAIMANT'S RIGHT TO BE REIMBURSED FOR MEDICAL TRAVEL EXPENSES. THE CARRIER HAD TENDERED CLAIMANT 200 DOLLARS AS REIMBURSEMENT FOR SUCH EXPENSES, HOWEVER, CLAIMANT CLAIMED 819.58 DOLLARS, BASED UPON 87 TWO AND QUARTER MILE TRIPS AT 10 CENTS A MILE FOR A TOTAL OF 19.58 DOLLARS AND 32 TWO HUNDRED AND FIFTY MILE TRIPS AT 10 CENTS A MILE FOR A SUM OF 800 DOLLARS. THE REASON FOR THE SUBSTANTIAL DISCREPANCY IN MILEAGE IS THAT ON OR ABOUT APRIL 18, 1973, CLAIMANT MOVED FROM PORTLAND TO ALSEA, OREGON AND, AFTER MAKING SUCH MOVE, CONTINUED TO DRIVE BACK AND FORTH BETWEEN ALSEA AND PORTLAND EVERY OTHER DAY FOR OFFICE CALLS.

THE REFEREE FOUND THE ONLY REASON CLAIMANT MOVED FROM PORTLAND TO ALSEA WAS BECAUSE SHE PREFERRED TO GET AWAY FROM THE BIG CITY ATMOSPHERE. CLAIMANT TESTIFIED THAT DR. CADDY ADVISED HER SHE COULD NOT GET THE TREATMENT SHE NEEDED IN CORVALLIS -

HOWEVER, DR. CADDY TESTIFIED THAT HE HAD NEVER DISCUSSED THE POSSIBILITY OF TREATMENT IN CORVALLIS WITH CLAIMANT.

THE REFEREE FOUND THAT CLAIMANT COULD HAVE OBTAINED THE SAME TYPE OF MEDICAL CARE AND TREATMENT IN CORVALLIS AS SHE RECEIVED IN PORTLAND AND THAT A REASONABLE PERSON COULD CONCLUDE THAT IT WAS NOT, THEREFORE, REASONABLE TO EXPECT REIMBURSEMENT FOR THE TRIPS BETWEEN ALSEA AND PORTLAND.

HE CONCLUDED THAT CLAIMANT WAS ONLY ENTITLED TO BE REIMBURSED FOR THE 32 TRIPS BASED UPON THE MILEAGE BETWEEN ALSEA AND CORVALLIS WHICH IS 50 MILES ROUND TRIP. THIS AMOUNT PLUS THE 19.58 DOLLARS FOR THE 87 TRIPS CLAIMANT MADE WHILE LIVING IN PORTLAND TOTALLED A SUM OF 179.58 DOLLARS, A SUM LESS THAN THAT TENDERED BY THE CARRIER. HE ORDERED CLAIMANT TO BE REIMBURSED THE SUM OF 179.58 DOLLARS.

THE BOARD, ON DE NOVO REVIEW, FINDS THAT CLAIMANT FAILED TO MEET THE BURDEN OF PROVING THAT SHE HAD NOT BEEN PROPERLY COMPENSATED FOR HER POTENTIAL LOSS OF WAGE EARNING CAPACITY. TO THE CONTRARY, THE MEDICAL EVIDENCE SHOWED SHE HAD NEARLY ZERO INDUSTRIALLY RELATED IMPAIRMENT, SHE HAD A SEDENTARY WORK HISTORY AND WAS NOT LIMITED BY EITHER INTELLIGENCE OR AGE FOR THE POSSIBILITY OF RETRAINING BUT SHE LACKED MOTIVATION AND VOLUNTARILY WAS LIMITING HERSELF TO SPORADIC ATTEMPTS TO FIND SPECIFIC TYPES OF WORK. THE BOARD CONCLUDES THAT THE REFEREE'S ORDER AFFIRMING THE DETERMINATION ORDER OF JANUARY 2, 1974 SHOULD BE AFFIRMED.

THE BOARD FURTHER FINDS THAT CLAIMANT WAS ENTITLED TO REIMBURSEMENT FOR MEDICAL EXPENSES UNDER THE PROVISIONS OF ORS 656.245 BUT ONLY FOR SUCH MEDICAL EXPENSES AS WERE NECESSARILY AND REASONABLY INCURRED. WAIT V. MONTGOMERY WARD, INC. (UNDERSCORED), 10 OR APP 333. FURTHERMORE, CLAIMANT HAS THE BURDEN OF PROOF TO SHOW THE NECESSITY AND REASONABLENESS OF EXTRA EXPENSES ABOVE THAT ORDINARILY INCURRED - IN THIS INSTANCE CLAIMANT FAILED TO MEET THAT BURDEN.

THE BOARD CONCLUDES THAT THE APPLICATION OF THE REASONABLENESS TEST BY THE REFEREE WITH RESPECT TO THE CLAIMED TRAVEL EXPENSES WAS PROPER, THAT HE DID NOT MAKE AN ARBITRARY DECISION BUT HE EVALUATED ALL THE TESTIMONY AND EVIDENCE AND DECIDED THAT THE ROUND TRIPS BETWEEN ALSEA AND PORTLAND WERE UNREASONABLE WHEN ADEQUATE CARE AND TREATMENT COULD HAVE BEEN MADE AVAILABLE TO CLAIMANT IN CORVALLIS, A MUCH SHORTER DISTANCE FROM ALSEA THAN PORTLAND.

THE ORDERS OF THE REFEREE DATED JUNE 12, 1975 AND JULY 28, 1975, ARE BOTH AFFIRMED.

ROY MONTGOMERY, CLAIMANT

JACK, GOODWIN AND URBIGKEIT,
CLAIMANT'S ATTYS.
PHILIP A. MONGRAIN, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH REMANDED TO IT CLAIMANT'S CLAIM FOR THE ACCEPTANCE AND PAYMENT OF BENEFITS AS PROVIDED BY LAW.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON MAY 16, 1974 FOR WHICH HE FILED A CLAIM. THE CLAIM WAS DENIED ON THE GROUND THAT THE INJURY DID NOT APPEAR TO HAVE ARISEN OUT OF AND IN THE COURSE OF EMPLOYMENT AND ALSO ON THE GROUND THAT THE CLAIMANT WAS A SOLE PROPRIETOR AND WAS NOT COVERED UNDER THE TERMS OF HIS INSURANCE POLICY.

CLAIMANT BECAME THE SOLE PROPRIETOR OF MONTGOMERY BROS. TRUCKING TWO YEARS PRIOR TO THE INJURY. CLAIMANT, IN ADDITION TO BEING THE SOLE PROPRIETOR, ALSO, INITIALLY, DROVE ONE OF THE TRUCKS - HE ALSO REPAIRED THE TRUCKS, INCLUDING THE ONE HE DROVE, FOR THE FIRST PHASE OF HIS ENTERPRISE.

THE CARRIER'S SALES AGENT HAD HANDLED ALL THE INSURANCE FOR THE COMPANY FOR WHOM CLAIMANT HAD WORKED PRIOR TO COMMENCING HIS OWN BUSINESS AND, THEREFORE, CLAIMANT TALKED TO HIM SEVERAL TIMES ABOUT TAKING CARE OF INSURANCE ON HIS OWN VENTURE. THERE WAS SOME DISPUTE AS TO WHETHER, DURING THEIR CONVERSATION, REFERENCE WAS MADE BY CLAIMANT ABOUT TRYING TO SAVE AS MUCH MONEY AS POSSIBLE IN SECURING THE NECESSARY WORKMEN'S COMPENSATION COVERAGE. THE EVIDENCE INDICATES THAT THE PREMIUM FOR COVERAGE WOULD BE REDUCED APPROXIMATELY 360 DOLLARS ANNUALLY IF CLAIMANT DID NOT ELECT TO BE COVERED. BOTH CLAIMANT AND HIS WIFE TESTIFIED THAT THEY WERE UNDER THE BELIEF THAT CLAIMANT HAD COVERAGE WHICH INCLUDED HIM AS WELL AS HIS EMPLOYEES, THAT CLAIMANT WAS UNABLE TO ASCERTAIN FROM THE POLICY, NOR WAS HE INFORMED, THAT HE WAS NOT PERSONALLY COVERED.

THE REFEREE FOUND THAT THE CIRCUMSTANCES OF THE MAY 16, 1974 INJURY WERE SUFFICIENT TO SUPPORT THE CONCLUSION THAT THE INJURY AROSE OUT OF AND IN THE COURSE OF CLAIMANT'S EMPLOYMENT - THE MAIN ISSUE BEFORE THE REFEREE THEN WAS WHETHER OR NOT CLAIMANT, AS A SOLE PROPRIETOR, WAS COVERED UNDER THE TERMS OF HIS WORKMEN'S COMPENSATION INSURANCE POLICY.

THE REFEREE FOUND THAT AN UNSIGNED QUESTIONNAIRE MADE OUT BY THE CARRIER INDICATED CLAIMANT WAS THE OWNER AND HAD THE DUTIES OF BEING A MANAGER AND DRIVER - IT INDICATED THAT THE OWNER REJECTED OR ELECTED NOT TO BE SUBJECT TO ANY WORKMEN'S COMPENSATION LAW. THE GUARANTY CONTRACT FURNISHED TO THE COMPLIANCE DIVISION OF THE WORKMEN'S COMPENSATION BOARD RECITED THAT NO NON-SUBJECT WORKMAN HAD ELECTED COVERAGE AND THE ATTACHED SHEET RECITED THAT CLAIMANT DID NOT DESIRE COVERAGE.

THE REFEREE FURTHER FOUND THAT THE POLICY IN QUESTION INCORPORATED WITHIN IT THE WORKMEN'S COMPENSATION ACT OF OREGON, THEREFORE, THE STATUTE REQUIRING A SOLE PROPRIETOR TO TAKE AFFIRMATIVE ACTION TO OBTAIN COVERAGE BY MAKING AN ELECTION TO BECOME ENTITLED

AS A SUBJECT WORKMAN TO THE COMPENSATION BENEFITS WAS A PART OF THE POLICY.

THE REFEREE FURTHER FOUND THAT CLEAR AND SATISFACTORY EVIDENCE WAS NECESSARY TO PROVE THAT THE CONTRACT AS WRITTEN DID NOT CONFORM TO THE ORDER AND INTENTION OF THE PARTIES. HE CONCLUDED THAT THE EVIDENCE PREPONDERATED IN FAVOR OF CLAIMANT BY ACCEPTING CLAIMANT'S TESTIMONY TOGETHER WITH HIS WIFE'S THAT THEY ATTEMPTED TO ORDER FULL COVERAGE AND THAT A READING OF THE POLICY DID NOT INDICATE THAT THE CLAIMANT WAS EXCLUDED. IT DID NOT CONTAIN AN ENDORSEMENT INDICATING THE SOLE PROPRIETOR HAD ELECTED NOT TO BE COVERED.

BASED UPON THE TESTIMONY OF CLAIMANT AND HIS WIFE WITH RESPECT TO THE CONVERSATIONS BETWEEN THEMSELVES AND THE SALES AGENT FOR THE CARRIER, WHICH TESTIMONY THE REFEREE FOUND TO BE MORE ACCEPTABLE ON THE MORE CRITICAL POINTS, THE REFEREE CONCLUDED THAT THE POLICY OF INSURANCE IN EFFECT AT THE TIME OF THE INJURY SHOULD BE REFORMED TO INCLUDE THE COVERAGE OF CLAIMANT AS INTENDED BY THE PARTIES, AND THEREFORE, THE CLAIMANT'S CLAIM SHOULD BE ACCEPTED.

THE BOARD, ON DE NOVO REVIEW, DISAGREES WITH THE OPINION OF THE REFEREE. ORS 656.128 PROVIDES THAT ANY PERSON WHO IS A SOLE PROPRIETOR, OR A MEMBER OF A PARTNERSHIP SUBJECT TO ORS 656.001 TO 656.794 AS AN EMPLOYER, MAY MAKE WRITTEN APPLICATION TO THE STATE ACCIDENT INSURANCE FUND OR AN INSURANCE COMPANY ISSUING GUARANTY CONTRACTS UNDER SUBSECTION (1) OF ORS 656.405 TO BECOME ENTITLED AS A SUBJECT WORKMAN TO THE COMPENSATION BENEFITS THEREOF. IN SHORT, THE PROVISIONS OF THE AFORESAID STATUTE ALLOW A SOLE PROPRIETOR COVERAGE AS A WORKMAN ONLY IF HE ELECTS SUCH COVERAGE (UNDERSCORED) = HE IS AUTOMATICALLY NOT COVERED UNLESS HE MAKES SUCH AN ELECTION. NO ENDORSEMENT OF NON-COVERAGE IS NECESSARY. THE REFEREE HELD, IN EFFECT, THAT THERE WAS COVERAGE UNLESS THERE WAS AN ENDORSEMENT TO THE CONTRARY BY THE EMPLOYER.

THE FACT THAT CLAIMANT, A SOLE PROPRIETOR, ALSO DID SOME DRIVING DOES NOT, IPSO FACTO, MAKE HIM AN EMPLOYE. ONE CANNOT BE HIS OWN EMPLOYE WHETHER HE BE AN INDIVIDUAL EMPLOYER OR A MEMBER OF A PARTNERSHIP. ALLEN V. SIAC (UNDERSCORED), 200 OR 521. THE FACT THAT CLAIMANT DID SOME INCIDENTAL DRIVING DOES NOT BRING HIM WITHIN THE CLASSIFICATION CONTAINED IN THE POLICY WHICH STATES = 'ALL EMPLOYES INCLUDING DRIVERS' BECAUSE CLAIMANT CANNOT BE CONSIDERED AS AN EMPLOYE.

THE BOARD CONCLUDES THAT CLAIMANT, AS A SOLE PROPRIETOR, DID NOT ELECT TO BECOME ENTITLED TO COMPENSATION AS A SUBJECT WORKMAN AND, THEREFORE, MUST BE CONSIDERED ONLY AS A SUBJECT EMPLOYER. AN EMPLOYER ASSUMES CERTAIN RESPONSIBILITIES OF UNDERSTANDING HIS OBLIGATIONS SUCH AS COMPLIANCE WITH MANDATORY COVERAGE PROVISIONS, ETC. HE SHOULD BE KNOWLEDGEABLE OF WHAT CONSTITUES SELF-COVERAGE AND ONLY IF THE CARRIER OR ITS AGENT HAS BEEN GUILTY OF FRAUD OR MISREPRESENTATION IS AN EMPLOYER EXONERATED FROM A VOLUNTARY ACTION. NOWHERE IN THIS RECORD IS THERE ANY EVIDENCE OF FRAUD OR MISREPRESENTATION ON THE PART OF THE CARRIER OR ITS AGENT.

THE BOARD IS PERSUADED THAT THE EVIDENCE INDICATES THAT THE TESTIMONY RECEIVED FROM THE AGENT OF THE CARRIER SHOULD BE GIVEN AS MUCH WEIGHT AS THAT GIVEN THE TESTIMONY RECEIVED FROM THE CLAIMANT AND HIS WIFE. WHILE THERE MAY HAVE BEEN A MISUNDERSTANDING, THE FACT REMAINS THAT AN UNSIGNED QUESTIONNAIRE MADE OUT BY THE CARRIER INDICATED THAT CLAIMANT WAS THE OWNER AND HAD THE DUTIES OF BEING A MANAGER AND DRIVER AND IT FURTHER INDICATED THAT CLAIMANT HAD NOT ELECTED TO BE PROVIDED COVERAGE AS A SUBJECT WORKMAN.

THE ENDORSEMENT ATTACHED WHICH INDICATED THAT CLAIMANT DID NOT DESIRE COVERAGE WAS, AS STIPULATED BY BOTH PARTIES, NOT SIGNED BY CLAIMANT – THIS IS IMMATERIAL AS AN ELECTION NOT TO DESIRE COVERAGE IS NOT NECESSARY. THE REQUIREMENT IS THAT THE EMPLOYER ELECT TO RECEIVE COVERAGE. IN THIS INSTANCE HE DID NOT DO SO AND, THEREFORE, AT THE TIME OF HIS INJURY CLAIMANT WAS NOT COVERED BY THE WORKMEN'S COMPENSATION LAW.

THE BOARD CONCLUDES THAT THE CLAIM WAS PROPERLY DENIED BY THE CARRIER – THAT CLAIMANT, AS A SOLE PROPRIETOR, WAS NOT COVERED UNDER THE TERMS OF HIS WORKMEN'S COMPENSATION INSURANCE POLICY AT THE TIME OF HIS INJURY.

ORDER

THE ORDER OF THE REFEREE DATED JUNE 6, 1975 IS REVERSED.

WCB CASE NO. 74–2998 JANUARY 9, 1976

DONNA VELASQUEZ, CLAIMANT

KISSLING AND KEYS, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 120 DEGREES FOR 37.5 PER CENT UNSCHEDULED LOW BACK DISABILITY CONTENDING THAT SHE IS PERMANENTLY AND TOTALLY DISABLED UNDER THE ODD-LOT DOCTRINE.

CLAIMANT, A 40 YEAR OLD WAITRESS, SUSTAINED AN INDUSTRIAL INJURY TO HER LOW BACK ON AUGUST 18, 1970. SHE RECEIVED A LONG COURSE OF CONSERVATIVE TREATMENT, PRIMARILY FROM DR. NOALL, AN ORTHOPEDIC SURGEON AND HAS ALSO UNDERGONE EXHAUSTIVE TESTING PROCEDURES. CLAIMANT ATTENDED THE PAIN CLINIC AND HAS HAD 12 PERIODS OF HOSPITALIZATION IN THE PAST 4 AND ONE HALF YEARS PRIOR TO THE HEARING. THE DIAGNOSIS HAS ALWAYS BEEN CHRONIC LOW BACK STRAIN WITH MINIMAL OBJECTIVE FINDINGS. CLAIMANT HAS NOT WORKED SINCE SHE WAS INJURED.

CLAIMANT'S FAMILY DOCTOR TESTIFIED THAT CLAIMANT WOULD PROBABLY ALWAYS BE IN PAIN BUT HE KNEW OF NOTHING WHICH COULD BE DONE TO ALLEVIATE THIS PAIN.

CLAIMANT HAS AN EIGHTH GRADE EDUCATION AND HAS A LIMITED POTENTIAL FOR VOCATIONAL RETRAINING, HER WORK EXPERIENCE HAS BEEN BASICALLY THAT OF A WAITRESS AND BARTENDER AND THE MEDICAL EVIDENCE INDICATES THAT SHE CANNOT RETURN TO THAT TYPE OF WORK IN HER PRESENT CONDITION. HER PROSPECTS FOR REEMPLOYMENT ARE POOR AND THE PSYCHOLOGICAL REPORT CONCLUDED THAT, TO A MODERATE DEGREE, THE INJURY HAD INFLUENCED CLAIMANT'S NERVOUS TENSION AND ANXIETY WHICH IS CLAIMANT'S BASIC PROBLEM.

THE REFEREE, BASED UPON THE ABOVE FACTS, CONCLUDED THAT CLAIMANT HAD SUFFERED A SUBSTANTIAL LOSS OF HER EARNING CAPACITY AND INCREASED THE AWARD OF 48 DEGREES FOR 15 PER CENT UNSCHEDULED LOW BACK DISABILITY WHICH CLAIMANT HAD RECEIVED WHICH CLAIMANT HAD RECEIVED WHEN HER CLAIM WAS INITIALLY CLOSED BY A DETERMINATION ORDER MAILED JULY 17, 1974, TO 120 DEGREES.

THE REFEREE ALSO ORDERED THE STATE ACCIDENT INSURANCE FUND TO PAY FOR CLAIMANT'S HOSPITALIZATION AT PORTLAND ADVENTIST HOSPITAL IN MAY 1974, HOWEVER, THIS WAS NOT AN ISSUE ON REVIEW.

THE BOARD, ON DE NOVO REVIEW, CONCURS IN THE FINDINGS AND CONCLUSIONS OF THE REFEREE AND AFFIRMS THEM AS ITS OWN.

ORDER

THE ORDER OF THE REFEREE DATED JUNE 12, 1975 IS AFFIRMED.

WCB CASE NO. 75-319 JANUARY 15, 1976

MILTON E. CARSON, CLAIMANT

DON G. SWINK, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH FOUND THAT THE INCIDENT OF MARCH 3, 1975 WAS NOT A COMPENSABLE AGGRAVATION OF CLAIMANT'S AUGUST 6, 1974 INJURY AND ALSO AFFIRMED THE DETERMINATION ORDER MAILED NOVEMBER 4, 1974 WHICH AWARDED CLAIMANT NO PERMANENT PARTIAL DISABILITY FOR THE AUGUST 6, 1974 INDUSTRIAL INJURY.

CLAIMANT IS A 40 YEAR OLD WELDER WHO HAS HAD BACK PROBLEMS SINCE 1961 WHEN HE STRAINED HIS BACK LIFTING A MILK CAN. IN 1970 CLAIMANT UNDERWENT A POSTERIOR LUMBAR FUSION AT L4-5 AND S1. HE TESTIFIED THAT FROM 1972 UNTIL AUGUST 6, 1974 HE HAD NO LOW BACK SORENESS.

ON AUGUST 6, 1974 CLAIMANT SUFFERED A COMPENSABLE LOW BACK INJURY WHILE LIFTING ONE END OF A 20 FOOT H BEAM. THIS CLAIM WAS CLOSED WITH NO AWARD OF PERMANENT DISABILITY.

ON MARCH 3, 1975, WHILE AT HOME, CLAIMANT WAS BENDING OVER TO PICK UP SOMETHING FROM THE GROUND WHEN HE FELT A PAIN IN HIS BACK. HE HAS HOSPITALIZED AND, ULTIMATELY, DR. CASE PERFORMED A LUMBAR MYELOGRAM AND A SPINAL FUSION AT L4-5.

DR. CASE WAS OF THE OPINION THAT CLAIMANT HAD A PSEUDO-ARTHROSIS OF HIS SPINAL FUSION OF 1970 AND THAT THIS WAS THE CAUSE OF THE INTERMITTENT PERIODS OF BACK PAIN CLAIMANT HAD BEEN HAVING SINCE AUGUST 1974. DR. KERN STATED THAT WHEN HE SAW CLAIMANT ON AUGUST 7, 1974 HE FOUND RATHER SEVERE PARALUMBAR MUSCLE SPASM LOCATED IN THE AREA OF THE L-1 THROUGH L-4. ALTHOUGH THIS AREA WAS SOMEWHAT HIGHER IN THE LUMBAR SPINE, HE FELT IT WAS AN AGGRAVATION OF A PREEXISTING CONDITION.

THE REFEREE FOUND THAT CLAIMANT HAD FAILED TO SUSTAIN THE BURDEN OF PROVING THE RELATIONSHIP BETWEEN HIS BACK PROBLEMS OF MARCH 3, 1975 AND HIS COMPENSABLE INJURY AND LIKEWISE HAD FAILED TO SUSTAIN THE BURDEN OF PROVING A PERMANENT DISABILITY RESULTING FROM HIS AUGUST 7, 1974 COMPENSABLE INJURY.

THE REFEREE CONCLUDED THAT THE DE FACTO DENIAL OF AGGRAVATION WAS PROPER AND THAT THE DETERMINATION ORDER RELATING TO THE AUGUST 6, 1974 INJURY SHOULD BE AFFIRMED.

THE BOARD, ON DE NOVO REVIEW, FEELS THAT THE REFEREE CORRECTLY CONCLUDED THAT CLAIMANT HAD NOT PROVED A RELATIONSHIP BETWEEN HIS MARCH 3, 1975 BACK PROBLEMS AND THE COMPENSABLE INDUSTRIAL INJURY SUFFERED ON AUGUST 6, 1974 - HOWEVER, THE BOARD DOES FEEL THAT THERE IS MEDICAL EVIDENCE SUFFICIENT TO WARRANT REMANDING THIS MATTER FOR A DETERMINATION ON CLAIMANT'S EXTENT OF PERMANENT DISABILITY. THE ORDER OF THE REFEREE AFFIRMED THE DETERMINATION ORDER OF NOVEMBER 4, 1974, WHICH RAISES A PRESUMPTION THAT HE FOUND CLAIMANT WAS NOT ENTITLED TO ANY AWARD FOR PERMANENT DISABILITY, HOWEVER, THERE IS NO DISCUSSION IN THE ORDER WITH RESPECT TO CLAIMANT'S PHYSICAL DISABILITY, HIS PROGNOSIS FOR RETRAINING, THE TYPE OF WORK FOR WHICH CLAIMANT IS PRESENTLY PHYSICALLY CAPABLE OF DOING OR OTHER FACTORS WHICH MUST BE CONSIDERED IN DETERMINING WHETHER OR NOT CLAIMANT HAS SUFFERED A POTENTIAL LOSS OF EARNING CAPACITY, THE SOLE BASIS FOR DETERMINING UNSCHEDULED DISABILITY.

THE BOARD CONCLUDES THE MATTER SHOULD BE REMANDED TO THE HEARINGS DIVISION FOR A HEARING ON THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY RESULTING FROM HIS COMPENSABLE INJURY OF AUGUST 6, 1974.

ORDER

THE ORDER OF THE REFEREE DATED JULY 21, 1975 IS MODIFIED.

THE DETERMINATION ORDER MAILED NOVEMBER 4, 1974 IS NOT, AT THIS TIME, AFFIRMED BUT THE MATTER IS REFERRED TO THE HEARINGS DIVISION FOR A FURTHER HEARING ON THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY RESULTING FROM HIS COMPENSABLE INJURY SUFFERED ON AUGUST 6, 1974.

THE REMAINDER OF THE REFEREE'S ORDER IS AFFIRMED.

WCB CASE NO. 75-427 JANUARY 15, 1976

GEORGE E. CUNNINGHAM, CLAIMANT

EMMONS, KYLE, KROPP AND KRYGER,
CLAIMANT'S ATTYS.
MERLIN MILLER, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT
CROSS REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH DENIED CLAIMANT'S CLAIM FOR A COMPENSABLE LOW BACK INJURY ALLEGEDLY OCCURRING ON FEBRUARY 17, 1973. THE EMPLOYER CROSS REQUESTS BOARD REVIEW OF THAT PORTION OF THE REFEREE'S ORDER WHICH DIRECTED IT TO PAY CLAIMANT TEMPORARY TOTAL DISABILITY COMPENSATION FROM FEBRUARY 7, 1973 TO JUNE 24, 1975, THE DATE OF ITS ORAL DENIAL OF RECORD AT THE HEARING, LESS TIME WORKED, AND TO ALSO PAY A PENALTY OF 10 PER CENT OF THE AFORESAID TEMPORARY TOTAL DISABILITY COMPENSATION AND A REASONABLE ATTORNEY'S FEE TO CLAIMANT'S ATTORNEY.

CLAIMANT CONTENDS HE RECEIVED A COMPENSABLE INJURY TO HIS LOW BACK ON EITHER FEBRUARY 16TH OR 17TH, 1973 WHILE EMPLOYED BY THE DEFENDANT. CLAIMANT TESTIFIED HE REPORTED THE OCCURRENCE THE SAME DAY TO THE SERVICE MANAGER FOR THE DEFENDANT AND TO AN UNNAMED CO-EMPLOYE.

ON FEBRUARY 19, 1973 CLAIMANT CONTACTED DR. FRISCH, CLAIMANT'S FAMILY DOCTOR, WHO REFERRED HIM TO DR. HOPKINS. AFTER EXAMINING CLAIMANT ON MARCH 13, 1973, DR. HOPKINS DIAGNOSED A HERNIATED DISC L4-5, RIGHT. CLAIMANT TOLD DR. HOPKINS THAT APPROXIMATELY SIX WEEKS PRIOR TO THE EXAMINATION HE WAS MOVING A REFRIGERATOR AT HIS HOME, CARRYING IT DOWNSTAIRS, WHEN THE OTHER PARTY HELPING HIM LOST CONTROL OF THE REFRIGERATOR AND CLAIMANT CAUGHT MOST OF THE WEIGHT ON HIS BACK. HE HAD NO IMMEDIATE PAIN BUT NOTICED PAIN APPROXIMATELY ONE AND A HALF WEEKS LATER, AS HE BENT OVER TO PICK UP THE SPROCKET OF A GEAR WHICH WEIGHED APPROXIMATELY 90 POUNDS, AND THAT HE HAS HAD PAIN IN HIS BACK SINCE THAT TIME ALTHOUGH HE CONTINUED TO WORK FOR ANOTHER WEEK.

IN 1973 CLAIMANT, WHILE IN CALIFORNIA, HAD A LAMINECTOMY PERFORMED BY A DR. WESLEY. HE ALSO RECEIVED SURGERY ON HIS RIGHT LEG TO DEADEN SOME OF THE NERVES - THIS SURGERY WAS PERFORMED BY DR. GREWE, A PORTLAND NEUROSURGEON.

SOMETIME BETWEEN FEBRUARY 17, 1973 AND APRIL 16, 1973 CLAIMANT APPLIED FOR NON-WORK CONNECTED BENEFITS THROUGH METROPOLITAN LIFE INSURANCE COMPANY AND AMERICAN GUARANTY LIFE INSURANCE COMPANY. THIS WAS DONE THROUGH THE EMPLOYER'S REPRESENTATIVE WHO HAD THE RESPONSIBILITY FOR PROCESSING BOTH PRIVATE INSURANCE CLAIMS AND WORKMEN'S COMPENSATION CLAIMS. METROPOLITAN PAID CLAIMANT TIME LOSS BENEFITS FROM THE DATE OF HIS INJURY TO JULY 1973 AND ALSO CERTAIN MEDICAL BENEFITS. AMERICAN GUARANTY PAID CERTAIN AMOUNTS OF CLAIMANT'S OUTSTANDING CREDITORS UNDER A CREDIT POLICY.

ON APRIL 16, 1973 CLAIMANT WAS HOSPITALIZED AND SIGNED A PRELIMINARY CLAIM REPORT - THIS REPORT IS NOT A STANDARD FORM 801 BUT IT SET FORTH PARTICULARS RELATING, IN THIS CASE, TO A WORK-CONNECTED ON-THE-JOB ACCIDENTAL INJURY. THIS REPORT WAS RECEIVED BY THE EMPLOYER. ON APRIL 25, 1973 THE SERVICE MANAGER FOR THE EMPLOYER RETURNED THE REPORT TO CLAIMANT AND SUGGESTED HE RECONSIDER BEFORE FILING IT - HOWEVER, NO DENIAL OF THE CLAIM WAS MADE BY THE EMPLOYER UNTIL THE DATE OF THE HEARING. THE EMPLOYER DID NOT PROCESS THE CLAIM NOR DID IT PAY COMPENSATION.

AFTER THE HEARING HAD BEEN CLOSED EXCEPT FOR THE PRESENTATION OF ORAL ARGUMENT, COUNSEL FOR THE EMPLOYER RAISED, FOR THE FIRST TIME, THE ISSUE OF CLAIMANT'S FAILURE TO GIVE TIMELY NOTICE UNDER THE PROVISIONS OF ORS 656.265(1).

THE REFEREE FOUND THAT DEFENDANT DID NOT RAISE THE ISSUE OF FAILURE TO GIVE NOTICE AT THE FIRST HEARING ON A CLAIM FOR COMPENSATION AS PROVIDED BY ORS 656.265, BUT INSTEAD REMAINED MUTE UNTIL BOTH PARTIES HAD RESTED AND ORAL ARGUMENTS WERE TO BE PRESENTED. THE REFEREE CONCLUDED THAT THE EMPLOYER DID NOT TIMELY RAISE THIS ISSUE AND THEREFORE CONSIDERATION OF IT BY THE REFEREE WAS PRECLUDED.

THE REFEREE FOUND THAT CLAIMANT HAD FILED A NOTICE OF A CLAIM ON APRIL 16, 1973 WHICH HAD BEEN RECEIVED BY THE EMPLOYER ALTHOUGH SUCH NOTICE WAS NOT FILED ON AN 801. HE FURTHER FOUND THAT THERE WAS NO DENIAL OF THIS CLAIM BY THE EMPLOYER OR ITS CARRIER ISSUED UNTIL AT THE TIME OF HEARING ON RECORD BEFORE THE REFEREE.

HE CONCLUDED THAT THIS CONSTITUTED AN UNREASONABLE DELAY, REFUSAL AND RESISTANCE TO PAY COMPENSATION AS WELL AS AN UNREASONABLE DELAY IN THE ACCEPTANCE OR DENIAL OF THE CLAIM. HE FURTHER CONCLUDED THAT CLAIMANT WAS ENTITLED TO TEMPORARY TOTAL DISABILITY COMPENSATION FROM THE DATE OF THE NOTICE OF THE CLAIM, APRIL 16, 1973, TO THE DATE OF THE ORAL DENIAL ON RECORD, WHICH WAS JUNE 24,

1975, AND ALSO A PENALTY OF 10 PER CENT ON SAID AMOUNTS, ORS 656.262 (8) AND AN ATTORNEY'S FEE, ORS 656.382(1).

HOWEVER, ON THE MAIN ISSUE OF WHETHER CLAIMANT SUSTAINED A COMPENSABLE INJURY, THE REFEREE FELT THAT CLAIMANT'S CASE, IN A LARGE PART, MUST TURN ON ITS CREDIBILITY AND WAS NOT CONVINCED THAT CLAIMANT WAS A CREDIBLE WITNESS BECAUSE OF HIS ACTUAL COURSE OF CONDUCT FOLLOWING THE INCIDENT OF FEBRUARY 17, 1973 AND UP UNTIL THE TIME HE FILED THE REQUEST FOR HEARING ON JANUARY 9, 1975. THIS CONDUCT WAS SOMEWHAT INCONSISTENT WITH HIS TESTIMONY REGARDING THE COMPENSABLE INJURY.

THE REFEREE FOUND THAT CLAIMANT DELAYED FILING A CLAIM FOR AN INDUSTRIAL (UNDERSCORED) INJURY FOR APPROXIMATELY TWO MONTHS AND THAT PRIOR THERETO HE HAD FILED AND RECEIVED BENEFITS FROM TWO PRIVATE INSURANCE CARRIERS WHO PROVIDED OFF-THE-JOB COVERAGE FOR THE EMPLOYES OF THE EMPLOYER. THE REFEREE FURTHER FOUND THAT EVEN AFTER THE EMPLOYER RETURNED CLAIMANT'S NOTICE OF CLAIM ON APRIL 25, 1973 AND SUGGESTED HE RECONSIDER FILING SUCH APPLICATION, CLAIMANT STILL DID NOTHING UNTIL JANUARY 9, 1975, ONE YEAR AND NINE MONTHS LATER, WHEN HE FINALLY FILED A REQUEST FOR HEARING.

THE REFEREE CONCLUDED THAT ALTHOUGH DR. HOPKINS' REPORT OF JANUARY 25, 1975 APPEARS TO CAUSALLY CONNECT CLAIMANT'S LOW BACK INJURY TO HIS WORK-CONNECTED ACTIVITIES THAT THIS REPORT NECESSARILY RESTS ON THE HISTORY GIVEN TO THE DOCTOR BY THE CLAIMANT WHICH IN TURN RESTS UPON CLAIMANT'S CREDIBILITY - THEREFORE, THE REFEREE COULD NOT GIVE DR. HOPKINS' CONCLUSION ANY WEIGHT.

THE REFEREE FURTHER CONCLUDED THAT CLAIMANT'S LOW BACK INJURY WAS THE RESULT OF HIS NON-WORK CONNECTED ACCIDENT WHICH PRECEDED FEBRUARY 17, 1973 AND THAT THE INCIDENT OF FEBRUARY 17, 1973 DID NOT CAUSE NOR MATERIALLY CONTRIBUTE TO AN AGGRAVATION OF CLAIMANT'S PREEXISTING BACK CONDITION AND THAT CLAIMANT'S BACK CONDITION, THEREFORE, WAS NOT COMPENSABLE. INASMUCH AS CLAIMANT'S BACK CONDITION WAS NOT WORK-CONNECTED, THE EMPLOYER HAS NO RESPONSIBILITY FOR THE PAYMENT OF ANY MEDICAL CARE AND TREATMENT INCURRED BY CLAIMANT.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE AS ITS OWN.

ORDER

THE ORDER OF THE REFEREE DATED JULY 29, 1975, AS AMENDED BY THE ORDER ENTERED AUGUST 8, 1975 IS AFFIRMED.

WCB CASE NO. 74-4454 JANUARY 15, 1976

JEFFREY DULCICH, CLAIMANT

KENNEDY AND KING, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE EMPLOYER'S DENIAL OF CLAIMANT'S CLAIM FOR AGGRAVATION.

CLAIMANT, 17 YEARS OLD AT THE TIME, SUFFERED A COMPENSABLE INJURY TO HIS LUMBAR SPINE ON JULY 9, 1970. HE RECEIVED CONSERVATIVE TREATMENT THEREFOR AND HIS CLAIM WAS CLOSED BY DETERMINATION ORDER MAILED JANUARY 29, 1971 WHEREBY HE WAS AWARDED 32 DEGREES FOR 10 PER CENT UNSCHEDULED LOW BACK DISABILITY.

SINCE HIS INJURY, CLAIMANT FINISHED HIGH SCHOOL WHERE HE PLAYED FOOTBALL AND HE HAS GONE TO VARIOUS COLLEGES. HE HAS WORKED FOR HIS FATHER'S COMPANY WHEN HE WAS NOT IN SCHOOL. IN 1971 HE WAS IN AN AUTOMOBILE ACCIDENT WHICH RESULTED IN A SEVERE HEAD INJURY. LATER HE WAS INVOLVED IN A WATER SKI ACCIDENT. AT THE PRESENT TIME CLAIMANT IS ABLE TO PARTICIPATE IN SOCCER, WATER SKIING AND SNOW SKIING. HE SAYS THESE ACTIVITIES BOTHER HIS BACK, AND HIS ENDURANCE IS CUT DOWN SOMEWHAT BY HIS BACK CONDITION, HOWEVER, HE APPARENTLY IS ABLE TO ENJOY ALL THESE ACTIVITIES.

ON AUGUST 15, 1974, DR. FAGAN, WHO INITIALLY TREATED CLAIMANT IN 1970, ADVISED THE FUND THAT HE FELT CLAIMANT'S CONDITION WAS BECOMING AGGRAVATED AND THAT HIS CLAIM SHOULD BE REOPENED FOR POSSIBLE TREATMENT. ON DECEMBER 4, 1974, DR. FAGAN AGAIN EXPRESSED THIS OPINION STATING = 'I THINK THIS IS A RE-AGGRAVATION OF HIS INITIAL CLAIM AND THE CLAIM SHOULD BE REOPENED.'

THE REFEREE FOUND THAT WHERE THERE WAS UNCONTRADICTED MEDICAL EVIDENCE THAT ONE OF SEVERAL ACCIDENTS TO AN INJURED WORKMAN IS A CONTRIBUTING CAUSE TO AN ULTIMATE NEED FOR SURGERY THE WORKMAN IS ENTITLED TO AGGRAVATION BENEFITS - HOWEVER, IN THIS CASE THE MEDICAL EVIDENCE IS NOT CLEAR EXCEPT TO SHOW THAT CLAIMANT HAS DEFINITE BACK DISABILITY THAT HAS PERSISTED WITH HEAVY ACTIVITY AS WAS PREDICTED BY DR. FAGAN WHEN HE FIRST RECOMMENDED THAT THE CLAIM BE CLOSED ON DECEMBER 29, 1970. THE REFEREE FOUND THAT CLAIMANT HAD PERSISTED IN ENGAGING IN STRENUOUS ACTIVITIES BOTH AT WORK AND IN THE AREA OF SPORTS.

THE REFEREE CONCLUDED THAT CLAIMANT HAD FAILED TO PROVE THAT HE HAS ANY WORSENED CONDITION RESULTING FROM THE ORIGINAL INJURY SAVE, POSSIBLY, OCCASIONAL NEED FOR MEDICAL CARE WHICH IS AVAILABLE TO HIM UNDER THE PROVISIONS OF ORS 656.245. CLAIMANT HAS NOT SHOWN THAT HE HAS LOST ANY TIME FROM WORK AS THE RESULT OF THE ALLEGED AGGRAVATION.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 29, 1975 IS AFFIRMED.

WCB CASE NO. 74-3145 JANUARY 15, 1976

MICHAEL MOSKO, CLAIMANT

BAILEY, DOBLIE AND BRUUN,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE STATE ACCIDENT INSURANCE FUND'S DENIAL OF CLAIMANT'S CLAIM ON THE GROUNDS THAT IT WAS NOT TIMELY FILED AND THAT CLAIMANT HAD BEEN PREJUDICED THEREBY.

CLAIMANT FILED A CLAIM ON APRIL 8, 1974 FOR AN INJURY OF DECEMBER 21, 1972. ON JANUARY 31, 1973 CLAIMANT WAS SEEN AT THE PERMANENTE CLINIC COMPLAINING OF PAIN IN THE RIGHT SHOULDER. HE STATED HE POSSIBLY HAD HURT IT AT WORK ABOUT A MONTH PREVIOUSLY BUT HE WASN'T SURE. THE IMPRESSION, BASED ON THE EXAMINATION, WAS A 'STRAIN BURSITIS.'

ON APRIL 4, 1974 CLAIMANT WAS STILL COMPLAINING OF PAIN IN THE SHOULDER AND BETWEEN THE SHOULDERS, ALSO IN THE BACK OF THE HEAD. THE X-RAYS INDICATED DEGENERATIVE CHANGES AT C5-6 AND AT THE C7 LEVEL AND THE IMPRESSION WAS CERVICAL DISC DEGENERATIVE DISEASE WITHOUT SIGNIFICANT NERVE ROOT COMPRESSION.

ON APRIL 24, 1975 DR. NAG REPORTED THAT CLAIMANT HAD, FOR THE FIRST TIME, ON AUGUST 12, 1974 RELATED TO HIM THAT HIS PROBLEMS HAD STARTED ON DECEMBER 21, 1972 WHILE LIFTING A CABINET AT WORK. DR. NAG'S OPINION WAS THAT CLAIMANT'S SYMPTOMS PROBABLY WERE AGGRAVATED BY THE INJURY BUT HIS MAIN DISEASE WAS A DEGENERATIVE ONE AND NOT RELATED TO ANY SPECIFIC INJURY.

THE REFEREE FOUND THAT CLAIMANT HAD NOT MET HIS BURDEN OF PROOF THAT HE SUSTAINED A COMPENSABLE INJURY ON THE JOB. HE FURTHER FOUND THAT HIS CLAIM HAD NOT BEEN TIMELY MADE AND THAT THE FUND HAD BEEN PREJUDICED BY THE LATE NOTICE. THE EVIDENCE DID NOT PREPONDERATE THAT THE EMPLOYER HAD NOTICE OF KNOWLEDGE OF A DISABLING INJURY FOR WHICH A CLAIM COULD BE FILED AND EVEN THOUGH CLAIMANT SOUGHT MEDICAL ATTENTION, HE WAS UNABLE TO ATTRIBUTE IT TO ANY INDUSTRIAL ACCIDENT AND HIS PRIVATE INSURANCE CARRIER PAID FOR IT.

THE REFEREE CONCLUDED THAT CLAIMANT HAD A DEGENERATIVE DISC CONDITION IN HIS BACK BOTH IN THE CERVICAL AND LUMBAR AREAS WHICH, OVER THE PASSAGE OF YEARS, CLAIMANT HAS CONVINCED HIMSELF WAS JOB RELATED, ALTHOUGH AT THE TIME IT ALLEGEDLY OCCURRED HE WAS UNABLE TO SHOW SUCH RELATIONSHIP WITH ANY DEGREE OF CERTAINTY. IF CLAIMANT HAD TIMELY REPORTED THE INCIDENT, THE FUND WOULD HAVE HAD AN OPPORTUNITY TO INVESTIGATE AND OBTAIN MEDICAL EVIDENCE WITH RELATIONSHIP TO THE ALLEGED INJURY. NOT HAVING THIS OPPORTUNITY, ITS POSITION WAS PREJUDICED.

THE BOARD, ON DE NOVO REVIEW, FEELS THAT THE OPINION OF DR. NAG THAT CLAIMANT'S MAIN DISEASE IS A DEGENERATIVE ONE AND NOT RELATED TO ANY SPECIFIC INJURY MUST BE CONSIDERED AS THE CONTROLLING FACTOR, ALTHOUGH THERE IS SUBSTANTIAL EVIDENCE TO INDICATE THAT THE REFEREE CORRECTLY FOUND THAT CLAIMANT HAD NOT TIMELY FILED HIS CLAIM AND THAT HIS FAILURE TO DO SO DID PREJUDICE THE POSITION OF THE FUND.

ORDER

THE ORDER OF THE REFEREE DATED JULY 8, 1975 IS AFFIRMED.

SAIF CLAIM NO. C 487 JANUARY 15, 1976

JAMES H. PLANCK, CLAIMANT

DEPT. OF JUSTICE, DEFENSE ATTY.
OWN MOTION DETERMINATION

THIS CLAIMANT SUFFERED A COMPENSABLE INJURY TO HIS BACK ON JANUARY 1, 1966 AND WAS GRANTED COMPENSATION EQUAL TO 15 PER CENT LOSS OF AN ARM FOR UNSCHEDULED DISABILITY.

SUBSEQUENTLY, AFTER CLAIMANT'S AGGRAVATION RIGHTS HAD EXPIRED, HE REQUIRED FURTHER MEDICAL CARE AND TREATMENT AND PETITIONED THE BOARD TO REOPEN THE CLAIM UNDER THE OWN MOTION PROVISIONS OF ORS 656.278. BY THE BOARD'S OWN MOTION ORDER ENTERED MAY 15, 1974 THE STATE ACCIDENT INSURANCE FUND WAS REQUIRED TO PAY CERTAIN TEMPORARY TOTAL DISABILITY ASSOCIATED WITH CLAIMANT'S HOSPITALIZATION AND SPINAL SURGERY, AND AN ADDITIONAL 15 PER CENT LOSS OF AN ARM FOR UNSCHEDULED DISABILITY WAS AWARDED TO CLAIMANT.

ON JUNE 13, 1975, THE CLAIMANT RETURNED TO HIS PHYSICIAN WITH RECURRENT SYMPTOMATOLOGY. AFTER REVIEWING THE MEDICAL REPORTS AND CONDUCTING ITS OWN INVESTIGATION, THE STATE ACCIDENT INSURANCE FUND VOLUNTARILY REOPENED CLAIMANT'S CLAIM FOR FURTHER TREATMENT AND PAYMENT OF TIME LOSS COMPENSATION FROM JUNE 17, 1975.

THE TREATING PHYSICIAN'S REPORT DATED DECEMBER 9, 1975 INDICATED CLAIMANT WOULD NOT BE ABLE TO RETURN TO HIS FORMER OCCUPATION. THE EVALUATION DIVISION OF THE BOARD HAS REVIEWED THE ENTIRE CLAIM AND FINDS CLAIMANT IS ENTITLED TO -

(1) ADDITIONAL COMPENSATION FOR TEMPORARY TOTAL DISABILITY FROM JUNE 17, 1975 THROUGH DECEMBER 1975 - AND

(2) ADDITIONAL COMPENSATION FOR PERMANENT PARTIAL DISABILITY EQUAL TO 20 PER CENT LOSS OF AN ARM FOR UNSCHEDULED DISABILITY (38.4 DEGREES) MAKING A TOTAL AWARD OF 50 PER CENT OF THE MAXIMUM ALLOWABLE FOR UNSCHEDULED DISABILITY.

IT IS SO ORDERED.

WCB CASE NO. 75-698 JANUARY 15, 1976

GLADYS M. STOPPLEWORTH, CLAIMANT

ROD KIRKPATRICK, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH GRANTED CLAIMANT AN AWARD OF PERMANENT TOTAL DISABILITY.

CLAIMANT, WHILE WORKING AS A NURSE'S AIDE, SUSTAINED A COMPENSABLE INJURY ON OCTOBER 30, 1972 LIFTING A PATIENT FROM THE BED. CLAIMANT WAS FIRST SEEN BY A CHIROPRACTOR WHO DIAGNOSED AN INTERVERTEBRAL DISC SYNDROME - LATER SHE CAME UNDER THE CARE OF DR. BEGG, AN ORTHOPEDIC PHYSICIAN AND DR. GREWE, A NEUROSURGEON. DURING THE COURSE OF TREATMENT FROM THESE DOCTORS, CLAIMANT

UNDERWENT A LAMINECTOMY L4-5 ON APRIL 3, 1973 - A FACET RHIZOTOMY, BILATERAL, L3-4, L4-5, L5-S1 ON SEPTEMBER 22, 1973 - AND A LUMBAR LAMINECTOMY WITH DECOMPRESSION OF NERVE ROOTS AND REMOVAL NUCLEUS PULPOSUS, PLUS FACET RHIZOTOMY ON JANUARY 18, 1974. SHE ALSO HAD MYELOGRAMS AND SPINAL BLOCKS. THE SURGERIES PROVIDED CLAIMANT WITH SOME RELIEF, HOWEVER, IT WAS NOT PERMANENT. CLAIMANT TESTIFIED SHE HAD BEEN IN ALMOST CONSTANT PAIN SINCE HER INDUSTRIAL INJURY.

CLAIMANT WAS EXAMINED AT THE DISABILITY PREVENTION DIVISION AND ALSO GIVEN A PSYCHOLOGICAL EVALUATION BY DR. PERKINS. ON FEBRUARY 4, 1975 HER CLAIM WAS CLOSED WITH AN AWARD OF 160 DEGREES FOR 50 PER CENT UNSCHEDULED LOW BACK DISABILITY AND 22.5 DEGREES FOR 15 PER CENT LOSS OF THE RIGHT LEG.

CLAIMANT REQUESTED A HEARING CONTENDING THAT SHE CAME WITHIN THE ODD-LOT DOCTRINE BECAUSE SHE WAS UNABLE TO DO ANYTHING ON A SUSTAINED BASIS, OR ON A DAY TO DAY BASIS, AND THEREFORE WAS ENTITLED TO AN AWARD OF PERMANENT TOTAL DISABILITY.

THE REFEREE FOUND THAT ALTHOUGH THE DOCTORS AT THE DISABILITY PREVENTION DIVISION FOUND CLAIMANT HAD GOOD RANGE OF MOTION, DR. GREWE CONTINUED TO FIND PAIN AND TENDERNESS IN 1975 AND, ON VARIOUS OCCASIONS, HAD TO GIVE HER INJECTIONS TO RELIEVE THE PAIN. DR. PERKINS FELT THAT CLAIMANT WAS NOT MOTIVATED TO RETURN TO WORK. THE REFEREE CONCLUDED THAT BECAUSE CLAIMANT WAS UNABLE TO DO MOST OF THE ACTIVITIES SHE DESIRED TO DO INCLUDING KEEPING HER HOUSE IN THE MANNER SHE WAS ABLE TO DO PREVIOUS TO HER INJURY, HER INABILITY TO GO OUT AND SEEK WORK BECAUSE OF THE PAIN, THE UNRELIABILITY OF HER RIGHT LEG AND THE FACT THAT SHE WAS ALMOST CONSTANTLY IN PAIN, CLAIMANT WAS ONLY BEING REALISTIC ABOUT HER PROSPECTS FOR RETURNING TO WORK. THIS IS NOT THE SAME AS LACK OF MOTIVATION.

THE REFEREE FOUND THAT IT WOULD BE HIGHLY IMPRACTICABLE FOR CLAIMANT TO ENGAGE IN ANY TYPE OF TRAINING PROGRAM AS SHE IS UNABLE TO SIT OR STAND VERY LONG OR WALK VERY FAR. ADDITIONALLY, THE PSYCHOLOGICAL FINDINGS INDICATE CLAIMANT WOULD ENCOUNTER DIFFICULTIES IF SHE ATTEMPTED TO ENTER INTO ANY TYPE OF EMPLOYMENT OTHER THAN THE HEAVY LABORING TYPE.

THE REFEREE CONCLUDED THAT CLAIMANT ESTABLISHED A PRIMA FACIE CASE THAT SHE FELL WITHIN THE ODD-LOT DOCTRINE AND THAT THE FUND HAD FAILED TO COME FORWARD WITH ANY EVIDENCE OF ANY GAINFUL AND SUITABLE EMPLOYMENT IN WHICH CLAIMANT COULD BE REGULARLY ENGAGED. ACCORDINGLY, HE CONCLUDED SHE WAS ENTITLED TO AN AWARD OF PERMANENT TOTAL DISABILITY.

THE BOARD, ON DE NOVO REVIEW, CONCURS IN THE FINDINGS AND CONCLUSIONS OF THE REFEREE. THE BOARD CONCLUDES THAT CLAIMANT SHOULD BE CONSIDERED AS PERMANENTLY AND TOTALLY DISABLED FROM THE DATE OF THE REFEREE'S ORDER WHICH WAS JUNE 23, 1975.

ORDER

THE ORDER OF THE REFEREE DATED JUNE 23, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 350 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 75-1434 JANUARY 15, 1976

CHARLES TLUSTY, CLAIMANT

GORDON H. PRICE, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE STATE ACCIDENT INSURANCE FUND'S DENIAL OF CLAIMANT'S CLAIM.

CLAIMANT WAS INJURED ON MARCH 9, 1975 WHEN HE WAS WORKING AS A RESERVE POLICEMAN FOR THE CITY OF MOLALLA. THE FUND MOVED FOR DISMISSAL ON THE GROUNDS OF LACK OF JURISDICTION, I.E., THERE WAS NO SHOWING THAT CLAIMANT WAS A WORKMAN AT THE TIME HE WAS INJURED AND THE BOARD HAD NOT FOLLOWED ITS OWN RULES, HAVING FAILED TO HAVE THE CITY OF MOLALLA DECLARED A SUBJECT NONCOMPLYING EMPLOYER.

THE EVIDENCE INDICATES THAT CLAIMANT HAD WORKED AS A RESERVE PATROLMAN FOR THE CITY OF MOLALLA FOR SOME 20 YEARS AND AS SUCH WAS REQUIRED TO SPEND A MINIMUM OF FIVE HOURS EACH MONTH RIDING WITH A REGULAR CITY PATROLMAN IN ORDER TO QUALIFY AS A SUBSTITUTE PATROLMAN. CLAIMANT HAD NOT BEEN PAID AS A SUBSTITUTE PATROLMAN SINCE SOME TIME IN 1973. HE DID RECEIVE PAY FOR SIX HOURS ON JANUARY 29, 1975 BUT THERE WAS NO EVIDENCE TO SHOW THAT THIS WAS FOR SERVICE AS A SUBSTITUTE PATROLMAN.

THERE WAS UNDISPUTED EVIDENCE THAT THE CITY OF MOLALLA HAD NOT COMPLIED WITH THE PROVISIONS OF ORS 656.031 UNTIL AFTER CLAIMANT HAD BEEN INJURED ON MARCH 9, 1975. THE INJURY OCCURRED WHILE CLAIMANT WAS RIDING WITH A REGULAR PATROLMAN AS A RESERVE DURING THE FIVE HOUR MONTHLY TRAINING PERIOD. SUBSEQUENTLY, THE CITY OF MOLALLA DID COMPLY WITH THE ELECTION PROVIDED BY THE STATUTE.

CLAIMANT CONTENDS HE WAS A WORKMAN AND AS SUCH WAS COVERED BECAUSE HE KEPT HIMSELF QUALIFIED AS A SUBSTITUTE POLICEMAN BUT THE EVIDENCE INDICATES HE WAS NOT PAID AS A SUBSTITUTE POLICEMAN DURING ANY TIME IN 1974 OR 1975.

THE REFEREE CONCLUDED THAT UNDER THE PROVISIONS OF ORS 656.031 (2) CLAIMANT COULD NOT BE CONSIDERED AS A WORKMAN UNTIL THE MUNICIPALITY HAD FILED AN ELECTION TO HAVE HIM CONSIDERED AS A SUBJECT WORKMAN FOR THE PURPOSES OF ORS 656.001 TO 656.794. THE CITY OF MOLALLA HAD NOT FILED THIS ELECTION AT THE TIME OF THE INJURY, THEREFORE, CLAIMANT COULD NOT BE CONSIDERED AS A WORKMAN AND THE DENIAL WAS PROPER.

THE BOARD, ON DE NOVO REVIEW, FINDS THAT THE STATUTE IS WHOLLY UNAMBIGUOUS AND THAT THE CIRCUMSTANCES OF THIS CASE PRECLUDE ANY FINDING OTHER THAN THAT MADE BY THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 4, 1975 IS AFFIRMED.

WCB CASE NO. 75-817 JANUARY 15, 1976

HERBERT FULLER, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
ROGER WARREN, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED JANUARY 20, 1975, AWARDING CLAIMANT 32 DEGREES FOR 10 PER CENT UNSCHEDULED NECK AND LEFT SHOULDER INJURY.

CLAIMANT SUSTAINED A COMPENSABLE INJURY ON NOVEMBER 14, 1973 WHILE SORTING WOOD IN AN EDGER. CLAIMANT WAS SEEN BY DR. KEIZER AND WAS OFF WORK FOR APPROXIMATELY TWO MONTHS. DR. KEIZER'S DIAGNOSIS WAS A MILD CERVICAL SPRAIN AND A MILD SPRAIN OF THE TEMPOROMADIBULAR JOINTS, BILATERALLY. CLAIMANT WAS ALSO SEEN BY DR. SMITH WHO MADE A DIAGNOSIS OF CERVICAL STRAIN WITH PERSISTING DISABILITY.

CLAIMANT WAS RELEASED TO RETURN TO WORK ON JANUARY 14, 1974 AND THEREAFTER THE DETERMINATION ORDER WAS ISSUED.

CLAIMANT WAS TRANSFERRED TO THE POSITION OF STACK-DRIVER UPON HIS RETURN TO WORK AND HE WAS ABLE TO DO THIS WORK WITHOUT ANY DIFFICULTY ALTHOUGH HE ALLEGES NECK FATIGUE, PARTICULARLY FOLLOWING THE WORK DAY.

THE REFEREE FOUND THAT PAIN AND FATIGUE, BY AND OF THEMSELVES, ARE NOT COMPENSABLE UNLESS DISABLING. THERE WAS NO TESTIMONY OFFERED BY CLAIMANT AS TO WHETHER OR NOT HE COULD CONTINUE TO PERFORM THE JOB HE WAS DOING AT THE TIME OF INJURY NOR WAS THERE ANY EVIDENCE THAT CLAIMANT'S EARNING CAPACITY HAD BEEN IMPAIRED IN ANY WAY. THE REFEREE CONCLUDED THERE WAS NO BASIS FOR INCREASING THE AWARD WHICH CLAIMANT HAD RECEIVED BY THE DETERMINATION ORDER MAILED JANUARY 20, 1975.

THE BOARD, ON DE NOVO REVIEW, FINDS THAT THERE IS SOME EVIDENCE IN THE RECORD THAT CLAIMANT'S EARNING CAPACITY HAS BEEN DIMINISHED, ALTHOUGH NOT SUBSTANTIALLY. THE DIMUNITION OF CLAIMANT'S EARNING CAPACITY AS A RESULT OF THE INDUSTRIAL INJURY DOES JUSTIFY THE AWARD OF 10 PER CENT UNSCHEDULED DISABILITY.

ORDER

THE ORDER OF THE REFEREE DATED MAY 23, 1975, AS MODIFIED BY THE COMMENTS MADE BY THE BOARD ON ITS DE NOVO REVIEW, IS AFFIRMED.

WCB CASE NO. 74-3879 JANUARY 15, 1976

DARRELL P. SMITH, CLAIMANT
POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
JONES, LANG, KLEIN, WOLF AND SMITH,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED OCTOBER 17, 1974 WHEREBY CLAIMANT WAS GRANTED 80 DEGREES FOR 25 PER CENT UNSCHEDULED RIGHT SHOULDER DISABILITY.

CLAIMANT SUFFERED A COMPENSABLE INJURY TO HIS RIGHT SHOULDER WHILE LIFTING HEAVY METAL SHIMS ON HIS JOB AS A PILEBUCK ON MARCH 4, 1973. CLAIMANT BROKE A TENDON IN HIS RIGHT SHOULDER FOR WHICH HE HAD CORRECTIVE SURGERY. HE HAS REGAINED NEARLY FULL USE OF HIS RIGHT ARM AND SHOULDER EXCEPT HE CANNOT WORK WITH HIS ARM RAISED OVER THE SHOULDER LEVEL. THIS RESTRICTION PRECLUDES HIM FROM APPLYING FOR PILE DRIVING JOBS AND ALSO RESTRICTS HIS EMPLOYMENT OPPORTUNITIES AS A CARPENTER, A SKILL HE HAD PRIOR TO HIS INJURY.

THE REFEREE FOUND THAT CLAIMANT WAS WELL MOTIVATED, THAT HE HAD AN INTERESTING AND VARIED BACKGROUND. HE HAS A HIGH SCHOOL DIPLOMA, HAS SCHOOLING BEYOND THAT LEVEL IN REAL ESTATE LAW AND SEWAGE TREATMENT AND AT THE PRESENT TIME IS ENROLLED UNDER THE AUSPICES OF THE DIVISION OF VOCATIONAL REHABILITATION IN A PROGRAM STUDYING TO BE A JUNIOR ACCOUNTANT, ALTHOUGH CLAIMANT STATES HE DOES NOT PLAN TO BECOME AN ACCOUNTANT.

THE REFEREE CONCLUDED THAT THE RESTRICTED USE OF CLAIMANT'S RIGHT ARM DID NOT RESULT FROM IMPAIRMENT IN THE ARM, BUT RATHER FROM IMPAIRMENT IN THE SHOULDER WHERE THE DISABILITY TRULY LIES, AND THAT THAT AREA BEING UNSCHEDULED THE DISABILITY HAD TO BE MEASURED BY LOSS OF EARNING CAPACITY. HE FURTHER CONCLUDED THAT, AFTER CONSIDERING CLAIMANT'S AGE, EDUCATION, TRAINING AND GENERAL PHYSICAL AND MENTAL CAPACITY AND ADAPTABILITY, FACTORS WHICH CLAIMANT PASSED WITH HIGH MARKS IN THE OPINION OF THE REFEREE, THE AWARD OF 25 PER CENT ADEQUATELY COMPENSATED CLAIMANT.

THE BOARD, ON DE NOVO REVIEW, DOES NOT FEEL THAT THE RESTRICTION IN CLAIMANT'S RIGHT ARM RESULTS FROM IMPAIRMENT IN THE SHOULDER BUT RATHER THAT IT RESULTS FROM IMPAIRMENT IN THE RIGHT ARM ITSELF AND, THEREFORE, CLAIMANT IS ENTITLED TO A SEPARATE AWARD FOR THIS SCHEDULED DISABILITY, BASED ON LOSS OF FUNCTION.

THE BOARD ALSO FINDS THAT, DESPITE CLAIMANT'S INTERESTING AND VARIED BACKGROUND, THE FACT THAT HE IS UNABLE TO RETURN TO HIS FORMER JOB AS A PILEBUCK AND HAS SEVERE LIMITATIONS ON HIS EMPLOYABILITY AS A CARPENTER, HE HAS SUSTAINED A SUBSTANTIAL LOSS OF EARNING CAPACITY. THE BOARD CONCLUDES THAT CLAIMANT IS ENTITLED TO AN AWARD OF 20 PER CENT SCHEDULED RIGHT ARM DISABILITY AND AN AWARD OF 35 PER CENT FOR HIS UNSCHEDULED RIGHT SHOULDER DISABILITY.

ORDER

THE ORDER OF THE REFEREE DATED JUNE 30, 1975 IS MODIFIED.

CLAIMANT IS GRANTED 38.4 DEGREES OF A MAXIMUM OF 192 DEGREES FOR HIS SCHEDULED RIGHT ARM DISABILITY AND 112 DEGREES OF A MAXIMUM OF 320 DEGREES FOR HIS UNSCHEDULED RIGHT SHOULDER DISABILITY. THESE AWARDS ARE IN LIEU OF AND NOT IN ADDITION TO THE AWARD GRANTED BY THE DETERMINATION ORDER MAILED OCTOBER 17, 1974.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, 25 PER CENT OF THE INCREASED COMPENSATION GRANTED CLAIMANT BY THIS ORDER ON REVIEW, PAYABLE THEREFROM AS PAID.

SAIF CLAIM NO. HC 68845 JANUARY 15, 1976

GERALDINE FOX MENDOZA, CLAIMANT

BUSS, LEICHNER, BARKER AND NESTING,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
OWN MOTION ORDER

CLAIMANT HAS PETITIONED THE WORKMEN'S COMPENSATION BOARD TO EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 AND CONSIDER WHETHER HER NEED FOR FURTHER MEDICAL CARE AND TREATMENT IS A RESULT OF HER COMPENSABLE INDUSTRIAL INJURY SUSTAINED APRIL 14, 1967.

A COPY OF THE REQUEST, TOGETHER WITH A REPORT FROM DR. ROBERT G. MCKILLOP DATED OCTOBER 6, 1975, WAS FURNISHED TO THE STATE ACCIDENT INSURANCE FUND AND ALSO TO THE EMPLOYER, COLUMBIA SPORTSWEAR MFG., INC.

OAR 83-810(C) PROVIDES THAT IF A REQUEST FOR BOARD'S OWN MOTION JURISDICTION IS MADE BY THE CLAIMANT, THE STATE ACCIDENT INSURANCE FUND SHALL ACKNOWLEDGE RECEIPT AND ADVISE THE BOARD WITHIN 20 DAYS OF ITS POSITION. THE REQUEST WAS RECEIVED BY THE BOARD ON DECEMBER 5, 1975 AND, PRESUMABLY, ON THE SAME DATE BY THE FUND. NO RESPONSE HAS BEEN MADE BY THE FUND TO CLAIMANT'S REQUEST.

THEREFORE, BASED UPON THE MEDICAL INFORMATION SUBMITTED BY DR. MCKILLOP, THE BOARD REMANDS CLAIMANT'S CLAIM TO THE STATE ACCIDENT INSURANCE FUND TO PROVIDE MEDICAL CARE AND TREATMENT AS RECOMMENDED BY DR. MCKILLOP AND TO PAY COMPENSATION, AS PROVIDED BY LAW, COMMENCING FEBRUARY 24, 1975 AND UNTIL THE CLAIM IS CLOSED UNDER THE PROVISIONS OF ORS 656.278.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE, 25 PER CENT OF THE COMPENSATION HEREBY ORDERED TO BE PAID CLAIMANT, PAYABLE THEREFROM AS PAID, NOT TO EXCEED 200 DOLLARS.

GENEVIEVE E. REYNOLDS, CLAIMANT

DEPT. OF JUSTICE, DEFENSE ATTY.
RECONSIDERATION OF OWN MOTION ORDER

ON DECEMBER 8, 1975, THE BOARD ENTERED ITS OWN MOTION ORDER DIRECTING THE STATE ACCIDENT INSURANCE FUND TO MAKE ARRANGEMENTS FOR CLAIMANT TO BE EXAMINED AND EVALUATED AT THE DISABILITY PREVENTION DIVISION IN PORTLAND AND TO HAVE A PSYCHIATRIC EXAMINATION AND EVALUATION WHILE THERE. THE FUND WAS FURTHER DIRECTED TO PAY CLAIMANT'S ROUND TRIP TRANSPORTATION BETWEEN HER HOME IN MARYSVILLE, WASHINGTON AND PORTLAND AND ALSO TO PAY TEMPORARY TOTAL DISABILITY COMPENSATION DURING THE PERIOD WHE WAS AT THE DISABILITY PREVENTION DIVISION. AT THAT TIME THE BOARD WAS UNADVISED AS TO WHETHER DR. QUAN HAD EXAMINED CLAIMANT.

ON DECEMBER 29, 1975, THE BOARD WAS FURNISHED BY THE FUND COPIES OF REPORTS FROM DR. QUAN DATED MAY 22, 1975 AND DR. NATHAN, DATED JULY 22, 1975, TOGETHER WITH A REQUEST THAT THE BOARD RECONSIDER ITS OWN MOTION ORDER BASED UPON THE CONTENTS OF THESE REPORTS.

DR. QUAN GAVE CLAIMANT A PSYCHIATRIC EXAMINATION ON MAY 22, 1975 AND, AS A RESULT THEREOF, STATED THAT, AT WORST, CLAIMANT MIGHT BE CONSIDERED TO HAVE A MILD PERSONALITY DISORDER - SHE DID NOT SHOW IMPAIRED FUNCTIONING DUE TO HER EMOTIONAL STATE AND HER ACTIVITIES REMAINED SOMEWHAT VARIED. HE COULD NOT 'CONCLUDE THAT THERE WAS ANY PSYCHIATRIC DISORDER, BY ITSELF OR WHICH WOULD ADD APPRECIABLY TO HER INJURED ARM, THAT WOULD PREVENT HER FROM WORKING.' HE FELT, HOWEVER, IT WAS HIGHLY IMPROBABLE THAT SHE WOULD RESUME WORKING.

DR. NATHAN, AFTER BEING INFORMED OF THE RESULT OF DR. QUAN'S PSYCHIATRIC EXAMINATION OF CLAIMANT, WAS OF THE OPINION THAT CLAIMANT'S IMPAIRMENT REMAINED IN THE AREA OF 74 PER CENT OF THE UPPER EXTREMITY. SHE HAS ALREADY RECEIVED AWARDS TOTALLING 100 PER CENT OF THE RIGHT FOREARM.

THE BOARD CONCLUDES, BASED UPON THESE REPORTS, PRIMARILY DR. QUAN'S, THAT CLAIMANT'S INABILITY TO RETURN TO WORK IS DUE TO FACTORS UNRELATED TO HER INDUSTRIAL INJURY AND, THEREFORE, NO FURTHER EXAMINATIONS, PHYSICAL OR PSYCHIATRIC, OF THE CLAIMANT ARE NECESSARY.

THE BOARD FURTHER CONCLUDES, UPON RECONSIDERATION, THAT ITS OWN MOTION ORDER ENTERED DECEMBER 8, 1975 SHOULD BE SET ASIDE.

IT IS SO ORDERED.

WCB CASE NO. 74-3917 JANUARY 19, 1976

RUDOLF E. ROTHAUGE, CLAIMANT

BAILEY, DOBLIE AND BRUUN,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDERS OF OCTOBER 27, 1972 AND OCTOBER 21, 1974 WHEREBY CLAIMANT WAS AWARDED A TOTAL OF 38.4 DEGREES FOR 20 PER CENT LOSS OF THE RIGHT ARM.

CLAIMANT SUSTAINED A COMPENSABLE INJURY TO HIS RIGHT ARM ON JUNE 7, 1972. HIS CLAIM WAS ACCEPTED, CLOSED WITH NO AWARD OF PERMANENT DISABILITY, WAS REOPENED FOR MEDICAL CARE AND TREATMENT AND, ULTIMATELY AN AWARD OF 38.4 DEGREES FOR 20 PER CENT LOSS OF THE RIGHT ARM WAS RECEIVED BY A DETERMINATION ORDER MAILED OCTOBER 21, 1974.

CLAIMANT HAS HAD PRIOR MEDICAL PROBLEMS, INCLUDING INVOLVEMENT OF THE RIGHT ARM FROM OTHER INJURIES AND MEDICAL CONDITIONS NOT RELATED TO HIS INDUSTRIAL INJURY - HOWEVER, HE WORKED AS A CARPENTER WITHOUT ANY LIMITATION OF USE OF HIS RIGHT ARM FOR SEVERAL YEARS PRIOR TO THE JUNE 1972 INJURY. CLAIMANT HAS BEEN A CARPENTER FOR 15 YEARS- HE CONTINUED TO WORK AFTER THE INJURY FOR SOME TIME BUT FINALLY HAD TO QUIT AND HAS BEEN UNABLE TO RETURN TO THIS WORK SINCE.

THE REFEREE FOUND THAT THE MEDICAL EVIDENCE CLEARLY REFLECTED THAT CLAIMANT'S SUBJECTIVE COMPLAINTS WERE VERY DISPROPORTIONATE TO THE OBJECTIVE FINDINGS OF LOSS OF STRENGTH OR MOTION AND THERE WAS CONSIDERABLE 'FUNCTIONAL OVERLAY'. A PSYCHOLOGICAL CONSULTATION WAS SUGGESTED BECAUSE THE CLAIMANT'S REGULAR TREATING PHYSICIAN WAS COMPLETELY MYSTIFIED AS TO THE ETIOLOGY OF CLAIMANT'S CONTINUED SYMPTOMS OF A SEVERE NATURE FROM WHAT APPEARED TO BE A SIMPLE TRAUMATIC EPICONDYLITIS OF THE RIGHT ELBOW.

DR. MICHAEL FLEMING, A CLINICAL PSYCHOLOGIST, STATED THAT CLAIMANT'S PSYCHOPHYSIOLOGICAL REACTIONS TO HIS DISABILITY WERE VERY PRONOUNCED, WITH SOMATIC COMPLAINTS AS THE MAJOR PREOCCUPATION, CONCLUDING THAT THERE WAS A MODERATE PSYCHOPATHOLOGY WHICH WAS LARGELY ATTRIBUTABLE TO CLAIMANT'S INJURIES. HE FELT THERE WAS GOOD PROGNOSIS CONCERNING THESE PSYCHOLOGICAL PROBLEMS PROVIDED CLAIMANT COULD RECEIVE SOME RELIEF FROM HIS PAIN AND DISABILITY. THE REFEREE FELT THAT THIS REPORT INDICATED THAT PSYCHOSOMATIC COMPLAINTS CONSTITUTED PART OF CLAIMANT'S ARM COMPLAINTS.

THE REFEREE FOUND THAT THE MEDICAL EVIDENCE IN TOTAL REFLECTED THAT, FROM A PURELY MEDICAL EVALUATION OF OBJECTIVE ORTHOPEDIC FINDINGS, CLAIMANT'S PHYSICAL DISABILITY OF THE RIGHT ARM HAS BEEN FAIRLY EVALUATED BY THE AWARD OF PERMANENT PARTIAL DISABILITY GRANTED TO HIM - HOWEVER, IT WAS APPARENT THAT CLAIMANT DID HAVE CONTINUED COMPLAINTS OF SEVERE DISTRESS AND LOSS OF PHYSICAL FUNCTION TO THE RIGHT ARM WHICH ARE MUCH GREATER IN DEGREE.

THE REFEREE CONCLUDED, BASED UPON THE NATURE OF CLAIMANT'S INDUSTRIAL INJURY, THAT IF ANY ADDITIONAL DISABILITY WAS TO BE AWARDED IT WOULD HAVE TO BE ON THE BASIS OF AN ESTABLISHED PSYCHOPATHOLOGY MANIFESTED BY PSYCHOSOMATIC REACTIONS RESULTING FROM

SUCH IMPAIRMENT. HE FURTHER CONCLUDED THAT UPON FIRST READING THE PSYCHOLOGICAL EVALUATION REPORT MIGHT ESTABLISH SUCH PSYCHOSOMATIC IMPAIRMENT IF THERE WERE NO CONTRADICTORY EVIDENCE. HOWEVER, THERE WAS SUCH CONTRADICTORY EVIDENCE CONTAINED IN THE REPORT OF DR. CARLSON AND THE REPORT OF DR. VAN OSDEL. THERE WAS NOT A PREPONDERANCE OF EVIDENCE THAT CLAIMANT HAD ANY PERMANENT DISABILITY RESULTING FROM HIS PSYCHOSOMATIC CONDITIONS, THEREFORE, CLAIMANT HAD NOT SUSTAINED HIS BURDEN OF PROOF TO ESTABLISH THAT HE IS ENTITLED TO A GREATER AWARD OF PERMANENT PARTIAL DISABILITY OF THE RIGHT ARM THAN THAT WHICH HE HAS PREVIOUSLY RECEIVED.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 8, 1975 IS AFFIRMED.

WCB CASE NO. 75-722 JANUARY 19, 1976

RAYMOND SEYMOUR, CLAIMANT

JONES, LANG, KLEIN, WOLF AND SMITH,
CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT
CROSS REQUEST BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S AMENDED ORDER WHICH REMANDED HIS CLAIM TO THE EMPLOYER TO BE SUBMITTED TO THE EVALUATION DIVISION OF THE BOARD FOR CLOSURE UNDER THE PROVISIONS OF ORS 656.268 AND ALLOWED CLAIMANT'S ATTORNEY FEE PAYABLE BY THE EMPLOYER. CLAIMANT CONTENDS HE IS ENTITLED TO TEMPORARY TOTAL DISABILITY COMPENSATION FROM JANUARY 12, 1975 LESS TIME WORKED UNTIL HIS CLAIM IS CLOSED.

CLAIMANT WAS HIRED BY THE SALVATION ARMY AS A TRUCK DRIVER. SOME TIME DURING THE MONTH OF SEPTEMBER 1974, CLAIMANT SUFFERED AN INJURY AND HE FILED A CLAIM WHICH DID NOT INDICATE THE SPECIFIC DATE OF INJURY BUT STATED THAT THE EMPLOYER FIRST HAD KNOWLEDGE OF THE INJURY ON SEPTEMBER 14, 1974. THE CLAIM WAS ACCEPTED AND TEMPORARY TOTAL DISABILITY COMPENSATION WAS PAID. CLAIMANT WAS TOTALLY DISABLED FROM SEPTEMBER 17, 1974 WITH A CHRONIC BACK STRAIN.

DR. KRAVITZ, CLAIMANT'S TREATING PHYSICIAN, ON OCTOBER 31, 1974 RELEASED CLAIMANT TO EMPLOYMENT WHICH INVOLVED NO LIFTING. ON NOVEMBER 18, 1974 A REPORT WAS FILED WHICH INDICATED CLAIMANT WAS MEDICALLY STATIONARY, HE HAD SUFFERED NO PERMANENT IMPAIRMENT AND HAD BEEN RELEASED TO RETURN TO REGULAR EMPLOYMENT ON OCTOBER 31, 1974 - HOWEVER, DR. KRAVITZ ON JANUARY 9, 1975 REPORTED CLAIMANT HAD NO PERMANENT IMPAIRMENT AND WAS RELEASED FOR REGULAR WORK AS OF DECEMBER 31, 1974. NO EXPLANATION WAS OFFERED FOR THE CONFLICT IN THE RELEASE DATES.

THE DISABILITY PREVENTION DIVISION EVIDENTLY THOUGHT CLAIMANT HAD NOT BEEN RELEASED TO RETURN TO WORK BY DR. KRAVITZ. THE EVIDENCE INDICATES THAT WHEN DR. KRAVITZ ADVISED THE BOARD THAT WHEN

HE HAD RELEASED CLAIMANT FOR WORK BY HIS REPORT OF JANUARY 9, 1975, IT WAS FOR LIMITED OR MODIFIED EMPLOYMENT. A NOTE FROM THE PERMANENTE CLINIC INDICATES THAT CLAIMANT WAS TOTALLY DISABLED FROM SEPTEMBER 16, 1974 TO JANUARY 1, 1975.

THE REFEREE FOUND THAT CLAIMANT RETURNED TO WORK FOR THE SALVATION ARMY ON JANUARY 13, 1975, THAT THE CARRIER HAD PAID CLAIMANT TEMPORARY TOTAL DISABILITY COMPENSATION THROUGH JANUARY 12, 1975. ALTHOUGH THE CLAIMANT CONTENDS THAT WHEN HE RETURNED TO WORK HE RETURNED TO A LIGHTER TYPE OF JOB SORTING CLOTHING, THE REFEREE FOUND THAT CLAIMANT RETURNED TO THIS JOB ON AN 8 HOUR BASIS AND THAT IT SHOULD BE CONSTRUED AS REGULAR EMPLOYMENT - FURTHERMORE, NOT ONLY DID CLAIMANT ACTUALLY RETURN TO REGULAR EMPLOYMENT BUT HIS ATTENDING PHYSICIAN APPROVED SUCH RETURN TO REGULAR EMPLOYMENT.

THE REFEREE CONCLUDED THAT THE CRITERIA WAS WHETHER OR NOT CLAIMANT WAS ABLE TO RETURN TO WORK FULL TIME ON JANUARY 12, 1975 AND THAT THE PREPONDERANCE OF EVIDENCE WAS THAT CLAIMANT WAS ABLE TO RETURN TO FULL TIME WORK ON THAT DATE, THEREFORE, THERE WAS NOT A UNILATERAL TERMINATION OF TEMPORARY TOTAL DISABILITY PAYMENTS BY THE CARRIER.

THE REFEREE FOUND NO EVIDENCE TO INDICATE THAT CLAIMANT'S CONDITION HAD EVER BEEN FOUND TO BE MEDICALLY STATIONARY AND HE REMANDED THE CLAIM TO THE EMPLOYER FOR CLOSURE PURSUANT TO ORS 656.268. THE REFEREE FURTHER FOUND THAT THE DELAY BY THE CARRIER IN PROVIDING FOR AN ORTHOPEDIC EXAMINATION OF CLAIMANT AFTER BEING SO REQUESTED BY THE EVALUATION DIVISION MUST BE CONSTRUED AS A FAILURE TO TIMELY PROCESS THE CLAIM UNDER THE PROVISIONS OF ORS 656.268 AND, THEREFORE, THE FAILURE JUSTIFIED THE IMPOSITION OF PENALTIES AND ATTORNEY'S FEES - HOWEVER, INASMUCH AS CLAIMANT WAS NOT ENTITLED TO ANY TEMPORARY TOTAL DISABILITY PAYMENTS, THERE WAS NO BASE UPON WHICH TO ASSESS A PENALTY. ATTORNEY'S FEES UNDER THE PROVISIONS OF ORS 656.382 WERE ALLOWED.

THE BOARD, ON DE NOVO REVIEW, CONCURS WITH THE FINDINGS AND CONCLUSIONS OF THE REFEREE. THE CLAIMANT CONTENDS HE HAD NOT BEEN RELEASED BY HIS DOCTOR TO RETURN TO HIS (UNDERSCORED) REGULAR EMPLOYMENT, I.E., TRUCK DRIVING. THE COURT OF APPEALS IN JACKSON V. SAIF (UNDERSCORED), 7 OR APP 109, HOLDS THAT TEMPORARY TOTAL DISABILITY PAYMENTS ORDINARILY CONTINUE UNTIL THE WORKMAN RETURNS TO REGULAR WORK, IS RELEASED BY HIS DOCTOR TO RETURN TO REGULAR WORK, OR THERE HAS BEEN A DETERMINATION THAT THE WORKMAN'S CONDITION IS MEDICALLY STATIONARY UNDER ORS 656.268. IT IS NOT NECESSARY, IN THE BOARD'S OPINION, THAT THE WORKMAN RETURN TO HIS FORMER (UNDERSCORED) WORK ON A REGULAR BASIS OR THAT HE BE RELEASED BY HIS DOCTOR TO RETURN TO HIS FORMER (UNDERSCORED) WORK ON A REGULAR BASIS - IT IS SUFFICIENT IF HE RETURNS TO REGULAR WORK OF ANY NATURE OR IS RELEASED BY HIS DOCTOR TO RETURN TO REGULAR WORK OF ANY NATURE.

ORDER

THE ORDER OF THE REFEREE DATED JUNE 10, 1975, AS AMENDED BY THE ORDER DATED JUNE 24, 1975, IS AFFIRMED.

NEIL WOODS, CLAIMANT
EVOHL F. MALAGON, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 67.5 DEGREES FOR 45 PER CENT LOSS OF THE LEFT FOREARM - AFFIRMED THE AWARD OF 15 DEGREES FOR 10 PER CENT LOSS OF THE RIGHT FOREARM MADE BY THE DETERMINATION ORDER MAILED NOVEMBER 15, 1974 - AWARDED CLAIMANT 48 DEGREES FOR 15 PER CENT UNSCHEDULED DISABILITY - DIRECTED THE CLAIMANT BE PAID ADDITIONAL COMPENSATION FOR TEMPORARY TOTAL DISABILITY FOR THE PERIOD OF OCTOBER 10, 1974 TO APRIL 30, 1975, AND AWARDED CLAIMANT'S ATTORNEY A FEE OF 650 DOLLARS FOR HIS SERVICES WITH REGARD TO THE FUND'S CROSS APPEAL AND AN ADDITIONAL FEE OF 25 PER CENT OF THE INCREASED COMPENSATION GRANTED BY THE REFEREE'S ORDER NOT TO EXCEED 850 DOLLARS.

THE ISSUES BEFORE THE REFEREE WERE -

(1) WHETHER THE FUND'S CROSS APPEAL ON THE ISSUE OF COMPENSABILITY WAS PROPER -

(2) WHETHER CLAIMANT'S CARPAL TUNNEL SYNDROMES ARE COMPENSABLE AND WHICH PARTY HAS THE BURDEN OF PROOF ON THE ISSUE -

(3) WHETHER THE CLAIM WAS PREMATURELY CLOSED AND SHOULD BE REOPENED -

(4) THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY, SCHEDULED AND UNSCHEDULED.

CLAIMANT SUSTAINED A COMPENSABLE INJURY ON NOVEMBER 12, 1973 WHEN HE SLIPPED AND FELL FROM A TRACTOR. DR. HOCKEY DIAGNOSED A CERVICAL STRAIN AND RULED OUT A NEUROLOGICAL LESION - HE RECOMMENDED CONSERVATIVE TREATMENT. CLAIMANT HAD BEEN TAKEN TO THE HOSPITAL SHORTLY AFTER HIS INJURY BY DR. PHETTEPLACE, HIS TREATING PHYSICIAN, COMPLAINING OF PAIN IN THE BACK OF HIS HEAD AND NECK AND NUMBNESS IN THE ARMS AND HANDS. AFTER CLAIMANT WAS DISCHARGED FROM THE HOSPITAL HE WAS AGAIN SEEN BY DR. HOCKEY WHO AT THAT TIME FELT CLAIMANT ALSO HAD A LOW BACK STRAIN RESULTING FROM HIS INJURY.

CLAIMANT RETURNED TO WORK AND WAS SEEN BY BOTH DR. PHETTEPLACE AND DR. HOCKEY. ON FEBRUARY 14, 1974, DR. HOCKEY FELT THAT CLAIMANT HAD MINIMAL PERMANENT PARTIAL DISABILITY BUT HE WAS STABLE AND HIS CLAIM COULD BE CLOSED. ON MARCH 25, 1974 CLAIMANT WAS COMPLAINING OF CONTINUED DISCOMFORT IN THE NECK AND NUMBNESS AND PAIN IN HIS RIGHT ARM AND ELBOW RADIATING INTO THE HAND AND DR. HOCKEY STATED THAT CLAIMANT HAD DEVELOPED AN EPICONDYLITIS ON THE RIGHT ELBOW OR 'TENNIS ELBOW'. HE REFERRED CLAIMANT TO DR. SCHROEDER, AN ORTHOPEDIC SURGEON, WHO FELT CLAIMANT HAD A POSTERIOR CERVICAL STRAIN WHICH WAS GRADUALLY IMPROVING. HE ALSO BELIEVED THAT THE NUMBNESS IN THE MEDIAN NERVE DISTRIBUTIONS IN BOTH HANDS SUGGESTED EITHER A CERVICAL INJURY ETIOLOGY OR POSSIBLY BILATERAL CARPAL TUNNEL SYNDROMES - HE REFERRED CLAIMANT TO DR. JONES FOR NEUROLOGICAL EXAMINATION. BILATERAL CARPAL TUNNEL SYNDROMES WERE FOUND BY DR. JONES, MORE MARKED ON THE RIGHT. CLAIMANT UNDERWENT A CARPAL TUNNEL RELEASE ON THE RIGHT IN MAY 1974, AND A CARPAL TUNNEL RELEASE ON THE LEFT IN JUNE 1974.

DR. HOCKEY, IN APRIL 1974, REPORTED THAT ALTHOUGH HE DIDN'T FEEL THE SYMPTOMATOLOGY WAS RELATED TO THE ORIGINAL INJURY THERE WERE CASES WHERE NECK STRAINS HAD BEEN ASSOCIATED WITH SUCH SYMPTOMS AND SUGGESTED A CONSULTATION WITH DR. SCHROEDER. DR. SCHROEDER FOUND CLAIMANT, ON SEPTEMBER 11, 1974, TO BE MEDICALLY STATIONARY, STATING THAT CLAIMANT CONTINUED TO HAVE MINOR RESIDUAL DIFFICULTY WITH HIS HANDS AS WELL AS HIS NECK, WEAKNESS IN HIS GRIP AND TENDERNESS IN BOTH PALMS ALL OF WHICH COULD CONTINUE.

ON NOVEMBER 15, 1974 A DETERMINATION ORDER AWARDED CLAIMANT TEMPORARY TOTAL AND TEMPORARY PARTIAL DISABILITY COMPENSATION AND 22.5 DEGREES FOR 15 PER CENT LOSS OF THE LEFT FOREARM AND 15 DEGREES FOR 10 PER CENT OF THE RIGHT FOREARM. THE CLAIMANT APPEALED AND THE FUND CROSS APPEALED REQUESTING A HEARING ON THE ISSUE OF COMPENSABILITY OF CLAIMANT'S CARPAL TUNNEL SYNDROMES.

DR. SCHROEDER FELT THAT THE CARPAL TUNNEL SYNDROMES, ALTHOUGH PERHAPS NOT DIRECTLY RELATED TO CLAIMANT'S BACK PROBLEM, APPEARED TO HAVE BECOME SYMPTOMATIC WITH THE DAY OF HIS ACCIDENT BUT HE STATED THAT THERE WAS NO ABSOLUTE ANSWER TO THE QUESTION OF CAUSAL RELATIONSHIP IN HIS OPINION. DR. HARWOOD, ON THE MEDICAL STAFF OF THE FUND, WAS OF THE OPINION THAT THE CARPAL TUNNEL SYNDROMES WERE NOT RELATED TO THE INJURY BECAUSE THERE WAS NO MENTION MADE AT THE TIME OF THE ACCIDENT OF ANY INVOLVEMENT OF THE WRISTS AND BECAUSE THE CONDITION COULD HAVE BEEN THE RESULT OF EITHER DIABETES MELLITIS OR HYPOTHYROIDISM.

THE REFEREE FOUND THAT UNDER THE PROVISIONS OF ORS 656.283(1) AND ORS 656.319 THE FUND HAD THE RIGHT WITHIN ONE YEAR TO REQUEST A HEARING OBJECTING TO THE DETERMINATION ORDER AND THAT HAVING DONE SO, THE ISSUE OF COMPENSABILITY OF THE CLAIMANT'S CARPAL TUNNEL SYNDROMES WAS PROPERLY BEFORE HIM.

WITH RESPECT TO THE COMPENSABILITY OF THE CARPAL TUNNEL SYNDROMES, THE REFEREE FOUND THAT THE MEDICAL EVIDENCE, ALONG WITH CLAIMANT'S CREDIBLE TESTIMONY, PLUS THE FACT THAT PRIOR TO THE INDUSTRIAL INJURY CLAIMANT HAD NO SYMPTOMS AND IMMEDIATELY FOLLOWING THE ACCIDENT HE COMPLAINED OF SYMPTOMS IN HIS HANDS AND ARMS, INDICATED BY A PREPONDERANCE OF THE EVIDENCE THAT CLAIMANT'S CARPAL TUNNEL SYNDROMES WERE CAUSALLY RELATED TO HIS INDUSTRIAL INJURY OF NOVEMBER 12, 1973 AND WERE COMPENSABLE. HAVING SO FOUND, IT WAS NOT NECESSARY TO MAKE A DECISION ON THE ISSUE OF WHO HAD THE BURDEN OF PROVING COMPENSABILITY.

ON THE ISSUE OF PREMATURE CLOSING AND REOPENING OF THE CLAIM, THE REFEREE FOUND THAT ALTHOUGH DR. HOCKEY, ON FEBRUARY 14, 1974, FELT THAT CLAIMANT'S CONDITION WAS STABLE AND HIS CLAIM SHOULD BE CLOSED, WHEN HE SAW HIM AGAIN ON MARCH 25, 1974, CLAIMANT HAD THE ADDITIONAL NUMBNESS AND PAIN IN HIS RIGHT ARM AND ELBOW AND HE REFERRED HIM TO DR. SCHROEDER. DR. SCHROEDER, ON SEPTEMBER 11, 1974, FOUND CLAIMANT'S CONDITION TO BE MEDICALLY STATIONARY BUT ON DECEMBER 10, 1974 HE WROTE THE FUND ASKING THAT THE CLAIM BE REOPENED, RECOMMENDING FURTHER TREATMENT. ON APRIL 30, 1975, DR. SCHROEDER STATED HE HAD NO FURTHER SURGICAL TREATMENT TO OFFER CLAIMANT AND RECOMMENDED A REPORT FROM DR. JONES. DR. JONES' REPORTS CONTAINED NO RECOMMENDATION FOR FURTHER TREATMENT AND THERE WAS NO MEDICAL EVIDENCE RECOMMENDING OR SUGGESTING ANY FURTHER TREATMENT FOR CLAIMANT.

THE REFEREE CONCLUDED THAT CLAIMANT'S CONDITION WAS STATIONARY AT THE TIME OF CLAIM CLOSURE SEPTEMBER 11, 1974 BUT THEREAFTER BECAME UNSTATIONARY WHEN DR. SCHROEDER REQUESTED THE CLAIM TO BE REOPENED, THEREFORE, CLAIMANT WAS ENTITLED TO PAYMENT OF TEMPORARY

TOTAL DISABILITY COMPENSATION FROM DECEMBER 10, 1974 TO APRIL 30, 1975 WHEN HE AGAIN BECAME MEDICALLY STATIONARY.

ON THE EXTENT OF SCHEDULED DISABILITY, THE REFEREE FELT THAT THE LOSS OF FUNCTION AND USE OF CLAIMANT'S LEFT HAND WHICH IS HIS DOMINANT HAND WAS SUCH THAT HE WAS ENTITLED TO AN AWARD OF 67.5 DEGREES EQUAL TO 45 PER CENT LOSS OF THE FOREARM. WITH RESPECT TO THE RIGHT FOREARM, THE REFEREE FOUND THAT CLAIMANT HAD NOT SUFFERED ANY GREATER LOSS OF FUNCTION AND USE THAN THAT FOR WHICH HE HAD BEEN AWARDED BY THE DETERMINATION ORDER.

ON THE EXTENT OF UNSCHEDULED DISABILITY, THE REFEREE FOUND, AFTER TAKING INTO CONSIDERATION CLAIMANT'S AGE, EDUCATION, WORK EXPERIENCE, TRAINING AND SUITABILITY TO THE EXISTING LABOR MARKET, THAT CLAIMANT HAD SUSTAINED A LOSS OF EARNING CAPACITY DUE TO HIS LOW BACK AND CERVICAL INJURIES. SUCH INJURIES RESULTED IN CLAIMANT BEING REHIRED AT A SALARY LESS THAN HE WOULD NORMALLY HAVE BEEN PAID BECAUSE CERTAIN DUTIES WHICH CLAIMANT COULD HAVE DONE PRIOR TO THE INJURY WOULD NOW HAVE TO BE DONE BY OTHERS, E.G., OPERATING HEAVY EQUIPMENT, DOING MECHANICAL WORK AND HEAVY LIFTING.

THE REFEREE CONCLUDED THAT CLAIMANT HAD SUSTAINED A LOSS OF EARNING CAPACITY AS A RESULT OF HIS UNSCHEDULED INJURIES ENTITLING HIM TO AN AWARD OF 15 PER CENT OF THE MAXIMUM ALLOWABLE FOR SUCH INJURIES.

THE REFEREE CONCLUDED THAT CLAIMANT'S ATTORNEY WAS ENTITLED TO A FEE TO BE PAID BY THE FUND UNDER THE PROVISIONS OF ORS 656.382(2) WHICH PROVIDES THAT IF A REQUEST FOR HEARING IS INITIATED BY THE FUND AND THE REFEREE FINDS THE COMPENSATION AWARDED TO THE CLAIMANT SHOULD NOT BE DISALLOWED OR REDUCED THE FUND SHALL BE REQUIRED TO PAY A REASONABLE ATTORNEY'S FEE IN THE AMOUNT SET BY THE REFEREE. HOWEVER, THE REFEREE FOUND THAT THE FUND'S FAILURE TO REOPEN THE CLAIM WAS NOT UNREASONABLE TO THE EXTENT THAT WOULD JUSTIFY THE IMPOSITION OF PENALTIES AND ATTORNEY'S FEE ON THAT GROUND.

THE BOARD, ON DE NOVO REVIEW, AGREES THAT THE FUND HAD A RIGHT TO REQUEST A HEARING ON THE ISSUE OF COMPENSABILITY OF THE CARPAL TUNNEL SYNDROMES AND, ALTHOUGH THE EVIDENCE IS NOT THE STRONGEST WITH RESPECT TO THE COMPENSABILITY OF THE CARPAL TUNNEL SYNDROMES, THE BOARD WILL NOT DISTURB THE AWARDS MADE BY THE DETERMINATION ORDER MAILED NOVEMBER 15, 1974, WHEREBY CLAIMANT WAS GRANTED 22.5 DEGREES FOR 15 PER CENT LOSS OF THE LEFT FOREARM AND 15 DEGREES FOR 10 PER CENT LOSS OF THE RIGHT FOREARM. THE BOARD CONCLUDES THAT AN AWARD FOR THESE SCHEDULED DISABILITIES IN EXCESS OF THOSE AWARDED BY THAT DETERMINATION ORDER IS NOT JUSTIFIED BY THE EVIDENCE.

THE BOARD FINDS THAT DR. SCHROEDER'S REPORT OF DECEMBER 10, 1974, DID NOT INDICATE THAT CLAIMANT WAS NOT WORKING FULL TIME NOR THAT HE WAS DISABLED FROM WORKING IN ANY WAY NOR DID ANY OF THE SUBSEQUENT REPORTS STATE THAT CLAIMANT WAS UNABLE TO WORK. THE BOARD CONCLUDES THAT ALTHOUGH CLAIMANT MAY NOT HAVE BEEN MEDICALLY STATIONARY DURING THE PERIOD FOR WHICH THE REFEREE AWARDED THE ADDITIONAL TEMPORARY TOTAL DISABILITY COMPENSATION, THE EVIDENCE DOES NOT SUPPORT A FINDING THAT CLAIMANT WAS DISABLED FROM WORKING DURING THAT PERIOD OF TIME AND, THEREFORE, CLAIMANT IS NOT ENTITLED TO THE ADDITIONAL TEMPORARY TOTAL DISABILITY COMPENSATION FROM DECEMBER 10, 1974 TO APRIL 30, 1975.

THE BOARD FINDS THAT THE REFEREE MISAPPLIED THE PROVISION CONTAINED IN ORS 656.382(2) WITH RESPECT TO AN AWARD OF ATTORNEY'S FEES. THAT SUBSECTION PROVIDES FOR THE PAYMENT OF ATTORNEY'S FEES

ONLY IF THE HEARING REQUEST IS 'INITIATED' BY THE FUND OR A DIRECT RESPONSIBILITY EMPLOYER. IN THE INSTANT CASE THE CLAIMANT INITIATED THE HEARING REQUEST, THE FUND MERELY FILED A CROSS REQUEST.

THE BOARD FINDS THAT CLAIMANT, BECAUSE OF HIS UNSCHEDULED INJURIES, HAS SUFFERED A LOSS OF EARNING CAPACITY AND IT AGREES WITH THE CONCLUSION REACHED BY THE REFEREE THAT CLAIMANT WOULD BE ADEQUATELY COMPENSATED FOR SUCH A LOSS OF EARNING CAPACITY BY AN AWARD OF 15 PER CENT OF THE MAXIMUM ALLOWABLE FOR SUCH UNSCHEDULED DISABILITY.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 4, 1975 IS MODIFIED.

THE DETERMINATION ORDER MAILED ON NOVEMBER 15, 1974 IS AFFIRMED. THE AWARDS FOR SCHEDULED DISABILITY CONTAINED IN THAT DETERMINATION ORDER SHALL BE IN LIEU OF THE AWARDS FOR SCHEDULED DISABILITY MADE BY THE REFEREE'S ORDER.

CLAIMANT IS NOT ENTITLED TO BE PAID COMPENSATION FOR TEMPORARY TOTAL DISABILITY FOR THE PERIOD OF DECEMBER 10, 1974 TO APRIL 30, 1975, AND ALTHOUGH SUCH COMPENSATION AS MAY HAVE BEEN PAID PRIOR TO THE DATE OF THIS ORDER CANNOT BE RECOVERED BY THE FUND, IF ANY SUM REMAINS UNPAID IT SHALL NOT BE PAID TO CLAIMANT.

CLAIMANT'S ATTORNEY SHALL NOT BE PAID THE SUM OF 650 DOLLARS IN ADDITION TO AND NOT OUT OF THE COMPENSATION AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES WITH REGARD TO THE FUND'S CROSS REQUEST FOR REVIEW.

IN ALL OTHER RESPECTS THE ORDER OF THE REFEREE IS AFFIRMED.

WCB CASE NO. 75-1292 JANUARY 19, 1976

KENNETH HICKMAN, CLAIMANT

HIBBARD, CALDWELL, CANNING, BOWERMAN AND SCHULTZ,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH FOUND CLAIMANT TO BE PERMANENTLY AND TOTALLY DISABLED AS DEFINED BY ORS 656.206.

AT THE TIME OF THE HEARING CLAIMANT WAS 61 YEARS OLD. HE HAS A HIGH SCHOOL EDUCATION AND HAD ATTENDED SEVERAL SHORT MACHINERY AND HEAVY EQUIPMENT SCHOOLS SPONSORED BY THE INTERNATIONAL HARVESTER CO. AND ALSO BY THE FORD MOTOR CO. FROM 1945 UNTIL JULY 3, 1973 CLAIMANT HAD WORKED FOR VARIOUS FARM MACHINERY EQUIPMENT COMPANIES BOTH IN CALIFORNIA AND IN OREGON - HE HAD ALSO BEEN A MECHANIC, SALES MANAGER AND SALESMAN AND HAD CONSIDERABLE EXPERTISE IN THE FIELD OF FARM MACHINERY AND HEAVY EQUIPMENT.

CLAIMANT SUFFERED A HEART ATTACK ON JULY 3, 1973 WHILE LOADING EQUIPMENT AT A FARM NEAR NEWBERG. HE STAYED HOME THE NEXT DAY, WHICH WAS A HOLIDAY, ATTEMPTED TO RETURN TO WORK ON JULY 5TH BUT WAS UNABLE TO FINISH THE DAY AND ON JULY 7 HE WAS ADMITTED TO

BESS KAISER HOSPITAL WHERE DR. NORRIS DIAGNOSED AN ACUTE INFERIOR MYOCARDIAL INFARCTION. CLAIMANT HAS NOT RETURNED TO WORK SINCE JULY 5.

THREE WEEKS AFTER THE HEART ATTACK CLAIMANT AGAIN SUFFERED CHEST PAINS AND WAS REHOSPITALIZED WITH SEVERE ANGINA SYMPTOMS AND CONSIDERED A CANDIDATE FOR CORONARY ANGIOGRAPHY WHICH WAS PERFORMED BY DR. WILD.

IN AUGUST 1974 DR. CRISLIP REPORTED CLAIMANT HAD AN ARTERIOSCLEROTIC HEART DISEASE WITH AN OLD INFERIOR WALL MYOCARDIAL INFARCTION AND ANGINA PECTORIS SYMPTOMS, CONDITION STABLE, PERMANENT IMPAIRMENT AND RESTRICTION TO SEDENTARY ACTIVITIES WITH THE POSSIBILITY CLAIMANT COULD BENEFIT FROM SURGICAL TREATMENT. DR. NORRIS, WHO WAS CLAIMANT'S TREATING PHYSICIAN AT PERMANENTE, TESTIFIED THAT CLAIMANT SUFFERED AN ACUTE INFERIOR MYOCARDIAL INFARCTION JULY 1973 WHEN HE WAS SEEN BY HIM IN THE HOSPITAL BUT THAT HE HAD HAD NO SYMPTOMS THEREOF AT THE TIME HE WAS DISCHARGED. THE SUBSEQUENT HOSPITALIZATION WAS BASED UPON A DIAGNOSIS BY DR. NORRIS OF ANGINA PECTORIS SYMPTOMS WHICH IS PAIN EMANATING FROM THE HEART AND IS CAUSED BY INSUFFICIENT OXYGEN WHICH, IN TURN, IS PROBABLY THE RESULT OF NARROWED ARTERIES. BYPASS SURGERY WAS RECOMMENDED BUT REFUSED BY THE CLAIMANT. DR. NORRIS' OPINION WAS THAT CLAIMANT'S CARDIAC INSUFFICIENCY WAS, IN ITSELF, DISABLING. IT WAS THIS PROBLEM THAT KEPT CLAIMANT FROM WORKING RATHER THAN THE MYOCARDIAL INFARCTION.

THE REFEREE FOUND THAT IT WAS NOT NECESSARY FOR CLAIMANT TO SUBMIT TO THE SURGERY BECAUSE THERE WAS NO GUARANTEE THAT IT WOULD BE SUCCESSFUL AND, EVEN IF IT WERE SUCCESSFUL, IT MIGHT BE SEVERAL YEARS BEFORE CLAIMANT WOULD BE ABLE TO RETURN TO WORK. HE FOUND THAT IF THE CLAIMANT HAD A SUCCESSFUL OPERATION HE WOULD BE RELIEVED OF HIS ANGINA PECTORIS SYMPTOMS AND ABLE TO ENGAGE IN MODERATE ACTIVITY BUT, NEVERTHELESS, THERE IS NO PROVISION IN THE WORKMEN'S COMPENSATION LAW WHICH COULD FORCE CLAIMANT TO UNDERGO THIS RISK.

THE REFEREE CONCLUDED, THAT PERMANENT TOTAL DISABILITY MEANT A LOSS, INCLUDING PREEXISTING DISABILITY, PERMANENTLY INCAPACITATING A WORKMAN FROM REGULARLY PERFORMING ANY WORK AT A GAINFUL AND SUITABLE OCCUPATION AND, IN THIS INSTANCE, CLAIMANT HAD SUFFERED SUCH LOSS AND MUST BE CONSIDERED AS PERMANENTLY AND TOTALLY DISABLED.

THE BOARD, ON DE NOVO REVIEW, FINDS THAT CLAIMANT'S DISABILITY AT THE PRESENT TIME IS CAUSED BY HIS ARTERY DISEASE. WHEN THE FUND ACCEPTED CLAIMANT'S CLAIM OF AN ACUTE MYOCARDIAL INFARCTION, IT DID NOT BECOME RESPONSIBLE FOR THE DISABILITY CAUSED BY CLAIMANT'S UNDERLYING AND PREEXISTING ARTERIOSCLEROTIC HEART DISEASE WHICH WAS A PRODUCT OF CLAIMANT'S LIFE STYLE AND WAS NOT CAUSED BY HIS WORK. AS LONG AS CLAIMANT TAKES DIGITALIS AS PRESCRIBED BY HIS DOCTOR, HIS MYOCARDIAL INFARCTION IS NOT A MATERIAL CONTRIBUTING FACTOR TO HIS PRESENT DISABILITY, ACCORDING TO DR. NORRIS.

DR. NORRIS TESTIFIED THAT, UNDER THE AMA CLASSES OF ORGANIC DISEASE, CLAIMANT WOULD BE RATED AS A 'CLASS III'. IN THIS CLASSIFICATION THE IMPAIRMENT RANGES BETWEEN 50 AND 75 PER CENT. CLAIMANT HAS ALREADY RECEIVED BY THE DETERMINATION ORDER DATED JANUARY 29, 1975, AN AWARD OF 240 DEGREES WHICH EQUALS 75 PER CENT UNSCHEDULED DISABILITY.

THE BOARD, ON DE NOVO REVIEW, CONCLUDES THAT THIS AWARD SUFFICIENTLY COMPENSATES CLAIMANT FOR HIS PRESENT DISABILITY.

ORDER

THE ORDER OF THE REFEREE DATED JULY 11, 1975 IS REVERSED.

THE DETERMINATION ORDER MAILED JANUARY 29, 1975 IS AFFIRMED.

WCB CASE NO. 75-312 JANUARY 19, 1976

EWELL E. HOOD, CLAIMANT

EMMONS, KYLE, KROPP AND KRYGER,
CLAIMANT'S ATTYS.
COSGRAVE AND KESTER, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS THE BOARD REVIEW THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 96 DEGREES FOR 50 PER CENT LOSS OF THE RIGHT ARM. CLAIMANT CONTENDS HE IS ENTITLED TO AN AWARD FOR UNSCHEDULED DISABILITY AND ALSO ADDITIONAL COMPENSATION FOR HIS RIGHT ARM DISABILITY.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON OCTOBER 26, 1973. HIS RIGHT ARM WAS INJURED WHILE HE WAS INSTALLING AN ENGINE IN A FORD PICKUP. DR. GOBY DIAGNOSED FRACTURED SPUR OLECRANON PROCESS, RIGHT ELBOW, AND STATED THAT NO PARTICULAR TREATMENT WAS INDICATED. LATER CLAIMANT WAS REFERRED TO DR. ELLISON WHO FOUND OLECRANON BURSITIS, SECONDARY TO INJURY WITH PROBABLE COMPRESSION NEUROPATHY OF THE ULNAR NERVE AT THE ELBOW. ON MAY 1, 1974 CLAIMANT UNDERWENT SURGERY FOR ANTERIOR TRANSPOSITION OF THE ULNAR NERVE AT THE RIGHT ELBOW AND EXCISION OF THE OLECRANON SPUR AND BURSA.

DR. ELLISON FOUND CLAIMANT TO BE MEDICALLY STATIONARY ON SEPTEMBER 30, 1974, NOTING SIGNIFICANT DIFFICULTY, PARTICULARLY IN LOSS OF STRENGTH IN THE RIGHT ARM AND PERMANENT FUNCTIONAL LIMITATION WHICH WOULD KEEP CLAIMANT FROM DOING ANY HEAVY LIFTING WITH HIS RIGHT ARM OR ENGAGING IN HIS PREVIOUS OCCUPATION AS A MECHANIC. HE RECOMMENDED RETRAINING. ON JANUARY 20, 1975, A DETERMINATION ORDER WAS MAILED WHEREBY CLAIMANT WAS AWARDED 76.8 DEGREES FOR 40 PER CENT LOSS OF THE RIGHT ARM.

CLAIMANT COMPLAINS OF PAIN AND DISCOMFORT, LOSS OF STRENGTH, LIMITATION OF MOTION, SWELLING AND NUMBNESS IN HIS RIGHT ARM AS WELL AS LOSS OF GRIP AND STRENGTH IN MANUAL DEXTERITY AND NUMBNESS IN HIS RIGHT HAND - ADDITIONALLY, HE COMPLAINS OF PAIN AND DISCOMFORT AND PERIODIC NUMBNESS IN HIS RIGHT SHOULDER.

THE REFEREE FOUND THAT CLAIMANT DID NOT HAVE ANY PHYSICAL LIMITATIONS REGARDING HIS JOB OR OTHER ACTIVITIES PRIOR TO THE INDUSTRIAL INJURY BUT IS NOW LIMITED IN HIS ABILITY TO PERFORM TASKS WHICH REQUIRE HEAVY LIFTING, OVERHEAD REACHING AND THE USE OF WRENCHES AND SMALL TOOLS.

WITH REGARD TO CLAIMANT'S COMPLAINTS OF RIGHT SHOULDER DISABILITY, THE REFEREE FOUND THE ONLY OBJECTIVE MEDICAL FINDING WAS IN DR. EDWARDS' REPORT OF OCTOBER 23, 1974 WHICH STATED THAT THE RIGHT SHOULDER WAS UNREMARKABLE EXCEPT FOR MILD DIFFUSE TENDERNESS DIFFUSELY AT THE SCAPULAR REGION EVIDENTLY GREATER OVER THE INFRASPINATUS MUSCLE. APPARENTLY DR. EDWARDS DID NOT FEEL THERE WOULD BE ANY RESIDUAL DISABILITY FROM THE RIGHT SHOULDER AS HE

STATED THERE WAS A GOOD PROGNOSIS FOR EVENTUAL IMPROVEMENT ALTHOUGH IT WAS FAIRLY PROBABLE THAT SOME DEGREE OF RESIDUAL DISABILITY WOULD ENSUE FROM THE INJURY SUSTAINED TO THE REGION OF THE RIGHT ELBOW. DR. ELLISON CONCURRED WITH DR. EDWARDS ON THIS POINT.

THE REFEREE CONCLUDED THAT THE GREATER WEIGHT OF THE MEDICAL EVIDENCE INDICATES THAT CLAIMANT'S RIGHT SHOULDER WAS NOT MATERIALLY AFFECTED BY HIS INDUSTRIAL ACCIDENT OF OCTOBER 26, 1973 AND THAT CLAIMANT HAD FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE AN UNSCHEDULED DISABILITY TO HIS RIGHT SHOULDER.

WITH RESPECT TO THE EXTENT OF PERMANENT PARTIAL DISABILITY TO CLAIMANT'S RIGHT ARM, THE REFEREE FOUND, BASED UPON THE EVIDENCE, INCLUDING THE CREDIBLE EVIDENCE OF CLAIMANT AND WITNESSES WHO TESTIFIED IN HIS BEHALF, THAT CLAIMANT DOES EXPERIENCE PAIN AND DISCOMFORT, LOSS OF STRENGTH AND LIMITATION OF MOTION AND PERIODIC SWELLING IN HIS RIGHT ARM - HE ALSO HAS LOSS OF STRENGTH AND GRIP IN MANUAL DEXTERITY IN HIS RIGHT HAND, ALL OF WHICH ARE DISABLING. HE CONCLUDED THAT CLAIMANT HAD SUFFERED 50 PER CENT LOSS FUNCTION AND USE OF HIS RIGHT ARM AND INCREASED THE PRIOR AWARD TO 96 DEGREES OF A MAXIMUM OF 192 DEGREES.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE AS ITS OWN.

ORDER

THE ORDER OF THE REFEREE DATED JULY 22, 1975 IS AFFIRMED.

WCB CASE NO. 75-1175 JANUARY 20, 1976

FRANK W. CARPENTER, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT
CROSS REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE SECOND DETERMINATION ORDER MAILED AUGUST 2, 1974 WHICH AWARDED CLAIMANT 240 DEGREES FOR 75 PER CENT UNSCHEDULED LOW BACK DISABILITY. THE CLAIMANT CONTENDS HE IS PERMANENTLY AND TOTALLY DISABLED. THE FUND CROSS REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER, CONTENDING THAT THE REFEREE IMPROPERLY DIRECTED IT TO PAY CLAIMANT'S ATTORNEY AN ATTORNEY'S FEE BECAUSE IT REQUESTED A HEARING AT THE COMMENCEMENT OF THE HEARING AND ON THE EXTENT OF CLAIMANT'S DISABILITY AND HAD NOT PREVAILED. IT ALSO CONTENDS ON REVIEW THAT THE AWARD MADE BY THE SECOND DETERMINATION ORDER WAS EXCESSIVE.

CLAIMANT WAS 59 YEARS OF AGE AND A BEER TRUCK DRIVER SALESMAN WHO SUSTAINED A COMPENSABLE INJURY ON AUGUST 8, 1973. AFTER CONSERVATIVE TREATMENT, THE CLAIM WAS FIRST CLOSED BY DETERMINATION ORDER MAILED OCTOBER 9, 1973 WHICH MADE NO AWARD OF PERMANENT DISABILITY. ON NOVEMBER 5, 1973 CLAIMANT STOPPED WORKING BECAUSE HIS SYMPTOMS RETURNED AND AGAIN HE WAS SUBJECTED TO CONSERVATIVE TREATMENT. CLAIMANT HAD NOT RETURNED TO WORK SINCE NOVEMBER 5, 1973.

CLAIMANT HAD SUSTAINED A BACK INJURY IN 1966 WHICH REQUIRED A TWO LEVEL FUSION L4-S1 BUT EVENTUALLY WAS ABLE TO RETURN TO WORK AND AS FAR AS HIS BACK WAS CONCERNED WAS ABLE TO PERFORM HIS DUTIES UNTIL THE 1973 INJURY.

DR. VAN OSDEL FELT THAT CLAIMANT COULD RETURN TO HIS FORMER WORK WITH NO MORE RESIDUAL NOW THAN PRIOR TO THE INJURY. THE EVIDENCE INDICATED THAT AS A RESULT OF THE PRIOR L4-S1 FUSION, CLAIMANT SHOULD NOT HAVE ENGAGED IN ANY WORK WHICH INVOLVED HEAVY LIFTING OR REPETITIVE BENDING, STOOPING OR TWISTING, BUT HE DID.

DR. GEIST WAS OF THE OPINION, IN VIEW OF THE EXTREMELY LIMITED MOTION OF CLAIMANT'S LUMBAR SPINE AND HIS CONTINUED PAIN, THAT THERE WAS LITTLE HOPE THAT CLAIMANT WOULD BE ABLE TO RETURN TO ANY GAINFUL EMPLOYMENT IN THE ORDINARY SENSE OF THE WORD.

FROM SEPTEMBER 3, 1973, FORWARD CLAIMANT WAS TREATED BY DR. SHORT AND DR. PARSONS. THE LATTER HAD ALSO TREATED CLAIMANT FOR HIS 1966 INJURY. DR. SHORT'S OPINION WAS THAT CLAIMANT WAS NOT MOTIVATED TO RETURN TO WORK ALTHOUGH HE MIGHT BE IF LIGHTER WORK WAS AVAILABLE - DR. PARSONS CONCURRED.

DR. HICKMAN, A CLINICAL PSYCHOLOGIST, REPORTED THAT CLAIMANT HAD A PSYCHOLOGICAL DYSFUNCTION WHICH WAS LARGELY ATTRIBUTABLE TO THE INDUSTRIAL INJURY AND TO HIS SUBSEQUENT PREDICAMENT - HE WAS OF THE OPINION THAT CLAIMANT PROBABLY WOULD SUFFER NO PERMANENT PSYCHOLOGIC DISABILITY AS A RESULT OF THE INJURY PROVIDED HE IS ABLE TO WORK OUT A SATISFACTORY RETIREMENT PROGRAM WHICH WOULD PROVIDE HIM WITH SUFFICIENT INCOME AND STILL ALLOW HIM TO PURSUE SOME OF HIS HOBBIES.

CLAIMANT AT THE PRESENT TIME IS RECEIVING DISABILITY RETIREMENT FROM THE TEAMSTERS AMOUNTING TO 304 DOLLARS A MONTH AND IS RECEIVING SOCIAL SECURITY BENEFITS OF 205 DOLLARS A MONTH. HIS WIFE ALSO DRAWS SOCIAL SECURITY DISABILITY BENEFITS.

THE REFEREE FOUND THAT, BECAUSE OF CLAIMANT'S AGE, IT WAS NOT FEASIBLE FOR HIM TO BE RETRAINED FOR LIGHTER WORK AND THAT AS A RESULT OF THE CONSEQUENCES OF HIS INDUSTRIAL INJURY BEING SUPERIMPOSED UPON HIS 1966 FUSION, CLAIMANT WAS UNABLE TO ENGAGE IN ANY OCCUPATION REQUIRING MORE THAN MODERATE PHYSICAL EFFORT ALTHOUGH HIS ABILITY TO TOLERATE ACTIVITIES WAS GREATER THAN HE ADMITTED.

THE REFEREE FOUND THAT CLAIMANT HAD POTENTIAL FOR INTELLECTUAL AND PROFESSIONAL DEVELOPMENT WHICH HE HAD NEVER ACHIEVED TO FULL EXTENT, BEING CONTENT TO DRIVE A TRUCK FOR 35 YEARS. BASED UPON THE MEDICAL EVIDENCE, ESPECIALLY THE OPINION EXPRESSED BY DR. PARSONS, THE REFEREE CONCLUDED THAT CLAIMANT COULD RETURN TO LIGHT WORK AND FALLS SQUARELY WITHIN THE ODD-LOT CATEGORY BUT THAT HIS LACK OF MOTIVATION PREVENTED HIM FROM RECEIVING PERMANENT TOTAL DISABILITY. HE AFFIRMED THE AWARD MADE BY THE SECOND DETERMINATION ORDER.

THE REFEREE ALSO CONCLUDED THAT BECAUSE THE FUND HAD REQUESTED A HEARING, CONTESTING CLAIMANT'S DISABILITY (SUCH REQUEST BEING MADE AT THE TIME OF THE HEARING) AND HAD NOT SUCCEEDED IN REDUCING THE AWARD MADE BY THE SECOND DETERMINATION ORDER, THEREFORE, THE FUND HAD TO PAY CLAIMANT'S ATTORNEY A REASONABLE ATTORNEY'S FEE.

THE BOARD, ON DE NOVO REVIEW, AGREES WITH THE BASIC FINDINGS AND CONCLUSIONS OF THE REFEREE - HOWEVER, IT CANNOT AGREE WITH THE REFEREE'S FINDING THAT 'CLAIMANT COULD RETURN TO LIGHT WORK AND FALLS SQUARELY WITHIN THE ODD-LOT CATEGORY.' MANY TIMES A WORKMAN,

AFTER AN INJURY, IS ABLE TO RETURN TO A LIGHTER TYPE OF WORK. HE CANNOT BE CONSIDERED AS FALLING WITHIN THE ODD-LOT CATEGORY MERELY BECAUSE HE CANNOT RETURN TO THE HEAVY MANUAL LABOR WHICH HE WAS ABLE TO PERFORM PRIOR TO HIS INJURY. SWANSON V. WESTPORT LUMBER CO. (UNDERSCORED), 4 OR APP 417, ET SEQ, EXPOUNDS ON THE THEORY OF THE 'ODD-LOT' DOCTRINE - THE BARE FINDING THAT A WORKMAN COULD ONLY RETURN TO LIGHT WORK IS NOT SUFFICIENT TO ESTABLISH A PRIMA FACIE CASE UNDER THAT DOCTRINE.

THE BOARD FINDS THAT THE REFEREE IMPROPERLY DIRECTED THE FUND TO PAY CLAIMANT'S ATTORNEY A REASONABLE ATTORNEY'S FEE BASED UPON THE PROVISIONS OF ORS 656.382(2). IN THIS CASE, THE REQUEST FOR HEARING WAS INITIATED BY THE CLAIMANT, NOT BY THE FUND - THE FUND REQUESTED A HEARING, CONTESTING THE EXTENT OF CLAIMANT'S DISABILITY AT THE TIME THE HEARING WAS CONVENED. THE BOARD CONCLUDES THAT THIS CANNOT BE CONSTRUED AS 'INITIATING' THE REQUEST FOR HEARING BY THE FUND, THEREFORE, IT WAS IMMATERIAL WHETHER OR NOT THE FUND WAS SUCCESSFUL IN REDUCING CLAIMANT'S AWARD.

ORDER

THE ORDER OF THE REFEREE DATED JULY 23, 1975 IS MODIFIED BY DELETING THEREFROM THE AWARD OF 600 DOLLARS PAYABLE TO CLAIMANT'S ATTORNEY AS AND FOR A REASONABLE ATTORNEY'S FEE. IN ALL OTHER RESPECTS THE ORDER IS AFFIRMED.

WCB CASE NO. 74-4622 JANUARY 20, 1976

THOMAS BENCH, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
RALPH TODD, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER AFFIRMING THE SECOND DETERMINATION ORDER MAILED DECEMBER 19, 1974 WHEREBY CLAIMANT WAS AWARDED NO ADDITIONAL PERMANENT DISABILITY AND AFFIRMED THE EMPLOYER'S DENIAL OF CLAIMANT'S CLAIM FOR HIS RHEUMATOID ARTHRITIS CONDITION.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON SEPTEMBER 22, 1971, HIS CLAIM WAS CLOSED INITIALLY BY DETERMINATION ORDER MAILED AUGUST 8, 1972 WHICH AWARDED CLAIMANT 48 DEGREES FOR 15 PER CENT UNSCHEDULED LOW BACK DISABILITY. PURSUANT TO STIPULATION, CLAIMANT WAS AWARDED AN ADDITIONAL 25 DEGREES MAKING A TOTAL OF 73 DEGREES FOR HIS UNSCHEDULED LOW BACK DISABILITY. THE CLAIM WAS REOPENED ON FEBRUARY 25, 1974 AND CLOSED BY A SECOND DETERMINATION ORDER MAILED DECEMBER 19, 1974 WHICH AWARDED CLAIMANT NO ADDITIONAL PERMANENT PARTIAL DISABILITY.

CLAIMANT IS A FORMER DIESEL MECHANIC. WHEN HE WAS SEEN BY MEMBERS OF THE BACK CLINIC AT THE TIME OF HIS 1971 INJURY, THE DIAGNOSIS WAS LUMBOSACRAL STRAIN WITH NO EVIDENCE OF NERVE ROOT DEPRESSION OR PERMANENT RESIDUAL DISABILITY. IT WAS THE IMPRESSION OF THE MEMBERS OF THE CLINIC THAT CLAIMANT HAD A SYSTEMIC DISEASE, POSSIBLY COLLAGEN DISEASE, SUCH AS RHEUMATOID OR OTHER INFLAMMATORY ARTHRITIS WHICH ACCOUNTED FOR MOST OF HIS SYMPTOMATOLOGY AT THAT TIME. THE MEMBERS FELT THAT CLAIMANT'S INDUSTRIAL INJURY WAS MINIMAL BUT MIGHT HAVE AGGRAVATED THE ARTHRITIC PROBLEM.

ON APRIL 2, 1974 CLAIMANT WAS EXAMINED BY DR. ROSENBAUM WHO FELT CLAIMANT HAD A RHEUMATIC DISEASE, POSSIBLY RHEUMATOID SPONDYLITIS BUT HE WAS UNABLE TO RELATE THIS ILLNESS TO THE INDUSTRIAL INJURY. ON JUNE 19, 1974 DR. ROSENBAUM REITERATED THIS OPINION. ON JUNE 18, 1974 DR. GROTH REPORTED THAT HE CONCURRED WITH THE FINDINGS OF THE BACK EVALUATION CLINIC.

CLAIMANT WAS EXAMINED BY DR. PASQUESI, AT THE REQUEST OF THE CARRIER. DR. PASQUESI THOUGHT CLAIMANT HAD A 20 PER CENT IMPAIRMENT DUE TO HIS INDUSTRIAL INJURY.

IN HIS FINAL REPORT DATED MARCH 3, 1975, DR. ROSENBAUM STATED THAT HE HAD SEEN THE CLAIMANT FOR MORE THAN A YEAR AND ALTHOUGH HE COULD NOT PROVE OBJECTIVELY, AT THAT TIME, THAT CLAIMANT HAD AN ORGANIC BACK DISEASE, HIS CLINICAL IMPRESSION WAS THAT HE MIGHT HAVE A RHEUMATIC DISEASE OF A MILD FORM WHICH SIMPLY HAD REMAINED QUIESCENT - HE BELIEVED CLAIMANT SHOULD BE STARTED ON A DISABILITY REHABILITATION PROGRAM.

THE REFEREE FOUND THAT THERE WAS SOME POSSIBILITY THAT CLAIMANT'S RHEUMATOID ARTHRITIS CONDITION WAS AGGRAVATED BY EMOTIONAL PROBLEMS OVERLAPPING THE INDUSTRIAL INJURY BUT THAT CLAIMANT HAD NOT PROVEN THIS. THERE WAS NO EVIDENCE THAT THE SYSTEMIC DISEASE WHICH CLAIMANT HAS WAS CAUSALLY RELATED TO HIS INDUSTRIAL ACCIDENT. IT APPEARS TO HAVE DEVELOPED SUBSEQUENTLY THERETO BUT WITHOUT ANY RELATIONSHIP TO SAID ACCIDENT AND WAS AN INCIDENTAL FINDING MADE IN THE COURSE OF CLAIMANT'S TREATMENT. THE REFEREE CONCLUDED THAT THE DENIAL BY THE EMPLOYER AND ITS CARRIER OF ANY RESPONSIBILITY FOR CLAIMANT'S CONDITION OF RHEUMATOID SPONDYLITIS SHOULD BE AFFIRMED.

WITH RESPECT TO THE ADEQUACY OF THE AWARD OF 73 DEGREES WHICH CLAIMANT HAS PREVIOUSLY RECEIVED FOR HIS UNSCHEDULED LOW BACK DISABILITY, THE REFEREE FOUND THAT CLAIMANT IS NOW WORKING, REBUILDING GENERATORS AND HE HAS BEEN ABLE TO PERFORM HIS DUTIES TO DATE PROVIDING HE IS ABLE TO GET OFF HIS FEET PERIODICALLY. HE EARNS 3 DOLLARS AN HOUR AT HIS PRESENT JOB WHEREAS A DIESEL MECHANIC NOW EARNS 6.50 DOLLARS. THE REFEREE FOUND CLAIMANT HAS PROBLEMS WITH HIS HANDS, JOINTS, NECK, KNEES AND ANKLES AND HE HAS A LIFTING LIMITATION OF 25 POUNDS WHICH HE HAS IMPOSED ON HIMSELF. CLAIMANT HAD ALSO TRIED TO APPLY FOR WORK AT MOTORCYCLE AND LAWNMOWER SHOPS, ATTEMPTING TO APPLY HIS TRAINING IN SMALL ENGINE REPAIR, BUT MET WITH LITTLE SUCCESS.

THE REFEREE CONCLUDED THAT CLAIMANT HAS LOST A PORTION OF THE LABOR MARKET WHICH WAS AVAILABLE TO HIM PRIOR TO HIS INDUSTRIAL INJURY BUT THAT THE AWARD OF 73 DEGREES ADEQUATELY COMPENSATES CLAIMANT FOR THIS LOSS.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE. THE BOARD NOTES THAT ANSWERS TO COMPLEX MEDICAL CAUSATION QUESTIONS ARE TO BE DETERMINED BY MEDICAL TESTIMONY AND THE MEDICAL EVIDENCE PRESENTED IN THIS CASE CLEARLY ESTABLISH THAT CLAIMANT'S RHEUMATOID PROBLEM OCCURRED AFTER THE INDUSTRIAL INJURY AND HAD NO RELATIONSHIP TO HIS INDUSTRIAL INJURY.

THE BOARD SUGGESTS THAT CLAIMANT AVAIL HIMSELF OF PSYCHOLOGICAL COUNSELING, BASED UPON DR. HICKMAN'S EVALUATION THAT CLAIMANT IS EXPERIENCING A MODERATELY SEVERE ANXIETY TENSION REACTION WITH PROBABLE CONVERSION REACTIONS AND EXTREME PREOCCUPATION WITH HIS SYMPTOMS. UNDER THE PROVISIONS OF ORS 656.245, PSYCHOLOGICAL COUNSELING CAN BE PROVIDED TO CLAIMANT.

ORDER

THE ORDER OF THE REFEREE DATED JULY 8, 1975 IS AFFIRMED.

WCB CASE NO. 75-400 JANUARY 20, 1976

GORDON WICKLANDER, CLAIMANT
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT
CROSS REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER CONTENDING HE ERRED IN FAILING TO MAKE A FINDING REVERSING THE DENIAL OF THE STATE ACCIDENT INSURANCE FUND AND IN AWARDING ATTORNEY'S FEES ON A DENIED CLAIM AND ALSO FAILED TO AWARD TEMPORARY TOTAL DISABILITY COMPENSATION.

THE FUND CROSS REQUESTS REVIEW OF THE REFEREE'S ORDER CONTENDING THAT THE EXTENT, IF ANY, OF CLAIMANT'S PERMANENT PARTIAL DISABILITY WAS LESS THAN THAT AWARDED BY THE REFEREE IN HIS OPINION AND ORDER DATED JULY 15, 1975.

ON AUGUST 13, 1975 THE BOARD WAS ADVISED BY CLAIMANT'S COUNSEL THAT CLAIMANT HAD BEEN ENROLLED IN AN AUTHORIZED PROGRAM OF VOCATIONAL REHABILITATION AND A REQUEST WAS MADE, PURSUANT TO THE PROVISIONS OF ORS 656.268, THAT THE FUND COMMENCE PAYMENT TO CLAIMANT OF TEMPORARY TOTAL DISABILITY COMPENSATION TO CONTINUE UNTIL CLAIMANT HAS COMPLETED THE AUTHORIZED PROGRAM.

THE FUND CONTENDED THAT THE DETERMINATION ORDER MAILED DECEMBER 3, 1974 WHICH ALLOWED TEMPORARY TOTAL DISABILITY COMPENSATION FROM AUGUST 28, 1974 THROUGH SEPTEMBER 10, 1974, IMPLIED A FINDING THAT CLAIMANT WAS BOTH MEDICALLY AND VOCATIONALLY STATIONARY AT THAT TIME.

ON SEPTEMBER 26, 1975 AN INTERIM ORDER WAS ENTERED WHICH REOPENED CLAIMANT'S CLAIM EFFECTIVE AUGUST 28, 1975 AND PROVIDED HIM WITH SUCH REHABILITATION AND COMPENSATION BENEFITS AS HIS CONDITION SHOULD WARRANT, IT FURTHER ORDERED PAYMENT OF COMPENSATION UNDER THE PREVIOUS ORDER TO BE SUSPENDED EFFECTIVE AUGUST 28, 1975 PENDING FINAL EVALUATION.

BECAUSE OF THE CIRCUMSTANCES WHICH HAVE OCCURRED SINCE THE ENTRY OF THE REFEREE'S OPINION AND ORDER ON JULY 15, 1975, THE ONLY ISSUE REMAINING BEFORE THE BOARD ON REVIEW IS THE PROPRIETY OF THE REFEREE'S REFUSAL TO AWARD AN ATTORNEY'S FEE ON A DENIED CLAIM.

THE BOARD, ON DE NOVO REVIEW, CONCURS WITH THE FINDING THAT CLAIMANT'S ATTORNEY IS NOT ENTITLED TO AN ATTORNEY'S FEE. THE DENIAL, DATED JANUARY 22, 1975, WHICH DENIED RESPONSIBILITY FOR FURTHER BACK CONDITION BEYOND OCTOBER 31, 1974 WAS A PROPER DENIAL.

ORDER

THE ORDER OF THE REFEREE DATED JULY 15, 1975 IS AFFIRMED WITH RESPECT TO THE AFFIRMANCE OF THE FUND'S DENIAL DATED JANUARY 22, 1975.

THE AWARD OF 48 DEGREES FOR 15 PER CENT PERMANENT PARTIAL DISABILITY IS SET ASIDE AS IS THE DIRECTIVE THAT THE FUND PAY CLAIMANT'S ATTORNEY 25 PER CENT OF THE AFORESAID AWARD TO A MAXIMUM OF 2,000 DOLLARS. A DETERMINATION OF THE EXTENT OF CLAIMANT'S PERMANENT PARTIAL DISABILITY MUST BE HELD IN ABEYANCE UNTIL THE CLAIMANT IS FOUND TO BE VOCATIONALLY STATIONARY.

WCB CASE NO. 74-4537 JANUARY 20, 1976

GEORGE WILLIAMS, CLAIMANT

EMMONS, KYLE, KROPP AND KRYGER,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH DENIED CLAIMANT'S REQUEST FOR HEARING BECAUSE IT WAS NOT FILED WITHIN 60 DAYS AFTER CLAIMANT'S CLAIM WAS DENIED.

CLAIMANT'S CLAIM WAS DENIED OCTOBER 17, 1974 AND HIS REQUEST FOR HEARING WAS DATED DECEMBER 16, 1974, POSTMARKED DECEMBER 17, 1974 AND RECEIVED BY THE BOARD ON DECEMBER 18, 1974.

THE REFEREE, AT THE HEARING, INQUIRED WHY CLAIMANT HAD NOT FILED EARLIER AS REQUIRED BY THE STATUTE AND RECEIVED AS AN ANSWER - 'I'M A PUTTER OFFER.' THE REFEREE FELT THIS WAS NOT A SATISFACTORY EXPLANATION NOR WAS THE CLAIMANT'S EXPLANATION OF THE METHOD HE USED TO COUNT THE 60 DAYS PERSUASIVE.

THE REFEREE CONCLUDED THAT CLAIMANT HAD FAILED TO SHOW GOOD CAUSE FOR HIS FAILURE TO FILE IN A TIMELY FASHION.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

WCB CASE NO. 74-4456 JANUARY 20, 1976

JAMES TEMPLE, CLAIMANT

GALBREATH AND POPE, CLAIMANT'S ATTYS.
KOTTKAMP AND O'ROURKE, DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER REQUESTS REVIEW BY THE BOARD OF A REFEREE'S ORDER WHICH REMANDED TO IT CLAIMANT'S CLAIM FOR AGGRAVATION.

CLAIMANT SUSTAINED A COMPENSABLE LOW BACK INJURY ON MAY 6, 1969 - HIS CLAIM WAS CLOSED BY DETERMINATION ORDER MAILED APRIL 20, 1970 WITH NO AWARD OF PERMANENT DISABILITY COMPENSATION.

ON JULY 30, 1971, CLAIMANT FILED A REQUEST FOR A HEARING ON AN AGGRAVATION BASIS, HOWEVER, WHILE THAT REQUEST WAS PENDING CLAIMANT WAS IMPRISONED IN THE OREGON STATE PENITENTIARY AND THE CLAIM FOR AGGRAVATION WAS DISMISSED FOR FAILURE TO FILE SUPPORTING

MEDICAL DOCUMENTS (AT THE TIME REQUIRED BY STATUTE). IN 1974 CLAIMANT AGAIN REQUESTED A HEARING AND, PURSUANT TO THE PROVISIONS OF ORS 656.273, AS AMENDED BY SENATE BILL 741, THE REQUEST WAS GRANTED.

DR. SMITH EXAMINED CLAIMANT ON JUNE 20, 1975 - HE HAD ALSO EXAMINED CLAIMANT IN JULY, 1969 (ACTUALLY HE HAD FIRST SEEN CLAIMANT IN MAY, 1965). CLAIMANT HAD CONSIDERABLE COMPLAINTS, TENDERNESS AND PAIN IN HIS BACK AND ALSO SHOWED A GREAT DEAL OF DEGENERATION THROUGHOUT THE LUMBAR SPINE. BASED UPON HIS EXAMINATION OF CLAIMANT ON JUNE 20, 1975, DR. SMITH WAS OF THE OPINION THAT CLAIMANT HAD A TREMENDOUS AMOUNT OF IMPAIRED FUNCTION IN HIS LOWER BACK AND ESSENTIALLY COULD NOT USE IT FOR ANY USEFUL PURPOSE. HE STATED, UNEQUIVOCALLY, THAT CLAIMANT'S CONDITION WAS PROBABLY GETTING WORSE AS TIME PROGRESSED AND THAT HE WAS HAVING MORE EPISODES OF ACUTE PAIN AND MUSCLE SPASMS. IT WAS HIS OPINION THAT CLAIMANT'S CONDITION AT THE PRESENT TIME WAS WORSE THAN IT WAS WHEN HE HAD SEEN HIM IN 1969.

BASED UPON THE TESTIMONY OF DR. SMITH, TO A LARGE EXTENT, THE REFEREE CONCLUDED THAT CLAIMANT HAD SUSTAINED HIS BURDEN OF PROOF THAT HIS CONDITION HAD BECOME AGGRAVATED AND WORSENED SINCE THE FIRST DETERMINATION ORDER MAILED APRIL 20, 1970 AND THAT THERE HAD BEEN A DE FACTO DENIAL OF THIS CLAIM FOR AGGRAVATION BY THE EMPLOYER.

THE REFEREE REMANDED THE CLAIM TO THE EMPLOYER FOR ACCEPTANCE AND PAYMENT OF BENEFITS AS PROVIDED BY LAW AND AWARDED CLAIMANT'S ATTORNEY A REASONABLE ATTORNEY'S FEE TO BE PAID BY THE EMPLOYER.

THE BOARD, ON DE NOVO REVIEW, CONCURS IN THE FINDINGS AND CONCLUSIONS REACHED BY THE REFEREE IN HIS OPINION AND ORDER.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 1, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 350 DOLLARS, PAYABLE BY THE EMPLOYER.

WCB CASE NO. 75-486 JANUARY 20, 1976

ESTHER NIMSIC, CLAIMANT

WENDELL GRONSO, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT PERMANENT TOTAL DISABILITY AS DEFINED BY ORS 656.206 EFFECTIVE ON THE DATE OF HIS ORDER, AUGUST 7, 1975.

CLAIMANT IS A 61 YEAR OLD COOK AND WAITRESS WHO SUFFERED A BACK INJURY ON MARCH 14, 1974 WHEN SHE WAS STRUCK BY A FREEZER DOOR WHILE CARRYING A TRAY OF MEAT. CLAIMANT HAS NOT WORKED SINCE THE DATE OF HER INJURY.

EXAMINATION AT THE DISABILITY PREVENTION DIVISION ON NOVEMBER 6, 1974 INDICATED INJURY-RELATED RIGHT SHOULDER AND NECK STRAIN

DUE TO THE FALL AND DEGENERATIVE ARTHRITIS OF THE CERVICAL SPINE. THE DOCTORS AT THE DISABILITY PREVENTION DIVISION DOUBTED WHETHER CLAIMANT WOULD BE ABLE TO RETURN TO ACTIVE COOKING OR RESTAURANT WORK.

THE PSYCHOLOGICAL EVALUATION OF NOVEMBER 15, 1974 REVEALED CLAIMANT TO BE AN EXCEEDINGLY POOR CANDIDATE FOR FUTURE EMPLOYMENT DUE TO HER AGE, PHYSICAL HEALTH PROBLEMS, LACK OF VOCATIONAL SKILLS AND LACK OF A HIGH SCHOOL DIPLOMA. CLAIMANT ALSO HAS VERY LIMITED VOCATIONAL INTERESTS.

IT IS DOUBTFUL THAT CLAIMANT IS REALLY INTERESTED IN TRYING TO WORK AGAIN AND IF SHE DID ATTEMPT TO RETURN TO THE LABOR MARKET SHE COULD ONLY BE CONSIDERED FOR A RELATIVELY LOW-LEVEL TYPE OF WORK. THE PHYSICAL IMPAIRMENT RELATES TO NECK AND SHOULDER AND WAS CONSIDERED MILD TO MILDLY MODERATE, HOWEVER, CLAIMANT COULD NOT RETURN TO WORK AS A WAITRESS BECAUSE OF THE LIMITATION OF RANGE OF MOTION IN HER NECK AND AGGRAVATION OF HER SYMPTOMS BROUGHT ON WHEN SHE IS FORCED TO LOOK DOWN.

DR. WHITE CONSIDERED HER PERMANENTLY AND TOTALLY DISABLED FROM PERFORMING ANY REGULAR AND SUITABLE WORK AS A RESULT OF HER INDUSTRIAL INJURY. CLAIMANT STATES SHE IS UNABLE TO RAISE HER RIGHT ARM AND SHE HAS DIFFICULTY MOVING HER NECK AND CANNOT LOOK DOWN - SHE IS ABLE TO DO HOUSEWORK IF IT DOES NOT REQUIRE LIFTING OR BENDING. AT THE PRESENT TIME SHE TAKES PAIN MEDICATION.

THERE ARE TWO RESTAURANTS IN BURNS THAT OCCASIONALLY HIRE RECEPTIONISTS. ONE USES A RECEPTIONIST SEVEN OR EIGHT TIMES A YEAR - THE OTHER THE OWNER PERFORMS THIS FUNCTION.

THE REFEREE FOUND THAT CLAIMANT'S INJURIES WERE SUCH THAT, WHEN COUPLED WITH OTHER FACTORS SUCH AS MENTAL CAPACITY, EDUCATION, TRAINING OR AGE, PLACED HER PRIMA FACIE IN THE ODD-LOT CATEGORY AND THAT, CONSEQUENTLY, THE BURDEN OF PROOF WAS UPON THE FUND TO SHOW SOME KIND OF SUITABLE WORK WHICH WAS REGULARLY AND CONTINUOUSLY AVAILABLE TO CLAIMANT. THE REFEREE FOUND THE FUND HAD NOT MET THIS BURDEN AND HE CONCLUDED, THEREFORE, THAT CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 7, 1975 IS AFFIRMED.

COUNSEL FOR CLAIMANT IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW THE SUM OF 400 DOLLARS PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 74-1077 JANUARY 20, 1976

ROBERT HAINES, CLAIMANT

EMMONS, KYLE, KROPP AND KRYGER,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 66 DEGREES OF A MAXIMUM OF 110 DEGREES FOR PARTIAL

LOSS OF USE OF THE LEFT LEG AND 105.6 DEGREES OF A MAXIMUM OF 192 DEGREES FOR UNSCHEDULED LOW BACK DISABILITY.

CLAIMANT SUFFERED A COMPENSABLE LEFT LEG INJURY IN APRIL 1967 WHILE WORKING AS A LOGGER. THE CLAIM WAS INITIALLY CLOSED IN SEPTEMBER 1968 WITH AN AWARD OF 22 DEGREES FOR 20 PER CENT LOSS OF LEFT LEG. CLAIMANT HAD RETURNED TO WORK AS A LOGGER IN MAY 1968 AND ON THE THIRD DAY ON THE JOB INJURED HIS RIGHT ANKLE AND FRACTURED THE RIGHT GREAT TOE. CLAIMANT FINALLY ABANDONED THE OCCUPATION OF LOGGING AND COMMENCED PICKING AND SELLING BRUSH IN 1969 AND IN JUNE 1971, WHILE PICKING BRUSH, HE FELL AND INJURED HIS BACK. THE CLAIM WAS REOPENED AND A MYELOGRAM REVEALED A LARGE HERNIATED VERTEBRAL DISC AT L4-5 WHICH REQUIRED A LAMINECTOMY AND DISC REMOVAL AT L4-5 IN MARCH 1972.

ALTHOUGH CLAIMANT'S BACK IS IMPROVED, HIS LEFT LEG PROBLEMS PERSISTED AND IN APRIL 1972 AN OSTEOTOMY WAS PERFORMED. CLAIMANT CONTENDS THAT HE IS WORSE NOW THAN BEFORE THIS SURGERY.

CLAIMANT HAS NUMBNESS ON THE OUTSIDE OF THE LEFT LEG FROM JUST BELOW THE KNEE TO THE ANKLE AND ACROSS THE TOP OF THE FOOT - HE WALKS ON THE OUTSIDE OF HIS FOOT AND ROLLS IT OVER IN THE PROCESS. HE HAS LIMITED RANGE OF MOTION WITH RESTRICTED FLEXION AND EXTENSION. THE ANKLE SWELLS AND DISCOMFORT IS CAUSED BY PROLONGED STANDING OR WALKING ESPECIALLY ON HARD OR UNEVEN SURFACES.

CLAIMANT TRIED TO WORK PERIODICALLY PICKING BRUSH EVEN AFTER THE OSTEOTOMY, HOWEVER, HE WAS FORCED TO QUIT DUE TO LEFT LEG PAIN AND ANKLE SWELLING AND HAS NOT WORKED SINCE.

NORMAN HICKMAN, A CLINICAL PSYCHOLOGIST, INTERVIEWED AND TESTED CLAIMANT AS DID ROBERT ADOLPH, A VOCATIONAL SPECIALIST AND PSYCHOLOGIST. MR. ADOLPH WAS OF THE OPINION THAT THERE WAS NO SUITABLE LIGHT SEDENTARY WORK PRESENTLY AVAILABLE FOR CLAIMANT IN LINCOLN COUNTY OR THE SURROUNDING AREA. HE CONCEDED THAT CLAIMANT WAS NOT MOTIVATED TO SEEK WORK OR TO BE RETRAINED, AN ASSESSMENT SHARED BY DR. HICKMAN. BOTH FELT THE LACK OF MOTIVATION WAS RELATED TO THE INJURY AND THE SUBSEQUENT LOSS OF WORK - BOTH FELT IT WOULD BE PSYCHOLOGICALLY DAMAGING TO CLAIMANT IF HE WAS REQUIRED TO LEAVE THE WALDPORT AREA UNLESS A SUITABLE JOB WAS FOUND FOR CLAIMANT WHICH WOULD PAY SUFFICIENTLY TO OFFSET THIS PSYCHOLOGICAL DAMAGE.

THE REFEREE FOUND AMPLE EVIDENCE THAT CLAIMANT WAS TRAINABLE, THAT HE WAS YOUNG AND HAD THE INTELLIGENCE, APTITUDES AND MECHANICAL SKILLS TO BE RETRAINED - HOWEVER, CLAIMANT APPEARED TO RESIST ANY HELP FROM GOVERNMENTAL AGENCIES. IT WOULD BE NECESSARY TO ESTABLISH A SUCCESSFUL REHABILITATION PROGRAM WHEREIN HE WOULD HAVE GOOD RAPPORT WITH HIS COUNSELOR BEFORE MUCH COULD BE ACCOMPLISHED IN THE WAY OF RETRAINING.

THE REFEREE FOUND THAT CLAIMANT HAD BEEN A LOGGER THE BULK OF HIS WORKING LIFE ALTHOUGH HE HAD HAD SOME EXPERIENCE IN CONSTRUCTION AND WORKING IN AN ALUMINUM PLANT. HE FURTHER FOUND THAT THE BRUSH PICKING CLAIMANT DID AFTER THE 1967 INJURY INVOLVED CONSIDERABLE BENDING AND STOOPING AND ALSO THE CARRYING OF 80 POUNDS OVER AN UNEVEN TERRAIN.

THE REFEREE FOUND THAT CLAIMANT, AT THE PRESENT TIME, WAS SUITABLE ONLY FOR LIGHT WORK, THAT HE CERTAINLY COULD NOT RETURN TO ANY OF THE WORK HE HAD DONE PRIOR TO HIS INJURY, BUT CLAIMANT HAD NOT ESTABLISHED THAT EVEN WITH RETRAINING HE WOULD BE UNSUITABLE FOR WORK IN WALDPORT OR IN URBAN AREAS - THAT SUCH TRAINING WAS OFFERED BUT REJECTED BY CLAIMANT.

THE REFEREE CONCLUDED THAT CLAIMANT HAD NOT PROVEN THAT HE COULD NOT GAIN AND HOLD SUITABLE EMPLOYMENT IN THE BROAD FIELD OF GENERAL INDUSTRIAL OCCUPATIONS, THEREFORE, HE WAS NOT ENTITLED TO BE AWARDED COMPENSATION FOR PERMANENT TOTAL DISABILITY - HOWEVER, CLAIMANT HAD LOST MORE EARNING CAPACITY AND SUFFERED MORE IMPAIRMENT TO HIS LEFT LEG THAN WAS REFLECTED BY THE AWARDS HE RECEIVED FOR HIS SCHEDULED AND UNSCHEDULED INJURIES.

CLAIMANT HAD RECEIVED A TOTAL OF 33 DEGREES FOR 30 PER CENT LOSS USE OF LEFT LEG AND 57.6 DEGREES FOR 30 PER CENT UNSCHEDULED DISABILITY. THE REFEREE INCREASED THESE AWARDS TO 66 DEGREES FOR 60 PER CENT LOSS USE OF LEFT LEG AND 105.6 DEGREES FOR 55 PER CENT UNSCHEDULED LOW BACK DISABILITY.

THE BOARD, ON DE NOVO REVIEW, CONCURS WITH THE BASIC FINDINGS AND CONCLUSIONS OF THE REFEREE, BUT FEELS THAT CLAIMANT IS ENTITLED TO A GREATER AWARD FOR HIS UNSCHEDULED DISABILITY THAN THAT WHICH THE REFEREE GRANTED. THE BOARD FINDS THAT TO ADEQUATELY COMPENSATE CLAIMANT FOR HIS LOSS OF EARNING CAPACITY HE SHOULD RECEIVE, IN ADDITION TO HIS AWARD OF 66 DEGREES FOR LOSS OF USE OF HIS LEFT LEG, 144 DEGREES FOR 75 PER CENT UNSCHEDULED LOW BACK DISABILITY.

THE BOARD, BASED UPON THE OPINIONS EXPRESSED BY BOTH DR. HICKMAN AND MR. ADOLPH AND THE COMMENTS CONTAINED IN THE REFEREE'S ORDER, URGES CLAIMANT TO TAKE ADVANTAGE OF VOCATIONAL REHABILITATION PROGRAMS AVAILABLE TO HIM THROUGH THE DIVISION OF VOCATIONAL REHABILITATION.

ORDER

THE ORDER OF THE REFEREE DATED JULY 11, 1975 IS MODIFIED TO THE EXTENT THAT CLAIMANT IS AWARDED 144 DEGREES OF A MAXIMUM OF 192 DEGREES FOR UNSCHEDULED LOW BACK DISABILITY. IN ALL OTHER RESPECTS THE ORDER OF THE REFEREE IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM EQUAL TO 25 PER CENT OF THE COMPENSATION INCREASED BY THIS AWARD, PAYABLE OUT OF SAID INCREASED COMPENSATION AS PAID, NOT TO EXCEED A MAXIMUM OF 2,300 DOLLARS, IN AGGREGATE.

WCB CASE NO. 74-4374 JANUARY 20, 1976

CLINTON PRESSEL, CLAIMANT

GALTON AND POPICK, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH FOUND CLAIMANT TO BE PERMANENTLY AND TOTALLY DISABLED WITHIN THE MEANING OF ORS 656.206(1)(A).

CLAIMANT, A 54 YEAR OLD BEER TRUCK DRIVER, SUFFERED AN INJURY TO HIS LOW BACK ON NOVEMBER 9, 1973 AND HAS BEEN UNABLE TO RETURN TO WORK BECAUSE OF THE STRAIN WHICH HE SUFFERED WHICH, IN TURN, WAS SUPERIMPOSED ON PREEXISTING, ADVANCED ARTHRITIC CHANGES IN HIS LUMBAR SPINE.

CLAIMANT HAS AN EIGHTH GRADE EDUCATION, IS OF AVERAGE INTELLIGENCE AND HAS SEVERAL VOCATIONAL APTITUDES, HOWEVER, THESE APTITUDES ARE BASICALLY RELATED TO PHYSICAL LABOR WHICH CLAIMANT IS NOW UNABLE TO DO. HIS WORK BACKGROUND HAS BEEN PRIMARILY TRUCK DRIVING ALTHOUGH HE HAS DONE SOME MILL WORK, WOODCUTTING, FARM AND CONSTRUCTION WORK.

THE DOCTORS AND PSYCHOLOGISTS WHO EXAMINED CLAIMANT EXPRESSED HOPE THAT CLAIMANT COULD BE VOCATIONALLY REHABILITATED TO MORE SEDENTARY WORK BUT CLAIMANT'S VOCATIONAL COUNSELOR STATED ON AUGUST 19, 1974 THAT CLAIMANT'S PHYSICAL LIMITATIONS WERE SO ACUTE THAT IT DID NOT APPEAR THAT CLAIMANT COULD BECOME ACTIVE WITH THE VOCATIONAL REHABILITATION DIVISION AT THAT TIME, AND HE AGREED TO CLOSE CLAIMANT'S CLAIM.

CLAIMANT'S CONDUCT AT THE HEARING, AS NOTICED BY THE REFEREE, INDICATED DISCOMFORT IN CLAIMANT'S BACK, HIP AND LEG TO SUCH A DEGREE THAT CLAIMANT WAS REQUIRED TO MAKE FREQUENT CHANGES BETWEEN STANDING AND SITTING POSITIONS.

THE REFEREE FOUND THAT, ALTHOUGH MUCH OF CLAIMANT'S DISABILITY WAS PREEXISTING ARTHRITIS, THE COMBINATION OF THE PREEXISTING CONDITION WITH RESIDUAL CHRONIC STRAIN RESULTING FROM THE INDUSTRIAL INJURY OF NOVEMBER 9, 1973, PERMANENTLY INCAPACITATING CLAIMANT FROM REGULARLY PERFORMING ANY WORK AT A GAINFUL AND SUITABLE OCCUPATION. THE CLAIMANT'S CLAIM HAS BEEN CLOSED WITH AN AWARD OF 96 DEGREES FOR 30 PER CENT UNSCHEDULED LOW BACK DISABILITY ON NOVEMBER 1, 1974. DR. CHERRY, WHO EXAMINED CLAIMANT, FELT HE WAS PERMANENTLY AND TOTALLY DISABLED AND THE VOCATIONAL REHABILITATION DIVISION DID NOT FEEL THAT HE WAS RETRAINABLE.

THE REFEREE CONCLUDED THAT CLAIMANT IS UNABLE TO RETURN TO ANY WORK AND IS AWARE THAT HE CANNOT, WITH ANY SUBSTANTIAL PROBABILITY, BE VOCATIONALLY REHABILITATED BECAUSE HE CAN'T STAND UP TO THE RIGORS OF SUCH A TRAINING PROGRAM, THEREFORE, CLAIMANT MUST BE CONSIDERED AS PERMANENTLY AND TOTALLY DISABLED.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE AS ITS OWN.

ORDER

THE ORDER OF THE REFEREE DATED JULY 10, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 400 DOLLARS PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 75-743 JANUARY 20, 1976

EDNA SCHOONOVER, CLAIMANT

SAHLSTROM, LOMBARD, STARR AND VINSON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH REMANDED CLAIMANT'S CLAIM TO IT FOR ACCEPTANCE AND PAYMENT OF COMPENSATION AS PROVIDED BY LAW

FROM AND AFTER OCTOBER 1974 AND UNTIL JULY 28, 1975, INCLUDING BUT NOT LIMITED TO ALL REQUIRED MEDICAL SERVICES INCURRED BY CLAIMANT - AWARDED CLAIMANT 37.5 DEGREES FOR 25 PER CENT LOSS OF THE RIGHT LEG AND 96 DEGREES FOR 30 PER CENT UNSCHEDULED DISABILITY. THE ORDER FURTHER DIRECTED THE FUND TO PAY CLAIMANT'S ATTORNEY A REASONABLE ATTORNEY'S FEE.

CLAIMANT SUSTAINED A COMPENSABLE INJURY ON JANUARY 14, 1972, INJURING HER BACK AND RIGHT LEG. BECAUSE OF PERSISTENT ACUTE RIGHT SCIATIC PAIN FOLLOWING THE INJURY, CLAIMANT WAS HOSPITALIZED ON MARCH 14, 1972 AND A LUMBAR LAMINECTOMY WAS PERFORMED ON MARCH 16, 1972. ON DECEMBER 18, 1972 DR. SCHROEDER RECOMMENDED CLAIM CLOSURE INDICATING CLAIMANT HAD MINIMAL BACK DISCOMFORT BUT HAD HAD A MODERATELY GOOD RESULT FROM HER LAMINECTOMY WITH PRACTICALLY COMPLETE RESOLUTION OF HER RIGHT LEG PAIN - SHE DID HAVE SOME RESIDUAL DISABILITY WITH HER RIGHT HIP AND BACK. HE RECOMMENDED SHE NOT RETURN TO ANY TYPE OF WORK REQUIRING LIFTING, BENDING OR STOOPING AND SUGGESTED VOCATIONAL REHABILITATION.

A DETERMINATION ORDER MAILED JANUARY 4, 1973 AWARDED CLAIMANT 32 DEGREES FOR 10 PER CENT UNSCHEDULED DISABILITY AND 15 DEGREES FOR 10 PER CENT LOSS OF THE RIGHT LEG. ON AUGUST 10, 1973 PURSUANT TO A STIPULATION, THE AWARDS WERE INCREASED TO A TOTAL OF 64 DEGREES FOR 20 PER CENT UNSCHEDULED DISABILITY AND 22.5 DEGREES FOR 15 PER CENT SCHEDULED RIGHT LEG DISABILITY.

IN AUGUST 1974 CLAIMANT MOVED FROM EUGENE TO EUREKA, CALIFORNIA. AT THIS TIME CLAIMANT HAD SOME OCCASIONAL PAIN BUT WAS RELATIVELY ASYMPTOMATIC. IN OCTOBER 1974, WHILE AT HOME, SHE FELL WHILE WALKING DOWN THE STAIRS. SHE STEPPED ON HER RIGHT LEG AND IT BUCKLED CAUSING HER TO FALL. SHE WAS SEEN BY DR. CHASE, AN ORTHOPEDIST, COMPLAINING OF PAIN OVER THE LOWER BACK RADIATING INTO THE RIGHT LEG AND ASSOCIATED WITH MUSCLE SPASM. DR. CHASE'S IMPRESSION WAS THAT CLAIMANT HAD A BACK STRAIN SUPERIMPOSED ON A POST-LAMINECTOMY SPINE BUT DID NOT DEMONSTRATE ANY EVIDENCE OF ACUTE, NEW DISC RUPTURE AT THAT TIME. HE RECOMMENDED CONSERVATIVE TREATMENT IN THE FORM OF MEDICATION, LIMITATION OF ACTIVITY, PHYSICAL THERAPY AND EXTERNAL SUPPORT, AND SO ADVISED THE FUND ON NOVEMBER 27, 1974.

ON FEBRUARY 4, 1975 THE FUND DENIED RESPONSIBILITY FOR CLAIMANT'S CURRENT CONDITIONS, STATING THAT THEY APPEARED TO BE RELATED NOT TO THE ORIGINAL INJURY BUT TO A COMPLETE NEW INCIDENT WHEN SHE FELL DOWN THE STAIRS AT HOME.

ON FEBRUARY 10, 1975 DR. CHASE REPORTED THAT IT APPEARED TO HIM THAT CLAIMANT'S RENEWED BACK AND LEG PAIN WERE THE RESULT OF THE FALL WHICH WAS CAUSED BY HER LEG WEAKNESS WHICH HAD BEEN PRESENT SINCE HER INDUSTRIAL INJURY OF JANUARY 1972.

CLAIMANT RETURNED TO OREGON AND WAS SEEN AGAIN BY DR. SCHROEDER IN JULY 1975. DR. SCHROEDER STATED THAT ALTHOUGH HE COULD NOT BE ABSOLUTELY SURE, IT WAS HIS OPINION THAT THE CURRENT PROBLEM CLAIMANT WAS HAVING WAS PROBABLY RESIDUALS FROM THE LUMBAR LAMINECTOMY OF 1972. HE FELT THAT CLAIMANT'S CURRENT DISABILITY WAS MINIMAL AND THAT A REPEAT MYELOGRAPHY OR LAMINECTOMY WAS NOT INDICATED BUT HE DID ENCOURAGE CONTINUED TRAINING WITH VOCATIONAL REHABILITATION.

THE REFEREE FOUND CLAIMANT'S TESTIMONY CREDIBLE AND SUPPORTED BY THE MEDICAL RECORDS WHICH INDICATED THAT SUBSEQUENT TO HER LAMINECTOMY CLAIMANT'S CONDITION GRADUALLY IMPROVED, BUT JUST PRIOR TO MOVING FROM OREGON SHE DID HAVE SOME DISCOMFORT IN

THE LOW BACK AND RIGHT LEG. CLAIMANT'S PAIN SUBSEQUENT TO THE FALL IN OCTOBER 1974 WAS LOCATED IN THE SAME AREA AS BEFORE THE FALL BUT WAS MUCH MORE SEVERE AND IS NOW CONSTANT. THE REFEREE FOUND THAT AFTER THE FALL CLAIMANT'S RIGHT LEG WOULD NOT SUPPORT HER AND SHE WAS REQUIRED TO USE CRUTCHES TO KEEP FROM FALLING. CLAIMANT HAS DIFFICULTY SLEEPING AT NIGHTS, A CONDITION SHE DID NOT HAVE PRIOR TO THE FALL AND, ALSO, SINCE THE FALL HER LEG PERIODICALLY BUCKLES UNDER HER WITHOUT WARNING.

THE REFEREE CONCLUDED, BASED UPON THE FACTS AND THE MEDICAL EVIDENCE, THAT CLAIMANT'S INDUSTRIAL INJURY OF 1972 WAS A MATERIAL CONTRIBUTING CAUSE TO HER FALL AT HOME IN OCTOBER 1974 AND HER PRESENT RIGHT LEG AND LOW BACK CONDITION WHICH REQUIRED MEDICAL TREATMENT. THE REFEREE FURTHER CONCLUDED THAT, BASED UPON DR. SCHROEDER'S REPORT OF JULY 28, 1975, CLAIMANT'S CONDITION WAS NOW STATIONARY AND THAT SHE NEEDED NO FURTHER MEDICAL TREATMENT.

IN EVALUATING THE CLAIMANT'S RIGHT LEG DISABILITY, THE REFEREE TOOK INTO CONSIDERATION ONLY THE LOSS OF FUNCTION AND USE OF THIS SCHEDULED MEMBER AND, BASED UPON CLAIMANT'S UNCONTRAVERTED TESTIMONY, WHICH WAS CORROBORATED BY HER HUSBAND, CONCERNING THIS LOSS OF FUNCTION AND USE AS WELL AS THE MEDICAL EVIDENCE, THE REFEREE FOUND CLAIMANT HAD SUSTAINED A 25 PER CENT LOSS OF FUNCTION AND USE OF THE RIGHT LEG AND THEREFORE INCREASED THE PREVIOUS AWARD 15 DEGREES FOR A TOTAL OF 37.5 DEGREES.

WITH RESPECT TO CLAIMANT'S UNSCHEDULED DISABILITY, WHICH IS MEASURED BY LOSS OF EARNING CAPACITY ONLY, THE REFEREE FOUND THAT CLAIMANT HAS A LOW BACK DISABILITY WHICH BARS HER FROM ENTERING THE GENERAL LABOR MARKET IN ANY JOBS WHICH REQUIRE HEAVY LABOR INCLUDING LIFTING, BENDING OR STOOPING. CLAIMANT HAS NEVER DONE WORK OTHER THAN THAT WHICH REQUIRES SUCH ACTIVITIES, HOWEVER, SHE IS NOW ENGAGED IN A PROGRAM OF RETRAINING HERSELF TO WORK WITHIN HER PHYSICAL CAPABILITIES. NEVERTHELESS, THE REFEREE CONCLUDED THAT CLAIMANT HAD SUSTAINED A SUBSTANTIAL LOSS OF EARNING CAPACITY IN THE BROAD FIELD OF INDUSTRIAL OCCUPATIONS PREVIOUSLY AVAILABLE TO HER AND TAKING INTO CONSIDERATION HER AGE, EDUCATION, WORK EXPERIENCE AND SUITABILITY TO THE EXISTING LABOR MARKET, CONCLUDED THAT SHE HAD SUSTAINED LOSS OF EARNING CAPACITY EQUAL TO 30 PER CENT OF THE MAXIMUM ALLOWABLE FOR UNSCHEDULED DISABILITY. THE REFEREE, ACCORDINGLY, INCREASED THE PREVIOUS AWARD BY 32 DEGREES FOR A TOTAL OF 96 DEGREES FOR THE UNSCHEDULED DISABILITY.

THE REFEREE FURTHER CONCLUDED THAT THE DENIAL OF THE REQUEST TO REOPEN WAS IMPROPER AND, THEREFORE, THE FUND SHOULD BE REQUIRED TO PAY CLAIMANT'S ATTORNEY A REASONABLE ATTORNEY'S FEE.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 27, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW THE SUM OF 400 DOLLARS PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 74-4303 JANUARY 22, 1976
AND OWN MOTION

JESSE R. LADELLE, CLAIMANT
COONS, COLE AND ANDERSON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH REMANDED CLAIMANT'S CLAIM TO IT FOR ACCEPTANCE AND PAYMENT OF COMPENSATION FROM THE DATE OF CLAIMANT'S 1974 INJURY UNTIL THE CLAIM IS CLOSED PURSUANT TO ORS 656.268 AND DIRECTED THE FUND TO REIMBURSE GEORGIA-PACIFIC FOR ALL COMPENSATION PAID BY IT PURSUANT TO THE JANUARY 9, 1974 ORDER OF THE BOARD DESIGNATING GEORGIA-PACIFIC AS THE PAYING AGENCY PURSUANT TO ORS 656.307.

CLAIMANT SUFFERED A COMPENSABLE LOW BACK INJURY IN OCTOBER 1968 WHILE WORKING FOR GEORGIA-PACIFIC. A HERNIATED DISC L4-5 WAS INDICATED BY A MYELOGRAM AND A LAMINECTOMY WAS PERFORMED IN NOVEMBER 1968. THE CLAIM WAS CLOSED BY DETERMINATION ORDER MAILED APRIL 1969 AWARDING CLAIMANT 48 DEGREES FOR UNSCHEDULED LOW BACK DISABILITY.

CLAIMANT RETURNED TO WORK FOR GEORGIA-PACIFIC IN 1970 FOR APPROXIMATELY TWO MONTHS, QUIT AND RETURNED AGAIN IN 1971 AND WORKED IN THE STUD MILL PULLING CHAIN AND LATER AS A LABORER SETTING UP TRAILERS.

CLAIMANT WAS UNEMPLOYED FOR PART OF 1971 AND 1972 AND BEGINNING IN 1972 HE RECEIVED FOR APPROXIMATELY ONE YEAR VOCATIONAL TRAINING IN FORESTRY. IN 1973 CLAIMANT WAS EMPLOYED BY THE STATE PARKS DEPARTMENT FALLING AND BUCKING TREES, CLEANING REST ROOMS, MOWING AND RAKING LAWNS AND HAULING GARBAGE - HE QUIT IN AUGUST 1973 FOR PERSONAL REASONS.

HIS NEXT JOB WAS STACKING LUMBER FOR STAR LUMBER COMPANY AND PULLING ON THE GREEN CHAIN. IN JULY 1974 NEW EQUIPMENT WAS INSTALLED AND CLAIMANT WAS PULLING RESAW LUMBER, A JOB MORE DIFFICULT THAN HIS PREVIOUS ONES. AFTER THIS DATE AND PARTICULARLY, IN SEPTEMBER 1974 CLAIMANT NOTICED A GRADUAL WORSENING OF THE CONDITION OF HIS BACK AND LEG. THE DISCOMFORT BECAME SO SEVERE AND CONSTANT THAT CLAIMANT COULD NOT CONTINUE WORK AND IN OCTOBER 1974 WAS HOSPITALIZED BY DR. SERBU. A MYELOGRAM REVEALED NO NEW DEFECTS.

CLAIMANT SOUGHT TO HAVE HIS CLAIM WITH GEORGIA-PACIFIC REOPENED. THIS CLAIM WAS DENIED ON THE BASIS THAT THE FIVE YEAR AGGRAVATION RIGHTS HAD EXPIRED - THEREAFTER, CLAIMANT FILED A NEW INJURY CLAIM WITH STAR WOOD PRODUCTS, (STAR LUMBER COMPANY). THIS CLAIM WAS DENIED ON THE BASIS THAT CLAIMANT'S CONDITION RESULTED FROM HIS 1968 INJURY AT GEORGIA-PACIFIC.

CLAIMANT REQUESTED BOARD'S OWN MOTION JURISDICTION UNDER ORS 656.278 AND THE BOARD REMANDED THE MATTER TO THE HEARINGS DIVISION TO HOLD A HEARING AND DETERMINE WHETHER CLAIMANT SUFFERED AN AGGRAVATION OF HIS 1968 INJURY OR A NEW INJURY. AT THIS HEARING DR. SERBU WAS UNABLE TO MAKE A DETERMINATION AS TO WHETHER CLAIMANT HAD AGGRAVATED HIS OLD INJURY OR SUFFERED A NEW

INJURY, AND THEREFORE, CLAIMANT WAS SEEN AND EVALUATED BY A TEAM OF TWO ORTHOPEDISTS AND ONE NEUROSURGEON. IT WAS THEIR FINAL OPINION THAT CLAIMANT'S CONDITION RESULTED FROM HIS WORK ACTIVITIES AT STAR LUMBER COMPANY.

THE REFEREE ACCEPTED THE OPINION OF THE TWO ORTHOPEDISTS AND THE NEUROSURGEON - THE ONLY MEDICAL EVIDENCE TO THE CONTRARY WAS EXPRESSED BY DR. PARCHER, A MEDICAL CONSULTANT TO THE FUND, WHO SAID IT WOULD BE DIFFICULT TO SAY WHETHER CLAIMANT HAD SUFFERED A NEW INJURY.

THE REFEREE FURTHER FOUND, BASED UPON CLAIMANT'S CREDIBLE TESTIMONY, THAT CLAIMANT'S WORK ACTIVITY AT STAR LUMBER COMPANY AFTER JULY 1974 WAS OF SUCH A DIFFERENCE IN QUALITY AS TO CONSTITUTE A FACTUAL SITUATION SUPPORTING APPLICATION OF THE 'REPEATED TRAUMA' THEORY.

THE REFEREE CONCLUDED THAT FOR MORE THAN FOUR YEARS PRIOR TO JULY 1974, CLAIMANT, WHILE EXPERIENCING SOME RESIDUALS FROM HIS 1968 INJURY, WAS NOT DISABLED AND HIS MEDICAL CONDITION HAD REMAINED STATIONARY AND THE EVIDENCE REGARDING CLAIMANT'S CHANGE IN WORK ACTIVITY IMMEDIATELY PRECEDING THE WORSENING OF HIS CONDITION SUPPORTED FINDING THAT CLAIMANT HAD SUFFERED A NEW INJURY IN 1974 FOR WHICH THE FUND WAS RESPONSIBLE.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 15, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 400 DOLLARS PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 75-3431 JANUARY 22, 1976

NEVIA M. WINGFIELD, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE,
DEFENSE ATTYS.
ORDER APPROVING STIPULATION AND DISMISSING REQUEST FOR REVIEW

ON DECEMBER 19, 1975, THE EMPLOYER, THROUGH HIS ATTORNEY, REQUESTED BOARD REVIEW OF A REFEREE'S ORDER DATED DECEMBER 15, 1975 WHICH GRANTED CLAIMANT AN AWARD OF PERMANENT TOTAL DISABILITY.

THE PARTIES HAVE NOW PRESENTED A STIPULATION TO THE BOARD AMICABLY DISPOSING OF THE ISSUES IN DISPUTE AND THE BOARD, BEING FULLY ADVISED, FINDS THE STIPULATION, COPY OF WHICH IS ATTACHED HERETO AND MADE A PART HEREOF, SHOULD BE EXECUTED ACCORDING TO ITS TERMS, AND THE REQUEST FOR BOARD REVIEW NOW PENDING SHOULD BE DISMISSED.

IT IS SO ORDERED.

ORDER ON STIPULATION

THE PARTIES HERETO STIPULATE AS FOLLOWS -

1. THE CLAIMANT, NEVIA M. WINGFIELD, SUFFERED A COMPENSABLE INJURY TO HER LOW BACK WHILE WORKING FOR THE EMPLOYER, NABISCO COMPANY, ON SEPTEMBER 26, 1973. ON AUGUST 18, 1975, SHE FILED A TIMELY REQUEST FOR HEARING ON THE ISSUE OF THE EXTENT OF HER PERMANENT DISABILITY RESULTING FROM THAT INJURY.

2. ON NOVEMBER 26, 1975, WORKMEN'S COMPENSATION BOARD THROUGH AN AUTHORIZED HEARING OFFICER CONDUCTED A HEARING AT WHICH BOTH PARTIES AND COUNSEL WERE PRESENT.

3. THEREAFTER, ON DECEMBER 15, 1975, THE HEARING OFFICER ISSUED AN OPINION AND ORDER DECLARING THE CLAIMANT TO BE PERMANENTLY AND TOTALLY DISABLED AND ORDERING THE EMPLOYER AND CARRIER TO PAY BENEFITS COMMENSURATE WITH THAT OPINION TO THE CLAIMANT.

4. SUBSEQUENT TO THE OPINION AND ORDER, THE CLAIMANT HAS BEEN REQUIRED BECAUSE OF HER INDUSTRIAL INJURY TO UNDERTAKE FURTHER HOSPITALIZATION AND MEDICAL TREATMENT.

5. THE EMPLOYER-CARRIER SINCE THE OPINION AND ORDER HAS FILED A REQUEST FOR REVIEW APPEALING FROM THE DECISION OF THE HEARING OFFICER.

6. THE PARTIES AND THEIR COUNSEL AT THE PRESENT TIME AGREE THAT THE CLAIMANT'S CONDITION IS MEDICALLY STATIONARY AND THAT SHE IS ENTITLED TO CONTINUANCE OF HER PAYMENTS FOR PERMANENT AND TOTAL DISABILITY.

7. THE PARTIES FURTHER AGREE AND STIPULATE AND THE EMPLOYER-CARRIER HEREBY MOVES THE BOARD FOR AN ORDER DISMISSING ITS REQUEST FOR REVIEW WHICH IT FILED ON DECEMBER 18, 1975, APPEALING FROM THE OPINION AND ORDER OF THE REFEREE DATED DECEMBER 15, 1975, AND THAT THE CLAIMANT BE CONTINUED IN HER STATUS OF PERMANENT AND TOTAL DISABILITY WITH COMMENSURATE BENEFITS THEREFOR.

NOW, THEREFORE, BASED UPON THE FACTS RECITED ABOVE, AND UPON THE STIPULATION OF THE PARTIES TO SUCH FACTS, WHICH STIPULATION APPEARS BELOW,

IT IS HEREBY ORDERED AS FOLLOWS -

1. THAT THE CLAIMANT BE, AND HEREBY IS, DECLARED MEDICALLY STATIONARY, AND THAT SHE CONTINUE RECEIVING BENEFITS FOR PERMANENT AND TOTAL DISABILITY PURSUANT TO THE OPINION AND ORDER OF THE HEARING OFFICER DATED DECEMBER 15, 1975.

2. THAT THIS CLAIM BE NO LONGER PROCESSED THROUGH THE CLOSING AND EVALUATION DIVISION OF THE WORKMEN'S COMPENSATION BOARD.

3. THAT THE REQUEST FOR REVIEW OF THE EMPLOYER AND CARRIER FILED ON DECEMBER 18, 1975, IN RESPONSE TO THE OPINION AND ORDER DATED DECEMBER 15, 1975, BE, AND HEREBY IS, DISMISSED.

WCB CASE NO. 74-4160 JANUARY 22, 1976

CECIL LONG, CLAIMANT
POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
GEARIN, CHENEY, LANDIS, AEBI AND KELLEY,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH FOUND CLAIMANT TO BE PERMANENTLY AND TOTALLY DISABLED AS OF MARCH 26, 1975.

CLAIMANT SUSTAINED A COMPENSABLE INJURY ON APRIL 1, 1971, HIS CLAIM WAS CLOSED BY DETERMINATION ORDER MAILED FEBRUARY 18, 1972 WHEREIN CLAIMANT WAS AWARDED 96 DEGREES FOR 30 PER CENT UNSCHEDULED BACK DISABILITY.

CLAIMANT FILED A CLAIM FOR INCREASED COMPENSATION DUE TO AGGRAVATION WHICH WAS DENIED BY THE EMPLOYER ON NOVEMBER 11, 1974.

THE EMPLOYER MOVED FOR AN ORDER DISMISSING THE HEARING ON THE GROUNDS THAT THE REFEREE DID NOT HAVE JURISDICTION AND IN SUPPORT OF ITS MOTION CITED SEVERAL CASES AMONG THEM LONG V. INDUSTRIAL INDEMNITY (UNDERSCORED), 75 ADV SH 73, IN WHICH THE SAME PARTIES WERE INVOLVED IN AN AGGRAVATION CLAIM RELATING TO THE SAME ACCIDENT.

IN LONG (UNDERSCORED), THE REFEREE HAD FOUND THAT HE HAD JURISDICTION AND, ULTIMATELY, CONCLUDED CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED - HOWEVER, THE BOARD, CIRCUIT COURT AND THE COURT OF APPEALS ALL HELD THAT THERE WAS INSUFFICIENT BASIS IN THE MEDICAL OPINIONS TO CONFER JURISDICTION. SUBSEQUENT TO THAT CASE AND THE OTHER CASES RELIED ON BY THE EMPLOYER, ORS 656.273 WAS AMENDED AND THE AMENDMENTS WERE MADE RETROACTIVE. ONE OF THE AMENDMENTS WAS THAT A PHYSICIAN'S REPORT WAS NO LONGER JURISDICTIONAL. HOWEVER, IT IS STILL NECESSARY TO HAVE SUFFICIENT MEDICAL EVIDENCE TO SUPPORT A CLAIM FOR AGGRAVATION.

THE REFEREE FOUND, BASED ON THE TESTIMONY OF DR. CARTER AND DR. CHERRY, THAT CLAIMANT IS NOW PERMANENTLY AND TOTALLY DISABLED. CLAIMANT HAD SUFFERED A LUMBAR STRAIN AND SPRAIN WHICH WAS SUPERIMPOSED ON A PREEXISTING CONDITION OF OSTEOARTHRITIS, HE HAD A FOURTH GRADE EDUCATION AND ALL OF HIS WORK EXPERIENCE HAD BEEN IN AGRICULTURAL TYPE JOBS. THE REFEREE FOUND THAT CLAIMANT HAD WORKED FOR THE EMPLOYER SINCE THE SUMMER OF 1943. UNTIL HIS INDUSTRIAL INJURY HE HAD NOT LOST TIME FROM WORK EITHER FROM INJURY OR ILLNESS, NOR HAD HE SUSTAINED ANY ACCIDENT OR INJURY SINCE HIS CLAIM WAS CLOSED ON FEBRUARY 18, 1972.

THE REFEREE CONCLUDED THAT CLAIMANT'S CONDITION HAD BECOME WORSENED AND AGGRAVATED AND THAT HE WAS, IN FACT, TOTALLY DISABLED, CONSIDERING HIS AGE, PHYSICAL CONDITION AND LACK OF EDUCATIONAL BACKGROUND.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED JULY 10, 1975 IS AFFIRMED.

CLAIMANT'S ATTORNEY IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 350 DOLLARS PAYABLE BY THE EMPLOYER.

WCB CASE NO. 74-2880 JANUARY 22, 1976

CAROL L. JONES, CLAIMANT

KEANE, HAESSLER, HARPER, PEARLMAN AND COPELAND,
CLAIMANT'S ATTYS.
JONES, LANG, KLEIN, WOLF AND SMITH,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED JUNE 6, 1974 WHICH AWARDED CLAIMANT TEMPORARY TOTAL DISABILITY COMPENSATION FROM SEPTEMBER 30, 1973 THROUGH MAY 6, 1974 AND 16 DEGREES FOR 5 PER CENT UNSCHEDULED LOW BACK DISABILITY.

CLAIMANT WAS AN 18 YEAR OLD NURSE'S AIDE WHEN SHE INJURED HER LOW BACK ON SEPTEMBER 20, 1973 LIFTING AN UNRULY PATIENT INTO BED. SHE WAS HOSPITALIZED BY DR. CALDWELL WHO DIAGNOSED HER INJURY AS A LUMBOSACRAL STRAIN. CLAIMANT'S FAMILY PHYSICIAN REFERRED HER TO DR. RUSCH WHO CONTINUED AS HER TREATING PHYSICIAN. IN MARCH 1974, CLAIMANT WAS EXAMINED BY DR. STORINO. ON MAY 6, 1974, DR. RUSCH EXPRESSED HIS OPINION THAT CLAIMANT'S BACK WAS ESSENTIALLY MEDICALLY STATIONARY.

ON JUNE 5, 1974 DR. RIPPEY PERFORMED A JEJUNO-ILEO BYPASS TO ASSIST CLAIMANT IN LOSING WEIGHT. BETWEEN JUNE 28, 1973 AND MAY 1975 CLAIMANT RECEIVED EITHER EMERGENCY ROOM TREATMENT OR IN-PATIENT TREATMENT AT VARIOUS HOSPITALS ON AT LEAST 40 SEPARATE OCCASIONS AND SHE CONTENDS THAT THE EMPLOYER SHOULD BE REQUIRED TO PAY FOR SUCH MEDICAL TREATMENT BECAUSE IT WAS (A) CAUSED BY HER LUMBOSACRAL STRAIN OR (B) CAUSED BY COMPLICATIONS OF THE JEJUNO-ILEO BYPASS SURGERY WHICH WAS NECESSITATED BY HER COMPENSABLE INJURY.

THE REFEREE FOUND THAT THE MEDICAL TREATMENT RECEIVED BY CLAIMANT DURING THAT PERIOD OF TIME WAS NEITHER DIRECTLY NOR INDIRECTLY RELATED TO HER COMPENSABLE INJURY. THE REFEREE FURTHER FOUND THAT THE DISPARITY BETWEEN THE CLAIMANT'S TESTIMONY AND THE DOCUMENTS PREPARED CONTEMPORANEOUSLY WITH THE VARIOUS HOSPITAL ADMISSIONS PERSUADED HIM TO GIVE MORE CREDENCE TO THE DOCUMENTARY EVIDENCE AND EVEN THOUGH CLAIMANT MAY HAVE BACK PAIN, HE CONCLUDED THAT IT WAS IMPOSSIBLE TO DETERMINE WHICH OF THE VARIOUS AND UNRELATED INJURIES SUSTAINED BY CLAIMANT PRODUCED THIS DISABILITY. HE FURTHER CONCLUDED THAT CLAIMANT HAD FAILED TO ESTABLISH THAT ANY DISABILITY SHE HAD AT THE PRESENT TIME WAS CAUSED BY HER COMPENSABLE INJURY.

THE REFEREE FOUND THAT IN SPITE OF TWO INTERVENING INJURIES, DR. RUSCH FOUND CLAIMANT'S CONDITION WAS ESSENTIALLY MEDICALLY STATIONARY WHEN HE EVALUATED HER ON MAY 6, 1974 AND THERE WAS NO

PERSUASIVE EVIDENCE TO THE CONTRARY. HE CONCLUDED THAT CLAIMANT'S TEMPORARY TOTAL DISABILITY AWARD WAS CORRECT.

WITH RESPECT TO THE ISSUE OF WHETHER OR NOT THE EMPLOYER WAS RESPONSIBLE FOR THE JEJUNO-ILEO BYPASS OPERATION ON JUNE 5, 1974, AND THE NUMEROUS HOSPITALIZATIONS FOR RESULTING COMPLICATIONS, THE REFEREE FOUND NO PERSUASIVE EVIDENCE THAT SUCH SURGERY WAS NECESSITATED BY HER COMPENSABLE INJURY. DR. RUSCH HAD STATED THAT CLAIMANT COULD NOT RECOVER FROM HER COMPENSABLE INJURY UNTIL HER WEIGHT WAS REDUCED SO HE SUGGESTED THE BYPASS SURGERY. HOWEVER, DR. BAUMEISTER, A COLLEAGUE OF DR. RIPPEY WHO PERFORMED THE BYPASS SURGERY, DISAGREED WITH DR. RUSCH, STATING THAT THE BYPASS SURGERY WAS FOR THE SOLE PURPOSE OF REDUCING CLAIMANT'S MORBID OBESITY.

THE REFEREE CONCLUDED THAT CLAIMANT HAD BEEN ADEQUATELY COMPENSATED BY THE AWARD OF 16 DEGREES FOR HER UNSCHEDULED LOW BACK DISABILITY, THAT SHE WAS NOT ENTITLED TO ANY ADDITIONAL TEMPORARY TOTAL DISABILITY COMPENSATION AND THAT THE JEJUNO-ILEO BYPASS SURGERY WAS NOT NECESSITATED BY HER COMPENSABLE INJURY.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE REFEREE'S ORDER.

ORDER

THE ORDER OF THE REFEREE DATED JUNE 5, 1975 IS AFFIRMED.

WCB CASE NO. 74-4483 JANUARY 22, 1976

CHARLENE BARRETH, CLAIMANT

BETTIS AND REIF, CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AWARDED HER 96 DEGREES FOR 30 PER CENT UNSCHEDULED DISABILITY.

CLAIMANT IS A 42 YEAR OLD LAB TECHNICIAN WHO SUFFERED A COMPENSABLE INJURY ON OR ABOUT JANUARY 15, 1973. HER CLAIM WAS CLOSED WITH NO AWARD OF PERMANENT PARTIAL DISABILITY BY DETERMINATION ORDER MAILED APRIL 3, 1974.

CLAIMANT COMPLAINS OF CONSTANT PAIN AND A BURNING SENSATION TO SUCH AN EXTENT THAT SHE IS BOTHERED EVEN WHEN SHE ATTEMPTS TO LAY HER ARM ON A TABLE - SHE COMPLAINS OF DIFFICULTY IN SLEEPING AND STATES THAT ANY ELEVATION OR REPETITIVE USE OF HER LEFT ARM CAUSED ACUTE PAIN. ON SEPTEMBER 14, 1973, BECAUSE OF THESE CONDITIONS, CLAIMANT CEASED WORKING.

CLAIMANT'S WORK BACKGROUND IS VARIED, SHE HAS BEEN A SALES CLERK, BOOKKEEPER, BARTENDER, WORKED FOR INSURANCE COMPANIES AND SELF-TRAINED IN LAB TECHNICIAN WORK. AT THE PRESENT TIME SHE IS TAKING A COURSE IN EMERGENCY MEDICINE BUT NOT FOR THE PURPOSE OF EMPLOYMENT IN SUCH ENDEAVOR.

CLAIMANT INSISTS SHE CAN NO LONGER GOLF, BOWL AND IS LIMITED TO THE AMOUNT OF HORSEBACK RIDING SHE IS ABLE TO DO. ALL OF THOSE ACTIVITIES WERE ACTIVELY ENGAGED IN BY CLAIMANT PRIOR TO HER INJURY.

SINCE HER INJURY IN JANUARY 1973 THROUGH MAY, 1975, CLAIMANT HAS BEEN EXAMINED AND TREATED BY AT LEAST 15 DOCTORS INCLUDING GENERAL PRACTITIONERS AND SPECIALISTS IN THE FIELD OF ORTHOPEDICS, PSYCHOLOGY, NEUROLOGY AND PSYCHIATRY. SHE HAS ALSO BEEN SEEN BY OSTEOPATHS. THE CONSENSUS OF OPINION OF THESE EXPERTS WITH THE EXCEPTION OF DR. HEATHERINGTON WAS THAT CLAIMANT'S SUBJECTIVE SYMPTOMS, AT WORSE, PREVENTED HER FROM ENGAGING IN AN OCCUPATION REQUIRING HER TO USE HER ARM ABOVE SHOULDER LEVEL. SOME OF THE DOCTORS EVEN FELT CLAIMANT COULD RETURN TO THE WORK SHE WAS DOING AT THE TIME SHE WAS INJURED. ALL OF THE DOCTORS FELT THAT THE OBJECTIVE FINDINGS DID NOT SUBSTANTIATE CLAIMANT'S SUBJECTIVE COMPLAINTS AND, WITH THE EXCEPTION OF DR. HEATHERINGTON, ALL FELT THAT THERE WAS NO MORE THAN MILD TO MINIMAL PHYSICAL IMPAIRMENT SUFFERED BY CLAIMANT.

THE REFEREE FOUND CLAIMANT HAD SUFFERED SOME RESIDUAL DISABILITY IN HER BACK, LEFT ARM AND SHOULDER AND THAT A PREEXISTING PSYCHIATRIC CONDITION HAD BEEN AGGRAVATED TO SOME EXTENT BY THIS INJURY. HE FURTHER FOUND THAT CLAIMANT WAS NOT GOING TO MAKE ANY REAL PROGRESS WITH RESPECT TO RESTORATION AND REHABILITATION UNTIL SHE REALIZED THAT THERE WERE MANY PEOPLE WHO HAD MUCH MORE SERIOUS DISABILITIES AND INJURIES THAN HERSELF AND WERE ABLE TO LEARN TO LIVE WITH THEM AND WITH THE ASSOCIATED PAIN. CLAIMANT HAS REPEATEDLY FAILED TO KEEP APPOINTMENTS FOR MEDICAL EXAMINATIONS AND HER MENTAL ATTITUDE TOWARD HER CONDITION AND TREATMENT IS SUCH THAT THE TREATMENT CAN AFFORD HER VERY LITTLE RELIEF.

THE REFEREE CONCLUDED THAT CLAIMANT HAD SUSTAINED RESIDUAL DISABILITY FROM BOTH PHYSIOLOGICAL AND PSYCHIATRIC STANDPOINTS AND, THEREFORE, THAT HER EARNING CAPACITY HAD BEEN DIMINISHED BY HER INDUSTRIAL INJURY. ACCORDINGLY, HE AWARDED CLAIMANT 30 PER CENT UNSCHEDULED DISABILITY EQUAL TO 96 DEGREES.

THE BOARD, ON DE NOVO REVIEW, FEELS THAT THE PSYCHOLOGICAL NEUROTIC PROBLEMS WHICH CLAIMANT HAS AND UPON WHICH HER PHYSICAL IMPAIRMENT HAS BEEN SUPERIMPOSED HAS CERTAINLY DEPRIVED CLAIMANT OF A SUBSTANTIAL SEGMENT OF THE LABOR MARKET AVAILABLE TO HER PRIOR TO HER INDUSTRIAL INJURY – HOWEVER, IT FEELS THE AWARD MADE BY THE REFEREE OF 30 PER CENT ADEQUATELY COMPENSATED CLAIMANT. CLAIMANT IS NOT PERMANENTLY AND TOTALLY DISABLED.

THE BOARD SUGGESTS THAT CLAIMANT SEEKS MEDICAL CARE AND TREATMENT FOR HER PSYCHOLOGICAL AND NEUROTIC PROBLEMS UNDER THE PROVISIONS OF ORS 656.245. IF CLAIMANT'S ATTITUDES CAN BE PROPERLY ADJUSTED WITH RESPECT TO THESE PROBLEMS SHE MIGHT BE IN A BETTER POSITION TO RETURN TO MANY TYPES OF WORK FOR WHICH SHE IS PHYSICALLY CAPABLE OF DOING AT THE PRESENT TIME.

ORDER

THE ORDER OF THE REFEREE DATED JULY 31, 1975 IS AFFIRMED.

WCB CASE NO. 74—533 JANUARY 22, 1976

EMERY A. ALLEN, CLAIMANT

BERNAU AND WILSON, CLAIMANT'S ATTYS.
KEITH D. SKELTON, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER AND ITS CARRIER, LIBERTY MUTUAL INSURANCE COMPANY, SEEK BOARD REVIEW OF THE REFEREE'S ORDER WHICH REMANDED CLAIMANT'S CLAIM FOR AGGRAVATION OF HIS RIGHT SHOULDER TO IT TO BE ACCEPTED FOR COMPENSATION FROM DECEMBER 4, 1973 UNTIL THE CLAIM IS CLOSED PURSUANT TO ORS 656.268 AND AWARDED CLAIMANT'S ATTORNEY A REASONABLE ATTORNEY'S FEE TO BE PAID BY THE EMPLOYER.

CLAIMANT SUFFERED A COMPENSABLE INJURY TO HIS RIGHT SHOULDER ON MARCH 4, 1969. AT THAT TIME HIS EMPLOYER WAS PROVIDED WORKMEN'S COMPENSATION COVERAGE BY LIBERTY MUTUAL INSURANCE COMPANY. ON JUNE 26, 1972, WHILE EMPLOYED BY THE SAME EMPLOYER, CLAIMANT SUFFERED A COMPENSABLE INJURY TO HIS RIGHT HIP AND LOW BACK - AT THIS TIME THE EMPLOYER WAS PROVIDED WORKMEN'S COMPENSATION COVERAGE BY THE STATE ACCIDENT INSURANCE FUND.

THE 1969 RIGHT SHOULDER INJURY WAS CLOSED ON A 'MEDICAL ONLY' BASIS. DR. HANFORD, AFTER EXAMINATION, HAD FOUND TENDERNESS OVER THE ACROMIOCLAVICULAR JOINT AND A FROZEN RIGHT SHOULDER BUT X-RAYS REVEALED NO TRAUMATIC PATHOLOGY. CLAIMANT LOST NO TIME FROM WORK NOR IS THERE ANY INDICATION THAT CLAIMANT SOUGHT OR RECEIVED TREATMENT FOR HIS SHOULDER UP TO THE INJURY OF JUNE 26, 1972.

CLAIMANT HAD WORKED CONTINUOUSLY UNTIL THE INJURY SUFFERED ON JUNE 26, 1972 - AS A RESULT OF THAT INJURY CLAIMANT WAS HOSPITALIZED FOR TRACTION, AFTER A DIAGNOSIS OF LOW BACK SPRAIN. THE CLAIM WAS CLOSED BY DETERMINATION ORDER MAILED OCTOBER 10, 1973 WHEREBY CLAIMANT WAS AWARDED 64 DEGREES FOR 20 PER CENT UNSCHEDULED LOW BACK DISABILITY.

IN DECEMBER 1973 AND, AGAIN, IN JANUARY 1974 CLAIMANT REQUESTED THAT HIS RIGHT SHOULDER CLAIM BE REOPENED. DR. DONAHOO, WHO EXAMINED CLAIMANT IN JANUARY 1974, FOUND DEGENERATIVE CHANGES IN THE RIGHT ACROMIOCLAVICULAR JOINT BUT HE DOUBTED THE SEVERITY OF CLAIMANT'S PROBLEM AND CONCLUDED THAT NO TREATMENT OR SURGERY WOULD BENEFIT CLAIMANT. HOWEVER, IN FEBRUARY 1974 CLAIMANT WAS EXAMINED BY DR. SINGER WHO DIAGNOSED POST TRAUMATIC ARTHRITIS RIGHT ACROMIOCLAVICULAR JOINT AND INDICATED THAT THIS WAS A DIRECT RESULT OF THE 1969 INJURY - HE RECOMMENDED SURGERY.

THE REFEREE FOUND THAT THERE WAS NO DETERMINATION ORDER ENTERED WITH REGARD TO THE 1969 SHOULDER INJURY AS CLAIMANT HAD INCURRED NO TIME LOSS. THE CLAIM WAS ACCEPTED, HOWEVER, AND CLAIMANT WAS ENTITLED TO PAYMENT FOR THE MEDICAL SERVICES WHICH HE RECEIVED ON APRIL 2, 1969 FROM DR. HANFORD. RELYING ON THE PROVISIONS OF ORS 656.273(3)(B) THE REFEREE DETERMINED THAT THE POINT FROM WHICH CLAIMANT HAD TO SHOW A WORSENING OF HIS CONDITION WAS THE DATE OF INJURY, I.E., MARCH 4, 1975.

THE REFEREE, RELYING UPON DR. SINGER'S REPORT AND THE OPINION HE EXPRESSED REGARDING CLAIMANT'S PRESENT IMPAIRMENT, CONCLUDED THAT CLAIMANT'S PRESENT CONDITION WAS WORSE THAN IT WAS ON MARCH 4, 1969 AND, THEREFORE, HIS CLAIM FOR AGGRAVATION OF THE

RIGHT SHOULDER INJURY SUFFERED ON MARCH 4, 1969 SHOULD BE REMANDED TO THE EMPLOYER AND ITS CARRIER, LIBERTY MUTUAL INSURANCE COMPANY, TO BE ACCEPTED FOR PAYMENT OF COMPENSATION AS PROVIDED BY LAW.

THE REFEREE FOUND THAT THERE WAS NO RELATIONSHIP ESTABLISHED BETWEEN THE AGGRAVATED SHOULDER CONDITION AND THE 1972 BACK INJURY. BOTH THE EXAMINER FOR THE DISABILITY PREVENTION DIVISION AND DR. SINGER RELATED CLAIMANT'S CURRENT SHOULDER CONDITION TO THE 1969 INJURY AND THERE WAS NO MEDICAL EVIDENCE TO THE CONTRARY. THEREFORE, THE REFEREE CONCLUDED THAT THE STATE ACCIDENT INSURANCE FUND WAS NOT RESPONSIBLE FOR CLAIMANT'S CONDITION AS IT HAD NOT BEEN AGGRAVATED AS A RESULT OF THE 1972 BACK INJURY.

THE BOARD, ON DE NOVO REVIEW, CONCURS IN THE FINDINGS AND CONCLUSIONS OF THE REFEREE AND AFFIRMS HIS ORDER.

ORDER

THE ORDER OF THE REFEREE DATED JUNE 24, 1975 IS AFFIRMED.

COUNSEL FOR CLAIMANT IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 250 DOLLARS PAYABLE BY THE EMPLOYER.

WCB CASE NO. 74-3316 JANUARY 27, 1976

THE BENEFICIARIES OF
CLARENCE CRONIN, DECEASED
CRAMER AND PINKERTON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH REMANDED THE WIDOW'S CLAIM TO IT FOR PAYMENT OF COMPENSATION AS PROVIDED BY ORS 656.208.

ON MAY 12, 1972 THE WORKMAN HAD SUFFERED A COMPENSABLE INJURY TO HIS RIGHT THIGH. AFTER CONSERVATIVE TREATMENT AND EXERCISES, HE WAS FOUND TO BE MEDICALLY STATIONARY BY DR. WATTLEWORTH ON SEPTEMBER 5, 1973. AT THAT TIME DR. WATTLEWORTH CONSIDERED HIM UNFIT FOR MANUAL LABOR. THE CLAIM WAS CLOSED WITH A DETERMINATION ORDER WHICH AWARDED THE WORKMAN 16 DEGREES FOR 5 PER CENT UNSCHEDULED DISABILITY.

PURSUANT TO STIPULATION THE CLAIM WAS REOPENED AND THE WORKMAN WAS REFERRED TO THE DISABILITY PREVENTION DIVISION ON DECEMBER 3, 1973 WHERE HE WAS GIVEN A PHYSICAL EXAMINATION AND ALSO PSYCHOLOGICAL EXAMINATION - HE WAS ALSO SEEN BY MEMBERS OF THE BACK EVALUATION CLINIC WHOSE DIAGNOSIS WAS DEGENERATIVE ARTHRITIS, LUMBAR SPINE, DEGENERATIVE SCOLIOSIS AND A HISTORY OF LOW BACK STRAIN.

ON JUNE 27, 1974 THE WORKMAN WAS SEEN BY DR. THRASHER WHO DIAGNOSED SEVERE DEGENERATIVE ARTHRITIS, LUMBOSACRAL SPINE WITH NO CONCLUSIVE EVIDENCE OF HERNIATED INTERVERTEBRAL RIGHT OR LEFT IN THE LUMBOSACRAL AREA. DR. THRASHER FELT THAT THE WORKMAN WAS NOT PERMANENTLY AND TOTALLY DISABLED FROM ANY ACTIVITY SINCE HE COULD DO LIGHT WORK WHICH DID NOT ENTAIL SIGNIFICANT LIFTING.

THE WORKMAN HAD A NINTH GRADE EDUCATION AND HAD BEEN EMPLOYED AS A SEASONAL MAINTENANCE MAN FOR SEVERAL YEARS. HIS CLAIM WAS AGAIN CLOSED BY A DETERMINATION ORDER DATED AUGUST 8, 1974 WHEREIN HE RECEIVED 80 DEGREES FOR 25 PER CENT UNSCHEDULED LOW BACK DISABILITY.

ON FEBRUARY 6, 1975 THE WORKMAN DIED, HE HAD HAD GALL BLADDER SURGERY BUT THE IMMEDIATE CAUSE OF HIS DEATH WAS A CARDIAC ARREST.

THE WORKMAN'S WIDOW FILED A CLAIM PURSUANT TO ORS 656.208. THE ISSUE BEFORE THE REFEREE WAS WHETHER, BEFORE THE CARDIAC ARREST ON FEBRUARY 6, 1975, CLAIMANT'S STATUS WAS THAT OF A PERMANENT TOTAL DISABLEMENT. IF SO, THEN THE WIDOW WAS ENTITLED TO PAYMENTS AS PROVIDED IN ORS 656.204.

THE REFEREE FOUND THAT THE DECEASED WORKMAN HAD SUSTAINED AN UNSCHEDULED DISABILITY, THE SOLE CRITERION FOR DETERMINING SUCH DISABILITY BEING LOSS OF FUTURE EARNING CAPACITY. THE REFEREE FOUND THAT CLAIMANT WAS OVER 60 YEARS OF AGE, THAT THE PROGNOSIS FOR RESTORATION AND REHABILITATION MADE AT THE DISABILITY PREVENTION DIVISION WAS FAIR PROVIDED CLAIMANT RECOVERED PHYSICALLY TO THE POINT WHERE HE COULD DO SOME PART TIME WORK WHICH DID NOT REQUIRE RETRAINING - HOWEVER, IF TRAINING WERE REQUIRED IT WAS ALMOST CERTAIN HE WOULD NOT BE ABLE TO COPE WITH THE DEMANDS OF A TRAINING SITUATION AND WOULD NOT, IN ALL PROBABILITY, BE ABLE TO RETURN TO FULL TIME GAINFUL EMPLOYMENT.

THE REFEREE CONCLUDED THAT THE ONLY JOBS WHICH MIGHT HAVE BEEN AVAILABLE TO THE WORKMAN WOULD BE IN A LIMITED SITUATION AND PARTICULARLY DIFFICULT TO FIND IN THE AREA IN WHICH THE WORKMAN HAD LIVED AND, BASED UPON THE EVIDENCE OF HIS PERSONAL RESOURCES COUPLED WITH HIS PHYSICAL IMPAIRMENT, THAT THE WORKMAN WAS PRIMA FACIE IN THE ODD-LOT CATEGORY AT THE TIME OF HIS DEATH. THIS FINDING SHIFTED THE BURDEN TO THE FUND TO SHOW THAT SOME KIND OF SUITABLE WORK WOULD HAVE BEEN REGULARLY AND CONTINUOUSLY AVAILABLE FOR THE WORKMAN PRIOR TO HIS DEATH. THE REFEREE CONCLUDED THAT THAT BURDEN HAD NOT BEEN MET BY THE FUND AND, CONSEQUENTLY, HE FOUND THAT THE WORKMAN, PRIOR TO HIS DEATH, WAS PERMANENTLY AND TOTALLY DISABLED AS DEFINED BY ORS 656.206 AND THAT THE WORKMAN'S WIDOW WAS ENTITLED TO THE PAYMENT OF COMPENSATION, AS PROVIDED IN ORS 656.204, UNDER THE PROVISIONS OF ORS 656.208(A)(B).

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 19, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 400 DOLLARS PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

JESS JONES, CLAIMANT

DYE AND OLSON, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH FOUND THE MYOCARDIAL INFARCTION SUFFERED BY THE CLAIMANT WAS COMPENSABLE AND REMANDED THE CLAIM FOR PAYMENT OF COMPENSATION AS PROVIDED BY LAW FROM THE DATE OF THE INJURY UNTIL TERMINATION AUTHORIZED PURSUANT TO ORS 656.268.

CLAIMANT IS A 44 YEAR OLD AUTO SERVICEMAN WHO IS EMPLOYED BY THE CITY OF SALEM TO REPAIR TIRES ON CITY VEHICLES. ON MARCH 4, 1974 HE WAS INSTRUCTED TO GO TO STAYTON ISLAND TO CHANGE A FLAT TIRE ON A TRACTOR. CLAIMANT DID SO AND, AFTER REMOVING THE FLAT TIRE, LOADED IT ON THE TRUCK THROUGH THE USE OF A MECHANICAL HOIST AND CABLE. HE RETURNED TO MASTER SERVICE CENTER IN SALEM WHERE THE FLAT TIRE WAS UNLOADED, REPAIRED AND RELOADED BY MASTER SERVICE PERSONNEL. CLAIMANT THEN DROVE BACK TO STAYTON ISLAND, REMOVED THE TIRE FROM THE TRUCK AND PLACED IT ON THE TRACTOR AND RETURNED TO THE SALEM CITY SHOPS. CLAIMANT HAD GONE TO WORK AT APPROXIMATELY 7.30 A.M. AND HE CONCLUDED HIS DUTIES AT 4.00 P.M. THE EVIDENCE INDICATES THAT CLAIMANT HAD EATEN NO BREAKFAST ON MARCH 4, A NORMAL PROCEDURE FOR HIM, AND HAD CHANGED TIRES ON TWO CARS AT THE SHOP BEFORE LEAVING FOR STAYTON ISLAND. THE TIRE AND RIM TAKEN FROM THE TRACTOR WEIGHED APPROXIMATELY 250 POUNDS AND A SOLUTION OF WATER AND OTHER MATERIAL USED TO FILL THE TIRE IN LIEU OF AIR BROUGHT THE TOTAL WEIGHT OF THE TIRE, IF COMPLETELY FULL, TO 850 POUNDS.

WHEN CLAIMANT RETURNED TO THE CITY SHOPS AT 4.00, CLAIMANT'S WIFE, WHO WAS WAITING TO PICK HIM UP AND BRING HIM HOME, NOTICED THAT HE APPEARED TIRED, EXHAUSTED AND RATHER PALE. CLAIMANT DID NOT DRIVE HOME BUT ALLOWED HIS WIFE TO DO SO - HE TOLD HER THAT HE HAD HAD A STRENUOUS DAY BUT HE DID NOT HAVE MUCH TO SAY, WHICH WAS RATHER UNUSUAL. HIS WIFE TESTIFIED THAT CLAIMANT WHO WAS NORMALLY A HEARTY EATER AT DINNER TIME, DID NOT EAT VERY MUCH AND AGAIN COMPLAINED OF BEING TIRED. HE WENT TO BED ABOUT 10.00 P.M., DID NOT SLEEP WELL BUT WAS RATHER RESTLESS AND COMPLAINED OF CHEST PAINS WHICH HE THROUGHT MIGHT BE CAUSED BY INDIGESTION. CLAIMANT LEFT FOR WORK THE FOLLOWING DAY, MARCH 5, SHORTLY AFTER 7.00 A.M. AND AT ABOUT 7.45 CLAIMANT TOLD HIS PART TIME SUPERVISOR HE HAD CHEST PAINS - HE WAS ADVISED TO GO HOME. AT WORK HE WAS UNABLE TO REMOVE HIS COAT BECAUSE OF AN INABILITY TO LIFT HIS LEFT ARM. HE DID NO WORK AT THE SHOP AND LEFT ABOUT 9.00 A.M. FOR HOME. HE HAD VOMITED AND STILL FELT THAT HE HAD INDIGESTION - HOWEVER, AT APPROXIMATELY NOON HE ALLOWED HIS WIFE TO CALL A DOCTOR.

AT THE DOCTOR'S OFFICE CLAIMANT HAD MORE PAIN AND WAS IMMEDIATELY HOSPITALIZED AND A DIAGNOSIS OF AN ACUTE MYOCARDIAL INFARCTION WAS MADE.

DR. CAMPBELL BASED ON INFORMATION FURNISHED TO HIM BY THE FUND, ON JUNE 6, 1974, STATED HIS OPINION THAT THE MYOCARDIAL INFARCTION SUFFERED ON MAY 5, 1974, UNDER NO CIRCUMSTANCES HAD ANY RELATION TO THE ALLEGED INJURY OF MARCH 4, 1974. THE FUND DENIED THE CLAIM ON JUNE 17, 1974.

ON JULY 12, 1974 CLAIMANT WAS EXAMINED BY DR. GROSSMAN, A SPECIALIST IN DIAGNOSIS AND INTERNAL MEDICINE. BASED UPON HIS EXAMINATION OF CLAIMANT AND HIS REVIEW OF THE MEDICAL RECORDS, DR. GROSSMAN STATED IT WAS PROBABLE THAT THE ONSET OF CLAIMANT'S ACUTE MYOCARDIAL PROCESS OCCURRED SOMETIME IN THE AFTERNOON OF MARCH 4, 1974 AND PROBABLY WAS PRECIPITATED BY THE PHYSICAL EXERTION.

DR. GRISWOLD, A FORMER HEAD OF THE CARDIOLOGY DEPARTMENT OF THE UNIVERSITY OF OREGON MEDICAL SCHOOL, WAS OF THE OPINION THAT THERE WAS PROBABLY NO RELATIONSHIP BETWEEN CLAIMANT'S WORK ACTIVITY OF MARCH 4 AND THE SUBSEQUENT HEART ATTACK SUSTAINED ON THE MORNING OF MARCH 5. DR. GRISWOLD DID NOT DO A PHYSICAL EXAMINATION OF CLAIMANT BUT HE DID REVIEW ALL OF THE EXHIBITS IN THE RECORD AND WAS PRESENT DURING THE HEARING. DR. GRISWOLD'S OPINION WAS BASED UPON THE FACT THAT THERE WAS A RATHER LENGTHY PERIOD OF TIME BETWEEN CLAIMANT'S WORK ACTIVITY ON MARCH 4 AND THE ONSET OF HIS SYMPTOMS THE FOLLOWING DAY - HE FEELS THAT UNLESS THE TWO EVENTS OCCUR MORE CLOSELY IN TIME THAN THEY DID IN THIS PARTICULAR CASE, IT IS ONLY RANK SPECULATION FOR A DOCTOR TO SAY THAT THE WORK ACTIVITY WAS A PROBABLE CONTRIBUTING CAUSE. ON THE OTHER HAND, DR. GROSSMAN EXPRESSED THE OPINION THERE WAS A REASONABLE MEDICAL PROBABILITY THAT THE WORK ACTIVITY ON MARCH 4 COULD PRECIPITATE THE MYOCARDIAL INFARCTION WHICH OCCURRED THE FOLLOWING DAY.

THE REFEREE, AFTER FULLY CONSIDERING THE USUAL OPPOSING MEDICAL OPINIONS WHICH ARE EXPRESSED IN HEART CASES, FOUND THAT DR. GROSSMAN'S OPINION THAT THE PROCESS OF THE MYOCARDIAL INFARCTION COMMENCED ON MARCH 4, ALTHOUGH THE INFARCT ITSELF OCCURRED ON MARCH 5, WAS MORE PERSUASIVE.

THE REFEREE CONCLUDED THAT THE UNUSUAL EVENTS OF MAY 4 AND MAY 5, E.G., CLAIMANT APPEARED QUITE TIRED AND PALE, HE DID NOT EAT DINNER IN HIS NORMAL FASHION AND WAS UNUSUALLY RESTLESS AND COMPLAINED OF CHEST PAINS DURING THE NIGHT, ETC., ALL TESTIFIED TO BY CREDIBLE WITNESSES, COULD HAVE BEEN CAUSED BY SOME FACTOR OR FACTORS BESIDES THE MYOCARDIAL INFARCTION - HOWEVER, RELATIONSHIP IN TIME TO THE SUBSEQUENT INFARCT AND THEIR UNUSUAL AND CUMULATIVE NATURE WERE BEST EXPLAINED BY ACCEPTING DR. GROSSMAN'S THEORY. THE REFEREE CONCLUDED, THEREFORE, THAT THE MYOCARDIAL INFARCTION WAS WORK-RELATED AND COMPENSABLE.

THE BOARD, ON DE NOVO REVIEW, AGREES WITH THE WELL EXPRESSED FINDINGS AND CONCLUSIONS REACHED BY THE REFEREE IN AN INVOLVED HEART CASE. AS THE REFEREE HAS NOTED, THE PROBLEM OF HEART ATTACK CAUSATION IS EXTREMELY TROUBLESOME TO THE MEDICAL PROFESSION AND MOST DOCTORS ADMIT THAT THERE IS A CONSIDERABLE LACK OF KNOWLEDGE WITH REGARD TO THIS FIELD. BOTH DR. GROSSMAN AND DR. GRISWOLD FELT THAT THERE COULD BE SOME RELATIONSHIP BETWEEN PHYSICAL EXERTION AND HEART ATTACKS - DR. GRISWOLD FELT THAT THE LAPSE OF TIME BETWEEN THE WORK ACTIVITY AND THE ATTACK MUST BE RATHER SHORT IN DURATION, WHEREAS DR. GROSSMAN FELT THAT THE PROCESS OF MYOCARDIAL INFARCTION COULD COMMENCE BY WORK ACTIVITY ON A DAY PRECEDING THE DAY OF THE ACTUAL INFARCT.

THE BOARD, AS WAS THE REFEREE, IS MORE PERSUADED BY DR. GROSSMAN'S OPINION BECAUSE OF THE CIRCUMSTANCES PRECEDING THE ACTUAL INFARCT.

ORDER

THE ORDER OF THE REFEREE DATED JULY 7, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 400 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 75-1631 JANUARY 27, 1976

WALTER ROGERS, CLAIMANT

DYE AND OLSON, CLAIMANT'S ATTYS.
ROGER R. WARREN, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT AS ADDITIONAL COMPENSATION 25 PER CENT OF ALL COMPENSATION DUE HIM FOR THE PERIOD FEBRUARY 13, 1975 THROUGH MARCH 24, 1975 AND FOR THE PERIOD MARCH 26, 1975 THROUGH APRIL 25, 1975.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON MAY 5, 1974. AN OPINION AND ORDER, ENTERED ON FEBRUARY 13, 1975, AWARDED CLAIMANT ADDITIONAL TEMPORARY TOTAL DISABILITY COMPENSATION FOR A SPECIFIED PERIOD AND ADDITIONAL COMPENSATION FOR UNREASONABLE CONDUCT ON THE PART OF THE EMPLOYER AND ADDITIONAL COMPENSATION FOR PERMANENT PARTIAL DISABILITY.

THE REFEREE FOUND THAT THE FIRST PAYMENT OF COMPENSATION DIRECTED TO BE PAID WAS MADE MARCH 20, 1975 AND RECEIVED BY THE CLAIMANT ON OR ABOUT MARCH 24, 1975. THE REFEREE ASSUMED THAT THE EMPLOYER RECEIVED THE OPINION AND ORDER ON FEBRUARY 24, 1975, AND, COUNTING THE 14TH OF FEBRUARY AS THE FIRST DAY, 38 DAYS HAD ELAPSED BETWEEN THE TIME THE EMPLOYER BECAME AWARE OF ITS OBLIGATION AND THE TIME IT BEGAN TO SATISFY IT.

THE REFEREE FOUND THAT ALTHOUGH THERE WAS NO STATUTE SPECIFYING WHEN THE EMPLOYER MUST MAKE HIS FIRST PAYMENT OF COMPENSATION PURSUANT TO AN OPINION AND ORDER, ORS 656.262 PROVIDED THE FIRST INSTALLMENT OF COMPENSATION MUST BE PAID WITHIN 14 DAYS OF NOTICE OR KNOWLEDGE OF A CLAIM AND THAT THE BOARD HAS CONSISTENTLY HELD THAT PAYMENTS MADE LATER THAN THE 14TH DAY CONSTITUTE A VIOLATION OF A CLEAR STATUTORY DUTY AND IS CONSIDERED UNREASONABLE.

THE REFEREE CONCLUDED THAT IN THIS CASE A CLAIM EXISTED AND THE OPINION AND ORDER CLEARLY STATED WHAT ADDITIONAL COMPENSATION HAD TO BE PAID AND WAS, THEREFORE, TO BE TREATED THE SAME AS NOTICE OR KNOWLEDGE OF A CLAIM BY THE EMPLOYER AND THE PROVISIONS OF ORS 656.262 WERE APPLICABLE. HE FURTHER CONCLUDED THAT, THERE BEING NOTHING IN THE RECORD TO INDICATE WHY THE FIRST PAYMENT WAS MADE 38 DAYS AFTER THE OPINION AND ORDER, SUCH DELAY MUST BE TREATED AS UNREASONABLE AND HE ASSESSED A PENALTY EQUAL TO 25 PER CENT OF THE COMPENSATION DUE CLAIMANT AS OF MARCH 24, 1975, THE DATE HE RECEIVED HIS COPY OF THE OPINION AND ORDER.

ON MARCH 5, 1975 THE CLAIM WAS REOPENED AND THE CLAIMANT SO NOTIFIED BY A LETTER DATED MARCH 25, 1975. THE REFEREE FOUND THAT CLAIMANT WAS ENTITLED TO AND WAS PAID TEMPORARY TOTAL DISABILITY COMPENSATION FROM MARCH 5, 1975 AND RECEIVED HIS FIRST CHECK FOR SUCH COMPENSATION ON OR ABOUT MARCH 26, 1975. THE REFEREE FOUND THAT THE FIRST NOTICE THE EMPLOYER HAD OF THE CLAIM FOR REOPENING WAS RECEIVED MARCH 14, 1975 AND THE FIRST INSTALLMENT

OF COMPENSATION PAID TO CLAIMANT ON OR ABOUT MARCH 26, 1975 AND WAS, THEREFORE, TIMELY. THIS PAYMENT WAS FOR THE PERIOD MARCH 6, THROUGH MARCH 19, 1975.

THE NEXT PAYMENT OF TEMPORARY TOTAL DISABILITY COMPENSATION WAS DUE WITHIN TWO WEEKS, NO LATER THAN APRIL 8 - HOWEVER, IT WAS NOT RECEIVED UNTIL APRIL 25 AND THIS PAYMENT WAS FOR THE PERIOD MARCH 20 THROUGH APRIL 16, 1975. THE REFEREE FOUND THIS WAS A VIOLATION OF STATUTORY DUTY AND THERE WAS NO EVIDENCE OFFERED BY THE EMPLOYER TO JUSTIFY THE DELAY. HE CONCLUDED THAT AN ASSESSMENT OF PENALTY EQUAL TO 25 PER CENT OF THE COMPENSATION DUE CLAIMANT FROM MARCH 26, 1975 TO APRIL 25, 1975 WAS PROPER.

AFTER THE CHECK CLAIMANT RECEIVED ON APRIL 25, 1975, HE CONTINUED TO RECEIVE HIS CHECKS AT REGULAR 2-WEEK INTERVALS - HOWEVER, CLAIMANT CONTENDS THAT EACH CHECK PAID HIM ONLY UP TO THE WEEK PRIOR TO THE DATE OF THE CHECK AND THAT HE SHOULD BE PAID CURRENTLY WITH EACH CHECK.

THE REFEREE CONCLUDED THAT ORS 656.262(4), WHICH PROVIDES THAT COMPENSATION SHALL BE PAID WITHIN 14 DAYS, DOES NOT SPECIFY THAT ALL COMPENSATION WHICH MAY BE OWING CLAIMANT ON THE 14TH DAY BE PAID. FOLLOWING BULLETIN 27 OF THE WORKMEN'S COMPENSATION BOARD, WHICH PROVIDES GUIDELINES FOR PAYMENT OF COMPENSATION ON OR BEFORE THE 14TH DAY, THE REFEREE FURTHER CONCLUDED THAT THE EMPLOYER HAD ACTED PURSUANT TO THE STATUTE AND IN CONFORMITY WITH THE POLICY DIRECTIVES OF THE BOARD IN INITIALLY WITHHOLDING ONE WEEK'S TEMPORARY TOTAL DISABILITY COMPENSATION AND CONTINUING TO WITHHOLD THAT ONE WEEK'S COMPENSATION.

WITH RESPECT TO PAYMENT OF ATTORNEY'S FEES, THE REFEREE FOUND THAT CLAIMANT WAS ENTITLED TO HAVE HIS ATTORNEY PAID A REASONABLE FEE BY THE EMPLOYER. THE DELAY IN PAYMENT OF COMPENSATION ORDERED BY THE OPINION AND ORDER WAS OF SUCH A LENGTH OF TIME AS TO BE BEYOND MERE DELAY, IT MUST BE CONSTRUED AS RESISTANCE, THEREFORE, THE PROVISIONS OF ORS 656.382(1) ARE APPLICABLE.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 15, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICE IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 300 DOLLARS, PAYABLE BY THE EMPLOYER.

WCB CASE NO. 75-492 JANUARY 27, 1976

VERN HAUGEN, CLAIMANT

AND IN THE MATTER OF THE COMPLYING
STATUS OF FANTASY FOODS, INC., EMPLOYER
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE DENIAL OF HIS CLAIM BY THE STATE ACCIDENT INSURANCE FUND ON DECEMBER 6, 1974.

AT THE HEARING THE EMPLOYER, FANTASY FOODS, INC., APPEALED FROM A PROPOSED AND FINAL ORDER NO. 2530-A OF THE BOARD DECLARING IT TO BE A NONCOMPLYING EMPLOYER AS DEFINED BY THE WORKMEN'S COMPENSATION LAW, DURING THE PERIOD FROM SEPTEMBER 15, 1974 TO NOVEMBER 12, 1974 AND THE CLAIMANT REQUESTED A HEARING ON THE DENIAL OF HIS CLAIM BY THE FUND.

THE PRESIDENT OF FANTASY FOODS, INC., MRS. MCGAW, HAD DISCUSSED WITH CLAIMANT, WHO WAS ENGAGED IN DOOR TO DOOR SALES, THE POSSIBILITY OF CLAIMANT ASSISTING IN AN ENTERPRISE WHICH INCLUDED THE PREPARATION AND SELLING OF HOT LUNCHES AT VARIOUS JOBSITES. BY SEPTEMBER 15, 1974 THEY HAD ENTERED INTO AN ASSOCIATION TO CARRY OUT THE PROPOSED ENTERPRISE WHICH ALSO INCLUDED RUNNING KITCHEN FACILITIES AT FIRST ONE AND THEN ANOTHER BAR, SO THAT THE BAR COULD COMPLY WITH OLCC FOOD SERVICE REQUIREMENTS. WHEN MRS. MCGAW WAS READY SHE ADVISED CLAIMANT BY PHONE AND HE SAID THAT HE WOULD HELP HER.

INITIALLY, CLAIMANT WORKED SELLING HOT LUNCHES AT A JOBSITE ON SWAN ISLAND AS DID MRS. MCGAW. CLAIMANT ALSO WORKED IN THE RESTAURANT PART OF THE T BAR T, THE FIRST LOCATION FROM WHICH MRS. MCGAW OPERATED. ULTIMATELY, MRS. MCGAW TRANSFERRED TO A DIFFERENT BAR CALLED THE CASTAWAYS. WHILE OPERATING AT THE FIRST BAR THE CLAIMANT HAD LONG WORK HOURS BUT AFTER THE MOVE TO THE SECOND BAR, HIS HOURS WERE SHORTER AND FINALLY CLAIMANT QUIT COMING TO WORK ON OR ABOUT OCTOBER 15, 1974.

CLAIMANT CLAIMS MRS. MCGAW SAID HIS PRESENCE WAS NO LONGER DESIRED, HOWEVER, MRS. MCGAW DENIES THIS, CONTENDING THAT SHE ASKED CLAIMANT TO ACCOUNT FOR CERTAIN MONIES HE HAD RECEIVED FROM THE SALE OF HOT LUNCHES AND HE DID NOT MAKE AN ACCOUNTING TO HER AND FINALLY QUIT SHOWING UP FOR WORK.

EARLY IN OCTOBER 1974 CLAIMANT WAS TREATED FOR COMPLAINTS OF ABDOMINAL PAIN AND WAS SEEN ON OCTOBER 25, 1974 BY A PSYCHIATRIST WHO DIAGNOSED A MANIC-DEPRESSIVE TYPE ILLNESS AND CONCLUDED CLAIMANT'S DIFFICULTIES WERE CONTRIBUTED TO BY CLAIMANT'S FAMILY PROBLEMS, TRYING TO KEEP PREVIOUS PART TIME BUSINESSES GOING AND A DESIRE TO KEEP WHAT WAS A PROMISING CATERING-TYPE SERVICE GOING. CLAIMANT FILED A CLAIM FOR AN INDUSTRIAL INJURY ON OCTOBER 23, 1974 WHICH WAS DENIED ON DECEMBER 6, 1974 BY THE FUND.

THE REFEREE FOUND THAT THE EVIDENCE DID NOT SHOW THAT A DISTRIBUTORSHIP WAS CONTEMPLATED FOR CLAIMANT BY BOTH PARTIES - CLAIMANT DID RECEIVE COMPENSATION FROM THE EMPLOYER FOR HIS SERVICES IN THE FORM OF FOOD EATEN ON THE PREMISES AND LEFT OVER LUNCHES TAKEN HOME TO HIS FAMILY. IT WAS POSSIBLE THAT CLAIMANT SPENT SOME OF HIS OWN MONEY ON BEHALF OF THE EMPLOYER'S ENTERPRISE AND ALSO QUITE POSSIBLE HE KEPT MONIES RECEIVED FROM SALES OF HOT LUNCHES WITHOUT ACCOUNTING TO THE EMPLOYER FOR THE SAME. THE REFEREE FOUND THAT CLAIMANT WAS NEITHER AN OFFICER NOR A SHAREHOLDER OF THE EMPLOYER NOR WAS HE A PARTNER - HE HAD NO RIGHT TO INTERFERE WITH THE WORKINGS OF THE EMPLOYER PER SE, HOWEVER HE DID OR ATTEMPTED TO DO SO. THE REFEREE FOUND CLAIMANT TO BE A NERVOUS, EXCITABLE AND TALKATIVE PERSON WHO HAD BEEN ACCUSTOMED TO WORKING IN THE PAST WITHOUT SUPERVISION.

THE REFEREE CONCLUDED THAT ALTHOUGH MRS. MCGAW (THE EMPLOYER) INTENDED TO HIRE CLAIMANT AS AN INDEPENDENT DISTRIBUTOR, HIS 'EXTRA' SERVICES SUCH AS WORKING AT THE T BAR T RESTAURANT WERE SUBJECT TO THE EMPLOYER'S RIGHT TO CONTROL. THE EMPLOYER WAS OBLIGATED BY AN AGREEMENT TO OPERATE THE RESTAURANT AT THE T BAR T AND WAS AWARE OF CLAIMANT'S 'EXTRA' ACTIVITIES BUT DID

NOTHING TO PREVENT THEM. BECAUSE OF THE FAILURE OF THE EMPLOYER TO PREVENT CLAIMANT FROM DESISTING FROM ALL ACTIVITIES INCONSISTENT WITH HIS BEING AN INDEPENDENT DISTRIBUTOR, THE REFEREE CONCLUDED THAT CLAIMANT BECAME AN EMPLOYE DURING THE PERIOD IN QUESTION.

CLAIMANT'S CLAIM WAS DENIED ON DECEMBER 6, 1974 AND HIS REQUEST FOR HEARING WAS INITIALLY SENT TO THE FUND ON DECEMBER 31, 1974 (ALTHOUGH IT WAS NOT RECEIVED BY THE FUND UNTIL JANUARY 8, 1975). CLAIMANT SENT ANOTHER REQUEST FOR HEARING TO THE BOARD WHICH WAS RECEIVED ON FEBRUARY 6, 1975, 62 DAYS AFTER THE CLAIM HAD BEEN DENIED.

THE REFEREE CONCLUDED THAT THE CLAIMANT BELIEVED HE WAS MAKING A PROPER FILING WHEN HE FILED THE REQUEST FOR HEARING WITH THE FUND, AND TAKING INTO CONSIDERATION THE CLAIMANT'S EMOTIONAL PROBLEMS AT THE TIME, THE REFEREE FURTHER CONCLUDED THAT CLAIMANT HAD SHOWN GOOD CAUSE FOR THE LATE REQUEST AS PROVIDED BY ORS 656.319(2)(A)(B).

THE REFEREE FOUND THAT THE RELATIONSHIP BETWEEN CLAIMANT'S EMPLOYMENT AND HIS EMOTIONAL PROBLEMS WAS QUESTIONABLE. CLAIMANT CLAIMED HE WAS FIRED BY THE EMPLOYER. THE REFEREE FOUND THAT IF THIS WAS SO, THEN CLAIMANT WAS FIRED BECAUSE OF HIS CONDUCT DUE UNDOUBTEDLY TO PERSONALITY AND EMOTIONAL PROBLEMS WHICH HAD BEEN PRESENT AT THAT TIME.

THE REFEREE CONCLUDED THAT THE ACTIVITY REQUIRED BY CLAIMANT IN HIS JOB WAS NOT SUCH THAT COULD HAVE RESULTED IN ANY EMOTIONAL PROBLEMS AND FURTHER CONCLUDED THAT HIS PRESENT DISABILITY INSOFAR AS IT RELATED TO HIS JOB WAS DUE TO CLAIMANT'S REACTION TO HAVING BEEN 'FIRED', THEREFORE, IT DID NOT ARISE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT.

THE REFEREE AFFIRMED THE PROPOSED AND FINAL ORDER NO. 2530-A.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS, CONCLUSIONS AND AFFIRMATION OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED JULY 31, 1975 IS AFFIRMED.

WCB CASE NO. 75-619 JANUARY 27, 1976

WANDA SUE STINSON, CLAIMANT

DAVID R. VANDENBERG, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH DISAPPROVED ITS DENIAL OF JANUARY 22, 1975 AND REMANDED CLAIMANT'S CLAIM TO IT FOR PAYMENT OF TEMPORARY TOTAL DISABILITY COMPENSATION AND OTHER BENEFITS PROVIDED BY LAW FROM AND AFTER THE LAST PAYMENT OF TEMPORARY TOTAL DISABILITY COMPENSATION UNTIL CLAIM IS AGAIN CLOSED PURSUANT TO ORS 656.268. THE REFEREE FURTHER ASSESSED THE FUND A PENALTY AMOUNTING TO 25 PER CENT OF THE TEMPORARY TOTAL DISABILITY COMPENSATION PAYABLE FROM THE LAST DATE OF PAYMENT OF SUCH COMPENSATION UNTIL THE DATE OF THE REFEREE'S ORDER AND NULLIFIED THE

DETERMINATION ORDER MAILED DECEMBER 11, 1974 ON THE BASIS OF A PREMATURE CLOSING, STATING CLAIMANT'S AGGRAVATION RIGHTS ARE TO DATE FROM THE DATE OF A PROPER CLOSURE UNDER ORS 656.268.

CLAIMANT, THEN A 29 YEAR OLD HOUSEKEEPING AIDE, FILED A CLAIM INDICATING THAT ON SEPTEMBER 6, 1974 SHE FELT A PULL IN HER LOWER BACK WHILE VACUUMING WITH A COMMERCIAL VACUUM CLEANER. THIS CLAIM WAS CONFIRMED BY THE TESTIMONY OF A FELLOW EMPLOYEE. ON SEPTEMBER 16, 1974 AN X-RAY REPORT INDICATED DEGENERATIVE DISC DISEASE AT L4-5. THE INITIAL DIAGNOSIS WAS ACUTE LUMBOSACRAL SPRAIN AND STRAIN.

ON OCTOBER 7, 1974 CLAIMANT UNDERWENT SURGERY FOR THE REPAIR OF A CYSTOURETHROCELE FOLLOWED BY A TOTAL ABDOMINAL HYSTERECTOMY AND BILATERAL OOPHORECTOMY WITH LYSIS OF ADHESIONS. ON OCTOBER 30, 1974 DR. HAWKINS WHO MADE THE FIRST DIAGNOSIS OF THE LUMBOSACRAL SPRAIN AND STRAIN, REPORTED THAT CLAIMANT WAS MEDICALLY STATIONARY AS OF OCTOBER 4, 1974 AND THAT SHE WOULD SUFFER NO PERMANENT IMPAIRMENT FROM THE BACK INJURY. A DETERMINATION ORDER WAS MAILED DECEMBER 11, 1974 WHEREBY CLAIMANT WAS AWARDED NO PERMANENT DISABILITY.

ON DECEMBER 19, 1974 DR. WILSON, AN ORTHOPEDIC SURGEON, ADMITTED CLAIMANT TO THE HOSPITAL FOR TRACTION, PHYSICAL THERAPY AND BED REST. HE FELT THAT HER PRESENT COMPLAINTS OF PAIN AND DISCOMFORT IN THE LOW BACK AREA WERE DEFINITELY CONNECTED WITH HER SEPTEMBER 6, 1974 INCIDENT AND RECOMMENDED THE CLAIM BE REOPENED FOR TREATMENT.

ON JANUARY 17, 1975 A LAMINECTOMY, DECOMPRESSION AND TWO-LEVEL SPINAL FUSIONS WERE PERFORMED. THE FUND REFUSED TO REOPEN BY A LETTER OF DENIAL DATED JANUARY 22, 1975 WHICH STATED THAT ITS MEDICAL STAFF FELT THE BACK PAIN CLAIMANT HAD ON SEPTEMBER 6, 1974 MIGHT HAVE BEEN BROUGHT ABOUT BY THE CONDITION WHICH NECESSITATED THE NEED FOR HER HYSTERECTOMY AND THAT HER CURRENT BACK CONDITION WAS MORE LIKELY DUE TO HER ACTIVITIES ON THANKSGIVING DAY THAN HER INDUSTRIAL INJURY BECAUSE OF THE IMMEDIATE PAIN FOLLOWING AND THAT HER SYMPTOMS PRIOR TO THE INJURY WERE MINOR MUSCLE STRAIN RATHER THAN THE NERVE ROOT IRRITATION RESULTING FROM A HERNIATED DISC.

THE REFEREE FOUND, BASED UPON THE CREDIBLE TESTIMONY OF CLAIMANT'S HUSBAND, (CLAIMANT WAS RECUPERATING FROM THE SURGERY AND NOT PRESENT AT THE HEARING) THAT CLAIMANT HAD BEEN CONTINUOUSLY DISABLED FOLLOWING HER INJURY ON SEPTEMBER 6, 1974 AND THAT THERE HAD BEEN NO INCIDENT OR ACCIDENT OF SIGNIFICANCE CONTRIBUTING TO HER ACUTE DISABILITY PRECIPITATING THE NEED FOR MEDICAL CARE BY DR. WILSON IN DECEMBER 1974 AND THE ULTIMATE SURGERY SHE UNDERWENT IN JANUARY 1975. THE REFEREE FOUND, AGAIN BASED UPON CLAIMANT'S HUSBAND'S TESTIMONY, THAT CLAIMANT SPENT MOST OF THANKSGIVING DAY LYING ON THE COUCH, THAT SHE ENGAGED IN ONLY MINIMAL PHYSICAL ACTIVITIES AROUND THE HOUSE AND THEN HAD EXACERBATION OF PAIN FROM TYPES OF BENDING WHICH WERE INCIDENTAL TO THE NORMAL ROUTINE OF LIVING.

THE REFEREE FURTHER FOUND THAT DR. HAWKINS' REPORT OF MARCH 24, 1975 WHICH INDICATED HE FOUND NO EVIDENCE OF A RUPTURED LUMBAR DISC WAS NOT INCONSISTENT WITH THE PROGRESSION OF CLAIMANT'S SYMPTOMATOLOGY HAVING OCCURRED AS TESTIFIED TO BY CLAIMANT'S HUSBAND AND BY CLAIMANT THROUGH HER DEPOSITION TAKEN BECAUSE OF HER INABILITY TO ATTEND THE HEARING.

THE REFEREE CONCLUDED THAT THE LAY AND MEDICAL EVIDENCE CLEARLY DEFINED A MEDICAL CONDITION WHICH DEMANDED TREATMENT FROM AND AFTER DR. WILSON'S EXAMINATION OF CLAIMANT ON DECEMBER 19, 1974

AND THAT THIS CONDITION WAS THE CAUSAL RESULT OF THE INDUSTRIAL INJURY. HE FURTHER CONCLUDED THAT CLAIMANT HAS NEVER BEEN MEDICALLY STATIONARY BUT HAS HAD A CONTINUING DISABILITY EXTENDING FROM HER SEPTEMBER 6, 1974 INJURY WHICH REQUIRED THE ULTIMATE MEDICAL TREATMENT RECEIVED FROM DR. WILSON AND ALSO FROM DR. CAMPAGNA.

THE REFEREE FOUND THAT THE FUND HAD BEEN FULLY APPRISED OF THE MEDICAL RECOMMENDATIONS OF DR. WILSON AND DR. CAMPAGNA AND HE CONCLUDED THAT THE BASIS FOR THE FUND'S DENIAL OF THE REQUEST TO REOPEN CLAIMANT'S CLAIM WAS PURE SPECULATION AND THAT SUCH DENIAL AMOUNTED TO UNREASONABLE RESISTANCE TO THE PAYMENT OF COMPENSATION WHICH JUSTIFIED THE ASSESSMENT OF PENALTY UNDER THE PROVISIONS OF ORS 656.262(8) AND THE AWARDING OF A REASONABLE ATTORNEY'S FEE UNDER THE PROVISIONS OF ORS 656.382(1).

THE BOARD, ON DE NOVO REVIEW, AGREES THAT THE DETERMINATION ORDER MAILED DECEMBER 11, 1974 MUST BE SET ASIDE AS CLAIMANT WAS NOT, AT THAT TIME, MEDICALLY STATIONARY - THE CLAIM WAS PREMATURELY CLOSED. THE BOARD ALSO AGREES THAT CLAIMANT'S AGGRAVATION RIGHTS SHALL DATE FROM THE DATE OF CLOSURE WHICH WILL BE MADE WHEN CLAIMANT IS FOUND TO BE MEDICALLY STATIONARY PURSUANT TO THE PROVISIONS OF ORS 656.268.

THE BOARD FINDS THAT ALTHOUGH THE FUND WAS WRONG IN DENYING CLAIMANT'S REQUEST TO REOPEN HER CLAIM, ITS ACTIONS WERE NOT UNREASONABLE TO THE EXTENT THAT PENALTIES SHOULD HAVE BEEN IMPOSED. AT THE TIME THE FUND ENTERED ITS DENIAL THERE WERE CIRCUMSTANCES WHICH COULD HAVE LED THE FUND TO BELIEVE THAT CLAIMANT'S CONDITION ON AND AFTER DECEMBER 19, 1974 MIGHT NOT HAVE BEEN CAUSALLY RELATED TO HER SEPTEMBER 6, 1974 INDUSTRIAL INJURY. THE FACT THAT THE EVIDENCE PROVED THAT THE FUND WAS IN ERROR IN MAKING THIS DENIAL DOES NOT, BY ITSELF, MAKE THE DENIAL UNREASONABLE.

THE BOARD CONCLUDES THAT NO PENALTIES SHOULD HAVE BEEN ASSESSED AGAINST THE FUND.

ORDER

THE ORDER OF THE REFEREE DATED JULY 10, 1975 IS MODIFIED BY DELETING THEREFROM PARAGRAPH THREE OF THE 'ORDER' PORTION OF THE OPINION AND ORDER. IN ALL OTHER RESPECTS THE ORDER IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 300 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 74-1705 JANUARY 27, 1976

JAMES W. KEETON, CLAIMANT

BABCOCK, ACKERMAN AND HANLON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED AUGUST 5, 1974 AWARDING CLAIMANT TEMPORARY TOTAL DISABILITY COMPENSATION FROM JANUARY 28, 1974 THROUGH APRIL 7, 1974. THE CLAIMANT CONTENDS

THE CLAIM WAS PREMATURELY CLOSED AND HE IS ENTITLED TO ADDITIONAL MEDICAL CARE AND TREATMENT AND ADDITIONAL TEMPORARY TOTAL DISABILITY COMPENSATION.

CLAIMANT, A 45 YEAR OLD MILL WORKER, SUFFERED A COMPENSABLE BILATERAL HERNIA ON JANUARY 16, 1974. SURGICAL REPAIR WAS PERFORMED BY DR. KING ON JANUARY 28, 1974. ON APRIL 9, 1974 CLAIMANT FELL OFF THE PORCH.

CLAIMANT COMPLAINED TO THE FUND IN EARLY MAY 1974 THAT HE HAD HURT HIS SHOULDER AT THE TIME OF THE HERNIA ONSET AND IN JULY 1974 HE ADVISED DR. KING'S OFFICE THAT THE SHOULDER WAS INJURED ON JANUARY 16, 1974, THE DATE HE SUFFERED THE BILATERAL HERNIA.

CLAIMANT WROTE THE BOARD ASKING FOR TEMPORARY TOTAL DISABILITY COMPENSATION FROM JANUARY 19, TO JANUARY 28, 1974 AND FROM APRIL 8 TO APRIL 14, 1974, INDICATING COMPLAINTS OF LEFT SHOULDER PROBLEMS – HE ALSO INDICATED HE SHOULD BE REIMBURSED FOR MEDICINES AND THAT HE WAS DISSATISFIED WITH THE DETERMINATION ORDER.

DR. CAMPAGNA IN HIS FIRST REPORT DATED AUGUST 1, 1974, RELYING UPON THE HISTORY RELATED TO HIM BY CLAIMANT, TO-WIT – THAT WHILE PULLING TIMBER ON JANUARY 16, 1974 HE NOTICED AN ACHING ON THE LEFT SIDE OF HIS NECK AND LEFT SHOULDER WHICH WORSENED AND THAT HE WAS SEEN BY DR. KING ON JANUARY 17, 1974 AND GIVEN MEDICATION FOR POSSIBLE PULLED MUSCLE, RELATED CLAIMANT'S PRESENT SYMPTOMS TO THE INDUSTRIAL INCIDENT AND FELT THAT CLAIMANT HAD SUSTAINED MILDLY-MODERATE DISABILITY AS A RESULT THEREOF. HOWEVER, IN HIS DEPOSITION TAKEN ON JUNE 10, 1975, DR. CAMPAGNA INDICATED THAT IF CLAIMANT HAD NOT COMPLAINED OF LEFT SHOULDER, ARM AND NECK SYMPTOMS FOR SEVERAL MONTHS AFTER THE JANUARY 16, 1974 INCIDENT AND THERE WAS NOT A SHOULDER PULLED MUSCLE DIAGNOSIS MADE BY DR. KING ON JANUARY 17, 1974, HIS OPINION ON CAUSATION WOULD BE DIFFERENT.

THE REFEREE FOUND THE EVIDENCE INDICATED THERE WAS ONE ONSET OF THE BILATERAL HERNIA AND THAT WAS ON JANUARY 16, 1974, THEREFORE, CLAIMANT WAS NOT ENTITLED TO ANY TEMPORARY TOTAL DISABILITY COMPENSATION PRIOR TO THAT DATE NOR WAS THERE ANY EVIDENCE OF EXTENT OF DISABILITY BECAUSE OF THE HERNIA BEYOND THE 60 WORK DAY PERIOD.

THE REFEREE, CONSIDERING CLAIMANT'S MEDICAL HISTORY PRIOR TO JANUARY 16, 1974 TOGETHER WITH DR. CAMPAGNA'S MODIFIED OPINION MADE AFTER HE WAS FULLY APPRISED OF THE CIRCUMSTANCES PRIOR TO JANUARY 16, 1974 INSOFAR AS CLAIMANT'S ALLEGED DISABILITY WAS CONCERNED, CONCLUDED THAT CLAIMANT HAD FAILED TO SHOW THAT HIS LEFT SHOULDER, ARM OR NECK PROBLEMS WERE CAUSALLY RELATED TO THE JANUARY 16, 1974 INCIDENT.

THE REFEREE FURTHER CONCLUDED THAT THE EVIDENCE DID NOT ESTABLISH THAT THE MEDICAL EXPENSES INCURRED BY THE CLAIMANT WERE IN CONNECTION WITH THE HERNIA AND, THEREFORE, WERE NOT REIMBURSABLE.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 8, 1975 IS AFFIRMED.

WCB CASE NO. 74-317 JANUARY 27, 1976

IN THE MATTER OF THE RIGHT TO
SECOND INJURY FUND BENEFITS OF
CARL CROUSE, DBA CARL'S COMB AND SHEAR
ALLEN G. OWEN, CLAIMANT'S ATTY.
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A HEARING WAS HELD IN PORTLAND, OREGON BEFORE GEORGE RODE, A REFEREE OF THE WORKMEN'S COMPENSATION BOARD, ON OCTOBER 1, 1975.

CARL CROUSE WAS REPRESENTED BY ALLEN G. OWEN, ATTORNEY AT LAW AND THE WORKMEN'S COMPENSATION BOARD WAS REPRESENTED BY NORMAN F. KELLEY.

THE ISSUE PRESENTED WAS WHETHER A NONCOMPLYING EMPLOYER WAS ENTITLED TO RECEIVE SECOND INJURY FUND RELIEF FOR THE COSTS OF AN INJURY TO A SUBJECT WORKMAN.

FINDINGS -

CARL CROUSE, DBA CARL'S COMB AND SHEAR, EMPLOYED ROBERT BILLINGS TO WORK AS A BARBER, KNOWING THAT BILLINGS WAS HANDICAPPED BY A PREEXISTING MUSCULAR DYSTROPHY CONDITION. THE CONDITIONS UNDER WHICH BILLINGS WORKED AGGRAVATED HIS MUSCULAR DYSTROPHY AND HE FILED A CLAIM FOR WORKMEN'S COMPENSATION BENEFITS UNDER THE OREGON WORKMEN'S COMPENSATION LAW. IT WAS EVENTUALLLY ESTABLISHED THAT CROUSE WAS SUBJECT TO AND NOT COMPLIED WITH THE OREGON WORKMEN'S COMPENSATION LAW AND HE WAS DECLARED A NONCOMPLYING EMPLOYER. MEANWHILE, THE CLAIM OF BILLINGS WAS PROCESSED AND ALLOWED IN ACCORDANCE WITH ORS 656.054 AND BILLINGS WAS ULTIMATELY FOUND TO BE PERMANENTLY AND TOTALLY DISABLED.

CROUSE FILED A CLAIM FOR SECOND INJURY RELIEF WHICH WAS DENIED PURSUANT TO RULE IB OF WCB ADMINISTRATIVE ORDER 3-1973, RELATING TO RULES FOR THE PAYMENT OF SECOND INJURY BENEFITS UNDER ORS 656.622.

THAT RULE PROVIDES -

> 'B. AN EMPLOYER WHO IS IN A NONCOMPLYING STATUS WITHIN THE MEANING OF THE WORKMEN'S COMPENSATION LAW AT THE TIME OF THE DISABLING INJURY FOR WHICH SECOND INJURY BENEFITS ARE BEING REQUESTED IS NOT ENTITLED TO RECEIVE PAYMENT.'

CROUSE MET ALL OTHER CONDITIONS FOR ELIGIBILITY CREATED BY THE RULES. THE EMPLOYER REQUESTED A HEARING CONTENDING THE RULE WAS INCONSISTENT WITH AND IN DEROGATION OF ORS 656.622 AND THAT THE LIMITATION OF REIMBURSEMENT TO COMPLYING EMPLOYERS ONLY WAS THEREFORE INVALID.

ORS 656.622 PROVIDES, AMONG OTHER THINGS -

> '(1) THE BOARD SHALL ESTABLISH A SECOND INJURY RESERVE WITHIN THE ADMINISTRATIVE FUND FOR THE BENEFIT OF EMPLOYERS AND THEIR WORKMEN AND FOR THE PURPOSE OF -
> (A) GIVING EMPLOYERS AND THEIR WORKMEN THE BENEFITS PROVIDED IN SUBSECTION (2) OF THIS SECTION...'
>
> '(2) THE BOARD MAY REIMBURSE, TO THE EXTENT REASONABLY

JUSTIFIED BY THE FACTS, WITHIN SUCH RULES AS ARE PROMULGATED BY THE BOARD, THE ADDITIONAL AMOUNT AN EMPLOYER PAYS, IN COMPENSATION OR OTHER AMOUNTS, WITH RESPECT TO ANY INJURY RESULTING IN PERMANENT DISABILITY OR DEATH WHERE THE INJURY IS ATTRIBUTABLE WHOLLY OR PARTIALLY TO A PREEXISTING DISABILITY OF THE EMPLOYE OR ANOTHER EMPLOYE OF THE SAME EMPLOYER, OR WHERE THE RESULTANT DISABILITY OR DEATH IS DUE WHOLLY OR PARTIALLY TO A PREEXISTING DISABILITY...'

'(5) THE BOARD MAY MAKE SUCH RULES AS MAY BE REQUIRED TO ESTABLISH, REGULATE, MANAGE AND DISBURSE THE RESERVE CREATED IN ACCORDANCE WITH THE INTENT OF THIS SECTION, INCLUDING THE NATURE AND EXTENT OF PREEXISTING OR SUBSEQUENT DISABILITIES WHICH QUALIFY FOR REIMBURSEMENT.'

THE REFEREE, CONSIDERING HIMSELF BOUND BY THE RULE WHICH THE BOARD ADOPTED, RECOMMENDED THAT THE DENIAL OF THE EMPLOYER'S REQUEST FOR SECOND INJURY RELIEF BE AFFIRMED.

ULTIMATE FINDINGS OF FACT —

CARL CROUSE, DBA DARL'S COMB AND SHEAR, WAS A NONCOMPLYING EMPLOYER AT ALL TIMES MATERIAL HERETO.

DISCUSSION —

WE ARE PERSUADED, FOR THE REASONS CONTAINED IN THE BOARD'S MEMORANDUM, (DEFENDANT'S EXHIBIT 'A') AND THE BOARD'S ARGUMENT TO THE REFEREE, THAT THE LEGISLATURE INTENDED THAT THE PROTECTIONS AND BENEFITS OF THE WORKMEN'S COMPENSATION LAW WERE TO BE EXTENDED ONLY TO THOSE EMPLOYERS WHO WERE COMPLYING WITH THE LAW. THE RULE IN QUESTION IS IN HARMONY WITH THE BROAD LEGISLATIVE INTENT BEHIND THE WORKMEN'S COMPENSATION, GENERALLY AND SPECIFICALLY, ORS 656.622.

THE RULE WAS VALIDLY ADOPTED AND CONTROLS THE OUTCOME.

CONCLUSIONS OF LAW —

CARL CROUSE, DBA CARL'S COMB AND SHEAR, IS NOT ENTITLED TO ANY REIMBURSEMENT FROM THE SECOND INJURY RESERVE FUND ON ACCOUNT OF THE CLAIM OF ROBERT BILLINGS.

ORDER —

THE REQUEST OF CARL CROUSE, DBA CARL'S COMB AND SHEAR, FOR SECOND INJURY RELIEF RELATING TO THE WORKMEN'S COMPENSATION CLAIM OF ROBERT BILLINGS IS HEREBY DENIED.

NOTICE —

YOU ARE ENTITLED TO JUDICIAL REVIEW OF THIS ORDER. JUDICIAL REVIEW MAY BE OBTAINED BY FILING A PETITION FOR REVIEW WITHIN SIXTY DAYS FROM THE SERVICE OF THIS ORDER. JUDICIAL REVIEW IS PURSUANT TO THE PROVISIONS OF ORS CHAPTER 183.

WCB CASE NO. 75-685 JANUARY 27, 1976

JAMES L. BIDWELL, CLAIMANT
CHARLES PAULSON, CLAIMANT'S ATTY.
JONES, LANG, KLEIN, WOLF AND SMITH,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH GRANTED CLAIMANT AN AWARD OF PERMANENT TOTAL DISABILITY.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON FEBRUARY 19, 1974 WHEN HE FELL APPROXIMATELY 16 FEET, LANDING ON HIS LEFT SIDE. THE INITIAL DIAGNOSIS WAS DISLOCATION OF LEFT SHOULDER, HEMATOMA LEFT SHOULDER, ELBOW AND LEFT BUTTOCK.

ON MARCH 2, 1974 CLAIMANT WAS STILL VERY STIFF AND HAD PAIN ACROSS THE LUMBOSACRAL JOINT WHICH WAS EXACERBATED BY BENDING OF THE TRUNK AND THE PELVIC AREA - THE HEMATOMA AREAS WERE RESOLVING. LATER, CLAIMANT SAW A CHIROPRACTIC PHYSICIAN COMPLAINING OF LEFT HIP AND LEFT SHOULDER PAIN AND PAIN ACROSS THE LOW BACK AND IN THE NECK WITH CONSTANT DULL HEADACHES.

CLAIMANT WAS SEEN BY THE PHYSICIANS AT THE DISABILITY PREVENTION DIVISION WHO ATTRIBUTED CLAIMANT'S PERMANENT PARTIAL DISABILITY ONLY TO RESIDUALS OF THE LEFT SHOULDER AND HIP AND CLASSIFIED SUCH DISABILITY AS MILD.

THE CLAIM WAS CLOSED ON DECEMBER 5, 1974 BY DETERMINATION ORDER WHICH AWARDED CLAIMANT 128 DEGREES FOR 40 PER CENT UNSCHEDULED LEFT SHOULDER AND LEFT HIP DISABILITY.

CLAIMANT WAS NEXT SEEN BY THE ORTHOPEDIC CONSULTANTS. X-RAYS SHOWED A LIPPING WITH MILD NARROWING OF DEGENERATIVE OSTEOPHYTOSIS OF A GENERALIZED NATURE AT THE L5-S1, THE RIGHT LUMBOSACRAL FACET WAS SCLEROTIC AND THERE WAS LUMBAR SCOLIOSIS OF A MILD DEGREE TO THE RIGHT. THE DIAGNOSIS WAS ADVANCED DEGENERATIVE ARTHRITIS IN THE THORACOLUMBAR SPINE WITH MILD DEGENERATIVE ARTHRITIS IN THE CERVICAL SPINE - MODERATE DEGENERATIVE DISC DISEASE AT L5-S1 AT THE DORSO-LUMBAR JUNCTION WITH MILD RIGHT LUMBAR SCOLIOSIS. SUPERIMPOSED ON THE PROBLEMS DIAGNOSED ABOVE WERE CHRONIC STRAIN LUMBOSACRAL AREA AND SUBOCCIPITAL HEADACHES ON THE LEFT WITH SYMPTOMATIC DEGENERATIVE CHANGES IN THE LEFT ACROMIOCLAVICULAR JOINTS. A REVIEW OF CLAIMANT'S SPINAL COLUMN INDICATED CLAIMANT TO BE MUCH OLDER THAN HIS CHRONOLOGICAL AGE.

THE THREE ORTHOPEDIC SURGEONS WERE OF THE OPINION CLAIMANT COULD NOT RETURN TO HIS OCCUPATION AS A BRICKLAYER, AN OCCUPATION HE HAD FOLLOWED FOR 30 YEARS, BUT THEY DID NOT BELIEVE CLAIMANT WAS PERMANENTLY AND TOTALLY UNABLE TO DO ANY WORK - THEY FELT THAT CLAIMANT COULD WORK AS A SECURITY GUARD OR A WATCHMAN.

CLAIMANT IS PRESENTLY 57 YEARS OLD AND HAS THREE YEARS OF HIGH SCHOOL EDUCATION. HE DENIED ANY PRIOR INJURIES TO HIS NECK AND BACK. CLAIMANT TESTIFIED HE TRIED TO RETURN TO WORK BUT THE PAIN WAS TOO MUCH.

THE REFEREE FOUND THAT CLAIMANT HAD A SEVERE DEGENERATIVE ARTHRITIS CONDITION INVOLVING HIS ENTIRE SPINE WHICH HAD BEEN DORMANT

PRIOR TO HIS INDUSTRIAL ACCIDENT. THE ACCIDENT EXACERBATED THE PREEXISTING CONDITION AND THAT CONDITION, WHEN COUPLED WITH CLAIMANT'S SHOULDER DISABILITY, CONVINCED THE REFEREE THAT CLAIMANT WAS AT THE PRESENT TIME PERMANENTLY AND TOTALLY DISABLED. HE FELT THE STATEMENT OF THE THREE ORTHOPEDIC SURGEONS THAT CLAIMANT COULD WORK AS A SECURITY GUARD WAS NEITHER REALISTIC NOR PERSUASIVE.

THE BOARD, ON DE NOVO REVIEW, FINDS THAT THE ASSESSMENT OF CLAIMANT'S DISABILITY DUE TO HIS INDUSTRIAL INJURY WAS MILD AND THE DISABILITY NOT RELATED TO THE INJURY, BUT OF A DEGENERATIVE NATURE, WAS CONSIDERED MODERATELY SEVERE. THE ORTHOPEDIC CONSULTANTS CONCLUDED THAT CLAIMANT COULD NOT RETURN TO HIS REGULAR JOB AS A BRICKLAYER BUT THAT HE COULD DO LIGHTER TYPES OF WORK. THE EVIDENCE INDICATES THAT WHEN CLAIMANT WAS SEEN AT VOCATIONAL REHABILITATION HE INDICATED HE HOPED TO GO BACK TO MASONRY TYPE WORK, THAT IT WAS HARD FOR HIM TO VISUALIZE HIMSELF DOING ANYTHING ELSE. BECAUSE OF THIS POSITION TAKEN BY CLAIMANT, HIS APPLICATION WAS NOT ACCEPTED BUT HE WAS ENCOURAGED TO CONTACT VOCATIONAL REHABILITATION IN THE FUTURE IF HE FELT HE NEEDED THEIR SERVICES. CLAIMANT NEVER RETURNED NOR SOUGHT SUCH SERVICES FOR ANY TYPE OF RETRAINING BUT ATTEMPTED TO RETURN TO BRICKLAYING FOR APPROXIMATELY FOUR DAYS AND FOUND HE COULD NOT DO THAT. THERE IS NO EVIDENCE IN THE RECORD THAT CLAIMANT HAS ATTEMPTED TO FIND ANY TYPE OF WORK EXCEPT AS A BRICKLAYER.

THE BOARD CONCLUDES THAT BECAUSE CLAIMANT REFUSED TO GO BACK TO ANY TYPE OF WORK EXCEPT BRICKLAYING, A JOB WHICH HE OBVIOUSLY IS PHYSICALLY INCAPABLE OF DOING AT THE PRESENT TIME, AND THE LACK OF EVIDENCE THAT HE HAS MADE ANY ENDEAVOR TO SECURE LIGHTER TYPES OF WORK WHICH HE MIGHT BE CAPABLE OF DOING IN HIS PRESENT PHYSICAL CONDITION, PRECLUDES A FINDING THAT CLAIMANT IS, AT THE PRESENT TIME, PERMANENTLY AND TOTALLY DISABLED.

THE BOARD CONCLUDES THAT THE AWARD OF 40 PER CENT UNSCHEDULED DISABILITY ADEQUATELY COMPENSATES CLAIMANT FOR HIS LOSS OF EARNING CAPACITY.

ORDER

THE ORDER OF THE REFEREE DATED JUNE 27, 1975 IS REVERSED.

THE DETERMINATION ORDER MAILED DECEMBER 5, 1974 IS AFFIRMED.

WCB CASE NO. 74-2931
WCB CASE NO. 75-3365

JANUARY 27, 1976

CONAN OLSON, CLAIMANT

EVOHL F. MALAGON, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER DATED JULY 30, 1975 WHICH AWARDED CLAIMANT PERMANENT TOTAL DISABILITY AS OF AUGUST 5, 1974 AND ALSO THE REFEREE'S ORDER ENTERED AUGUST 4, 1975 WHEREBY THE REFEREE AWARDED CLAIMANT 100.92 DEGREES FOR BINAURAL HEARING LOSS.

THE CLAIMANT HAD REQUESTED A HEARING ON THE DETERMINATION ORDER MAILED AUGUST 15, 1974 WHICH AWARDED CLAIMANT 56.8 DEGREES

FOR 29.6 PER CENT LOSS BINAURAL HEARING, RESULTING FROM 32.5 PER CENT LOSS OF HEARING IN THE LEFT EAR AND 29.16 PER CENT LOSS OF HEARING IN THE RIGHT EAR.

THE CLAIMANT HAD ALSO REQUESTED A HEARING ON THE DETERMINATION ORDER MAILED AUGUST 5, 1974, AS AMENDED ON AUGUST 13, 1974, WHICH AWARDED CLAIMANT 30 DEGREES FOR 20 PER CENT LOSS OF THE RIGHT HAND AND 30 DEGREES FOR 20 PER CENT LOSS OF THE LEFT HAND.

THE TWO REQUESTS WERE CONSOLIDATED FOR HEARING BUT SEPARATE OPINION AND ORDERS WERE ENTERED BY THE REFEREE UPON THE CONCLUSION OF THE HEARING.

CLAIMANT IS A 60 YEAR OLD TIMBER FALLER WHO WAS EMPLOYED BY THE EMPLOYER FROM JUNE 1961 TO DECEMBER 1973. CLAIMANT HAD ALSO WORKED IN THE WOODS FOR DIFFERENT COMPANIES SINCE 1941 - HIS ONLY OTHER WORK EXPERIENCE INVOLVED FARM LABOR WORK, TRUCK DRIVING, ROAD AND POWER LINE CONSTRUCTION AND GREASING AND WASHING AUTOMOBILES. CLAIMANT HAS AN EIGHTH GRADE EDUCATION.

IN JUNE 1973 CLAIMANT FIRST NOTICED A SKIN REACTION - HIS HANDS WOULD SWELL SO THAT HE COULD NOT CLOSE THEM AND THEY WOULD ITCH QUITE SEVERELY. ALTHOUGH HE REMAINED ON THE EMPLOYER'S PAYROLL FOR SIX MORE MONTHS HE WAS ONLY ABLE TO WORK A FEW DAYS DURING THAT PERIOD. WHEN HE REMAINED OUT OF THE WOODS TWO OR THREE WEEKS, THE SKIN CONDITION WOULD HEAL, HOWEVER, UPON RETURN TO THE WOODS THE PROBLEM WOULD AGAIN LIGHT UP. THE CONDITION WAS DIAGNOSED CHRONIC ECZEMATOUS DERMATITIS. PATCH TESTS WITH VARIOUS WOOD PRODUCTS AND TARS WERE NEGATIVE. IT WAS MEDICALLY ESTABLISHED THAT THE PROBLEM WAS RELATED TO CLAIMANT'S WORK IN THE WOODS, HOWEVER, NO SPECIFIC ALLERGIC AGENT WAS IDENTIFIED.

CLAIMANT WAS REFERRED TO THE DISABILITY PREVENTION DIVISION AFTER HE HAD BEEN OUT OF THE WOODS FOR SEVERAL MONTHS AND HAD, AT THAT TIME, NO DERMATOLOGICAL COMPLAINTS OR APPARENT SYMPTOMS. HOWEVER, DURING OCCUPATIONAL THERAPY AT DISABILITY PREVENTION DIVISION HE WORKED BRIEFLY WITH FIR PLYWOOD AND NOTICED HIS HANDS WOULD ITCH ALTHOUGH NO SERIOUS APPARENT SYMPTOMS WERE NOTED BY THE DOCTORS.

WHILE CLAIMANT WAS AT DISABILITY PREVENTION DIVISION A CARDIAC CONDITION WAS DISCOVERED AND IN AUGUST 1974 A PERMANENT TRANSVENOUS PACEMAKER WAS IMPLANTED. THE CARDIOLOGIST WAS OF THE OPINION THAT THIS PARTICULAR PROBLEM WOULD NOT PROHIBIT CLAIMANT FROM RETURNING TO HIS REGULAR WORK IN THE WOODS ALTHOUGH HE WOULD RECOMMEND A MORE MODERATE ACTIVITY.

DR. ROLLINS, CLAIMANT'S TREATING DERMATOLOGIST, WAS OF THE OPINION THAT CLAIMANT'S SKIN CONDITION WAS ASSOCIATED WITH HIS WORK IN THE WOODS AND THAT CLAIMANT WAS NO LONGER ABLE TO FOLLOW THAT VOCATION.

THE REFEREE WAS OF THE OPINION THAT, ALTHOUGH THE DETERMINATION ORDER CLOSED CLAIMANT'S CLAIM WITH AWARDS OF SCHEDULED DISABILITIES FOR BOTH HANDS, THE AWARD SHOULD HAVE BEEN BASED ON UNSCHEDULED DISABILITY BECAUSE CLAIMANT'S CONDITION IS SYSTEMIC IN NATURE. THE REFEREE FOUND THAT CLAIMANT IS ALLERGIC TO SOMETHING WITH WHICH HE COMES IN CONTACT WHILE WORKING IN THE FOREST BUT THAT AS OF THE DATE OF THE HEARING, NO ONE HAD BEEN ABLE TO IDENTIFY THE SPECIFIC ALLERGEN. EARLY HISTORY OF CLAIMANT'S CONDITION INDICATES COMPLAINTS THAT IT WAS MANIFESTED ALSO TO CLAIMANT'S FACE ALTHOUGH THE MORE RECENT MEDICALS REFER ONLY TO THE HAND PROBLEM. HOWEVER, THE CONDITION MANIFESTED ITSELF IN THE HANDS ONLY BECAUSE

CLAIMANT WORKS WITH HIS HANDS. THE REFEREE FOUND THAT ALTHOUGH CLAIMANT'S CONDITION, I.E. DERMATITIS, MANIFESTED ITSELF PRIMARILY TO HIS HANDS, IT IS GENERALIZED THROUGHOUT HIS BODY.

EVERY TIME CLAIMANT ATTEMPTED TO RETURN TO WORK IN THE WOODS, THE CONDITION 'FLARED UP', OBVIOUSLY, CLAIMANT CANNOT RETURN TO SUCH WORK. CLAIMANT IS 60 YEARS OLD AND HAS WORKED FOR NEARLY 32 YEARS IN THE WOODS - HIS EDUCATION IS LIMITED AND VOCATIONAL REHABILITATION IS NOT A VERY REALISTIC ALTERNATIVE.

THE REFEREE CONCLUDED THAT CLAIMANT'S MEDICAL CONDITION, WHEN CONSIDERED WITH HIS AGE, EDUCATION, TRAINING AND WORK EXPERIENCE, MADE CLAIMANT PERMANENTLY AND TOTALLY DISABLED.

WITH RESPECT TO THE HEARING LOSS, THE REFEREE FOUND THAT THE EVALUATION DIVISION OF THE BOARD IN COMPUTING THE PERCENTAGE BINAURAL HEARING LOSS SUFFERED BY CLAIMANT HAD UTILIZED THE AUDIOLOGICAL FINDING IN THE NORMAL FREQUENCY RANGES ONLY.

IN THE MATTER OF THE COMPENSATION OF OSCAR PRIVETTE (UNDERSCORED), WCB 73-1563, THE BOARD HELD THAT HIGH TONE LOSSES MUST BE INCLUDED IN DETERMINING LOSS OF 'NORMAL' HEARING WITHIN THE MEANING OF ORS 656.214(F) AND (G). THE REFEREE CONCLUDED USING THE AUDIOGRAMS TAKEN ON JUNE 25, AND JUNE 26, 1974 AND APPLYING THE FORMULA IN PRIVETTE (UNDERSCORED), THAT CLAIMANT HAD SUFFERED 51.15 PER CENT RIGHT EAR LOSS EQUAL TO 30.69 DEGREES AND 22.40 PER CENT LEFT EAR LOSS EQUAL TO 37.44 DEGREES FOR A TOTAL OF 68.3 DEGREES WHICH RESULTS IN A BINAURAL HEARING LOSS EQUAL TO 52.56 PER CENT OR 100.92 DEGREES.

THE BOARD, ON DE NOVO REVIEW, AGREES WITH THE REFEREE'S CONCLUSION THAT CLAIMANT'S DERMATOLOGICAL PROBLEM IS SYSTEMIC AND, THEREFORE, MUST BE TREATED AS AN UNSCHEDULED RATHER THAN A SCHEDULED DISABILITY. HOWEVER, THE BOARD DOES FEEL, BASED UPON DR. HICKMAN'S REPORT WHICH SUGGESTS POSSIBLE RETRAINING OF CLAIMANT TO ENABLE HIM TO ENGAGE IN OTHER TYPES OF WORK NOT REQUIRING CONTACT WITH WOOD OR WOOD PRODUCTS, THAT CLAIMANT IS NOT ENTITLED TO AN AWARD OF PERMANENT TOTAL DISABILITY BUT THAT HIS LOSS OF EARNING CAPACITY DOES JUSTIFY AN AWARD OF 50 PER CENT OF THE MAXIMUM ALLOWABLE BY STATUTE FOR UNSCHEDULED DISABILITY.

THE BOARD AGREES WITH THE FINDINGS AND CONCLUSIONS REACHED BY THE REFEREE WITH RESPECT TO THE CLAIMANT'S CLAIM FOR BINAURAL HEARING LOSS AND AFFIRMS IT.

ORDER

THE ORDER OF THE REFEREE DATED JULY 30, 1975 (WCB CASE NO. 74-2931) IS MODIFIED TO THE EXTENT THAT CLAIMANT IS AWARDED 160 DEGREES OF A MAXIMUM OF 320 DEGREES FOR UNSCHEDULED (DERMATITIS) DISABILITY. THIS IS IN LIEU OF THE AWARD MADE BY THE REFEREE IN HIS ORDER WHICH IN ALL OTHER RESPECTS IS AFFIRMED.

THE ORDER OF THE REFEREE DATED AUGUST 4, 1975 (WCB CASE NO. 74-3365) IS AFFIRMED.

CLAIMANT'S ATTORNEY IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 350 DEGREES, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 74-1419 JANUARY 27, 1976

ROBERT JAMES, CLAIMANT

WILLIAM CROTHERS, JR., CLAIMANT'S ATTY.
PHILIP A. MONGRAIN, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH REMANDED CLAIMANT'S CLAIM TO IT FOR ACCEPTANCE AND PAYMENT OF BENEFITS AS PROVIDED BY STATUTE.

THE ISSUE BEFORE THE REFEREE WAS WHETHER CLAIMANT HAD SUSTAINED A COMPENSABLE INJURY OR OCCUPATIONAL DISEASE. CLAIMANT IS 56 YEARS OLD AND WAS EMPLOYED BETWEEN JANUARY 21 AND FEBRUARY 8, 1974 AS A SPOT WELDER. HE HAD BEEN A JOURNEYMAN SHEET METAL WORKER SINCE 1950 BUT PRIOR TO BEING EMPLOYED BY THE EMPLOYER HE HAD DONE VERY LITTLE SPOT WELDING AND NOT FOR ANY LENGTH OF TIME. HIS JOB AS A SPOT WELDER FOR THE EMPLOYER CONSISTED OF SPOT WELDING THE FITTING ON A CONTINUOUS BASIS THROUGHOUT HIS 7 AND ONE HALF HOUR SHIFT.

AFTER TWO OR THREE DAYS CLAIMANT DEVELOPED A COUGH, WHICH WORSENED, AND ON FEBRUARY 7, 1974, HE ASKED HIS FOREMAN IF THERE WAS ANY OTHER WORK AVAILABLE FOR HIM - HE WAS ADVISED THAT THERE WAS NOT AND CLAIMANT THEN GAVE NOTICE THAT HE WOULD QUIT WORK THE FOLLOWING DAY.

ON FEBRUARY 19, 1975 CLAIMANT SAW DR. FRENCH WHO, AFTER EXAMINATION, FOUND COUGH AND CHEST CONGESTION AND DIAGNOSED BRONCHITIS RESULTING FROM THE INDUSTRIAL INJURY OR EXPOSURE DESCRIBED TO HIM BY CLAIMANT. ON THAT SAME DATE CLAIMANT HAD FILED THE REPORT OF HIS INDUSTRIAL INJURY. ON MARCH 25, 1974 THE CLAIM WAS DENIED.

CLAIMANT WAS AGAIN EXAMINED LATER BY DR. FRENCH, AT THAT TIME CLAIMANT WAS COUGHING BLOOD. IMMEDIATE HOSPITALIZATION WAS RECOMMENDED BUT BECAUSE HIS INDUSTRIAL CLAIM HAD BEEN DENIED, CLAIMANT DECIDED TO GO TO THE VETERANS ADMINISTRATION HOSPITAL IN PORTLAND. HE WAS THERE APPROXIMATELY A WEEK AND HIS CONDITION WAS DIAGNOSED AS HEMOPTYSIS AND SHORTNESS OF BREATH. A PHYSICAL EXAMINATION INDICATED DRIED BLOOD IN ONE NOSTRIL.

IN AUGUST 1974 CLAIMANT WAS EXAMINED BY DR. TUHY AT THE REQUEST OF THE EMPLOYER. DR. TUHY DIAGNOSED CHRONIC OBSTRUCTIVE LUNG DISEASE WITH CHRONIC BRONCHITIS. HE FELT THAT CLAIMANT DID NOT SUFFER ANY PERMANENT EXACERBATION OF HIS LUNG CONDITION BECAUSE OF HIS THREE WEEKS OF WELDING BUT THAT IT WAS A REASONABLE MEDICAL PROBABILITY THAT HE SUFFERED A TEMPORARY EXACERBATION OF THE SYMPTOMS OF BRONCHITIS WHICH HE WOULD HAVE EXPECTED TO HAVE SUBSIDED IN PERHAPS ONE WEEK BUT CERTAINLY NOT TO PERSIST MORE THAN ONE MONTH.

DR. TUHY ALSO STATED THAT HARMFUL FUMES ARISING FROM WELDING NEED NOT BE VISIBLE AND THAT PERSONS WITH PREEXISTING CHRONIC OBSTRUCTIVE LUNG DISEASE AND CHRONIC BRONCHITIS WERE MORE SUSCEPTIBLE TO IRRITATION OF THE LUNGS AND BRONCHI THAN WOULD BE A NORMAL PERSON. IN OTHER WORDS, THE LEVEL OF EXPOSURE WHICH COULD BE TOLERATED BY A PERSON WITH NORMAL BREATHING COULD GIVE RISE TO SYMPTOMS IN A MAN WITH EMPHYSEMA OR BRONCHITIS.

DR. FRENCH WAS OF THE OPINION THAT CLAIMANT'S SYMPTOMS WERE CAUSED BY HIS OCCUPATION AND THAT HE SHOULD QUIT SPOT WELDING UNTIL THE SYMPTOMS SUBSIDED.

PRIOR TO CLAIMANT'S WORK AT THE EMPLOYERS HE HAD NOT EXPERIENCED PERSISTENT COUGHING NOR HAD HE COUGHED UP BLOOD - THIS TESTIMONY WAS CORROBORATED BY HIS WIFE. CLAIMANT TESTIFIED THAT THERE WERE FUMES FROM SPOT WELDING ON GALVANIZED STEEL WHICH WERE DISTINCTLY RECOGNIZABLE ALTHOUGH NOT OVERPOWERING - CLAIMANT'S FOREMAN DISPUTED THIS. BOTH THE FOREMAN AND A FELLOW WORKER TESTIFIED THAT THE BUILDING IN WHICH CLAIMANT WORKED WAS PRESSURIZED BY EXHAUST FANS, HOWEVER, NO TESTIMONY WAS PRESENTED TO INDICATE WHETHER THE FANS WERE WORKING ALL THE TIME WHEN CLAIMANT WAS PRESENT.

THE REFEREE, BASED UPON THE CREDIBLE TESTIMONY OF CLAIMANT AND HIS WIFE THAT PRIOR TO WORKING AT THE EMPLOYERS AS A SPOT WELDER HE HAD HAD NO SYMPTOMS SIMILAR TO THOSE HE EXPERIENCED AFTER SPOT WELDING AND THAT SUCH SYMPTOMS REQUIRED HIM TO QUIT WORK AND SEEK MEDICAL ATTENTION AND UPON BOTH THE OPINION OF DR. FRENCH AND DR. TUHY, CONCLUDED CLAIMANT DID INCUR A COMPENSABLE OCCUPATIONAL DISEASE WHILE EMPLOYED AS A SPOT WELDER BY THE EMPLOYER.

THE BOARD, ON DE NOVO REVIEW, FINDS THAT THE CONTENTION MADE BY THE EMPLOYER THAT THE REPORTS OF CLAIMANT'S TREATING PHYSICIAN, DR. FRENCH, WERE NOT AS RELIABLE AS THOSE OF DR. TUHY BECAUSE OF THE LATTER'S GREATER EXPERTISE IN THIS PARTICULAR FIELD, IS NOT WELL TAKEN. THE BOARD AGREES WITH THE FINDINGS AND CONCLUSIONS OF THE REFEREE AND AFFIRMS AND ADOPTS HER ORDER.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 24, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW THE SUM OF 400 DOLLARS, PAYABLE BY THE EMPLOYER.

WCB CASE NO. 74-3969-E JANUARY 27, 1976

YVONNE WEBB, CLAIMANT

BUSS, LEICHNER, LINDSTEDT, BARKER AND BRUNO,
CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED OCTOBER 1, 1974 WHEREBY CLAIMANT WAS AWARDED 112.5 DEGREES FOR 75 PER CENT LOSS OF THE RIGHT HAND.

CLAIMANT IS A 52 YEAR OLD REGISTERED NURSE WHO SUFFERED A COMPENSABLE INJURY ON MAY 29, 1973 WHEN SHE DISLOCATED HER RIGHT THUMB WHILE LIFTING A PATIENT OUT OF THE BATHTUB. CLAIMANT WAS FIRST SEEN BY DR. GROTH, AN ORTHOPEDIC SURGEON, AND THEREAFTER BY DR. NATHAN, WHO SPECIALIZES IN TREATMENT OF THE HAND. ON

NOVEMBER 14, 1973 DR. GROTH PERFORMED A RELEASE OF THE TUNNEL OF THE ABDUCTOR POLLICUS LONGUS TENDON AND ON MARCH 21, 1974 A CARPAL TUNNEL RELEASE WAS PERFORMED BY DR. NATHAN.

CLAIMANT HAS BEEN GIVEN A PSYCHOLOGICAL EVALUATION BY DR. JULIA PERKINS, A CLINICAL PSYCHOLOGIST AND ALSO HAS BEEN EXAMINED BY DR. QUAN, A PSYCHIATRIST.

DR. NATHAN AND DR. GILL, ANOTHER HAND SPECIALIST, ARE IN AGREEMENT THAT CLAIMANT HAS SUFFERED PHYSICAL IMPAIRMENT OF 10 PER CENT, HOWEVER, BOTH RECOGNIZE THE EXISTENCE OF A STRONG FUNCTIONAL OVERLAY.

THE REFEREE FOUND THAT ALTHOUGH THE PHYSICAL IMPAIRMENT RATING OF 10 PER CENT MIGHT BE CORRECT, THE EXISTENCE OF A SUBSTANTIAL PSYCHOLOGICAL PROBLEM MUST HAVE BEEN TAKEN INTO CONSIDERATION AT THE TIME CLAIMANT WAS INTERVIEWED BY THE EVALUATION DIVISION OF THE BOARD, OTHERWISE THERE WOULD BE NO JUSTIFICATION FOR THE AWARD OF 75 PER CENT LOSS OF THE RIGHT HAND.

THE REFEREE FOUND THAT THE REPORTS OF DR. PERKINS AND DR. QUAN ESTABLISHED THE INJURY DID NOT CAUSE OR SUBSTANTIALLY CONTRIBUTE TO CLAIMANT'S PSYCHOLOGICAL PROBLEMS, HOWEVER, IT DID PRODUCE IN CLAIMANT A DISABILITY FAR IN EXCESS OF THAT WHICH WOULD HAVE BEEN PRODUCED IN THE ABSENCE OF THE PSYCHOLOGICAL FACTORS WHICH BOTH DR. PERKINS AND DR. QUAN FOUND AFTER EXAMINING CLAIMANT. THE REFEREE, BASED UPON HIS OBSERVATIONS OF CLAIMANT DURING THE COURSE OF THE HEARING, REACHED THE SAME CONCLUSION REACHED BY THE EVALUATION DIVISION, THE TREATING DOCTORS, THE PSYCHIATRISTS AND THE CLINICAL PSYCHOLOGIST AND CONCLUDED, THEREFORE, THE DETERMINATION ORDER MAILED OCTOBER 1, 1974 CORRECTLY REFLECTED CLAIMANT'S DISABILITY AND HE AFFIRMED IT.

THE BOARD, ON DE NOVO REVIEW, AGREES WITH THE REFEREE IN HIS ANALYSIS OF THE EVIDENCE. THE FACTS IN THE INSTANT CASE DIFFER FROM THOSE FOUND IN IN THE COMPENSATION OF LIONEL LUCERO (UNDERSCORED), WCB CASE NO. 71-1741, 9 VAN NATTA, P 20. IN THE PRESENT CASE, THE EVIDENCE INDICATES THAT CLAIMANT'S RIGHT HAND PAINS HER CONSTANTLY AND TO THE EXTENT THAT SHE CANNOT SLEEP MORE THAN FOUR HOURS AT A TIME, SHE LACKS SENSATION IN THE HAND WHICH MAKES IT DIFFICULT, IF NOT COMPLETELY IMPOSSIBLE, TO PICK UP OBJECTS EXCEPT BY SIGHT, SHE IS UNABLE TO WRITE WITH HER HAND AND HAS REACHED THE CONCLUSION THAT FOR HER TYPE OF PROFESSION SHE HAS LOST THE USE OF HER HAND TO ALL EXTENTS AND PURPOSES. THE BOARD IS INCLINED TO AGREE WITH THE ARTICULATE DESCRIPTION GIVEN BY THE CLAIMANT WITH RESPECT TO HER DISABILITY.

THE BOARD CONCLUDES THAT THE PAIN AND SUFFERING EXPERIENCED BY CLAIMANT WAS DISABLING AND ALSO THAT THE SUFFERING AND NERVOUSNESS RESULTING THEREFROM, WHETHER IT BE ANATOMIC OR PSYCHOSOMATIC, MUST BE TAKEN INTO CONSIDERATION IN DETERMINING THE TOTALITY OF CLAIMANT'S DISABLING AFFECTS AS A RESULT OF HER INDUSTRIAL INJURY.

ORDER

THE ORDER OF THE REFEREE DATED JULY 15, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 350 DOLLARS, PAYABLE BY THE EMPLOYER.

WCB CASE NO. 75-1202 JANUARY 22, 1976

PAUL YOUNG, CLAIMANT

BAILEY, DOBLIE, AND BRUUN,
CLAIMANT'S ATTYS.
KEITH D. SKELTON, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH REMANDED CLAIMANT'S CLAIM TO IT TO BE ACCEPTED AS AN OCCUPATIONAL DISEASE CLAIM FOR HIGH FREQUENCY HEARING LOSS ONLY, PURSUANT TO ORS 656.807.

CLAIMANT HAS BEEN EMPLOYED BY THE EMPLOYER FOR THE LAST 12 YEARS - PRIOR TO SUCH EMPLOYMENT HE HAD WORKED AS AN IRONWORKER AND FOR THE IDAHO AIR NATIONAL GUARD. CLAIMANT DENIES ANY SUBSTANTIAL NOISE LEVELS AT EITHER OF HIS PREVIOUS OCCUPATIONS - SOME OF THE MEDICAL REPORTS INDICATE TO THE CONTRARY.

CLAIMANT TESTIFIED THAT HE FIRST NOTICED A HEARING LOSS APPROXIMATELY TWO YEARS PRIOR TO THE HEARING AND HAD WORN NO PROTECTIVE DEVICES ON THE JOB TO PROTECT HIS HEARING UNTIL THAT TIME.

CLAIMANT CONTENDS THAT HE WORKS IN A NOISY ENVIRONMENT AT THE MILL ALTHOUGH HE DOES NOT STAND IN CLOSE PROXIMITY TO ANY PARTICULAR MACHINE CONSTANTLY BUT MOVES ABOUT FROM ONE PART OF THE MILL TO ANOTHER. THE MEDICAL REPORTS INDICATE CLAIMANT IS SUFFERING FROM MENIERE'S DISEASE AND HAS A PERMANENT LOW FREQUENCY HEARING LOSS IN HIS RIGHT EAR. THE CLAIM WAS DENIED BY THE EMPLOYER BECAUSE MENIERE'S DISEASE IS NOT KNOWN TO BE CAUSED BY EXPOSURE TO NOISE - HOWEVER, THE MEDICAL REPORTS ALSO INDICATE THAT CLAIMANT IS ALSO SUFFERING FROM A BILATERAL HIGH FREQUENCY LOSS.

THE REFEREE FOUND THAT BASED UPON THE MEDICAL REPORTS, CLAIMANT'S BILATERAL HIGH FREQUENCY HEARING LOSS WAS JOB-RELATED. HE CONCLUDED THAT THESE REPORTS, TOGETHER WITH TESTIMONY OF THE CLAIMANT, WERE SUFFICIENT TO REMAND CLAIMANT'S CLAIM FOR ACCEPTANCE OF THE HIGH FREQUENCY HEARING LOSS ONLY.

HE FURTHER CONCLUDED THAT THE DENIAL OF THE LOW FREQUENCY HEARING LOSS IN THE RIGHT EAR WAS JUSTIFIED.

THE BOARD, ON DE NOVO REVIEW, FINDS NO EVIDENCE THAT CLAIMANT WAS WORKING IN A NOISY AREA OR UNDER NOISY CONDITIONS, NONE OF THE DOCTORS, UPON WHOSE MEDICAL REPORTS THE REFEREE RELIED, HAD A DECIBEL RATING IN THEIR FILES, IN FACT, THERE HAD BEEN NO DECIBEL RATINGS TAKEN BY ANYBODY OR PRESENTED AS EVIDENCE BY THE PLAINTIFF. THE CLAIMANT IS A MILLWRIGHT AND HIS DUTIES REQUIRE THAT HE MOVE FROM ONE AREA OF THE MILL TO ANOTHER DEPENDING UPON THE NEED FOR HIS SERVICES.

THE BOARD FINDS THAT THE CLAIMANT HAS FAILED TO SHOW THAT HE HAS BEEN EXPOSED TO NOISE SUFFICIENT TO INDUCE HIGH FREQUENCY HEARING LOSS. THE BOARD CONCLUDES THAT THE BURDEN IS UPON THE CLAIMANT TO SHOW SUCH EXPOSURE AND, HAVING FAILED TO DO SO, THE CLAIM WAS PROPERLY DENIED BY THE EMPLOYER.

ORDER

THE ORDER OF THE REFEREE DATED JULY 18, 1975 IS REVERSED.

WCB CASE NO. 75-1445 JANUARY 28, 1976

WILLIAM S. MCMICHAEL, CLAIMANT

BROWN, BURT AND SWANSON, CLAIMANT'S ATTYS.
ROGER R. WARREN, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS THAT THE BOARD REVIEW THE ORDER OF THE REFEREE WHICH AWARDED CLAIMANT 37.5 DEGREES FOR 25 PER CENT LOSS OF THE LEFT LEG, CONTENDING THAT, IN ADDITION TO A SCHEDULED LEFT LEG DISABILITY, HE ALSO SUFFERED AN UNSCHEDULED DISABILITY.

CLAIMANT IS A 53 YEAR OLD SAWMILL EMPLOYE WHO SUFFERED A COMPENSABLE INJURY ON MARCH 6, 1974 WHEN HE FELL AND TWISTED HIS LEFT KNEE AT WORK. AN ARTHROTOMY AND MEDIAL MENISCECTOMY WERE PERFORMED IN MAY 1974, CLAIMANT'S POST SURGERY RECOVERY WAS UNEVENTFUL AND HE WAS ABLE TO RETURN TO WORK AS A TRIM SAW OPERATOR FOUR MONTHS AFTER THE INJURY. HE HAS WORKED REGULARLY SINCE THAT DATE.

AFTER A CLOSING EXAMINATION PERFORMED ON JANUARY 31, 1975, DR. FAX FELT CLAIMANT'S CONDITION WAS STATIONARY. CLAIMANT HAD FULL EXTENSION OF THE LEFT KNEE AND FLEXION WAS WITHIN 5 TO 10 DEGREES DIFFERENCE OF THE RIGHT KNEE. DR. FAX FELT THERE WAS SOME SIGNIFICANT RESIDUAL DISABILITY AND THE CLAIM WAS CLOSED ON APRIL 9, 1975 WITH AN AWARD OF 15 DEGREES FOR 10 PER CENT LOSS OF THE LEFT LEG.

CLAIMANT AT THE PRESENT TIME IS COMPLAINING OF LEFT LEG PAIN WHICH EXTENDS DOWN HIS ANKLE AND, AT TIMES, UP THE THIGH INTO HIS HIP. HE SAYS HIS KNEE BECOMES TIRED AND HE SUFFERS LEG MUSCLE CRAMPS AS A RESULT OF LENGTHY STANDING. ALSO HE HAS PROBLEMS WALKING OVER UNEVEN TERRAIN AND HE IS UNABLE TO RUN.

THE REFEREE FOUND NO EVIDENCE THAT CLAIMANT SUFFERED AN UNSCHEDULED DISABILITY. NONE OF THE MEDICAL REPORTS REFLECTED ANY UNSCHEDULED AREA PROBLEMS ALTHOUGH CLAIMANT COMPLAINED OF OCCASIONAL PAIN EXTENDING INTO THE LEFT LEG. THERE IS NO EVIDENCE THAT THIS PAIN IS DISABLING.

THE REFEREE FOUND THAT CLAIMANT'S SCHEDULED DISABILITY OF THE LEFT LOWER EXTREMITY RESULTED IN A GREATER LOSS OF FUNCTION AND USE THAN INDICATED BY THE AWARD OF 10 PER CENT. THE REFEREE CONCLUDED THAT, BASED UPON THE MEDICAL EVIDENCE AND THE TESTIMONY OF THE CLAIMANT, THE FUNCTIONAL IMPAIRMENT OF CLAIMANT'S LEFT LOWER EXTREMITY WAS 25 PER CENT ALTHOUGH DR. PASQUESI HAD, AFTER EXAMINING CLAIMANT ON JUNE 20, 1974, MEASURED THE COMBINED IMPAIRMENT OF CLAIMANT'S LOW EXTREMITY AS 14 PER CENT.

THE REFEREE FURTHER CONCLUDED THAT WHILE THE MEASUREMENT OF IMPAIRMENT BY A DOCTOR IS HIGHLY IMPORTANT AND RELEVANT, IT IS NOT THE ONLY OPINION THAT MAY BE CONSIDERED AND THAT THE TESTIMONY OF THE CLAIMANT AND HIS WITNESSES AS TO CLAIMANT'S PRESENT LEG PROBLEMS WAS SUFFICIENT TO CONVINCE HIM THAT THE PHYSICAL IMPAIRMENT WAS 25 PER CENT.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE ORDER OF THE REFEREE AS ITS OWN.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 8, 1975 IS AFFIRMED.

WCB CASE NO. 75-2379 JANUARY 28, 1976

SHARON S. WEBSTER, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
RONALD J. PODNAR, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED APRIL 30, 1975 WHEREBY CLAIMANT WAS AWARDED NO PERMANENT DISABILITY COMPENSATION.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON DECEMBER 5, 1973 WHEN SHE SLIPPED AND SPRAINED HER ANKLE WHILE WALKING TO THE CAFETERIA. SHE DEVELOPED ACUTE THROMBOPHLEBITIS WHICH WAS SUCCESSFULLY TREATED BUT DID NOT RETURN TO WORK BECAUSE OF A PSYCHOLOGICAL DYSFUNCTION.

CLAIMANT WAS TREATED BY DR. PETROSKE, A PSYCHIATRIST, WHO RECOMMENDED IN-PATIENT CARE INITIALLY, BUT LATER CHANGED HIS MIND AND CONTINUED HIS OUT-PATIENT TREATMENT UNTIL MAY 16, 1975. CLAIMANT STATED SHE WOULD ACCEPT PSYCHIATRIC TREATMENT IF IT WERE AVAILABLE EVEN IF IT REQUIRED HOSPITALIZATION.

THE REFEREE FOUND THAT CLAIMANT HAD SUFFERED AN INJURY TO HER LEFT ANKLE AND THAT THE THROMBOPHLEBITIS WAS IN THE LOWER LEFT EXTREMITY, THEREFORE, BOTH REPRESENTED SCHEDULED INJURIES WHICH HAD TO BE EVALUATED BY DETERMINING THE LOSS OF PHYSICAL FUNCTION. THE ORTHOPEDIC-NEUROLOGICAL EXAMINATION OF MARCH 26, 1975 INDICATED NO OBJECTIVE ORTHOPEDIC OR NEUROLOGICAL FINDINGS.

DR. PETROSKE HAD REPORTED CLAIMANT CONTINUED TO MANIFEST A DEPRESSIVE NEUROSIS WHICH WAS RELATED TO HER INDUSTRIAL ACCIDENT AND PREVENTED HER FROM BEING GAINFULLY EMPLOYED, HOWEVER, THE REFEREE FOUND THAT BY FAILING TO INCLUDE ANY INFORMATION RELATIVE TO FURTHER TREATMENT, DR. PETROSKE IMPLIED HER CONDITION WAS MEDICALLY STATIONARY, THEREFORE, HE CONCLUDED CLAIMANT'S CLAIM SHOULD NOT BE REOPENED FOR HOSPITALIZATION FOR INTENSIVE PSYCHIATRIC TREATMENT AND THAT CLAIMANT'S CONDITION WITH RESPECT TO HER SCHEDULED DISABILITIES WAS MEDICALLY STATIONARY. HE CONCLUDED THERE WAS NO MEDICAL EVIDENCE TO SUPPORT A FINDING OF ANY LOSS OF PHYSICAL FUNCTION OF CLAIMANT'S LOWER EXTREMITY AND HE AFFIRMED THE DETERMINATION ORDER MAILED APRIL 30, 1975.

THE BOARD, ON DE NOVO REVIEW, FEELS THAT THE REFEREE HAS MISINTERPRETED THE DIAGNOSIS MADE BY DR. PETROSKE AND ALSO THE OPINIONS EXPRESSED BY HIM WITH RESPECT TO CLAIMANT'S UNSCHEDULED PSYCHOLOGICAL DISABILITY. THE BOARD FINDS THAT THERE IS MEDICAL EVIDENCE IN THE RECORD WHICH ESTABLISHES THAT CLAIMANT IS SUFFERING FROM A SEVERE DEPRESSIVE NEUROSIS WHICH IS DIRECTLY ATTRIBUTABLE TO HER COMPENSABLE INDUSTRIAL INJURY AND PREVENTS CLAIMANT FROM ENGAGING IN ANY REGULAR AND GAINFUL EMPLOYMENT.

THE BOARD DOES NOT FEEL THAT CLAIMANT'S CONDITION INSOFAR

AS THE UNSCHEDULED DISABILITY IS CONCERNED IS MEDICALLY STATIONARY AND CONCLUDES THAT THE CLAIM SHOULD BE REMANDED TO THE EMPLOYER TO BE REOPENED AS OF APRIL 2, 1975 WITH SPECIFIC INSTRUCTIONS TO PROVIDE CLAIMANT SUCH PSYCHIATRIC CARE AND TREATMENT AS MAY BE RECOMMENDED BY DR. PETROSKE AND TO PAY CLAIMANT COMPENSATION, AS PROVIDED BY LAW, FROM APRIL 2, 1975 UNTIL CLAIMANT'S PSYCHIATRIC CONDITION BECOMES MEDICALLY STATIONARY AND HER CLAIM IS UNDER THE PROVISIONS OF ORS 656.268.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 29, 1975 IS REVERSED.

THE CLAIM IS REMANDED TO THE EMPLOYER WITH INSTRUCTIONS TO PROVIDE CLAIMANT WITH SUCH PSYCHIATRIC CARE AND TREATMENT AS MAY BE RECOMMENDED FOR HER BY DR. PETROSKE AND FOR THE PAYMENT OF COMPENSATION, AS PROVIDED BY LAW, COMMENCING APRIL 2, 1975 AND UNTIL CLAIMANT'S PSYCHIATRIC CONDITION IS FOUND TO BE MEDICALLY STATIONARY AND THE CLAIM IS CLOSED PURSUANT TO ORS 656.268.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 400 DOLLARS PAYABLE BY THE EMPLOYER.

WCB CASE NO. 75-403 JANUARY 28, 1976

HAROLD LONG, CLAIMANT

DUNCAN AND WALTER, CLAIMANT'S ATTYS.
CHARLES PAULSON, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE EMPLOYER'S DENIAL OF CLAIMANT'S CLAIM ON JANUARY 13, 1975.

THE SOLE ISSUE BEFORE THE REFEREE WAS WHETHER CLAIMANT WAS AN EMPLOYE OF HANEY TRUCK LINES (CALLED HANEY) OR AN INDEPENDENT CONTRACTOR AT THE TIME HE WAS INJURED ON JULY 19, 1974.

THE REFEREE FOUND THAT PURSUANT TO A WRITTEN AGREEMENT ENTERED INTO BETWEEN CLAIMANT AND HANEY, CLAIMANT PROVIDED HIS OWN TRUCK FOR HAULING HANEY'S TRAILERS, HAULED EXCLUSIVELY FOR HANEY AND TOOK CARE OF HIS OWN EXPENSES FOR REPAIRS, FUEL, ETC. CLAIMANT WAS COMPENSATED AT THE RATE OF 65 PER CENT OF THE GROSS REVENUE RETURNED FROM EACH HAUL LESS CERTAIN EXPENSES. THE AGREEMENT SPECIFICALLY PROVIDED THAT CLAIMANT WAS AN INDEPENDENT CONTRACTOR AND SUBJECT TO HANEY MERELY AS TO THE RESULT TO BE ACCOMPLISHED AND NOT AS TO THE MEANS AND METHODS FOR ACCOMPLISHING THE RESULTS.

THE REFEREE CONCLUDED THAT UNDER THE WORKMEN'S COMPENSATION ACT THE RIGHT TO DIRECT AND CONTROL THE SERVICES OF ANY PERSONS, WHEN SUCH RIGHT IS SPECIFICALLY CONTRACTED FOR AND SECURED, IS CONCLUSIVE EVIDENCE OF A RELATIONSHIP OF EMPLOYER AND EMPLOYE - THAT THE RIGHT OF CONTROL WAS THE PRIMARY TEST BUT IN MOST CASES THE TRUE NATURE OF THE CONTRACT WITH RESPECT TO THE RIGHT OF CONTROL IS NOT EXPRESSED AND MUST BE ASCERTAINED BY THE APPLICATION OF MANY SECONDARY TESTS.

THE REFEREE CONCLUDED THAT THE AGREEMENT BETWEEN THE PARTIES WAS IN FORM AND IN SUBSTANCE ONE FOR THE EXCLUSIVE USE OF EQUIPMENT PROVIDED BY AN INDEPENDENT CONTRACTOR - THAT WHILE CLAIMANT WAS RESTRICTED BY CERTAIN GOVERNMENTAL REGULATIONS AND BY THE VERY NATURE OF THE SERVICES WHICH HE PROVIDED, NEVERTHELESS, HE WAS NOT PERSONALLY RESTRICTED AS TO HIS SERVICES OTHERWISE. CLAIMANT COULD HAVE FULFILLED HIS OBLIGATIONS UNDER THE AGREEMENT BY HIRING HIS OWN DRIVERS AND ENGAGING IN ANY OTHER OCCUPATION OR WORK ACTIVITY WITHOUT INVOLVING THE USE OF HIS TRUCK WITHOUT BREACHING THE AGREEMENT.

THE REFEREE CONCLUDED THAT IT WAS THE INTENT OF THE PARTIES THAT CLAIMANT BE AN INDEPENDENT CONTRACTOR AND THAT THE EVIDENCE SUPPORTED A FINDING THAT CLAIMANT WAS AN INDEPENDENT CONTRACTOR, NOT AN EMPLOYE, AT THE TIME HE WAS INJURED ON JULY 19, 1974. THE DENIAL WAS PROPER.

THE BOARD ON DE NOVO REVIEW, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 11, 1975 IS AFFIRMED.

WCB CASE NO. 75-148 JANUARY 29, 1976

PATRICK Q. HAMILL, CLAIMANT

WILLIAM O. LEWIS, CLAIMANT'S ATTY.
JONES, LANG, KLEIN, WOLF AND SMITH,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED SEPTEMBER 18, 1974 WHEREIN CLAIMANT WAS AWARDED 64 DEGREES FOR 20 PER CENT UNSCHEDULED LOW BACK DISABILITY.

CLAIMANT SUFFERED A COMPENSABLE LOW BACK INJURY ON OCTOBER 22, 1973 WHEN HE SLIPPED AND FELL. HE RECEIVED SOME OSTEOPATHIC TREATMENT AND RETURNED TO HIS USUAL JOB ABOUT A MONTH LATER. IN FEBRUARY, 1974 HE EXACERBATED HIS BACK WHEN HE FELL WHILE GETTING OUT OF BED. THEREAFTER, HE TERMINATED HIS JOB WITH THE EMPLOYER AND DID NOT WORK GAINFULLY UNTIL FEBRUARY, 1975.

BOTH DR. STEELE AND DR. PASQUESI DIAGNOSED A LOW BACK SPRAIN AND THE FORMER REPORTED CLAIMANT'S CONDITION WAS STATIONARY IN AUGUST 1974 AND THAT CLAIMANT WAS PERMANENTLY IMPAIRED FROM RETURNING TO HEAVY WORK. THE CLAIM WAS THEN CLOSED BY THE DETERMINATION ORDER OF SEPTEMBER 18, 1974.

SUBSEQUENTLY, CLAIMANT WAS REFERRED TO THE DISABILITY PREVENTION DIVISION FOR VOCATIONAL REHABILITATION EVALUATION - HE ALSO UNDERWENT PSYCHOLOGICAL TESTING. CLAIMANT WAS FOUND TO BE EXPERIENCING MODERATE ANXIETY AND MODERATE DEPRESSION ASSOCIATED WITH HIS SOMATIC COMPLAINTS AND THERE WAS SOME INDICATION OF A HYSTERICAL REACTION. THIS PSYCHOPATHOLOGY WAS RELATED TO THE INJURY IN THE OPINION OF THE PSYCHOLOGISTS, HOWEVER, GOOD PROGNOSIS FOR RESTORATION AND REHABILITATION WAS MADE.

AT THE PRESENT TIME CLAIMANT IS NOT TAKING ANY MEDICATION OTHER THAN ASPIRIN NOR IS HE UNDERGOING ANY CURRENT TREATMENT. HE HAS HAD TO TERMINATE SUCH PRE-INJURY ACTIVITIES AS BASKETBALL AND HANDBALL BUT HE DOES CHOP WOOD, MOW HIS LAW AND RIDES HIS MOTOR-CYCLE. HE AVOIDS AS MUCH AS POSSIBLE LIFTING AND BENDING. AT THE TIME OF THE HEARING CLAIMANT WAS ATTENDING LINN BENTON COMMUNITY COLLEGE.

THE REFEREE FOUND THAT DR. MASON, DR. STEELE AND THE PSY-CHOLOGIST ALL RECOMMENDED CLAIMANT NOT RETURN TO HEAVY TYPE WORK. OBVIOUSLY CLAIMANT CANNOT RETURN TO HIS PRIOR WORK - HOWEVER, HE IS NOT DEPENDENT UPON THIS TYPE OF EMPLOYMENT FOR HIS VOCATION. THE COMMUNITY COLLEGE TRAINING WHICH HE IS PRESENTLY OBTAINING WILL PREPARE HIM FOR A CAREER IN THE FIELD OF MEDICAL TECHNOLOGY, HOW-EVER, CLAIMANT HAS SUFFERED SOME LOSS OF EARNING CAPACITY.

THE REFEREE CONCLUDED THAT CLAIMANT, BEING ONLY 24 YEARS OLD AND HAVING EXPERIENCE AND RETRAINING POTENTIAL, WAS NOT ENTITLED TO ANY GREATER AWARD THAN THE 20 PER CENT UNSCHEDULED LOW BACK DISABILITY. HE AFFIRMED THE DETERMINATION ORDER.

THE BOARD, ON DE NOVO REVIEW, FINDS THAT CLAIMANT HAS SUFFERED MORE THAN 20 PER CENT LOSS OF EARNING CAPACITY BECAUSE OF THE LIMI-TATIONS PLACED UPON HIM WITH RESPECT TO HEAVY LIFTING, BENDING OR ENGAGING IN ANY HEAVY TYPE WORK. THE BOARD CONCLUDES THAT AN AWARD OF 30 PER CENT OF THE MAXIMUM FOR UNSCHEDULED DISABILITY IS JUSTI-FIED. CLAIMANT IS YOUNG AND HE HAS BETTER THAN AVERAGE POTENTIAL FOR RETRAINING, NEVERTHELESS, HE IS PRECLUDED FROM RETURNING TO A RATHER LARGE SEGMENT OF THE LABOR MARKET WHICH WAS AVAILABLE TO HIM PRIOR TO THE INJURY.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 28, 1975 IS MODIFIED TO THE EXTENT THAT CLAIMANT IS AWARDED 96 DEGREES FOR 30 PER CENT UNSCHEDULED LOW BACK DISABILITY. THIS IS IN LIEU OF AND NOT IN ADDI-TION TO THE AWARD MADE BY THE DETERMINATION ORDER MAILED SEPTEMBER 18, 1974.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, 25 PER CENT OF THE COMPENSATION INCREASED BY THIS ORDER, PAYABLE FROM SUCH COMPENSATION AS PAID, NOT TO EXCEED A MAXIMUM OF 2,300 DOL-LARS, IN AGGREGATE.

WCB CASE NO. 75-1619 JANUARY 29, 1976

PHYLLIS KERN, CLAIMANT

MERTEN AND SALTVEIT, CLAIMANT'S ATTYS.
JONES, LANG, KLEIN, WOLF AND SMITH,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH HELD THAT THE EMPLOYER HAD PROPERLY COMPLIED WITH THE STIPULATION AND ORDER APPROVED ON AUGUST 29, 1974.

CLAIMANT ON OR ABOUT JANUARY 16, 1974 BECAME DISABLED AS A RESULT OF A DERMATITIS CONDITION AND SHE FILED A CLAIM FOR WORKMEN'S COMPENSATION BENEFITS WHICH WAS ACCEPTED BY THE EMPLOYER.

THE PHYSICIANS WHO EXAMINED CLAIMANT ALL RECOMMENDED THAT SHE SEEK A NEW LINE OF WORK AND CLAIMANT ENROLLED IN A PROGRAM AT MT. HOOD COMMUNITY COLLEGE UNDER THE AUSPICES OF DEPARTMENT OF VOCATIONAL REHABILITATION WITH THE OBJECTIVE OF TRAINING HERSELF IN 'FLORAL TECHNOLOGY'.

CLAIMANT CONTENDED THE EMPLOYER REFUSED TO PAY HER ANY TEMPORARY TOTAL DISABILITY WHILE SHE WAS IN SCHOOL AND SHE REQUESTED A HEARING CONTESTING SUCH REFUSAL. ON AUGUST 15, 1974 THE PARTIES STIPULATED THAT THE ISSUES BEFORE THE REFEREE OF WHETHER OR NOT CLAIMANT WAS ENTITLED TO TEMPORARY TOTAL DISABILITY COMPENSATION WHILE ATTENDING VOCATIONAL REHABILITATION BE RESOLVED BY THE EMPLOYER'S AGREEMENT TO BE RESPONSIBLE FOR THIS VOCATIONAL REHABILITATION TRAINING FOR A PERIOD OF APPROXIMATELY 20 MONTHS. THE REFEREE APPROVED THIS STIPULATION ON AUGUST 29, 1974 AND CLAIMANT WAS AWARDED TEMPORARY TOTAL DISABILITY COMPENSATION COMMENCING JUNE 4, 1974 AND CONTINUING UNTIL SHE HAD COMPLETED HER PRESENT VOCATIONAL REHABILITATION TRAINING.

ON FEBRUARY 26, 1975 A DETERMINATION ORDER WAS MAILED WHEREIN CLAIMANT WAS AWARDED TEMPORARY TOTAL DISABILITY COMPENSATION 'PER STIPULATION APPROVED BY REFEREE AUGUST 29, 1974.'

ON MARCH 20, 1975, RALPH TODD, VOCATIONAL REHABILITATION COORDINATOR OF THE DISABILITY PREVENTION DIVISION, ADVISED CLAIMANT BY LETTER THAT THE BOARD WAS TERMINATING SPONSORSHIP OF HER VOCATIONAL REHABILITATION PROGRAM EFFECTIVE MARCH 31, 1975 BECAUSE SHE WAS NOT MAKING SATISFACTORY PROGRESS TOWARDS HER VOCATIONAL OBJECTIVE AND BECAUSE PRESENT MEDICAL INFORMATION INDICATED SHE HAD NO VOCATIONAL HANDICAP WHICH RESULTED FROM HER ON THE JOB INJURY. THE EMPLOYER PAID PURSUANT TO THE STIPULATION UNTIL MR. TODD HAD DETERMINED THAT CLAIMANT WAS NO LONGER ELIGIBLE FOR THE BOARD'S REHABILITATION PROGRAM, THEN STOPPED. CLAIMANT CONTENDS THIS IS NOT COMPLIANCE WITH THE STIPULATION AND ORDER.

THE REFEREE FOUND THAT THE EMPLOYER HAD NOT STRICTLY COMPLIED WITH THE STIPULATION BECAUSE IT WAS IMPOSSIBLE FOR IT TO DO SO. THE STIPULATION CALLED FOR PAYMENT 'FOR A PERIOD OF APPROXIMATELY 20 MONTHS.' THIS IS RATHER VAGUE AND BECAUSE OF THE VAGUENESS, THE REFEREE, IN APPROVING THE STIPULATION, ORDERED PAYMENT OF TEMPORARY TOTAL DISABILITY COMPENSATION ONLY (UNDERSCORED) FOR THE PERIOD OF CLAIMANT'S 'PRESENT VOCATIONAL TRAINING.' NO APPEAL WAS TAKEN FROM THIS ORDER OF APPROVAL BY EITHER PARTY. ORS 656.268(1) FORBIDS CLOSING CLAIMS OR TERMINATION OF TEMPORARY TOTAL DISABILITY UNTIL A WORKMAN IS MEDICALLY STATIONARY AND A WORKMAN HAS COMPLETED 'ANY AUTHORIZED PROGRAM OF VOCATIONAL REHABILITATION THAT HAS BEEN PROVIDED ACCORDING TO RULES ADOPTED PURSUANT TO ORS 656.728.'

THE REFEREE FOUND NO CLAIM HAD BEEN MADE THAT CLAIMANT'S ENTITLEMENT TO BOARD SPONSORSHIP OF HER VOCATIONAL REHABILITATION PROGRAM WAS IMPROPERLY TERMINATED BY MR. TODD AND HE CONCLUDED THAT THE REFEREE'S ORDER APPROVING THE STIPULATION LIMITED THE EMPLOYER'S LIABILITY FOR TIME LOSS TO THE PERIOD DURING WHICH CLAIMANT WAS VOCATIONALLY HANDICAPPED AND THAT UNDER THE UNUSUAL CIRCUMSTANCES OF THIS PARTICULAR CASE THE EMPLOYER HAD COMPLIED WITH THE REFEREE'S ORDER APPROVING THE STIPULATION.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 25, 1975 IS AFFIRMED.

WCB CASE NO. 74-3410 JANUARY 29, 1976

EUGENE KING, CLAIMANT
GRANT, FERGUSON AND CARTER,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF
CROSS REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE FUND REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 288 DEGREES FOR 90 PER CENT UNSCHEDULED LOW BACK DISABILITY, CONTENDING THAT CLAIMANT'S REFUSAL TO SUBMIT TO SURGERY WAS UNREASONABLE AND THAT THE DETERMINATION ORDER MAILED OCTOBER 12, 1973 WHICH AWARDED 64 DEGREES FOR 20 PER CENT UNSCHEDULED LOW BACK DISABILITY BE REINSTATED UNTIL SUCH TIME AS CLAIMANT ACCEPTED THE RECOMMENDED SURGERY.

THE CLAIMANT CROSS REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER CONTENDING THAT HE IS PERMANENTLY AND TOTALLY DISABLED.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON DECEMBER 8, 1971, AT THAT TIME HE WAS A 38 YEAR OLD HEAD CHAINMAN WORKING FOR THE STATE HIGHWAY DIVISION (REFERRED TO AS HIGHWAY). DR. WEINMAN, AN ORTHOPEDIC PHYSICIAN, ON DECEMBER 15, 1971, DIAGNOSED A SPONDYLOLISTHESIS, L5-S1, MILDLY SYMPTOMATIC - BY FEBRUARY 1972 DR. WEINMAN CONSIDERED CLAIMANT A CANDIDATE FOR SURGERY. IN MARCH 1972 DR. CAMPAGNA, A NEUROSURGEON, DIAGNOSED POST-TRAUMATIC AGGRAVATION OF THE SPONDYLOLISTHESIS FOUND AT L5-S1.

IN APRIL 1973 DR. GILSDORF, AN ORTHOPEDIC SURGEON, SAID CLAIMANT'S CERVICAL OCCIPITAL DISCOMFORT WAS POSSIBLY CONTRIBUTED TO BY MILD CERVICAL SPONDYLOSIS BUT WAS PREDOMINANTLY TENSIONAL. WITH RESPECT TO THE LOW BACK PROBLEM, DR. GILSDORF FELT CLAIMANT HAD A MAJOR DEGREE OF SYMPTOMS WITH LUMBOSACRAL INSTABILITY DIRECTLY RELATED TO THE SPONDYLOLISTHESIS WITH A QUESTIONABLE HISTORY OF RADICULITIS. HE FELT THAT WITHOUT SURGICAL TREATMENT CLAIMANT'S CONDITION WAS STATIONARY BUT IN VIEW OF HIS LIMITATION AND HIS DESIRE TO CONTINUE WORKING, DR. GILSDORF RECOMMENDED A GILL PROCEDURE AND A POSTEROLATERAL L5-S1 FUSION. ALTHOUGH CLAIMANT STATED HE COULD NOT TOLERATE HIS CONTINUING PAIN DISTRESS, HE WAS RELUCTANT TO UNDERGO ANY MAJOR SURGERY.

CLAIMANT HAS AN ELEVENTH GRADE EDUCATION AND OBTAINED A GED WHILE SERVING IN THE MILITARY SERVICE. UPON DISCHARGE FROM THE SERVICE IN 1955, HE WENT TO WORK FOR HIGHWAY. BETWEEN 1955 AND 1965 HE DID VARIOUS TYPES OF WORK ALL STRENUOUS AND PHYSICALLY DEMANDING IN NATURE. FOLLOWING THE INJURY CLAIMANT WAS TRANSFERRED TO LIGHTER DUTY INCLUDING INSPECTIONS IN THE FIELD AND CLERICAL WORK IN THE OFFICE. AT THE PRESENT TIME HE IS CONFINED TO OFFICE WORK ALONE, AND UNABLE TO WORK A FULL 8 HOUR DAY. HE HAS A TOTALLY INDIVIDUALIZED WORK SCHEDULE WHICH ALLOWS HIM TO WORK FOR TWO OR THREE HOURS AND THEN RETURN HOME AND PLACE HIMSELF IN TRACTION UNTIL HE IS AFFORDED SUFFICIENT RELIEF FROM HIS PAIN TO RETURN TO THE JOB. HIGHWAY IS AWARE OF CLAIMANT'S PROBLEMS AND RESPECTS CLAIMANT, CONSIDERS HIM AS AN OUTSTANDING EMPLOYE, HOWEVER, THE FAVORABLE SCHEDULING OF HIS TIME COULD NOT BE CONTINUED INDEFINITELY. IF CLAIMANT WERE AN APPLICANT FOR EMPLOYMENT HE WOULD NOT BE HIRED IN HIS PRESENT CONDITION AND HAD HE NOT HAD SUBSTANTIAL SERVICE WITH HIGHWAY, HE PROBABLY WOULD ALREADY HAVE BEEN TERMINATED.

THE REFEREE FOUND QUITE CONCEIVABLY THAT CLAIMANT'S CONDITION WOULD BE IMPROVED BY THE SURGERY RECOMMENDED BY DR. GILSDORF, WHOSE OPINION WAS THAT THE RECOMMENDED SURGERY WOULD STAND EXCELLENT CHANCES OF DECREASING CLAIMANT'S LOW BACK SYMPTOMS.

THE REFEREE FOUND THAT CLAIMANT IS, AT THE PRESENT TIME, EMPLOYED, THEREFORE HE CANNOT BE CONSTRUED AS PERMANENTLY AND TOTALLY DISABLED. CLAIMANT HAS THE INTELLECTUAL, EDUCATIONAL AND PERSONAL ATTRIBUTES REQUISITE TO RETRAINING - HOWEVER, THE LIMITATIONS IMPOSED BY HIS PHYSICAL CONDITION ARE CLEARLY SUBSTANTIAL BOTH WITH RESPECT TO RETRAINING AND WITH RESPECT TO CONTINUED EMPLOYMENT OR RE-EMPLOYMENT.

THE REFEREE FURTHER FOUND CLAIMANT HAD DISCUSSED THE RECOMMENDED SURGERY WITH DR. GILSDORF WHO ADVISED HIM THAT IT WAS A MAJOR OPERATION WITH ATTENDANT DANGER AND HE COULD NOT GUARANTEE SUCCESS AND THAT THE RESULTS MIGHT BE A WORSENING OF HIS CONDITION. CLAIMANT ALSO HAD DISCUSSED THE SURGERY WITH HALF A DOZEN PERSONS WHO HAD HAD SPINAL FUSION SURGERY AND EACH ADVISED CLAIMANT AGAINST THE SURGERY.

THE REFEREE CONCLUDED THAT UNDER THE CIRCUMSTANCES, CLAIMANT'S REFUSAL TO SUBMIT TO THE RECOMMENDED SURGERY WAS NOT UNREASONABLE TO THE DEGREE THAT IT PRECLUDED HIM FROM RECEIVING COMPENSATION BENEFITS.

THE REFEREE FOUND, BASED UPON DR. GILSDORF'S REPORT, THAT WITHOUT THE RECOMMENDED SURGERY CLAIMANT WAS PERMANENTLY RESTRICTED TO HIS MINIMAL STRESSFUL ACTIVITIES IN WHICH HE IS PRESENTLY INVOLVED. CLAIMANT COULD NOT TOLERATE ANY SUSTAINED STANDING OR SITTING, COULD NOT TOLERATE WORKING IN A STOOPED OR FLEXED POSITION AND COULD NOT TOLERATE ANY SIGNIFICANT LIFTING. THE REFEREE CONCLUDED THAT BECAUSE OF THESE LIMITATIONS CLAIMANT HAS BEEN EXCLUDED FROM A SUBSTANTIAL PART OF THE INDUSTRIAL LABOR MARKET AND HAS SUFFERED A LOSS OF WAGE EARNING CAPACITY EQUAL TO 90 PER CENT.

THE REFEREE FURTHER CONCLUDED THAT SHOULD CLAIMANT'S EMPLOYMENT WITH HIGHWAY BE TERMINATED AND CLAIMANT THEN BE FOUND INCAPABLE OF RETRAINING FOR EMPLOYMENT WITHIN HIS PHYSICAL CAPACITY THE REFEREE WOULD CONSIDER IT APPROPRIATE FOR THE BOARD, ON ITS OWN MOTION, TO FIND CLAIMANT PERMANENTLY AND TOTALLY DISABLED.

THE BOARD, ON DE NOVO REVIEW, FEELS THAT THERE IS NOT ADEQUATE MEDICAL TESTIMONY IN THE RECORD WITH RESPECT TO THE NECESSITY FOR THE RECOMMENDED SURGERY NOR THE EXTENT OF CLAIMANT'S DISABILITY AT THE PRESENT TIME AND, THEREFORE, THE MATTER SHOULD BE REMANDED TO THE REFEREE TO MAKE ARRANGEMENTS FOR ENROLLING CLAIMANT AT THE DISABILITY PREVENTION DIVISION FOR BOTH A PHYSICAL AND PSYCHOLOGICAL EVALUATION OF HIS CONDITION. UPON RECEIPT OF THE REPORTS AND RECOMMENDATIONS RESULTING FROM THESE EXAMINATIONS, THE REFEREE SHALL MAKE SAID REPORTS A PART OF THE RECORD, ALLOW ALL PARTIES TO FILE AMENDED ARGUMENTS, IF DESIRED, AND, BASED THEREUPON, ENTER A FINAL AND APPEALABLE ORDER.

ORDER

THIS MATTER IS REMANDED TO REFEREE JOHN F. DRAKE WITH INSTRUCTIONS TO ARRANGE FOR CLAIMANT TO BE ENROLLED AT THE DISABILITY PREVENTION DIVISION IN PORTLAND FOR A PHYSICAL AND PSYCHOLOGICAL EXAMINATION AND EVALUATION AND FOR SUCH APPROPRIATE RECOMMENDATIONS FOR THE TREATMENT OF CLAIMANT'S CONDITION AS MAY BE FORTHCOMING AS A RESULT OF SAID EXAMINATION AND EVALUATION.

CLAIMANT SHALL RECEIVE TEMPORARY TOTAL DISABILITY COMPENSATION DURING HIS STAY AT THE CENTER - THE PERMANENT PARTIAL DISABILITY COMPENSATION AWARDED BY THE REFEREE IN HIS ORDER DATED AUGUST 21, 1975 SHALL BE SUSPENDED ON THE DATE CLAIMANT ARRIVES AT THE CENTER AND REINSTATED WHEN HE LEAVES THE CENTER. THE EXPENSES OF THIS PROCEDURE SHALL BE PAID BY THE EMPLOYER.

UPON CONCLUSION OF THE EXAMINATION AND EVALUATION, THE REPORTS THEREOF SHALL BE SUBMITTED TO THE REFEREE FOR A RECONSIDERATION OF HIS OPINION AND ORDER DATED AUGUST 21, 1975.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE, 25 PER CENT OF THE TEMPORARY TOTAL DISABILITY COMPENSATION PAYABLE PURSUANT TO THIS ORDER OF REMAND PAYABLE FROM SAID COMPENSATION, AS PAID, TO MAKE A MAXIMUM OF 400 DOLLARS.

WCB CASE NO. 75-518 JANUARY 29, 1976

LAMBROS AGOURIDAS, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
ROGER WARREN, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT PERMANENT TOTAL DISABILITY EFFECTIVE JUNE 12, 1975.

CLAIMANT, NOW 61 YEARS OLD, WAS EMPLOYED AS A FURNITURE WORKER BY THE EMPLOYER WHEN HE SUSTAINED A COMPENSABLE RIGHT SHOULDER AND RIGHT FOREARM INJURY ON DECEMBER 12, 1973 - CLAIMANT ALSO INJURED HIS RIGHT HAND. HE WAS FIRST SEEN BY DR. NATHAN, A HAND SURGEON. THERE WAS SOFT TISSUE LACERATION OVER THE DORSAL ASPECT OF THE HAND AT THE LEVEL OF THE BASES OF THE SECOND AND THIRD METACARPALS AND ALSO LACERATION OF THE EXTENSOR CARPI RADIALIS LONGUS. AFTER THE INITIAL SURGERY BY DR. NATHAN, THE WOUNDS HEALED WITHOUT PROBLEMS, HOWEVER, CLAIMANT'S LONG TERM PROBLEM HAS BEEN CONTINUED DISABILITY OF THE RIGHT HAND WITH A REFLEX SYNTHETIC DYSTROPHY-TYPE PROBLEM IN THE HAND ASSOCIATED WITH A SHOULDER PAIN, COMPATIBLE WITH A HAND-SHOULDER SYNDROME.

CLAIMANT WAS EXAMINED BY DR. VESSELY, AN ORTHOPEDIST, AND BY DR. CRUICKSHANK, A NEUROLOGIST. THE LATTER RECOMMENDED A SYMPATHECTOMY TO ALLEVIATE THE SHOULDER PAIN BUT THIS PROCEDURE WAS REJECTED BY THE CLAIMANT.

THE CLAIM WAS CLOSED BY A DETERMINATION ORDER MAILED JANUARY 6, 1975 WHEREIN CLAIMANT RECEIVED 112 DEGREES FOR 75 PER CENT LOSS OF RIGHT FOREARM AND 160 DEGREES FOR 50 PER CENT UNSCHEDULED (RIGHT SHOULDER) DISABILITY.

THE REFEREE FOUND THAT THE AWARD MADE BY THE DETERMINATION ORDER ADEQUATELY REFLECTED THE PHYSICAL DISABILITY TO CLAIMANT'S RIGHT SHOULDER AND RIGHT ARM, HOWEVER, THE QUESTION TO BE DETERMINED WAS WHETHER CLAIMANT WAS ENTITLED TO AN AWARD OF PERMANENT TOTAL DISABILITY UNDER THE ODD-LOT DOCTRINE. CLAIMANT CAN ONLY SPEAK THROUGH AN INTERPRETER, HE KNOWS VERY FEW ENGLISH WORDS, HE DOES SPEAK GREEK. HE HAS THE EQUIVALENT OF LITTLE MORE THAN

AN ELEMENTARY EDUCATION. HE WAS BORN IN TURKEY AND LATER MOVED TO GREECE AND CAME TO THE UNITED STATES IN 1969. CLAIMANT'S ENTIRE WORK EXPERIENCE HAS BEEN PRINCIPALLY IN FURNITURE MANUFACTURING, ALTHOUGH HE DID WORK FOR 11 MONTHS IN A GREEK RESTAURANT AS A JANITOR. AS A FURNITURE WORKER CLAIMANT TESTIFIED HE COULD PERFORM ALL HAND OPERATIONS NECESSARY IN MAKING FURNITURE.

THE REFEREE FOUND THAT CLAIMANT'S TESTIMONY, TOGETHER WITH MEDICAL EVIDENCE, ESTABLISHED BEYOND DOUBT CLAIMANT'S INABILITY TO RETURN TO FURNITURE MANUFACTURING, AND HIS EDUCATION, AGE AND INABILITY TO SPEAK ENGLISH RENDERED HIM UNSUITABLE FOR VOCATIONAL REHABILITATION. THE REFEREE GAVE SOME THOUGHT TO CLAIMANT'S REFUSAL TO UNDERGO THE SYMPATHECTOMY WHICH MIGHT HAVE RELIEVED THE RIGHT SHOULDER PAIN AND INCREASED HIS RIGHT SHOULDER MOTION, BUT CONCLUDED THAT THIS ACTION ON THE PART OF THE CLAIMANT DID NOT CONSTITUTE A REFUSAL TO ACCEPT FURTHER MEDICAL TREATMENT TO THE EXTENT OF JUSTIFYING A WITHHOLDING OF BENEFITS.

THE REFEREE CONCLUDED THAT CLAIMANT'S SCHEDULED AND UNSCHEDULED DISABILITIES TOGETHER PRECLUDED HIM FROM RETURNING TO ANY TYPE OF WORK FOR WHICH HE WAS QUALIFIED AND THAT HE HAD SUSTAINED THE BURDEN OF PROVING THAT HE WAS PERMANENTLY AND TOTALLY DISABLED.

THE BOARD, ON DE NOVO REVIEW, NOTES THAT NEITHER PARTY FILED A BRIEF AND BASED UPON THE MEDICAL REPORTS AS WELL AS THE TESTIMONY OF THE CLAIMANT TAKEN THROUGH AN INTERPRETER, FINDS THAT CLAIMANT IS PERMANENTLY AND TOTALLY DISABLED AS OF THE DATE OF THE HEARING.

ORDER

THE ORDER OF THE REFEREE DATED JUNE 25, 1975 IS AFFIRMED.

CLAIMANT'S ATTORNEY IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 300 DOLLARS, PAYABLE BY THE EMPLOYER.

WCB CASE NO. 75—2197 JANUARY 29, 1976

MARY ANN JOHNSON, CLAIMANT

RICHARD H. RENN, CLAIMANT'S ATTY.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT SEEKS BOARD REVIEW OF A REFEREE'S ORDER WHICH APPROVED THE EMPLOYER'S DENIAL OF HER AGGRAVATION CLAIM AND FOUND NO EVIDENCE TO JUSTIFY THE IMPOSITION OF A PENALTY AND ATTORNEY FEE.

CLAIMANT FIRST EXPERIENCED LOW BACK PROBLEMS IN 1970. ON JUNE 23, 1972, WHILE EMPLOYED AT BOISE CASCADE, SHE SUFFERED A COMPENSABLE INJURY TO HER BACK FOR WHICH SHE WAS HOSPITALIZED FOR TRACTION. THE CLAIM WAS CLOSED WITHOUT AN AWARD FOR PERMANENT DISABILITY ON NOVEMBER 10, 1972. ON APPEAL BOTH THE REFEREE AND THE BOARD AFFIRMED THE DETERMINATION ORDER.

IN AUGUST OR SEPTEMBER, 1973 CLAIMANT WAS EMPLOYED AT WHITE'S ELECTRONICS, INC. HER JOB ALLOWED HER TO SIT MOST OF THE

TIME AND INVOLVED NO HEAVY LIFTING. SOMETIME IN FEBRUARY, 1974, CLAIMANT WAS HOSPITALIZED AGAIN WITH AN EPISODE OF LOW BACK PAIN AND, ON JUNE 19, 1974 A SECOND DETERMINATION ORDER AWARDED NO PERMANENT DISABILITY.

DURING JANUARY AND FEBRUARY, 1975 CLAIMANT HAD EPISODES WHERE HER BACK WOULD 'GET A CATCH' AND CAUSE PAIN. ON MARCH 31, 1975, WHILE VACUUMING, AN EPISODE OCCURRED WHICH NECESSITATED HER BEING HOSPITALIZED FOR CARE AND TREATMENT. SHE WAS RELEASED ON APRIL 5, 1975, RE-HOSPITALIZED AND RELEASED ON APRIL 23, 1975. DR. ANDERSON FELT CLAIMANT SUFFERED RECURRENT LUMBOSACRAL SPRAIN AND RECOMMENDED EXERCISES WHICH CLAIMANT HAD NOT BEEN DOING.

ON MAY 19, 1975, CLAIMANT'S COUNSEL FILED AN AGGRAVATION CLAIM, CONTENDING CLAIMANT'S CONDITION REQUIRING HOSPITALIZATION DURING 1975, WAS AN AGGRAVATION OF HER COMPENSABLE INDUSTRIAL INJURY SUSTAINED JUNE 23, 1972. THIS WAS DENIED BY THE EMPLOYER.

THE REFEREE FOUND NO MEDICAL EVIDENCE THAT CLAIMANT'S 1972 INJURY WAS A MATERIAL CONTRIBUTING CAUSE OF ANY CHRONIC BACK CONDITION OR TO CLAIMANT'S BACK CONDITION IN 1975 WHICH CAUSED HER TO BE HOSPITALIZED. WITHOUT SUCH EXPERT MEDICAL TESTIMONY SHOWING A CAUSAL RELATIONSHIP, SHE CONCLUDED CLAIMANT'S CLAIM OF AGGRAVATION MUST FAIL.

THE BOARD, ON DE NOVO REVIEW, CONCURS IN THE FINDINGS AND CONCLUSIONS OF THE REFEREE AND AFFIRMS AND ADOPTS HER ORDER.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 29, 1975 IS AFFIRMED.

SAIF CLAIM NO. SC 287424 JANUARY 30, 1976

TED E. TAYLOR, CLAIMANT

EVOHL MALAGON, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
AMENDED OWN MOTION PROCEEDING REFERRED FOR HEARING

ON NOVEMBER 13, 1975, THE BOARD ISSUED AN OWN MOTION ORDER REFERRING TO THE HEARINGS DIVISION THE REQUEST MADE BY THE FUND ON OCTOBER 29, 1975 THAT CONSIDERATION BE GIVEN TO THE CANCELLATION OF THE PERMANENT TOTAL DISABILITY AWARD GRANTED TO CLAIMANT ON JULY 5, 1975.

CLAIMANT'S CLAIM FOR HIS DECEMBER 29, 1970 INJURY WAS INITIALLY CLOSED ON A 'MEDICAL ONLY' BASIS ON FEBRUARY 9, 1971 - THE FIRST ADMINISTRATIVE CLOSURE, ERRONEOUSLY IDENTIFIED AS A SECOND DETERMINATION ORDER MAILED JUNE 6, 1972, STATES THAT AGGRAVATION RIGHTS WILL COMMENCE AS OF FEBRUARY 9, 1971. THIS IS INCORRECT AND SUCH RIGHTS DID NOT COMMENCE UNTIL JUNE 6, 1972.

THEREFORE, THE BOARD WILL NOT EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278. HOWEVER, AN AWARD OF COMPENSATION GIVEN A WORKMAN SHALL BE SUBJECT TO PERIODIC EXAMINATION AND ADJUSTMENT IN CONFORMITY WITH ORS 656.268 AND ANY PARTY MAY REQUEST A HEARING ON ANY DISPUTE (THEREON) PURSUANT TO ORS 656.283. ORS 656.325(3)(4) (UNDERSCORED).

THE MATTER HAS BEEN SET FOR HEARING ON FEBRUARY 5, 1976.

THE ISSUES ARE NOT CHANGED WITH RESPECT TO EITHER PARTY, AND THE BOARD STILL DOES NOT HAVE SUFFICIENT EVIDENCE UPON WHICH TO GIVE CONSIDERATION TO THE FUND'S REQUEST.

THEREFORE, THE MATTER REMAINS REFERRED TO THE HEARINGS DIVISION WITH INSTRUCTIONS TO HOLD A HEARING AND TAKE EVIDENCE ON THE ISSUE OF WHETHER CLAIMANT IS, AT THE PRESENT TIME, PERMANENTLY AND TOTALLY DISABLED. HOWEVER, UPON CONCLUSION OF THE HEARING, THE REFEREE SHALL ENTER A FINAL AND APPEALABLE ORDER. THE FUND'S REQUEST SHALL BE TREATED AS HAVING BEEN MADE UNDER THE PROVISIONS OF ORS 656.325(3)(4) RATHER THAN ORS 656.278.

WCB CASE NO. 75-3872 JANUARY 30, 1976

HARLEY SHORT, CLAIMANT

EVOHL F. MALAGON, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
OWN MOTION ORDER REMANDING FOR HEARING

ON JANUARY 20, 1976 THE CLAIMANT REQUESTED THE BOARD TO EXERCISE ITS OWN MOTION JURISDICTION UNDER THE PROVISIONS OF ORS 656.278 AND REOPEN HIS CLAIM FOR AN INDUSTRIAL INJURY SUFFERED ON JANUARY 11, 1968.

CLAIMANT WAS ORIGINALLY INJURED ON JANUARY 11, 1968 WHILE IN THE EMPLOY OF UNISPHERE, INC., WHOSE WORKMEN'S COMPENSATION COVERAGE WAS FURNISHED BY AETNA CASUALTY AND SURETY COMPANY. A DETERMINATION ORDER MAILED MAY 7, 1968 AWARDED CLAIMANT 32 DEGREES FOR 10 PER CENT UNSCHEDULED DISABILITY. ON MARCH 26, 1970 A SECOND DETERMINATION ORDER AWARDED CLAIMANT AN ADDITIONAL 48 DEGREES, AND ON NOVEMBER 7, 1972 A THIRD DETERMINATION ORDER AWARDED AN ADDITIONAL 32 DEGREES GIVING CLAIMANT A TOTAL OF 112 DEGREES FOR HIS UNSCHEDULED DISABILITY AT THAT TIME. CLAIMANT'S AGGRAVATION RIGHTS HAVE EXPIRED.

ON DECEMBER 24, 1975, THE CLAIMANT REQUESTED A HEARING ON THE DENIAL BY SAIF, DATED DECEMBER 19, 1975, OF AN INDUSTRIAL INJURY ALLEGED TO HAVE BEEN SUFFERED ON FEBRUARY 27, 1975 WHILE IN THE EMPLOY OF LANE COUNTY, WHOSE WORKMEN'S COMPENSATION COVERAGE WAS FURNISHED BY SAIF.

THE EVIDENCE BEFORE THE BOARD, AT THE PRESENT TIME, IS NOT SUFFICIENT FOR IT TO DETERMINE THE MERITS OF THE REQUEST TO REOPEN THE 1969 CLAIM. THE QUESTION IS WHETHER CLAIMANT HAS SUFFERED A NEW INJURY WHICH WOULD BE THE RESPONSIBILITY OF SAIF OR HAS SUFFERED AN AGGRAVATION OF THE 1968 INJURY WHICH WOULD BE THE RESPONSIBILITY OF AETNA CASUALTY AND SURETY COMPANY.

THE MATTER IS, THEREFORE, REFERRED TO THE HEARINGS DIVISION WITH INSTRUCTIONS TO HOLD A HEARING AND TAKE EVIDENCE ON THE ISSUE OF WHETHER CLAIMANT HAS AGGRAVATED HIS 1968 INJURY OR SUFFERED A NEW INJURY AS THE RESULT OF THE INCIDENT OF FEBRUARY 27, 1975. UPON CONCLUSION OF THE HEARING IF THE REFEREE FINDS CLAIMANT HAS SUFFERED AN AGGRAVATION OF THE 1968 INJURY, HE SHALL CAUSE A TRANSCRIPT OF THE PROCEEDING TO BE PREPARED AND SUBMITTED TO THE BOARD WITH HIS RECOMMENDATIONS - HOWEVER, IF THE REFEREE SHALL FIND CLAIMANT SUFFERED A NEW INJURY, HE SHALL ENTER A FINAL AND APPEALABLE ORDER THEREON.

CLAIM NO. E42 CC 98720 RG JANUARY 30, 1976

ERNEST ALLEY, CLAIMANT
EMMONS, KYLE, KROPP AND KRYGER,
CLAIMANT'S ATTYS.
COLLINS, FERRIS AND VELURE,
DEFENSE ATTYS.
OWN MOTION ORDER REMANDING FOR HEARING

ON DECEMBER 11, 1975, CLAIMANT REQUESTED THE BOARD TO EXERCISE ITS OWN MOTION JURISDICTION UNDER THE PROVISIONS OF ORS 656.278 AND REOPEN HIS CLAIM FOR AN INDUSTRIAL INJURY WHICH HE SUFFERED ON FEBRUARY 4, 1969 WHILE WORKING FOR OREGON CONSTRUCTION COMPANY, WHOSE WORKMEN'S COMPENSATION COVERAGE WAS FURNISHED BY AETNA CASUALTY AND SURETY COMPANY.

THE CLAIM FOR THE COMPENSABLE INJURY OF FEBRUARY 4, 1969 WAS ACCEPTED AND CLOSED BY A DETERMINATION ORDER MAILED OCTOBER 21, 1969. CLAIMANT'S AGGRAVATION RIGHTS HAVE EXPIRED WITH RESPECT TO THAT COMPENSABLE INJURY.

IN SUPPORT OF HIS PETITION FOR BOARD'S OWN MOTION JURISDICTION, THE CLAIMANT SUBMITTED REPORTS FROM DR. K. CLAIR ANDERSON DATED OCTOBER 6, 1975 AND NOVEMBER 14, 1975 - THE FIRST INDICATES THAT CLAIMANT HAS DEVELOPED ACUTE SYMPTOMS CONSISTENT WITH AN EXTRUDED DISC AND IN DR. ANDERSON'S OPINION WERE DIRECTLY RELATED TO RECURRENT EPISODES OF DIFFICULTY CLAIMANT HAS HAD IN THE PAST INCLUDING HIS ORIGINAL INDUSTRIAL INJURY OF FEBRUARY 1969. THE REPORT OF NOVEMBER 14, 1975 INDICATES CLAIMANT UNDERWENT A PARTIAL HEMILAMINECTOMY WITH DISC EXCISION AND FUSION FROM L4 TO S1 ON SEPTEMBER 26, 1975.

IN AUGUST 1972 CLAIMANT, WHILE WORKING FOR THE STATE HIGHWAY DEPARTMENT, WHOSE INSURANCE CARRIER WAS, AND STILL IS, THE STATE ACCIDENT INSURANCE FUND, SUFFERED AN INJURY WHICH WAS ULTIMATELY FOUND TO BE A 'NEW INJURY' RATHER THAN AN AGGRAVATION OF THE 1969 INJURY. A REQUEST FOR HEARING, APPEALING BOTH THE DETERMINATION ORDER RELATING TO THE 1969 INJURY AND THE DETERMINATION ORDER RELATING TO THE 1972 INJURY, WAS MADE AND, AFTER HEARING, AN ORDER WAS ISSUED ON NOVEMBER 20, 1973 WHEREBY CLAIMANT WAS AWARDED AN ADDITIONAL 48 DEGREES FOR A TOTAL OF 96 DEGREES FOR HIS 1969 INJURY AND THE AWARD OF 48 DEGREES FOR 15 PER CENT FOR THE 1972 INJURY WAS AFFIRMED.

CLAIMANT'S AGGRAVATION RIGHTS WITH RESPECT TO THE 1972 INJURY HAVE NOT EXPIRED - HOWEVER, DR. ANDERSON RELATES CLAIMANT'S CURRENT DIFFICULTIES TO THE FEBRUARY 1969 INJURY.

THE EVIDENCE BEFORE THE BOARD IS NOT SUFFICIENT FOR IT TO DETERMINE THE MERITS OF THE REQUEST TO REOPEN THE 1969 CLAIM, THEREFORE, THE MATTER IS REFERRED TO THE HEARINGS DIVISION WITH INSTRUCTIONS TO HOLD A HEARING AND TAKE EVIDENCE ON THE ISSUE OF WHETHER CLAIMANT'S PRESENT CONDITION CONSTITUTES AN AGGRAVATION OF HIS 1969 INJURY. UPON CONCLUSION OF THE HEARING, THE REFEREE SHALL CAUSE A TRANSCRIPT OF THE PROCEEDINGS TO BE PREPARED AND SUBMITTED TO THE BOARD TOGETHER WITH RECOMMENDATIONS AS TO THE ISSUE.

KATHERINE VANDERPOOL, CLAIMANT

JONES, LANG, KLEIN, WOLF AND SMITH,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF
CROSS REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED A DETERMINATION ORDER MAILED SEPTEMBER 18, 1974 WHEREBY CLAIMANT WAS DETERMINED TO BE PERMANENTLY AND TOTALLY DISABLED, DIRECTED SAIF TO PAY CERTAIN DISPUTED MEDICAL BILLS AND ASSESSED A PENALTY AND ATTORNEY FEE FOR REQUESTING A HEARING WITHOUT HAVING REASONABLE GROUNDS THEREFOR. THE CLAIMANT CROSS REQUESTS BOARD REVIEW OF A PORTION OF THE REFEREE'S ORDER, ALLEGING THAT THE REFEREE FAILED TO ASSESS PENALTIES AND ATTORNEY'S FEES FOR THE FUND'S FAILURE TO PAY MEDICAL BILLS, DID NOT REQUIRE THE FUND TO PAY THE WITNESS FEE OF DR. KANE AND DID NOT AWARD A SUFFICIENT ATTORNEY'S FEE.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON AUGUST 13, 1973 WHEN SHE SLIPPED AND INJURED HER LOW BACK, RIGHT HIP AND HER STERNUM. SHE HAS HAD CONTINUOUS PAIN IN HER LOW BACK AND MID BACK BELOW THE LEFT SHOULDER BLADE SINCE THAT DATE. SHE HAS NOT RETURNED TO WORK.

ULTIMATELY, CLAIMANT CAME UNDER THE CARE OF DR. KANE, WHO HAS BEEN HER TREATING PHYSICIAN SINCE JANUARY 1974. DR. KANE TESTIFIED AT THE HEARING THAT CLAIMANT WAS SUFFERING FROM MULTIPLE MYELOMA, A CANCER OF THE BONE MARROW. DR. KANE HAD ADVISED THE FUND ON FEBRUARY 20, 1974 OF THIS CONDITION AND ON MARCH 12, 1974 THE FUND DENIED RESPONSIBILITY FOR IT. SUBSEQUENTLY CLAIMANT REQUESTED A HEARING ON THE PARTIAL DENIAL BUT A DISPUTED CLAIM SETTLEMENT WAS APPROVED JULY 28, 1974 WHEREBY CLAIMANT WITHDREW HER REQUEST FOR HEARING AND THE FUND PAID HER 200 DOLLARS WITH THE EXPRESS UNDERSTANDING THAT HER CLAIM FOR MULTIPLE MYELOMA WOULD REMAIN IN THE DENIED STATUS.

THE REFEREE FOUND THAT THERE WAS NO MEDICAL EVIDENCE THAT CLAIMANT HAD ANY BACK PROBLEMS PRIOR TO HER INJURY OF AUGUST 19, 1973, BUT FROM THAT TIME SHE HAD CONTINUING WORSENING BACK PAIN AND THAT WHILE SHE WAS BEING TREATED FOR THIS PAIN, SHE WAS ALSO SUFFERING FROM MULTIPLE MYELOMA. THE REFEREE FOUND IT COULD HAVE BEEN POSSIBLE THAT SHE WOULD HAVE SUFFERED FROM THE SAME CONDITIONS EVEN HAD SHE NOT HAD THE MULTIPLE MYELOMA - IT WAS LESS POSSIBLE THAT SHE WOULD HAVE HAD THE SAME SYMPTOMS FROM THE MULTIPLE MYELOMA ALONE. DR. KANE WAS UNABLE TO DISTINGUISH HOW MUCH OF CLAIMANT'S PAIN WAS FROM THE CANCEROUS BONE CONDITION AND HOW MUCH FROM HER BACK INJURY.

THE REFEREE FOUND THAT THE PREPONDERANCE OF THE MEDICAL EVIDENCE WAS THAT CLAIMANT'S DISABLING PAIN IS CAUSED BY TWO SEPARATE EVENTS, THE FALL AND THE CANCEROUS CONDITION AND ALTHOUGH THERE IS NO WAY OF SEPARATING OR DISTINGUISHING BETWEEN THE TWO, HE FURTHER CONCLUDED THAT CLAIMANT HAD TO BE CONSIDERED PERMANENTLY AND TOTALLY DISABLED.

THE FUND CONTENDED THAT THE DISPUTED CLAIM SETTLEMENT ON THE MULTIPLE MYELOMA RELIEVED IT FROM PAYMENT OF MEDICAL BILLS

SUBMITTED WITH RESPECT TO THAT CONDITION. THE REFEREE FOUND CLAIMANT IS UNDER THE SAME DRUGS NOW AS SHE WAS PRIOR TO THE SETTLEMENT AND THAT THE MEDICATION IS TO REDUCE THE PAIN IN HER BACK IF POSSIBLE. HE CONCLUDED THAT THE MEDICAL BILLS SHOULD BE PAID BY THE FUND, HOWEVER, HE DID NOT IMPOSE ANY PENALTIES FOR ITS FAILURE TO PAY BILLS NOR DID HE ASSESS AN ATTORNEY'S FEE ON THAT BASIS.

THE REFEREE FOUND THAT THE FUND RELIED VERY HEAVILY ON THE INITIAL PHYSICIAN'S REPORT SIGNED BY DR. PUZISS ON OCTOBER 30, 1973 WHICH INDICATED THE INJURY WOULD NOT CAUSE PERMANENT IMPAIRMENT, ALTHOUGH 16 DAYS LATER THE SAME DOCTOR INDICATED THAT IT WAS UNDETERMINED WHETHER PERMANENT IMPAIRMENT WOULD RESULT AND HE FELT THAT CLAIMANT'S CONDITION WAS NOT MEDICALLY STATIONARY BUT THAT FURTHER TREATMENT WOULD BE REQUIRED. THE REFEREE CONCLUDED THAT THE FUND, BY RELYING UPON ONE ISOLATED MEDICAL REPORT, RELATING TO THE FIRST TREATMENT OF CLAIMANT BY DR. PUZISS, WEAKENED THE BALANCE OF ITS ARGUMENTS THAT CLAIMANT'S PRESENT SYMPTOMS WERE THE RESULT OF MULTIPLE MYELOMA RATHER THAN THE BACK INJURY. HE FURTHER CONCLUDED THAT THE FUND HAD FAILED TO SUSTAIN ANY ISSUE AND THAT THE APPEAL IT TOOK FROM THE DETERMINATION ORDER WAS WITHOUT REASONABLE GROUNDS AND FOR THAT REASON HE ASSESSED A PENALTY OF 500 DOLLARS.

THE BOARD, ON DE NOVO REVIEW, FINDS THAT CLAIMANT IS PERMANENTLY AND TOTALLY DISABLED BASED UPON THE MEDICAL REPORTS AND DR. KANE'S TESTIMONY. THE BOARD FURTHER FINDS THAT THE MEDICAL COSTS SHOULD HAVE BEEN PAID BY THE FUND BUT BELIEVES THAT PENALTIES SHOULD HAVE BEEN ASSESSED FOR ITS FAILURE TO PAY THESE MEDICAL BILLS.

THE BOARD DOES NOT FEEL THE FUND ACTED CAPRICIOUSLY IN REQUESTING A HEARING, THERE WAS SOME REASONABLE DOUBT AS TO WHETHER CLAIMANT'S CONDITION WAS PERMANENTLY AND TOTALLY DISABLED AS A RESULT OF HER INDUSTRIAL INJURY AND THE FUND HAD A RIGHT TO REQUEST A HEARING UNDER THE PROVISIONS OF ORS 656.319. THEREFORE, THE PENALTY OF 500 DOLLARS WAS IMPROPERLY ASSESSED AGAINST THE FUND.

THE BOARD FINDS THAT THE ALLOWANCE OF 650 DOLLARS BY THE REFEREE AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES AT THE HEARING WAS INSUFFICIENT.

ORDER

THE ORDER OF THE REFEREE DATED MAY 16, 1975 IS MODIFIED BY DELETING THEREFROM THAT PORTION OF THE 'ORDER' WHICH DIRECTS THE STATE ACCIDENT INSURANCE FUND TO PAY CLAIMANT A PENALTY OF 500 DOLLARS FOR A REQUEST FOR HEARING WITHOUT REASONABLE GROUNDS, AND ADDING THERETO THE DIRECTIVE THAT THE STATE ACCIDENT INSURANCE FUND SHALL PAY AS A PENALTY UNDER THE PROVISIONS OF ORS 656.262(8), 25 PER CENT OF THE AMOUNT OF THE MEDICAL BILLS, AS INDICATED IN EXHIBITS 4 THROUGH 13.

IN ALL OTHER RESPECTS THE REFEREE'S ORDER IS AFFIRMED.

COUNSEL FOR CLAIMANT IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 650 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

SAIF CLAIM NO. A 738110 FEBRUARY 4, 1976

RAY VRASPIR, CLAIMANT

DEPT. OF JUSTICE, DEFENSE ATTY.
OWN MOTION DETERMINATION

ON JUNE 3, 1959 CLAIMANT SUFFERED A COMPENSABLE INJURY WHEN HE WAS STRUCK IN THE RIGHT EYE BY A PIECE OF WOOD WITH A RESULTANT CORNEAL ABRASION AND A SMALL ANTERIOR CHAMBER-HEMORRHAGE. ON AUGUST 6, 1959 THE ANTERIOR CHAMBER WAS ENTIRELY CLEAR, INTRA-OCULAR TENSION WAS NORMAL AND THE EYE WAS CORRECTABLE TO 20-25. THE CLAIM WAS CLOSED FEBRUARY 27, 1961 WITH AN AWARD OF 5 PER CENT LOSS VISION OF THE RIGHT EYE.

ON OCTOBER 28, 1974, DR. W. LEIGH CAMPBELL REQUESTED THE CLAIM BE REOPENED, STATING CLAIMANT HAD COMPLETELY LOST VISION IN THE RIGHT EYE. HE HAD HAD AN EXTENSIVE RETINAL TEAR AND TRAU-MATIC CATARACT AND ON AUGUST 6, 1974 A RETINAL REATTACHMENT PROCEDURE WAS PERFORMED. IN OCTOBER, 1974 A SECOND SURGERY HAD BEEN PERFORMED.

DR. CAMPBELL STATED THAT BECAUSE OF THE NATURE OF THE FIND-INGS AND THE EXTENT OF THE OLD INJURY, COUPLED WITH THE FINDINGS OF NORMAL ARCHITECTURE IN THE LEFT EYE, HE FELT THE CLAIMANT'S OLD INJURY WAS THE CAUSE OF CLAIMANT'S PRESENT CONDITION DIAGNOSED AS SURGICAL APHAKIA, RIGHT EYE - RIGHT EXOTROPIA AND STABLE RETINAL DETACHMENT SCARS.

THE PATIENT DID NOT DESIRE FURTHER SURGERY AND DR. CAMPBELL REPORTED THAT THE GLASSES PRESCRIBED WERE READING GLASSES FOR THE LEFT EYE ONLY - THE RIGHT EYE WAS NOT BEING USED.

CLAIMANT'S CLAIM HAS NOW BEEN SUBMITTED TO THE EVALUATION DIVISION OF THE BOARD, AND IT IS THEIR FINDING THAT CLAIMANT, IN ADDITION TO CERTAIN TEMPORARY TOTAL DISABILITY, IS ENTITLED TO PERMANENT PARTIAL DISABILITY OF AN ADDITIONAL 95 PER CENT OF THE RIGHT EYE FOR A TOTAL OF 100 PER CENT OF THE RIGHT EYE.

ORDER

CLAIMANT IS AWARDED ADDITIONAL TEMPORARY TOTAL DISABILITY FROM AUGUST 5, 1974 TO AUGUST 26, 1974 - FROM OCTOBER 8, 1974 TO DECEMBER 6, 1974 - AND FROM APRIL 2, 1975 TO MAY 14, 1975 - AND TEMPORARY PARTIAL DISABILITY FROM MAY 14, 1975 THROUGH MAY 28, 1975, AND TO AN ADDITIONAL 95 DEGREES FOR SCHEDULED RIGHT EYE DIS-ABILITY.

WCB CASE NO. 74-4123 FEBRUARY 4, 1976
WCB CASE NO. 74-4124

JOE THOMPSON, CLAIMANT
RASK AND SOTO-SEELING,
CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY THE EMPLOYER
CROSS REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER REQUESTS REVIEW BY THE BOARD OF THAT PORTION OF THE REFEREE'S ORDER WHICH HELD CLAIMANT HAD SUFFERED A COMPENSABLE OCCUPATIONAL DISEASE ON JULY 18, 1974. THE CLAIMANT REQUESTS REVIEW BY THE BOARD OF THAT PORTION WHICH HELD CLAIMANT'S CLAIM FOR A COMPENSABLE INJURY OR OCCUPATIONAL DISEASE ALLEGEDLY SUFFERED ON DECEMBER 22, 1973 WAS VOID FOR FAILURE BY CLAIMANT TO FILE WITHIN THE TIME PROVIDED BY STATUTE AND ALSO THE AMOUNT OF ATTORNEY'S FEE AWARDED CLAIMANT'S ATTORNEY.

CLAIMANT WAS EMPLOYED BY THE EMPLOYER IN 1965, PRIOR TO THAT TIME HE FIRST HAD DIFFICULTY WITH HIS BACK IN 1958 WHILE IN THE NAVY. HE AGAIN SUFFERED DIFFICULTY WITH HIS BACK WHILE WORKING IN A MINE IN 1964. DURING HIS EMPLOYMENT WITH THE EMPLOYER, CLAIMANT OCCASIONALLY EXPERIENCED EPISODES WHEN HIS BACK WOULD 'POP OUT' - CLAIMANT WOULD SEEK CHIROPRACTIC TREATMENT FOR THE ALLEVIATION OF HIS PAIN.

ON DECEMBER 23, 1973 CLAIMANT EXPERIENCED ONE OF THESE EPISODES AND CONSULTED A CHIROPRACTOR BUT DID NOT OBTAIN ANY MEASURABLE RELIEF - HE WAS REFERRED BY HIS FAMILY DOCTOR TO DR. HO, AN OSTEOPATHIC PHYSICIAN AND SURGEON SPECIALIZING IN ORTHOPEDICS.

ON FEBRUARY 1, 1974 CLAIMANT FILED A CLAIM WITH HIS OFF-THE-JOB INSURANCE CARRIER, AETNA LIFE AND CASUALTY. THE CLAIM INDICATED IT WAS BASED ON AN ACCIDENT OCCURRING APPROXIMATELY DECEMBER 20, 1973, HOWEVER, THE QUERY AS TO WHETHER IT WAS RELATED TO HIS EMPLOYMENT WAS CHECKED 'NO' IN PENCIL. THE EVIDENCE INDICATES THAT PROBABLY AN EMPLOYE OF AETNA MADE THIS CHECK AS THE CLAIMANT DOES NOT RECALL WHETHER HE ANSWERED THE QUESTION OR NOT.

AFTER MYELOGRAPHY AND ELECTROMYOGRAPHIC STUDIES, DR. HO DIAGNOSED A HERNIATED DISC AND PERFORMED A HEMILAMINECTOMY AT L4-5 AND REMOVED A PROTRUDED DISC AT THAT LEVEL ON MARCH 1, 1974.

ON MARCH 6, 1974 CLAIMANT FILED ANOTHER CLAIM WITH AETNA, HE WAS UNABLE TO DETERMINE IF THE CLAIM WAS BASED ON AN ACCIDENT BUT GAVE A DATE OF DECEMBER 22, 1973 - HE AGAIN STATED 'UNKNOWN' WITH RESPECT TO HOW THE ACCIDENT HAPPENED. ON MARCH 15, 1974 CLAIMANT FILED STILL ANOTHER CLAIM WITH AETNA FOR AN ACCIDENT WHICH OCCURRED ON DECEMBER 28, 1973 AND WAS WORK-RELATED.

CLAIMANT RETURNED TO WORK IN JUNE 1974 BUT ON JULY 18 SAW DR. HO WITH A RECURRENCE OF HIS SYMPTOMS. DR. HO RECOMMENDED HE STOP WORKING AND WEAR A BACK BRACE.

ON AUGUST 7, 1974 CLAIMANT FILED A FOURTH CLAIM WITH AETNA, STATING IT WAS NOT BASED ON AN ACCIDENT AND HE WAS NOT SURE WHETHER IT WAS RELATED TO HIS EMPLOYMENT.

A MYELOGRAM PERFORMED BY DR. HEUSCH ON AUGUST 14, 1974 SHOWED A DEFECT AT L4-5 ON THE RIGHT, A POSSIBLE MINIMAL SPONDYLOLISTHESIS OF L4 ON L5 WAS NOTED WHICH COULD BE RELATED TO DEGENERATIVE FACETS.

ON SEPTEMBER 16, 1974 CLAIMANT FILED A FORM 801 WHICH STATED CLAIMANT WAS INJURED ON DECEMBER 22, 1973, LEFT WORK JANUARY 23, 1974, RETURNED ON JULY 1, 1974 AND HAD A RELAPSE. THE DATE OF INJURY WAS INDICATED AS 'LEFT WORK JULY 18.'

CLAIMANT WAS AGAIN HOSPITALIZED ON SEPTEMBER 20, 1974 AND BILATERAL POSTEROLATERAL LUMBAR FUSION OF L3 TO S2 WITH A REMOVAL OF A DISC AT L5-S1 AND A NEUROLYSIS OF THE L5 NERVE ROOT ON THE RIGHT WAS PERFORMED BY DR. HEUSCH.

ON OCTOBER 28, 1974 CLAIMANT FILED ANOTHER FORM 801, RELATING HIS BACK PROBLEMS TO DECEMBER 1973, THE DATE OF INJURY BEING 12-23-73.

ON OCTOBER 16, 1974 THE CARRIER ISSUED A DENIAL OF CLAIMANT'S JULY 18, 1974 CONDITION AND, ON NOVEMBER 11, 1974, DENIED CLAIMANT'S CLAIM FOR HIS DECEMBER 22, 1973 CONDITION.

DR. HO'S DEPOSITION WAS THAT, IN TERMS OF CLAIMANT'S JOB DESCRIPTION, THERE WOULD BE PROBABLE CONNECTION BETWEEN CLAIMANT'S NEED FOR SURGERY AND HIS JOB. HE FELT THAT THE LAMINECTOMY AND FUSION PERFORMED ON SEPTEMBER 20, 1974 WERE RELATED TO THE JULY 18, 1974 INJURY.

DR. PARSONS, WHO EXAMINED CLAIMANT ON MARCH 1, 1975, FELT THERE WAS NO RELATIONSHIP BETWEEN CLAIMANT'S WORK ACTIVITY AND THE MEDICAL CARE AND TREATMENT ACCOMPLISHED BY DR. HO - THAT CLAIMANT'S PROBLEMS OVER THE YEARS HAD BEEN PRIMARILY RELATED TO A SPONDYLOLISTHESIS AT L4-L5 AND NOT RELATED TO AN ACCIDENTAL INJURY. DR. PARSONS AGREED WITH DR. HO THAT SPONDYLOLISTHESIS IS A FORM OF SUBLUXATION AND IS USED INTERCHANGEABLY WITH THAT TERM ALTHOUGH SUBLUXATION IS USUALLY THE TERM USED WHEN THERE IS TRAUMA INVOLVED AND SPONDYLOLISTHESIS WHEN IT IS A CONGENITAL MALFORMATION.

THE REFEREE FOUND THAT BOTH DR. PARSONS AND DR. HO SPOKE OF A CONGENITAL CONDITION WHICH COULD BECOME SYMPTOMATIC AND CAUSE PAIN AND, IN THIS INSTANCE, LED TO TWO SURGERIES IN AN ATTEMPT TO ALLEVIATE THE CONDITION. THE TWO DOCTORS DIFFERED AS TO WHETHER IT WAS MEDICALLY PROBABLE THAT THE CLAIMANT'S WORK WAS RESPONSIBLE FOR HIS SURGERY - DR. PARSONS SAID IT WAS A POSSIBILITY BUT WOULD NOT STATE THAT IT WAS A PROBABILITY. THE REFEREE GAVE GREATER WEIGHT TO THE OPINION OF DR. HO WHO WAS CLAIMANT'S TREATING PHYSICIAN AND PERFORMED THE SURGERY.

THE REFEREE FOUND THAT CLAIMANT'S JOB CONSISTED OF REPETITIVE LIFTING AND CARRYING OF HEAVY OBJECTS AND MANEUVERING OF LARGE HAND TRUCKS WHICH WERE AWKWARD AND BULKY AND THAT THIS WORK ACTIVITY OVER A NINE YEAR PERIOD WAS SUFFICIENTLY STRENUOUS TO CAUSE THE PROBLEMS DESCRIBED BY DR. HO WHICH LED TO THE SURGERY.

THE REFEREE CONCLUDED THAT THE MEDICAL EVIDENCE AND HISTORY INDICATED NO SPECIFIC TRAUMA OR SERIES OF TRAUMAS AND NO SPECIFIC ACCIDENT OR INJURY BUT A GRADUAL ONSET OF SYMPTOMS PROBABLY INITIATING ON DECEMBER 22, 1973. SHE CONCLUDED THAT DISABILITY RESULTING FROM AN ON-THE-JOB AGGRAVATION OF A PREEXISTING CONDITION NOT CAUSED BY A SPECIFIC INJURY WAS AN OCCUPATIONAL DISEASE, CITING BEAUDRY V. WINCHESTER PLYWOOD CO. (UNDERSCORED), 255 OR 503.

THE REFEREE, ALTHOUGH FINDING CLAIMANT SUFFERED A COMPENSABLE OCCUPATIONAL DISEASE ON OR ABOUT DECEMBER 22, 1973, CONCLUDED THAT THE CLAIM WAS VOID FOR FAILURE BY CLAIMANT TO FILE A CLAIM WITHIN THE TIME PROVIDED BY STATUTE, ORS 656.807. CLAIMANT HAD BEEN ADVISED BY HIS DOCTOR DURING HIS FIRST HOSPITALIZATION IN MARCH 1974 (CLAIMANT HAD BEEN HOSPITALIZED FROM FEBRUARY 15, 1974 TO MARCH 6, 1974) THAT HIS OCCUPATION LED TO HIS BACK PROBLEM. CLAIMANT DID NOT FILE A CLAIM FOR THIS PROBLEM UNTIL SEPTEMBER 16, 1974, MORE THAN 180 DAYS AFTER BEING ADVISED THAT HE WAS SUFFERING FROM AN OCCUPATIONAL DISEASE. THE FILING OF CLAIM FORMS WITH AETNA DID NOT CONSTITUTE THE NOTICE TO THE EMPLOYER AS REQUIRED BY STATUTE.

THE REFEREE FOUND THAT CLAIMANT DID SUFFER A COMPENSABLE OCCUPATIONAL DISEASE IN JULY 1974 AND THAT HIS CLAIM FOR THIS OCCUPATIONAL DISEASE WAS TIMELY FILED. THE REFEREE FOUND CLAIMANT BECAME DISABLED ON JULY 18, 1974 AND LEFT WORK BECAUSE OF HIS BACK PAIN AND FILED A CLAIM ON A FORM 801 ON SEPTEMBER 16, 1974, WHICH WAS WITHIN 180 DAYS OF THE TIME CLAIMANT BECAME DISABLED.

THE BOARD, ON DE NOVO REVIEW, AGREES WITH THE FINDINGS AND CONCLUSIONS SUCCINCTLY EXPRESSED AND SET FORTH IN THE REFEREE'S ORDER AND AFFIRMS AND ADOPTS THEM AS ITS OWN.

ORDER

THE ORDER OF THE REFEREE DATED JUNE 30, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 350 DOLLARS, PAYABLE BY THE EMPLOYER.

WCB CASE NO. 74-3296 FEBRUARY 4, 1976
WCB CASE NO. 74-3345

JANET G. SMITH, CLAIMANT

FLINN, LAKE AND BROWN,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER REMANDING CLAIMANT'S CLAIM FOR HER INJURY OF APRIL 17, 1974 FOR PAYMENT OF COMPENSATION FROM THAT DATE UNTIL THE CLAIM IS CLOSED PURSUANT TO ORS 656.268, ASSESSING THE FUND A PENALTY EQUAL TO 25 PER CENT OF ALL OF THE SUMS DUE CLAIMANT FROM JULY 17, 1974 TO SEPTEMBER 4, 1974 AND DIRECTING THE FUND TO PAY CLAIMANT'S ATTORNEY A REASONABLE ATTORNEY'S FEE.

CLAIMANT, A 35 YEAR OLD COOK, SUSTAINED A COMPENSABLE INJURY ON OR ABOUT MAY 18, 1973 WHILE EMPLOYED BY ED'S PANCAKE HOUSE, WHOSE WORKMEN'S COMPENSATION CARRIER WAS INDUSTRIAL INDEMNITY. CLAIMANT WAS SEEN BY DR. SCHROEDER, AN ORTHOPEDIST WHO, FIRST EXAMINED CLAIMANT ON MAY 25, 1973 AND DIAGNOSED AN ACUTE LUMBAR STRAIN. LESS THAN A MONTH AFTER THE INJURY, CLAIMANT RETURNED TO WORK AND HER TEMPORARY TOTAL DISABILITY COMPENSATION WAS TERMINATED, HOWEVER, NO DETERMINATION ORDER WAS EVER ISSUED AS A RESULT OF THE MAY, 1973 INJURY. (WCB CASE NO. 74-3296) IN AUGUST 1973 DR. SCHROEDER'S CHART NOTES INDICATED COMPLAINTS INVOLVING THE LEFT

CHEST AND MID-BACK, CONTINUED LOW AND MID-BACK COMPLAINTS AND A DIAGNOSIS OF A THORACOLUMBAR STRAIN.

CLAIMANT CONTINUED WORKING FOR ED'S PANCAKE HOUSE UNTIL MARCH, 1974 WHEN SHE COMMENCED WORK AS A FRY COOK AT DEB'S DOWN-TOWN RESTAURANT, WHOSE WORKMEN'S COMPENSATION CARRIER WAS THE FUND.

ON APRIL 17, 1974 CLAIMANT SLIPPED AND FELL WHILE AT WORK AT DEB'S. SHE LANDED ON HER BACK AND BUTTOCKS AND WAS SEEN BY DR. SCHROEDER ON MAY 7, 1974 COMPLAINING OF MID AND LOW BACK DISCOM-FORT WHICH HE DIAGNOSED AS A CHRONIC THORACIC STRAIN. FOUR DAYS LATER CLAIMANT, WHO HAD CONTINUED WORKING AFTER HER FALL, WAS TERMINATED.

AT THE REQUEST OF DR. SHCROEDER CLAIMANT WAS EXAMINED BY DR. BENDER, AN INTERNIST, IN JUNE 1974 - AT THAT TIME CLAIMANT WAS COMPLAINING OF PAIN IN BOTH SHOULDERS AND UPPER BACK RADIATING AROUND THE COSTAL MARGIN TO THE LEFT BREAST. DR. BENDER DIAGNOSED A CHRONIC DORSAL BACK PAIN OF UNKNOWN ETIOLOGY PROBABLY A MUSCLE STRAIN. DR. SCHROEDER EXAMINED CLAIMANT FOR THE LAST TIME IN OCTOBER 1974, NOTING A SIGNIFICANT CHANGE IN HER SYMPTOMS FROM THOSE INDICATED BY HIS PRIOR EXAMINATION IN MAY 1974. IN OCTOBER CLAIMANT'S COMPLAINTS WERE OF INCREASING LOW BACK PAIN AND RATHER SEVERE LEFT SCIATIC PAIN TO THE ANKLE AND FOOT, THE MID AND UPPER BACK COMPLAINTS HAD APPARENTLY DISAPPEARED.

DR. PASQUESI EXAMINED CLAIMANT IN MARCH 1974 AND, BASED ON CLAIMANT'S HISTORY, DIAGNOSED A CHRONIC LUMBOSACRAL STRAIN AND A MILD UPPER DORSAL AND LOWER CERVICAL STRAINS.

CLAIMANT FILED A CLAIM FOR THE APRIL 17, 1974 INJURY IN AUGUST 1974. ED'S PANCAKE HOUSE AND ITS CARRIER DENIED THE CLAIM ON THE BASIS THAT THE CLAIMANT HAD SUFFERED A NEW INJURY. THE FUND DENIED THE CLAIM ON THE BASIS THAT CLAIMANT'S TREATMENT AFTER THE FALL IN 1974 DID NOT RESULT FROM THAT FALL BUT WAS RELATED TO THE 1973 INDUSTRIAL INJURY AND WAS THE RESPONSIBILITY OF THE PRE-VIOUS EMPLOYER AND ITS CARRIER.

ALTHOUGH THE FUND CONTENDED THE CLAIMANT FAILED TO SHOW SHE HAD SUFFERED ANY COMPENSABLE INJURY REQUIRING TREATMENT AS A RESULT OF THE APRIL 17, 1974 INJURY, THE REFEREE FOUND IT WAS REASONABLE TO CONCLUDE THAT TRAUMATIC CONSEQUENCES COULD FOLLOW A FALL SUCH AS CLAIMANT SUSTAINED IN APRIL 1974 AND THAT THE MEDI-CAL EVIDENCE INDICATED A CONTINUED AND MORE SEVERE LOW BACK PROB-LEM AFTER THAT FALL. HE CONCLUDED THAT WHILE CLAIMANT'S PRESENT LOW BACK SYMPTOMS WERE NOT SOLELY RELATED TO THE APRIL 17, 1974 FALL, AND IT WAS NOT NECESSARY THAT THEY BE IN ORDER THAT SUCH FALL COULD BE CONSIDERED COMPENSABLE, THE APRIL 1974 INCIDENT WAS A MATERIAL CONTRIBUTING CAUSE OF CLAIMANT'S PRESENT CONDITION AND WAS A COMPENSABLE INJURY AND THE RESPONSIBILITY FOR CLAIMANT'S CONDITION RESULTING THEREFROM WAS THAT OF THE FUND.

THE REFEREE FURTHER FOUND THAT THE 1973 INJURY WAS COMPEN-SABLE BUT THAT THERE HAD NEVER BEEN ANY POSITIVE EVIDENCE THAT CLAIMANT'S CONDITION WAS MEDICALLY STATIONARY. HE FOUND THAT CLAIMANT HAD RETURNED TO HER OLD JOB WITH THE KNOWLEDGE AND AP-PARENT ACQUIESCENCE OF HER DOCTOR AND THIS WOULD JUSTIFY TERMINA-TION OF TEMPORARY TOTAL DISABILITY COMPENSATION. HOWEVER, THERE WAS SOME EQUIVOCATION WITH RESPECT TO DR. SCHROEDER'S REPORTS RELATING TO CLAIMANT'S MEDICAL CONDITION. THE REFEREE CONCLUDED THAT, TAKING DR. SCHROEDER'S REPORTS AS A WHOLE, THERE WAS NO DEFINITE FINDING THAT CLAIMANT WAS EVER MEDICALLY STATIONARY BUT

ONLY A SUGGESTION THAT SHE MIGHT BE AND THIS SUGGESTION IN TURN WAS CONTRADICTED BY SUBSEQUENT REPORTS WHICH INDICATED CLAIMANT HAD NOT FULLY RECOVERED FROM HER 1973 INJURY. UNDER THESE CIRCUMSTANCES THE EMPLOYER WAS NOT UNREASONABLE IN FAILING TO REQUEST A CLOSURE OF THE CLAIM UNDER THE PROVISIONS OF ORS 656.268.

WITH RESPECT TO THE ISSUE OF WHETHER THE FUND WAS RESPONSIBLE FOR PAYMENT OF CLAIMANT'S ATTORNEY'S FEE AND SHOULD BE ASSESSED PENALTIES BECAUSE OF ITS FAILURE TO PAY COMPENSATION TO CLAIMANT OR TO ACCEPT OR DENY HER CLAIM FOR THE 1974 INJURY WITHIN 60 DAYS AFTER KNOWLEDGE OR NOTICE, THE REFEREE FOUND THAT THE EMPLOYER WAS NOT PUT ON NOTICE UNTIL SOME TIME SHORTLY PRIOR TO AUGUST 1, WHEN HIS WIFE RECEIVED A TELEPHONE CALL FROM CLAIMANT ADVISING HER WHERE AND HOW THE INJURY OCCURRED AND REQUESTING A CLAIM FORM. THE CLAIMANT TESTIFIED SHE RECEIVED A CLAIM FORM ABOUT TWO DAYS PRIOR TO SIGNING IT AND THE 801 INDICATES CLAIMANT SIGNED THE FORM ON JULY 16, 1974. THE REFEREE CONCLUDED THAT THE EMPLOYER MUST HAVE KNOWN OF THE INJURY ON OR ABOUT JULY 14, 1974 AND THE DENIAL WAS DATED SEPTEMBER 5, 1974 WHICH WAS WITHIN THE 60 DAYS REQUIRED BY STATUTE. THEREFORE, IT WOULD NOT BE PROPER TO ASSESS PENALTIES PURSUANT TO ORS 656.262(5)(8).

THE REFEREE FOUND, HOWEVER, THAT THE FUND, THROUGH ITS REPRESENTATIVE, HAD SIGNED THE CLAIM FORM ON AUGUST 1, 1974 AND TESTIMONY INDICATED THE FUND HAD HAD THE FORM ABOUT TWO DAYS PRIOR TO THAT DATE. THE FIRST INSTALLMENT OF COMPENSATION WAS RECEIVED BY CLAIMANT ON SEPTEMBER 4, 1974, MORE THAN 14 DAYS AFTER NOTICE OR KNOWLEDGE OF CLAIM BY THE FUND. ORS 656.262(4) PROVIDES THAT THE FIRST INSTALLMENT OF COMPENSATION IS DUE WITHIN 14 DAYS OF NOTICE OR KNOWLEDGE OF THE CLAIM BY THE EMPLOYER. THE FUND GAVE NO REASON FOR ITS DELAY AND THE REFEREE CONCLUDED THAT THIS VIOLATION OF A CLEAR STATUTORY DUTY WAS UNREASONABLE ON ITS FACE AND, THEREFORE, ASSESSED A PENALTY PURSUANT TO ORS 656.262(8) AND AWARDED AN ATTORNEY'S FEE PURSUANT TO ORS 656.386(1).

THE REFEREE FURTHER DIRECTED THAT ED'S PANCAKE HOUSE, AND ITS CARRIER, SUBMIT WCB CASE NO. 74-3296 FOR CLOSURE PURSUANT TO ORS 656.268 WITH A REQUEST THAT A DETERMINATION ORDER BE ENTERED IN THAT CASE AT THE SAME TIME AS A DETERMINATION ORDER IS ENTERED IN WCB CASE NO. 74-3345 WHICH THE REFEREE REMANDED TO THE FUND FOR ACCEPTANCE AND PAYMENT OF COMPENSATION FROM APRIL 17, 1974 UNTIL CLOSURE PURSUANT TO ORS 656.268.

THE BOARD, ON DE NOVO REVIEW, CONCURS WITH THE FINDINGS AND CONCLUSIONS OF THE REFEREE - HOWEVER, IT FINDS THAT THE ASSESSMENT OF 25 PER CENT OF ALL COMPENSATION DUE CLAIMANT FROM JULY 17, 1974 TO SEPTEMBER 4, 1974 IS AN EXCESSIVE PENALTY AND CONCLUDES THAT SUCH PENALTY SHOULD BE REDUCED TO 5 PER CENT OF ALL SUMS DUE CLAIMANT FROM JULY 17, 1974 TO SEPTEMBER 4, 1974.

ORDER

THE ORDER OF THE REFEREE DATED JULY 22, 1975 IS MODIFIED TO THE EXTENT THAT CLAIMANT IS AWARDED ADDITIONAL COMPENSATION PURSUANT TO ORS 656.268(8) IN AN AMOUNT EQUAL TO 5 PER CENT OF ALL SUMS DUE HER FROM JULY 17, 1974 TO SEPTEMBER 4, 1974. THIS IS IN LIEU OF THE AWARD OF ADDITIONAL COMPENSATION MADE BY THE REFEREE IN HIS ORDER, WHICH IN ALL OTHER RESPECTS, IS HERBY AFFIRMED.

KENNETH P. MULL, CLAIMANT
EMMONS, KYLE, KROPP AND KRYGER,
CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER AWARDING CLAIMANT PERMANENT AND TOTAL DISABILITY AS OF JANUARY 16, 1974 AND ALLOWING THE FUND TO BE CREDITED WITH PAYMENTS MADE ON THE PERMANENT PARTIAL DISABILITY AWARDED BY THE DETERMINATION ORDER MAILED FEBRUARY 22, 1974.

CLAIMANT IS A 41 YEAR OLD CARPENTER WHO SUFFERED A COMPENSABLE INJURY WHILE WORKING IN MINNESOTA IN THE EARLY 1960'S WHICH RESULTED IN A LAMINECTOMY AND A TWO LEVEL FUSION PERFORMED IN 1964. CLAIMANT ALSO HAD A FUSION OF HIS RIGHT WRIST.

HE RETURNED TO WORK AS A CONSTRUCTION CARPENTER IN 1970 AND WORKED UNTIL HIS PRESENT INJURY ON NOVEMBER 9, 1970. CLAIMANT HAS A SEVENTH GRADE EDUCATION, HAS 18 YEARS WORK EXPERIENCE AS A ROUGH CARPENTER FOR CONSTRUCTION COMPANIES, BUILDING BRIDGES, COMMERCIAL BUILDINGS, ETC. DURING SEASONAL LAYOFFS FROM THIS TYPE OF WORK, CLAIMANT HAS PUMPED GAS, WORKED AS A CLEANUP MAN IN THE MILL, ON THE ASSEMBLY LINE AND AS A MECHANIC'S HELPER.

FOLLOWING HIS 1970 INJURY CLAIMANT WAS OFF WORK SEVERAL WEEKS THEN RETURNED AND CONTINUED DOING CONSTRUCTION WORK FOR TWO YEARS BUT HAS NOT BEEN GAINFULLY EMPLOYED SINCE EXCEPT FOR ONE DAY DURING THE SUMMER OF 1974.

CLAIMANT'S BACK BECAME AGGRAVATED IN 1972. BOTH DR. MARTENS AND DR. KIMBERLEY DIAGNOSED A PSEUDOARTHROSIS OF THE SPINAL FUSION L4-S1 AND CLAIMANT'S CLAIM WAS REOPENED (IT HAD BEEN CLOSED PREVIOUSLY WITH NO AWARD FOR PERMANENT DISABILITY).

THE PSEUDOARTHROSIS WAS REPAIRED BY DR. KIMBERLEY AND IN JANUARY 1974 DR. KIMBERLEY DECLARED CLAIMANT'S CONDITION WAS MEDICALLY STATIONARY BUT CLAIMANT COULD NOT DO EXTREMELY HEAVY TYPES OF MANUAL LABOR ALTHOUGH HE COULD DO MODERATELY HEAVY MANUAL WORK. THE CLAIM WAS AGAIN CLOSED ON FEBRUARY 22, 1974 WITH AN AWARD OF 48 DEGREES FOR 15 PER CENT UNSCHEDULED LOW BACK DISABILITY.

AT THE REQUEST OF THE REFEREE, CLAIMANT WAS EXAMINED AT THE BACK EVALUATION CLINIC - IT WAS FELT THAT HE COULD RETURN TO A LIGHT TYPE OF WORK AND PSYCHOLOGICAL COUNSELING WAS SUGGESTED TOGETHER WITH VOCATIONAL REHABILITATION. TOTAL LOSS OF FUNCTION OF THE BACK WAS CONSIDERED MODERATE. HAL J. MAY, PH.D., A CLINICAL PSYCHOLOGIST, EVALUATED CLAIMANT AND FELT THE PROGNOSIS FOR CLAIMANT'S RETURN TO GAINFUL EMPLOYMENT WAS VERY POOR WITHOUT A DEFINITE ALTERATION IN HIS PSYCHOLOGICAL STANCE. CLAIMANT HAD A MODERATELY SEVERE ANXIETY TENSION REACTION COUPLED WITH CHRONIC ANXIETY. IT WAS DOUBTED STRONGLY THAT LONG-TERM COUNSELING WOULD BE OF ANY BENEFIT TO CLAIMANT.

THE DIVISION OF VOCATIONAL REHABILITATION ATTEMPTED TO WORK WITH CLAIMANT DURING 1974 BUT WITHOUT SUCCESS, ALTHOUGH CLAIMANT

APPEARED TO BE WELL MOTIVATED IN SEEKING WORK AND COOPERATED WELL WITH THE DIVISION OF VOCATIONAL REHABILITATION PERSONNEL.

THE REFEREE FOUND THAT CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED. THE REFEREE, BASED UPON THE REPORTS FROM THE BACK EVALUATION CLINIC AND PSYCHOLOGIST HAL J. MAY, CONCLUDED THAT CLAIMANT WAS PERMANENTLY INCAPACITATED FROM WORK AT ANY GAINFUL AND SUITABLE OCCUPATION. HE FURTHER CONCLUDED THAT, ALTHOUGH THE DOCTORS AT THE BACK EVALUATION CLINIC FELT CLAIMANT COULD RETURN TO SOME LIGHTER TYPE OF OCCUPATION, HE COULD NOT CONCEIVE OF SUCH WORK FOR THIS CLAIMANT WHO HAS ONLY A SEVENTH GRADE EDUCATION AND WHOSE WORK EXPERIENCE IS LIMITED TO HEAVY LABOR AND WHO FUNCTIONS WITHIN THE DULL NORMAL RANGE OF INTELLECTUAL RESOURCES AND ALSO SUFFERS FROM A VERY OBVIOUS PHYSICAL IMPAIRMENT.

THE BOARD, ON DE NOVO REVIEW, AGREES WITH THE CONCLUSIONS REACHED BY THE REFEREE. THE FUND CONTENDS THAT CLAIMANT IS RETRAINABLE AND RE-EMPLOYABLE - HOWEVER, THERE IS NO EVIDENCE IN THE RECORD THAT THE FUND MADE ANY ATTEMPT TO ASSIST CLAIMANT IN A RETRAINING PROGRAM OR TO DO ANYTHING WHICH MIGHT MAKE CLAIMANT RE-EMPLOYABLE IN A DIFFERENT FIELD OF WORK. WITHOUT SUCH EVIDENCE, THE FUND'S CONTENTION IS PURE SPECULATION AND ENTITLED TO NO WEIGHT.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 29, 1975 IS AFFIRMED.

COUNSEL FOR CLAIMANT IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THE BOARD REVIEW THE SUM OF 400 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 75-1129 FEBRUARY 4, 1976

CHARLES H. MCKEEN, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 160 DEGREES FOR 50 PER CENT UNSCHEDULED LOW BACK DISABILITY.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON FEBRUARY 29, 1968 WHICH REQUIRED A LAMINECTOMY AND L4 DISKECTOMY. CLAIMANT RETURNED TO WORK AND REINJURED HIS BACK ON JANUARY 27, 1969. IN OCTOBER 1969 A REPEAT LAMINECTOMY AT THE L4 LEVEL WAS PERFORMED - THERE WAS NO EVIDENCE OF AN EXTRUDED DISC AND IN MAY 1974 CLAIMANT WAS FOUND TO BE MEDICALLY STATIONARY AND BOTH HIS 1968 AND 1969 CLAIMS WERE CLOSED ON MAY 17, 1971. CLAIMANT WAS AWARDED 32 DEGREES FOR 10 PER CENT UNSCHEDULED LOW BACK DISABILITY AS A RESULT OF THE FEBRUARY 29, 1968 INJURY AND 48 DEGREES FOR 15 PER CENT UNSCHEDULED LOW BACK DISABILITY RESULTING FROM THE JANUARY 27, 1969 INJURY.

CLAIMANT WAS RETRAINED AS A MACHINIST UNDER THE AUSPICES OF VOCATIONAL REHABILITATION DIVISION AND DID FAIRLY WELL UNTIL APRIL 1974 WHEN HIS SYMPTOMS RETURNED AND HE WAS GIVEN CONSERVATIVE TREATMENT, INCLUDING TREATMENT AT THE PORTLAND PAIN CENTER WHERE

IN JANUARY 1975, DR. SERES RECOMMENDED THE CLAIM BE CLOSED. THE CLAIM WAS CLOSED BY A SECOND DETERMINATION ORDER MAILED MARCH 12, 1975 WHICH AWARDED CLAIMANT 32 DEGREES FOR 10 PER CENT UNSCHEDULED LOW BACK DISABILITY RESULTING FROM THE JANUARY 27, 1969 INJURY. AS A RESULT OF THE FIRST AND SECOND DETERMINATION ORDERS CLAIMANT HAS RECEIVED 80 DEGREES FOR 25 PER CENT UNSCHEDULED DISABILITY FOR HIS 1969 INJURY AND 32 DEGREES FOR 10 PER CENT UNSCHEDULED DISABILITY FOR HIS 1968 INJURY - A TOTAL OF 112 DEGREES REPRESENTING 35 DEGREES UNSCHEDULED LOW BACK DISABILITY.

CLAIMANT IS 40 YEARS OLD AND HAS A GED CERTIFICATE. AFTER SERVING IN THE MARINE CORPS FOR 10 YEARS, WHERE HE WAS AN AVIATION ELECTRONICS OPERATOR, HE RECEIVED A MEDICAL DISCHARGE BECAUSE OF A KNEE INJURY. HE SPENT THREE YEARS OPERATING A FORKLIFT IN A SOFT DRINK FACTORY AND WORKED AS AN ELECTRICIAN AT BOEING FOR SIX MONTHS BEFORE RETURNING TO THE SOFT DRINK FACTORY FOR A YEAR. HE WAS THEN EMPLOYED BY THE ROSE CITY TRANSIT DURING WHICH PERIOD HE RECEIVED THE 1968 AND 1969 INJURIES. AFTER HE HAD BEEN RETRAINED AS A MACHINIST, HE WAS EMPLOYED BY WARREN INDUSTRIES UNTIL APRIL 1974 WHEN HE SUFFERED HIS FLAREUP.

CLAIMANT STATES HE HAS CONSTANT PAIN IN HIS LOW BACK WHICH IS INCREASED BY STOOPING, PROLONGED SITTING, STANDING OR DRIVING - THE PAIN IS SOMETIMES RELIEVED BUT ONLY FOR A SHORT DURATION. CLAIMANT WOULD LIKE TO BE RETRAINED FOR LIGHTER WORK BUT APPARENTLY BECAUSE OF A MISUNDERSTANDING BETWEEN CLAIMANT AND THE VOCATIONAL REHABILITATION DIVISION, HIS TRAINING PLANS WERE DISCONTINUED.

THE REFEREE FOUND THAT CLAIMANT HAD A BRIGHT-NORMAL INTELLECTUAL RANGE BUT HAD NOT FULLY DEVELOPED HIS INTELLECTUAL POTENTIAL. BECAUSE OF HIS INJURIES CLAIMANT IS UNABLE TO ENGAGE IN ANY OCCUPATION REQUIRING REPETITIVE BENDING OR TWISTING, LIFTING OF MORE THAN 25 POUNDS OR MAINTAINING ONE POSITION FOR PROLONGED PERIODS. BASED UPON THE EVIDENCE, THE REFEREE CONCLUDED THAT TO ADEQUATELY COMPENSATE CLAIMANT FOR HIS LOSS OF EARNING CAPACITY HIS AWARD SHOULD BE INCREASED BY 48 DEGREES WHICH WOULD GIVE CLAIMANT A TOTAL OF 160 DEGREES EQUAL TO 50 PER CENT OF THE MAXIMUM FOR UNSCHEDULED DISABILITY.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

THE BOARD NOTES THAT THE REFEREE COMMENTED THAT ALTHOUGH HE LACKED AUTHORITY TO REOPEN CLAIMANT'S CLAIM FOR SUCH VOCATIONAL REHABILITATION, HE HAD BEEN INFORMED BY THE BOARD'S DISABILITY PREVENTION DIVISION THAT IF CLAIMANT WOULD AGAIN CONSULT RUSS CARTER, AN ASSISTANT VOCATIONAL REHABILITATION COORDINATOR AT THE DISABILITY PREVENTION DIVISION, HIS MATTER WOULD BE RECONSIDERED. THE BOARD ALSO STRONGLY URGES CLAIMANT TO SEEK RETRAINING.

ORDER

THE ORDER OF THE REFEREE DATED JULY 28, 1975 IS AFFIRMED.

WCB CASE NO. 75-2517 FEBRUARY 4, 1976

MELANEE HATCHER, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
PHILIP A. MONGRAIN, DEFENSE ATTY.
ORDER OF DISMISSAL

A REQUEST FOR REVIEW, HAVING BEEN DULY FILED WITH THE WORKMEN'S COMPENSATION BOARD IN THE ABOVE-ENTITLED MATTER BY THE EMPLOYER, AND SAID REQUEST FOR REVIEW NOW HAVING BEEN WITHDRAWN,

IT IS THEREFORE ORDERED THAT THE REQUEST FOR REVIEW NOW PENDING BEFORE THE BOARD IS HEREBY DISMISSED AND THE ORDER OF THE REFEREE IS FINAL BY OPERATION OF LAW.

SAIF CLAIM NO. EC 142578 FEBRUARY 4, 1976

GUST CLEYS, CLAIMANT

DEPT. OF JUSTICE, DEFENSE ATTY.
OWN MOTION PROCEEDING REFERRED FOR HEARING

ON DECEMBER 22, 1975 THE CLAIMANT REQUESTED THE BOARD TO EXERCISE ITS OWN MOTION JURISDICTION UNDER THE PROVISIONS OF ORS 656.278 AND REOPEN HIS CLAIM FOR THE TREATMENT OF HIS PRESENT CONDITION AS A RESULT OF THE INDUSTRIAL INJURY WHICH HE SUFFERED ON AUGUST 23, 1968.

CLAIMANT'S 1968 CLAIM WAS CLOSED BY A DETERMINATION ORDER MAILED SEPTEMBER 19, 1969 WHEREBY HE WAS AWARDED 16 DEGREES FOR 5 PER CENT UNSCHEDULED DISABILITY. A REQUEST FOR HEARING WAS FILED BY THE CLAIMANT AND THE HEARING OFFICER, THE BOARD AND THE CIRCUIT COURT AFFIRMED THE AWARD. CLAIMANT'S AGGRAVATION RIGHTS HAVE EXPIRED.

DR. THOMAS J. O'LEARY OF THE PERMANENTE CLINIC, WHERE CLAIMANT HAS BEEN TREATED AND EXAMINED PERIODICALLY SINCE 1965, STATED IN HIS REPORT OF NOVEMBER 11, 1975 THAT IN DECEMBER 1974 AND MARCH, APRIL, MAY, JULY AND AUGUST 1975, THE CLAIMANT HAD NUMEROUS CLINIC VISITS FOR PAIN IN HIS RIGHT SHOULDER AND RIGHT ELBOW AREAS. IT WAS FELT HE MIGHT HAVE CALCIFIC TENDINITIS IN THE SHOULDER AND A TENNIS ELBOW ON THE RIGHT SIDE. IN SEPTEMBER 1975 CLAIMANT COMPLAINED OF SEVERE LOW BACK PAIN WHICH HAS PERSISTED UNTIL THE DATE OF THE REPORT FROM DR. O'LEARY. CLAIMANT HAS HAD RECURRENCE OF THIS LOW BACK PAIN SINCE HIS INDUSTRIAL INJURY AND HAS BEEN SEEN BY MEMBERS OF THE CLINIC INTERMITTENTLY FOR SUCH PROBLEM.

DR. O'LEARY'S OPINION WAS THAT CLAIMANT'S MAJOR DIFFICULTY IS PERSISTENT LOW BACK PAIN PRIMARILY AND MODERATE TO SEVERE DISCOMFORT IN THE RIGHT SHOULDER AND ELBOW AND HE FELT THAT THE LATTER SYMPTOMS WERE DEFINITELY RELATED TO CLAIMANT'S INDUSTRIAL INJURY BECAUSE OF THE RECURRENCES SINCE THE DATE OF SAID INJURY.

CLAIMANT ALSO HAS ARTERIOSCLEROTIC HEART DISEASE AND ARTERIOSCLEROTIC PERIPHEROVASCULAR DISEASE WHICH ARE SEPARATE PROBLEMS AND, IN DR. O'LEARY'S OPINION UNRELATED TO CLAIMANT'S EMPLOYMENT.

THE STATE ACCIDENT INSURANCE FUND ON JANUARY 21, 1976, DENIED THAT CLAIMANT'S PRESENT CONDITION IS RELATED TO THE AUGUST 1968 INJURY.

THE BOARD DOES NOT HAVE SUFFICIENT EVIDENCE, AT THIS TIME, TO DETERMINE THE MERITS OF CLAIMANT'S REQUEST TO REOPEN THE 1968 CLAIM, THEREFORE, THE MATTER IS REFERRED TO THE HEARINGS DIVISION WITH INSTRUCTIONS TO HOLD A HEARING AND TAKE EVIDENCE ON THE ISSUE OF WHETHER CLAIMANT'S PRESENT CONDITION IS RELATED TO HIS INDUSTRIAL INJURY OF AUGUST 1968 AND REPRESENTS AGGRAVATION.

UPON CONCLUSION OF THE HEARING, THE REFEREE SHALL CAUSE A TRANSCRIPT OF THE PROCEEDINGS TO BE PREPARED AND SUBMITTED TO THE BOARD TOGETHER WITH HIS RECOMMENDATION.

SAIF CLAIM NO. NC 79531 C 89728 FEBRUARY 4, 1976

ADRIAN CAVE, CLAIMANT

HUGH COLE, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
OWN MOTION ORDER

PURSUANT TO THE BOARD'S OWN MOTION ORDER OF REMAND, DATED SEPTEMBER 3, 1975, A HEARING WAS HELD IN THE ABOVE ENTITLED MATTER. THE BOARD IS NOW IN RECEIPT OF THE ADVISORY OPINION, FINDINGS AND RECOMMENDATION OF THE REFEREE WHICH RECOMMENDS THE DENIAL OF CLAIMANT'S OWN MOTION PETITION FOR RELIEF.

THE BOARD AFFIRMS AND ADOPTS THE ADVISORY OPINION, FINDINGS AND RECOMMENDATION, A COPY OF WHICH IS ATTACHED HERETO, AS ITS OWN.

ORDER

THE CLAIMANT'S OWN MOTION PETITION FOR RELIEF AS TO EITHER EMPLOYER OR EITHER CLAIM IS DENIED.

ADVISORY OPINION, FINDINGS AND RECOMMENDATION

TWO SESSIONS OF HEARING WERE HELD IN THIS MATTER AT EUGENE, OREGON BEFORE THE UNDERSIGNED REFEREE, PURSUANT TO THE OWN MOTION ORDER ON REMAND OF THE WORKMEN'S COMPENSATION BOARD REGARDING SAIF CLAIM NO. NC 79531. THE FIRST SESSION WAS HELD ON DECEMBER 12, 1974. DURING THE PRELIMINARY PROCEEDINGS AT THIS FIRST SESSION IT DEVELOPED THAT CLAIMANT HAD SUFFERED ANOTHER COMPENSABLE INJURY LATER IN TIME UNDER WHICH SOME LIABILITY MIGHT BE IMPOSED UPON THE STATE ACCIDENT INSURANCE FUND OR SOME OTHER CARRIER FOR THE LIABILITY OF ANOTHER EMPLOYER OR UNDER WHICH SOME SEPARATE OR ADDITIONAL OWN MOTION RELIEF MIGHT BE GRANTED - THEREFORE, THE HEARING WAS CONTINUED FOR THE PURPOSE OF DEVELOPING FURTHER THE EXISTENCE OF THAT OTHER CLAIM. AT THIS FIRST SESSION OF HEARING DOCUMENTARY EVIDENCE WAS INTRODUCED BUT NO TESTIMONY WAS TAKEN. SUBSEQUENTLY, AN ORDER OF JOINDER WAS ENTERED BY THE UNDERSIGNED REFEREE ON APRIL 7, 1975 WHICH JOINED THE STATE ACCIDENT INSURANCE FUND FOR ITS RESPONSIBILITY, IF ANY, ON BEHALF OF PACIFIC COAST TIMBERLANDS, INC., AS TO SCD CLAIM NO. C 89728. A SECOND SESSION OF HEARING WAS HELD ON MAY 7, 1975 AT WHICH TIME ADDITIONAL DOCUMENTARY EVIDENCE WAS INTRODUCED AND TESTIMONY WAS PRESENTED OF WITNESSES. THE HEARING WAS THEN FURTHER CONTINUED IN ORDER TO ALLOW FOR ADDITIONAL MEDICAL EVIDENCE TO BE DEVELOPED THROUGH ADDITIONAL REPORTS AND CROSS-EXAMINATION BY DEPOSITION. THE ADDITIONAL EVIDENCE WAS SUBMITTED AND ADMITTED. CLOSING ARGUMENTS WERE THEN SUBMITTED - CONSEQUENTLY, AFTER THE TRANSCRIPT OF THE TESTIMONY OF THE SECOND

SESSION OF HEARING WAS RECEIVED ON DECEMBER 30, 1975 THE HEARING WAS CLOSED ON JANUARY 2, 1976.

BY WAY OF EXPLANATION IT IS POINTED OUT THAT THE EXHIBITS IN THIS OWN MOTION PROCEEDING ARE IDENTIFIED AS HAVING BEEN SUBMITTED IN WCB CASE NO. 74-1387 - THIS COMES ABOUT BECAUSE THE OWN MOTION PROCEEDING WAS CARRIED FORWARD IN THE HEARINGS DIVISION UNDER SAID NUMBERED CASE WHICH INVOLVED A PRIOR CLAIM AND REQUEST FOR HEARING ON AGGRAVATION WHICH HAD BEEN DISMISSED BY THE HEARINGS DIVISION BECAUSE THE FIVE YEAR AGGRAVATION PERIOD HAD EXPIRED AS TO SAIF CLAIM NO. NC 79531. AT THE TWO SESSIONS OF THE HEARING DOCUMENTARY EVIDENCE WAS INTRODUCED AND ADMITTED AS EXHIBITS 1 THROUGH 39 INCLUSIVE, WHILE EXHIBITS 40 THROUGH 45 INCLUSIVE WERE ADMITTED DURING THE PERIOD OF CONTINUANCE.

BASED UPON THE EVIDENCE PRESENTED IN THIS HEARING AND THE RECORDS IN WCB CASE NO. 74-1387 THE REFEREE MAKES THE FOLLOWING

FINDINGS

THE HISTORY OF THIS CASE IS AS FOLLOWS - CLAIMANT SUSTAINED A COMPENSABLE INJURY ON MAY 15, 1967 WHILE WORKING FOR MCD LOGGING COMPANY. THIS INJURY WAS DIAGNOSED AS A CONTUSION, CERVICAL SPRAIN AND ANTERIOR SCALENE SPASM AND PRIMARILY INVOLVED HIS UPPER BACK, NECK, AND RIGHT SHOULDER. THIS INJURY WAS ORIGINALLY DESCRIBED TO HAVE BEEN SUSTAINED WHEN HE SLIPPED IN SOME GREASE OR MUD AND FELL INJURING HIS RIGHT SHOULDER - IT WAS SUBSEQUENTLY DESCRIBED TO HAVE OCCURRED WHEN HE JUMPED OFF A SHOVEL HE WAS OPERATING AND CAUGHT HIS RIGHT ARM IN THE LADDER RUNG, SWINGING HIS BODY AND STRIKING HIS LEFT HIP ON THE SHOVEL TRACK (EXHIBITS 1,2,5 AND TRANSCRIPT, PAGES 17-20). THIS CLAIM WAS ACCEPTED AND ORIGINALLY CLOSED ON OCTOBER 3, 1967 BY A DETERMINATION ORDER WHICH GRANTED CLAIMANT SOME TEMPORARY DISABILITY BENEFITS BUT FOUND NO PERMANENT DISABILITY HAD BEEN SUSTAINED (EXHIBIT 7). BEFORE THAT, HOWEVER, CLAIMANT HAD SUSTAINED ANOTHER COMPENSABLE INJURY ON JULY 17, 1967 WHILE WORKING FOR PACIFIC COAST TIMBERLANDS INC. THIS WAS ALSO CONSIDERED TO BE AN INJURY TO CLAIMANT'S RIGHT ARM, HIS LEFT BUTTOCK AND HIS LEFT HIP THROUGH A SACROSPINALIS SPRAIN WHICH OCCURRED WHEN HE, AS ORIGINALLY DESCRIBED, JUMPED OFF A SHOVEL, CAUGHT HIS RIGHT ARM ON A LADDER RUNG, FEET HIT SOME ROCKS AND HE HIT HIS LEFT HIP ON THE SHOVEL TRACK (EXHIBIT 35), BUT WHICH WAS SUBSEQUENTLY DESCRIBED TO HAVE OCCURRED WHEN HE JUMPED OFF THE SHOVEL AND LANDED ON HIS HEELS IN SOME ROCKS INJURING PRIMARILY HIS LOWER BACK (EXHIBIT 5 AND TRANSCRIPT, PAGES 25-28). THIS SECOND CLAIM WAS ALSO ACCEPTED AND SUBSEQUENTLY CLOSED ON DECEMBER 27, 1967 BY DETERMINATION ORDER WHICH ALSO GRANTED SOME TEMPORARY DISABILITY BENEFITS BUT FOUND, AGAIN, THAT CLAIMANT HAD NOT SUSTAINED ANY PERMANENT DISABILITY AS A RESULT OF THIS INJURY. IN LATE SUMMER AND FALL, 1970, CLAIMANT'S CLAIM WAS REOPENED UNDER CLAIM NO. NC 79531 FOR ADDITIONAL MEDICAL TREATMENT AS HE CONTINUED TO HAVE PAIN IN BOTH THE UPPER AND LOWER BACK AREAS BUT PREDOMINATELY IN THE RIGHT UPPER EXTREMITY (EXHIBITS 8,9,11,12,13 AND 14). DURING THE COURSE OF THIS ADDITIONAL MEDICAL TREATMENT SURGERY WAS PERFORMED (A RIGHT SCALENOTOMY) PERFORMED IN NOVEMBER, 1970 (EXHIBIT 16). CLAIMANT THEN UNDERWENT A COMPLETE PHYSICAL REHABILITATION WORKUP AT THE DISABILITY PREVENTION DIVISION CENTER IN PORTLAND, OREGON IN 1971 (EXHIBITS 16 THROUGH 24 INCLUSIVE). CLAIM NO. NC 79531 WAS ONCE AGAIN CLOSED ON SEPTEMBER 23, 1971 BY A SECOND DETERMINATION ORDER WHICH GRANTED ADDITIONAL DISABILITY BENEFITS AND THIS TIME GRANTED AN AWARD FOR PERMANENT PARTIAL DISABILITY OF 38 DEGREES FOR UNSCHEDULED NECK AND RIGHT SHOULDER DISABILITY AS COMPARED TO THE LOSS OF AN ARM BY SEPARATION AND 29 DEGREES FOR PARTIAL LOSS OF THE RIGHT ARM (EXHIBIT 26). (AT SOME PERIOD OF TIME BETWEEN 1967 AND 1970 CLAIMANT DID WORK AGAIN

FOR MCD LOGGING COMPANY AND WAS FIRED FROM THAT JOB BECAUSE OF HIS MENTAL ATTITUDE PRODUCED BY THE DISTRESS HE WAS HAVING. THERE IS ALSO SOME EVIDENCE THAT HE MAY HAVE HAD ANOTHER INJURY DURING THAT SUBSEQUENT WORK PERIOD BUT THIS WAS NEVER SUBSTANTIATED (EXHIBIT 22, PAGE 2). AFTER THE SECOND CLOSURE OF CLAIM NO. NC 79531 IN 1971 NOTHING FURTHER WAS HEARD FROM CLAIMANT REGARDING THESE CLAIMS UNTIL APRIL, 1974 WHEN CLAIMANT FILED A CLAIM AND REQUEST FOR HEARING ON AGGRAVATION AND SUBMITTED CERTAIN MEDICAL OPINIONS IN SUPPORT THEREOF (EXHIBITS 28 AND 29). THIS CLAIM FOR AGGRAVATION WAS DENIED (EXHIBIT 31) AND WAS SUBSEQUENTLY DISMISSED BECAUSE THE FIVE YEAR AGGRAVATION PERIOD HAD EXPIRED BEFORE THE CLAIM FOR AGGRAVATION WAS MADE (WCB 74-1387). CLAIMANT THEN FILED A PETITION FOR OWN MOTION RELIEF WITH THE WORKMEN'S COMPENSATION BOARD AND THE MATTER WAS REMANDED TO THE HEARINGS DIVISION FOR PRESENTATION OF EVIDENCE.

CONSIDERING THE RECORD IN THIS CASE IT IS QUITE CLEAR THAT CLAIMANT IS A VERY POOR HISTORIAN. THE RECORD IS REPLETE WITH INCONSISTENCIES OF HIS DESCRIPTION OF THE ACCIDENTS HE SUSTAINED AND THE INJURIES HE SUFFERED FROM THOSE ACCIDENTS. RELYING ONLY ON THE MEDICAL EVIDENCE IT DEVELOPS THAT CLAIMANT HAS HAD INJURY TO HIS UPPER BACK, RIGHT SHOULDER AND NECK FROM THE MAY 15, 1967 INJURY WHICH HE SUSTAINED WHILE EMPLOYED BY MCD LOGGING COMPANY. THIS WAS FROM A STRAIN OR SPRAIN OF THE UPPER BACK. THE INJURIES HE SUFFERED IN THE JULY, 1967 ACCIDENT WHILE EMPLOYED BY PACIFIC COAST TIMBERLANDS, INC. INVOLVED MAINLY THE LOWER BACK SYMPTOMS AS WELL. AT THE PRESENT TIME CLAIMANT COMPLAINS OF DISTRESS AND PHYSICAL DISABILITY OF BOTH THE UPPER AND LOWER BACK, RIGHT ARM AND HIS LEGS.

THE MEDICAL SITUATION IS FURTHER COMPLICATED BY THE FACT THAT CLAIMANT ALSO SUFFERS FROM TWO MEDICAL CONDITIONS WHICH ARE NOT RELATED TO EITHER INDUSTRIAL INJURY. HE HAS SEVERE DEGENERATIVE OSTEOARTHRITIS OF THE SPINE WHICH IS SIGNIFICANTLY PROGRESSIVE AND HE ALSO SUFFERS FROM PARKINSON'S DISEASE, MORE SEVERE ON THE LEFT SIDE THAN THE RIGHT. THE PARKINSON'S DISEASE IS PRETTY WELL CONTROLLED BY EXTENSIVE USE OF MEDICATION. THE MEDICAL EVIDENCE REFLECTS THAT, OF THE THE TWO GENERAL AREAS, THE MAJOR COMPLAINTS IN 1974 AND ALSO AT THE PRESENT TIME INVOLVE THE LUMBAR AREA AND HIS LOWER EXTREMITIES. THE ADVANCED DEGENERATIVE CHANGES ALSO INCLUDES DEGENERATIVE CONDITION OF THE DISCS OF THE LUMBAR AND CERVICAL SPINE. IT APPEARS MEDICALLY PROBABLE THAT THIS COMBINATION OF MEDICAL CONDITIONS ARE THE PRIMARY SOURCE OF HIS PRESENT COMPLAINTS DEVELOPING FROM THOSE AREAS.

IN 1974 THERE WAS SOME CONSIDERATION OF FURTHER DIAGNOSTIC TREATMENT WHICH WAS RESTRICTED TO USE OF AN AIR MYELOGRAM OR DISCOGRAM BECAUSE OF CLAIMANT'S REACTION TO IODINE. THE CONSIDERED DIAGNOSTIC TREATMENT WAS ATTEMPTED LATER AND PROVED TO BE UNSUCCESSFUL. THERE REALLY IS NO FURTHER RECOMMENDATION AT THIS TIME FOR ANY ACTIVE TREATMENT.

CLAIMANT'S COMPLAINTS ARE CONSIDERED BY MANY OF THE MEDICAL OPINIONS PRESENTED AS NOT CONSISTENT WITH THE OBJECTIVE FINDINGS OR WITH THE NATURE OF HIS INDUSTRIAL INJURIES. THERE IS ALSO MENTION AT VARIOUS TIMES THAT CONSIDERABLE 'FUNCTIONAL OVERLAY' APPEARS PRESENT OR MODERATELY SEVERE PSYCHOPATHOLOGY CONTRIBUTES TO THE TOTAL IMPAIRMENT. CLAIMANT CONTENDED THAT ANY FUNCTIONAL OVERLAY OR PSYCHOPATHOLOGY REFERRED TO IN THE EVIDENCE WAS MATERIALLY CAUSED BY THE INDUSTRIAL INJURIES HE SUSTAINED BUT THE PSYCHIATRIC EXAMINATION LATER CONDUCTED REFLECTS THAT NO PSYCHIATRIC DISORDERS OR SEVERE PERMANENT PSYCHOPATHOLOGY HAS DEVELOPED FROM THE OCCURRENCE OF THOSE INDUSTRIAL INJURIES (EXHIBIT 40 AND 45). IN FACT, THE PSYCHIATRIST'S OPINION REFLECTS THAT EVEN THE NORMAL PSYCHIATRIC DISORDERS EXPECTED FROM THE PARKINSON'S DISEASE ARE NOT

SIGNIFICANTLY FOUND IN CLAIMANT'S CASE. NO PERMANENT IMPAIRMENT FROM PSYCHOLOGICAL COMPONENTS HAS THEREFORE BEEN ESTABLISHED.

IN MY OPINION, CLAIMANT IS PERMANENTLY AND TOTALLY DISABLED FROM REGULARLY PERFORMING ANY SUITABLE AND GAINFUL OCCUPATION. HE IS NOT RETRAINABLE. HOWEVER, IT IS QUITE EVIDENT IN THIS CASE THAT CLAIMANT WOULD BE PERMANENTLY AND VIRTUALLY TOTALLY DISABLED, AS FAR AS CONTINUING IN ANY BRANCH OF EMPLOYMENT FOR WHICH HE HAS ANY TRAINING OR EXPERIENCE, BY THE EXISTENCE OF HIS PARKINSON'S DISEASE. IT IS FURTHER QUITE EVIDENT THAT THE PROGRESSIVE DEVELOPMENT OF THE DEGENERATIVE OSTEOARTHRITIS HAS LIKEWISE CAUSED MUCH OF HIS PRESENT DISTRESS.

I CONCLUDE FROM THE EVIDENCE SUBMITTED THAT THE MEDICAL EVIDENCE PREDOMINATELY INDICATES THAT CLAIMANT'S PRESENT CONDITION IS NOT RELATED TO EITHER OF HIS INDUSTRIAL INJURIES. WHILE THOSE WERE IMMEDIATELY PRODUCTIVE OF QUITE SEVERE DISTRESS IN THE AREAS CONCERNED AT THE TIME, BOTH INJURIES CONSISTED OF ONLY SPRAIN AND STRAIN TYPE INJURIES AND THE BULK OF THE MEDICAL EVIDENCE FAILS TO SHOW THAT THERE WAS ANY GREAT PERMANENT IMPACT BY THOSE INJURIES ON HIS THEN EXISTING MEDICAL CONDITION WHEREAS THE ALMOST INESCAPABLE CONCLUSION FROM THE MAJORITY OF THE MEDICAL EVIDENCE PRESENTED FROM MEDICAL PRACTITIONERS THAT I CONSIDER THE MOST QUALIFIED (DRS. MASON, STUMME, WEINMAN, BERG) IS THAT IT IS THE PROGRESSIVE DEGENERATION OF THE OSTEOARTHRITIS CONDITION WHICH IS MOST PRODUCTIVE OF HIS QUITE SIGNIFICANT COMPLAINTS AND THE BASIS FOR ANY WORSENED CONDITION SINCE THE CLAIMS FOR HIS INDUSTRIAL INJURIES WERE CLOSED.

BASED UPON THE FOREGOING FINDINGS, THE REFEREE MAKES THE FOLLOWING

RECOMMENDATIONS

WHILE THERE IS SOME EVIDENCE THAT THERE MAY BE SOME TRACEABLE INVOLVEMENT OF THE SPRAIN AND STRAIN INJURIES IN HIS PRESENT GENERAL CONDITION BECAUSE OF THE DEVELOPMENT OF THOSE PROBLEMS TO A STAGE OF CHRONIC STRAIN, THE EVIDENCE OF SUCH INVOLVEMENT WITH THE PRESENT CONDITION IS SO MEAGER THAT I RECOMMEND THAT THE CLAIMANT'S PETITION FOR OWN MOTION RELIEF BE DENIED. THE EVIDENCE CLEARLY REVEALS THAT THE DEGENERATIVE CHANGES OF THE SPINE ARE THE SOURCE OF THE COMPLAINTS IN THOSE AREAS AT THIS TIME AND THE MORE LOGICAL MEDICAL EXPLANATION IS THAT THIS IS FROM THE PROGRESSIVE DEGENERATIVE OSTEOARTHRITIS RATHER THAN ANY COMPONENT TRACEABLE TO THE INDUSTRIAL INJURIES. IT IS ALSO QUITE SIGNIFICANT THAT CLAIMANT WOULD BE COMPLETELY DISABLED FROM ENGAGING IN ANY GAINFUL OCCUPATION FOR WHICH HE MIGHT BE SUITED MERELY BY THE EXISTENCE OF THE PARKINSON'S DISEASE FOR WHICH NEITHER OF THESE EMPLOYERS HAVE BEEN SHOWN TO HAVE RESPONSIBILITY (EVEN THOUGH THERE IS SOME CONFLICT IN THE EVIDENCE AS TO WHETHER THIS CONDITION AROSE BEFORE OR AFTER EITHER OR BOTH OF THE INDUSTRIAL INJURIES). IN CONCLUSION, I RECOMMEND THAT CLAIMANT'S OWN MOTION PETITION FOR RELIEF BE DENIED AS TO EITHER EMPLOYER OR EITHER CLAIM.

PALMA BRUSCO, CLAIMANT
LINDSAY, NAHSTOLL, HART, DUNCAN, DAFOE AND KRAUSE,
CLAIMANT'S ATTYS.
MERLIN MILLER, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH GRANTED CLAIMANT PERMANENT TOTAL DISABILITY EFFECTIVE NOVEMBER 6, 1974, BUT ALLOWED THE EMPLOYER'S CARRIER TO TAKE CREDIT FOR PERMANENT PARTIAL DISABILITY MADE PURSUANT TO THE DETERMINATION ORDER OF DECEMBER 10, 1974.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON MARCH 24, 1972 WHEN SHE WAS STRUCK IN THE LOW BACK. SHE HAD WORKED FOR THE EMPLOYER FOR APPROXIMATELY 27 YEARS.

HER CLAIM WAS INITIALLY CLOSED BY DETERMINATION ORDER MAILED JULY 23, 1973 WHEREBY CLAIMANT RECEIVED 32 DEGREES FOR 10 PER CENT UNSCHEDULED LOW BACK DISABILITY. THIS DETERMINATION ORDER STATED IT DID NOT INVOLVE A BOARD DETERMINATION ON ANY QUESTION OF RELATIONSHIP TO CONDITIONS DENIED IN THE LETTER DATED AUGUST 22, 1972 (THIS PARTIAL DENIAL RELATED TO ANY CLAIM FOR DYSFUNCTIONAL UTERINE BLEEDING).

THE CLAIM WAS SUBSEQUENTLY REOPENED, BASED UPON REPORTS FROM DR. GRITZKA, AND CLOSED BY A SECOND DETERMINATION ORDER MAILED DECEMBER 10, 1974 WHEREBY CLAIMANT WAS GRANTED AN ADDITIONAL 48 DEGREES FOR 15 PER CENT UNSCHEDULED DISABILITY, GIVING CLAIMANT A TOTAL OF 80 DEGREES FOR 25 PER CENT UNSCHEDULED LOW BACK DISABILITY.

CLAIMANT HAS NOT WORKED SINCE HER MARCH 24, 1972 INJURY. SINCE THAT TIME SHE HAS BEEN SEEN BY MANY SPECIALISTS IN THE FIELDS OF MEDICINE, PSYCHOLOGIST, A VOCATIONAL COUNSELOR, AN ACUPUNCTURIST AND A CHIROPRACTOR - NONE HAVE BEEN SUCCESSFUL IN CURING, RESTORING OR REHABILITATING CLAIMANT. CLAIMANT HAS A HIGH SCHOOL EDUCATION AND HAS HAD SOME TRAINING IN BOOKKEEPING, SHE HAS ALSO WORKED FOR SEVERAL YEARS FOR THE EMPLOYER AS LEAD WOMAN IN THE UPHOLSTERY FINISHING DEPARTMENT. THESE DUTIES INVOLVE PHYSICAL ACTIVITY AS WELL AS SUPERVISORY WORK AND INCLUDE RECORD KEEPING. CLAIMANT HAD NO PRIOR BACK PROBLEMS PRIOR TO HER INJURY AND HAS DENIED ANY SINCE THE INJURY.

THE REFEREE FOUND THAT, AT PRESENT, CLAIMANT IS INACTIVE EVEN AT HOME BECAUSE OF PAIN WHICH IS DUE IN PART TO THE LUMBAR STRAIN RESULTING FROM HER ACCIDENT AND DUE IN A GREATER PART TO THE PSYCHOPATHOLOGY WHICH IS LARGELY CHRONIC BUT TRIGGERED TO A MILD DEGREE INTO SOME INCREASED DEPRESSION AND NERVOUS TENSION. THE REFEREE FOUND THAT CLAIMANT'S PSYCHOPATHOLOGY HAD BEEN TRIGGERED EVEN MORE BY EVENTS IN HER PERSONAL LIFE.

THE REFEREE FOUND THAT THE PREPONDERANCE OF THE EVIDENCE INDICATED THAT ALMOST EVERYTHING MEDICALLY HAD BEEN TRIED TO IMPROVE CLAIMANT'S CONDITION, BOTH PHYSICALLY AND PSYCHOLOGICALLY, AND NOTHING HAD WORKED.

IT IS NOT NECESSARY THAT THE ACCIDENT OR INJURY BE THE PRINCIPAL CAUSE OF DISABILITY - IT IS SUFFICIENT IF IT CONTRIBUTES TO THE DISABILITY. THEREFORE, EVEN THOUGH THE CONTRIBUTION OF THE ACCIDENT

WAS MILD, THE REFEREE CONCLUDED THAT CLAIMANT WOULD NOT HAVE BECOME PSYCHOLOGICALLY DISABLED WHEN SHE DID HAD NOT THE ACCIDENT OCCURRED AND, BASED UPON THE RATIONALE OF PATITUCCI V. BOISE CASCADE CORP. (UNDERSCORED), 8 OR APP 503, SHE WAS PERMANENTLY AND TOTALLY DISABLED AS A RESULT OF HER INJURY.

THE BOARD, ON DE NOVO REVIEW, FINDS THAT CLAIMANT HAD A PREEXISTING PSYCHOLOGICAL CONDITION AND, ON MARCH 24, 1974, AS A RESULT OF AN ON-THE-JOB ACCIDENT SHE SUSTAINED A PHYSICAL INJURY TO HER LOW BACK AND AN AGGRAVATION OF HER PREEXISTING PSYCHOLOGICAL CONDITION - HOWEVER, THE COMBINED RESULTS OF THESE TWO CONDITIONS DID NOT, ACCORDING TO THE MEDICAL EVIDENCE, MAKE CLAIMANT PERMANENTLY AND TOTALLY DISABLED. THE MEDICAL EVIDENCE QUITE CLEARLY INDICATES THAT CLAIMANT'S PHYSIOLOGICAL PROBLEMS ARE NOT TOTALLY DISABLING AND HER PHYSICAL IMPAIRMENT WAS RATED IN THE AREA OF 10-25 PER CENT.

DR. PERKINS, WHO GAVE CLAIMANT A PSYCHOLOGICAL EVALUATION, WAS OF THE OPINION THAT CLAIMANT'S PSYCHOPATHOLOGY WAS, TO A MODERATE DEGREE, RELATED TO HER AGE AND CHRONIC PERSONALITY TRAITS WITH NEUROTIC TYPE DEFENSES HAVE BEEN PRESENT FOR MANY YEARS. TO A MILD DEGREE, IT WAS JUDGED THAT THE INJURY AND ITS AFTER EFFECTS TRIGGERED SOME DEPRESSION AND NERVOUS TENSION. DR. PERKINS DOESN'T SAY THAT THE AGGRAVATION RESULTING FROM THE INDUSTRIAL INJURY, EITHER SOLELY OR IN COMBINATION WITH THE PHYSICAL RESIDUALS OF THE INJURY, CAUSED PERMANENT TOTAL DISABILITY.

DR. PERKINS, THE DOCTORS AT THE BACK EVALUATION CLINIC AND THE OTHER DOCTORS WHO TREATED AND-OR EXAMINED CLAIMANT WERE OF THE OPINION THAT CLAIMANT COULD, WITH PROPER COUNSELING, BE RETURNED TO THE WORK FORCE. THE SOLE EXCEPTION WAS DR. GRITZKA. CLAIMANT IS MORBIDLY OBESE AND THIS OBESITY CERTAINLY IS A LARGE CONTRIBUTING FACTOR TO HER PRESENT PAINFUL BACK CONDITION.

CLAIMANT MAY BE PERMANENTLY AND TOTALLY DISABLED AT THE PRESENT TIME BUT HER PERMANENT TOTAL DISABILITY IS NOT ATTRIBUTABLE TO THE COMBINATION OF HER PHYSICAL INJURY AND HER PSYCHOLOGICAL AGGRAVATION FROM SUCH INJURY. SUBSEQUENT TO THE INDUSTRIAL INJURY CLAIMANT'S HUSBAND DIED AND THIS LOSS, ACCORDING TO DR. PERKINS, HAD A MUCH GREATER EFFECT ON HER PSYCHOPATHOLOGY THAN THE INDUSTRIAL INJURY. THE EMPLOYER IS ONLY COMPENSABLY RESPONSIBLE FOR PREEXISTING CONDITIONS TO THE EXTENT THEY MAY BE AGGRAVATED BY AN ON-THE-JOB INJURY AND NOT FOR SUBSEQUENT, INDEPENDENT OCCURRENCES.

THE BOARD FINDS SUBSTANTIAL EVIDENCE OF LACK OF COOPERATION BY CLAIMANT WITH HER PHYSICIANS AND COUNSELORS AND ALSO A LACK OF MOTIVATION SUFFICIENT TO PRECLUDE HER FROM CONSIDERATION FOR PERMANENT TOTAL DISABILITY EVEN SHOULD HER PRESENT CONDITION BE THE RESPONSIBILITY OF THE EMPLOYER, WHICH IT IS NOT. CLAIMANT, HOWEVER, HAS LOST A SUBSTANTIAL AMOUNT OF POTENTIAL EARNING CAPACITY. THE BOARD URGES CLAIMANT TO GIVE SERIOUS EFFORT TO ENTERING A RETRAINING PROGRAM AVAILABLE TO HER AND TO SEEK FUTURE MEDICAL CARE UNDER THE PROVISIONS OF ORS 656.245. THE BOARD CONCLUDES THAT CLAIMANT HAS BEEN ADEQUATELY COMPENSATED FOR HER LOSS OF EARNING CAPACITY BY AN AWARD OF 192 DEGREES WHICH REPRESENTS 60 PER CENT OF THE MAXIMUM ALLOWABLE BY STATUTE.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 8, 1975 IS MODIFIED.

CLAIMANT IS AWARDED 192 DEGREES OF A MAXIMUM OF 320 DEGREES FOR UNSCHEDULED LOW BACK DISABILITY. THIS IS IN LIEU OF AND NOT IN ADDITION TO ANY PREVIOUS AWARD FOR UNSCHEDULED DISABILITY RECEIVED BY THE CLAIMANT.

DONNA PADDOCK, CLAIMANT
POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
JONES, LANG, KLEIN, WOLF AND SMITH,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH REMANDED CLAIMANT'S CLAIM TO IT FOR ACCEPTANCE AND PAYMENT OF BENEFITS, AS PROVIDED BY LAW, UNTIL HER CLAIM IS CLOSED PURSUANT TO ORS 656.268.

CLAIMANT ALLEGES SHE SUFFERED A LOW BACK CONDITION ARISING OUT OF AN INCIDENT OCCURRING ON OR ABOUT APRIL 22, 1975. THE EMPLOYER DENIED THE CLAIM.

CLAIMANT WAS AN OFF-BEARER ON A DRUM-TYPE SANDER WHEN SHE DEVELOPED ACHING IN HER BACK AND NECK FROM STACKING WOOD PRODUCTS ON A CART LOCATED LOW OFF THE FLOOR. DR. MCCOMB EXAMINED CLAIMANT ON APRIL 25, 1975 FOR LOW BACK PAIN WHICH LASTED APPROXIMATELY ONE WEEK - AT THAT TIME SHE TOLD DR. MCCOMB HER JOB WAS DIFFERENT FROM THE ONE SHE HAD BEEN ACCUSTOMED TO DOING AND SHE HAD REQUESTED HER WORK SUPERVISOR TO ALLOW HER TO LOAD RATHER THAN OFF-BEAR. DR. MCCOMB FELT THAT CLAIMANT'S CONDITION WAS RELATED TO HER JOB BECAUSE IT WAS ONE TO WHICH SHE WAS NOT NORMALLY ACCUSTOMED.

CLAIMANT'S SUPERVISOR TESTIFIED THAT CLAIMANT DID NOT REPORT ANY INJURY TO HIM EITHER ON APRIL 22 OR 23 AND ALSO THAT CLAIMANT PUT ONE THIRD TO ONE HALF OF HER TIME IN AS AN OFF-BEARER EVEN THOUGH HER FULL TIME ASSIGNMENT WAS THAT OF A FEEDER.

THE PHYSICIAN'S INITIAL REPORT OF THE WORK INJURY, SIGNED MAY 9, 1975, INDICATED TENDER SPASTIC LEFT TRAPEZIUS AND LUMBAR MUSCLES AND POSITIVE STRAIGHT LEG RAISING TESTS BILATERALLY AT 45 DEGREES. THE DIAGNOSIS WAS CERVICAL LUMBAR STRAIN. THE 801 WAS FILLED OUT BY THE EMPLOYER BUT THE CLAIMANT WAS UNABLE TO SIGN AND THE INFORMATION WAS TAKEN FROM HER OVER THE TELEPHONE.

THE REFEREE FOUND THAT THE EMPLOYER'S LETTER OF DENIAL INDICATED THAT THE EMPLOYER WAS UNABLE TO RELATE CLAIMANT'S PROBLEM WITH HER EMPLOYMENT, STATING IT HAD CONTACTED HER DOCTOR AND THE DOCTOR HAD INDICATED HE HAD NO RECORD OF AN ON-THE-JOB INJURY FOR THE CLAIM. THE REFEREE FOUND THAT THE PHYSICIAN'S INITIAL REPORT DID CAUSALLY RELATE THE PROBLEM TO THE INDUSTRIAL INJURY DESCRIBED AND AS FAR AS CLAIMANT'S FAILURE TO REPORT TO HER IMMEDIATE SUPERVISOR THE REFEREE FOUND CLAIMANT HAD REPORTED HER ABSENCE OF APRIL 24 BY TELEPHONE TO THE PERSONNEL MANAGER.

THE REFEREE CONCLUDED INASMUCH AS THE FORM 801 WAS FILLED OUT BY THE EMPLOYER, OBVIOUSLY, SOMEONE WORKING FOR THE EMPLOYER HAD TO DIRECT THAT IT BE COMPLETED AND FILLED OUT AND, THEREFORE, MUST HAVE HAD NOTICE OF THE CLAIM. CONSTRUING THE LAW LIBERALLY IN FAVOR OF THE WORKMAN THE REFEREE CONCLUDED THAT CLAIMANT HAD SUSTAINED HER BURDEN OF PROOF - HOWEVER, THAT PENALTIES WERE NOT APPLICABLE BECAUSE OF THE CIRCUMSTANCES OF THIS CASE.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE AS ITS OWN.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 5, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 350 DOLLARS, PAYABLE BY THE EMPLOYER.

WCB CASE NO. 75-992 FEBRUARY 6, 1976

MINNIE M. NORGARD, CLAIMANT

GALTON AND POPICK, CLAIMANT'S ATTYS.
PHILIP MONGRAIN, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH REMANDED TO IT CLAIMANT'S CLAIM TO BE ACCEPTED FOR PAYMENT OF COMPENSATION, AS PROVIDED BY LAW, UNTIL CLOSED PURSUANT TO ORS 656.268.

CLAIMANT IS 59 YEARS OLD AND HAD BEEN EMPLOYED FOR APPROXIMATELY THREE YEARS WHEN, ON APRIL 7, 1969 SHE FELL BACKWARDS ON THE CONCRETE FLOOR IN THE LAUNDRY WHERE SHE WORKED.

AS A RESULT OF THIS INDUSTRIAL INJURY A HERNIORRHAPHY WAS PERFORMED ON JULY 25, 1969. ON JANUARY 22, 1971, AN EXAMINATION BY DR. LEE, REVEALED A DEFINITE HERNIA BULGE AT THE SITE AND ON FEBRUARY 19, 1971 A SECOND OPERATION WAS PERFORMED. AFTER THE FIRST OPERATION THE CLAIM WAS CLOSED ON MAY 6, 1970 WITH NO AWARD OF PERMANENT PARTIAL DISABILITY - AFTER THE SECOND SURGICAL REPAIR A SECOND DETERMINATION ORDER ON JULY 29, 1972 WAS ENTERED WHICH ALSO GAVE CLAIMANT NO AWARD OF PERMANENT PARTIAL DISABILITY.

PRIOR TO THE SECOND CLOSURE, CLAIMANT HAD BEEN SEEN BY DR. ARMENTROUT WHO REPORTED CLAIMANT HAD A CHRONIC LUMBOSACRAL STRAIN IN ADDITION TO THE HERNIA. DR. BOYDEN ALSO FOUND A CHRONIC RECURRENT LUMBOSACRAL STRAIN - DR. BOYDEN IS CLAIMANT'S TREATING PHYSICIAN.

AFTER THE SECOND CLAIM CLOSURE CLAIMANT DID NOT RETURN TO WORK FOR THE EMPLOYER BUT ENROLLED AT PORTLAND COMMUNITY COLLEGE AND RECEIVED HER GED AND THEN ENROLLED IN PACIFIC BUSINESS SCHOOL COMPLETING A BUSINESS COURSE IN DECEMBER 1972. AFTER GRADUATION CLAIMANT SECURED EMPLOYMENT AS A CLERK WITH A NEW YORK MERCHANDISE COMPANY IN APRIL 1973 AND WAS SO EMPLOYED AT THE DATE OF THE HEARING.

IN JANUARY 1974 DR. LANGSTON HOSPITALIZED CLAIMANT WITH SEVERE LOW BACK PAIN, DIAGNOSED AS A DEGENERATIVE DISC DISEASE AGGRAVATED BY DEPRESSION DUE TO HER HUSBAND'S DEATH (SHORTLY BEFORE HER HOSPITALIZATION CLAIMANT HAD AWAKENED WITH EXTREME BACK PAIN, SHE SOUGHT HELP FROM HER HUSBAND AND FOUND HIM LYING DEAD ON THE KITCHEN FLOOR).

DR. LEE INDICATED THAT CLAIMANT'S CHRONIC BACK COMPLAINT AND PAIN HAD EXISTED SINCE THE ORIGINAL INJURY AND THE HERNIA OPERATION. A DENIAL WAS ISSUED ON JANUARY 27, 1975 BY THE EMPLOYER STATING IT FELT THE LOW BACK CONDITION WAS NOT RELATED TO THE APRIL 7, 1969 INJURY.

THE REFEREE, BASED UPON DR. BOYDEN'S OPINION THAT CLAIMANT'S PRESENT CONDITION IS RELATED TO HER 1969 INJURY AND THAT SUCH CONDITION HAD APPARENTLY BEEN WITH CLAIMANT IN SOME DEGREE SINCE THE ORIGINAL ACCEPTED INDUSTRIAL INJURY, CONCLUDED THAT CLAIMANT HAD SUFFERED AN AGGRAVATION OF THE CONDITION WHICH WAS ORIGINALLY ACCEPTED ALTHOUGH NO PARTICULAR INCIDENT PRODUCED IT. THE OPINION EXPRESSED BY DR. BOYDEN WAS ALMOST THE SAME AS THAT EXPRESSED BY DR. LANGSTON IN HIS DEPOSITION. HE REMANDED THE CLAIM TO THE EMPLOYER TO BE ACCEPTED AS AN AGGRAVATION OF SAID 1969 INJURY.

THE BOARD, ON DE NOVO REVIEW, FINDS, AS DID THE REFEREE, THAT SOME SLIGHT DISCREPANCY EXISTS BETWEEN DR. BOYDEN'S OPINION AND DR. LANGSTON'S OPINION, HOWEVER, BASICALLY EACH OPINION SUPPORTS THE CONCLUSION THAT THERE IS A RELATIONSHIP BETWEEN CLAIMANT'S PRESENT CONDITION AND HER 1969 INDUSTRIAL INJURY. NO MEDICAL EVIDENCE WAS OFFERED BY THE EMPLOYER TO DISPUTE THIS. THE BOARD AFFIRMS THE ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 27, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 400 DOLLARS, PAYABLE BY THE EMPLOYER.

WCB CASE NO. 75-489 FEBRUARY 6, 1976

SANFORD KOWITT, CLAIMANT

ALLEN G. OWEN, CLAIMANT'S ATTY.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 80 DEGREES FOR 25 PER CENT UNSCHEDULED LOW BACK DISABILITY.

CLAIMANT IS A 48 YEAR OLD ATTORNEY, A SOLE PRACTITIONER, WHO SUSTAINED A COMPENSABLE INJURY WHILE MOVING SOME OFFICE MATERIALS SOME TIME BETWEEN JANUARY 26 AND JANUARY 31, 1974. CLAIMANT SOUGHT NO TREATMENT UNTIL MARCH 12, 1974 WHEN HE WAS SEEN BY DR. COHEN, WHO INITIATED CONSERVATIVE TREATMENT CONSISTING OF MEDICATION AND A LUMBAR BRACE. CLAIMANT HAS NEITHER BEEN HOSPITALIZED NOR SUBJECTED TO SURGERY.

CLAIMANT HAS A BACHELOR'S DEGREE IN LIBERAL ARTS AS WELL AS HIS BACHELOR'S DEGREE IN LAW. IN ADDITION TO PRACTICING LAW FOR 11 YEARS CLAIMANT HAS TAUGHT SCHOOL, OPERATED A RETAIL BUSINESS AND WORKED AS A PAROLE OFFICER.

THE REFEREE FOUND, BASED UPON CLAIMANT'S EDUCATION, AGE AND WORK BACKGROUND, THAT HE WAS PROBABLY MORE ADAPTABLE THAN AVERAGE. HIS GPA BOTH AT UNDERGRADUATE AND GRADUATE LEVEL, AS WELL AS HIS OTHER ACHIEVEMENTS, INDICATE CLAIMANT'S INTELLIGENCE IS AT LEAST BRIGHT-NORMAL TO SUPERIOR.

CLAIMANT CONTENDS THAT BECAUSE OF THE LOW BACK ACHES WHICH

ARE CONSTANT HE GOES TO WORK LATER AND QUITS SOONER AND LOSES APPROXIMATELY TWO HOURS OF EACH DAY'S WORKING TIME AS A RESULT OF THIS PAIN. THE EMPLOYER CONTENDS THAT THE INJURY DID NOT AFFECT CLAIMANT'S EARNING CAPACITY, OFFERING EVIDENCE THAT CLAIMANT'S 1973-74 INCOME TAX RETURN REFLECTED LESS THAN 1000 DOLLARS DIFFERENCE IN GROSS INCOME - HIS 1975 INCOME TO DATE OF THE HEARING REVEALED INCREASED EARNINGS.

THE REFEREE, RELYING UPON FORD V. SAIF (UNDERSCORED), 7 OR APP 549, CONCLUDED THAT ALTHOUGH EARNINGS WERE RELEVANT, A WORKMAN COULD NOT BE DEPRIVED OF AN AWARD MERELY BECAUSE HIS EARNINGS SUBSEQUENT TO THE INJURY WERE GREATER THAN HIS EARNINGS PRIOR TO THE INJURY BECAUSE EARNINGS WERE NOT NECESSARILY DETERMINATIVE OF THE EARNING CAPACITY.

THE REFEREE CONCLUDED THAT BECAUSE CLAIMANT WAS UNABLE TO PARTICIPATE IN HIS CHOSEN PROFESSION ON A FULL TIME BASIS SINCE HIS INJURY, BECAUSE OF DISCOMFORT RESULTING THEREFROM, HE HAD SUFFERED A LOSS OF EARNING CAPACITY. HE FURTHER CONCLUDED THAT BECAUSE CLAIMANT WAS A SOLE PRACTITIONER AND NORMALLY WOULD HAVE DONE SOME WORK AT HOME EVENINGS AND OVER THE WEEKENDS WHICH HE IS NO LONGER ABLE TO DO CLAIMANT HAS SUFFERED A SUBSTANTIAL LOSS OF RESERVE.

THE BOARD, ON DE NOVO REVIEW, AGREES THAT CLAIMANT HAS SUFFERED SOME LOSS OF HIS EARNING CAPACITY BUT CERTAINLY NOT TO THE EXTENT THAT HE IS ENTITLED TO AN AWARD OF EQUAL TO 25 PER CENT OF THE MAXIMUM ALLOWABLE BY STATUTE FOR UNSCHEDULED DISABILITY.

THE FACT THAT CLAIMANT IS A SOLE PRACTITIONER IN THE FIELD OF LAW ALLOWS CLAIMANT TO SET HIS OWN HOURS AT THE OFFICE - IF HE CHOSE TO COME IN LATER THAN USUAL AND LEAVE EARLIER THAN USUAL, THIS IS NOT, BY ITSELF, EVIDENCE OF ANY COMPENSABLE DISABILITY.

THE BOARD CONCLUDES THAT THE EVIDENCE DOES NOT SUPPORT A FINDING THAT CLAIMANT IS, AS A RESULT OF HIS INDUSTRIAL INJURY, PRECLUDED FROM RETURNING TO ONE-FOURTH OF THE LABOR MARKET WHICH WAS AVAILABLE TO HIM PRIOR TO THE INDUSTRIAL INJURY. CLAIMANT WOULD BE ADEQUATELY COMPENSATED BY AN AWARD OF 32 DEGREES FOR 10 PER CENT UNSCHEDULED DISABILITY.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 15, 1975 IS MODIFIED AND THE AWARD OF 80 DEGREES OF A MAXIMUM OF 320 DEGREES FOR UNSCHEDULED LOW BACK DISABILITY IS REDUCED TO 32 DEGREES OF A MAXIMUM OF 320 DEGREES FOR UNSCHEDULED LOW BACK DISABILITY. IN ALL OTHER RESPECTS THE ORDER OF THE REFEREE IS AFFIRMED.

WCB CASE NO. 75-991 FEBRUARY 6, 1976

RAYMOND LEDFORD, CLAIMANT

EVOHL F. MALAGON, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEW BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH REMANDED CLAIMANT'S CLAIM FOR HIS BACK CONDITION TO THE STATE ACCIDENT INSURANCE FUND TO BE ACCEPTED FOR PAYMENT OF

COMPENSATION, AS PROVIDED BY LAW, UNTIL CLOSURE PURSUANT TO ORS 656.268 - ALSO OF HIS ORDER ON RECONSIDERATION WHEREIN THE REFEREE REFUSED TO ADMIT THE REPORT OF DR. CARTER BASED UPON A PSYCHIATRIC EVALUATION MADE ON MAY 19, 1975 OF THE CLAIMANT.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON NOVEMBER 19, 1968 TO HIS RIGHT LEG WHICH RESULTED IN BOTH BELOW-THE-KNEE AND ABOVE-THE-KNEE AMPUTATIONS. CLAIMANT WAS FITTED WITH A RIGHT ABOVE-THE-KNEE PROSTHESIS, LEARNED TO WALK ON IT WITHOUT ANY SPECIAL TRAINING AND, BY FEBRUARY 18, 1969, WAS WALKING WITHOUT THE AID OF A CRUTCH OR CANE.

AFTER CLAIMANT WAS DISCHARGED FROM THE HOSPITAL HE COMPLAINED OF INCREASING BACK PAIN RELATED TO ACTIVITY AND ORIGINATING AT THE TIME OF HIS INITIAL HOSPITALIZATION. THIS PAIN WAS PRIMARILY IN THE LOW BACK AND RADIATED INTO THE END OF THE AMPUTATION STUMP. DR. STEELE DIAGNOSED CHRONIC LOW BACK STRAIN WHICH WAS CAUSED IN PART BY THE CLAIMANT'S POOR GAIT. CLAIMANT WAS SENT TO A PHYSICAL THERAPIST FOR GAIT TRAINING BUT CONTINUED TO HAVE PROBLEMS WITH THE ARTIFICIAL LIMB AND A NEW ONE WAS RECOMMENDED IN DECEMBER 1973.

ON MAY 29, 1975 CLAIMANT SAW DR. STEELE, STATING HIS AMPUTATION STUMP AND PROSTHESIS HAD BEEN STABLE AND THERE HAD BEEN NO RECENT CHANGE SINCE 1970 BUT HE WAS STILL HAVING TROUBLE WITH IT. AT THAT TIME HE WAS WEARING THE OLD PROSTHESIS BECAUSE THE NEW ONE WAS BEING REPAIRED. CLAIMANT'S MAJOR PROBLEM APPEARED TO BE BACK PAIN AND DR. STEELE NOTED THAT THERE HAD BEEN NO PREVIOUS MENTION OF BACK PAIN OR INJURY UNTIL FEBRUARY 1973 AND IN THE LAST EXAMINATION THERE WAS NO DIFFERENCE IN THE SYMPTOMS THAN IN THE FEBRUARY 1973 EXAMINATION. DR. STEELE FELT THAT THE BACK PAIN WAS AGGRAVATED BY CLAIMANT'S POOR GAIT AND HIS ARTIFICIAL LIMB BOTH OF WHICH RESULTED FROM THE INDUSTRIAL INJURY.

PRIOR TO THE INJURY CLAIMANT HAD WORKED FOR THE EMPLOYER FOR APPROXIMATELY TWO AND A HALF YEARS. HE HAS NOT WORKED SINCE THAT DATE. HE IS PRESENTLY SEEING DR. CARTER FOR PSYCHIATRIC TREATMENT. DR. CARTER FEELS THAT CLAIMANT'S CONDITION HAS AGGRAVATED.

CLAIMANT'S CLAIM FOR AGGRAVATION REQUESTS REOPENING FOR PSYCHIATRIC TREATMENT AS WELL AS FOR TREATMENT OF THE BACK CONDITION.

THE REFEREE FOUND THAT THE MEDICAL EVIDENCE INDICATED CLAIMANT HAD TOLD DR. STEELE IN 1973 THAT HE HAD SUFFERED BACK PAIN WHEN HE WAS HOSPITALIZED AND THAT DR. STEELE'S OPINION WAS THAT AT LEAST PART OF THE BACK PAIN WAS DUE TO CLAIMANT'S POOR GAIT RESULTING FROM WALKING ON HIS ARTIFICIAL LIMB. THE REFEREE CONCLUDED THAT CLAIMANT HAD SUFFERED AN AGGRAVATION RESULTING FROM HIS INDUSTRIAL INJURY AS IT RELATED TO HIS BACK CONDITION.

WITH RESPECT TO CLAIMANT'S PSYCHIATRIC CONDITION, THE REFEREE FOUND THAT IN DR. CARTER'S OPINION THERE WERE REASONABLE GROUNDS FOR THE CLAIM THAT SUCH DISABILITY HAD WORSENED OR DETERIORATED SUBSEQUENT TO THE LAST AWARD OR ARRANGEMENT OF COMPENSATION AND WAS SUFFICIENT TO ESTABLISH JURISDICTION PURSUANT TO ORS 656.273 BUT THAT THE EVIDENCE AS A WHOLE DID NOT SHOW A WORSENING OF CLAIMANT'S PSYCHIATRIC CONDITION.

ON AUGUST 21, 1975 THE REFEREE ENTERED HIS OPINION AND ORDER - ON AUGUST 27, 1975 CLAIMANT FILED A REQUEST FOR RECONSIDERATION, ATTACHING THERETO A REPORT OF DR. CARTER, DATED AUGUST 8, 1975, WHICH WAS BASED ON A PSYCHIATRIC EXAMINATION MADE OF CLAIMANT ON MAY 19, 1975.

THE REFEREE FOUND THAT THE REPORT OF DR. CARTER WAS MADE AT THE CLAIMANT'S REQUEST AND THAT THE EVALUATION WAS DONE PRIOR TO THE ENTRY OF HIS OPINION AND ORDER AND THAT THE EVIDENCE WAS NOT NEW EVIDENCE BUT WAS OBTAINABLE WITH REASONABLE DILIGENCE AT THE TIME OF THE FIRST HEARING. THE REFEREE CONCLUDED THAT THE REPORT OF DR. CARTER COULD NOT BE CONSIDERED AS NEW MATERIAL EVIDENCE AND A BASIS FOR RECONSIDERATION - HE, THEREFORE, DENIED THE REQUEST TO RECONSIDER.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE IN HIS ORDER DATED AUGUST 21, 1975.

THE BOARD FINDS THAT ALTHOUGH THE REPORT FROM DR. CARTER, DATED AUGUST 8, 1975, WOULD BE ADEQUATE TO SUPPORT A FINDING OF A WORSENING OF CLAIMANT'S PSYCHIATRIC CONDITION WHICH WOULD JUSTIFY REMANDING HIS CLAIM FOR ACCEPTANCE OF THE PSYCHIATRIC CONDITION. UNFORTUNATELY THE CLAIMANT HAS FAILED TO SHOW THAT THIS REPORT REPRESENTS NEW EVIDENCE WHICH WAS NOT AVAILABLE NOR COULD HAVE BEEN MADE AVAILABLE AT THE TIME OF THE HEARING BY THE EXERCISE OF DUE DILIGENCE ON THE PART OF CLAIMANT.

THE REFEREE CORRECTLY DENIED THE REQUEST TO RECONSIDER - HOWEVER, THE BOARD CONCLUDES THAT CLAIMANT IS ENTITLED, UNDER THE PROVISIONS OF ORS 656.245, TO SUCH PSYCHIATRIC CARE AND TREATMENT AS DR. CARTER MAY RECOMMEND.

ORDER

THE ORDER OF THE REFEREE, DATED AUGUST 21, 1975, AND THE ORDER ON RECONSIDERATION, DATED SEPTEMBER 5, 1975, ARE AFFIRMED.

WCB CASE NO. 75-2103 FEBRUARY 6, 1976

DOREEN V. STINER, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
JONES, LANG, KLEIN, WOLF AND SMITH,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 96 DEGREES FOR 30 PER CENT UNSCHEDULED LOW BACK DISABILITY.

CLAIMANT IS A 35 YEAR OLD REGISTERED NURSE WITH A HIGH SCHOOL EDUCATION. ON MAY 14, 1974 SHE SUSTAINED A COMPENSABLE LOW BACK DISABILITY FOR WHICH SHE RECEIVED AN AWARD OF 64 DEGREES FOR 20 PER CENT UNSCHEDULED LOW BACK DISABILITY BY A DETERMINATION ORDER MAILED APRIL 25, 1975.

IN 1971 CLAIMANT HAD SUSTAINED A NON-OCCUPATIONAL LOW BACK INJURY AND A LEFT SIDED LAMINECTOMY AND DISKECTOMY WAS PERFORMED AT THE L4-5 AND L5-S1 LEVELS ON JULY, 1971. REPEAT SURGERY WAS DONE IN FEBRUARY 1972 AT THE SAME LEVELS TO REMOVE ADHESIONS AND SCAR TISSUE AND AGAIN REMOVED THE DISC.

IN SEPTEMBER 1972 CLAIMANT WAS HIRED BY THE EMPLOYER AS A REGISTERED NURSE AND WITHIN A SHORT PERIOD OF TIME WAS PROMOTED TO NURSING SUPERVISOR, WORKING THE GRAVEYARD SHIFT. WHILE SO EMPLOYED, CLAIMANT REINJURED HER LOW BACK ASSISTING A PATIENT. CONSERVATIVE CARE PRODUCED LITTLE IMPROVEMENT AND, ON AUGUST 5, 1974, A DECOMPRESSIVE LAMINECTOMY

WAS AGAIN PERFORMED AT THE L4-5 AND L5-S1 LEVELS. NO DISC PROBLEMS WERE NOTED BUT THE NERVE ROOT IMPINGEMENT BY PERIDURAL AND PERINEURAL FIBROSIS WAS SURGICALLY REPAIRED.

THE REFEREE FOUND THAT PRIOR TO THE COMPENSABLE INJURY, ALTHOUGH CLAIMANT WAS SUBJECT TO LIMITATIONS IN HER VOCATIONAL, AVOCATIONAL AND DOMESTIC ACTIVITIES, NEVERTHELESS, SHE WAS ABLE TO ASSIST PATIENTS AND WAS ABLE TO PERFORM ALL OF THE DUTIES REQUIRED BY HER POSITION ON A FIVE DAY A WEEK BASIS. THE REFEREE FOUND THAT SINCE THE INDUSTRIAL INJURY, SHE IS ONLY ABLE TO WORK FOUR DAYS A WEEK, SHE IS NO LONGER ABLE TO ASSIST IN EMERGENCY ROOM SURGERY FOR MORE THAN 30 MINUTES, CANNOT ASSIST PATIENTS BEING MOVED FROM AN AMBULANCE STRETCHER TO A GURNEY, OR FROM A GURNEY TO THE OPERATING TABLE. CLAIMANT'S DUTIES ARE NOW STRICTLY SUPERVISORY AND SHE STILL HAS EXACERBATION OF HER SYMPTOMS PERIODICALLY.

THE REFEREE, NOTING THAT UNSCHEDULED DISABILITY IS EVALUATED BY DETERMINING THE EFFECT OF THE INJURY ON THE INJURED WORKER'S EARNING CAPACITY WITH DUE CONSIDERATION TO THE AGE, EDUCATION, INTELLIGENCE AND ADAPTABILITY UPON WHICH THE CONSEQUENCE OF THE INJURY MAY HAVE BEEN SUPERIMPOSED, FOUND THAT CLAIMANT HAD SUBSTANTIAL DISABILITY BUT THAT PART OF HER DISABILITY STEMMED FROM THE 1971 INJURY AND THE RESULTING SURGERIES.

THE REFEREE CONCLUDED THAT AS A RESULT OF HER 1974 INJURY, CLAIMANT WAS ENTITLED TO AN AWARD OF 30 PER CENT FOR HER UNSCHEDULED LOW BACK DISABILITY TO ADEQUATELY COMPENSATE HER FOR THE LOSS OF EARNING CAPACITY RESULTING FROM THAT INJURY.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 15, 1975 IS AFFIRMED.

WCB CASE NO. 74-3398 FEBRUARY 6, 1976

JERRY L. PRATER, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH APPROVED THE STATE ACCIDENT INSURANCE FUND'S DENIAL OF CLAIMANT'S CLAIM FOR AGGRAVATION.

CLAIMANT SUFFERED A COMPENSABLE LOW BACK INJURY ON MARCH 16, 1973, THE CLAIM WAS CLOSED BY DETERMINATION ORDER MAILED MAY 30, 1973 WITH NO AWARD FOR PERMANENT PARTIAL DISABILITY.

IN JULY 1975, DR. KEIZER, AFTER EXAMINING CLAIMANT, CONSIDERED CLAIMANT'S CONDITION HAD WORSENED AND REQUESTED THE CLAIM BE REOPENED. THIS REQUEST WAS TREATED AS A CLAIM FOR AGGRAVATION AND DENIED BY THE FUND.

THE REFEREE FOUND THAT THE MEDICAL EVIDENCE INDICATED CLAIMANT'S CONDITION HAD WORSENED SINCE THE LAST AWARD OR ARRANGEMENT OF COMPENSATION - HOWEVER, THE WORSENING WAS NOT RELATED TO NOR DID IT RESULT FROM THE INDUSTRIAL INJURY OF MARCH 16, 1973.

CLAIMANT SUFFERED TWO OFF-THE-JOB INJURIES, ONE IN MAY OR JUNE, 1974 AND ANOTHER A MONTH LATER - BOTH INJURIES WERE TO HIS LOW BACK AREA. THE REFEREE FOUND THAT THE TWO OFF-THE-JOB INCIDENTS WERE OF A TYPE FROM WHICH TRAUMATIC EFFECTS COULD REASONABLY BE ANTICIPATED WHETHER OR NOT CLAIMANT HAD HAD A PRIOR INJURY. HE FURTHER FOUND THAT EACH INCIDENT, PROVIDED IT HAD OCCURRED ON-THE-JOB, WAS ACTUALLY SUFFICIENT TO CONSTITUTE A NEW INJURY UNDER THE WORKMEN'S COMPENSATION LAW.

THE REFEREE CONCLUDED THAT, ALTHOUGH CLAIMANT'S CONDITION HAD WORSENED SINCE THE INDUSTRIAL INJURY, THE SIGNIFICANT EVENTS WHICH MATERIALLY CONTRIBUTED TO HIS PRESENT CONDITION WERE THE TWO SUBSEQUENT OFF-THE-JOB INCIDENTS WHICH WERE 'INJURIES' AS CONTEMPLATED BY THE WORKMEN'S COMPENSATION LAW AND THEIR INTERVENTION BROKE THE CAUSAL RELATIONSHIP BETWEEN CLAIMANT'S PRESENT CONDITION AND HIS INDUSTRIAL INJURY OF MARCH 16, 1973.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE AS ITS OWN.

ORDER

THE ORDER OF THE REFEREE DATED JUNE 11, 1975 IS AFFIRMED.

WCB CASE NO. 75-1362 FEBRUARY 6, 1976

MICHAEL N. GUISCHER, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE STATE ACCIDENT INSURANCE FUND'S DENIAL OF CLAIMANT'S CLAIM.

THE ISSUE BEFORE THE REFEREE WAS THE COMPENSABILITY FOR A TORN CARTILAGE OF THE RIGHT KNEE INCURRED BY THE CLAIMANT WHILE PITCHING BASEBALL FOR PORTLAND STATE UNIVERSITY ON APRIL 3, 1973.

THE FUND OBJECTED TO THE HEARING ON THE GROUNDS THAT CLAIMANT WAS NOT AN EMPLOYE AND, IF HE WAS, NO INJURY AROSE OUT OR IN THE COURSE OF HIS EMPLOYMENT.

CLAIMANT WAS ON A FEDERALLY FUNDED WORK STUDY PROGRAM AT PORTLAND STATE - PRIOR TO 1972 HE HAD PAID HIS OWN TUITION. THE WORK ASSIGNED TO HIM UNDER THE WORK STUDY PROGRAM WAS BY THE PERSONNEL AND ATHLETIC DEPARTMENT AND CONSISTED OF WORKING IN THE CONCESSIONS, HANDLING THE TICKET TAKING AND DOING SOME BUS DRIVING TO AND FROM ATHLETIC PRACTICE.

THE REFEREE FOUND THAT ALTHOUGH CLAIMANT COULD HAVE BEEN CONSIDERED AN EMPLOYE OF PORTLAND STATE UNIVERSITY WHILE DRIVING THE BUS, WORKING AT THE CONCESSION STANDS OR TAKING TICKETS, THIS, BY ITSELF DID NOT MAKE HIM AN EMPLOYE WHILE HE WAS VOLUNTARILY PLAYING BASEBALL. THERE WAS NO EVIDENCE THAT CLAIMANT WAS PAID FOR PLAYING BASEBALL NOR THAT HE WOULD HAVE ENDANGERED HIS FEDERALLY FUNDED WORK STUDY PROGRAM BY FAILURE TO PLAY BASEBALL.

THE REFEREE FOUND THAT CLAIMANT WAS FURNISHED SOME FUNDS FOR TUITION AND BOOKS FROM THE DAD'S CLUB AND, IN ALL PROBABILITY, IT WAS BECAUSE OF CLAIMANT'S BASEBALL ACHIEVEMENTS, HOWEVER, THERE WAS NO CONCLUSIVE EVIDENCE THAT HE COULD NOT HAVE RECEIVED SUCH ASSISTANCE FROM THE DAD'S CLUB WITHOUT PLAYING BASEBALL AND THERE IS NO EVIDENCE THAT THE DAD'S CLUB WAS PART OF PORTLAND STATE UNIVERSITY.

THE REFEREE CONCLUDED THAT CLAIMANT WAS NOT AN EMPLOYE WITHIN THE MEANING OF THE WORKMEN'S COMPENSATION LAW AND THAT HIS INJURY, IF ANY, DID NOT ARISE OUT OF OR IN THE COURSE OF HIS EMPLOYMENT AT PORTLAND STATE UNIVERSITY.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 12, 1975, IS AFFIRMED.

WCB CASE NO. 75-104 FEBRUARY 6, 1976

CLAUD ASKEW, CLAIMANT

INGRAM AND SCHMAUDER,
CLAIMANT'S ATTYS.
GEARIN, CHENEY, LANDIS, AEBI AND KELLEY,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED JANUARY 3, 1975 WHICH AWARDED CLAIMANT AN ADDITIONAL 48 DEGREES FOR 15 PER CENT UNSCHEDULED DISABILITY. ON JULY 16, 1970 CLAIMANT HAD RECEIVED 240 DEGREES FOR 75 PER CENT UNSCHEDULED DISABILITY, THEREFORE, CLAIMANT AT THE TIME OF HEARING HAD RECEIVED A TOTAL OF 288 DEGREES FOR 90 PER CENT UNSCHEDULED PERMANENT PARTIAL DISABILITY.

CLAIMANT CONTENDS THAT HE IS PERMANENTLY AND TOTALLY DISABLED. COUNSEL, IN THEIR CLOSING BRIEFS, RAISED, FOR THE FIRST TIME, THE QUESTION OF WHETHER SENATE BILL 743, WHICH AMENDED ORS 656.206 EFFECTIVE JULY 1, 1975, SHOULD BE APPLIED RETROSPECTIVELY OR PROSPECTIVELY. SENATE BILL 743 ELIMINATED ORS 656.206 PARAGRAPH (2) WHICH MERELY CODIFIED INTO STATUTE THE HOLDING OF THE COURT OF APPEALS IN DEATON V. SAIF (UNDERSCORED), 13 OR APP 298. THE REFEREE CORRECTLY FOUND THAT THE APPLICATION OF ORS 656.206, AS AMENDED, MUST BE MADE PROSPECTIVELY - THE ACT IS SUBSTANTIVE RATHER THAN PROCEDURAL OR REMEDIAL IN NATURE.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON NOVEMBER 5, 1968 AND HAS NOT WORKED SINCE THAT DATE. HE HAS HAD A LUMBAR LAMINECTOMY AND SPINAL FUSION WHICH WAS PERFORMED ON JUNE 13, 1969 BY THE LATE DR. HIESTAND AND A REPAIR OF AN ADDITIONAL FUSION IN THE LOWER BACK FROM L3 TO S1 PERFORMED BY DR. KIMBERLEY ON DECEMBER 31, 1973. CLAIMANT TESTIFIED THAT HIS PRESENT PROBLEM INCLUDES PAIN IN BOTH SHOULDERS AND IN THE BACK, HE ALSO HAS A SHARP PAIN EXTENDING IN THE CALVES OF BOTH LEGS AND SEVERE RESTRICTIONS IN STANDING, SITTING, BENDING, LIFTING, GRIPPING AND HOLDING. CLAIMANT ALLEGES HE CANNOT WORK AND THAT THERE IS NO WORK TO HIS KNOWLEDGE WHICH HE WOULD BE ABLE TO DO.

DR. KIMBERLEY IN NOVEMBER 1974 MADE A DIAGNOSIS WHICH INCLUDED MULTIPLE PSEUDOARTHROSIS FOLLOWING REPEATED SURGERY, CHRONIC LOW BACK PAIN, SECONDARY TO TRAUMA AND PSYCHOSOMATIC PROBLEMS. HE FELT, ON THAT DATE, THAT AS FAR AS MANUAL LABOR WORK WAS CONCERNED CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED BUT THAT THERE WERE OTHER THINGS WHICH CLAIMANT COULD DO ON A WAGE EARNING BASIS INCLUDING JOBS AS A CUSTODIAN, WATCHMAN, ETC.

THE REFEREE FOUND THAT PRIOR TO THE DECEMBER 31, 1973 SURGERY THE EVIDENCE INDICATED A GREAT LACK OF MOTIVATION BY CLAIMANT, THAT THERE WERE STATEMENTS OR INSINUATIONS MADE BY VARIOUS PARTIES TO THE EFFECT THAT CLAIMANT WAS ALWAYS OUT FISHING AND HUNTING ALTHOUGH HE ALLEGED INABILITY TO WORK. CLAIMANT'S LACK OF MOTIVATION PRIOR TO DECEMBER 31, 1973 WAS WELL DOCUMENTED. HE FURTHER FOUND THAT FOLLOWING THE OPERATION NO IMPROVEMENT TOOK PLACE AND THERE WERE ONLY A FEW MEDICAL REPORTS FILED AFTER THE SECOND SURGERY, ONE FROM DR. MILLER, WHO GAVE CLAIMANT SOME PALLIATIVE TREATMENT, AND TWO REPORTS FROM DR. KIMBERLEY, ONE OF WHICH HAS ALREADY BEEN DISCUSSED.

THE REFEREE, BASED UPON THE STATEMENT OF DR. KIMBERLEY THAT THERE WERE SOME THINGS CLAIMANT COULD DO ON A WAGE EARNING BASIS SUCH AS WORKING AS A CUSTODIAN, IF IT DID NOT INVOLVE TOO MUCH BENDING OR LIFTING, WORKING AS A WATCHMAN OR WHAT HE WOULD LIKE TO DO, IF SUCH JOB WERE AVAILABLE, WORKING FOR THE WILDLIFE AND GAME DIVISION OF THE STATE OF OREGON, FOUND THAT IT WAS NOT NECESSARY TO REACH THE POINT OF MOTIVATION BECAUSE THE MOST RECENT MEDICAL REPORT CLEARLY INDICATED SOME ABILITY ON THE PART OF THE CLAIMANT TO WORK AT A GAINFUL AND SUITABLE OCCUPATION.

THE REFEREE CONCLUDED THAT CLAIMANT, WHO IS ONLY 42 YEARS OF AGE, WHILE HAVING A SIGNIFICANT AMOUNT OF DISABILITY, FAILED TO SHOW, EITHER MEDICALLY OR OTHERWISE, THAT HE IS TOTALLY DISABLED AND THAT THE AWARD OF 90 PER CENT OF THE MAXIMUM ALLOWABLE BY STATUTE FOR HIS UNSCHEDULED DISABILITY ADEQUATELY COMPENSATES HIM FOR HIS LOSS OF EARNING CAPACITY.

THE BOARD, ON DE NOVO REVIEW, DISAGREES WITH THE REFEREE. THERE IS AMPLE MEDICAL EVIDENCE TO INDICATE THE CLAIMANT, AT THE PRESENT TIME, IS PERMANENTLY AND TOTALLY DISABLED. CLAIMANT FINISHED THE NINTH GRADE AND THEN DROPPED OUT OF SCHOOL - SINCE THEN HE HAS WORKED AT VARIOUS MENIAL LABOR TYPE JOBS AND DURING HIS ENTIRE WORKING CAREER AS WELL AS THE TIME SPENT WITHIN THE MILITARY SERVICE CLAIMANT RECEIVED NO VOCATIONAL TRAINING OF ANY TYPE. HIS ENTIRE TRAINING HAS BEEN ON-THE-JOB TRAINING. CLAIMANT HAS HAD TWO SERIOUS SURGERIES, THE LAST PERFORMED TO REMEDY A PSEUDOARTHROSIS BETWEEN L4 AND L5, HOWEVER, THERE IS NO INDICATION THAT THIS PSEUDOARTHROSIS WAS CORRECTED BY THE DECEMBER 31, 1973 SURGERY.

DR. KIMBERLEY SAID THAT POSSIBLY THERE WERE 'OTHER THINGS' CLAIMANT COULD DO, HOWEVER, THE QUALIFICATIONS DR. KIMBERLEY ATTACHED TO THOSE 'OTHER THINGS' ARE MORE PERSUASIVE FOR A FINDING THAT CLAIMANT IS PERMANENTLY AND TOTALLY DISABLED UNLESS A MIRACLE CAN BE AFFECTED THROUGH REHABILITATION. CLAIMANT WAS EVALUATED BY THE VOCATIONAL REHABILITATION CENTER AND THE GENERAL IMPRESSION WAS THAT CLAIMANT DID NOT POSSESS PARTICULARLY STRONG APTITUDES NOR DID HE POSSESS CONSTRUCTIVE EMOTIONAL RESOURCES - IT WAS ALSO FOUND, HOWEVER, THAT PSYCHOLOGICAL FACTORS WERE NOT PREVENTING CLAIMANT FROM RETURNING TO GAINFUL EMPLOYMENT AS MUCH AS PHYSICAL FACTORS.

THE BOARD, RELYING UPON COOPER V. PUBLISHERS PAPER (UNDERSCORED), 3 OR APP 415, CONCLUDES THAT EVEN IF CLAIMANT IS CONSIDERED CAPABLE OF PERFORMING LIGHT WORK OR EARNING AN OCCASIONAL WAGE A FINDING OF TOTAL DISABILITY IS NOT PRECLUDED.

THE BOARD CONCLUDES, TAKING INTO CONSIDERATION THE SEVERE PHYSICAL INJURIES WHICH STILL RESULT IN DISABLING PAIN, CLAIMANT'S MENTAL CAPACITY, HIS LIMITED EDUCATION AND LACK OF TRAINING, THAT CLAIMANT IS CLEARLY WITHIN THE ODD-LOT CATEGORY AND THAT THE EMPLOYER FAILED TO PRODUCE ANY EVIDENCE THAT SOME KIND OF SUITABLE WORK WAS REGULARLY AND CONTINUOUSLY AVAILABLE TO THE CLAIMANT.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 22, 1975 IS REVERSED.

CLAIMANT IS PERMANENTLY AND TOTALLY DISABLED AS DEFINED BY ORS 656.206(1) AND SHALL BE CONSIDERED AS PERMANENTLY AND TOTALLY DISABLED FROM THE DATE OF THIS ORDER.

CLAIMANT'S COUNSEL SHALL BE AWARDED AS REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, 25 PER CENT OF THE INCREASED COMPENSATION AWARDED TO CLAIMANT BY THIS ORDER, PAID OUT OF SAID COMPENSATION AS PAID, TO A MAXIMUM OF 2,300 DOLLARS.

WCB CASE NO. 74-1826 FEBRUARY 6, 1976

JACK P. YOES, CLAIMANT

MOTION AND ORDER

FOR GOOD AND VALUABLE CONSIDERATION RECEIVED IN STATE ACCIDENT INSURANCE FUND CLAIM NUMBER EC 133192 PENDING BEFORE A REFEREE ON REQUEST FOR HEARING FROM CLOSING AND EVALUATION DETERMINATION DATED AND MAILED NOVEMBER 25, 1975 AND ON MOTION OF CLAIMANT, WITHOUT OBJECTION FROM RESPONDENT IT IS

ORDERED THAT THIS REQUEST FOR REVIEW BE AND THE SAME HEREBY IS DISMISSED WITH PREJUDICE AND THE ORDER OF REFEREE FORREST JAMES DATED OCTOBER 22, 1975 BE AND THE SAME HEREBY IS AFFIRMED.

DATED AND ENTERED THIS 6TH DAY OF FEBRUARY 1976.

SAIF CLAIM NO. AC 84657 FEBRUARY 9, 1976

DELLMORE CROY, CLAIMANT

RUDY M. MURGO, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
OWN MOTION ORDER REFERRED FOR HEARING

THIS CLAIMANT SUFFERED A COMPENSABLE INJURY TO HIS LOW BACK JULY 24, 1967 AND NOW REQUESTS THE BOARD TO REOPEN HIS CLAIM UNDER THE OWN MOTION JURISDICTION GRANTED TO THE BOARD PURSUANT TO ORS 656.278, ALLEGING HIS PRESENT PHYSICAL CONDITION IS THE RESULT OF THIS INDUSTRIAL INJURY. CLAIMANT SUPPORTS HIS REQUEST WITH A LETTER FROM DR. ROBERT F. ANDERSON, HIS TREATING PHYSICIAN, WHICH STATES THAT CLAIMANT IS UNABLE TO CARRY OUT A GAINFUL OCCUPATION.

THE STATE ACCIDENT INSURANCE FUND RESPONDS BY DENYING ANY RESPONSIBILITY FOR CLAIMANT'S PRESENT CONDITION BASED UPON EXAMINATION AND REPORTS FROM THE ORTHOPEDIC CONSULTANTS.

WITH CONFLICTING MEDICAL OPINIONS PRESENTED TO IT, THE BOARD IS UNABLE TO DETERMINE IF THERE IS AN OBLIGATION ON THE PART OF THE FUND TO PROVIDE ADDITIONAL COMPENSATION OR MEDICAL CARE TO CLAIMANT FOR HIS PRESENT CONDITION.

THEREFORE, THIS MATTER IS REFERRED TO THE HEARINGS DIVISION WITH INSTRUCTIONS TO HOLD A HEARING, TAKE EVIDENCE, PREPARE A TRANSCRIPT OF THE PROCEEDINGS AND SUBMIT A RECOMMENDATION FROM THE REFEREE AS TO THE DISPOSITION OF THE ISSUE.

WCB CASE NO. 74-1909 FEBRUARY 9, 1976

DAVID A. WRIGHT, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE,
DEFENSE ATTYS.
ORDER OF DISMISSAL

A REQUEST FOR REVIEW, HAVING BEEN DULY FILED WITH THE WORKMEN'S COMPENSATION BOARD IN THE ABOVE-ENTITLED MATTER BY THE CLAIMANT, AND SAID REQUEST FOR REVIEW NOW HAVING BEEN WITHDRAWN,

IT IS THEREFORE ORDERED THAT THE REQUEST FOR REVIEW NOW PENDING BEFORE THE BOARD IS HEREBY DISMISSED AND THE ORDER OF THE REFEREE IS FINAL BY OPERATION OF LAW.

CLAIM NO. 403 C 12628 FEBRUARY 9, 1976

FRANK L. LENGELE, CLAIMANT

THOMAS J. REEDER, CLAIMANT'S ATTY.
COLLINS, FERRIS AND VELURE,
DEFENSE ATTY.
OWN MOTION ORDER REFERRED FOR HEARING

CLAIMANT HAS PETITIONED THE BOARD TO REOPEN HIS CLAIM FOR FURTHER MEDICAL CARE AND TREATMENT PURSUANT TO THE OWN MOTION JURISDICTION GRANTED THE BOARD UNDER ORS 656.278, CONTENDING HIS PRESENT PHYSICAL CONDITION IS THE RESULT OF HIS COMPENSABLE INDUSTRIAL INJURY SUSTAINED JANUARY 31, 1968.

THE BOARD DOES NOT HAVE SUFFICIENT INFORMATION BEFORE IT ON WHICH TO MAKE A DECISION AND IS, THEREFORE, REFERRING THIS MATTER TO THE HEARINGS DIVISION WITH INSTRUCTIONS TO HOLD A HEARING, TAKE EVIDENCE, PREPARE A TRANSCRIPT OF THE PROCEEDINGS AND SUBMIT A RECOMMENDATION FROM THE REFEREE AS TO THE DISPOSITION OF THE ISSUES.

IT IS SO ORDERED.

WCB CASE NO. 74-4068 FEBRUARY 10, 1976

MARY M. JONES, CLAIMANT
GALTON AND POPICK, CLAIMANT'S ATTYS.
RAY MIZE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH FOUND CLAIMANT DID NOT SUSTAIN A COMPENSABLE INJURY OR AN OCCUPATIONAL DISEASE NOR WAS SHE ENTITLED TO PENALTIES AND ATTORNEY FEES - THAT THE DENIAL OF HER CLAIM BY THE EMPLOYER WAS PROPER.

CLAIMANT IS 57 YEARS OLD, SHE HAS WORKED 20 YEARS FOR THE EMPLOYER IN SUPPLY DISTRIBUTION, WITHOUT ANY PRIOR HISTORY OF SIGNIFICANT INJURIES OR COMPLAINTS. IN 1969 CLAIMANT BEGAN COMPLAINING OF CRAMPS IN BOTH FEET OCCURRING INTERMITTENTLY UNTIL 1973, AT WHICH TIME THEY INCREASED IN SEVERITY AND SHE HAD TO TERMINATE HER EMPLOYMENT ON AUGUST 8, 1974 THEREFOR.

CLAIMANT HAD BEEN SEEN BY DR. SITTNER ON JULY 29, 1974, COMPLAINING OF PAIN IN HER LEFT HEEL. HE DIAGNOSED AN INFLAMMATION OF THE TENDON RUNNING FROM THE ARCH TO THE HEEL. CLAIMANT CONTINUED TO BE SEEN BY DR. SITTNER BUT, AS OF SEPTEMBER 24, 1974, HAD NEVER CLAIMED ANY RELATIONSHIP BETWEEN HER SYMPTOMS AND HER WORK ACTIVITY. DR. SITTNER MADE A FINAL DIAGNOSIS OF PLANTER FASCIITIS OF BOTH FEET. HE TESTIFIED AT THE HEARING THAT CLAIMANT HAD A CONDITION OF METATARSALGIA ASSOCIATED WITH LONG STANDING FLAT FEET WHICH WAS CONGENITAL AND NOT OF TRAUMATIC ORIGIN.

DRS. SHORT, JONES AND BERG, ALL ORTHOPEDIC SURGEONS, EXAMINED CLAIMANT AND FOUND NO SPECIFIC INJURY HAD BEEN SUFFERED WITH RESPECT TO CLAIMANT'S FEET AND THAT THERE WAS NO OCCUPATIONAL DISEASE IN HER FEET OR LEGS - THEY MADE THE SAME DIAGNOSIS AS DR. SITTNER.

CLAIMANT WAS SEEN BY DR. NORTH, WHO FELT THAT HER CONDITION WAS NOT DIRECTLY CAUSED BY HER JOB BUT HAD BEEN AGGRAVATED BY IT.

THE CLAIMANT DID NOT TESTIFY TO ANY SPECIFIC TRAUMA OR OF ANY REPEATED TRAUMA TO HER FEET, LEGS OR BACK NOR DID SHE TESTIFY TO ANY PARTICULAR OR SPECIAL ACTIVITY OVER AND ABOVE THE REQUIREMENTS OF NORMAL MOVEMENT IN THE COURSE OF HER EMPLOYMENT. HER ONLY CLAIM WAS THAT SHE WAS REQUIRED TO WORK ON A CONCRETE FLOOR.

THE REFEREE FOUND THAT ALL ACTIVITIES, AWAY FROM WORK AS WELL AS AT WORK, AGGRAVATED THE UNDERLYING PATHOLOGY WHICH WAS INDUSTRIALLY IDIOPATHIC. HE FOUND NO EVIDENCE OF ANYTHING RELATING TO THE WORK ACTIVITIES OR ANYTHING INDIGENOUS TO HER EMPLOYMENT THAT WOULD BE A MATERIAL CONTRIBUTING FACTOR IN PRECIPITATING CLAIMANT'S UNDERLYING PATHOLOGY RESULTING IN AN ACCIDENTAL INJURY OR OCCUPATIONAL DISEASE.

IN THE ABSENCE OF ANY SPECIFIC TRAUMA OR REPEATED TRAUMA AND THE LACK OF FINDING OF ANY FACTOR PECULIAR TO CLAIMANT'S EMPLOYMENT, THE REFEREE CONCLUDED THERE WAS NEITHER AN ACCIDENTAL INJURY NOR OCCUPATIONAL DISEASE WITHIN THE PURVIEW OF THE WORKMEN'S COMPENSATION ACT AND THE CLAIM WAS PROPERLY DENIED.

WITH RESPECT TO THE IMPOSITION OF PENALTIES AND ASSESSMENT OF ATTORNEY'S FEE PURSUANT TO ORS 656.262(8)(A), THE REFEREE COULD NOT FIND THAT THE EMPLOYER WAS TOTALLY UNJUSTIFIED OR UNREASONABLE

IN THE DELAY OR REFUSAL TO PAY COMPENSATION OR UNREASONABLY DELAYING OR REFUSING TO ACCEPT OR DENY THE CLAIM. HE CONCLUDED THAT THE EMPLOYER, THEREFORE, WAS NOT SUBJECT TO EITHER THE ASSESSMENT OF PENALTIES OR THE PAYMENT OF CLAIMANT'S ATTORNEY FEE.

THE BOARD, ON DE NOVO REVIEW, FINDS NO MEDICAL EVIDENCE TO SUPPORT COMPENSABILITY OF CLAIMANT'S CLAIM AND, THEREFORE, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED MAY 9, 1975 IS AFFIRMED.

CLAIM NO. 274-512-822 FEBRUARY 10, 1976

LOLA MAE LOVEL, CLAIMANT

KEITH D. SKELTON, CLAIMANT'S ATTY.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE,
DEFENSE ATTYS.
OWN MOTION ORDER

THIS CLAIMANT ORIGINALLY SUFFERED A COMPENSABLE INJURY ON JULY 6, 1968 WHILE WORKING AS A CUSTODIAN FOR THE PORTLAND WARD OF THE CHURCH OF LATTER DAY SAINTS. ON JULY 22, 1968 A LAMINECTOMY WAS PERFORMED AND THE CLAIM WAS CLOSED ON AUGUST 26, 1969 WITH 20 PER CENT UNSCHEDULED LOW BACK DISABILITY.

THE CLAIM WAS REOPENED ON DECEMBER 3, 1970 WHEN CLAIMANT CAME UNDER THE CARE AND TREATMENT OF DR. CHERRY AND DR. KLOOS. ANOTHER LAMINECTOMY WAS PERFORMED ON APRIL 2, 1971. AN EVALUATION MADE ON SEPTEMBER 13, 1972 FOUND CLAIMANT'S CONDITION STATIONARY, THAT SHE WAS ABLE TO DO LIGHT WORK AND THAT THERE WAS A MILD OBJECTIVE LOSS. THE SECOND DETERMINATION ORDER MAILED OCTOBER 17, 1972 GRANTED NO ADDITIONAL PERMANENT DISABILITY. DR. CHERRY DID NOT AGREE WITH THIS AWARD - HE FELT CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED.

SUBSEQUENTLY CLAIMANT WAS SEEN AT THE PAIN CLINIC AND BY SEVERAL OTHER PHYSICIANS INCLUDING DR. KIMBAL AND DR. QUAN. PURSUANT TO AN ORDER ON STIPULATION DATED JULY 24, 1975, CLAIMANT WAS AWARDED AN ADDITIONAL 45 PER CENT AWARD OF PERMANENT PARTIAL DISABILITY.

CLAIMANT AGAIN CAME UNDER THE CARE OF DR. CHERRY AND, PURSUANT TO THE BOARD'S OWN MOTION ORDER DATED SEPTEMBER 26, 1975, THE CLAIM WAS REOPENED AS OF SEPTEMBER 8, 1975. CLAIMANT WAS HOSPITALIZED BUT NO SURGERY WAS PERFORMED. BASED ON TWO FINAL REPORTS FROM DR. CHERRY AND DR. KLOOS, THE EVALUATION DIVISION OF THE BOARD RECOMMENDS THAT CLAIMANT BE GRANTED AN AWARD OF PERMANENT TOTAL DISABILITY EFFECTIVE JANUARY 1, 1976.

ORDER

CLAIMANT IS ENTITLED TO TEMPORARY TOTAL DISABILITY COMPENSATION FROM SEPTEMBER 8, 1975 THROUGH DECEMBER 31, 1975 - AND AS OF JANUARY 1, 1976, CLAIMANT SHALL BE CONSIDERED AS PERMANENTLY AND TOTALLY DISABLED.

CLAIMANT'S COUNSEL IS ALLOWED AS A REASONABLE ATTORNEY'S FEE, 25 PER CENT OF THE INCREASE IN COMPENSATION GRANTED HEREBY, NOT TO EXCEED THE SUM OF 2,300 DOLLARS.

JIMMY FAULK, CLAIMANT

ROBERT J. THORBECK, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
ORDER ON MOTION

ON FEBRUARY 5, 1976 THE STATE ACCIDENT INSURANCE FUND, APPEARING SPECIALLY, MOVED TO DISMISS THE REQUEST FOR REVIEW MADE BY EBI, INC. IN THE ABOVE ENTITLED MATTER.

THE REQUEST FOR REVIEW BY INDEPENDENT MOTOR TRANSPORT AND ITS CARRIER, EBI, INC., WAS MADE JULY 21, 1975 AND, AFTER DE NOVO REVIEW, THE BOARD SET ASIDE THE OPINION AND ORDER OF THE REFEREE, DATED JULY 9, 1975 AND REMANDED THE MATTER TO THE HEARINGS DIVISION.

THE MATTER WAS TO BE SET FOR HEARING ON THE ISSUE OF WHETHER THE MARCH 28, 1973 INCIDENT WAS A NEW INJURY AND, THEREFORE, THE RESPONSIBILITY OF INDEPENDENT MOTOR TRANSPORT AND ITS CARRIER, EBI, INC., OR AN AGGRAVATION OF AN INJURY SUFFERED ON JANUARY 10, 1971 BY CLAIMANT WHILE IN THE EMPLOY OF MASTER CHEMICAL CORPORATION AND, THEREFORE, THE RESPONSIBILITY OF THE STATE ACCIDENT INSURANCE FUND.

AFTER FULL CONSIDERATION, THE BOARD CONCLUDES THAT THE GROUNDS SET FORTH IN SUPPORT OF THE MOTION TO DISMISS ARE BOTH IRRELEVANT AND INSUFFICIENT.

THEREFORE, THE MOTION TO DISMISS FILED BY THE STATE ACCIDENT INSURANCE FUND ON FEBRUARY 5, 1976 IN THE ABOVE ENTITLED MATTER IS HEREBY DENIED.

MOTION TO DISMISS

DEFENDANT STATE ACCIDENT INSURANCE FUND APPEARING SPECIALLY MOVES TO DISMISS THE REQUEST FOR REVIEW OF EBI COMPANIES, INC., FOR THE REASONS SET FORTH IN THE AFFIDAVIT OF QUINTIN B. ESTELL, ASSISTANT ATTORNEY GENERAL, ONE OF ITS ATTORNEYS, MARKED EXHIBIT 'A' SHOWING - (1) NO COPY OF ANY ORDER SUBSEQUENT TO THE ORDER THAT DEFENDANT STATE ACCIDENT INSURANCE FUND NOT BE MADE A PARTY WAS EVER SERVED UPON SAID DEFENDANT UNTIL A COPY OF A PURPORTED ORDER ON REVIEW WAS RECEIVED BY IT. - (2) THERE WAS NEVER ANY SERVICE OF ANY REQUEST FOR REVIEW MADE UPON THE STATE ACCIDENT INSURANCE FUND - (3) NO NOTICE THAT REVIEW WAS REQUESTED WAS EVER SENT FROM THE WORKMEN'S COMPENSATION BOARD TO DEFENDANT STATE ACCIDENT INSURANCE FUND - (4) NO COPY OF ANY TRANSCRIPT OR OF ANY DOCUMENTS WAS EVER SERVED UPON DEFENDANT STATE ACCIDENT INSURANCE FUND - (5) NO COPY OF ANY LETTER OF THE BOARD, WHICH (UNDERSCORED) IS TO ALWAYS BE SENT TO LITIGANTS, WAS EVER SENT TO DEFENDANT STATE ACCIDENT INSURANCE FUND - (6) NO COPY OF ANY BRIEF WAS EVER SERVED UPON DEFENDANT STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 75-1880 FEBRUARY 10, 1976

JACK W. O' BRYANT, CLAIMANT
EVOHL F. MALAGON, CLAIMANT'S ATTY.
JONES, LANG, KLEIN, WOLF AND SMITH,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

Reviewed by Board Members Wilson and Moore.

Claimant requests Board review of the referee's order which awarded claimant 192 degrees for 60 per cent unscheduled neck disability. Claimant contends the claim was prematurely closed by the determination order, dated May 9, 1974. The issue of extent of permanent disability is before the Board also because of the position taken by the employer.

Claimant, age 49, suffered a compensable injury in September, 1971 when the tanker truck he was driving slipped off the road and crashed. Claimant experienced head, neck and shoulder pains and had difficulty focusing his eyes. Following a myelogram, an anterior discectomy and fusion at C5-6 was performed.

A determination order, dated November 2, 1973, awarded claimant 64 degrees for unscheduled neck disability. After re-opening, a second determination order, dated May 9, 1975, awarded claimant an additional 32 degrees for a total of 96 degrees equal to 30 per cent unscheduled neck disability. Claimant's counsel urges that claimant's condition is not stationary and the claim should not have been closed.

The referee found there was no further treatment contemplated, either on a neurological nor orthopedic basis, and the only treatment claimant was presently undergoing was group therapy under Dr. Carter, a psychiatrist. This treatment is the responsibility of the employer pursuant to ORS 656.245.

The test for determining the degree of disability resulting from an unscheduled injury is loss of earning capacity measured by considering the effect the physical injury has upon claimant and taking into account his intelligence, education, age and trainability. Motivation to seek employment is also a relevant factor.

Claimant now has intermittent but chronic pain in his head, neck and shoulder - has daily, often severe, headaches - has a constant head and neck tremor and holds his head in semi-flexion as a means of alleviating the headaches. The medical evidence and testimony of claimant and witnesses establishes that claimant is now precluded from returning to truck driving, a job which paid upwards of 20,000 dollars per year.

Claimant's present disabilities appear to involve elements of both physical and psychological problems. There is no indication claimant has sought any post-injury employment in light work. Although claimant possesses no skills other than those acquired in truck driving, he does have intellectual resources and an adequate understanding of mechanical and electrical principles. Claimant is receiving a good tax-free disability income and, as a result, the prognosis for his vocational rehabilitation is guarded.

The referee concluded claimant's condition was stationary and he was not, in fact, permanently and totally disabled, but

WAS ENTITLED TO AN ADDITIONAL 96 DEGREES FOR A TOTAL AWARD OF 192 DEGREES OF THE MAXIMUM OF 320 DEGREES FOR HIS UNSCHEDULED NECK DISABILITY.

THE BOARD, ON DE NOVO REVIEW, CONCURS AND AFFIRMS AND ADOPTS THE ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 17, 1975 IS AFFIRMED.

WCB CASE NO. 74-3503 FEBRUARY 10, 1976

IN THE MATTER OF THE COMPENSATION OF
DARLENE MILLS, CLAIMANT
AND IN THE MATTER OF COMPLYING STATUS OF
EDWARD A. LONGSHORE, SR., RUBY T. LONGSHORE, EDWARD A. LONGSHORE, JR., AND DARLENE D. LONGSHORE, DBA MYRTLE GROVE MOTEL OR JAY V. SIMLER, DBA MYRTLE GROVE MOTEL, EMPLOYER
EVOHL F. MALAGON, CLAIMANT'S ATTY.
FARRELL AND SPENCE, DWYER AND JENSEN,
PAUL E. GEDDES, DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH FOUND THAT EDWARD A. LONGSHORE, SR., EDWARD A. LONGSHORE, JR., AND DARLENE D. LONGSHORE, DBA MYRTLE GROVE MOTEL AND TRAILER PARK (HEREINAFTER REFERRED TO AS LONGSHORE) WAS A NONCOMPLYING SUBJECT EMPLOYER ON SEPTEMBER 2, 1973 WHEN CLAIMANT, A SUBJECT WORKMAN, SUFFERED A COMPENSABLE INJURY ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT.

ON MAY 17, 1973 LONGSHORE PURCHASED THE MOTEL AND TRAILER PARK FROM JAY SIMLER, DBA MYRTLE GROVE MOTEL, (HEREINAFTER REFERRED TO AS SIMLER) AND IN JUNE 1973 CLAIMANT MOVED INTO THE MOTEL UNDER AN AGREEMENT WITH LONGSHORE TO ACT AS MANAGER THEREOF. CLAIMANT'S DUTIES WERE TO CLEAN THE UNITS WHEN THEY BECAME VACANT AND SHOW THEM TO PROSPECTIVE RENTERS AND CONCLUDE RENTAL AGREEMENTS - SHE WAS TO RECEIVE 20 DOLLARS FOR EACH UNIT SHE CLEANED AND WAS GIVEN A RENT REDUCTION FOR HER OWN UNIT IN WHICH SHE LIVED. CLAIMANT HAD OTHER DUTIES WHICH INCLUDED MAINTENANCE WORK IN GENERAL.

ON AUGUST 6, 1973 LONGSHORE NOTIFIED SIMLER THAT BECAUSE OF ALLEGED MISREPRESENTATIONS THEY WERE SEEKING RESCISSION OF THE CONTRACT. SIMLER WAS ALSO NOTIFIED THAT LONGSHORE WOULD REMAIN IN POSSESSION SOLELY TO PROTECT THE PROPERTY. CLAIMANT WAS ADVISED OF THIS ACTION BY LONGSHORE AND THE RECEIPT BOOKS AND KEYS WERE TURNED OVER TO CLAIMANT AND HER HUSBAND. THE LONGSHORE FAMILIES RETURNED TO CALIFORNIA.

ON AUGUST 31, 1973 CLAIMANT RECEIVED A LETTER FROM MR. LONGSHORE, SR., ADVISING HER THAT HIS ATTORNEY HAD INFORMED HIM NOT TO RENT TO ANYONE AFTER SEPTEMBER 1, BUT THAT THIS DID NOT MEAN THAT CLAIMANT AND HER HUSBAND WOULD HAVE TO MOVE. THE LETTER WAS RECEIVED BY CLAIMANT ON SEPTEMBER 4, 1973.

ON SEPTEMBER 2, 1973 CLAIMANT ALLEGES THAT SHE FELL IN AN OPEN DITCH WHILE WALKING FROM THE APARTMENT TO THE PUMP HOUSE TO CHLORINATE THE WATER SUPPLY. SHE FURTHER ALLEGES SHE WAS IN THE SCOPE AND COURSE OF HER EMPLOYMENT AT THE TIME SHE SUFFERED FROM INJURIES RESULTING FROM THIS FALL.

THE REFEREE FOUND THAT NEITHER LONGSHORE NOR SIMLER CARRIED A POLICY OF WORKMEN'S COMPENSATION INSURANCE ON SEPTEMBER 2, 1973 AND, THEREFORE, IF EITHER WAS FOUND TO BE AN EMPLOYER THERE WAS, AT THAT DATE, NO COMPLIANCE WITH ORS 656.016.

THE REFEREE FOUND THAT CLAIMANT WAS AN EMPLOYE FROM MID-JULY TO, AT LEAST, AUGUST 6, 1973 - ALL OF THE REQUIREMENTS TO ESTABLISH AN EMPLOYER-EMPLOYE RELATIONSHIP BETWEEN LONGSHORE AND CLAIMANT WERE PRESENT. THE REFEREE FURTHER FOUND THAT CLAIMANT WAS NOT A NONSUBJECT WORKMAN AS DESCRIBED IN ORS 656.027(3) BY VIRTUE OF THE WORK BEING BOTH CASUAL AND NOT IN THE COURSE OF HIS EMPLOYER'S TRADE, BUSINESS OR PROFESSION. TO THE CONTRARY, THE EVIDENCE INDICATED THAT THE MOTEL OPERATION WAS A BUSINESS OF LONGSHORE AND THAT ALTHOUGH THE AMOUNTS PAID CLAIMANT MAY HAVE BEEN LESS THAN 100 DOLLARS IN ANY 30 DAY PERIOD, THE RULING IN BUCKNER V. KENNEDY'S RIDING ACADEMY (UNDERSCORED), 99 ADV SH 1525, IS THAT THE PROVISIONS OF THE STATUTE PROVIDING THAT TOTAL LABOR COSTS IN A 30 DAY PERIOD MUST EXCEED 100 DOLLARS IS NOT APPLICABLE IN THOSE INSTANCES WHERE THE EMPLOYMENT IS IN THE COURSE OF THE TRADE, BUSINESS, OR PROFESSION OF THE EMPLOYER. THE REFEREE CONCLUDED THAT CLAIMANT WAS A SUBJECT EMPLOYE.

THE REFEREE FURTHER FOUND THAT SUBSEQUENT TO AUGUST 6, 1973 LONGSHORE ACQUIESCED IN CLAIMANT AND HER HUSBAND STAYING ON AS CARETAKERS OF THE PROPERTY. THE LETTER TO CLAIMANT FROM MR. LONGSHORE, SR., DATED AUGUST 31, 1973 CERTAINLY INDICATED THAT LONGSHORE WAS AWARE THAT CLAIMANT HAD REMAINED ON THE PREMISES AND THAT THEY WERE TO BE PERMITTED TO CONTINUE REMAINING ON THE PREMISES BUT NOT TO RENT ANY UNITS TO ANYONE. THE INSTRUCTION NOT TO RENT IS A CONCLUSIVE SHOWING OF PRINCIPLE-AGENT RELATIONSHIP EXISTING AS OF AUGUST 31. THE REFEREE CONCLUDED THAT EVEN IF SUCH LETTER COULD BE CONSTRUED TO SHOW AN INTENT TO TERMINATE SUCH RELATIONSHIP, THE TERMINATION WOULD NOT BE EFFECTIVE UNTIL THE LETTER WAS RECEIVED WHICH WAS ON SEPTEMBER 4, 1973. SIMLER WAS ALSO AWARE THAT THE PROPERTY WAS UNDER A CARETAKER APPOINTED BY LONGSHORE AND THE REFEREE CONCLUDED IT WAS UNREASONABLE TO ASSUME THAT LONGSHORE WITH THE SUBSTANTIAL INVESTMENT IN THE REAL AND PERSONAL PROPERTY WOULD SIMPLY WALK OFF AND ABANDON IT LEAVING NO CARETAKERS WHEN, AT THAT TIME, IT HAD NO KNOWLEDGE WHETHER THE SUIT FOR RESCISSION WOULD BE SUCCESSFUL.

THE REFEREE CONCLUDED THAT THE EMPLOYER-EMPLOYE RELATIONSHIP CONTINUED UNINTERRUPTED UNTIL THE AUGUST 31, 1973 LETTER WAS RECEIVED ON SEPTEMBER 4 BY CLAIMANT. HE CONCLUDED THAT THERE WAS NO EVIDENCE THAT SIMLER WAS AN EMPLOYER OF CLAIMANT ON SEPTEMBER 2, 1973 - HE HAD TALKED TO CLAIMANT ABOUT THE POSSIBILITY OF BEING APPOINTED A RECEIVER BUT, IN HIS AFFIDAVIT REQUESTING SUCH APPOINTMENT, SIMLER HAD INDICATED THAT THE PERSON LEFT IN CHARGE BY LONGSHORE WAS SATISFACTORY TO HIM. AT NO TIME DID SIMLER EVER GIVE INSTRUCTIONS TO THE CLAIMANT TO TAKE ANY ACTION AT THE MOTEL ON HIS BEHALF.

WITH RESPECT TO WHETHER OR NOT CLAIMANT HAD SUSTAINED AN INJURY ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT, THE REFEREE FOUND THAT THOUGH THERE WAS SOME TESTIMONY THAT CLAIMANT WAS WEARING HIGH HEELS AND PREPARING TO GO INTO TOWN THAT NIGHT THIS DID NOT, BY AND OF ITSELF, INDICATE THAT SHE WAS NOT

DOING HER CHORES. THE EVIDENCE THAT SHE WAS WALKING OUT ON THE PROPERTY TO CHLORINATE THE WATER SUPPLY, WHICH WAS A PART OF HER EMPLOYMENT DUTIES, WAS NOT CONTRADICTED. THE REFEREE ACCEPTED CLAIMANT'S TESTIMONY AND CONCLUDED THAT SHE HAD SUFFERED A COMPENSABLE INJURY ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT ON SEPTEMBER 2, 1973.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE OPINION AND ORDER OF THE REFEREE, AS AMENDED.

ORDER

THE ORDER OF THE REFEREE DATED JUNE 30, 1975, AS AMENDED BY THE ORDER DATED JULY 21, 1975, IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 400 DOLLARS PAYABLE IN THE FIRST INSTANCE BY THE STATE ACCIDENT INSURANCE FUND, BUT RECOVERABLE BY THE WORKMEN'S COMPENSATION BOARD FROM EDWARD A. LONGSHORE, SR., EDWARD A. LONGSHORE, JR., AND DARLENE D. LONGSHORE, DBA MYRTLE GROVE MOTEL, UNDER THE PROVISIONS OF ORS 656.054(3).

WCB CASE NO. 74-3166 FEBRUARY 11, 1976
WCB CASE NO. 75-1490

MELVIN E. BARNEY, CLAIMANT

DYE AND OLSON, CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH APPROVED THE DENIALS OF CLAIMANT'S CLAIMS FOR AGGRAVATION IN WCB CASE NOS. 74-3166 AND 75-1490.

ON JANUARY 12, 1972 CLAIMANT HAD SUFFERED MYOCARDIAL INFARCTION WHILE AT WORK AND, ON JULY 4, 1972, SUFFERED A SECOND MYOCARDIAL INFARCTION WHICH WAS AN EXTENSION OF THE FIRST. BOTH WERE FOUND TO BE COMPENSABLE INTERIOR (UNDERSCORED) INFARCTIONS - THE RIGHT CORONARY ARTERY PRINCIPALLY SUPPLIED BLOOD TO THE AREAS DAMAGED.

CLAIMANT HAS NOT WORKED SINCE THE SECOND MYOCARDIAL INFARCTION, HOWEVER, HE HAS PARTICIPATED IN RODEO ACTIVITIES AND EVENTS. ON MAY 23, 1974 CLAIMANT SUFFERED A THIRD MYOCARDIAL INFARCTION. THIS INFARCTION WAS AN ANTERIOR (UNDERSCORED) INFARCTION INVOLVING THE LEFT CORONARY ARTERY WHICH SUPPLIES BLOOD TO THE FRONT OF THE HEART, THE AREA DAMAGED. AFTER THE THIRD INFARCTION CLAIMANT HAD 100 PER CENT OCCLUSION OF THE RIGHT CORONARY ARTERY AND CORONARY DISEASE IN BOTH THE RIGHT AND LEFT ARTERIES.

CLAIMANT CONTENDS THAT THE FIRST TWO INFARCTIONS TO THE ONE AREA OF THE HEART RESULTED IN INCREASED STRESS ON THE REST OF THE HEART, THUS CULMINATING IN THE THIRD MYOCARDIAL INFARCTION. HE RELIES UPON THE OPINION OF DR. GROSSMAN, WHO FELT THAT THE ABOVE-AVERAGE LEVEL OF FATTY SUBSTANCE IN CLAIMANT'S BLOOD, DIABETES, OBESITY AND HIS SMOKING WERE ALL FACTORS CONTRIBUTING TO CORONARY

ARTERY DISEASE AND, AS THESE CONDITIONS CONTINUED TO THE PRESENT TIME, SPECIFICALLY CONTRIBUTED TO THE THREE MYOCARDIAL INFARCTIONS.

DR. ROGERS ALSO WAS OF THE OPINION THAT THE ORIGINAL MYOCARDIAL INFARCTION IN 1972 TRIGGERED THE CHAIN OF EVENTS WHICH CULMINATED IN THE THIRD MYOCARDIAL INFARCTION, HOWEVER, DR. ROGERS DOES NOT INDICATE THAT THE TWO PRIOR MYOCARDIAL INFARCTIONS WERE MATERIALLY RELATED TO THE THIRD. NEITHER DR. GROSSMAN NOR DR. ROGERS TREATED OR EXAMINED CLAIMANT NOR DID THEY CONSULT WITH HIS TREATING PHYSICIAN, DR. HOWARD, AN INTERNIST WITH CONSIDERABLE EXPERIENCE IN CARDIOLOGY.

DR. HOWARD WAS OF THE OPINION THAT THE THIRD MYOCARDIAL INFARCTION WAS NOT MATERIALLY RELATED TO THE TWO PRIOR ONES. THE RIGHT CORONARY ARTERY SUPPLIED BLOOD TO THE AREA DAMAGED BY THE FIRST TWO INFARCTIONS, THE LEFT CORONARY ARTERY WHICH WAS INVOLVED IN THE THIRD INFARCTION SUPPLIES BLOOD TO AN ENTIRELY DIFFERENT AREA. DR. HOWARD FELT THAT THE COMBINATION OF DIABETES, LIPACIDEMIA, OBESITY AND SMOKING WERE MATERIAL CAUSAL FACTORS IN THE THIRD MYOCARDIAL INFARCTION TOGETHER WITH THE UNDERLYING PROGRESSIVE ARTERIOSCLEROTIC HEART DISEASE, ALL OF WHICH EXISTED SUBSEQUENT TO THE 1972 INFARCTION. CLAIMANT'S CONDITION WAS CONSIDERED INOPERABLE AND HE HAD BEEN TOLD NOT TO ENGAGE IN ANY PHYSICAL ACTIVITY OR WORK, HOWEVER, HE DID ENGAGE TO THE EXTENT OF PARTICIPATING IN RODEOS AND DR. HOWARD FELT SUCH ACTIVITY WAS DETRIMENTAL TO HIS CONDITION.

THE REFEREE, BASED PRIMARILY UPON THE OPINIONS OF DR. HOWARD, WHO HAD TREATED CLAIMANT FOR ALL THREE MYOCARDIAL INFARCTIONS, CONCLUDED THAT CLAIMANT HAD FAILED TO SUSTAIN HIS BURDEN OF PROOF THAT THE THIRD MYOCARDIAL INFARCTION WAS AN AGGRAVATION OF EITHER THE FIRST OR SECOND INFARCTION. DR. HOWARD AGREED THAT THE TWO INFARCTIONS OCCURRING IN 1972 WERE RELATED AS THEY INVOLVED THE SAME ARTERY AND OCCURRED RELATIVELY CLOSE IN TIME - THIS WAS NOT THE SITUATION WITH RESPECT TO THE 1974 INFARCTION.

WCB CASE NO. 74-3166 AND 75-1490 WERE TREATED BY THE REFEREE AS ONE CLAIM - TWO CLAIMS HAD BEEN FILED FOR THE SAME INCIDENT.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 18, 1975 IS AFFIRMED.

WCB CASE NO. 74-1694 FEBRUARY 11, 1976

GARY T. CHRISTENSEN, CLAIMANT

FROHMAYER AND DEATHERAGE,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH DENIED CLAIMANT'S CLAIM FOR FURTHER COMPENSATION FOR MEDICAL

SERVICES BETWEEN JULY 6, 1973 AND THE DATE OF HIS ORDER (SEPTEMBER 22, 1975) AND FOR ADDITIONAL TEMPORARY TOTAL DISABILITY BETWEEN SEPTEMBER 1, 1972 AND THE DATE OF HIS ORDER, AFFIRMED THE DETERMINATION ORDER MAILED JULY 26, 1973 AND DENIED CLAIMANT'S CLAIM FOR AGGRAVATION.

CLAIMANT SUSTAINED A COMPENSABLE INJURY TO HIS MID AND LOW BACK ON AUGUST 16, 1972 - THE CLAIM WAS ACCEPTED AND CLOSED JULY 26, 1973 BY DETERMINATION ORDER WHICH AWARDED CLAIMANT TEMPORARY TOTAL DISABILITY COMPENSATION TO SEPTEMBER 1, 1972 AND 16 DEGREES FOR 5 PER CENT UNSCHEDULED LOW BACK DISABILITY.

CLAIMANT HAD A PREEXISTING DEVELOPMENTAL CONGENITAL ANOMALY OF THE LUMBAR SPINE DESCRIBED AS A 'TRANSITIONAL VERTEBRA'. PRIOR TO AUGUST 16, 1972 CLAIMANT HAD EXPERIENCED ONSETS OF PAIN SYMPTOMS DUE TO EXACERBATION OF THIS PREEXISTING CONDITION BY BACK TRAUMAS BUT NONE WERE SERIOUS ENOUGH TO PREVENT CLAIMANT FROM RETURNING TO WORK SOON THEREAFTER. CLAIMANT HAD BEEN EMPLOYED AS A CHECKER FOR THE EMPLOYER FOR SOME THREE YEARS PRIOR TO HIS 1972 INJURY AND FOR SEVERAL MONTHS PRIOR TO THE INJURY HAD NOT EXPERIENCED ANY BACK PROBLEMS.

AFTER THE AUGUST 16, 1972 INJURY, WHICH WAS DIAGNOSED AS A LUMBAR-DORSAL CONTUSION AND WHICH ALSO EXACERBATED HIS TRANSITIONAL VERTEBRA CONDITION, CLAIMANT RETURNED TO WORK ON SEPTEMBER 1, 1972. CLAIMANT EXPERIENCED SOME OCCASIONAL ACHING IN THE LOW BACK BROUGHT ON BY PROLONGED STANDING OR HEAVY LIFTING, BENDING OR TWISTING ACTIVITIES, BUT HIS CONDITION WAS CONSIDERED TO BE STATIONARY AND HIS CLAIM WAS CLOSED ON JULY 26, 1973.

CLAIMANT CONTINUED TO WORK FULL TIME UNTIL JANUARY 31, 1974, BUT ON THE FOLLOWING DAY SOUGHT THE SERVICES OF DR. LYNCH FOR CHRONIC RECURRENT LOW BACK PAIN. FOUR OR FIVE DAYS PRIOR TO SEEING DR. LYNCH, CLAIMANT HAD SLIPPED AND FALLEN IN THE BATHTUB AND HIS SYMPTOMS HAD BECOME MORE SEVERE. CLAIMANT WAS RELEASED TO RETURN TO HIS REGULAR JOB ON MAY 6, 1974 WITH A PRESCRIPTION FOR PAIN MEDICATION AND ADVICE TO WEAR A BACK BRACE. HE RETURNED TO FULL TIME WORK AND CONTINUED UNTIL OCTOBER 28, 1974 WHEN AGAIN HE EXPERIENCED SEVERE LOW BACK PAIN WHICH FORCED HIM TO QUIT WORK. ON DECEMBER 2, 1974 CLAIMANT UNDERWENT A POSTERIOR AND POSTEROLATERAL LUMBAR FUSION L5 TRANSITIONAL SEGMENT AND SACRUM. FOLLOWING SURGERY CLAIMANT'S CONDITION IMPROVED.

THE REFEREE CONCLUDED THAT THE MEDICAL EVIDENCE WAS NOT SUFFICIENTLY PERSUASIVE TO ESTABLISH THAT THE MEDICAL TREATMENT CLAIMANT RECEIVED IN FEBRUARY 1974 AND CONTINUED TO RECEIVE UNTIL MAY 1974 OR THE MEDICAL TREATMENT HE RECEIVED BETWEEN OCTOBER 29, 1974 AND SEPTEMBER 22, 1975 WAS REQUIRED AS A RESULT OF CONDITIONS CAUSED BY OR COMPENSABLY RELATED TO HIS AUGUST 16, 1972 INJURY.

CLAIMANT HAD WORKED FOR SEVERAL MONTHS AFTER HIS RETURN TO WORK IN SEPTEMBER 1972 WITHOUT REQUIRING ANY FURTHER MEDICAL TREATMENT WITH ONLY INTERMITTENT BACK SYMPTOMS, HE DID NOT SEEK OR RECEIVE ANY FURTHER MEDICAL TREATMENT FOR HIS BACK SYMPTOMS UNTIL FEBRUARY 1, 1974 AND THE EVIDENCE INDICATES THAT THAT VISIT WAS DICTATED PRIMARILY BECAUSE OF THE INCREASED SYMPTOMS RESULTING FROM THE FALL IN THE BATHTUB WHICH WERE CONSIDERABLY GREATER THAN THOSE CLAIMANT EXPERIENCED AFTER HIS AUGUST 16, 1972 EPISODE. THE SURGERY WHICH CLAIMANT RECEIVED IN DECEMBER 1974 HAD BEEN CONSIDERED FOR SEVERAL YEARS AS A POSSIBLE TREATMENT FOR CLAIMANT'S CONGENITAL CONDITION, THEREFORE, IT COULD NOT BE ATTRIBUTED JUST TO THE INDUSTRIAL INJURY BUT MUST BE CONSIDERED AS ONE MORE TRAUMATIC EXACERBATION, NOT UNLIKE THE JANUARY 1974 FALL IN THE BATHTUB, WHICH ADDED

TO THE DEVELOPMENT OF THE PREEXISTING CONGENITAL CONDITION AND CULMINATED IN THE REQUIRED SURGERY. IT WAS NOT ESTABLISHED MEDICALLY THAT THE INDUSTRIAL INJURY OR ITS RESIDUAL CONSEQUENCES WERE THE CAUSE OF THE ONSET OF INCREASED PAIN SUFFERED BY CLAIMANT IN OCTOBER 1974. THERE WAS NO EVIDENCE OF NEED OF FURTHER MEDICAL TREATMENT AS A RESULT OF THE INJURY OF AUGUST 16, 1972.

THE REFEREE FOUND NO EVIDENCE SUFFICIENT TO ESTABLISH CLAIMANT'S INABILITY TO WORK AFTER SEPTEMBER 1, 1972 DUE TO THE RESIDUAL AFFECTS OF HIS INDUSTRIAL INJURY. HE CONCLUDED THAT THE RECORD INDICATED SOME PERIODS WHEN CLAIMANT WAS UNABLE TO WORK BUT THE EVIDENCE DID NOT RELATE SUCH INABILITY TO THE INDUSTRIAL INJURY.

WITH RESPECT TO THE PERMANENT DISABILITY SUFFERED BY THE CLAIMANT, THE REFEREE FOUND THAT CLAIMANT HAD SUFFERED ONLY MINIMAL PERMANENT DISABILITY AS A RESULT OF THE AUGUST 16, 1972 INCIDENT. THE REFEREE CONCLUDED THAT AS A RESULT OF THE AUGUST 16, 1972 INJURY CLAIMANT HAD SUFFERED ONLY A MINIMAL LOSS OF EARNING CAPACITY AND HAD BEEN ADEQUATELY COMPENSATED FOR THIS LOSS BY THE AWARD OF 5 PER CENT OF THE MAXIMUM ALLOWABLE BY STATUTE FOR UNSCHEDULED DISABILITY.

ON THE CLAIM OF AGGRAVATION, THE REFEREE FOUND THAT THE FALL IN THE BATHTUB WAS A SEPARATE NON-RELATED INCIDENT AND ACTUALLY THE BASIS FOR CLAIMANT'S WORSENED CONDITION AT THE PRESENT TIME. THERE WAS SOME EVIDENCE THAT CLAIMANT HAD SOME INCREASED BACK PAIN PRIOR TO THE FALL IN THE BATHTUB BUT NO EVIDENCE TO INDICATE THAT SUCH PAIN CAUSED CLAIMANT TO FALL. THE REFEREE CONCLUDED THAT CLAIMANT HAD ALSO FAILED TO PROVE THAT HIS PRESENT CONDITION WAS RELATED TO THE AUGUST 16, 1972 INCIDENT AND, THEREFORE, HIS CLAIM FOR AGGRAVATION WAS PROPERLY DENIED.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE VERY COMPREHENSIVE FINDINGS AND CONCLUSIONS OF THE REFEREE. THE BOARD FINDS THAT CLAIMANT'S CONDITION AT THE PRESENT TIME MAY BE WORSE THAN IT WAS ON JULY 26, 1973 BUT, IF SO, IT IS BECAUSE OF THE INTERVENING NON-RELATED, OFF-THE-JOB INCIDENT WHICH OCCURRED SOMETIME IN JANUARY 1974 IMMEDIATELY PRIOR TO CLAIMANT'S SEEKING THE SERVICES OF DR. LYNCH.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 22, 1975 IS AFFIRMED.

WCB CASE NO. 74-1272 FEBRUARY 11, 1976
WCB CASE NO. 74-1273

GALEN DIZICK, CLAIMANT

COLLINS, FERRIS AND VELURE,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH REMANDED TO IT CLAIMANT'S CLAIM RELATING TO AN OCTOBER 29, 1973 COMPENSABLE INJURY TO BE ACCEPTED FOR PAYMENT OF COMPENSATION AS PROVIDED BY LAW COMMENCING JULY 12, 1974 THROUGH OCTOBER 20, 1974 AND AGAIN COMMENCING JUNE 10, 1975 UNTIL

CLOSURE IS AUTHORIZED PURSUANT TO ORS 656.268 - ASSESSED A 25 PER CENT PENALTY - AND AWARDED CLAIMANT'S ATTORNEY A FEE OF 2,000 DOLLARS.

THE ISSUE IS COMPENSABILITY OF CLAIMANT'S NECK AND SHOULDER PROBLEMS.

THE REFEREE FOUND THAT THE EVIDENCE INDICATED A CAUSAL RELATIONSHIP BETWEEN THE CLAIMANT'S OCTOBER 29, 1973 COMPENSABLE INJURY AND THE NECK AND SHOULDER PROBLEMS FOR WHICH DR. CAMPAGNA HAS BEEN TREATING CLAIMANT AND WHICH WERE THE BASIS FOR CLAIMANT'S REQUEST FOR REOPENING HIS CLAIM WHICH WAS DENIED BY THE FUND.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE ORDER OF THE REFEREE AND ADOPTS HIS OPINION AND ORDER AS ITS OWN. A COPY OF THE OPINION AND ORDER IS ATTACHED HERETO, MARKED EXHIBIT 'A' AND BY THIS REFERENCE INCORPORATED HEREIN.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 2, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 450 DOLLARS PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 75-1225 FEBRUARY 11, 1976

ROBERT C. HARPER, JR., CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 60 DEGREES FOR 40 PER CENT LOSS OF HIS LEFT LEG.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON JULY 31, 1973 WHEN HE FELL APPROXIMATELY 17 FEET FROM THE ROOF OF A BUILDING ON WHICH HE WAS WORKING. AT THE EMERGENCY ROOM OF EMANUAL HOSPITAL A DIAGNOSIS OF TRAUMATIC SYNOVITIS OF THE ANKLES AND KNEES AND A SPRAIN OF THE LUMBAR SPINE WAS MADE. CLAIMANT RECEIVED SOME CONSERVATIVE TREATMENT BUT SUDDENLY DISAPPEARED AND THREE MONTHS AFTER HIS DISAPPEARANCE THE CLAIM WAS CLOSED ON DECEMBER 5, 1973 WITHOUT AN AWARD OF PERMANENT DISABILITY.

ON JANUARY 2, 1974 CLAIMANT WAS SEEN BY A DR. CHIN IN SAN FRANCISCO. CLAIMANT'S LEFT KNEE HAD LOCKED CAUSING HIM TO FALL DOWNSTAIRS AND RESULTED IN AN AVULSION FRACTURE OF THE LATERAL MALEOLUS. AN ARTHROGRAM WAS TAKEN AND ON MARCH 12, 1974 DR. CHIN PARTIALLY EXCISED LOOSENED FRAGMENTS AND ATTEMPTED TO RESTORE CIRCULATION WITH MULTIPLE DRILL HOLES.

CLAIMANT RETURNED TO WORK PARKING CARS BUT AFTER A FEW MONTHS THE PAIN AND SWELLING IN HIS LEFT KNEE WAS SUCH THAT HE WAS REQUIRED TO SEEK EMPLOYMENT WHICH DID NOT INVOLVE FULL TIME LEFT LEG STRESS. HE HAS NOT RETURNED TO WORK ALTHOUGH HE HAS APPLIED FOR VOCATIONAL REHABILITATION IN CALIFORNIA AND ALSO APPLIED FOR EMPLOYMENT AS A POSTAL CLERK.

ON MARCH 6, 1975 A SECOND DETERMINATION ORDER AWARDED CLAIMANT 45 DEGREES FOR 30 PER CENT LOSS OF HIS LEFT LEG. CLAIMANT CONTENDS THAT HIS LEFT LEG IS NO BETTER THAN AN ARTIFICIAL LEG AND THAT HE IS ENTITLED TO AN AWARD OF 75 PER CENT.

THE REFEREE FOUND THAT THE PRINCIPAL FUNCTIONS OF THE LOWER EXTREMITY ARE FOR WALKING AND WEIGHT BEARING AND THAT ALTHOUGH CLAIMANT'S LEFT LEG FUNCTION IS COMPLETE EXCEPT FOR A SMALL LOSS OF MOTION, NEVERTHELESS, PROLONGED OR CONTINUED ACTIVITY PRODUCES INCREASED SYMPTOMS. SCHEDULED DISABILITY IS EVALUATED BY LOSS OF PHYSICAL FUNCTION AND THE REFEREE CONCLUDED, GIVING WEIGHT TO CLAIMANT'S TESTIMONY, THAT CLAIMANT HAD SUFFERED 40 PER CENT LOSS OF PHYSICAL FUNCTION OF HIS LEFT LEG.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE. IT ALSO CONCURS IN THE SUGGESTION MADE BY THE REFEREE THAT CLAIMANT SHOULD, IF HE TRULY DESIRES, SEEK VOCATIONAL REHABILITATION.

ORDER

THE ORDER OF THE REFEREE DATED JUNE 25, 1975 IS AFFIRMED.

WCB CASE NO. 74-3023 FEBRUARY 11, 1976

CHARLIE HUGHES, CLAIMANT

FRANKLIN, BENNETT, OFELT AND JOLLES,
CLAIMANT'S ATTYS.
PHILIP MONGRAIN, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH REMANDED TO IT CLAIMANT'S CLAIM FOR ACCEPTANCE AND PAYMENT OF BENEFITS AS PROVIDED BY LAW UNTIL THE CLAIM IS CLOSED PURSUANT TO ORS 656.268, AND AWARDED CLAIMANT'S ATTORNEY A FEE OF 2,000 DOLLARS TO BE PAID BY THE EMPLOYER.

ON MAY 13, 1974 CLAIMANT, A 53 YEAR OLD CHIPPER OPERATOR, WAS PERFORMING HIS SPECIFIC DUTY OF WATCHING THE THREE CHIPPERS WHICH WERE ELEVATED AT APPROXIMATELY 18 FEET ABOVE THE FLOOR OF THE PLANT AND REQUIRED CLAIMANT TO WORK ON A CATWALK AND IN A FAIRLY WELL CONFINED SPACE. SHORTLY BEFORE 5.20 A.M. ONE OF THE CHIPPERS BECAME PLUGGED BY A PIECE OF WOOD APPROXIMATELY 8 FEET LONG AND ABOUT 18 INCHES WIDE. CLAIMANT LAID ON THE PLATFORM WITH HIS HEAD DOWN INTO THE HOPPER AND BENT FORWARD WITH A SAFETY LINE TO PREVENT HIM FALLING INTO THE HOPPER. IT TOOK LESS THAN 10 MINUTES TO REMOVE THE STOPPAGE AND HE THEN SHOVELED WOOD CHIPS OFF THE CATWALK.

CLAIMANT HUNG UP HIS SHOVEL AND THEN BECAME NAUSEATED - HE HAD A SEVERE HEADACHE AND NUMBNESS OF THE ARM AND LEG. HE BLEW ONE BLAST ON THE WHISTLE TO CALL THE FOREMAN. SEVERAL WITNESSES, INCLUDING THE FOREMAN, REACHED CLAIMANT AND ONE OF THEM HAD HAD SOME MEDICAL FIRST AID TRAINING. HE SAW CLAIMANT SITTING ON THE STEPS WITH ANOTHER WORKER HOLDING HIS SHOULDERS. HE FELT CLAIMANT WAS HAVING A STROKE BECAUSE OF HIS COMPLAINTS OF HIS LEG GIVING OUT AND THE NUMBNESS AND PERSPIRATION AND ALSO THE DIFFICULTY IN BREATHING. CLAIMANT'S FACE WAS BECOMING NUMB ON THE LEFT SIDE

AND HE WAS SLURRING OUT OF THE CORNER OF HIS MOUTH SO BAD THAT HE COULD HARDLY BE UNDERSTOOD. CLAIMANT WAS ADMITTED TO THE HOSPITAL IN COQUILLE AT 7.50 A.M. AND DISCHARGED AT 11.00 A.M., TAKEN TO EUGENE AND ADMITTED TO THE SACRED HEART HOSPITAL AT APPROXIMATELY 1.45 P.M. ON MAY 13, 1974.

THE REFEREE FOUND THAT CLAIMANT WAS EXERTING HIMSELF IN AT LEAST THE USUAL AND NORMAL MANNER IN THE PERFORMANCE OF HIS WORK AT THE TIME OF THE INCIDENT AND PROBABLY TO A DEGREE BEYOND THE USUAL AND NORMAL MANNER IN REMOVING THE STOPPAGE FROM THE CHIPPERS AND THAT AS FAR AS LEGAL CAUSATION WAS CONCERNED, CLAIMANT'S WORK ACTIVITY WAS A MATERIAL CONTRIBUTING CAUSE IN BRINGING ABOUT THE CEREBROVASCULAR ACCIDENT.

WITH RESPECT TO MEDICAL CAUSATION, DR. DAVIS, A NEUROSURGEON, EXPRESSED HIS OPINION, BASED UPON HIS EXAMINATION OF THE HOSPITAL RECORDS, STATEMENT OF THE WITNESSES AND AN INVESTIGATION REPORT, THAT HE COULD FIND NOTHING IN THE TYPE OF WORK CLAIMANT WAS DOING THAT MIGHT HAVE CAUSED THE STROKE. DR. GROSSMAN, AN INTERNIST, STATED THAT IN HIS OPINION CLAIMANT HAD A PREEXISTING CEREBROARTERIOSCLEROTIC DISEASE OF THE RIGHT MIDDLE CEREBRAL ARTERY WHICH WAS INVOLVED IN PRODUCING THE LEFT HEMIPLEGIA AND HE FOUND THAT THIS WAS A SIGNIFICANT CONTRIBUTING CAUSE LEADING TO THE CEREBROVASCULAR ACCIDENT.

DR. WATSON ALSO WAS OF THE OPINION THAT THE WORKING CIRCUMSTANCES CONTRIBUTED TO THE DEVELOPMENT OF THIS CEREBROVASCULAR ACCIDENT AND FOUND FURTHER THAT THE RELATIVE DELAY IN GETTING CLAIMANT TO FIRST AID, MUCH LESS MEDICAL ATTENTION, FURTHER CONTRIBUTED TO THE FINAL OUTCOME. DR. WATSON IN HIS REPORT INDICATED THAT, IN ADDITION TO THE EXERTION, THERE WAS CONSIDERABLE TENSION AT THE TIME THE STROKE OCCURRED WHICH HEIGHTENED TO AN INCREASING DEGREE DURING THE ENSUING HOUR PRIOR TO CLAIMANT BEING REMOVED TO THE HOSPITAL.

THE REFEREE FOUND THAT THE WORK ACTIVITY OF THE CLAIMANT AT THE TIME OF THE STROKE WAS A MATERIAL CONTRIBUTING CAUSE OF THE STROKE AND FURTHER THAT THE EMOTIONAL STRESS, STRAIN AND WORRY ENDURED BY THE CLAIMANT AFTER THE STROKE BECAUSE OF HIS CONCERN OF FURTHER INJURY TO HIMSELF, THE SAFETY OF HIS CO-WORKERS AND THE DESTRUCTION OF HIS EMPLOYER'S PROPERTY, WAS ALSO A MATERIAL CONTRIBUTING CAUSE AND AGGRAVATED THE PREEXISTING CEREBROVASCULAR CONDITION AS WAS THE DELAY IN SECURING THE PROPER FIRST AID AND PROMPT MEDICAL CARE AND TREATMENT.

THE REFEREE CONCLUDED, BASED UPON THE OPINIONS EXPRESSED BY DR. GROSSMAN AND DR. WATSON, THAT CLAIMANT'S CEREBROVASCULAR ACCIDENT WAS DIRECTLY RELATED TO HIS WORK ACTIVITY AND, THEREFORE, COMPENSABLE.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS REACHED BY THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED JUNE 23, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 450 DOLLARS PAYABLE BY THE EMPLOYER.

WCB CASE NO. 75-260 FEBRUARY 11, 1976

HARRY ROHDE, CLAIMANT

FRANCIS YUNKER, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH APPROVED THE DENIAL OF CLAIMANT'S CLAIM BY THE STATE ACCIDENT INSURANCE FUND.

CLAIMANT, A 59 YEAR OLD BODY AND FENDER REPAIRMAN, ON OCTOBER 23, 1974 WAS SPRAYING THE HOOD OF AN AUTOMOBILE WITH SPRAY LACQUER WHICH CONTAINED A BENZINE CATALYST. THAT EVENING CLAIMANT'S STOMACH WAS UPSET AND HE HAD A TASTE OF PAINT IN HIS MOUTH OF WHICH HE ATTEMPTED TO RID HIMSELF THROUGH COUGHING AND EXPECTORATION.

THE FOLLOWING DAY THE HOOD WAS REPAINTED AND CLAIMANT BECAME ILL, COUGHED UP PAINT AND BEGAN HAVING PAIN IN THE SUBSTERNAL AREA OF HIS CHEST AND RADIATING DOWN BOTH ARMS. CLAIMANT WENT HOME AT NOON AND BECAME INCREASINGLY ILL, AGAIN VOMITING AND COUGHING - THIS CONTINUED THROUGH THE NIGHT. THE NEXT DAY CLAIMANT WAS HOSPITALIZED, THE INITIAL DIAGNOSIS IN THE EMERGENCY ROOM WAS INFECTIOUS OR INFLAMMATORY BRONCHITIS, HOWEVER, DR. HANSON, CLAIMANT'S TREATING PHYSICIAN, ULTIMATELY DIAGNOSED A MYOCARDIAL INFARCTION.

CLAIMANT CONTENDS THAT THE INHALATION OF THE FUMES OF THE PAINT CAUSED THE MYOCARDIAL INFARCTION, HOWEVER, BOTH DR. HANSON AND DR. GRISWOLD, WHO WERE FURNISHED A COMPLETE HISTORY OF CLAIMANT'S ACTIVITIES AND MEDICAL PROBLEMS, WERE OF THE OPINION THAT THE TOXIC NATURE OF THE PAINT FUMES POSSIBLY (UNDERSCORED) COULD BE A MATERIAL CONTRIBUTING FACTOR PRECIPITATING THE MYOCARDIAL INFARCTION. POSSIBILITY WAS DISTINGUISHED FROM PROBABILITY BASED UPON THE VOLUME OF TOXIC SPRAY INHALED.

THE REFEREE FOUND THAT THE AMOUNT INHALED AT THE TIME WAS NOT UNUSUAL. CLAIMANT HAD A PRIOR MEDICAL HISTORY OF PULMONARY TUBERCULOSIS WHICH HAD REQUIRED A CONVALESCENT PERIOD OF FOUR YEARS. IT WAS DR. GRISWOLD'S OPINION THAT THE FUME INHALATION WAS NOT A MATERIAL CONTRIBUTING FACTOR IN PRECIPITATING THE MYOCARDIAL INFARCTION, THAT THE COUGHING AND VOMITING MAY HAVE HAD A TRANSIENT AFFECT UPON CLAIMANT'S BLOOD PRESSURE BUT IT WAS NOT OF ANY MATERIAL SIGNIFICANCE IN RELATION TO THE SUBSEQUENT MYOCARDIAL INFARCTION.

THE REFEREE CONCLUDED THAT THE EVIDENCE INDICATED THAT CLAIMANT HAD BEEN EXPOSED TO A TOTAL OF VERY FEW MINUTES OF THE TOXIC FUMES ON TWO DIFFERENT OCCASIONS AND THAT THE VOLUME OF TOXIC FUME INHALATION WAS NOT OF A SUFFICIENT OR SIGNIFICANT AMOUNT TO BE A MATERIAL CONTRIBUTING FACTOR IN PRECIPITATING THE MYOCARDIAL INFARCTION. THE DENIAL OF THE CLAIM BY THE FUND WAS PROPER.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 22, 1975 IS AFFIRMED.

WCB CASE NO. 75—2379 FEBRUARY 11, 1976

SHARON S. WEBSTER, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
AMENDED ORDER ON REVIEW

ON JANUARY 28, 1976 THE WORKMEN'S COMPENSATION BOARD ENTERED AN ORDER ON REVIEW IN THE ABOVE ENTITLED MATTER. INADVERTENTLY, NO REASONABLE ATTORNEY'S FEE WAS AWARDED CLAIMANT'S COUNSEL FOR HIS SERVICES AT THE HEARING. ONE OF THE CONTENTIONS MADE BY THE CLAIMANT AT THE HEARING WAS THAT THE FUND HAD UNREASONABLY RESISTED THE REQUEST TO REOPEN HER CLAIM AND HAD REFUSED TO PROVIDE TREATMENT RECOMMENDED BY DR. PETROSKE. THE BOARD REVERSED THE REFEREE AND REMANDED THE CLAIM TO THE FUND, THEREFORE, CLAIMANT'S COUNSEL IS ENTITLED TO AN ATTORNEY'S FEE AT THE HEARING LEVEL AS WELL AS FOR HIS SERVICES AT BOARD REVIEW.

THE ORDER ON REVIEW ENTERED JANUARY 28, 1976 IS AMENDED AS FOLLOWS —

ON PAGE 2 OF SAID ORDER WHEREVER THE WORD "EMPLOYER" IS USED, SUBSTITUTE THE WORD "FUND".

IN THE "ORDER" PORTION ON PAGE 2 INSERT AFTER THE SECOND PARAGRAPH THEREOF, THE FOLLOWING ADDITIONAL PARAGRAPH —

> "CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES AT THE HEARING BEFORE THE REFEREE, THE SUM OF 1,000 DOLLARS, PAYABLE BY THE FUND."

IN ALL OTHER RESPECTS THE ORDER ON REVIEW ENTERED JANUARY 28, 1976 IS REAFFIRMED.

WCB CASE NO. 75—1070 FEBRUARY 12, 1976

MARY WHITE, CLAIMANT

SCOTT AND NORMAN, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER AFFIRMING THE THIRD DETERMINATION ORDER MAILED OCTOBER 31, 1974 WHICH AWARDED CLAIMANT NO ADDITIONAL COMPENSATION FOR PERMANENT PARTIAL DISABILITY.

CLAIMANT IS A 61 YEAR OLD COOK WHO SUFFERED A COMPENSABLE INJURY TO HER RIGHT MIDDLE FINGER ON DECEMBER 26, 1971. THE DISTAL PHALANX OF THE RIGHT MIDDLE FINGER WAS LACERATED. THE BONE WAS CLEANED, SUTURED AND SPLINTED AND CLAIMANT WAS RELEASED TO RETURN TO HER REGULAR WORK WITHIN TWO WEEKS. SUBSEQUENTLY, CLAIMANT DEVELOPED A DROPPED FINGER BUT THE CLAIM WAS CLOSED ON JUNE 6, 1972 BY THE FIRST DETERMINATION ORDER WHICH AWARDED CLAIMANT 40 PER CENT LOSS OF THE RIGHT MIDDLE FINGER EQUAL TO 8.8 DEGREES.

IN NOVEMBER 1972 DR. ELLISON RECOMMENDED THE FINGER BE AMPUTATED BECAUSE OF THE DEFORMITY AND HYPESTHESIA OF THE DISTAL PORTION. THE ENTIRE MIDDLE FINGER ON THE RIGHT HAND WAS AMPUTATED. CLAIMANT RETURNED TO HER REGULAR WORK IN FEBRUARY 1972 AND HER CLAIM WAS CLOSED BY THE SECOND DETERMINATION ORDER MAILED NOVEMBER 21, 1973 WHEREBY CLAIMANT WAS AWARDED 40 PER CENT LOSS OF THE RIGHT HAND EQUAL TO 60 DEGREES.

ON FEBRUARY 1, 1974 CLAIMANT WAS EXAMINED BY DR. NATHAN, AT THAT TIME SHE WAS COMPLAINING OF PAINFUL LUMPS IN THE PALM OF HER HAND. DR. NATHAN THOUGHT THAT CLAIMANT'S CONDITION WAS STATIONARY AND THAT SHE HAD SUFFERED A TOTAL COMBINED IMPAIRMENT OF THE HAND EQUAL TO 24.25 PER CENT.

IN JUNE 1974 CLAIMANT WAS HOSPITALIZED BECAUSE OF A TENDER NEUROMA IN HER HAND AND DURING SURGERY A SECOND NEUROMA WAS DISCOVERED. ONE WAS EXCISED AND THE OTHER WAS TRANSPLANTED. CLAIMANT RETURNED TO WORK ON JULY 23, 1974 AND THE CLAIM WAS AGAIN CLOSED BY THE THIRD DETERMINATION ORDER WITH NO AWARD OF PERMANENT PARTIAL DISABILITY.

SCHEDULED DISABILITY IS MEASURED BY LOSS OF FUNCTION ONLY. LOSS OF WAGE EARNING CAPACITY IS NOT TAKEN INTO CONSIDERATION. THE REFEREE FOUND THAT THERE WAS NO QUESTION BUT THAT CLAIMANT HAD SUFFERED A CONSIDERABLE LOSS OF FUNCTION OF HER RIGHT HAND, SHE WAS A VERY CREDIBLE WITNESS AND HE FELT THAT THE PROBLEMS ABOUT WHICH SHE TESTIFIED WERE VERY REAL. HOWEVER, CLAIMANT HAD ALREADY RECEIVED AN AWARD OF 40 PER CENT LOSS OF HAND EVEN THOUGH DR. NATHAN HAD ESTIMATED A TOTAL COMBINED IMPAIRMENT OF THE HAND AT SLIGHTLY MORE THAN 25 PER CENT. DR. DENKER, WHO HAD TREATED CLAIMANT AND HAD EXCISED AND TRANSPLANTED THE MULTIPLE NEUROMA, FELT THAT 40 PER CENT AWARD WAS CORRECT, TAKING INTO CONSIDERATION THIS LATTER SURGERY.

THE REFEREE CONCLUDED THAT CLAIMANT HAD NOT SUFFERED ANY MORE THAN 40 PER CENT LOSS FUNCTION OF HER RIGHT HAND AND THAT THE AWARD ADEQUATELY COMPENSATED HER FOR SUCH LOSS OF FUNCTION.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE OPINION OF THE REFEREE AS ITS OWN.

ORDER

THE ORDER OF THE REFEREE DATED JULY 17, 1975 IS AFFIRMED.

CLAIM NO. 87CM 11972Z FEBRUARY 12, 1976

HELEN B. VAN DOLAH, CLAIMANT

JAY WHIPPLE, CLAIMANT'S ATTY.
NOREEN SALTVEIT, DEFENSE ATTY.
OWN MOTION ORDER

PURSUANT TO ORS 656.278 THE BOARD'S OWN MOTION ORDER, DATED APRIL 21, 1975, REFERRED THIS MATTER TO THE HEARINGS DIVISION TO HOLD A HEARING TO DETERMINE IF CLAIMANT'S WORSENED CONDITION REQUIRED FURTHER MEDICAL CARE AND TREATMENT AS A RESULT OF HER INDUSTRIAL INJURY SUFFERED IN DECEMBER 1968.

THE REFEREE RECOMMENDED THAT CLAIMANT'S CLAIM BE REOPENED FOR FURTHER MEDICAL CARE AND TREATMENT. THE BOARD, BY A SECOND

OWN MOTION ORDER, DATED AUGUST 14, 1975, REFERRED THE MATTER TO THE EMPLOYER FOR SUCH REOPENING AND PAYMENT OF BENEFITS, AS PROVIDED BY LAW, COMMENCING NOVEMBER 5, 1974 AND UNTIL THE CLAIM WAS CLOSED PURSUANT TO ORS 656.278.

CLAIMANT'S CLAIM WAS SUBMITTED TO THE EVALUATION DIVISION FOR CLOSURE. DR. GREWE REPORTED THAT CLAIMANT HAD UNDERGONE A LEFT DORSAL SYMPATHECTOMY AND RESECTION OF THE LEFT ANTERIOR SCALENE MUSCLE AND HER CONDITION HAD BECOME STATIONARY ON NOVEMBER 4, 1975. AT THE CARRIER'S REQUEST, CLAIMANT WAS EXAMINED BY THE ORTHOPEDIC CONSULTANTS, WHO FOUND CLAIMANT'S SHOULDER AND ARM MOTION TO BE NORMAL, NO ATROPHY AND ONLY A SLIGHTLY REDUCED GRIP. IT APPEARS CLAIMANT COULD RETURN TO BOOKKEEPING OR ACCOUNTING FOR WHICH SHE HAS BEEN TRAINED.

ORDER

CLAIMANT IS ENTITLED TO TEMPORARY TOTAL DISABILITY COMPENSATION FROM NOVEMBER 5, 1974 THROUGH NOVEMBER 19, 1975, AND NO ADDITIONAL AWARD FOR PERMANENT PARTIAL DISABILITY COMPENSATION.

THE BOARD'S OWN MOTION ORDER DATED AUGUST 14, 1975 ALLOWED CLAIMANT'S COUNSEL AS A REASONABLE ATTORNEY'S FEE, 25 PER CENT OF ANY ADDITIONAL COMPENSATION CLAIMANT MIGHT RECEIVE UPON CLOSURE OF THE CLAIM UNDER ORS 656.278. BY THIS ORDER THAT FEE IS LIMITED TO A MAXIMUM OF 300 DOLLARS.

WCB CASE NO. 65-68 FEBRUARY 12, 1976

GORDON THOMPSON, CLAIMANT

EMMONS, KYLE, KROPP AND KRYGER,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH FOUND CLAIMANT TO BE PERMANENTLY AND TOTALLY DISABLED AS DEFINED IN ORS 656.206, EFFECTIVE ON AUGUST 29, 1975.

CLAIMANT IS A 53 YEAR OLD MILLWRIGHT WHO SUFFERED HEAD AND LEG INJURIES ON AUGUST 3, 1973 WHEN STRUCK BY A PIECE OF LUMBER. THE DAY OF THE INJURY WAS A FRIDAY. ON THE FOLLOWING MONDAY MORNING CLAIMANT RETURNED TO WORK BUT FELT UNSTEADY AND WAS HOSPITALIZED. DR. TSAI'S IMPRESSION WAS A CEREBRAL CONCUSSION, POST-CONCUSSIONAL SYNDROME.

CLAIMANT WAS BOTHERED BY PERSISTENT DIZZINESS AND WAS AGAIN SEEN BY DR. TSAI ON SEPTEMBER 4, 1973. DR. TSAI RELATED THE DIZZINESS TO THE POST-CONCUSSIONAL SYNDROME BROUGHT ABOUT BY POSTERIAL CHANGES. HE FELT CLAIMANT COULD RESUME LIGHT WORK INVOLVING NO RAPID CHANGE IN HIS BODY POSTURE BUT HE COULD NOT WORK OFF THE GROUND OR IN AREAS WHERE THERE WERE MOVING MACHINES.

ON SEPTEMBER 19, 1974 CLAIMANT WAS EXAMINED BY DR. KENT, AN ENT SPECIALIST, WHOSE DIAGNOSIS WAS BENIGN EPISODIC POSITIONAL VERTIGO, SECONDARY TO HEAD INJURY AND BILATERAL HIGH FREQUENCY NEUROSENSORY HEARING LOSS, SECONDARY TO LONG TERM NOISE EXPOSURE.

HE WAS OF THE OPINION THAT CLAIMANT WAS UNABLE TO RETURN TO HIS USUAL ACTIVITIES AS A MILLWRIGHT ALTHOUGH CLAIMANT'S SYMPTOMS HAD IMPROVED IN THE PAST YEAR AND HE ANTICIPATED FURTHER IMPROVEMENT AND THAT CLAIMANT COULD RETURN TO GAINFUL EMPLOYMENT IN THE FUTURE.

DR. FLEMING, A CLINICAL PSYCHOLOGIST, GAVE CLAIMANT A PSYCHOLOGICAL EXAMINATION IN NOVEMBER 1974 AND FOUND CLAIMANT TO BE FUNCTIONING WITHIN THE BRIGHT-NORMAL RANGE OF INTELLECTUAL ABILITY WITH VERBAL MATERIALS AND WITHIN THE NORMAL RANGE WITH NON-VERBAL MATERIALS. HE FOUND THAT CLAIMANT HAD AN EXCELLENT WORK HISTORY AND HAD ACQUIRED A WIDE RANGE OF SKILLS, THE PRIMARY OBSTACLES TO VOCATIONAL REHABILITATION APPEARED TO BE CLAIMANT'S PHYSICAL LIMITATIONS, ALTHOUGH THE INITIAL PROGNOSIS FOR A SUCCESSFUL REHABILITATION WAS CONSIDERED FAIR, THE VOCATIONAL COUNSELOR ULTIMATELY CONCLUDED THAT IN THE PREDICTABLE FUTURE CLAIMANT WAS NOT VOCATIONALLY MARKETABLE.

ON DECEMBER 31, 1974 A DETERMINATION ORDER AWARDED CLAIMANT 48 DEGREES FOR 15 PER CENT UNSCHEDULED HEAD INJURY.

IN MAY 1975 DR. KERNEK, CLAIMANT'S TREATING PHYSICIAN, ADVISED CLAIMANT THAT HE SHOULD NOT BE EMPLOYED IN ANY TYPE OF POSITION INVOLVING RAPID CHANGES IN BODY POSTURE BECAUSE OF IMPAIRMENT OF HIS BALANCE MECHANISM - HE SUGGESTED VOCATIONAL REHABILITATION FOR A DIFFERENT TYPE OF WORK AS CLAIMANT WAS TOTALLY DISABLED AND PROBABLY PERMANENTLY DISABLED FROM THE TYPE OF WORK WHICH HE HAD DONE PREVIOUSLY. HE FELT THE DISABILITY WAS THE RESULT OF THE BRAIN DAMAGE CAUSED BY HIS AUGUST 3, 1973 INJURY.

ON MAY 15, 1975 DR. TSAI, AFTER EXAMINING CLAIMANT, WAS OF THE IMPRESSION THAT CLAIMANT STILL HAD A POST-CONCUSSIONAL SYNDROME WITH DIZZINESS AS THE PREDOMINATING SYMPTOM. CLAIMANT HAD RECEIVED A BRAIN CONCUSSION AS A RESULT OF THE INDUSTRIAL INJURY AND THE SYNDROME WAS ONE OF THE COMPLEX SYMPTOMS RELATED TO THE BRAIN CONCUSSION, OTHER SYMPTOMS ARE HEADACHE AND MEMORY CHANGE. DR. TSAI WAS OF THE OPINION THAT CLAIMANT'S CONDITION WAS PERMANENT AND IT WAS NOT UNUSUAL THAT ALL TESTS WHICH HAD BEEN TAKEN WERE NORMAL DESPITE THE POST-CONCUSSION SYNDROME.

HEIGHTS BOTHERED CLAIMANT AND ALSO LOOKING DOWN AND BENDING OVER CAUSED HIM PROBLEMS. DR. TSAI HAD FELT CLAIMANT MIGHT BE ABLE TO HANDLE A SEDENTARY JOB IN A SEDENTARY POSITION BUT THAT ANY CHANGE OF POSITION WOULD INCREASE HIS DIZZINESS AND IT WOULD BE DIFFICULT FOR HIM TO HANDLE ANY JOB WHERE HE WOULD HAVE TO MOVE ABOUT.

CLAIMANT HAS COMPLETED HIGH SCHOOL AND HAS HAD TWO TERMS OF COLLEGE, MOST OF HIS WORK LIFE HAS BEEN AS A CARPENTER AND MILLWRIGHT. CLAIMANT HAD BUILT FOUR HOUSES AND PRESENTLY HAS SIX LOTS LEFT WHICH HE HAD DEVELOPED AND WOULD HAVE LIKED TO BUILD ON BUT HE HAS BEEN UNABLE TO CONTINUE THAT PROJECT. CLAIMANT KNOWS ALMOST EVERY PHASE OF HOUSE CONSTRUCTION BUT BECAUSE OF HIS DIZZINESS HE NOW FEELS THERE IS NOTHING HE CAN DO EITHER AS A CARPENTER, MILLWRIGHT OR HOUSE BUILDER.

UNDER THE 'ODD-LOT' DOCTRINE, A FINDING OF TOTAL DISABILITY IS PERMITTED ALTHOUGH THE WORKMAN IS NOT COMPLETELY INCAPACITATED FROM ANY KIND OF WORK. IT IS SUFFICIENT IF THE WORKMAN IS FOUND TO BE SO HANDICAPPED THAT HE WILL NOT BE ABLE TO OBTAIN REGULAR EMPLOYMENT IN ANY WELL KNOWN BRANCH OF THE LABOR MARKET. THE REFEREE CONCLUDED THAT THE EVIDENCE JUSTIFIED A FINDING, BASED UPON CLAIMANT'S OBVIOUS PHYSICAL IMPAIRMENT COUPLED WITH HIS MENTAL CAPACITY, EDUCATION, TRAINING AND AGE, THAT CLAIMANT HAD ESTABLISHED A PRIMA FACIE CASE THAT HE FELL WITHIN THE 'ODD-LOT' CATEGORY. THE

BURDEN THEN SHIFTS TO THE FUND TO SHOW THAT SOME KIND OF SUITABLE WORK WAS REGULARLY AND CONTINUOUSLY AVAILABLE TO CLAIMANT. THE REFEREE CONCLUDED THAT THE FUND HAD FAILED TO MEET THAT BURDEN OF PROOF AND HE AWARDED CLAIMANT COMPENSATION FOR PERMANENT AND TOTAL DISABILITY.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE. THE MEDICAL OPINION EXPRESSED BY DOCTORS TSAI, KERNEK AND KENT ALL INDICATE CLAIMANT IS UNABLE TO RETURN TO THE TYPE OF EMPLOYMENT HE HAD DONE PREVIOUS TO HIS INJURY AND THE COUNSELOR FROM THE DIVISION OF VOCATIONAL REHABILITATION FEELS THAT CLAIMANT IS NOT VOCATIONALLY RETRAINABLE.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 29, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 450 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 74-2284 FEBRUARY 12, 1976

REKKA REA, CLAIMANT

GALTON AND POPICK,
CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH FOUND CLAIMANT TO BE PERMANENTLY AND TOTALLY DISABLED AS OF NOVEMBER 20, 1974.

CLAIMANT IS 66 YEARS OF AGE, SHE SUFFERED A COMPENSABLE INJURY TO HER LEFT KNEE ON APRIL 11, 1973 WHICH NECESSITATED THE SURGICAL REMOVAL OF AN INTERNAL SEMILUNAR CARTILAGE BY DR. COHEN ON JUNE 20, 1973. DR. COHEN CONTINUED TO TREAT CLAIMANT UNTIL APRIL 30, 1974 WHEN HE MADE A CLOSING EVALUATION WHICH INDICATED THAT CLAIMANT WALKED WITH A SLIGHT LEFT LIMP AND HAD SIGNIFICANT LOSS OF EXTENSION-FLEXION IN THE LEFT KNEE AS COMPARED TO THE RIGHT AND BECAUSE OF HER INABILITY TO KNEEL. CLAIMANT HAD WORKED FOR OVER 12 YEARS FOR THE EMPLOYER AS A SALESLADY, CASHIER, BUYER AND FLOOR SUPERVISOR. ON JUNE 5, 1974 THE CLAIM WAS CLOSED BY A DETERMINATION ORDER WHICH AWARDED CLAIMANT 60 DEGREES FOR 40 PER CENT LOSS OF HER LEFT LEG.

ON JULY 10, 1974 AND AGAIN ON NOVEMBER 20, 1974 CLAIMANT WAS EXAMINED BY DR. CHERRY WHO, BASED UPON A HISTORY GIVEN TO HIM BY CLAIMANT THAT INCLUDED COMPLAINTS OF LOW BACK PAIN, FELT THAT, IN ADDITION TO A 50 PER CENT IMPAIRMENT OF HER LEFT KNEE, CLAIMANT HAD A PERMANENT DISABILITY IN THE LOW BACK CONSISTING OF A STRAIN DUE TO CLAIMANT'S INABILITY TO TAKE WEIGHT WELL ON HER LEFT LEG WHICH RESULTED IN OVERCOMPENSATION OF HER BACK. DR. CHERRY, AFTER TAKING INTO CONSIDERATION CLAIMANT'S LACK OF FORMAL TRAINING, WORK EXPERIENCE AND PHYSICAL CONDITION, STATED THAT SHE PROBABLY COULD NOT BE RETRAINED TO ENTER ANY OCCUPATION.

DR. COHEN, ALTHOUGH HE HAD NOT SEEN CLAIMANT SINCE APRIL 1974, SAID IN FEBRUARY 1975 THAT IT WAS NOT REASONABLY PROBABLE THAT CLAIMANT'S BACK PROBLEMS WERE RELATED TO HER KNEE CONDITION.

THE REFEREE FOUND THAT IT WAS REASONABLE TO CONCLUDE THAT THE ALTERED GAIT CAUSED BY CLAIMANT'S COMPENSABLE INJURY COULD PRODUCE A STRAIN ON A WOMAN CLAIMANT'S AGE AND WHO ALREADY HAD LUMBAR OSTEOARTHRITIS. HE FOUND THAT CLAIMANT HAD AN EIGHTH GRADE EDUCATION AND THAT HER WORK HISTORY WAS LIMITED TO THE 12 YEARS WITH THIS EMPLOYER. HE CONCLUDED THAT CLAIMANT HAD MADE A PRIMA FACIE CASE OF ODD-LOT PERMANENT TOTAL DISABILITY MAINLY BECAUSE OF HER AGE - THERE MIGHT BE WORK WHICH CLAIMANT COULD DO BUT IT WAS VERY DOUBTFUL THAT SHE COULD OBTAIN SUCH WORK. HE ORDERED CLAIMANT TO BE CONSIDERED PERMANENTLY AND TOTALLY DISABLED AS OF MAY 1, 1974, THE DATE CLAIMANT WAS DECLARED TO BE MEDICALLY STATIONARY BY DR. COHEN.

DEFENDANT FILED A MOTION FOR RECONSIDERATION AND THE REFEREE, AFTER RECONSIDERATION OF THE RECORD, WAS PERSUADED THAT CLAIMANT'S BACK DISABILITY WAS NOT PRESENT TO A DEGREE NOTICEABLE WHEN SHE WAS GIVEN HER CLOSING EVALUATION BY DR. COHEN WHICH STATED CLAIMANT WAS MEDICALLY STATIONARY AS OF MAY 1, 1974 BUT THAT IT WAS PRESENT AND NOTICEABLY AND SIGNIFICANTLY DISABLING TO CLAIMANT ACCORDING TO DR. CHERRY WHEN HE EXAMINED CLAIMANT ON NOVEMBER 20, 1974.

THE REFEREE CONCLUDED THAT PERMANENT TOTAL DISABILITY MAY BE FOUND TO EXIST AT THE TIME OF AN EARLIER DETERMINATION OR TO HAVE HAD ITS INCEPTION AT ANY TIME THEREAFTER UP TO AND INCLUDING THE DATE OF THE HEARING AND BASED UPON HIS RECONSIDERATION OF THE RECORD, CONCLUDED THAT CLAIMANT'S PERMANENT TOTAL DISABILITY BEGAN ON NOVEMBER 20, 1974 RATHER THAN MAY 1, 1974. HIS ORDER OF AUGUST 19, 1975 WAS AMENDED ACCORDINGLY.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 19, 1975 AND THE SECOND OPINION AND ORDER DATED SEPTEMBER 18, 1975 ARE AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 400 DOLLARS, PAYABLE BY THE EMPLOYER.

WCB CASE NO. 75-1515 FEBRUARY 12, 1976

KENNETH H. MARTIN, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 55 DEGREES FOR PARTIAL LOSS OF THE RIGHT HAND.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON MARCH 20, 1974 - WHILE HE WAS GRINDING A WEDGE, HIS RIGHT THUMB CAME IN CONTACT WITH

THE WHEEL OF THE BENCH SANDER RESULTING IN AVULSION OF THE ULNAR TWO-THIRDS OF THE NAILBED WITH GRINDING INJURY PASSING DOWN INTO THE BONE. CLAIMANT HAS HAD SIX DIFFERENT SURGICAL REPAIRS ON HIS RIGHT THUMB AND AS A RESULT THE DISTAL HALF OF THE DISTAL PHALANX HAS BEEN REMOVED. CLAIMANT APPARENTLY HAS LOST ALL MOTION IN THE DISTAL INTERPHALANGEAL JOINT OF HIS RIGHT THUMB BUT THE REMAINING JOINTS DO NOT EVIDENCE ANY LOSS OF MOTION.

THE CLAIM WAS FIRST CLOSED BY A DETERMINATION ORDER MAILED JULY 8, 1974 WHICH AWARDED CLAIMANT 14.4 DEGREES FOR 30 PER CENT LOSS OF HIS RIGHT THUMB. SUBSEQUENT SURGERIES NECESSITATED REOPENING OF THE CLAIM AND A SECOND DETERMINATION ORDER MAILED JUNE 12, 1975 AWARDED CLAIMANT AN ADDITIONAL 28.5 DEGREES FOR 60 PER CENT LOSS OF HIS RIGHT THUMB, THEREBY GIVING CLAIMANT A TOTAL OF 43.2 DEGREES FOR 90 PER CENT LOSS OF THE RIGHT THUMB.

CLAIMANT CONTENDS HE IS ENTITLED TO AN AWARD FOR EXTRINSIC SCHEDULED DISABILITY IN ADDITION TO THE INTRINSIC SCHEDULED DISABILITY AWARD HE HAS RECEIVED.

THE REFEREE FOUND THAT THE PRIMARY USEFULNESS OF THE THUMB LIES IN ITS ABILITY TO OPPOSE THE OTHER DIGITS AND WHEN THE THUMB IS LOST, THERE IS A CORRESPONDING LOSS IN EACH OF THE DIGITS HE WOULD NORMALLY OPPOSE. IN THE INSTANT CASE CLAIMANT HAS LOST HALF THE DISTAL PHALANX OF HIS RIGHT THUMB TOGETHER WITH ALL MOTION OF THE DISTAL INTERPHALANGEAL JOINT OF THE SAME DIGIT. THE REFEREE CONCLUDED THAT CLAIMANT'S LOSS OF FUNCTION AMOUNTED TO 36.67 PER CENT OF HIS RIGHT HAND AND AWARDED CLAIMANT 55 DEGREES OF A MAXIMUM OF 150 DEGREES FOR SCHEDULED HAND DISABILITY.

THE BOARD, ON DE NOVO REVIEW, FINDS THAT CLAIMANT STILL HAS MORE THAN TWO-THIRDS FUNCTION OF HIS RIGHT HAND - HOWEVER, THE BOARD FINDS THAT THE PROPER BASIS OF THE AWARD WOULD NOT BE THE HAND BUT THE THUMB AND THE LOSS OF OPPOSITION RELATING TO THE FIRST AND SECOND FINGER OF THE RIGHT HAND.

THE BOARD CONCLUDES THAT CLAIMANT IS ENTITLED TO AN AWARD OF 40 DEGREES FOR LOSS OF HIS RIGHT THUMB AND AN ADDITIONAL 15 DEGREES FOR LOSS OF EFFECTIVE OPPOSITION OF THE UNINJURED FIRST AND SECOND FINGERS OF THE RIGHT HAND.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 26, 1975 IS MODIFIED AND CLAIMANT IS AWARDED 40 DEGREES OF A MAXIMUM OF 48 DEGREES FOR PARTIAL LOSS OF THE RIGHT THUMB AND 15 DEGREES FOR LOSS OF EFFECTIVE OPPOSITION TO THE UNINJURED FIRST AND SECOND FINGERS OF THE RIGHT HAND. IN ALL OTHER RESPECTS THE REFEREE'S ORDER IS AFFIRMED.

WCB CASE NO. 75-2066 FEBRUARY 12, 1976

ROGER LOVEN, CLAIMANT

EDWARDS AND EDWARDS, CLAIMANT'S ATTYS.
JONES, LANG, KLEIN, WOLF AND SMITH,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER AFFIRMING THE DETERMINATION ORDER MAILED JULY 15, 1974 WHEREBY

CLAIMANT WAS AWARDED NO PERMANENT PARTIAL DISABILITY.

CLAIMANT SUSTAINED A COMPENSABLE INJURY ON DECEMBER 6, 1973, INJURING HIS LOW BACK. HE WAS TREATED ON THAT DATE BY DR. STALDER, WHO DIAGNOSED AN ACUTE LUMBAR SPRAIN. CLAIMANT RECEIVED CONSERVATIVE TREATMENT, THE LAST SUCH TREATMENT BEING RECEIVED ON MAY 13, 1974. ON JUNE 19, 1974 DR. STALDER REPORTED THAT CLAIMANT COULD RETURN TO WORK AND THAT NO FURTHER TREATMENT WAS NECESSARY. THE CLAIM WAS CLOSED ON JULY 15, 1974 WITH NO AWARD OF PERMANENT PARTIAL DISABILITY.

IN APRIL 1974 CLAIMANT HAD BEEN GIVEN AN EXAMINATION BY DR. GRIPEKOVEN WHO FELT THAT CLAIMANT'S CONDITION WAS STATIONARY AT THAT TIME AND THAT NO FURTHER SPECIFIC TREATMENT WAS INDICATED. HE FELT THERE WAS NO REASON CLAIMANT COULD NOT RETURN TO HIS PREVIOUS EMPLOYMENT AS A TRUCK DRIVER WITHOUT ANY LIMITATION AND FOUND NO PERMANENT PARTIAL DISABILITY SECONDARY TO THE DECEMBER 6, 1973 ACCIDENT.

THE REFEREE FOUND THAT DURING THE PERIOD CLAIMANT RECEIVED TEMPORARY TOTAL DISABILITY COMPENSATION IT HAD BEEN DETERMINED THAT CLAIMANT COULD NOT SECURE ICC CLEARANCE AS A TRUCK DRIVER BECAUSE OF DEVELOPING CATARACT PROBLEMS. WHEN HE WAS RELEASED TO RETURN TO WORK, HE WAS NOT QUALIFIED TO DRIVE AND, THEREFORE, WAS PUT TO WORK IN THE EMPLOYER'S YARD OPERATION. THIS WORK IS ESSENTIALLY THE SAME AS THAT WHICH CLAIMANT DID WHEN HE WAS DRIVING EXCEPT FOR THE LONG-HAUL, INTERSTATE DRIVING.

THE REFEREE FOUND NO EVIDENCE TO INDICATE CLAIMANT WAS UNABLE TO COPE WITH THE DUTIES AND REQUIREMENTS OF HIS PRESENT JOB.

THE REFEREE CONCLUDED THAT THERE WAS NO SATISFACTORY MEDICAL EVIDENCE UPON WHICH TO BASE ANY AWARD OF PERMANENT PARTIAL DISABILITY AND SUSTAINED THE DETERMINATION ORDER.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE AS ITS OWN.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 2, 1975 IS AFFIRMED.

WCB CASE NO. 74-3934-E FEBRUARY 12, 1976
WCB CASE NO. 74-3863

IN THE MATTER OF THE COMPENSATION OF
JULIAN WEBB, CLAIMANT
AND IN THE MATTER OF THE COMPLYING STATUS OF
C AND H CONTRACTORS, INC., EMPLOYER
BROPHY, WILSON AND DUHAIME,
CLAIMANT'S ATTYS.
JOEL REEDER, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH FOUND THE EMPLOYER WAS A SUBJECT NONCOMPLYING EMPLOYER FROM OCTOBER 5, 1973 TO JUNE 17, 1974 AND REMANDED THE CLAIMANT'S CLAIM FOR HIS COMPENSABLE INJURY SUFFERED ON JUNE 12,

1974 TO THE STATE ACCIDENT INSURANCE FUND FOR THE PROCESSING PURSUANT TO ORS 656.054.

CLAIMANT, A 48 YEAR OLD TRUCK DRIVER, COMMENCED WORKING FOR C AND H CONTRACTORS, INC. (HEREINAFTER REFERRED TO AS C AND H) IN APRIL 1973 AS A LOG TRUCK DRIVER - HE WAS TO BE PAID BY THE TRIP AND TO MAINTAIN THE TRUCK WHICH HE DROVE. CLAIMANT RECEIVED COMPENSATION FOR MAINTAINING THE TRUCK.

C AND H WAS A SMALL FAMILY CORPORATION AND AFTER COMMENCING WORK CLAIMANT ACCEPTED THE POSITION OF SECOND VICE PRESIDENT AND AUTHORIZED THE CORPORATION TO CARRY MUTUAL OF OMAHA INSURANCE AS HIS SOLE INSURANCE COVERAGE. THE TRUCK WHICH CLAIMANT DROVE WAS OWNED BY MR. HUFFMAN, PRESIDENT OF THE CORPORATION. MR. HUFFMAN SUPPLIED THE FUEL, PARTS AND EVERYTHING THAT WAS NECESSARY TO MAINTAIN THE TRUCK.

THE ONLY DUTIES PERFORMED BY CLAIMANT CONSISTED OF DRIVING THE LOG TRUCK AND MAINTAINING THE TRUCK, HE PERFORMED NO DUTIES AS A CORPORATE OFFICER AND RECEIVED NO COMPENSATION AS A CORPORATE OFFICER.

OCCASIONALLY, CLAIMANT WOULD HAUL LOGS FOR GYPO LOGGING OUTFITS, HOWEVER, HE WAS PAID BY THE TRIP BY C AND H THE SAME AS IF HE WERE HAULING LOGS FOR C AND H.

ON JUNE 10, 1974 ONE OF MR. HUFFMAN'S SONS WAS KILLED AND C AND H DID NO WORK THAT WEEK. DURING THAT PERIOD CLAIMANT RECEIVED A CALL FROM A MR. BALDWIN, THE FATHER-IN-LAW OF ONE OF HUFFMAN'S SONS, ASKING IF HE WANTED TO WORK ON THE SCHAFINER JOB WHICH MR. BALDWIN WAS WORKING ON. CLAIMANT SAID HE DIDN'T KNOW IF C AND H WOULD ALLOW HIM TO AND LATER MR. BALDWIN CALLED BACK AND SAID IT WAS O.K. MR. HUFFMAN DENIES THIS.

CLAIMANT WORKED THREE DAYS HAULING LOGS ON THE SCHAFINER JOB USING A TRUCK WHICH WAS LEASED BY C AND H. ON JUNE 12, 1974, WHILE HAULING LOGS ON A ONE WAY SERVICE ROAD WITH TURNOUTS, HE CAME UPON A FELLOW TRUCK DRIVER HAULING ON THE SAME JOB WHO NEEDED SOME ASSISTANCE. CLAIMANT WAS RENDERING THIS ASSISTANCE WHEN HE FELL AND INJURED HIMSELF. CLAIMANT WAS PAID BY C AND H FOR THE THREE DAYS HE HAULED ON THE SCHAFINER JOB.

THE REFEREE FOUND THAT THE EXEMPTION PROVIDED BY ORS 656.027(7) RELATING TO OFFICERS OF CORPORATIONS, DID NOT APPLY IN THIS CASE AS CLAIMANT WAS CLEARLY PERFORMING THE ORDINARY DUTIES OF A WORKMAN AND NOT THE DUTIES OF A CORPORATE OFFICER AND HE HAD NEVER PERFORMED SUCH DUTIES, HAD ANY FINANCIAL INTEREST IN THE COMPANY OR HAD ANY VOICE IN ITS MANAGEMENT OR RECEIVED COMPENSATION AS AN OFFICER. THE REFEREE CONCLUDED THAT THE CLAIMANT WAS A SUBJECT WORKMAN AND THAT C AND H WAS, THEREFORE, A SUBJECT EMPLOYER UNDER THE PROVISIONS OF ORS 656.023 DURING THE PERIOD THAT CLAIMANT WORKED FOR IT.

THE REFEREE FOUND THERE WAS UNCONTROVERTED EVIDENCE THAT C AND H DID NOT QUALIFY AS EITHER A DIRECT RESPONSIBILITY EMPLOYER OR A CONTRIBUTING EMPLOYER DURING THE PERIOD OF OCTOBER 5, 1973 TO JUNE 16, 1974 AND WAS, DURING THAT PERIOD, A NONCOMPLYING EMPLOYER AS DEFINED BY THE WORKMEN'S COMPENSATION ACT.

C AND H CONTENDS THAT CLAIMANT WAS NOT WITHIN THE COURSE AND SCOPE OF HIS EMPLOYMENT ON JUNE 12, 1974, THAT HE WAS SIMPLY OUT ON A LARK BY HIMSELF, FOR HIS OWN BENEFIT, TO MAKE MONEY WITH HIS EMPLOYER'S TRUCK AND WITH NO AUTHORITY FROM HIS EMPLOYER TO DO SO. THE REFEREE FOUND THAT ALTHOUGH THERE WAS A QUESTION CONCERNING

WHETHER EXPRESSED AUTHORIZATION FOR CLAIMANT TO WORK ON THE SCHAFINER JOB WAS GIVEN BY HIS EMPLOYER PRIOR TO HIS UNDERTAKING THE JOB, THE EVIDENCE WAS UNCONTROVERTED THAT SUBSEQUENT TO HAVING PERFORMED THE JOB, C AND H ACCEPTED PAYMENT FROM SCHAFINER AND PAID CLAIMANT FOR HIS SERVICES IN THE SAME MANNER AS THEY HAD DONE ON NUMEROUS OTHER OCCASIONS. THE REFEREE CONCLUDED THAT AT THE TIME HE SUFFERED HIS INJURY CLAIMANT WAS PERFORMING A JOB FOR THE BENEFIT OF HIS EMPLOYER AND THAT BY ACCEPTING THOSE BENEFITS AND PAYING FOR CLAIMANT'S SERVICES, THE EMPLOYER RATIFIED AND AUTHORIZED CLAIMANT'S PERFORMANCE OF THE SCHAFINER JOB.

C AND H ALSO CONTENDS THAT ON JANUARY 12, 1974 CLAIMANT WAS DOING A VOLUNTARY ACT WHEN HE STOPPED TO ASSIST THE FELLOW TRUCK DRIVER CHANGE A TIRE - THAT HE HAD BEEN EXPRESSLY INSTRUCTED NOT TO ASSIST ANYONE WHILE ON A TRIP. THE REFEREE FOUND THAT CLAIMANT WAS AWARE THAT THE TRUCK DRIVER WAS WORKING ON THE SAME JOB AND WAS ALSO AWARE THAT HE WAS IN TROUBLE AND NEEDED HELP. HE STOPPED AND GAVE THE ASSISTANCE REQUIRED.

THE REFEREE CONCLUDED THAT CLAIMANT WAS ACTING REASONABLY UNDER THE CIRCUMSTANCES AND IN GOOD FAITH AND THAT HE WAS AT A PLACE WHERE IT WAS REASONABLE FOR HIM TO BE IN THE PERFORMANCE OF HIS DUTIES - THERE WAS NO DEVIATION FROM HIS NORMAL OR USUAL DUTIES THAT WAS SUBSTANTIAL ENOUGH TO TAKE HIM OUT OF THE COURSE AND SCOPE OF HIS EMPLOYMENT. SHE CONCLUDED THAT CLAIMANT HAD SUSTAINED A COMPENSABLE INJURY ARISING OUT OF AND IN THE COURSE OF HIS EMPLOYMENT ON JUNE 12, 1974.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE VERY WELL WRITTEN OPINION OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED JULY 28, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 400 DOLLARS, PAYABLE IN THE FIRST INSTANCE BY THE STATE ACCIDENT INSURANCE FUND AND RECOVERABLE FROM C AND H CONSTRUCTION INC. BY THE WORKMEN'S COMPENSATION BOARD UNDER THE PROVISIONS OF ORS 656.054.

WCB CASE NO. 75-1842 FEBRUARY 13, 1976

WALTER EDMISON, CLAIMANT

S. DAVID EVES, CLAIMANT'S ATTY.
KEITH D. SKELTON, DEFENSE ATTY.
ORDER ON MOTION

ON DECEMBER 22, 1975, THE EMPLOYER REQUESTED BOARD REVIEW OF A REFEREE'S ORDER CONTENDING THE REFEREE EXCEEDED HIS JURISDICTION IN FINDING CLAIMANT ENTITLED TO VOCATIONAL REHABILITATION AT BOARD EXPENSE THROUGH THE VOCATIONAL REHABILITATION DIVISION OF THE DEPARTMENT OF HUMAN RESOURCES OF THE STATE OF OREGON OR, IF NECESSARY, THROUGH AN APPROPRIATE AGENCY OUTSIDE THE STATE. THE EMPLOYER CONCURRENTLY ASKED THE BOARD TO ENTER A TEMPORARY STAY OF VOCATIONAL REHABILITATION BENEFITS PENDING THE BOARD'S DECISION ON REVIEW.

THE MOTION WAS INADVERTENTLY OVERLOOKED UNTIL THE EMPLOYER RENEWED ITS MOTION ON FEBRUARY 3, 1976.

CLAIMANT RESPONDED TO THE MOTION BY LETTER OF FEBRUARY 6, 1976 CONTENDING THAT THE REFEREE DID NOT EXCEED HIS AUTHORITY SINCE ONE OF THE BASIC PRINCIPLES OF THE WORKMEN'S COMPENSATION LAW IS TO REHABILITATE INJURED WORKMEN SO THEY MAY BECOME A PRODUCTIVE MEMBER OF SOCIETY.

DID THE REFEREE EXCEED HIS JURISDICTION (AUTHORITY) IN ORDERING THE AGENCY TO PROVIDE VOCATIONAL REHABILITATION TO CLAIMANT?

ORS 656.283 PROVIDES -

(1) 'SUBJECT TO ORS 656.319, ANY PARTY OR THE BOARD MAY AT ANY TIME REQUEST A HEARING ON ANY QUESTION CONCERNING A CLAIM (UNDERSCORED).'

...

(3) 'THE BOARD SHALL REFER THE REQUEST FOR HEARING TO A REFEREE FOR DETERMINATION AS EXPEDITIOUSLY AS POSSIBLE.' (EMPHASIS ADDED)

IS A QUESTION CONCERNING A WORKMAN'S ENTITLEMENT TO VOCATIONAL REHABILITATION A 'QUESTION CONCERNING A CLAIM'?

ALTHOUGH THE STATUTE DOES NOT VEST THE WORKMAN WITH THE SAME RIGHT TO VOCATIONAL REHABILITATION AS IT DOES, FOR EXAMPLE, TO MEDICAL SERVICES FOR AN OCCUPATIONAL INJURY - IT CAN SCARCELY BE SAID - GIVEN THE BROAD GRANT OF JURISDICTION CONTAINED IN ORS 656.283 - THAT THE REFEREE EXCEEDED HIS JURISDICTION IN HEARING THE ISSUE. IF HE CAN HEAR THE ISSUE HE CAN GRANT RELIEF IN AN APPROPRIATE CASE. THE EMPLOYER SUGGESTS THAT THE ORDER AUTHORIZING REFERRAL TO A VOCATIONAL REHABILITATION AGENCY OUTSIDE THE STATE IS IMPROPER ON ITS FACE. WE DISAGREE. THE OREGON WORKMEN'S COMPENSATION LAW, NOWHERE LIMITS THE PROVISION OF BENEFITS ONLY TO OREGON RESIDENTS NOR DOES IT REQUIRE THAT RESTORATIVE SERVICES BE PROVIDED EXCLUSIVELY BY OREGON VENDORS. FROM TIME TO TIME THE BOARD CONTRACTS WITH SISTER STATE AGENCIES FOR THE VOCATIONAL REHABILITATION OF WORKMEN INJURED IN OREGON WHO, FOR ONE REASON OR ANOTHER, HAVE LEFT THE STATE. WE SEE NOTHING IN THE STATUTE WHICH SUGGESTS THAT THE BOARD MAY NOT PROVIDE REHABILITATION SERVICES WHEREVER CONVENIENT TO THE WORKMAN IF ADEQUATE SERVICES ARE AVAILABLE. THE EMPLOYER ALLEGES THAT THE CLAIMANT HAS BEEN REFERRED TO THE CALIFORNIA DEPARTMENT OF REHABILITATION WHOSE STANDARDS ARE DIFFERENT THAN OREGON'S WITHOUT ANY DIRECTION AS TO WHAT EFFORT THE WORKMEN'S COMPENSATION BOARD EXPECTS OF THE CALIFORNIA DEPARTMENT OF VOCATIONAL REHABILITATION OR WHAT CONDUCT WILL BE REQUIRED OF THE CLAIMANT. THERE IS NO EVIDENCE SUPPLIED TO SUPPORT THESE ALLEGATIONS.

FINALLY, ORS 656.313 PROVIDES THAT BENEFITS TO A WORKMAN ARE NOT TO BE DELAYED OR INTERRUPTED BY A REQUEST FOR REVIEW.

FOR THESE REASONS WE CONCLUDE THE MOTION FOR A TEMPORARY STAY OF VOCATIONAL REHABILITATION BENEFITS SHOULD BE DENIED.

IT IS SO ORDERED.

WCB CASE NO. 75—722 FEBRUARY 13, 1976

RAYMOND SEYMOUR, CLAIMANT

JONES, LANG, KLEIN, WOLF AND SMITH,
CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE,
DEFENSE ATTYS.
ORDER ON MOTION

CLAIMANT'S COUNSEL HAS MOVED THE BOARD FOR RECONSIDERATION OF ITS ORDER ON REVIEW DATED JANUARY 19, 1976, OR IN THE ALTERNATIVE, TO REMAND THIS MATTER TO THE HEARING REFEREE FOR THE TAKING OF ADDITIONAL EVIDENCE.

THE BOARD IS NOT PERSUADED BY THE ARGUMENTS ADVANCED IN SUPPORT OF THE CLAIMANT'S MOTION THAT FURTHER CONSIDERATION OF ITS ORDER OR A REMAND TO THE REFEREE IS JUSTIFIED. THE MOTION SHOULD, THEREFORE, BE DENIED.

IT IS SO ORDERED.

WCB CASE NO. 75—970 FEBRUARY 13, 1976

IVY BROWN, CLAIMANT

RICHARDSON AND MURPHY,
CLAIMANT'S ATTYS.
GEARIN, CHENEY, LANDIS, AEBI AND KELLEY,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER REQUESTS BOARD REVIEW OF THE ORDER OF THE REFEREE WHICH HELD THAT CLAIMANT SUSTAINED A COMPENSABLE INJURY, REMANDED HER CLAIM TO THE EMPLOYER FOR THE PAYMENT OF BENEFITS, AS PROVIDED BY LAW, UNTIL THE CLAIM IS CLOSED PURSUANT TO ORS 656.268 AND AWARDED CLAIMANT'S ATTORNEY A FEE OF 1,000 DOLLARS TO BE PAID BY THE EMPLOYER.

AT THE HEARING THE EMPLOYER MOVED THAT THE REQUEST FOR HEARING BE DISMISSED FOR WANT OF JURISDICTION ON THE GROUNDS THAT THE CLAIM HAD NOT BEEN TIMELY FILED, I.E., THE DATE OF THE ACCIDENT WAS AUGUST 26, 1972 AND THE SUBMISSION OF THE REPORT OF THE ACCIDENT ON A FORM 801 WAS MARCH 8, 1975. THE EMPLOYER CONTENDS THAT THIS INTERVAL OF APPROXIMATELY TWO AND A HALF YEARS VIOLATES THE PROVISION OF ORS 656.265 AND 656.319. THE REFEREE DENIED THE MOTION ON THE BASIS THAT WHILE THE NOTICE OF ACCIDENT WAS NOT SUPPLIED BY THE EMPLOYER WITHIN THE TIME REQUIRED BY LAW, THE EMPLOYER HAD ACTUAL KNOWLEDGE OF THE INJURY RECEIVED BY THE CLAIMANT ON THE DATE OF THE ACCIDENT AND COULD NOT BE PREJUDICED BY THE LATE FILING OF THE CLAIM.

ON THE MERITS OF THE CASE, THE REFEREE FOUND THAT CLAIMANT SUSTAINED INJURIES ON AUGUST 26, 1972 WHILE RIDING AS A PASSENGER IN AN AIRPLANE PILOTED BY THE EMPLOYER. THE EMPLOYER OPERATED A MARINA USED TO SERVICE BOATS AND AIRPLANES AND ALSO FOR THE SALE AND TRADE OF SMALL WATER CRAFT. THE REFEREE FOUND THE EMPLOYER OWNED THE AIRPLANE IN WHICH CLAIMANT WAS RIDING AND THAT HE USED IT NOT ONLY FOR PLEASURE BUT FOR THE PURPOSE OF PROMOTING SALES IN CONJUNCTION WITH HIS BUSINESS.

CLAIMANT WAS EMPLOYED AT A REGULAR MONTHLY SALARY IN A SPECIFIED AMOUNT AND THAT AS A PART OF HER DUTIES SHE WAS REQUIRED TO GO ON TRIPS WITH THE EMPLOYER TO PERFORM SUCH OTHER DUTIES AS COOKING, GARNERING SUPPLIES AND ASSISTING THE EMPLOYER IN THE OPERATION AND MAINTENANCE OF THE PLANE AND TRIP EQUIPMENT. ON THE PARTICULAR TRIP WHICH CULMINATED IN THE ACCIDENT THE EMPLOYER HAD TOLD CLAIMANT TO TRY TO SECURE A CUSTOMER FOR A CHARTER PLANE FOR A FISHING TRIP AND CLAIMANT HAD MADE ARRANGEMENTS WITH A GARY STAMP AND HIS WIFE TO HIRE SUCH A CHARTER. THE FOUR PERSONS FLEW NORTH, SOME FISHING WAS DONE AND, UPON CONCLUSION OF THE FISHING, ON TAKEOFF THE PLANE CRASHED AND CLAIMANT WAS INJURED.

THE EMPLOYER HAD TOLD THE STAMPS THAT CLAIMANT WAS ACCOMPANYING HIM AS AN EMPLOYE AND AS HIS 'RIGHT HAND MAN' = HE ASKED THEM IF THEY HAD ANY OBJECTIONS, THEY DIDN'T.

WHEN THE EMPLOYER FILLED OUT THE ACCIDENT REPORT HE INDICATED THE INJURIES RECEIVED BY CLAIMANT WERE IN THE COURSE OF HER EMPLOYMENT. THE REFEREE FOUND THAT THIS WAS AN ADMISSION CORROBORATING CLAIMANT'S TESTIMONY AND POSITION THAT SHE HAD SUSTAINED A COMPENSABLE INJURY. THE REFEREE FURTHER FOUND THAT THE EMPLOYER DID NOT DENY THE CLAIM BUT STATED THAT HE DID NOT HAVE WORKMEN'S COMPENSATION COVERAGE AND SUGGESTED THAT CLAIMANT SHOULD APPLY TO HER OWN PERSONAL INSURANCE CARRIER AND HE WOULD MAKE UP THE DIFFERENCE BETWEEN WHAT SHE RECEIVED FROM HER OWN CARRIER AND THE AMOUNT SHE WOULD BE ENTITLED TO UNDER THE WORKMEN'S COMPENSATION LAW.

THE REFEREE CONCLUDED THEREFROM THAT CLAIMANT WAS AN EMPLOYE ON SAID TRIP ACTING WITHIN THE SCOPE OF HER EMPLOYMENT AT THE TIME OF HER INJURY.

HAVING CONCLUDED THAT CLAIMANT SUSTAINED A COMPENSABLE INJURY, THE REFEREE FOUND THAT UNDER THE CIRCUMSTANCES ASSESSMENT OF PENALTIES WAS NOT JUSTIFIED. THE CLAIMANT HAD CONTENDED THAT PENALTIES SHOULD BE ASSESSED FOR UNREASONABLE DELAY IN PAYMENT OF COMPENSATION AND UNREASONABLE RESISTANCE OR DELAY IN PAYMENT OF COMPENSATION AND ALSO FOR FAILURE TO PAY TEMPORARY TOTAL DISABILITY COMPENSATION WITHIN THE 14 DAY PERIOD PROVIDED BY LAW.

THE REFEREE CONCLUDED THAT THE EMPLOYER WAS FACED WITH A PROBLEM AS TO WHETHER OR NOT HE HAD COVERAGE AND IT WAS APPARENT THAT HE DID NOT ACT THROUGH MALICE BUT EVEN WENT SO FAR AS TO OFFER TO PAY THE DIFFERENCE BETWEEN WHAT CLAIMANT WOULD ACTUALLY BE ENTITLED TO UNDER THE WORKMEN'S COMPENSATION LAW AND THAT AMOUNT WHICH SHE RECEIVED FROM HER OWN CARRIER. THERE WAS NO MOTIVATION OR INTENT ON THE PART OF THE EMPLOYER TO DEPRIVE CLAIMANT OF ANY BENEFITS - ALSO THE CLAIMANT ACQUIESCED IN THIS PARTICULAR METHOD OF CLAIM HANDLING. BECAUSE THE DENIAL WAS IMPROPER, AN ATTORNEY'S FEE PAYABLE BY THE EMPLOYER SHOULD BE ALLOWED UNDER THE PROVISIONS OF ORS 656.386(1).

THE BOARD, ON DE NOVO REVIEW, CONCURS IN THE FINDINGS AND CONCLUSIONS REACHED BY THE REFEREE IN HIS ORDER. AT THE HEARING THE EMPLOYER GROUNDED HIS MOTION TO DISMISS ON BOTH ORS 656.265 AND 656.319(A). THE REFERENCE DENIED THE MOTION, RELYING UPON THE PROVISIONS OF ORS 656.265(4)(A) ONLY. ORS 656.319(A) WAS RETROACTIVELY REPEALED BY CH 497 O L 1975, THEREFORE, IT WAS NOT NECESSARY FOR THE REFEREE TO BASE HIS DENIAL OF THE EMPLOYER'S MOTION ON ANY PROVISION OTHER THAN ORS 656.265(4)(A).

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 21, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 350 DOLLARS PAYABLE BY THE EMPLOYER.

WCB CASE NO. 75-966 FEBRUARY 13, 1976

EARL BONNER, CLAIMANT

ROY KILPATRICK, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE DENIAL BY THE STATE ACCIDENT INSURANCE FUND OF CLAIMANT'S CLAIM FOR A MYOCARDIAL INFARCTION SUFFERED ON NOVEMBER 29, 1974.

CLAIMANT IS A 58 YEAR OLD LOG HAULER. IN MARCH 1974 CLAIMANT WAS HOSPITALIZED FOR TREATMENT RELATING TO HIS LOW BACK - WHILE IN THE HOSPITAL HE SUFFERED EPISODES OF SUBSTERNAL CHEST PAINS AND WAS SEEN BY DR. BITTNER WHO, AT THE TIME, MADE A TENTATIVE DIAGNOSIS OF A PROBABLE HIATAL HERNIA OR PEPTIC ULCER DISEASE ALTHOUGH THERE WAS SOME INDICATION THAT THERE MIGHT BE A CORONARY BLOCK.

DURING THE PERIOD BETWEEN THE MARCH HOSPITALIZATION AND THE MYOCARDIAL INFARCTION ON NOVEMBER 29, CLAIMANT HAD EXPERIENCED RADIATING TYPE PAINS INCREASING IN SEVERITY TOWARDS THE LATTER PART OF THAT PERIOD.

CLAIMANT WORKED ON NOVEMBER 27, 1974, THE FOLLOWING DAY WAS THANKSGIVING AND HE RESTED AT HOME. ON NOVEMBER 29, HE LEFT HEPPNER WITH HIS SON INTENDING TO DRIVE HIS PICKUP TRUCK TO BEND - HE HAD DRIVEN ONLY A FEW MILES WHEN HE FELT CHEST PAINS. NO EXERTION WAS INVOLVED AND CLAIMANT STOPPED, RESTED FOR A SHORT WHILE AND THEN CONTINUED, ALTHOUGH HIS SON DID THE DRIVING AS THEY COMPLETED THEIR ROUND TRIP FROM HEPPNER TO BEND. DURING THE DAY CLAIMANT EXPERIENCED SEVEN OR EIGHT SEVERE PAINS IN HIS CHEST AND ARM AND HE STOPPED DURING THE TRIP TO SEEK ADVICE FROM A DOCTOR. UPON HIS ARRIVAL HOME ABOUT 9,00 P.M. HE CONTACTED DR. WOLFF WHO HOSPITALIZED HIM AND EXPRESSED HIS OPINION THAT CLAIMANT HAD SUFFERED AN ACUTE MYOCARDIAL INFARCTION ON NOVEMBER 29.

DR. GRISWOLD, WHO HAD EXAMINED CLAIMANT, EXPRESSED HIS OPINION THAT THERE PROBABLY WAS A CAUSAL RELATIONSHIP TO CLAIMANT'S WORK ACTIVITY SEVERAL DAYS BEFORE WHICH PRODUCED WITHIN CLAIMANT AN UNSTABLE ANGINAL SITUATION WITH THE RESULTANT MYOCARDIAL INFARCTION.

DR. BITTNER, WHO HAD EXAMINED CLAIMANT WHEN HE WAS HOSPITALIZED IN MARCH 1974, TESTIFIED THAT THE SYMPTOMS CLAIMANT HAD HAD AT THAT TIME WERE DUE TO A COMBINATION OF THE ACTIVE DUODENAL ULCER AND THE HIATAL HERNIA, BOTH OF WHICH COULD SIMULATE HEART PAIN. HE DID NOT FEEL THAT, AT THAT TIME, CLAIMANT WAS SUFFERING ANGINAL PAIN ALTHOUGH HE MAY HAVE LATER. DR. BITTNER'S OPINION WAS THAT CLAIMANT'S ACTIVITIES WERE NOT OF A SUFFICIENT MAGNITUDE TO CAUSE CLAIMANT TO HAVE AN INFARCT. TAKING INTO CONSIDERATION ALL OF CLAIMANT'S PREDISPOSING FACTORS - I.E., HYPERTENSION,

SMOKING, COFFEE DRINKING, HISTORY OF ANGINA, ETC. - CLAIMANT WAS HEADED FOR AN INFARCT WITH OR WITHOUT EXERTION.

THE REFEREE FOUND THAT CLAIMANT'S LAST WORK ACTIVITY WAS ON THE 27TH, HE WAS HOME ON THE 28TH, A HOLIDAY, AND THE ONLY ACTIVITY IN WHICH HE ENGAGED IN ON THE 29TH WAS RIDING AS A PASSENGER IN HIS PICKUP. THE EVIDENCE INDICATED THAT FOR THE THREE DAYS PRECEDING THE MYOCARDIAL INFARCTION, CLAIMANT HAD BEEN AVOIDING AS MUCH WORK ACTIVITY AS POSSIBLE AND THAT OTHERS HAD BEEN DOING STRENUOUS ACTIVITIES INVOLVED IN HIS WORK. HE CONCLUDED THAT THE MYOCARDIAL INFARCTION WAS NOT WORK-RELATED AND AFFIRMED THE DENIAL.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 25, 1975 IS AFFIRMED.

WCB CASE NO. 75-227 FEBRUARY 13, 1976

IN THE MATTER OF THE COMPENSATION OF
MARCELINO CARDOSO, JR., CLAIMANT
AND IN THE COMPLYING STATUS OF
IOSIF M. AND EKATERINA ANFILOFIEFF
EICHSTEADT, BOLLAND AND ENGLE,
CLAIMANT'S ATTYS.
CARL DAVIS, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH HELD THAT HIS HERNIA CLAIM WAS NOT COMPENSABLE.

THERE WERE TWO ISSUES BEFORE THE REFEREE - (1) SUBJECTIVITY AND (2) COMPENSABILITY.

CLAIMANT IS OF MEXICAN ORIGIN AND THE ALLEGED EMPLOYERS ARE RUSSIAN. ON OR ABOUT JULY 24, 1974 CLAIMANT AND OTHER MEMBERS OF HIS FAMILY WENT TO THE ALLEGED EMPLOYERS' FARM AND WERE HIRED ON A CONTRACT BASIS TO PICK BERRIES. MRS. ANFILOFIEFF, WITH WHOM THEY DEALT, SPOKE ONLY RUSSIAN AND CLAIMANT'S FATHER, WHO DID THE TALKING FOR CLAIMANT AND THE OTHER MEMBERS OF THE FAMILY, DID NOT SPEAK ENGLISH VERY WELL AND SPOKE NO RUSSIAN.

CLAIMANT TESTIFIED THAT HE AND HIS FAMILY WORKED APPROXIMATELY THREE HOURS ON THE 24TH AND ON THE 25TH HE WAS INSTRUCTED BY MRS. ANFILOFIEFF TO MOVE SOME CRATES OF BERRIES OUT OF THE SUN. THIS LIFTING, CLAIMANT CONTENDS, CAUSED HIM TO HAVE A HERNIA. HE HAD NOTED A PAIN IN HIS GROIN LATE JULY 25, AND ON THE FOLLOWING DAY SAW DR. ASPER WHO DIAGNOSED AN INFLAMED UNDESCENDED TESTICLE WHICH, ACCORDING TO THE DOCTOR, WAS CAUSED WHEN CLAIMANT LIFTED TOO MANY CRATES OF BERRIES. A FEW DAYS LATER DR. BAILEY PERFORMED A LEFT ORCHIECTOMY AND HERNIA REPAIR. DR. BAILEY STATED THERE WAS NO WAY HE COULD TELL IF THE HERNIA WAS PRESENT PRIOR TO JULY 25.

NO CLAIM FOR THE HERNIA WAS FILED BY CLAIMANT UNTIL LATE OCTOBER AND THE EMPLOYER HAD NO INFORMATION THAT THERE WAS AN ALLEGED INJURY UNTIL ABOUT THAT PERIOD OF TIME.

THE EMPLOYER PAID CLAIMANT'S FATHER WHO IN TURN, PRESUMABLY, PAID THE MEMBERS OF HIS FAMILY. MRS. ANFILOFIEFF TESTIFIED THE ONLY CHECK SHE MADE OUT WAS DATED JULY 26. INITIALLY, CLAIMANT TESTIFIED HE DID NOT WORK AT ALL ON JULY 26 BUT HE LATER SAID HE DID GO OUT TO THE FARM THAT DAY TO ADVISE HIS FATHER THAT HE WAS GOING INTO SALEM TO SEE A DOCTOR. MRS. ANFILOFIEFF DISAGREED, STATING THAT CLAIMANT WAS WORKING ON JULY 26 AND SHE SPECIFICALLY RECALLED HE WAS PRESENT AT 10:00 A.M. WHEN SHE PAID THE FAMILY OFF. SHE FURTHER TESTIFIED SHE DID NOT GIVE CLAIMANT ANY INSTRUCTIONS TO MOVE THE FULL BERRY CRATES ON JULY 24.

THE ALLEGED EMPLOYER CONTENDS THAT THE RELATIONSHIP BETWEEN THEM AND THE CLAIMANT AND OTHER MEMBERS OF CLAIMANT'S GROUP WAS ONE OF OWNER AND INDEPENDENT CONTRACTOR, NOT EMPLOYER AND EMPLOYES.

THE REFEREE FOUND THAT THE EVIDENCE DID NOT SUPPORT THIS CONTENTION. MOST OF THE FACTORS GENERALLY LOOKED TO TO DETERMINE EMPLOYER-EMPLOYE STATUS WERE PRESENT IN THE RELATIONSHIP BETWEEN CLAIMANT AND THE ANFILOFIEFFS. THE ANFILOFIEFFS RETAINED THE RIGHT TO DIRECT AND CONTROL THE CLAIMANT AND THE OTHER MEMBERS OF HIS FAMILY EVEN THOUGH THIS RIGHT MAY HAVE BEEN ONLY EXERCISED IN ORDERING CLAIMANT AND THE OTHERS TO PICK ON A CERTAIN SIDE OF THE ROW. HE CONCLUDED THAT CLAIMANT WAS AN EMPLOYE OF THE ANFILOFIEFFS IN JULY 1974 AND THAT THE ANFILOFIEFFS WERE EMPLOYERS SUBJECT TO THE ACT.

WITH RESPECT TO THE QUESTION OF COMPENSABILITY, THE REFEREE FOUND SUCH A CONFLICT IN THE TESTIMONY THAT HE HAD TO RESOLVE THIS QUESTION BASED ON CREDIBILITY OF THE WITNESSES. THE REFEREE FOUND MRS. ANFILOFIEFF'S TESTIMONY THE MOST CREDIBLE. IT WAS NOT UNTIL AFTER (UNDERSCORED) SHE HAD TESTIFIED THAT CLAIMANT WAS AT THE FARM ON JULY 26 THAT CLAIMANT ADMITTED THAT HE HAD BEEN THERE TO TELL HIS FATHER THAT HE WAS GOING IN TO SEE A DOCTOR. PREVIOUSLY CLAIMANT HAD TESTIFIED HE HAD NOT BEEN THERE AT ALL ON JULY 26. THE REFEREE FOUND THAT HER STATEMENTS REGARDING THE GIVING OF THE CHECK TO THE CLAIMANT'S FATHER ON THE 26TH WAS A FAR MORE LIKELY STORY THAN THAT TOLD BY THE CLAIMANT WHO SAID THE CHECK WAS GIVEN TO HIS FATHER ON JULY 25. THERE IS NO EVIDENCE OF A CHECK DATED JULY 25 PAYABLE TO CLAIMANT'S FATHER.

THE REFEREE CONCLUDED THAT ALTHOUGH THE RELATIONSHIP BETWEEN CLAIMANT AND THE ANFILOFIEFFS ON JULY 24 AND 25, 1974 WAS THAT OF EMPLOYER-EMPLOYE AND THAT THE EMPLOYER WAS SUBJECT TO THE WORKMEN'S COMPENSATION LAW THE CLAIMANT FAILED TO ESTABLISH THAT HIS HERNIA WAS A COMPENSABLE INJURY.

THE BOARD, ON DE NOVO REVIEW, GIVES FULL CONSIDERATION TO THE FACT THAT THE REFEREE OBSERVED THE VARIOUS PARTIES AS EACH TESTIFIED AND CONCURS IN HIS JUDGMENT WITH RESPECT TO THE CREDIBILITY OF EACH. THE BOARD AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED JUNE 19, 1975 IS AFFIRMED.

WCB CASE NO. 75-1036 FEBRUARY 18, 1976

ROBERT CRONE, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED FEBRUARY 6, 1975 WHEREBY CLAIMANT RECEIVED 64 DEGREES FOR 20 PER CENT UNSCHEDULED LOW BACK DISABILITY AND 15 DEGREES FOR 10 PER CENT LEFT LEG DISABILITY. ON OCTOBER 27, 1974 CLAIMANT HAD BEEN AWARDED 32 DEGREES FOR 10 PER CENT UPPER BACK AND NECK DISABILITY FOR THE SAME INJURY WHICH WAS INCURRED ON FEBRUARY 25, 1972.

CLAIMANT, A 27 YEAR OLD TRUCK DRIVER, SUFFERED HIS COMPENSABLE INJURY WHEN HIS TRUCK WAS REARENDED. IMMEDIATELY FOLLOWING THE ACCIDENT CLAIMANT HAD NECK PAIN FOLLOWED BY LOW BACK PAIN SEVERAL DAYS LATER. HE WAS FIRST SEEN BY DR. HOLMES FOR BACK PAIN AND HEADACHES AND WAS LATER SEEN BY DR. HAZEL.

ON OCTOBER 12, 1972 DR. BLAUER EXAMINED CLAIMANT, WHO HAD RETURNED TO WORK ON A SELF-EMPLOYMENT BASIS. CLAIMANT WORE A CORSET-TYPE BACK SUPPORT WHEN REQUIRED TO DO HEAVY WORK BUT SEEMED TO BE GETTING ALONG RATHER WELL, HE HAD SOME INTERMITTENT PAIN. AT THAT TIME HIS CONDITION WAS CONSIDERED MEDICALLY STATIONARY WITH SOME RESIDUAL BACK DISABILITY AND THE CLAIM WAS CLOSED WITH THE AWARD OF 32 DEGREES.

ON JANUARY 22, 1974 CLAIMANT WAS SEEN BY DR. GAMBEE WHO FELT THAT CLAIMANT'S CLAIM SHOULD NOT HAVE BEEN CLOSED AS THE BACK PROBLEM HAD NEVER BEEN FULLY RESOLVED. DR. GAMBEE'S DIAGNOSIS WAS ACUTE RUPTURED DISC, HOWEVER, CLAIMANT REFUSED AN OPERATION BECAUSE OF HIS RELIGIOUS BELIEFS AND DR. GAMBEE FELT CLAIMANT WOULD CONTINUE TO HAVE THESE BACK PROBLEMS UNTIL HE HAD SURGERY.

DR. WADE EXAMINED CLAIMANT ON APRIL 17, 1974 AND HIS IMPRESSION WAS THAT OF A HERNIATED INTERVERTEBRAL DISC IMPROVING WITH CONSERVATIVE TREATMENT BUT LIKELY TO RETURN WITH HARD PHYSICAL ACTIVITY. DR. GAMBEE THOUGHT CLAIMANT'S CLAIM COULD BE CLOSED WITH AN AWARD OF PERMANENT PARTIAL DISABILITY EQUAL TO WHAT HE WOULD HAVE RECEIVED HAD HE RECEIVED SUCCESSFUL SURGICAL RELIEF AND THAT CLAIMANT SHOULD TRY TO RETURN TO WORK.

CLAIMANT HAS REGISTERED AT A COMMUNITY COLLEGE AND HAD BEGUN SIX TERMS OF TRAINING IN BUSINESS MANAGEMENT ON JANUARY 10, 1975 - HIS VOCATIONAL GOAL IS BASIC MANAGEMENT AND HE APPEARS TO BE DOING QUITE WELL. CLAIMANT HAS A HIGH SCHOOL EDUCATION AND HAS WORKED AT SEVERAL TYPES OF JOBS SINCE HIS GRADUATION IN 1962. CLAIMANT CONTENDS THAT HE IS ENTITLED TO TEMPORARY TOTAL DISABILITY COMPENSATION DURING THE TIME HE IS UNDER HIS VOCATIONAL REHABILITATION PROGRAM.

THE REFEREE FOUND THAT THE PROVISION OF ORS 656.268 THAT NO CLAIM SHALL BE CLOSED UNTIL THE WORKMAN HAS COMPLETED ANY AUTHORIZED PROGRAM OF VOCATIONAL REHABILITATION IS NOT APPLICABLE BECAUSE CH 634, O.L. 1973, WHICH CREATED THAT PROVISION, BECAME EFFECTIVE ON JANUARY 1, 1974 AND CLAIMANT'S INJURY OCCURRED ON FEBRUARY 25, 1972.

DR. GAMBEE BELIEVED THAT CLAIMANT HAD A DEFINITE PERMANENT RESIDUAL WHICH COULD BE IMPROVED SIGNIFICANTLY WITH SURGERY BUT SINCE THE CLAIMANT WAS RELUCTANT TO SUBMIT TO THIS SURGERY HIS CLAIM SHOULD BE CLOSED. ON JULY 9, 1974 THIS RECOMMENDATION WAS REPORTED BY DR. WADE AND TEMPORARY TOTAL DISABILITY COMPENSATION WAS TERMINATED AS OF JULY 8, 1974.

THE REFEREE CONCLUDED THAT WHILE CLAIMANT'S CONDITION MAY NOT HAVE BECOME STATIONARY FROM A MEDICAL POINT OF VIEW, AS LONG AS HE REFUSED TO SUBMIT TO SURGERY ON RELIGIOUS GROUNDS, WHICH HE HAD A RIGHT TO DO, HE COULD NOT EXPECT TO CONTINUE TO RECEIVE TEMPORARY TOTAL DISABILITY COMPENSATION.

IN DETERMINING CLAIMANT'S UNSCHEDULED DISABILITY, THE REFEREE FOUND CLAIMANT COULD NOT RETURN TO HEAVY MANUAL LABOR. WHILE RECOGNIZING THAT CLAIMANT'S CONDITION MUST BE CONSIDERED AS IS AT THE PRESENT, THE REFEREE, NEVERTHELESS, FOUND THAT IN DETERMINING LOSS OF FUTURE EARNING CAPACITY THE TRAINING WHICH CLAIMANT IS RECEIVING AT THE COMMUNITY COLLEGE UNDER THE DIVISION OF VOCATIONAL REHABILITATION PROGRAM MUST BE TAKEN INTO CONSIDERATION ALONG WITH CLAIMANT'S ABILITY TO SUCCESSFULLY COMPLETE IT.

THE REFEREE CONCLUDED THAT CLAIMANT WAS DOING QUITE WELL AT THE COMMUNITY COLLEGE AND THE PROGNOSIS FOR RESTORATION AND REHABILITATION WAS GOOD. UPON COMPLETION OF CLAIMANT'S TRAINING HE SHOULD BE IN A POSITION TO DEMAND WAGES COMPARABLE TO THOSE HE WAS EARNING PRIOR TO HIS INJURY. THE AWARD OF 30 PER CENT OF THE MAXIMUM FOR CLAIMANT'S UNSCHEDULED BACK AND NECK DISABILITY ADEQUATELY COMPENSATES CLAIMANT FOR HIS LOSS OF EARNING CAPACITY.

THE REFEREE FOUND NO EVIDENCE TO INDICATE THAT THE DISABILITY TO CLAIMANT'S LEG WAS GREATER THAN THAT FOR WHICH HE RECEIVED AN AWARD OF 15 DEGREES.

THE BOARD, ON DE NOVO REVIEW, FINDS THAT CLAIMANT FAILED TO OFFER ANY EVIDENCE TO SUPPORT HIS REFUSAL TO SUBMIT TO SURGERY BASED UPON HIS RELIGIOUS BELIEFS. CLAIMANT COULD HAVE SUBSTANTIATED HIS OWN TESTIMONY TO THIS EFFECT BY CALLING AS A WITNESS ANOTHER MEMBER OF HIS FAITH - HE CHOSE NOT TO DO SO. THE BOARD FEELS THAT THE REFEREE'S FINDINGS AND CONCLUSIONS WERE PROPER AND AFFIRMS THEM.

ORDER

THE ORDER OF THE REFEREE DATED JULY 22, 1975 IS AFFIRMED.

WCB CASE NO. 73-2975 FEBRUARY 18, 1976

LLOYD A. GAY, CLAIMANT

FRED P. EASON, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH ALLOWED CLAIMANT 240 DEGREES FOR 75 PER CENT UNSCHEDULED LOW BACK PELVIS DISABILITY AND PREEXISTING NEUROLOGICAL CONDITION AND AFFIRMED THE AWARD OF 37.5 DEGREES FOR 24 PER CENT LOSS OF THE LEFT LEG MADE BY THE DETERMINATION ORDER MAILED SEPTEMBER 4, 1973. CLAIMANT CONTENDS HE IS PERMANENTLY AND TOTALLY DISABLED.

CLAIMANT, A 48 YEAR OLD LOG TRUCK DRIVER, SUFFERED A COMPENSABLE INJURY ON MAY 8, 1972. WHILE IN THE HOSPITAL, CLAIMANT'S FRACTURED LEFT FEMUR WAS PINNED AND BILATERAL PELVIC FRACTURES WERE NOTED. CLAIMANT ALSO HAD A MEMORY PROBLEM WHILE HOSPITALIZED AND COMPLAINED OF A WORSENING OF A PREEXISTING FAMILIAL CEREBELLAR TREMOR WHICH PRIOR TO HIS INJURY HAD NOT INTERFERED WITH HIS ABILITY TO WORK AS A LOG TRUCK DRIVER.

IN JANUARY 1973 DR. MATTHEWS FELT CLAIMANT SHOULD BE ABLE TO DO MOST TYPES OF LIGHTER WORK AND PROBABLY EVENTUALLY WOULD RETURN TO HEAVIER WORK. HE FELT THAT CLAIMANT NEEDED FURTHER CARE FOR THE PELVIS AND HIP AREAS AND FOR THE NEUROLOGICAL TREMOR.

DR. CAMPAGNA WAS OF THE OPINION THAT CLAIMANT HAD A PROTRUDED LUMBOSACRAL DISC AND A MYELOGRAM REVEALED A LUMBOSACRAL DISC SPACE, HOWEVER, NO SURGERY WAS PERFORMED.

CLAIMANT WAS GIVEN THE USUAL PHYSICAL AND PSYCHOLOGICAL TESTS AT THE DISABILITY PREVENTION DIVISION AND WAS ALSO EXAMINED BY MEMBERS OF THE BACK EVALUATION CLINIC. THE LATTER RECOMMENDED CLAIMANT NOT RETURN TO LOGGING BUT FELT HE COULD DO LIGHTER MECHANICAL WORK. LOSS OF FUNCTION DUE TO THE INJURY WAS FELT TO BE IN THE RANGE OF MILDLY MODERATE. CLAIMANT WAS RE-EXAMINED BY DR. CAMPAGNA IN JULY, 1973 WHO FELT, AT THAT TIME, CLAIMANT WAS CAPABLE OF SUSTAINING GAINFUL EMPLOYMENT. ON AUGUST 31, 1973 CLAIMANT WAS EXAMINED BY DR. HOLLAND, A PSYCHIATRIST, WHO FELT CLAIMANT WAS SUFFERING A PSYCHOLOGICAL CONSEQUENCE OF HIS INJURY WHICH WAS UNDOUBTEDLY COMPLICATING ANY ATTEMPT ON HIS PART TO MOBILIZE HIMSELF.

ON SEPTEMBER 4, 1973 THE CLAIM WAS CLOSED WITH AN AWARD OF 37.5 DEGREES FOR 24 PER CENT LOSS OF LEFT LEG AND 160 DEGREES FOR 50 PER CENT UNSCHEDULED LOW BACK PELVIS AND AGGRAVATION OF THE PREEXISTING NEUROLOGICAL CONDITION. CLAIMANT WAS SEEN THEREAFTER BY DR. CAMPAGNA, ONCE IN NOVEMBER 1973 AND AGAIN IN MARCH 1974 AND EACH EXAMINATION REVEALED NO CHANGE IN CLAIMANT'S CONDITION.

CLAIMANT HAS HAD A NUMBER OF COUNSELING AND GUIDANCE SESSIONS WITH VOCATIONAL REHABILITATION CASE WORKERS, HOWEVER, HIS FILE WAS EVENTUALLY CLOSED ON THE BASIS OF INABILITY TO PROVIDE SERVICES AND RETRAINING NOT BEING FEASIBLE. THE FILES INDICATE SOME LACK OF MOTIVATION ON THE PART OF CLAIMANT, THE DEPRESSED JOB SITUATION IN THE AREA WHERE CLAIMANT LIVED AND DESIRED TO REMAIN, AND CERTAIN PSYCHOLOGICAL PROBLEMS WHICH INTERFERED WITH RETRAINING POSSIBILITIES.

JUST PRIOR TO CLAIM CLOSURE CLAIMANT HAD WORKED AS A GENERAL TRUCK MECHANIC FOR WEST COAST TRUCKING COMPANY, A JOB WHICH INCLUDED BOTH LIGHT AND HEAVY TASKS, FOR APPROXIMATELY FIVE MONTHS. HE QUIT, TELLING HIS COUNSELOR THAT IT WAS TOO DIFFICULT FOR HIM TO PERFORM THE WORK. CLAIMANT HAS NOT ATTEMPTED TO SEEK GAINFUL WORK SINCE THAT DATE ALTHOUGH HE FEELS HE COULD DO LIGHT MECHANICAL WORK EXCEPT FOR HIS TREMOR.

THE REFEREE FOUND THAT CLAIMANT HAS SEVERE DISABILITY WHICH HAS SERIOUSLY IMPAIRED, BUT NOT TOTALLY DESTROYED, HIS EARNING CAPACITY. THE REFEREE DID NOT BELIEVE, BASED UPON THE MEDICAL REPORTS AND THE TESTIMONY AT THE HEARING, THAT CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED BUT HE FELT THAT HE HAD NOT BEEN SUFFICIENTLY COMPENSATED FOR HIS UNSCHEDULED DISABILITY.

THE REFEREE FOUND SOME LACK OF MOTIVATION ON THE PART OF CLAIMANT BUT NOT TO THE EXTENT THAT IT WOULD PRECLUDE AN ADDITIONAL AWARD.

THE REFEREE CONCLUDED THAT, WHEN THE PHYSICAL IMPAIRMENTS, I.E., THE BACK AND HIP PAIN AND THE SERIOUSNESS OF HIS TREMOR, NOTED BY THE REFEREE AT THE HEARING, ARE COMBINED WITH THE FACTORS OF EDUCATION, WORK EXPERIENCE, ETC., CLAIMANT HAS SUFFERED A SUBSTANTIAL LOSS IN HIS EARNING CAPACITY. HE, THEREFORE, INCREASED THE UNSCHEDULED DISABILITY AWARD FROM 50 PER CENT TO 75 PER CENT.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE REFEREE'S ORDER AS ITS OWN.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 27, 1975 IS AFFIRMED.

WCB CASE NO. 75-305 FEBRUARY 18, 1976

DIANA ZWIRNER, CLAIMANT

FRANKLIN, BENNETT, OFELT AND JOLLES,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED DECEMBER 10, 1974 WHEREBY CLAIMANT WAS AWARDED 64 DEGREES FOR 20 PER CENT UNSCHEDULED DISABILITY.

ON APRIL 17, 1973 CLAIMANT, WHILE DRIVING THE TIGARD SCHOOL BUS WAS HIT ON THE BACK OF THE HEAD BY AN OBJECT, PRESUMABLY, THROWN BY AN OCCUPANT OF THE BUS. AS A RESULT OF THIS ACCIDENT, CLAIMANT SUSTAINED SOME ORGANIC BRAIN DAMAGE RESULTING IN PSYCHOMOTOR EPILEPSY AND, AT THE PRESENT TIME, SHE HAS SOME INSTABILITY IN HER LEFT LEG AND SOME LESSENING IN DEXTERITY OF HER LEFT HAND. THE FORMER AFFECTS HER GAIT, THE LATTER THE FUNCTION OF HER HAND.

THE REFEREE FOUND THAT CLAIMANT'S EPILEPTIC SEIZURES ARE WELL CONTROLLED AS LONG AS SHE TAKES THE PRESCRIBED AMOUNT OF DILANTIN. THE REFEREE FOUND THAT HER CONDITION WAS MEDICALLY STATIONARY AND, THEREFORE, SHE WAS NOT ENTITLED TO ANY FURTHER TEMPORARY TOTAL DISABILITY COMPENSATION.

THE REFEREE FOUND CLAIMANT TO BE A BRIGHT, INTELLIGENT WOMAN AND A CREDIBLE WITNESS. HE FOUND THAT MOST OF CLAIMANT'S WORKING LIFE HAD BEEN ON A PART TIME BASIS BECAUSE SHE HAD BEEN ATTENDING COLLEGE AND ALSO RAISING HER FAMILY AND DESIRED TO SPEND AS MUCH TIME AS SHE COULD AT HOME WITH HER THREE CHILDREN. HE FURTHER FOUND THAT CLAIMANT HAD NOT SOUGHT FULL TIME EMPLOYMENT NOR WAS SHE INTERESTED IN SEEKING FULL TIME EMPLOYMENT AT THE PRESENT TIME.

SINCE THE INCIDENT OF APRIL 17, 1973 CLAIMANT HAS HAD FOUR EPILEPTIC SEIZURES - SHE CANNOT DRIVE A SCHOOL BUS, WHICH SHE WAS DOING ON A 4 AND ONE HALF HOUR PER DAY BASIS, BUT ACCORDING TO DR. SMITH, SHE CAN DRIVE A PASSENGER CAR.

THE REFEREE FOUND THAT CLAIMANT HAD ALSO GIVEN PIANO LESSONS AND DERIVED A SMALL INCOME OVER THE YEARS FROM SO DOING, BUT THAT BECAUSE OF HER PROBLEMS WITH HER LEFT HAND NOW SHE HAS DIFFICULTY TEACHING PIANO.

THE REFEREE FOUND THAT CLAIMANT WAS WELL MOTIVATED BUT HER PLANS FOR VOCATIONAL REHABILITATION WERE FRUSTRATED BY THE FACT THAT SHE WAS NOT READY TO ENTER THE LABOR MARKET ON A FULL TIME BASIS. HE CONCLUDED THAT CLAIMANT WOULD PROBABLY NEVER BE ABLE TO DRIVE A SCHOOL BUS AGAIN AND BECAUSE OF HER PSYCHOMOTOR EPILEPSY PROBABLY WOULD BE PRECLUDED FROM ANY WORK INVOLVING MACHINERY AS THAT MIGHT PRESENT A RISK OF DANGER TO HERSELF OR OTHER PERSONS BUT SHE DID NOT HAVE A GREATER DISABILITY THAN THAT FOR WHICH SHE HAD BEEN AWARDED BY THE DETERMINATION ORDER OF DECEMBER 10, 1974.

THE BOARD, ON DE NOVO REVIEW, FINDS THAT CLAIMANT HAS VERY GOOD POTENTIAL FOR RETRAINING IN MANY TYPES OF WORK WHICH SHE COULD DO PHYSICALLY. CLAIMANT HAS EXPRESSED THE DESIRE TO BE TRAINED AS AN X-RAY TECHNICIAN BUT SHE IS RELUCTANT TO SEEK ANY FULL TIME EMPLOYMENT UNTIL HER CHILDREN ARE OLDER, THEREFORE, CLAIMANT HAS VOLUNTARILY REMOVED HERSELF FROM A SUBSTANTIAL SEGMENT OF THE LABOR MARKET.

DR. SMITH DID ADVISE CLAIMANT NOT TO DRIVE A SCHOOL BUS BUT THAT ADVICE WAS GIVEN LESS THAN FOUR MONTHS AFTER CLAIMANT HAD VOLUNTARILY REDUCED HER DILANTIN INTAKE WHICH CAUSED A SEIZURE. SINCE THAT TIME CLAIMANT HAS RESUMED THE PROPER DOSAGE AND HAS HAD NO FURTHER SEIZURES.

THE BOARD CONCLUDES THAT CLAIMANT HAS NOT EXERCISED HER FULL POTENTIAL FOR RETRAINING AND HAS DELIBERATELY REFUSED TO SEEK FULL TIME EMPLOYMENT; THEREFORE, IT AGREES THAT CLAIMANT HAS BEEN ADEQUATELY COMPENSATED FOR HER LOSS OF EARNING CAPACITY CAUSED BY HER UNSCHEDULED DISABILITY.

HOWEVER, THE MEDICAL EVIDENCE INDICATES, IN ADDITION TO THE DISORDER OF THE BRAIN RESULTING IN THE EPILEPTIC SEIZURES, CLAIMANT HAS RESIDUAL DISABILITY IN HER LEFT HAND AND IN HER LEFT LEG. DR. SMITH EXAMINED CLAIMANT ON APRIL 15, 1974 AND REPORTED THAT CLAIMANT WAS A LITTLE SLOWER WITH ALTERNATING RHYTHMIC MOVEMENTS ON THE LEFT, ALSO SHE DID NOT HOP QUITE AS WELL ON THE LEFT FOOT AS ON THE RIGHT. A RE-EXAMINATION ON AUGUST 7, 1974 BY DR. SMITH REVEALED THAT CLAIMANT WAS STILL HAVING DIFFICULTY WITH THE LEFT FOOT AND ALSO HAVING SOME MINIMAL CLUMSINESS OF HER LEFT HAND - HER LEFT HAND DOES NOT PERFORM AS WELL AS HER RIGHT HAND AND CLAIMANT'S DOMINANT HAND IS THE LEFT.

THE BOARD CONCLUDES THAT, IN ADDITION TO THE AWARD FOR HER UNSCHEDULED DISABILITY, CLAIMANT SHOULD BE ENTITLED TO AWARDS OF 5 PER CENT FOR LOSS FUNCTION OF THE LEFT LEG AND 5 PER CENT LOSS FUNCTION OF THE LEFT HAND.

ORDER

THE ORDER OF THE REFEREE DATED JUNE 23, 1975 IS MODIFIED.

IN ADDITION TO THE AWARD OF 64 DEGREES OF A MAXIMUM OF 320 DEGREES FOR UNSCHEDULED DISABILITY, CLAIMANT IS AWARDED 7.5 DEGREES OF A MAXIMUM OF 150 DEGREES FOR SCHEDULED LEG DISABILITY AND 7.5 DEGREES OF A MAXIMUM OF 150 DEGREES FOR SCHEDULED LEFT HAND DISABILITY.

CLAIMANT'S COUNSEL SHALL BE AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, 25 PER CENT OF THE COMPENSATION INCREASED BY THIS AWARD PAYABLE OUT OF SUCH COMPENSATION, AS PAID, NOT TO EXCEED 2,300 DOLLARS.

WCB CASE NO. 75-4361 FEBRUARY 18, 1976

KATHERINE MCRAY, CLAIMANT

C. S. EMMONS, CLAIMANT'S ATTY.
LYLE VELURE, DEFENSE ATTY.
OWN MOTION ORDER REMANDING FOR HEARING

CLAIMANT SUSTAINED AN INDUSTRIAL INJURY ON AUGUST 25, 1975. FOLLOWING A PARTIAL DENIAL BY INDUSTRIAL INDEMNITY COMPANY, CLAIMANT REQUESTED A HEARING - THE HEARING IS SCHEDULED FOR MARCH 11, 1976.

WHILE EMPLOYED BY THE SAME EMPLOYER, WHOSE WORKMEN'S COMPENSATION CARRIER AT THE TIME WAS HARTFORD ACCIDENT AND INDEMNITY COMPANY, CLAIMANT SUSTAINED AN INDUSTRIAL INJURY ON OCTOBER 13, 1966.

THE EMPLOYER, AND ITS INSURER INDUSTRIAL INDEMNITY, HAVE MOVED THE BOARD TO EXERCISE ITS OWN MOTION AUTHORITY PURSUANT TO ORS. 656.278, AND JOIN HARTFORD ACCIDENT AND INDEMNITY COMPANY AS A NECESSARY PARTY IN THE ABOVE ENTITLED PROCEEDINGS SO THAT A DETERMINATION CAN BE MADE ON THE ISSUE OF WHETHER CLAIMANT'S PRESENT PROBLEMS ARE RELATED TO THE AUGUST 25, 1975 INCIDENT OR ARE THE RESULT OF THE OCTOBER 13, 1966 INJURY.

THE MATTER IS, THEREFORE, REFERRED TO THE HEARINGS DIVISION WITH INSTRUCTIONS TO JOIN HARTFORD ACCIDENT AND INDEMNITY COMPANY AS A NECESSARY PARTY, TO HOLD A HEARING, AND TAKE EVIDENCE ON THE ISSUE OF WHETHER CLAIMANT HAS AGGRAVATED HER 1966 INJURY OR SUFFERED A NEW INJURY ON AUGUST 25, 1975.

AT THE CONCLUSION OF THE HEARING, IF THE REFEREE FINDS CLAIMANT HAS SUFFERED AN AGGRAVATION OF THE 1966 INJURY, HE SHALL CAUSE A TRANSCRIPT OF THE PROCEEDING TO BE PREPARED AND SUBMITTED TO THE BOARD WITH HIS RECOMMENDATIONS. HOWEVER, IF THE REFEREE FINDS CLAIMANT HAS SUFFERED A NEW INJURY, HE SHALL RECOMMEND THAT THE MOTION BE DENIED AND SHALL ENTER A FINAL AND APPEALABLE ORDER.

SAIF CLAIM NO. PC 101474 FEBRUARY 18, 1976

KERRY SMITH, CLAIMANT

OWN MOTION DETERMINATION

CLAIMANT SUSTAINED A COMMINUTED FRACTURE OF THE RIGHT RADIUS ON NOVEMBER 18, 1967. AFTER TREATMENT, INCLUDING TWO SURGICAL PROCEDURES, CLAIMANT RECEIVED AN AWARD OF 15 PER CENT LOSS OF THE RIGHT FOREARM BY A DETERMINATION ORDER DATED OCTOBER 8, 1968.

A SECOND DETERMINATION ORDER DATED APRIL 28, 1970 GRANTED CLAIMANT A SHORT PERIOD OF TEMPORARY TOTAL DISABILITY BUT NO INCREASE IN PERMANENT PARTIAL DISABILITY.

ON APRIL 15, 1975 DR. HOLBERT RESUMED TREATMENT FOR CLAIMANT'S AGGRAVATED RIGHT ARM CONDITION. THE CLAIM WAS VOLUNTARILY REOPENED BY THE STATE ACCIDENT INSURANCE FUND FOR SURGERY PERFORMED ON MAY 28, 1975 FOR A RESECTION OF THE RADIAL HEAD AND TRANSPOSITION OF THE ULNAR NERVE, RIGHT ELBOW.

CLAIMANT RETURNED TO WORK AUGUST 4, 1975 WITH SOME DEGREE OF DISCOMFORT. HIS CONDITION WAS REPORTED AS STATIONARY ON JANUARY 12, 1976. THE MATTER WAS SUBMITTED TO THE EVALUATION DIVISION FOR CLOSURE AND IT IS THEIR FINDING THAT CLAIMANT IS ENTITLED TO ADDITIONAL TEMPORARY TOTAL DISABILITY FROM MAY 27, 1975 THROUGH AUGUST 3, 1975 AND AN AWARD OF 30 PER CENT FOR LOSS OF HIS RIGHT ARM.

ORDER

CLAIMANT IS HEREBY GRANTED ADDITIONAL TEMPORARY TOTAL DISABILITY COMPENSATION FROM MAY 27, 1975 THROUGH AUGUST 3, 1975, AND 45 DEGREES OF A MAXIMUM OF 150 DEGREES FOR LOSS OF RIGHT ARM. THIS AWARD IS IN LIEU OF AND NOT IN ADDITION TO THE AWARD PREVIOUSLY GRANTED.

WCB CASE NO. 74-3342 FEBRUARY 18, 1976

DELMER LUCKY, CLAIMANT

CHARLES PAULSON, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH FOUND CLAIMANT TO BE PERMANENTLY AND TOTALLY DISABLED AS DEFINED BY ORS 656.206.

CLAIMANT IS A 57 YEAR OLD FLAGMAN WHO HAS WORKED FOR THE MULTNOMAH COUNTY ROAD DEPARTMENT FOR THE PAST 22 YEARS IN VARIOUS JOBS SUCH AS SANDING PAVEMENT, OILING PAVEMENT, CUTTING BRUSH, FLAGGING AND OPERATING A 95 POUND JACKHAMMER. HE ALSO WORKED FOR OTHER EMPLOYERS AS A CARPENTER'S HELPER, WASHED BUSES, DRIVEN A TRUCK AND WAS A SHIPFITTER'S HELPER FOR ABOUT THREE MONTHS. ALTHOUGH CLAIMANT HAS AN EIGHTH GRADE EDUCATION, THE EVIDENCE INDICATES HE DID NOT ATTEND SCHOOL VERY REGULARLY AND HE IS ILLITERATE.

ON OCTOBER 31, 1973, WHILE FLAGGING, CLAIMANT RECEIVED A NECK INJURY. DR. EHRENSPERGER, A CHIROPRACTIC PHYSICIAN WHO WAS CLAIMANT'S FAMILY PHYSICIAN, DIAGNOSED A CERVICAL MUSCULAR STRAIN. CLAIMANT WAS LATER EXAMINED BY DR. CRUICKSHANK WHO FOUND ACUTE CERVICAL SPRAIN AMONG OTHER THINGS AND FITTED CLAIMANT WITH A CERVICAL COLLAR IN FEBRUARY 1974. CLAIMANT HAS NEVER RETURNED TO WORK.

IN APRIL 1974 DR. MASON, AFTER EXAMINING CLAIMANT FOUND CERVICAL SPINE STRAIN, DEGREE QUESTIONABLE, WITH GROSS EMOTIONAL OVERLAY AND EXTREME VOLUNTARY RESTRICTION TO RANGES OF MOTION CONCERNING CLAIMANT'S NECK. CLAIMANT CONTINUED TO WEAR HIS CERVICAL COLLAR ALTHOUGH BOTH DR. SHLIM AND DR. CRUICKSHANK WERE OF THE OPINION THAT HE HAD BECOME OVERLY FIXED WITH THE CERVICAL COLLAR AND DR. SHLIM ASKED HIM TO REMOVE IT AND TRY TO GET ALONG WITHOUT IT. APPARENTLY CLAIMANT DID NOT DO SO.

A PSYCHOLOGICAL EVALUATION OF CLAIMANT REVEALED HIS INTELLECTUAL RESOURCES PLACED HIM IN THE LOWEST 5 PER CENT OF THE GENERAL POPULATION, HE WAS ILLITERATE WITH SEVERE EDUCATIONAL DEFICIENCY. THE LIMITED INTELLECTUAL RESOURCES ARE NOT ATTRIBUTABLE TO THE INDUSTRIAL INJURY BUT THE PSYCHOPATHOLOGY IS AND THE PROGNOSIS FOR RESTORATION AND REHABILITATION OF CLAIMANT WAS EXTREMELY POOR.

THE REFEREE FOUND THAT ALTHOUGH THE CONSENSUS OF MEDICAL OPINION, BASED UPON OBJECTIVE FINDINGS, IS THAT CLAIMANT HAS SUFFERED A MINIMAL CERVICAL INJURY WHICH WOULD NOT PREVENT HIM FROM RETURNING TO WORK, CLAIMANT'S EMOTIONAL PROBLEMS DO PREVENT HIM FROM RETURNING TO THE LABOR MARKET AND SUCH EMOTIONAL PROBLEMS STEM FROM THE INDUSTRIAL INJURY.

AT THE PRESENT TIME CLAIMANT HAS MADE NO EFFORT TO FIND WORK AND THE REFEREE CONCLUDED THAT IT WAS PROBABLY NOT REASONABLE TO EXPECT HIM TO LOOK FOR WORK WHICH HE COULD NOT PERFORM. CLAIMANT IS RECEIVING TOTAL DISABILITY COMPENSATION FROM SOCIAL SECURITY AND MULTNOMAH COUNTY AMOUNTING TO 522 DOLLARS PER MONTH. AT THE TIME OF HIS INJURY HE WAS EARNING APPROXIMATELY 734 DOLLARS PER MONTH. THE FUND CONTENDS THAT PAYMENT OF ANY WORKMEN'S COMPENSATION BENEFITS WILL MOTIVATE CLAIMANT TO SEEK RETIREMENT RATHER THAN TO SEEK WORK.

THE REFEREE CONCLUDED THAT THE PREPONDERANCE OF THE EVIDENCE WAS THAT CLAIMANT IS PERMANENTLY AND TOTALLY DISABLED AT THE PRESENT TIME.

THE BOARD, ON DE NOVO REVIEW, FINDS THAT CLAIMANT IS NOT PERMANENTLY AND TOTALLY DISABLED BUT THAT HE HAS, AS A RESULT OF A MINIMAL PHYSICAL INJURY COUPLED WITH EXTREME EMOTIONAL OVERLAY WHICH IS ATTRIBUTABLE TO THE INDUSTRIAL INJURY, SUFFERED A SUBSTANTIAL LOSS OF EARNING CAPACITY.

THE BOARD FINDS THAT CLAIMANT'S EMOTIONAL PROBLEMS MAY HAVE MADE IT DIFFICULT FOR THE EMPLOYER TO PUT HIM BACK TO WORK, HOWEVER, IT ALSO FINDS THAT THE EMPLOYER DID NOT MAKE ANY SERIOUS ATTEMPT TO ASSIST CLAIMANT IN RETURNING TO HIS FORMER WORK, TAKING INTO CONSIDERATION HIS EMOTIONAL STATE.

THE BOARD CONCLUDES THAT AN AWARD OF 70 PER CENT OF THE MAXIMUM ADEQUATELY COMPENSATES CLAIMANT FOR HIS LOSS OF WAGE EARNING CAPACITY, THE SOLE CRITERION FOR DETERMINING UNSCHEDULED DISABILITY. THE BOARD FURTHER DIRECTS THAT ALL THE RESOURCES OF THE DISABILITY PREVENTION DIVISION OF THE WORKMEN'S COMPENSATION BOARD AS WELL AS THOSE OF THE DIVISION OF VOCATIONAL REHABILITATION BE MADE AVAILABLE TO CLAIMANT SO THAT, HOPEFULLY, CLAIMANT MAY BE ABLE TO RETURN TO WORK.

ORDER

THE ORDER OF THE REFEREE DATED JULY 22, 1975, IS MODIFIED. CLAIMANT IS AWARDED 224 DEGREES OF A MAXIMUM OF 320 DEGREES FOR HIS UNSCHEDULED NECK AND EMOTIONAL DISABILITY. THIS IS IN LIEU OF THE AWARD OF PERMANENT TOTAL DISABILITY MADE BY THE REFEREE IN HIS ORDER. IN ALL OTHER RESPECTS THE ORDER OF THE REFEREE IS AFFIRMED.

WCB CASE NO. 75-1862 FEBRUARY 18, 1976

IRENE A. WHITE, CLAIMANT

MERTEN AND SALTVEIT, CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH GRANTED CLAIMANT 128 DEGREES FOR 40 PER CENT UNSCHEDULED DISABILITY.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON JANUARY 15, 1974 WHEN SHE TWISTED AND STRAINED HER BACK AND RIGHT SHOULDER. THE TREATMENT CLAIMANT HAS RECEIVED SINCE THE INJURY HAS BEEN PRIMARILY CHIROPRACTIC. THE DISABILITY PREVENTION DIVISION DIAGNOSED A DORSAL STRAIN WITH AGGRAVATION OF DEGENERATIVE DISEASE AT T6-7 AND SCOLIOSIS. THE MEDICAL CONSENSUS IS THAT CLAIMANT SHOULD BE ABLE TO RETURN TO HER FORMER TYPE OF EMPLOYMENT IF SHE IS NOT REQUIRED TO BEND, TWIST OR LIFT OVER 10 POUNDS.

ACTING UPON MEDICAL ADVICE CLAIMANT ATTEMPTED TO RETURN TO PART TIME WORK AT LIGHT DUTY BUT WAS FORCED TO QUIT WORKING ALTOGETHER ON DECEMBER 2, 1974 BECAUSE WORK ACTIVITIES CAUSED HER FATIGUE AND AGGRAVATED HER SYMPTOMS. CLAIMANT'S CLAIM WAS CLOSED BY A DETERMINATION ORDER MAILED MAY 2, 1975 WHICH AWARDED CLAIMANT 48 DEGREES FOR 15 PER CENT UNSCHEDULED DISABILITY TO HER RIGHT SHOULDER, NECK AND BACK.

CLAIMANT HAS A HIGH SCHOOL EDUCATION AND HAS DONE SOME FACTORY WORK, CLERKED IN A STORE, SOLD INSURANCE AND FOR APPROXIMATELY 7 YEARS PRIOR TO HER ACCIDENT WAS EMPLOYED AS A DRAPERY SPECIALIST FOR THE EMPLOYER.

THE REFEREE FOUND THAT CLAIMANT'S PROBLEMS WERE AGGRAVATED BY HER WORK ACTIVITIES PRIMARILY BECAUSE SHE WAS THE TYPE OF PERSON WHO COULD NOT HOLD BACK IN DOING HER JOB - IF SOMETHING NEEDED TO BE DONE SHE DID IT HERSELF RATHER THAN SEEKING ASSISTANCE FROM OTHER EMPLOYES. THE REFEREE ALSO FOUND THERE HAD BEEN SERIOUS ATTEMPTS BY BOTH THE EMPLOYER AND THE CLAIMANT TO RESTORE CLAIMANT TO HER FORMER POSITION AS A VALUABLE EMPLOYE BUT SUCH ATTEMPTS, AS OF THE DATE OF HEARING, HAD MET WITH LITTLE SUCCESS PRIMARILY BECAUSE OF CLAIMANT'S FAILURE TO WORK WITHIN HER PHYSICAL LIMITATIONS.

CLAIMANT'S TEMPORARY TOTAL DISABILITY COMPENSATION WAS TERMINATED AS OF MARCH 12, 1975, THE DATE DR. THURLOW FOUND CLAIMANT TO BE MEDICALLY STATIONARY. THE REFEREE FOUND NO MEDICAL EVIDENCE TO THE CONTRARY ALTHOUGH CLAIMANT HAS CONTINUED TO RECEIVE PALLIATIVE TREATMENT FROM DR. SWOBODA, D.C.

THE REFEREE CONCLUDED THAT CLAIMANT'S FAILURE TO REJOIN THE LABOR MARKET WAS DUE IN PART TO HER RELUCTANCE TO ACCEPT RECOMMENDED PSYCHOLOGICAL COUNSELING AND, THEREFORE, SHE IS NOT ENTITLED TO ANY MORE TEMPORARY TOTAL DISABILITY COMPENSATION BUT, CONSIDERING HER AGE, PHYSICAL IMPAIRMENT, LIMITED VOCATIONAL POTENTIAL AND EMOTIONAL PROFILE, HE CONCLUDED SHE WAS ENTITLED TO AN AWARD OF 40 PER CENT OF THE MAXIMUM ALLOWABLE BY STATUTE. HE BELIEVED THIS WOULD AID CLAIMANT IN READJUSTING HERSELF SO THAT SHE MIGHT BE ABLE TO SUCCESSFULLY REENTER THE LABOR MARKET.

THE BOARD, ON DE NOVO REVIEW, FINDS THAT THE EMPLOYER HAS A JOB AVAILABLE WHICH CLAIMANT COULD DO WITH HER PRESENT PHYSICAL LIMITATIONS - ALSO, DR. THURLOW DOES NOT FEEL THAT A JOB CHANGE IS INDICATED.

BOTH PARTIES HAD REQUESTED REVIEW OF THE REFEREE'S ORDER ON THE SOLE ISSUE OF THE EXTENT OF PERMANENT DISABILITY. THE EMPLOYER FELT THE AWARD WAS TOO GREAT, THE CLAIMANT FELT IT WAS NOT SUFFICIENT. THE BOARD CONCLUDES, BASED PRIMARILY ON CLAIMANT'S ATTITUDE AND LACK OF COOPERATION WITH PERSONS WHO ARE IN A POSITION TO ASSIST CLAIMANT IN REALIZING SOME REALISTIC VOCATIONAL POSSIBILITIES, THAT THE AWARD GRANTED BY THE REFEREE ADEQUATELY COMPENSATES CLAIMANT FOR HER LOSS OF WAGE EARNING CAPACITY.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 28, 1975 IS AFFIRMED.

SAIF CLAIM NO. A 109886 FEBRUARY 20, 1976

EDDIE H. HOLSTE, CLAIMANT

GOODING AND SUSAK, CLAIMANT'S ATTYS.
OWN MOTION

CLAIMANT HAS PETITIONED THE WORKMEN'S COMPENSATION BOARD FOR CONSIDERATION OF HIS CLAIM PURSUANT TO THE OWN MOTION JURISDICTION GRANTED THE BOARD UNDER ORS 656.278, CONTENDING THAT HIS PRESENT WORSENED PHYSICAL CONDITION IS THE RESULT OF AN INDUSTRIAL INJURY SUSTAINED IN 1948.

THE STATE ACCIDENT INSURANCE FUND HAS DENIED ANY RESPONSIBILITY FOR CLAIMANT'S WORSENED CONDITION AND SUPPORTS ITS POSITION BY SUBMITTING A MEDICAL REPORT OF EXAMINATION OF CLAIMANT BY DR. EDWIN G. ROBINSON, ORTHOPEDIC SURGEON, ON JANUARY 19, 1976. DR. ROBINSON INDICATES CLAIMANT'S SYMPTOMS ARE RELATED TO OSTEOARTHRITIC CHANGES AND DEGENERATIVE DISC CHANGES, DUE TO THE NORMAL AGING PROCESS. DR. ROBINSON CONCLUDED THEY ARE NOT RELATED TO CLAIMANT'S ORIGINAL INJURY IN ITS PROGRESSION.

THEREFORE, THE REQUEST TO REOPEN CLAIMANT'S CLAIM UNDER ORS 656.278 IS HEREBY DISMISSED.

IT IS SO ORDERED.

WCB CASE NO. 75-1406 FEBRUARY 20, 1976

SHARON HALSTEAD, CLAIMANT

DYE AND OLSON, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF.

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH REOPENED CLAIMANT'S CLAIM, REMANDED IT TO THE FUND FOR PAYMENT OF TEMPORARY TOTAL DISABILITY COMPENSATION AND MEDICAL SERVICES FROM AND AFTER APRIL 1, 1975 AND UNTIL

THE CLAIM WAS CLOSED PURSUANT TO ORS 656.268 AND ORDERED THE FUND TO PAY CLAIMANT'S ATTORNEY A FEE OF 600 DOLLARS.

CLAIMANT SUSTAINED A COMPENSABLE INJURY ON NOVEMBER 21, 1974. APPROXIMATELY A WEEK LATER SHE CONSULTED DR. MCCALLUM, COMPLAINING OF PAIN IN THE LUMBOSACRAL REGION AND IN THE LOWER QUANDRANT ON EITHER SIDE OF THE ABDOMEN. DR. MCCALLUM DIAGNOSED A MINOR LUMBOSACRAL STRAIN, OBESITY AND MUSCULOSKELETAL NEUROSIS - HE RECOMMENDED CLAIMANT LOSE WEIGHT AND STAY OFF WORK ONE WEEK. LATER HE REFERRED CLAIMANT TO DR. STANFORD, AN ORTHOPEDIST, STATING HE WAS UNABLE TO FIND ANYTHING OBJECTIVE TO SUPPORT AN ORGANIC COMPLAINT ALTHOUGH CLAIMANT CONTINUED TO COMPLAIN OF DISABILITY.

AFTER EXAMINING CLAIMANT, DR. STANFORD DIAGNOSED A BACK STRAIN WITH SOME OVEREMPHASIS ON CLAIMANT'S PART AND HE REFERRED HER FOR PHYSICAL THERAPY THREE TIMES A WEEK AT SALEM GENERAL. CLAIMANT TOOK THESE TREATMENTS TWICE AND COMPLAINED TO DR. STANFORD THAT THEY MADE HER WORSE BECAUSE OF THE HEAT AND THAT SHE WAS UNABLE TO DO ANY OF THE EXERCISES PRESCRIBED. DR. STANFORD WAS UNABLE TO FIND ANYTHING OBJECTIVELY WRONG WITH CLAIMANT.

ON FEBRUARY 26, 1975 CLAIMANT WAS EXAMINED BY DR. HARWOOD WHO, BASED ON HIS PHYSICAL FINDINGS, FELT THAT THERE WAS NO PHYSICAL IMPAIRMENT BUT STRICTLY ALLEGATIONS ON AN EMOTIONAL LEVEL. HE ADVISED CLAIMANT TO LOSE WEIGHT, FOUND HER TO BE MEDICALLY STATIONARY AND RECOMMENDED CLOSURE WITHOUT AN AWARD. ON MARCH 21, 1975 A DETERMINATION ORDER WAS MAILED WHEREBY CLAIMANT WAS GRANTED SOME TIME LOSS BUT NO AWARD FOR PERMANENT PARTIAL DISABILITY.

ON APRIL 1, 1975 CLAIMANT WAS SEEN BY DR. POULSON, AN ORTHOPEDIST, COMPLAINING OF CONTINUING CONSTANT LUMBAR PAIN WITH OCCASIONAL PAIN IN THE INGUINAL REGION. IT WAS DR. POULSON'S OPINION THAT CLAIMANT PROBABLY HAD A DEGENERATIVE LUMBAR DISC WHICH HAD NOT PROGRESSED TO THE EXTENT THAT IT COULD BE SEEN ON AN X-RAY. HE HOSPITALIZED CLAIMANT FOR THREE DAYS FOR CONSERVATIVE TREATMENT. ON APRIL 10 CLAIMANT FILED A REQUEST FOR HEARING ASKING FOR ADDITIONAL TEMPORARY TOTAL DISABILITY COMPENSATION. ON MAY 8, 1975 THE FUND ADVISED CLAIMANT'S ATTORNEY THAT HER CLAIM HAD BEEN REVIEWED FOR POSSIBLE REOPENING AND PAYMENT OF COMPENSATION AND IT WAS ITS OPINION THAT THERE HAD BEEN NO WORSENING OF CLAIMANT'S CONDITION WHICH WOULD ALLOW A REOPENING OF THE CLAIM. ON MAY 16, 1975 CLAIMANT AMENDED HER REQUEST FOR HEARING, ADDING THE REJECTION BY THE FUND AS AN ISSUE.

ON MAY 21, 1975 DR. POULSON REPORTED THAT CLAIMANT WAS STILL UNDER HIS CARE AND HE WAS CONTEMPLATING A DISCOGRAM IN EITHER LATE JUNE OR EARLY JULY AND THAT CLAIMANT'S CONDITION WAS NOT THEN STATIONARY BUT SEEMED TO BE WORSENING AND WAS DISABLING. ON JULY 1, 1975 THE FUND WROTE CLAIMANT'S ATTORNEY ADVISING THAT IT WOULD BE RESPONSIBLE FOR DR. POULSON'S MEDICAL CARE, HOSPITALIZATION FOR DIAGNOSTIC TESTS, TIME LOSS WHILE CLAIMANT WAS AN IN-PATIENT FOR DIAGNOSTIC PURPOSES AND THE DISCOGRAM. AT THE TIME OF THE HEARING THE DISCOGRAM HAD NOT BEEN PERFORMED.

THE REFEREE FOUND THAT CLAIMANT MAY, WITHIN ONE YEAR AFTER THE MAILING DATE OF A DETERMINATION ORDER, RAISE ANY ISSUE RELATING TO THAT ORDER, INCLUDING WHETHER CLAIMANT WAS MEDICALLY STATIONARY, WITHOUT PROVING THAT HER CONDITION HAD WORSENED TO THE EXTENT THAT THERE WAS AGGRAVATION. CLAIMANT MAY BE MEDICALLY STATIONARY AT THE TIME OF CLAIM CLOSURE BUT SUBSEQUENTLY BECOME MEDICALLY UNSTATIONARY AND, IF SO, THAT IS SUFFICIENT GROUNDS FOR REOPENING THE CLAIM.

THE REFEREE CONCLUDED THAT CLAIMANT WAS MEDICALLY STATIONARY AT THE TIME THE DETERMINATION ORDER WAS MAILED ON MARCH 21, 1975 BUT ON APRIL 1, 1975, AFTER CONSULTING DR. POULSON, WHO MADE A TENTATIVE DIAGNOSIS AND CERTAIN RECOMMENDATIONS FOR TREATMENT AND DIAGNOSTIC STUDIES, CLAIMANT'S CONDITION WAS NO LONGER MEDICALLY STATIONARY AND HER CLAIM SHOULD, THEREFORE, HAVE BEEN REOPENED.

THE REFEREE DID NOT CONSTRUE THIS AS AN AGGRAVATION CLAIM BUT SHE DID FEEL THE DENIAL OF THE FUND WITH RESPECT TO REOPENING CLAIMANT'S CLAIM HAD TO BE DISPROVED AS CONTRARY TO THE MEDICAL EVIDENCE WHICH CLEARLY SHOWED CLAIMANT'S ENTITLEMENT FOR FURTHER MEDICAL CARE UNDER ORS 656.245, AT THE VERY LEAST. THE REFEREE, THEREFORE, DIRECTED THE FUND TO PAY CLAIMANT'S ATTORNEY A REASONABLE ATTORNEY'S FEE AS PROVIDED IN ORS 656.386(1), RELYING ON CAVINS V. SAIF (UNDERSCORED), 75 ADV SH 1963(1975). HOWEVER, SHE FELT THAT, UNDER THE CIRCUMSTANCES OF THE CASE, THE CONDUCT OF THE FUND WAS NOT UNREASONABLE TO THE DEGREE THAT WOULD JUSTIFY THE IMPOSITION OF PENALTIES.

THE BOARD, ON DE NOVO REVIEW, FINDS THAT THE LETTER FROM THE FUND DATED MAY 8, 1975 ONLY DENIED CLAIMANT HAD SUFFERED AN AGGRAVATION. GRANTED, THERE HAD BEEN A REQUEST FOR A HEARING BY CLAIMANT MADE ON APRIL 10, 1975, BUT THE MAY 8, 1975 DENIAL DID NOT GENERATE THAT REQUEST FOR HEARING AND THERE IS NO EVIDENCE THAT THE FUND AT ANY TIME IMPROPERLY DENIED CLAIMANT'S REQUEST TO REOPEN HER CLAIM ON THE GROUNDS THAT SHE WAS NOT MEDICALLY STATIONARY. THEREFORE, THE REFEREE WAS IN ERROR IN AWARDING ATTORNEY'S FEES PAYABLE BY THE FUND INSTEAD OUT OF COMPENSATION RECEIVED BY THE CLAIMANT.

WITH RESPECT TO THE COMMENCEMENT OF PAYMENT OF TEMPORARY TOTAL DISABILITY COMPENSATION, THE BOARD AGREES WITH THE REFEREE THAT SUCH PAYMENTS SHOULD COMMENCE ON APRIL 1, 1975, THE DATE CLAIMANT WAS SEEN BY DR. POULSON, WHO CONTINUED TO TREAT HER UP UNTIL THE DATE OF THE HEARING.

ORDER

THE ORDER OF THE REFEREE DATED JULY 31, 1975 IS MODIFIED.

CLAIMANT'S ATTORNEY IS AWARDED AS A REASONABLE ATTORNEY'S FEE 25 PER CENT OF THE TEMPORARY TOTAL DISABILITY COMPENSATION PAYABLE OUT OF SUCH COMPENSATION, AS PAID, TO A MAXIMUM OF 600 DOLLARS.

CLAIMANT'S ATTORNEY IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 300 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 74-3768 FEBRUARY 20, 1976

JOHN GERSTNER, CLAIMANT

GARY K. JENSEN, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH REMANDED CLAIMANT'S CLAIM TO IT FOR PAYMENT OF COMPENSATION UNTIL CLOSURE WAS AUTHORIZED PURSUANT TO ORS 656.268.

CLAIMANT HAD BEEN HIRED BY THE CITY OF COTTAGE GROVE AS A FIREMAN IN 1951 AND WAS AN ASSISTANT FIRE CHIEF ON JANUARY 29, 1968 WHEN HE SUFFERED A HEART ATTACK. CLAIMANT'S CONDITION WAS DIAGNOSED AS AN ARTERIOSCLEROTIC HEART DISEASE WITH ACUTE ANTEROSEPTAL MYOCARDIAL INFARCTION. THIS CONDITION WAS ACCEPTED BY THE FUND AS AN OCCUPATIONAL DISEASE UNDER THE 'FIREMAN'S PRESUMPTION'.

CLAIMANT SATISFACTORILY RECOVERED FROM THIS ATTACK AND RETURNED TO WORK ON MAY 1, 1968. A DETERMINATION ORDER MAILED SEPTEMBER 22, 1969 AWARDED CLAIMANT 48 DEGREES PERMANENT PARTIAL DISABILITY FOR HIS HEART CONDITION. CLAIMANT RETURNED TO WORK AS A FIRE MARSHALL FOR ONE YEAR AND THEN AS BUILDING INSPECTOR. SUBSEQUENTLY, THE CITY TRANSFERRED HIM FROM THE FIRE DEPARTMENT AND MADE HIM WATER SUPERVISOR.

ON JULY 22, 1974 CLAIMANT AGAIN SUFFERED A MYOCARDIAL INFARCTION DIAGNOSED AS AN ARTERIOSCLEROTIC HEART DISEASE WITH ACUTE MYOCARDIAL INFARCTION AND ONE EPISODE OF VENTRICULAR TACHYCARDIA. DR. JACOBS ADVISED THE FUND THAT THE 1974 HEART ATTACK WAS NOT SIGNIFICANTLY RELATED TO CLAIMANT'S HEART ATTACK OF 1968, BUT WAS AN EXPECTED MANIFESTATION IN THE NATURAL HISTORY OF AN ARTERIOSCLEROTIC HEART DISEASE.

CLAIMANT FILED A CLAIM FOR THE 1974 HEART ATTACK AND ON OCTOBER 4, 1974 THE FUND DENIED THE RESPONSIBILITY FOR IT, STATING IT DID NOT FEEL THAT CONDITION WAS EITHER CAUSED OR AGGRAVATED BY CLAIMANT'S HEART ATTACK OCCURRING ON JANUARY 29, 1968.

DR. JACOBS EXPRESSED HIS OPINION THAT CLAIMANT'S CURRENT WORK WAS NOT A MATERIAL CONTRIBUTING FACTOR TO HIS 1974 ATTACK - HE LATER OPINED, BASED ON A HISTORY RELATED TO HIM BY THE CLAIMANT, THAT THE HEART ATTACK ON JULY 22, 1974 WAS NOT RELATED TO CLAIMANT'S WORK ACTIVITY. CLAIMANT REQUESTED A HEARING ON THE ISSUE OF THE FUND'S DENIAL OR, IF THE CLAIM WAS NOT ACCEPTABLE ON AN AGGRAVATION BASIS, ON THE ISSUE OF A NEW COMPENSABLE CLAIM.

ON JULY 22, 1974 CLAIMANT HAD WORKED UNDULY HARD HAULING ROCKS AND WORKING WITH A SCRAPERLOADER AND A DUMP TRUCK REPAIRING A WATER MAIN. THAT NIGHT HE DID NOT FEEL WELL - ABOUT 4.00 A. M. HE BEGAN TO HAVE CHEST PAINS AND WAS SUBSEQUENTLY HOSPITALIZED FOR HIS HEART ATTACK. DR. HAWN, CLAIMANT'S TREATING PHYSICIAN, (DR. JACOBS IS NO LONGER PRACTICING MEDICINE IN EUGENE) WAS OF THE OPINION THAT CLAIMANT'S CONDITION WAS NOT CAUSED BY HIS WORK BUT WAS BROUGHT ABOUT BY THIS ARTERIOSCLEROTIC DISEASE. ALTHOUGH THERE WAS NO RELATIONSHIP, IN HIS OPINION, BETWEEN THE 1968 AND THE 1974 INFARCTION, THE LATTER WAS A MANIFESTATION WHICH COULD BE EXPECTED FROM ARTERIOSCLEROTIC HEART DISEASE AND HAD BEEN FIRST MANIFESTED BY THE 1968 INFARCTION.

THE REFEREE FOUND NO MEDICAL EVIDENCE TO SUPPORT THE CLAIM FOR A NEW INJURY SUFFERED BY CLAIMANT ON JULY 22, 1974.

ON THE ISSUE OF WHETHER CLAIMANT HAD SUFFERED AN AGGRAVATION OF THE CONDITION WHICH HAD BEEN ACCEPTED AS COMPENSABLE BY THE FUND UNDER THE PROVISIONS OF ORS 656.802 IN 1968, THE REFEREE FOUND THAT HAD IT NOT BEEN ACCEPTED AS AN OCCUPATIONAL DISEASE THE EVIDENCE WOULD ONLY INDICATE THAT CLAIMANT HAD SUFFERED A NATURAL PROGRESSION OF AN ARTERIOSCLEROTIC HEART DISEASE WHICH RESULTED IN A MYOCARDIAL INFARCTION. HOWEVER, THE 1968 HEART ATTACK WAS ACCEPTED AS AN OCCUPATIONAL DISEASE. ORS 656.802(1)(B), IN PART, PROVIDES THAT DISABILITY CAUSED BY ANY DISEASE OF THE LUNG OR RESPITORY TRACT, HYPERTENSION OR CARDIOVASCULAR-RENAL DISEASE (UNDERSCORED) IS AN OCCUPATIONAL DISEASE. (EMPHASIS SUPPLIED).

THE REFEREE CONCLUDED THAT CARDIOVASCULAR DISEASE INCLUDED THE DISEASE OF ARTERIOSCLEROSIS AND THAT THE ARTERIOSCLEROSIS HAD TO BE ASSUMED BY HIM AS PART OF THE OCCUPATIONAL DISEASE WHICH WAS ACCEPTED BY THE FUND IN 1968. THE FUND DID NOT ACCEPT THE 1968 HEART ATTACK ALONE, IT ACCEPTED THE CARDIOVASCULAR DISEASE AND THAT DISEASE, ACCORDING TO BOTH DR. JACOBS AND DR. HAWN, HAD WORSENED.

THE BOARD, ON DE NOVO REVIEW, FINDS THAT WHEN THE FUND ACCEPTED CLAIMANT'S OCCUPATIONAL DISEASE IN 1968 BASED UPON THE 'FIREMEN'S PRESUMPTION', IT ACCEPTED CLAIMANT'S CLAIM FOR HIS COMPLETE CARDIOVASCULAR-RENAL CONDITION AND THAT THAT CONDITION HAS NOW WORSENED AND HAS RESULTED IN ANOTHER INFARCT. THE FINDINGS AND CONCLUSIONS OF THE REFEREE ARE AFFIRMED.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 2, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 300 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 75-995 FEBRUARY 20, 1976

LOREN ENGEL, CLAIMANT

EMMONS, KYLE, KROPP AND KRYGER,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

CLAIMANT SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT AN ADDITIONAL 32 DEGREES FOR UNSCHEDULED LOW BACK DISABILITY, MAKING A CUMULATIVE AWARD OF 64 DEGREES EQUAL TO 20 PER CENT UNSCHEDULED LOW BACK DISABILITY.

CLAIMANT SUSTAINED A COMPENSABLE INJURY ON SEPTEMBER 24, 1973 WHEN HE SLIPPED AND FELL INJURING HIS LOW BACK. DR. GLAEDE, INITIALLY, SAW CLAIMANT AND PRESCRIBED HOT PACKS, CODEINE AND VALIUM - CLAIMANT WAS THEN REFERRED TO DR. MC HOLLICK, AN ORTHOPEDIST WHO DIAGNOSED A SPRAIN INJURY OF THE LOW BACK.

CLAIMANT RETURNED TO THE CARE OF DR. GLAEDE IN DECEMBER 1973 - DR. GLAEDE FELT CLAIMANT'S CONDITION WAS NOT GOING TO IMPROVE AND REQUESTED CLAIMANT BE REFERRED TO THE DISABILITY PREVENTION DIVISION. DR. VAN OSDEL DIAGNOSED A CHRONIC STRAIN, LEFT PARAVERTEBRAL MUSCLES AND LIGAMENTS SUPERIMPOSED ON AN OLD DEGENERATIVE DISC DISEASE AT L1-2 - HE ALSO FOUND SOME EVIDENCE OF PSYCHOLOGICAL INTERFERENCE DURING THE EXAMINATION. A PSYCHOLOGICAL EVALUATION REVEALED A GOOD PROGNOSIS FOR CLAIMANT'S RETURN TO GAINFUL EMPLOYMENT BASED UPON HIS WORK HISTORY AND RESOURCES.

CLAIMANT HAS WORKED AT A MULTITUDE OF DIFFERENT TYPES OF WORK, TOO NUMEROUS TO MENTION IN THIS ORDER. CLAIMANT INDICATED TO DR. PERKINS THAT HE HAD A RATHER STABLE WORK RECORD WITH PERIODS UP TO FIVE YEARS PER JOB, HOWEVER, HIS TESTIMONY INDICATED HE HAD HELD NO JOB LONGER THAN ABOUT A YEAR AND A HALF TO TWO YEARS AND THERE WAS AN INDICATION THAT ALCOHOLISM PLAYED A MAJOR ROLE IN THE FREQUENCY OF JOB CHANGES.

THE REFEREE FOUND THAT ALL OF THE OCCUPATIONS IN WHICH CLAIMANT HAD HAD EXPERIENCE REQUIRED A GOOD BACK. CLAIMANT CANNOT DO ANY HEAVY LIFTING AND PROLONGED SITTING AND STANDING AGGRAVATES THE PAIN IN HIS LOWER BACK AS DOES WALKING. DR. VAN OSDEL INDICATED CLAIMANT SHOULD NOT DO ANY HEAVY LIFTING OR REPETITIVE BENDING, STOOPING OR TWISTING.

THE REFEREE CONCLUDED THAT THE AWARD MADE BY THE DETERMINATION ORDER ON APRIL 2, 1972 WHEREBY CLAIMANT RECEIVED 32 DEGREES FOR 10 PER CENT UNSCHEDULED LOW BACK DISABILITY DID NOT ADEQUATELY COMPENSATE HIM FOR THE LOSS OF EARNING CAPACITY RESULTING FROM HIS INDUSTRIAL INJURY. HE INCREASED THE AWARD TO 64 DEGREES.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 9, 1975 IS AFFIRMED.

WCB CASE NO. 75-1596 FEBRUARY 20, 1976

CLEVELAND DAVIS, CLAIMANT

SAMUEL M. SUWOL, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH SUSTAINED THE DENIAL OF CLAIMANT'S CLAIM BY THE STATE ACCIDENT INSURANCE FUND.

ON NOVEMBER 20, 1974, CLAIMANT, AN EMPLOYE OF COAST JANITORIAL SERVICE, WAS UNLOADING SUPPLIES OFF AN ELEVATOR WHEN THE DOOR CLOSED FROM THE LEFT - TO PREVENT IT FROM CLOSING CLAIMANT STRUCK IT WITH THE INSIDE OF HIS RIGHT KNEE. HE RECEIVED MEDICAL TREATMENT THAT DATE FOR A SPRAIN OF THE RIGHT KNEE.

HIS CLAIM FOR COMPENSATION WAS DENIED BY THE FUND JANUARY 20, 1975.

TESTIMONY BY AN OFFICIAL OF THE ELEVATOR COMPANY INDICATED THE ELEVATOR DOORS GO FROM THE RIGHT SIDE TO THE LEFT, AND WILL OPEN AUTOMATICALLY WHEN A BEAM OF LIGHT IN THE DOORS IS BROKEN. THE ELEVATOR HAD BEEN REGULARLY INSPECTED AND SERVICED AND WAS FULLY OPERABLE AT THE TIME IN QUESTION.

THE BOARD FINDS, AS DID THE REFEREE, THAT THE MECHANICS OF THIS ACCIDENT CANNOT BE CORRELATED WITH THE PHYSICAL FACTS AND THE ALLEGED ACCIDENT COULD NOT HAVE OCCURRED IN THE MANNER DESCRIBED BY CLAIMANT.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 17, 1975 IS AFFIRMED.

WCB CASE NO. 75-910 FEBRUARY 20, 1976

ROBERT DAHLSTROM, CLAIMANT
CHARLES PAULSON, CLAIMANT'S ATTY.
JONES, LANG, KLEIN, WOLF AND SMITH,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE EMPLOYER'S DENIAL OF CLAIMANT'S CLAIM.

THIS CLAIM HAS BEEN DENIED SUCCESSIVELY BY A HEARING OFFICER, THE WORKMEN'S COMPENSATION BOARD, THE CIRCUIT COURT AND THE COURT OF APPEALS ON THE GROUNDS THAT SAID CLAIM WAS UNTIMELY FILED. DAHLSTROM V. HUNTINGTON RUBBER MILLS (UNDERSCORED), 12 OR APP 55 (JANUARY 19, 1973)

ON FEBRUARY 13, 1975 CLAIMANT'S PRESENT COUNSEL WROTE THE EMPLOYER THAT EVEN THOUGH THE CLAIM HAD PREVIOUSLY BEEN LITIGATED, IN CASES WHERE THE EMPLOYER HAS ACTUAL KNOWLEDGE OF THE INJURY THE ONE YEAR LIMITATION ON FILING A CLAIM HAS NO APPLICATION. HE FORWARDED A REPORT OF INJURY ON A FORM 801 DATED THE SAME DAY AND ON MARCH 4, 1975 THE CLAIM WAS AGAIN DENIED AND CLAIMANT REQUESTED A HEARING ON SAID DENIAL. THE EMPLOYER RESPONDED CONTENDING THAT THE CLAIM DID NOT ARISE OUT OF OR IN THE SCOPE AND COURSE OF CLAIMANT'S EMPLOYMENT AND THAT THE CLAIM HAD BEEN UNTIMELY FILED AND THE FILING OF THE CLAIM WAS BARRED AS A RESULT OF THE PREVIOUS DECISIONS.

CLAIMANT HAD BEEN INJURED ON APRIL 10, 1969, HE DID NOT MAKE A CLAIM FOR COMPENSATION UNTIL JULY 1970. THIS CLAIM WAS DENIED AND THE DENIAL WAS AFFIRMED BY THE HEARING OFFICER ON THE GROUND THAT CLAIMANT HAD FAILED, IN EFFECT, TO FILE A CLAIM AND REQUEST A HEARING WITHIN ONE YEAR OF THE ACCIDENT PURSUANT TO ORS 656.265 AND ORS 656.319.

AFTER THE BOARD HAD AFFIRMED THE HEARING OFFICER, CLAIMANT'S CONTENTIONS ON APPEAL WERE PRIMARILY BASED ON A RIGHT TO INTRODUCE NEW 'UNOBTAINABLE' EVIDENCE OR OBTAIN A REMAND TO THE HEARING OFFICER FOR THE TAKING OF NEW EVIDENCE ON CLAIMANT'S ALLEGED MENTAL INCAPACITY WHICH MIGHT HAVE EXCUSED HIS FAILURE TO FILE THE CLAIM WITHIN ONE YEAR. CLAIMANT AGAIN FAILED TO OBTAIN RELIEF.

ON NOVEMBER 2, 1970 THE COURT OF APPEALS HELD THAT PARAGRAPHS (A), (B) AND (C) WERE INDEPENDENT OF EACH OTHER AND THE CLAIM WOULD NOT BE BARRED IF ANY ONE OF SAID PARAGRAPHS WERE SATISFIED. WILSON V. STATE ACC. INS. FUND (UNDERSCORED), 3 OR APP (1970), THEREFORE, A CLAIMANT IS NOT LIMITED TO ONE YEAR TO FILE HIS CLAIM IF HIS EMPLOYER HAS NOTICE OF HIS INJURY. THE CLAIMANT NOW CONTENDS THAT IT WOULD BE INCONGRUOUS THAT HIS CLAIM SHOULD REMAIN BARRED BY A PRIOR DECISION WHEN IF HE WAS NOW BEFORE THE REFEREE FOR THE FIRST TIME IT WOULD BE CONSIDERED TIMELY AND NOT BARRED.

THE REFEREE FOUND THAT THE PRIOR DECISION IN CLAIMANT'S CLAIM WAS RES JUDICATA, TO ALLOW RELITIGATION OF THE THRESHOLD ISSUE OF JURISDICTION NOW COULD OPEN THE DOOR TO INNUMERABLE LITIGATIONS INVOLVING ALL CASES AFFECTED BY JUDICIAL CONSTRUCTIONS OF THE LAW THAT DRASTICALLY CHANGE PREVIOUSLY ESTABLISHED CONSTRUCTIONS.

THE REFEREE FOUND THAT IF CLAIMANT DID NOT GET A FULL, COMPLETE

AND FAIR OPPORTUNITY TO LITIGATE ANY ISSUE UPON WHICH HIS RIGHTS DEPENDED, IT MAY HAVE BEEN BECAUSE HE CHOSE TO PROVE INCAPACITY AS AN EXCUSE FOR LATE FILING RATHER THAN TO ATTACK THE CONSTRUCTION OF THE PROVISIONS OF ORS 656.268(4). THE OPPORTUNITY TO LITIGATE THE CONSTRUCTION OF BOTH ORS 656.268 AND 656.319 WAS AVAILABLE TO CLAIMANT BUT HAD NOT BEEN TAKEN ADVANTAGE OF BY HIM IN HIS PREVIOUS HEARING.

THE REFEREE CONCLUDED THAT THE CLAIM WAS BARRED BY THE PRIOR LITIGATION ON THE SAME POINT WHICH WAS ULTIMATELY AFFIRMED BY THE COURT OF APPEALS.

THE BOARD, ON DE NOVO REVIEW, FINDS THE REFEREE'S INTERPRETATION OF THE FACTS AND THE LAW TO BE VERY WELL EXPRESSED AND AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE AS ITS OWN.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 29, 1975 IS AFFIRMED.

WCB CASE NO. 75-2382 FEBRUARY 20, 1976

KATHERINE PETTEY BOTT, CLAIMANT

EDWARDS AND EDWARDS, CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE SECOND DETERMINATION ORDER OF JUNE 9, 1975.

CLAIMANT SUSTAINED A COMPENSABLE BACK INJURY ON NOVEMBER 6, 1969 WHILE WORKING AS A NURSE - HER CONDITION BECAME MEDICALLY STATIONARY AND THE CLAIM WAS CLOSED WITH THE AWARD OF 32 DEGREES.

IN 1974 CLAIMANT SUBMITTED A CLAIM FOR AGGRAVATION BASED UPON A REPORT FROM DR. KEIZER. HER CLAIM WAS REOPENED FOR FURTHER MEDICAL CARE AND TREATMENT AND PAYMENT OF COMPENSATION, AS PROVIDED BY LAW, COMMENCING JANUARY 19, 1974 - THE CLAIM WAS AGAIN CLOSED BY THE SECOND DETERMINATION ORDER DATED JUNE 9, 1975 WHICH AWARDED CLAIMANT TEMPORARY TOTAL DISABILITY COMPENSATION FROM JANUARY 19, 1974 THROUGH APRIL 7, 1975 BUT NO ADDITIONAL AWARD FOR PERMANENT TOTAL DISABILITY.

ON JULY 11, 1975 CLAIMANT WAS EXAMINED BY DR. CHERRY, AN ORTHOPEDIST. BASED UPON HIS EXAMINATION, DR. CHERRY ISSUED TWO REPORTS - ONE, ON JULY 15, 1975 TO CLAIMANT'S ATTORNEY AND ONE, DATED AUGUST 13, 1975, TO LIBERTY MUTUAL INSURANCE COMPANY. BASICALLY, THE REPORTS WERE THE SAME AND THE SECOND REPORT CONCLUDED WITH THE STATEMENT 'I HEREBY REQUEST THAT HER CLAIM BE REOPENED FOR THE ABOVE SUGGESTED TREATMENT'. THE EMPLOYER DID REOPEN THE CLAIM AND MADE ITS FIRST PAYMENT OF TEMPORARY TOTAL DISABILITY COMPENSATION ON AUGUST 27, 1975 FOR THE PERIOD JULY 11, 1975 TO AUGUST 2, 1975.

THE REFEREE FOUND CLAIMANT HAD FAILED TO DEMONSTRATE A NEED FOR IMMEDIATE MEDICAL TREATMENT, THAT THE REFERRAL TO THE PORTLAND PAIN CLINIC, SUGGESTED IN BOTH OF DR. CHERRY'S REPORTS, WAS ONLY FOR

FURTHER EVALUATION AND THERE WAS NO ELEMENT OF IMMEDIACY INDICATED AS THE REPORTS RECEIVED FROM DR. CHERRY INTRODUCED NO NEW DIAGNOSIS.

THE REFEREE FOUND THAT CLAIMANT HAD FAILED TO SUSTAIN HER BURDEN OF PROVING AN UNREASONABLE DELAY IN REOPENING HER CLAIM BECAUSE THE TWO REPORTS FROM DR. CHERRY WERE SOMEWHAT EQUIVOCAL AS TO THE EXISTENCE OF TEMPORARY TOTAL DISABILITY FROM JULY 11, 1975 FORWARD. HE CONCLUDED THAT THE EMPLOYER HAD GIVEN CLAIMANT THE BENEFIT OF THE DOUBT IN ACCEPTING THE CLAIM FOR PAYMENT OF TIME LOSS AND FOR A MEDICAL REOPENING ON THE RECOMMENDATION WHICH WAS ESSENTIALLY FOR EXPLORATION OF FURTHER POSSIBLE AVENUES OF DIAGNOSIS. THE CONTENTION OF CLAIMANT THAT SHE WAS ENTITLED TO TEMPORARY TOTAL DISABILITY COMPENSATION FROM APRIL 7, 1975 TO DATE WAS NOT SUPPORTED BY THE MEDICAL EVIDENCE.

THE REFEREE FURTHER CONCLUDED THAT THE EMPLOYER HAD VOLUNTARILY REOPENED CLAIMANT'S CLAIM FOR FURTHER MEDICAL CARE AND FOR THE PAYMENT OF TEMPORARY TOTAL DISABILITY COMPENSATION AND, THEREFORE, CLAIMANT HAD ALREADY RECEIVED ALL OF THE COMPENSATION BENEFITS TO WHICH SHE WAS ENTITLED BY LAW.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 23, 1975 IS AFFIRMED.

WCB CASE NO. 75-1320 FEBRUARY 23, 1976

JAMYE C. SMITH, CLAIMANT

GRANT, FERGUSON AND CARTER,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 288 DEGREES FOR 90 PER CENT UNSCHEDULED LOW BACK DISABILITY.

CLAIMANT WAS A 46 YEAR OLD NURSE'S AIDE WHEN SHE INJURED HER BACK ON JULY 22, 1972 ATTEMPTING TO TURN A PATIENT. SHE WAS FIRST SEEN BY DR. WEINMAN, AN ORTHOPEDIST, ON JULY 25, 1972 - HE DIAGNOSED A LUMBAR SPRAIN AGGRAVATING DEGENERATIVE JOINT DISEASE, LUMBOSACRAL SPINE AND ESTIMATED CLAIMANT WOULD SUFFER APPROXIMATELY TWO WEEKS TIME LOSS.

CLAIMANT LEFT MEDFORD FOR CALIFORNIA AND WHILE THERE A LAMINECTOMY AND DISC EXCISION WAS PERFORMED BY DR. FLORIO, AN ORTHOPEDIC PHYSICIAN, IN MAY 1973. LATER CLAIMANT RETURNED TO MEDFORD AND CAME UNDER THE CARE OF DR. WILSON, ALSO AN ORTHOPEDIST.

IN OCTOBER 1973 DR. WILSON NOTED CLAIMANT WAS SYMPTOMATIC FROM PERSISTENT NERVE ROOT IRRITATION ON THE COMPRESSION AND, AFTER CONSULTATION WITH DR. LUCE, A NEUROSURGEON, RECOMMENDED A LAMINECTOMY, DECOMPRESSION AND TWO LEVEL SPINAL FUSION. THE PROPOSED SURGERY WAS DISCUSSED WITH CLAIMANT WHO INDICATED THAT BECAUSE SHE WAS A JOHOVAH'S (SIC) WITNESS, SHE COULD NOT SUBMIT TO THE

SURGERY IF IT INVOLVED THE POSSIBILITY OF A BLOOD TRANSFUSION. NEITHER DR. WILSON NOR DR. LUCE FELT IT WAS WISE TO UNDERTAKE SURGERY UNDER SUCH CONDITIONS.

IN JANUARY 1975 CLAIMANT WAS EXAMINED BY DR. HALFERTY AT THE DISABILITY PREVENTION DIVISION, HE FOUND HER MEDICALLY STATIONARY IN VIEW OF HER REFUSAL OF SURGERY. DR. HALFERTY WAS OF THE OPINION THAT THE IMPAIRMENT AS RELATED TO THE INDUSTRIAL ACCIDENT WAS IN THE RANGE OF MODERATE. ON FEBRUARY 12, 1975 THE CLAIM WAS CLOSED BY A DETERMINATION ORDER WHICH AWARDED CLAIMANT 160 DEGREES FOR 5.0 PER CENT UNSCHEDULED LOW BACK DISABILITY.

ON JUNE 24, 1975 DR. WILSON COMMENTED THAT HE FELT THAT IF CLAIMANT HAD HAD THE PROPOSED SURGERY AND ACHIEVED A GOOD RESULT THEREFROM, SHE WOULD NOT HAVE BEEN ENTITLED TO AN AWARD EQUAL TO 50 PER CENT OF THE MAXIMUM. HE FELT HER RIGHT TO REFUSE SURGERY WAS UNQUESTIONABLE BUT THAT HER DISABILITY AS FAR AS LIFTING AND BENDING OCCUPATIONS WERE CONCERNED WAS QUITE SEVERE WITH HER PRESENT SYMPTOMATOLOGY - CLAIMANT WOULD HAVE TO BE CONFINED TO A RATHER SEDENTARY TYPE OF INACTIVE OCCUPATION IN ORDER TO FUNCTION AT ALL.

ON JULY 17, 1975 DR. LUCE CLASSIFIED HER DISABILITY AS MODERATELY SEVERE.

AT THE INITIAL DISCUSSION REGARDING THE PROPOSED SURGERY, CLAIMANT'S ONLY RELUCTANCE WAS RELATED TO THE USE OF BLOOD TRANSFUSIONS, BASED UPON HER RELIGIOUS BELIEFS, BUT AT THE HEARING SHE TESTIFIED THAT AFTER TALKING AGAIN WITH DR. LUCE, SHE CONCLUDED THAT THE RESULTS OF SURGERY WOULD BE SO QUESTIONABLE THAT SHE WOULD NOT BE WILLING TO UNDERGO IT.

THE REFEREE FOUND THAT AS A MATTER OF GENERAL KNOWLEDGE, A SPINAL FUSION IS A VERY SERIOUS PROCEDURE AND THAT THERE CAN BE NO FIRM EXPECTATION OF IMPROVEMENT IN THE PHYSICAL STATUS OF A PARTICULAR PATIENT - HE CONCLUDED THAT CLAIMANT'S REFUSAL OF SURGERY WAS NOT UNREASONABLE WITHOUT TAKING INTO CONSIDERATION THE FACT THAT CLAIMANT BASED, INITIALLY, THE REFUSAL ON RELIGIOUS SCRUPLES.

THE REFEREE FURTHER FOUND THAT THE OBESITY MENTIONED IN THE MEDICAL REPORTS WAS NOT A SUBSTANTIALLY CONTROLLING FACTOR IN THE LEVEL OF CLAIMANT'S DISABILITY. CLAIMANT HAS COMPLETED THE 11TH GRADE, SHE HAS BEEN MARRIED TWICE AND HAS HAD SIX CHILDREN, TWO OF WHOM LIVE WITH HER AT THE PRESENT TIME. HER WORK BACKGROUND CONSISTS OF SEASONAL CANNERY AND AGRICULTURAL WORK, A SALES CLERK IN A BAKERY SHOP AND WORKING, BRIEFLY, IN A BANK. BETWEEN 1950 AND 1965 SHE WAS OCCUPIED PRIMARILY WITH RAISING A FAMILY, SHE WORKED ABOUT ONE THIRD OF THE TIME. AFTER 1965 SHE WORKED FOR A LITTLE MORE THAN A YEAR AS A NURSE'S AIDE IN CALIFORNIA BUT DID NOT WORK AGAIN UNTIL 1969 WHEN SHE WENT TO WORK FOR THE EMPLOYER.

CLAIMANT HAS PERFORMED NO WORK FOR PAY SINCE HER INDUSTRIAL INJURY. THE REFEREE FOUND THAT SHE HAD MARKED LIMITATIONS ON HER ABILITY TO REMAIN ON HER FEET FOR ANY EXTENDED PERIOD OF TIME, TO WALK MORE THAN A BLOCK WITHOUT AGGRAVATING HER BACK PAIN AND WAS UNABLE TO SIT CONTINUOUSLY OR ASSUME ANY POSTURE WITHOUT CHANGING HER POSITION FROM TIME TO TIME. SHE HAS MARKED INABILITY TO BEND AND HAS TROUBLE LIFTING ANYTHING OF SUBSTANTIAL WEIGHT - SHE ALSO HAS DIFFICULTY SLEEPING ON ACCOUNT OF HER BACK PAIN.

A PSYCHOLOGICAL EVALUATION BY DR. PERKINS INDICATED THAT CLAIMANT COULD BE CONSIDERED AS A PERSON WHO WOULD RETURN TO WORK

IF HER PHYSICAL HEALTH PERMITTED HER TO DO SO AND SHE FELT CAPABLE OF EMPLOYMENT. SHE WAS FELT TO BE A GOOD CANDIDATE, FOLLOWING TRAINING, FOR EMPLOYMENT AS A HOSPITAL ADMITTING CLERK OR RECEPTIONIST IF ONLY VERY LITTLE CLERICAL ROUTINE WERE INVOLVED.

THE REFEREE, RELYING ON FERGUSON V. WOHL SHOE COMPANY (UNDERSCORED), 11 OR APP 407, FOUND THAT CLAIMANT COULD BE CONSIDERED AS A PERSON WILLING TO WORK BUT PHYSICALLY UNABLE TO UNDERTAKE A FULL TIME RETRAINING PROGRAM.

THE REFEREE CONCLUDED, CONSIDERING CLAIMANT'S AGE, EDUCATION, INTELLIGENCE AND WORK EXPERIENCE IN CONTEXT WITH HER VERY SUBSTANTIALLY LIMITING PHYSICAL DISABILITY AND QUESTIONABLE ABILITY TO PHYSICALLY TOLERATE A VOCATIONAL RETRAINING PROGRAM - MAKING THE PROJECTION CALLED FOR BY FERGUSON (UNDERSCORED) - THAT CLAIMANT HAD SUSTAINED A LOSS OF WAGE EARNING CAPACITY FAR GREATER THAN THAT FOR WHICH SHE HAD BEEN AWARDED. HE INCREASED THE AWARD OF 50 PER CENT TO 90 PER CENT OF THE MAXIMUM ALLOWABLE BY STATUTE FOR UNSCHEDULED DISABILITY.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 11, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 400 DOLLARS, PAYABLE BY STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 74-4344 FEBRUARY 24, 1976

HAROLD MITCHELL, CLAIMANT

SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH DISAPPROVED THE DENIAL OF CLAIMANT'S CLAIM BY THE STATE ACCIDENT INSURANCE FUND, REMANDED THE CLAIM TO THE FUND TO ACCEPT AND PROVIDE CLAIMANT COMPENSATION PURSUANT TO THE OCCUPATIONAL DISEASE LAW, ASSESSED A PENALTY OF 25 PER CENT OF THE TEMPORARY TOTAL DISABILITY COMPENSATION TO WHICH CLAIMANT WAS ENTITLED AS OF THE DATE OF THE DENIAL AND ORDERED THE FUND TO PAY CLAIMANT'S COUNSEL A REASONABLE ATTORNEY'S FEE.

CLAIMANT WAS A 48 YEAR OLD HEARING AID REPAIRMAN - AFTER 9 YEARS ON THE JOB HE QUIT ON JULY 19, 1974 BUT WAS UNABLE TO OBTAIN A CLAIM FORM (HIS EMPLOYER DID NOT PROVIDE WORKMEN'S COMPENSATION COVERAGE) UNTIL AUGUST 1, 1974. SOMETIME PRIOR TO SEPTEMBER 24, 1974 CLAIMANT RECEIVED A CHECK FROM THE FUND IN THE AMOUNT OF 21.33 DOLLARS - HE HAS RECEIVED NO MONEY FROM THE FUND SINCE THEN.

ON NOVEMBER 25, 1974 THE FUND DENIED THE CLAIM ON THE GROUNDS THE AUDIOGRAMS REVEALED NO MEASURABLE LOSS OF HEARING ACUITY.

CLAIMANT IS AFFLICTED WITH A CHRONIC ANXIETY NEUROSIS WHICH BECAME SYMPTOMATIC AT LEAST 20 YEARS PRIOR TO THE DATE OF HIS CLAIM. EVENTUALLY, HE OBTAINED PROFESSIONAL HELP AND BY REDUCING HIS DAILY WORK LOAD HAD BEEN ABLE TO BRING THE LEVEL OF HIS SYMPTOMS DOWN. DURING THE YEAR PRIOR TO HIS TERMINATION CLAIMANT HAD DRIFTED BACK INTO HIS OLD HABITS OF ASSUMING A GREATER WORK LOAD AND, ACCORDINGLY, HIS TENSIONS INCREASED.

CLAIMANT CONTENDS THE HIGH FREQUENCY NOISE LEVELS TO WHICH HEARING AID TESTING SUBJECTED HIM DAILY INCREASED HIS TENSIONS TO THE POINT THAT HE FINALLY HAD TO QUIT AND THAT THEREAFTER HIS NOISE-PROVOKED SYMPTOMS SUBSIDED TO A LOWER LEVEL AND HIS CONDITION IMPROVED.

THE REFEREE FOUND NO MEDICAL EVIDENCE WHICH INDICATED CLAIMANT HAD BEEN ADVISED HE HAD AN OCCUPATIONAL DISEASE BEFORE HE QUIT WORK BUT THAT CLAIMANT HAD FOR SOME TIME TOLD HIS SPECIAL CONSULTANTS THAT HIS JOB WAS RESPONSIBLE FOR HIS PROBLEMS AND THAT HE WANTED TO QUIT WORKING. DR. GORDON, A PSYCHIATRIST, SAW CLAIMANT FOUR TIMES BETWEEN SEPTEMBER 5, 1973 AND JULY 12, 1974. IT WAS HIS OPINION THAT THE NOISE EXPOSURE AT CLAIMANT'S WORK WAS A MATERIAL CONTRIBUTING FACTOR IN AGGRAVATING CLAIMANT'S PREEXISTING ANXIETY NEUROSIS AND THAT IT WAS PROBABLE THAT CLAIMANT WOULD NOT BE ABLE TO RETURN TO THIS TYPE OF WORK. HE CONCEDED, HOWEVER, THAT CLAIMANT HAS LOWERED THE LEVEL OF HIS SYMPTOMS SINCE LEAVING HIS JOB AND, THEREFORE, THE RESULTS OF THE AGGRAVATION NO LONGER EXIST. THE REFEREE CONCLUDED THAT CLAIMANT'S PREEXISTING CHRONIC ANXIETY NEUROSIS WAS AGGRAVATED, EVEN THOUGH TEMPORARILY, BY HIS WORK AND THAT, THEREFORE, HE WAS ENTITLED TO COMPENSATION.

THE REFEREE FOUND THAT CLAIMANT LEFT WORK ON JULY 19, 1974 BUT BECAUSE HIS EMPLOYER DID NOT COMPLY WITH THE LAW AND PROVIDE WORKMEN'S COMPENSATION INSURANCE FOR HIS EMPLOYES, IT TOOK CLAIMANT UNTIL AUGUST 1, 1974 TO GET A CLAIM FORMALLY STARTED. THE REFEREE CONCLUDED THAT THE CLAIMANT WAS ENTITLED TO PENALTIES FOR NONPAYMENT OF COMPENSATION FOR THIS PERIOD CHARGEABLE BACK TO THE EMPLOYER UNDER THE PROVISIONS OF ORS 656.262(3)(D)(8). THE REFEREE FOUND THAT CLAIMANT WAS PAID 21.33 DOLLARS BETWEEN AUGUST 1, 1974 AND SEPTEMBER 24, 1974 ALTHOUGH THE CLAIM WAS NOT DENIED UNTIL NOVEMBER 25, 1974. HE CONCLUDED THAT ANY ADDITIONAL COMPENSATION TO WHICH CLAIMANT MIGHT BE ENTITLED FROM AND AFTER AUGUST 1, 1974 WAS LIKEWISE SUBJECT TO PENALTY BECAUSE OF THE FUND'S FAILURE TO COMPLY WITH THE PROVISIONS OF ORS 656.262(4) AND THAT CLAIMANT'S COUNSEL WAS ENTITLED TO A REASONABLE ATTORNEY'S FEE.

WITH RESPECT TO THE ISSUE OF TIMELINESS OF CLAIM, THE REFEREE FOUND THAT CLAIMANT HAD KNOWN OF HIS CONDITION FOR YEARS AND FELT THAT HIS JOB CAUSED IT - HOWEVER, HE DID NOT BECOME DISABLED IN THE SENSE THAT HE WAS UNABLE TO CONTINUE WORKING UNTIL JULY 19, 1974 NOR DID ANY DOCTOR TELL HIM THAT HE HAD AN OCCUPATIONAL DISEASE BEFORE THAT DATE. THE REFEREE FURTHER FOUND THAT CLAIMANT HAD SIGNED HIS CLAIM FOR OCCUPATIONAL INJURY OR DISEASE WITHIN ONE MONTH AFTER HE BECAME DISABLED AND HIS CLAIM WAS NOT BARRED.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED JUNE 24, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW THE SUM

OF 350 DOLLARS, PAYABLE IN THE FIRST INSTANCE BY THE STATE ACCIDENT INSURANCE FUND AND RECOVERABLE FROM PORTLAND HEARING AID CENTER, INC. BY THE WORKMEN'S COMPENSATION BOARD UNDER THE PROVISIONS OF ORS 656.054.

WCB CASE NO. 75-2283 FEBRUARY 24, 1976

DONALD MAUCK, CLAIMANT

BAILEY, DOBLIE AND BRUNN,
CLAIMANT'S ATTYS.
PHILIP MONGRAIN, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT.

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED MARCH 13, 1975 WHEREBY CLAIMANT WAS AWARDED 13 AND ONE HALF DEGREES FOR 22 AND ONE HALF PER CENT LOSS OF HEARING IN HIS LEFT EAR.

CLAIMANT, A 61 YEAR OLD WELDER, WAS INJURED ON MAY 1, 1971 WHEN SOME HOT METAL FELL INTO HIS LEFT EAR AND PERFORATED HIS EAR DRUM. HE WAS TREATED BY DR. CONWAY AND IN OCTOBER 1971 A TYMPANOPLASTY OF THE LEFT EAR WAS PERFORMED.

ON NOVEMBER 21, 1974 DR. CONWAY INDICATED IN HIS FINAL REPORT THAT CLAIMANT HAD HAD DIFFICULTY WITH HIS EAR SINCE HIS LAST VISIT IN JANUARY 1972, THAT IT REMAINED SOMEWHAT OF A PROBLEM TO HIM BUT HE DID NOT HAVE ANY DRAINAGE OR PAIN. THERE WAS SOME PERSISTENT HIGH PITCH TINNITUS. EXAMINATION OF THE EAR REVEALED A WELL HEALED SURGICAL PROCEDURE ON THE LEFT SIDE WITH A SMALL RETENTION CYST AT THE ANTERIOR INFERIOR EXTENT OF THE CANAL AND SLIGHT LATERAL HEALING OF THE TYMPANIC GRAFT. AUDIOMETRIC EVALUATION REVEALS A STABLE LEVEL AT APPROXIMATELY 35 DECIBELS THROUGH THE FREQUENCIES BELOW 2,000 CYCLES IN THE LEFT EAR AND A LEVEL OF APPROXIMATELY 15 DECIBELS BELOW 2,000 CYCLES IN THE RIGHT EAR. AT AND ABOVE 2,000 CYCLES, THERE WAS EVIDENCE OF ACOUSTIC TRAUMA, I.E., PERSISTENT HIGH PITCH TINNITIS.

BASED ON THIS EXAMINATION THE DETERMINATION ORDER WAS ISSUED ON MARCH 13, 1975.

ON JULY 14, 1975 CLAIMANT WAS EXAMINED BY DR. SWANCUTT. THE EXAMINATION INDICATED THE RIGHT EAR DRUM TO BE NEGATIVE AND THE LEFT EAR DRUM WAS QUITE THICKENED BUT IT APPEARED INTACT. AN AUDIOGRAM SHOWED A HIGH TONE SENSORY NEURAL LOSS, BILATERALLY, WITH A CONDUCTIVE LOSS IN THE LOWER FREQUENCIES, BILATERALLY, WHICH WAS MORE MARKED ON THE LEFT. A COMPUTATION OF THE LOSS REVEALED A 21 PER CENT LOSS ON THE RIGHT WITH A 34 PER CENT LOSS ON THE LEFT OR BINAURAL LOSS OF 24 PER CENT. DR. SWANCUTT FELT THAT THE LOSS ON THE LEFT MIGHT WELL BE ASSOCIATED WITH THE INDUSTRIAL INJURY, HOWEVER, THE LOSS ON THE RIGHT WAS NOT, IN ALL PROBABILITY, ASSOCIATED WITH THAT INJURY. SUBSEQUENTLY, DR. SWANCUTT STATED THAT SOME OF THE LOSS IN THE LEFT EAR PROBABLY COULD BE ASSOCIATED WITH THE INJURY BUT IT WAS IMPOSSIBLE TO DETERMINE EXACTLY HOW MUCH OF HIS HEARING LOSS IN THE LEFT EAR COULD BE THE RESULT OF THE INJURY INASMUCH AS HE HAS HAD A LOSS ON THE RIGHT ALTHOUGH NOT AS SEVERE.

THE REFEREE FOUND THAT THE 34 PER CENT LOSS OF HEARING IN THE LEFT EAR MUST BE CONSIDERED WITH THE 21 PER CENT LOSS IN THE RIGHT

EAR THAT APPARENTLY PREEXISTED THE INDUSTRIAL INJURY - HE FELT IT WAS REASONABLE TO ASSUME THAT SOME HEARING LOSS WAS ALSO PRESENT IN THE LEFT EAR PRIOR TO THE INJURY. THE REFEREE CONCLUDED THAT THE AWARD OF 22 AND ONE HALF PER CENT LOSS OF HEARING AWARDED CLAIMANT WAS SUFFICIENT TO COMPENSATE CLAIMANT FOR THE LOSS OF FUNCTION CAUSED BY THIS SCHEDULED DISABILITY.

THE REFEREE CONCLUDED THAT WITH RESPECT TO THE TINNITUS, THE EVIDENCE DID NOT INDICATE IT WAS DISABLING - IT MIGHT BE UNCOMFORTABLE BUT IT DID NOT AFFECT CLAIMANT'S ABILITY TO WORK OR HAVE ANY EFFECT ON HIS HEARING ABOVE THAT FOR WHICH CLAIMANT HAD BEEN COMPENSATED BY THE AWARD FOR HIS SCHEDULED DISABILITY.

THE BOARD, ON DE NOVO REVIEW, FINDS NO MEDICAL REPORTS CONTRADICTING THOSE UPON WHICH THE REFEREE RELIED AND AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS REACHED BY THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 25, 1975 IS AFFIRMED.

WCB CASE NO. 74-4139 FEBRUARY 24, 1976

JAMES BIASI, CLAIMANT

BROWN, BURT AND SWANSON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED OCTOBER 29, 1974 WHEREBY CLAIMANT WAS GRANTED AN AWARD FOR 30 DEGREES FOR 20 PER CENT LOSS OF THE LEFT LEG.

CLAIMANT SUSTAINED A COMPENSABLE INJURY ON AUGUST 24, 1972 WHEN HE BUMPED HIS LEFT KNEE AGAINST A WALL PARTITION IN THE OFFICE WHERE HE WAS EMPLOYED BY THE SILVERTON POLICE DEPARTMENT. DR. DAVIES, ON AUGUST 30, 1972, DIAGNOSED A CONTUSION OF THE LEFT KNEE WITH SYNOVITIS. CLAIMANT CONTINUED TO EXPERIENCE PAIN WITH 'POPPING' IN HIS LEFT KNEE AND IN OCTOBER 1972, TERMINATED HIS EMPLOYMENT.

CLAIMANT WAS SEEN, ON REFERRAL, BY DR. STANFORD, AN ORTHOPEDIST, ON NOVEMBER 27, 1972 AND A LITTLE MORE THAN A YEAR LATER DR. STANFORD PERFORMED AN ARTHROTOMY AND MEDIAL MENISCECTOMY ON CLAIMANT'S LEFT KNEE. CLAIMANT CONTINUED TREATMENT WITH DR. STANFORD WHO REPORTED, ON APRIL 18, 1974, THAT CLAIMANT HAD SOME EMOTIONAL INSTABILITY WHICH HAD SLOWED DOWN HIS RECOVERY AND THAT CLAIMANT WAS STILL APPREHENSIVE ABOUT THE USE OF HIS LEG. ON JULY 12, 1974 DR. STANFORD REPORTED THAT CLAIMANT HAD IMPROVED A GREAT DEAL AND HE FELT THAT CLAIMANT COULD GO BACK TO WORK AND COULD DO ALMOST ANY TYPE OF WORK EXCEPT THE MORE VIGOROUS TYPE WHICH HE, AS A POLICEMAN, HAD SOMETIMES BEEN REQUIRED TO DO.

ON SEPTEMBER 9, 1974 DR. HARWOOD, ON THE MEDICAL STAFF OF THE STATE ACCIDENT INSURANCE FUND, EXAMINED CLAIMANT. HE FOUND NO IMPAIRMENT IN CLAIMANT'S LEFT LOWER EXTREMITY, ALL RANGE OF MOTION WAS NORMAL AND MUSCLE STRENGTH IN THE KNEE JOINT REGION AND THE SENSATION WAS NORMAL. HE NOTED THAT CLAIMANT'S ANXIETY

ABOUT RETURNING TO WORK WAS A TRAIT PECULIAR TO CLAIMANT'S PERSONALITY AND NOT DUE TO ANY ACTUAL OR REAL PHYSICAL IMPAIRMENT. DR. STANFORD SUBSEQUENTLY READ DR. HARWOOD'S OPINION AND AGREED WITH IT ALTHOUGH HE FELT THAT CLAIMANT WAS GENERALLY DEPRESSED AND HE WOULD PREFER TO GET CLAIMANT BACK TO WORK BEFORE THE CLAIM WAS CLOSED. THE CLAIMANT'S CLAIM WAS CLOSED ON OCTOBER 29, 1974 WITH AN AWARD OF 20 PER CENT LOSS OF THE LEFT LEG.

CLAIMANT TESTIFIED THAT HIS CURRENT SYMPTOMS CONSIST OF A MILD PAIN IN HIS LEFT LEG FROM THE KNEE ALL THE WAY UP TO HIS HIP WHICH BECOMES SEVERE WITH ACTIVITIES SUCH AS WALKING UP A SLOPE, LIFTING OR CARRYING HEAVY ITEMS, GOING UPSTAIRS BACKWARDS OR GETTING IN AND OUT OF A CAR. HE CANNOT WALK, HE TESTIFIED, MORE THAN A BLOCK WITHOUT SITTING DOWN TO REST - HE IS APPREHENSIVE THAT HIS LEG WILL TWIST AND BUCKLE UNDERNEATH HIM. THIS HAS HAPPENED TWICE AND CAUSED HIM TO BE VERY CAREFUL IN STEPPING DOWN ON HIS RIGHT LEG FIRST. CLAIMANT CONTENDS HE IS ENTITLED TO AN AWARD FOR UNSCHEDULED DISABILITY BECAUSE OF THE HIP DISCOMFORT.

THE REFEREE FOUND NOTHING IN THE MEDICAL REPORTS WHICH MENTIONED ANY INJURIES TO OR ANY DISABILITY RELATED TO THE CLAIMANT'S HIP. CLAIMANT TESTIFIED THAT THE PAIN HE EXPERIENCED WAS FROM HIS KNEE UP TO HIS HIP. THE REFEREE CONCLUDED, BASED UPON THE EVIDENCE IN THE RECORD, CLAIMANT HAD SUFFERED NO INJURY TO, OR HAD ANY DISABILITY IN, HIS HIP, THEREFORE, HE WAS NOT ENTITLED TO AN AWARD FOR UNSCHEDULED DISABILITY.

BASED ON THE MEDICAL TESTIMONY AND THE TESTIMONY OF THE CLAIMANT, CLAIMANT'S LOSS OF FUNCTION AND USE OF THE LEFT KNEE HAS BEEN ADEQUATELY COMPENSATED BY THE AWARD OF 30 DEGREES FOR 20 PER CENT OF THE MAXIMUM FOR HIS SCHEDULED DISABILITY.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 27, 1975 IS AFFIRMED.

WCB CASE NO. 75-1101 FEBRUARY 24, 1976

S. TONY ZARBANO, CLAIMANT

FLAXEL, TODD AND FLAXEL,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH REMANDED TO IT CLAIMANT'S CLAIM FOR ACCEPTANCE AND PAYMENT OF COMPENSATION, AS PROVIDED BY LAW, FROM THE DATE OF THE INJURY UNTIL CLOSURE IS AUTHORIZED PURSUANT TO ORS 656.268.

CLAIMANT IS 47 YEARS OLD AND HAS SPENT APPROXIMATELY 26 YEARS OF HIS LIFE DOING LAW ENFORCEMENT WORK, BOTH MILITARY AND CIVIL. IN 1971 HE BECAME SHERIFF OF COOS COUNTY, HAVING SERVED THE PREVIOUS EIGHT YEARS AS CHIEF OF POLICE IN NORTH BEND. CLAIMANT WAS SHERIFF BETWEEN 1971 AND 1974.

THE REFEREE FOUND THAT CLAIMANT APPROACHED HIS JOB IN LAW ENFORCEMENT WORK ON A VERY PERSONALLY INVOLVED BASIS AND WORKED LONG HOURS, QUITE OFTEN 12 HOURS A DAY ON A 7 DAY PER WEEK BASIS. HE HAD BEEN INVOLVED IN VARIOUS INCIDENTS WHICH WERE QUITE DANGEROUS AND THREATS HAD BEEN MADE UPON HIS LIFE AND AGAINST HIS FAMILY. IN ADDITION TO HIS DUTIES OF ENFORCING CRIMINAL LAW CLAIMANT WAS TAX COLLECTOR FOR THE COUNTY AND WAS ALSO RESPONSIBLE FOR MAINTAINING THE COUNTY JAIL, A CONSTANT PROBLEM.

CLAIMANT'S PERSONAL SECRETARY DURING HIS TERM AS SHERIFF, AND ALSO WHILE HE WAS WITH THE NORTH BEND POLICE DEPARTMENT, TESTIFIED THAT SHE KNEW CLAIMANT AT NORTH BEND AND, AFTER HE FIRST BECAME SHERIFF HE WAS A VERY ACTIVE PERSON WITH NO PHYSICAL LIMITATIONS BUT COMMENCING IN 1973 SHE OBSERVED CHANGES IN CLAIMANT - HE BEGAN TO COMPLAIN OF NOT FEELING WELL AND OF HAVING PAIN IN HIS CHEST WHICH RADIATED INTO HIS SHOULDER AND HE ALSO LIMITED SOME OF HIS ACTIVITIES THEREAFTER. CLAIMANT'S CONDITION WORSENED AND IN MAY 1974 HE WAS SEEN BY DR. CHIAPUZIO WHO DIAGNOSED A HIATAL HERNIA. IN DECEMBER 1974 CLAIMANT SOUGHT THE SERVICES OF DR. OELKE, COMPLAINING OF CHEST PAIN WHEN HE WAS UNDER STRESS AND ESPECIALLY AFTER EATING. AN ANGIOGRAPHY WAS PERFORMED AND AN ARTERIOSCLEROTIC CORONARY VASCULAR DISEASE WAS DIAGNOSED. ON DECEMBER 20, 1974 DR. BALDWIN PERFORMED A FOUR-VESSEL CORONARY BYPASS.

CLAIMANT FILED A CLAIM WHICH WAS DENIED BY THE FUND AS A CONDITION NOT RESULTING FROM CLAIMANT'S JOB ACTIVITIES.

THE REFEREE CORRECTLY STATED THAT A MEDICALLY COMPLICATED PROBLEM SUCH AS IS PRESENTED IN HEART CASES REQUIRES RELIANCE UPON MEDICAL EXPERTISE AND, UNFORTUNATELY, THERE IS A VAST AREA OF DISAGREEMENT BETWEEN THE MEDICAL EXPERTS IN THE FIELD OF CARDIOLOGY AS TO MEDICAL CAUSATION, THE SOLE ISSUE IN THIS PARTICULAR CASE.

DR. GRISWOLD FELT THAT THERE WAS NO DATA TO SUPPORT A FINDING THAT THE ON-THE-JOB ACTIVITIES AS A SHERIFF AGGRAVATED OR ACCELERATED CLAIMANT'S ATHEROGENESIS - THAT THERE IS NO GOOD MEDICAL EVIDENCE TO SUPPORT THE CONTENTION THAT CHRONIC STRESS ACCELERATES ATHEROSCLEROSIS. DR. GRISWOLD DID NOT EXAMINE OR TREAT CLAIMANT PRIOR TO OR FOLLOWING THE DISCOVERY OF CLAIMANT'S DISEASED HEART CONDITION. HE WAS FURNISHED COPIES OF MOST OF THE MEDICAL DOCUMENTS AND HOSPITAL RECORDS INVOLVED.

DR. BALDWIN, ON THE OTHER HAND, ALSO A PRACTITIONER IN THE FIELD OF VASCULAR SURGERY, EXAMINED AND TREATED CLAIMANT BOTH PRIOR TO AND AFTER THE SURGERY, HE DIAGNOSED THE ATHEROSCLEROSIS AND PERFORMED THE BYPASS SURGERY. HIS OPINION IS DIAMETRICALLY OPPOSED TO THAT EXPRESSED BY DR. GRISWOLD. HE BELIEVES THAT THE JOB STRESS IN CLAIMANT'S CASE WAS A MATERIAL CONTRIBUTING FACTOR IN THE DEVELOPMENT OF THE INVOLVED DISEASE. AFTER LISTING SEVERAL PRECIPITATING FACTORS OF HEART DISEASE - NAMELY, SMOKING, ALCOHOL, DIABETES, DIETARY HABITS AND OBESITY, HYPERTENSION, FAMILY HISTORY, AND STRESS, HE POINTED TO THE ABSENCE OF ALL THESE FACTORS IN CLAIMANT'S CASE EXCEPT FOR THE STRESS AND THE DIET AND WEIGHT.

THE REFEREE CONCLUDED, BASED UPON DR. BALDWIN'S OPINION AND EXPLANATION THEREFOR, THAT CLAIMANT HAD SUSTAINED HIS BURDEN OF PROOF IN ESTABLISHING MEDICAL CAUSATION AND, THEREFORE, CLAIMANT'S CLAIM SHOULD HAVE BEEN ACCEPTED AS A COMPENSABLE CLAIM BY THE FUND. HE REMANDED THE CLAIM TO THE FUND AND DIRECTED THE FUND TO PAY CLAIMANT'S ATTORNEY A REASONABLE ATTORNEY'S FEE PURSUANT TO ORS 656.386(1).

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 31, 1975 IS AFFIRMED.

THE CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW THE SUM OF 450 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 74-4690 FEBRUARY 25, 1976

IN THE MATTER OF THE COMPENSATION OF
PETER J. GEIDL, CLAIMANT
AND THE COMPLYING STATUS OF
INTERNATIONAL RACEWAY PARKS, INC.,
DBA PORTLAND INTERNATIONAL RACEWAY, EMPLOYER
SANFORD KOWITT, CLAIMANT'S ATTY.
KEITH SKELTON, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH REMANDED TO IT CLAIMANT'S CLAIM TO BE ACCEPTED FOR THE PAYMENT OF BENEFITS, AS PROVIDED BY LAW, UNTIL CLOSED PURSUANT TO ORS 656.268 AND FURTHER DIRECTED THE FUND TO PAY CLAIMANT'S ATTORNEY FEE UNDER THE PROVISIONS OF ORS 656.262(8) AND 656.382(1). THE FUND WAS INSTRUCTED TO FOLLOW THE PROVISIONS OF OAR 52-050 FOR REIMBURSEMENT OF CLAIM COSTS AND ADMINISTRATIVE EXPENSES BUT WAS NOT ENTITLED TO REIMBURSEMENT FOR THE ATTORNEY FEE.

CLAIMANT IS A 21 YEAR OLD MAN WHO PERFORMED VARIOUS SERVICES FOR THE EMPLOYER DURING 1973 WITHOUT RECEIVING ANY SALARY. IN APRIL 1974 IT WAS AGREED HE WOULD BE PAID 10 DOLLARS FOR HELPING WITH THE RACES ON WEDNESDAY EVENINGS AND 15 DOLLARS FOR HELPING WITH THE RACES ON SATURDAYS. ON MAY 3, 1974, A FRIDAY, CLAIMANT WAS HAULING AND PLACING SOME SNOW FENCES AROUND THE RACE TRACK AREA TO CONTROL THE CROWD DURING THE RACES THE FOLLOWING DAY. CLAIMANT USED A TRUCK BELONGING TO THE CITY OF PORTLAND WHICH THE EMPLOYES OF THE EMPLOYER HAD USED ON SEVERAL OCCASIONS TO MOVE THE FENCES WHEN NECESSARY. WHILE INVOLVED IN UNLOADING THE FENCES, CLAIMANT INJURED HIS BACK.

THE REFEREE FOUND THAT DURING CLAIMANT'S EMPLOYMENT THE EMPLOYER WAS A NONCOMPLYING EMPLOYER. A PROPOSED AND FINAL ORDER NOTICE, ISSUED JULY 26, 1974, DECLARING THE EMPLOYER TO BE A NONCOMPLYING EMPLOYER FOR THAT PERIOD OF TIME HAD NOTIFIED HIM OF HIS RIGHT TO REQUEST A HEARING. NO SUCH REQUEST WAS MADE. ON SEPTEMBER 11, 1974 COMPLIANCE DIVISION OF THE BOARD MAILED THE FUND A LETTER REFERRING CLAIMANT'S CLAIM TO IT FOR ACTION AS OUTLINED IN OAR 436-52-010 TO 436-52-060. THE FUND INTERVIEWED BOTH THE CLAIMANT AND THE MANAGER OF THE EMPLOYER. A STATEMENT SIGNED BY CLAIMANT INDICATED THAT THE WORK HE WAS PAID TO DO CONSISTED OF ODD JOBS PREPARING FOR AND DURING THE RACES AND THAT ONE SPECIFIC JOB WAS PLACING OF SNOW FENCES FOR CROWD CONTROL - THE STATEMENT SIGNED BY THE MANAGER OF THE EMPLOYER STATED CLAIMANT WAS EMPLOYED UNDER HIS SUPERVISION TO WORK ONLY DURING THE EVENTS WHEN THE GATES OPENED

FOR THE RACE AND WORKED ONLY DURING THE RACING HOURS, THAT HE WAS NOT UNDER HIS CONTROL ON FRIDAY, MAY 3, 1974.

ON NOVEMBER 7, 1974 THE FUND MAILED CLAIMANT A LETTER OF DENIAL STATING CLAIMANT WAS NOT EMPLOYED UNDER THE COVERAGE OF THE WORKMEN'S COMPENSATION LAW AND HE WAS NOT INJURED DURING THE COURSE AND SCOPE OF HIS EMPLOYMENT.

THE EMPLOYER CONCEDED HE WAS IN A NONCOMPLYING STATUS AT THE TIME OF THE INJURY AND DID NOT CONTEST THE COMPENSABILITY OF THE CLAIM - HOWEVER, THE FUND AND THE BOARD TOOK THE POSITION THAT THE CLAIM WAS NOT COMPENSABLE.

THE REFEREE FOUND THAT SEVERAL YOUNG MEM HUNG AROUND THE RACE TRACKS AND PERFORMED ODD JOBS FOR THE EMPLOYER JUST FOR THE OPPORTUNITY OF BEING NEAR THE ACTIVITIES INVOLVED IN PREPARING FOR AND PUTTING ON THE RACES AND THAT THIS IS WHAT CLAIMANT DID DURING 1973. HOWEVER, IN APRIL 1974 AN AGREEMENT WAS ENTERED INTO WHEREBY CLAIMANT WAS TO BE PAID FOR CERTAIN DUTIES. THE FACT THAT CLAIMANT WAS NOT SUPERVISED BY THE EMPLOYER'S MANAGER ON THE DAY OF THE INJURY WAS OF LITTLE CONSEQUENCE AS THE WORK WAS VERY ROUTINE AND WAS CUSTOMARILY PERFORMED THE DAY PRIOR TO THE RACES. THE REFEREE CONCLUDED, AFTER CONSIDERING ALL OF THE EVIDENCE, THAT CLAIMANT'S CLAIM OCCURRED DURING THE SCOPE AND COURSE OF HIS EMPLOYMENT AND WAS THEREFORE COMPENSABLE.

ON THE QUESTION AS TO WHO IS RESPONSIBLE FOR CLAIMANT'S ATTORNEY'S FEES, CLAIMANT HAVING PREVAILED, THE REFEREE, RELYING UPON ORS 656.054(1) AND 656.262(1), CONCLUDED THAT THE CLAIM FOR COMPENSATION SHOULD HAVE BEEN PROCESSED BY THE FUND IN THE SAME MANNER AS IF CLAIMANT HAD BEEN EMPLOYED BY A CONTRIBUTING EMPLOYER AND THE RESPONSIBILITY OF PROCESSING CLAIMS OF A CONTRIBUTING EMPLOYER IS THE RESPONSIBILITY OF THE FUND. OAR 65-050 PROVIDES FOR REIMBURSEMENT TO THE FUND FOR COSTS INCURRED IN HANDLING CLAIMS FOR INJURED WORKMEN OF NONCOMPLYING EMPLOYERS, HOWEVER, 52-050(1)(C) SPECIFICALLY STATES THAT FEES AND SUMS PAID UNDER ORS 656.262 AND 656.382(1) ARE NOT REIMBURSABLE.

THE REFEREE CONCLUDED THAT THE MANNER IN WHICH CLAIMANT'S CLAIM WAS DENIED BY THE FUND CONSTITUTED AN UNREASONABLE REFUSAL TO PAY COMPENSATION AND, UNDER THE PROVISIONS OF ORS 656.262(8) AND 656.382(1), DIRECTED THE FUND TO PAY CLAIMANT'S ATTORNEY A REASONABLE FEE.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS IN ITS ENTIRETY THE ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 23, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 300 DOLLARS, PAYABLE BY STATE ACCIDENT INSURANCE FUND AND FOR WHICH STATE ACCIDENT INSURANCE FUND IS NOT ENTITLED TO REIMBURSEMENT BY THE WORKMEN'S COMPENSATION BOARD.

NICHOLAS R. GILLANDER, CLAIMANT

ROD KIRKPATRICK, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH APPROVED THE DENIAL OF CLAIMANT'S CLAIM BY THE FUND AND TERMINATED PAYMENT BY THE FUND OF TEMPORARY TOTAL DISABILITY COMPENSATION ON AUGUST 28, 1974.

ON FEBRUARY 11, 1974 CLAIMANT SUFFERED AN EPISODE OF ANGINA FOR WHICH HE FILED A CLAIM - ON MARCH 27, 1974 THE FUND ACCEPTED CLAIMANT'S CLAIM FOR ANGINA BUT DENIED RESPONSIBILITY FOR A PRE-EXISTING ATHEROSCLEROTIC CONDITION, ITS SUBSEQUENT TREATMENT AND ANY EVENTUAL DISABILITY WHICH MIGHT RESULT THEREFROM, CONTENDING SUCH WERE NOT NOW NOR WOULD THEY BE RELATED TO CLAIMANT'S WORK ACTIVITY. CLAIMANT DID NOT APPEAL FROM THIS DENIAL.

CLAIMANT HAD BEEN APPARENTLY IN GOOD HEALTH ALTHOUGH HE HAD HAD SOME CHEST PAINS IN THE YEAR PRECEDING FEBRUARY 11, 1974. AFTER HE WAS RELEASED FROM THE HOSPITAL ON FEBRUARY 17, 1974 CLAIMANT WAS FREE OF PAIN FOR THE MOST PART BUT SUFFERED 'EASY FATIGUABILITY' WHICH PREVENTED HIM FROM RETURNING TO WORK. AFTER OVEREXERTING HIMSELF AND OVEREATING AT A PARTY AND AFTER HAVING SUFFERED FROM HIGH ALTITUDE EXPOSURE AT CRATER LAKE, CLAIMANT WAS AGAIN HOSPITALIZED WITH SEVERE SYMPTOMS WHICH EVENTUALLY LED TO A DIAGNOSIS OF HEART ATTACK. ON SEPTEMBER 14, 1974 A DOUBLE SAPHENOUS VEIN BYPASS WAS PERFORMED.

ON NOVEMBER 15, 1974 THE FUND DENIED RESPONSIBILITY FOR THE BYPASS SURGERY.

BOTH DR. KLOSTER AND DR. WYSHAM, SPECIALISTS IN CARDIOVASCULAR DISEASES, WERE OF THE OPINION THAT THE ATTACK OF ANGINA WAS TRIGGERED BY THE WORK ACTIVITY OF FEBRUARY 11, 1974 BECAUSE OF THE UNDERLYING CORONARY ARTERY DISEASE WHICH CONTINUED TO PROGRESS NATURALLY AFTER THAT DATE UNTIL THE OPERATION WAS DONE ON SEPTEMBER 14, 1974. NEITHER THOUGHT THERE WAS ANY EVIDENCE OF MYOCARDIAL DAMAGE RESULTING FROM THE FEBRUARY INCIDENT OR THAT CLAIMANT'S CORONARY ARTERY LESIONS WOULD PROGRESS MORE RAPIDLY OR HIS CARDIAC FUNCTION BE PERMANENTLY IMPAIRED AS A RESULT OF THE FEBRUARY 1974 INCIDENT. DR. WYSHAM ALSO WAS OF THE OPINION THAT CLAIMANT HAD PROBABLY RECOVERED FROM THE ANGINA ATTACK BY THE TIME HE WAS DISCHARGED FROM THE HOSPITAL ON FEBRUARY 17, 1974 WITHOUT ANY RESIDUAL DAMAGE TO HIS HEART OR CORONARY SYSTEM. IF, IN FACT, HE HAD SUFFERED A SMALL MYOCARDIAL INFARCT IN FEBRUARY, DR. WYSHAM FELT HE WOULD HAVE RECOVERED THEREFROM WITHOUT ANY RESIDUALS AFTER THREE MONTHS.

THE REFEREE CONCLUDED THAT THE PREPONDERANCE OF EXPERT MEDICAL EVIDENCE WAS THAT THE FEBRUARY ANGINA LEFT NO PERMANENT RESIDUALS NOR DID IT CONTRIBUTE TO THE NEED FOR THE SURGERY IN SEPTEMBER 1974, THEREFORE, THE DENIAL BY THE FUND MUST BE AFFIRMED.

WITH RESPECT TO THE COLLATERAL ISSUE OF WHEN THE TEMPORARY TOTAL DISABILITY COMPENSATION SHOULD BE TERMINATED, THE REFEREE FOUND IT WAS IMPOSSIBLE TO PINPOINT THE EXACT TIME AT WHICH CLAIMANT RECOVERED FROM THE EFFECTS OF HIS FEBRUARY 1974 ANGINA ATTACK

AND AS A PURELY PRAGMATIC DECISION HE CONCLUDED THAT THE FUND'S RESPONSIBILITY FOR THAT ATTACK ENDED BY AUGUST 28, 1974, THE DAY CLAIMANT WAS HOSPITALIZED FOR THE SECOND TIME.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 22, 1975 IS AFFIRMED.

WCB CASE NO. 75-703 FEBRUARY 25, 1976

STEPHEN BUKOJEMSKY, CLAIMANT

BLITSCH AND CASE, CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED A DETERMINATION ORDER MAILED JANUARY 30, 1975 WHEREBY CLAIMANT WAS AWARDED 32 DEGREES FOR 10 PER CENT UNSCHEDULED LOW BACK DISABILITY.

FOR MORE THAN 20 YEARS CLAIMANT HAS BEEN AN ORDAINED MINISTER OF THE SEVENTH DAY ADVENTIST CHURCH. HE IS 51 YEARS OLD AND HAS A COLLEGE EDUCATION. FOR THE PAST YEAR HE HAS BEEN PASTOR OF THE CHURCH IN KLAMATH FALLS. PRIOR TO COMING TO KLAMATH FALLS HE WAS THE PASTOR AT THE UNIVERSITY PARK CHURCH IN PORTLAND. HIS SALARY IS 800 DOLLARS A MONTH, THE SAME AS HE RECEIVED IN PORTLAND BUT THE KLAMATH FALLS CHURCH HAS A LARGER CONGREGATION AND INVOLVES GREATER RESPONSIBILITY. IN NOVEMBER 1973 CLAIMANT SUFFERED A COMPENSABLE BACK INJURY WHICH WAS DIAGNOSED AS A STRAIN - HE UNDERWENT CHIROPRACTIC AND CONSERVATIVE MEDICAL TREATMENTS BUT THE PAIN CONTINUED AND DR. RUSCH, PORTLAND ORTHOPEDIST, COMMENCED TREATING CLAIMANT.

IN NOVEMBER 1974 AFTER CLAIMANT HAD BEEN TRANSFERRED TO KLAMATH FALLS, HE WAS AGAIN EXAMINED BY DR. RUSCH, THE COMPLAINTS WERE MINIMAL BACK PAIN AGGRAVATED BY ACTIVITIES OF BENDING, LIFTING AND PROLONGED SITTING. DR. RUSCH BELIEVED CLAIMANT'S CONDITION WAS STATIONARY BUT THAT THERE WOULD BE INTERMITTENT BACK PROBLEMS. THE CLAIM WAS CLOSED WITH AN AWARD OF 32 DEGREES.

CLAIMANT WAS LAST EXAMINED ON MAY 27, 1975 BY DR. RUSCH WHO FELT CLAIMANT COULD WORK AT FULL CAPACITY AS A CHURCH PASTOR, HOWEVER, THERE WOULD BE BRIEF TIME LOSSES BECAUSE OF AGGRAVATION OF THE BACK PAIN.

THE REFEREE FOUND THAT THE PRESENT DISABILITY OF CLAIMANT'S BACK IS ATTRIBUTABLE TO THE INDUSTRIAL INJURY OF NOVEMBER 1973 AND IT IS PERMANENT. HE FURTHER FOUND THAT ALTHOUGH CLAIMANT IS CONSCIOUS OF MINIMAL BACK PAIN MOST OF THE TIME HE IS NOT PREVENTED FROM HIS PERFORMANCE AS PASTOR OF HIS CHURCH - ALTHOUGH CERTAIN ACTIVITIES DO EXACERBATE THE BACK AND LEG PAIN. SUCH ACTIVITIES INCLUDE HEAVY LIFTING, LENGTHY STANDING, WALKING, LIFTING AND BENDING.

THE REFEREE CONCLUDED THAT CLAIMANT IS ABLE TO CARRY ON

MOST OF HIS PASTORAL DUTIES AS BEFORE THE INJURY, HOWEVER WITH RESPECT TO CERTAIN DUTIES OF BAPTIZING HEAVY PERSONS, VISITING MEMBERS OF HIS PARISH AND OTHER CHURCH CONNECTED SOCIAL EVENTS, HIS ACTIVITIES HAVE BEEN LIMITED TO THE EXTENT THAT HE HAS SUFFERED A SLIGHT LOSS OF EARNING CAPACITY.

THE REFEREE CONCLUDED THAT THE AWARD OF 32 DEGREES WHICH REPRESENTS 10 PER CENT OF THE MAXIMUM ALLOWABLE BY STATUTE FOR UNSCHEDULED DISABILITY ADEQUATELY COMPENSATED CLAIMANT FOR THIS LOSS OF EARNING CAPACITY.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 5, 1975 IS AFFIRMED.

WCB CASE NO. 75-2140 FEBRUARY 25, 1976

CHARLES L. SPRIGGS, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE EMPLOYER'S DENIAL OF CLAIMANT'S AGGRAVATION CLAIM.

IN DECEMBER 1969 CLAIMANT, THEN A 41 YEAR OLD EMPLOYE OF A LEAD FOUNDRY, DEVELOPED LEAD POISONING. HIS CLAIM WAS CLOSED IN 1970 WITH NO AWARD OF PERMANENT DISABILITY AND CLAIMANT REQUESTED A HEARING. AS A RESULT OF THE HEARING THE REFEREE AWARDED CLAIMANT SOME TIME LOSS BUT FOUND HE DID NOT HAVE ANY RESIDUAL DISABILITY RESULTING FROM HIS COMPENSABLE OCCUPATIONAL DISEASE. CLAIMANT APPEALED TO THE MEDICAL BOARD OF REVIEW WHICH UNANIMOUSLY AGREED THAT CLAIMANT WAS SUFFERING NO ACTUAL DISABILITY BUT THAT POTENTIAL DISABILITY MIGHT BE PRESENT. THE FINDINGS OF THE MEDICAL BOARD OF REVIEW WERE AFFIRMED BY THE CIRCUIT COURT FOR MULTNOMAH COUNTY ON MARCH 12, 1971.

CLAIMANT TESTIFIED THE LAST TIME HE WORKED ON A STEADY BASIS WAS IN OCTOBER 1971. ON JANUARY 21, 1975 DR. RINEHART EXAMINED CLAIMANT AND DIAGNOSED RHEUMATOID ARTHRITIS. HE STATED THE CAUSE OF RHEUMATOID ARTHRITIS IS UNKNOWN BUT IT IS LARGELY AN ALLERGIC REACTION OF AUTO-IMMUNITY. THERE WAS NO DOUBT IN DR. RINEHART'S MIND BUT THAT CLAIMANT'S COMPENSABLE INJURY (LEAD POISONING) PLAYED A MAJOR ROLE IN CAUSING CLAIMANT TO DEVELOP RHEUMATOID ARTHRITIS AND HE FELT THAT HIS CONDITION HAD WORSENED SUBSTANTIALLY SINCE MARCH 31, 1970, THE DATE OF THE LAST AWARD OR ARRANGEMENT OF COMPENSATION.

ON THE OTHER SIDE OF THE COIN, DR. REGAN WAS OF THE OPINION THAT CLAIMANT'S PRESUMED RHEUMATOID ARTHRITIS BORE NO RELATIONSHIP TO HIS JOB INCURRED LEAD POISONING IN 1969. THIS OPINION WAS SHARED BY DR. HARWOOD, A PHYSICIAN ON THE STAFF OF THE FUND, WHO FELT THAT CLAIMANT'S RHEUMATOID ARTHRITIS WAS NOT THE RESULT OF

THE COMPENSABLE LEAD POISONING BECAUSE CLAIMANT HAD NOT BEEN EXPOSED TO LEAD FOR FIVE YEARS BUT HIS RHEUMATOID ARTHRITIS HAD GROWN PROGRESSIVELY WORSE DURING THAT PERIOD.

THE REFEREE CONCLUDED THAT THE RHEUMATOID ARTHRITIS WHICH WAS DISCOVERED IN JANUARY 1975 WAS NOT RELATED TO THE LEAD INTOXICATION OF DECEMBER 1969. THE REFEREE CONCLUDED, BASED UPON THE OPINION OF DR. REGAN, THAT THERE WAS NO CAUSAL RELATIONSHIP ESTABLISHED BETWEEN CLAIMANT'S PRESENT RHEUMATOID ARTHRITIS AND HIS COMPENSABLE LEAD POISONING OF DECEMBER 1969 AND THE DENIAL WAS PROPER.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 8, 1975 IS AFFIRMED.

WCB CASE NO. 74-3521 FEBRUARY 25, 1976

VIRGIL L. MALLORY, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON, MOORE AND PHILLIPS.

THE CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 128 DEGREES FOR 40 PER CENT UNSCHEDULED LOW BACK DISABILITY.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON DECEMBER 14, 1971 WHICH REQUIRED A TWO LEVEL LAMINECTOMY, DISCECTOMY AND FUSION TO BE PERFORMED AT THE L4-5, L5-S1 LEVELS ON JANUARY 9, 1973. IN AUGUST 1973 CLAIMANT WAS FOUND TO HAVE DEVELOPED RHEUMATOID SPONDYLITIS AND WAS PROVIDED WITH CONSERVATIVE TREATMENT UNTIL APRIL 1974 BY HIS ORTHOPEDIC SURGEON WHO THEN REQUESTED CLAIMANT BE EXAMINED BY THE BACK EVALUATION CLINIC. IN AUGUST 1974 CLAIMANT'S TREATING PHYSICIAN CONCURRED WITH THE FINDINGS OF THE DISABILITY PREVENTION DIVISION AND RECOMMENDED CLOSURE OF THE CLAIM. ON SEPTEMBER 10, 1974 A DETERMINATION ORDER AWARDED CLAIMANT 128 DEGREES FOR 40 PER CENT UNSCHEDULED DISABILITY. CLAIMANT REQUESTED A HEARING.

THE EMPLOYER TESTIFIED THAT IT HAD OFFERED CLAIMANT EMPLOYMENT AS A RELIEF WEIGHMASTER (PRIOR TO THE INJURY CLAIMANT HAD BEEN EMPLOYED AS A FELLER-BUNCHER OPERATOR) AND CLAIMANT BEGAN TRAINING ON JUNE 6, 1975. CLAIMANT WORKED 11 DAYS AND THEN QUIT BECAUSE HE FELT HE COULD NOT HANDLE THE WORK.

CLAIMANT IS 47 YEARS OLD, HE HAS AN EIGHTH GRADE EDUCATION AND HAS COMPLETED PART OF HIS WORK TOWARDS OBTAINING A GED. HE IS OF AVERAGE INTELLIGENCE AND HIS WORK BACKGROUND INCLUDES A MULTITUDE OF JOBS OF DIFFERENT TYPES. CLAIMANT HAS BEEN TRAINED AS A BARBER AND ALSO AS A DENTAL PROSTHESIS TECHNICIAN. THE APTITUDE TESTS DISCLOSED CLAIMANT POSSESSES THE ABILITY TO LEARN WORK SUCCESSFULLY IN A VERY LARGE VARIETY OF OCCUPATIONS.

CLAIMANT HAD SUSTAINED INJURIES TO HIS LEFT ANKLE, HIS LEFT SHOULDER AND HIS NECK PRIOR TO THE DECEMBER 14, 1971 INCIDENT. CLAIMANT CLAIMS HE HAS HEADACHES, NECK, SHOULDER AND ARM PAIN, ALSO HAS PAIN IN HIS RIGHT WRIST, LOW BACK AND LEG PAIN WITH SOME NUMBNESS IN THE LEG. HE ALSO COMPLAINS OF DIZZY SPELLS. NOT ALL OF THESE COMPLAINTS ARE SUPPORTED OR EXPLAINED BY THE MEDICAL REPORTS AND CLAIMANT'S TREATING PHYSICIAN EXPRESSED HIS OPINION THAT CLAIMANT'S PRESENT PROBLEMS WERE RELATED TO HIS RHEUMATOID SPONDYLITIS RATHER THAN BEING A CONSEQUENCE OF HIS INDUSTRIAL INJURY OF DECEMBER 1971.

THE REFEREE FOUND PERSUASIVE EVIDENCE INDICATING CLAIMANT WAS NOT MOTIVATED TO RETURN TO WORK - AN EXAMPLE BEING THE WORK TRIAL EXPERIMENT WHICH LASTED ONLY 11 DAYS. BASED UPON THE MEDICAL EVIDENCE, THE REFEREE CONCLUDED THAT SOME OF CLAIMANT'S SYMPTOMS WERE THE RESULT OF HIS RHEUMATOID SPONDYLITIS, SOME WERE OF A PSYCHOGENIC ETIOLOGY, SOME THE RESULT OF PRIOR INJURIES AND SOME WERE RELATED TO THE INDUSTRIAL INJURY OF 1971.

THE DETERMINATION ORDER MAILED SEPTEMBER 10, 1974 BASED ITS AWARD ON A NECK INJURY. THE REFEREE CONCLUDED THAT WAS IN ERROR AS THERE WAS NO EVIDENCE THAT CLAIMANT HAD INJURED HIS NECK ON DECEMBER 14, 1971 ONLY THAT HE HAD SUSTAINED AN INJURY TO HIS BACK. THE REFEREE CONCLUDED, BASED UPON THE MEDICAL EVIDENCE, CLAIMANT'S WORK BACKGROUND, EDUCATION AND AGE, THAT THE LOSS OF EARNING CAPACITY SUFFERED BY CLAIMANT AS A RESULT OF HIS INDUSTRIAL INJURY DID NOT EXCEED 40 PER CENT OF THE MAXIMUM ALLOWABLE BY STATUTE.

THE BOARD, ON DE NOVO REVIEW, FINDS THAT CLAIMANT HAS DISABILITY RESULTING FROM BOTH INDUSTRIAL AND NON-INDUSTRIAL RELATED CAUSES, PLUS A RHEUMATIC DISEASE.

THE BOARD TAKES NOTE OF THE FACT THAT CLAIMANT WAS INTERVIEWED BY THE MEMBERS OF THE EVALUATION DIVISION AND WAS SEEN BY THE REFEREE DURING THE HEARING. BOTH THE EVALUATION DIVISION AND THE REFEREE ASSESSED THE DISABILITY AT 40 PER CENT. THE BOARD CONCLUDES THAT THIS IS A PROPER ASSESSMENT BASED UPON CLAIMANT'S LOSS OF EARNING CAPACITY, THE SOLE CRITERION IN DETERMINING UNSCHEDULED DISABILITY.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 1, 1975 IS AFFIRMED.

WCB CASE NO. 75-1936 FEBRUARY 25, 1976
WCB CASE NO. 75-1935

NORMAN J. SHANKLIN, CLAIMANT
DAVID H. VANDENBERG, JR., CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

THE CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 33.75 DEGREES FOR 22.5 PER CENT PARTIAL LOSS OF LEFT LEG FOR HIS APRIL 8, 1974 INJURY AND 11.25 DEGREES FOR 7.5 PER CENT PARTIAL LOSS OF LEFT LEG FOR HIS APRIL 29, 1974 INJURY.

CLAIMANT, WHO WAS A 49 YEAR OLD TIMBER FALLER AT THE TIME,

SUFFERED A COMPENSABLE INJURY ON APRIL 8, 1974 WHEN HE CUT HIS LEFT LEG IMMEDIATELY BELOW THE PATELLA. THE LACERATION WAS SUTURED BY DR. LILLY AND CLAIMANT WAS DISCHARGED TO RETURN HOME - AT THAT TIME CLAIMANT WAS EMPLOYED BY KANNA LOGGING COMPANY. ON APRIL 29, 1974 CLAIMANT RETURNED TO WORK FOR CALVIN PIERCE AND, AFTER APPROXIMATELY 3 HOURS ON THE JOB, AGAIN SUFFERED A COMPENSABLE INJURY TO HIS LEFT KNEE. A LOG UPON WHICH CLAIMANT WAS STANDING DROPPED SOME 18 INCHES THROUGH A WINDFALL - CLAIMANT WAS UNABLE TO WALK AND WAS TAKEN TO THE HOSPITAL.

DR. LILLY'S REPORT INDICATED THE LACERATION SUFFERED ON APRIL 8 DID NOT INVOLVE THE PATELLA TENDON BUT WAS AS FAR AS THE BONE AND INCURRED A FEW SMALL FRACTURES OF THE BONE. AFTER THE SECOND INJURY, SURGERY WAS PERFORMED BY DR. LILLY WHO REPORTED CLAIMANT HAD A TEAR OF THE PATELLA TENDON APPARENTLY THE RESULT OF THE APRIL 8 INJURY AND, IN ADDITION, HE HAD A TEAR OF THE MEDIAL COLLATERAL LIGAMENT, THE MEDIAL MENISCUS AND THE MEDIAL CAPSULE. IT WAS DR. LILLY'S OPINION THAT THE APRIL 8 INJURY PREDISPOSED CLAIMANT TO THE APRIL 29 INJURY. HE FELT THAT THE NECESSITY FOR THE SURGERY WAS ATTRIBUTABLE IN A RATIO OF 75 PER CENT TO 25 PER CENT AS BETWEEN THE FIRST AND SECOND INJURIES.

ON JANUARY 11, 1975 DR. LILLY RELEASED CLAIMANT FOR MODIFIED WORK, COMMENTING CLAIMANT HAD A CHONDROMALACIA PATELLA BUT HAD DECIDED AGAINST SURGERY AND HAD CHOSEN TO LIVE WITH THE PAIN IN HIS KNEE. CLAIMANT HAD GOOD STRENGTH OF THE QUADRICEPS ALTHOUGH THE LEFT SIDE WAS NOT AS STRONG AS THE RIGHT AND THERE WAS ABOUT ONE INCH ATROPHY OF THE THIGH FOUR FINGERS ABOVE THE SUPERIOR POLE OF THE PATELLA ON THE LEFT - CLAIMANT HAD A LOT OF CREPITUS, SUBPATELLAR, WITH ACTIVE MOTION OF THE KNEE WHICH WAS INDICATIVE OF THE CHONDROMALACIA PATELLA WHICH WOULD PROBABLY WORSEN AS TIME PASSED.

ON APRIL 22, 1975 TWO DETERMINATION ORDERS WERE ISSUED. ONE AWARDED CLAIMANT 5 PER CENT LOSS OF THE LEFT LEG FOR THE APRIL 8, 1974 INJURY, THE OTHER AWARDED CLAIMANT 5 PER CENT LOSS OF THE LEFT LEG FOR THE APRIL 29, 1974 INJURY, A COMBINED AWARD OF 10 PER CENT LOSS OF THE LEFT LEG.

CLAIMANT RETURNED TO WORK AS A TIMBER FALLER IN APRIL 1974 AND HAS WORKED STEADILY WITHOUT ANY TIME LOSS SINCE THAT DATE - HOWEVER, THE LEG IMPAIRMENT IMPOSES LIMITATION ON HIS ACTIVITIES TO SUCH AN EXTENT THAT HE IS NO LONGER ABLE TO CLIMB UP ONTO AND JUMP DOWN FROM LOGS IN THE COURSE OF HIS WORK BUT HAS TO SEMI-CRAWL USING HIS ARMS AND SHOULDERS TO GET ON A FOUR FOOT LOG AND HAS TO SLIDE DOWN TO GET OFF THE LOG. OCCASIONALLY CLAIMANT'S KNEE WILL GIVE OUT FROM UNDER HIM AND HE IS UNABLE TO RUN BUT DOES MAKE SORT OF A STIFF LEGGED TROT WHICH INCREASES THE PAIN IN HIS KNEE. THE PAIN IS CONSTANT. CLAIMANT HAS AN ABILITY TO FLEX THE KNEE NO MORE THAN 110 DEGREES OR 120 DEGREES.

IN SEPTEMBER 1974 DR. LILLY INDICATED THAT VOCATIONAL REHABILITATION WOULD BE VERY DESIRABLE FOR CLAIMANT ALTHOUGH CLAIMANT PREFERRED TO RETURN TO THE WOODS TO WORK. CLAIMANT WAS SEEN BY THE VOCATIONAL REHABILITATION DIVISION IN THE FALL OF 1974 AND EXPRESSED AN INTEREST IN TRAINING FOR SOME TYPE OF WORK WHICH WOULD INVOLVE SMALL ENGINE REPAIR - HOWEVER, ON OCTOBER 8, 1974 AN ASSISTANT VOCATIONAL REHABILITATION COORDINATOR FOR THE BOARD ADVISED THAT NO REFERRAL WOULD BE MADE FOR VOCATIONAL REHABILITATION SERVICES BECAUSE MEDICAL, PSYCHOLOGICAL AND VOCATIONAL INFORMATION DID NOT DESCRIBE A HANDICAP REQUIRING REHABILITATION. ON JANUARY 16, 1975 THE VOCATIONAL REHABILITATION DIVISION ENTERED A STATEMENT OF INELIGIBILITY BECAUSE OF THE POSSIBILITY OF FUTURE OPERATION ON THE KNEE WHICH WAS AT THAT TIME BEING RESISTED BY THE CLAIMANT.

THE REFEREE FOUND THAT CLAIMANT WAS A WORKMAN WHO HAD RETURNED TO THE WOODS IN SPITE OF HIS IMPAIRMENT AND, FURTHERMORE, THAT HE IS JEOPARDIZED BY REASON OF THIS IMPAIRMENT, HAVING ON AT LEAST ONE OCCASION FALLEN WHILE ATTEMPTING TO ESCAPE THE PATH OF A FALLING TREE. THE REFEREE WAS OF THE OPINION THAT CLAIMANT SHOULD BE VOCATIONALLY REHABILITATED AND HE FOUND THAT THE PREPONDERANCE OF THE EVIDENCE INDICATED A LEVEL OF DISABILITY IN THE LEFT LEG GREATER THAN THAT FOR WHICH CLAIMANT HAD PREVIOUSLY BEEN COMPENSATED. BASED UPON DR. LILLY'S 75 PER CENT = 25 PER CENT PRORATION BETWEEN THE TWO INDUSTRIAL INJURIES, THE REFEREE CONCLUDED THAT CLAIMANT WAS ENTITLED TO AN AWARD OF 33.75 DEGREES FOR 22.5 PER CENT PARTIAL LOSS OF THE LEFT LEG FOR THE FIRST INJURY AND AN AWARD OF 11.25 DEGREES FOR 7.5 PER CENT PARTIAL LOSS OF THE LEFT LEG AS A RESULT OF THE SECOND INJURY, A TOTAL AWARD OF 45 DEGREES FOR 30 PER CENT PARTIAL LOSS OF THE LEFT LEG.

THE BOARD, ON DE NOVO REVIEW, FEELS THAT THE AWARD GRANTED BY THE REFEREE DOES NOT ADEQUATELY COMPENSATE CLAIMANT FOR THE LOSS OF FUNCTION OF HIS LEFT LEG. THE BOARD FINDS THAT CLAIMANT IS ENTITLED TO 52.5 DEGREES FOR 35 PER CENT PARTIAL LOSS OF THE LEFT LEG ATTRIBUTABLE TO THE APRIL 8 INJURY AND 22.5 DEGREES FOR 15 PER CENT PARTIAL LOSS OF THE LEFT LEG ATTRIBUTABLE TO THE APRIL 29 INJURY, AN AGGREGATE OF 75 DEGREES FOR 50 PER CENT PARTIAL LOSS OF THE LEFT LEG.

THE BOARD AGREES WITH THE REFEREE THAT CLAIMANT SHOULD BE VOCATIONALLY REHABILITATED. IT IS UNABLE TO UNDERSTAND WHY CLAIMANT SHOULD BE DETERMINED AS INELIGIBLE FOR VOCATIONAL REHABILITATION BECAUSE OF HIS REFUSAL TO SUBMIT TO POSSIBLE FURTHER KNEE SURGERY. THERE IS NO MEDICAL EVIDENCE THAT THIS SURGERY WILL RESOLVE OR EVEN ALLEVIATE THE PAIN AND PROBLEMS CLAIMANT IS PRESENTLY EXPERIENCING WITH HIS LEFT KNEE.

THE BOARD FEELS THAT CLAIMANT CANNOT CONTINUE TO WORK IN THE WOODS WITHOUT RUNNING SEVERE RISK OF SUSTAINING FURTHER INJURY TO HIMSELF AND, POSSIBLY, TO HIS FELLOW WORKERS. THE BOARD STRONGLY URGES THAT ALL OF THE ADVANTAGES OF THE REHABILITATION PROGRAMS UNDER THE AUSPICES OF THE DISABILITY PREVENTION DIVISION AS WELL AS THE VOCATIONAL REHABILITATION DIVISION BE MADE AVAILABLE TO CLAIMANT AND THAT SUCH BE DONE AS QUICKLY AS POSSIBLE.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 27, 1975 IS MODIFIED.

CLAIMANT IS AWARDED 75 DEGREES OF A MAXIMUM OF 150 DEGREES FOR PARTIAL LOSS OF THE LEFT LEG. THIS IS IN LIEU OF AND NOT IN ADDITION TO AWARDS MADE BY THE TWO DETERMINATION ORDERS MAILED APRIL 22, 1975 RELATING TO THE APRIL 8, 1974 INJURY AND THE APRIL 29, 1974 INJURY.

IN ALL OTHER RESPECTS THE REFEREE'S ORDER IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW 25 PER CENT OF THE INCREASE IN COMPENSATION MADE BY THIS ORDER, PAYABLE OUT OF THE COMPENSATION AS PAID, NOT TO EXCEED 2,300 DOLLARS.

WCB CASE NO. 75-4619 FEBRUARY 25, 1976

TED I. ROGOWAY, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH REMANDED CLAIMANT'S CLAIM TO IT FOR ACCEPTANCE AND PAYMENT OF BENEFITS, AS PROVIDED BY LAW, UNTIL THE CLAIM IS CLOSED UNDER THE PROVISIONS OF ORS 656.268.

CLAIMANT IS A 63 YEAR OLD SELF-EMPLOYED GENERAL CONTRACTOR. HE COMMENCED CONSTRUCTION OF POLE BUILDINGS IN 1969 AS A SOLE PROPRIETOR AND CONTINUED UNTIL FEBRUARY 1974 WHEN HE AND MR. RICHENSTEIN, WHO HAD BEEN SELLING AND CONSTRUCTING ALUMINUM BUILDINGS, MERGED THEIR OPERATIONS. THE PARTNERSHIP RESULTING FROM THIS MERGER HAD A VERY SHORT LIFE AND WAS TERMINATED ON JULY 1, 1974.

ON THE WEEKEND PRIOR TO AUGUST 26, 1974 CLAIMANT DROVE TO TROUTLAKE, STOPPING AT GOLDENDALE, WHERE HE ATTEMPTED TO STRAIGHTEN OUT SOME PROBLEMS. HE EXPERIENCED SOME CHEST PAINS DURING DINNER SUNDAY, AUGUST 25, BUT THOUGHT IT WAS ONLY INDIGESTION. HE ARRIVED AT WORK THE FOLLOWING DAY ANTICIPATING TWO CHECKS OF A SUBSTANTIAL AMOUNT. WHEN THE MAIL ARRIVED THE CHECKS WERE SEVERAL THOUSAND DOLLARS LESS THAN HE ANTICIPATED, HE SUFFERED PAIN IN HIS CHEST AT THAT TIME AND HE ALSO HAD PAIN IN HIS LEFT ARM AND HE DROVE HIMSELF TO THE HOSPITAL EMERGENCY ROOM. CLAIMANT DECLINED TO BE ADMITTED TO THE HOSPITAL AND RECEIVED ONLY EMERGENCY ATTENTION.

CLAIMANT'S WIFE WAS IN THE HOSPITAL AND THAT EVENING WHEN HE WAS VISITING WITH HER HE BECAME ACUTELY ILL AND WAS ADMITTED TO THE HOSPITAL WHERE HIS ILLNESS WAS DIAGNOSED AS AN ACUTE MYOCARDIAL INFARCTION.

THE REFEREE FOUND THAT CLAIMANT WHILE OPERATING AS A SOLE PROPRIETOR WAS SOMEWHAT DISORGANIZED AND TOOK THINGS RATHER EASY BUT AFTER THE MERGER WITH RICHENSTEIN, WHO WAS AN ENTIRELY DIFFERENT TYPE OF OPERATOR, THERE WAS MUCH STRESS RESULTING FROM DISAGREEMENTS BETWEEN THE TWO MEN ON THE RESOLUTION OF CERTAIN PROBLEMS. CLAIMANT'S WIFE HAD HAD HEART SURGERY FOR THE SECOND TIME AND CLAIMANT WAS VERY WORRIED ABOUT THE HEALTH OF HIS WIFE AND ALSO THE MEDICAL BILLS BEING INCURRED AS A RESULT OF HER ILLNESS.

AS IS USUAL IN HEART CASES THERE WAS A DIVERSITY OF MEDICAL OPINION WITH RESPECT TO THE ISSUE OF MEDICAL CAUSATION. DR. SHEPHERD, CLAIMANT'S TREATING PHYSICIAN, STATED THAT IT HAD BEEN FELT FOR SOME TIME BY MANY CARDIOLOGISTS THAT STRESS WAS A FACTOR IN ACUTE MYOCARDIAL INFARCTION AND THOUGH THIS WAS AN ATTRACTIVE HYPOTHESIS IT WAS VIRTUALLY IMPOSSIBLE, IN INDIVIDUAL CASES, TO DETERMINE HOW MUCH STRESS CONTRIBUTES.

DR. DEMOTS FELT THAT BECAUSE THE DEGREE OF STRESS IN THIS PARTICULAR CASE APPEARED TO BE SO UNUSUAL AND BECAUSE OF THE TEMPORAL RELATIONSHIP OF THE STRESS AND INFARCTION, HE WOULD CONSIDER STRESS AS A MATERIAL CAUSE TO CLAIMANT'S MYOCARDIAL INFARCTION. DR. HARWOOD, A PHYSICIAN EMPLOYED BY THE FUND, DISAGREED AS DID DR. GRISWOLD WHO FELT THAT THE FACT THAT THE SYMPTOMS OF THE

HEART ATTACK OCCURRED AT WORK WAS PURELY COINCIDENTAL AND NOT AN INDICATION THAT IT WAS CAUSED BY WORK ACTIVITIES. DR. GRISWOLD'S OPINION WAS CONCURRED BY DR. KLOSTER, DRS. DEMOTS, GRISWOLD AND KLOSTER ARE ALL PROFESSORS IN THE DIVISION OF CARDIOLOGY AT THE UNIVERSITY OF OREGON MEDICAL SCHOOL.

THE REFEREE FELT THAT ONLY DR. DEMOTS' OPINION DELINATED KNOWLEDGE OF THE EVENTS BETWEEN FEBRUARY 1974 AND AUGUST 26, 1974 AND THE EVIDENCE INDICATED CLAIMANT COMMENCED A PHYSICAL AND EMOTIONAL STRESSFUL PERIOD IN FEBRUARY 1974, STRESSES WHICH DR. DEMOTS INDICATED APPEARED TO BE UNUSUAL AND OF SUCH RELATIONSHIPS IN TIME TO THE MYOCARDIAL INFARCTION THAT SUCH STRESS WAS A MATERIAL CONTRIBUTING FACTOR TO THE MYOCARDIAL INFARCTION. HE CONCLUDED THAT SUCH OPINION ESTABLISHED MEDICAL CAUSATION.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 15, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW THE SUM OF 450 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 74-2833 FEBRUARY 25, 1976

RUBY PARMENTER, CLAIMANT

EVOHL F. MALAGON, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

THE CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 128 DEGREES FOR 40 PER CENT UNSCHEDULED LOW BACK DISABILITY BUT FOUND THAT THE FUND WAS NOT RESPONSIBLE FOR THE PSYCHIATRIC CARE AND TREATMENT, INCLUDING HOSPITALIZATION IN 1974, RECEIVED BY CLAIMANT.

CLAIMANT SUSTAINED AN INJURY TO HER BACK ON OCTOBER 26, 1973. DR. SCHROEDER'S ORIGINAL DIAGNOSIS WAS OF A LUMBOSACRAL STRAIN, WITH A POSSIBLE EARLY NERVE ROOT COMPRESSION. CLAIMANT WAS REFERRED TO DR. HOCKEY, A NEUROSURGEON, WHO CONFIRMED THAT CLAIMANT HAD SOME CERVICAL AND LUMBOSACRAL STRAIN BUT FOUND NO EVIDENCE OF A HERNIATED DISC EITHER IN THE CERVICAL OR LUMBAR REGIONS. DR. SCHROEDER DECLARED CLAIMANT MEDICALLY STATIONARY IN APRIL 1974 AND A DETERMINATION ORDER MAILED MAY 1, 1974 AWARDED CLAIMANT SOME TIME LOSS BUT NO AWARD OF PERMANENT DISABILITY.

CLAIMANT CONTINUED TO COMPLAIN OF BACK DISCOMFORT AND CONSULTED SEVERAL DOCTORS INCLUDING HER ORIGINAL PHYSICIAN, DR. SCHROEDER. BETWEEN THE ISSUANCE OF THE DETERMINATION ORDER ON MAY 1, 1974 AND FEBRUARY 1975 CLAIMANT DID NOT WORK ALTHOUGH SHE DID ATTEMPT TO LOOK FOR WORK AND HAD BEEN ENROLLED IN BUSINESS SCHOOL THROUGH THE AUSPICES OF DIVISION OF VOCATIONAL REHABILITATION TRAINING AS A MEDICAL RECEPTIONIST. CLAIMANT ALLEGES SHE WAS UNABLE TO KEEP UP WITH HER CLASSES BECAUSE OF HER BACK CONDITION.

IN FEBRUARY 1975 CLAIMANT TOOK AN OVERDOSE OF BOTH BARBITURATES AND OTHER MEDICATIONS AND WAS THEN SEEN BY DR. CARTER, PSYCHIATRIST, AT THE SACRED HEART HOSPITAL. BASED UPON THE HISTORY RELATED TO HIM BY CLAIMANT AND HIS FINDINGS, DR. CARTER CONCLUDED THAT CLAIMANT WAS TAKING A DANGEROUS COMBINATION OF MEDICATIONS, APPARENTLY AS A RESULT OF SEEING SO MANY DIFFERENT DOCTORS AND EACH, UNAWARE OF OTHER MEDICATIONS PREVIOUSLY PRESCRIBED FOR CLAIMANT, PRESCRIBING DIFFERENT MEDICATIONS. IN DR. CARTER'S OPINION CLAIMANT WAS CLEARLY TOXIC FROM THESE MEDICATIONS AND ALSO SUFFERED, AS A RESULT OF TAKING THEM, MENTAL DEPRESSION, DISCOMFORT, INSOMNIA, ETC. HE CONCLUDED THAT THESE FACTORS CONTRIBUTED TO CLAIMANT'S INABILITY TO ATTEND CLASSES ON A REGULAR BASIS.

THE FUND THEN REQUESTED THAT CLAIMANT BE EXAMINED BY DR. PARVARESH, A PSYCHIATRIST. DR. PARVARESH CONFIRMED THE FINDINGS OF DR. CARTER WITH REGARD TO THE MEDICATION BUT DISAGREED WITH HIM ON THE CAUSE OF CLAIMANT'S NEUROSES AND DEPRESSION WHICH HE FELT WERE TRIGGERED BY A HYSTERECTOMY IN 1972 AND BY A FINAL SEPARATION BY CLAIMANT FROM HER HUSBAND.

THE REFEREE FOUND THAT CLAIMANT DID, IN FACT, HAVE SEVERE NEUROSES PRIOR TO HER INDUSTRIAL INJURY. SHE HAD SEVERAL TIMES ATTEMPTED SUICIDE - SHE ALSO HAD A PEPTIC ULCER. THE REFEREE WAS MOST PERSUADED BY THE UNEQUIVOCAL STATEMENT OF DR. SCHROEDER THAT HE FELT CLAIMANT SHOULD RETURN TO SOME TYPE OF LIGHT DUTY WITH RESTRICTIONS ON HEAVY LIFTING, BENDING AND STOOPING, THAT HE FELT THAT TENSIONS WOULD PLAY A SIGNIFICANT ROLE IN HER SYMPTOMS AND SHE WOULD BE MUCH BETTER OFF IF SHE COULD BECOME OCCUPIED IN SOME TYPE OF LIGHT WORK.

THE REFEREE CONCLUDED THAT THE AWARD OF NO PERMANENT DISABILITY BY THE EVALUATION DIVISION WAS INCORRECT - DR. SCHROEDER'S STATEMENT INDICATES THAT CLAIMANT HAS SUSTAINED A VALID AND A PERMANENT LOSS OF HER EARNING CAPACITY FOR WHICH SHE SHOULD BE COMPENSATED. HER WORK BACKGROUND IS VERY LIMITED, CONSISTING OF FARM LABOR AND NURSE'S AIDE WORK PRIMARILY, BOTH TYPES OF WORK INVOLVE LIFTING, BENDING AND STOOPING.

THE REFEREE FOUND THAT CLAIMANT'S PSYCHIATRIC PROBLEMS DID NOT STEM FROM THE INDUSTRIAL ACCIDENT. THEY WERE OBVIOUSLY SEVERE IN NATURE AND PREDATED THE ACCIDENT. HE CONCLUDED THAT THE FUND WAS RESPONSIBLE ONLY FOR THE BACK INJURY AND THE RESULTANT DISABILITY AND THAT SUCH DISABILITY, BASED UPON LOSS OF EARNING CAPACITY, WAS 40 PER CENT OF THE MAXIMUM ALLOWABLE BY STATUTE.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE. THE BOARD STRONGLY SUGGESTS THAT CLAIMANT CONTINUE THE GROUP THERAPY SUGGESTED BY DR. CARTER AND ADVISES CLAIMANT THAT SHE IS ENTITLED TO SUCH TREATMENT UNDER THE PROVISIONS OF ORS 656.245.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 4, 1975 IS AFFIRMED.

SAIF CLAIM NO. NC 47563 FEBRUARY 26, 1976

JEFFREY C. DAVIS, CLAIMANT

DEPT. OF JUSTICE, DEFENSE ATTY.
OWN MOTION DETERMINATION

CLAIMANT SUSTAINED A COMPENSABLE INJURY TO HIS RIGHT KNEE IN OCTOBER 1966. HE WAS AWARDED 25 PER CENT OF THE MAXIMUM ALLOWABLE BY STATUTE FOR RIGHT LEG DISABILITY BY A DETERMINATION ORDER MAILED JULY 28, 1967.

ON MAY 7, 1975 CLAIMANT WAS SEEN BY DR. LARSON WHO FOUND EVIDENCE OF ROTARY INSTABILITY OF THE RIGHT KNEE. AN ILIOTIBIAL BAND TRANSFER WAS ACCOMPLISHED ON JUNE 2, 1975, CORRECTING THE ANTERIOR INTERNAL ROTARY INSTABILITY.

CLAIMANT RETURNED TO WORK ON AUGUST 27, 1975.

THE EVALUATION DIVISION OF THE WORKMEN'S COMPENSATION BOARD HAS RECOMMENDED THAT CLAIMANT IS ENTITLED TO ADDITIONAL TEMPORARY TOTAL DISABILITY COMPENSATION, BUT NO ADDITIONAL AWARD OF PERMANENT PARTIAL DISABILITY.

ORDER

IT IS THEREFORE ORDERED THAT CLAIMANT BE GRANTED COMPENSATION FOR TEMPORARY TOTAL DISABILITY FROM JUNE 2, 1975 THROUGH AUGUST 26, 1975.

WCB CASE NO. 75-1232 FEBRUARY 26, 1976

JOY BALL, CLAIMANT

COREY, BYLER AND REW,
CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED A DETERMINATION ORDER OF MARCH 25, 1975, WHEREIN CLAIMANT WAS AWARDED NO PERMANENT DISABILITY COMPENSATION AS A RESULT OF HER INDUSTRIAL INJURY OF MAY 2, 1974.

CLAIMANT, AGE 27, WAS EMPLOYED IN A FOOD PROCESSING PLANT AND SUSTAINED A COMPENSABLE LOW BACK INJURY ON MAY 2, 1974. THE INITIAL TREATING DOCTORS COULD FIND NO PERMANENT DISABILITY AS A RESULT OF THE INCIDENT. CLAIMANT'S WEIGHT OF APPROXIMATELY 240 POUNDS ON A 5'2" FRAME COULD CERTAINLY BE A CAUSAL FACTOR IN HER CONTINUING COMPLAINTS OF BACK PROBLEMS.

THE REFEREE, AT HEARING, FOUND CLAIMANT NOT TO BE A CREDIBLE WITNESS. HER TESTIMONY WAS IN DIRECT CONFLICT WITH THE TESTIMONY OF FOUR WITNESSES WHO LIVED IN CLAIMANT'S NEIGHBORHOOD ALL OF WHOM HE FOUND TO BE CREDIBLE WITNESSES. "

THE BOARD GIVES WEIGHT TO THE OBSERVATION OF CLAIMANT AND THE WITNESSES BY THE REFEREE AND CONCURS IN HIS FINDINGS AND CONCLUSIONS.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 26, 1975 IS AFFIRMED.

WCB CASE NO. 75-1014 FEBRUARY 26, 1976

TONY HADLEY, CLAIMANT

FRANKLIN, BENNETT, OFELT AND JOLLES,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

CLAIMANT REQUESTS BOARD REVIEW OF A REFEREE'S ORDER WHICH AFFIRMED A DETERMINATION ORDER OF JANUARY 16, 1975, AWARDING CLAIMANT NO ADDITIONAL PERMANENT PARTIAL DISABILITY. A PREVIOUS DETERMINATION OF AUGUST 21, 1975 HAD AWARDED CLAIMANT 15 PER CENT LOSS OF THE RIGHT FOOT EQUAL TO 20.25 DEGREES.

ON OCTOBER 10, 1973, CLAIMANT, A 21 YEAR OLD SAW OPERATOR, SUFFERED A COMPENSABLE INJURY WHEN HIS RIGHT LEG WAS SMASHED BETWEEN TWO LOGS. CLAIMANT WAS HOSPITALIZED FOR A SPIRAL FRACTURE OF THE TIBIA. DR. FAX, AN ORTHOPEDIST, FELT CLAIMANT WOULD HAVE A SOLID FUSION BUT UNDOUBTEDLY WOULD HAVE SOME OCCASIONAL ACHING WITH HARD USE OR COLD, DAMP WEATHER, TYPICAL OF A SERIOUS TIBILA FRACTURE.

CLAIMANT RETURNED TO REGULAR WORK ON MARCH 25, 1974. ON JULY 1, 1974 DR. FAX CONCLUDED CLAIMANT HAD A MILD DISABILITY DUE TO THE INJURY TO HIS MUSCLES, ALTHOUGH THE BONE ITSELF WAS WELL-HEALED. ON SEPTEMBER 18, 1974 CLAIMANT UNDERWENT FURTHER SURGERY, A REPAIR OF MUSCLE HERNIATION, RIGHT ANTERIOR TIBIA. ON DECEMBER 19, 1975, DR. FAX REPORTED CLAIMANT STILL HAD SOME PAIN AND ACHING, AND WAS STILL HAVING PROBLEMS WITH STUMBLING AND TRIPPING WITH HIS RIGHT FOOT. ALTHOUGH HE RELEASED CLAIMANT AGAIN FOR FULL TIME WORK, HE RECOMMENDED CLAIMANT BE RESTRICTED FROM WORKING AROUND HIGH-SPEED, DANGEROUS EQUIPMENT OR ON UNEVEN GROUND.

THROUGH DIVISION OF VOCATIONAL REHABILITATION, CLAIMANT IS NOW A STUDENT AT A COMMUNITY COLLEGE TAKING COMPUTER PROGRAMMING COURSES AND DOING EXCELLENT WITH A 3.9 AVERAGE.

CLAIMANT IS NOW ABLE TO JOG AND PLAY GOLF AND, WHILE HE HAS NOT SUBJECTED HIS LEG TO EXTREMELY DIFFICULT PHYSICAL EXERTION, THE REFEREE CONCLUDED CLAIMANT COULD BE COMPENSATED ONLY FOR THOSE DISABILITIES THAT WOULD INTERFERE WITH NORMAL WORK-RELATED ACTIVITIES, AND THE EVIDENCE DID NOT SUPPORT A FINDING THAT CLAIMANT WAS ENTITLED TO A GREATER AWARD FOR HIS PERMANENT PARTIAL DISABILITY THAN HE HAS ALREADY RECEIVED.

ON DE NOVO REVIEW, THE BOARD RELIES ON THE FINDINGS OF THE REFEREE, HIS PERSONAL OBSERVATION OF THE CLAIMANT, AND CONCURS WITH HIS CONCLUSIONS.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 11, 1975 IS AFFIRMED.

WCB CASE NO. 75-514-E FEBRUARY 26, 1976

KENITH DICKENSON, CLAIMANT
CASH R. PERRINE, CLAIMANT'S ATTY.
JONES, LANG, KLEIN, WOLF AND SMITH,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH SET ASIDE THAT PORTION OF THE DETERMINATION ORDER MAILED OCTOBER 16, 1974 WHEREBY CLAIMANT WAS AWARDED 128 DEGREES FOR 40 PER CENT UNSCHEDULED DISABILITY AND AFFIRMED THE AWARD OF 67.2 DEGREES FOR 35 PER CENT LOSS OF THE LEFT ARM.

CLAIMANT IS A 64 YEAR OLD WELDER WITH A HIGH SCHOOL EDUCATION AND ALSO A DEGREE IN WELDING FROM A TECHNICAL SCHOOL. HE HAS BEEN A WELDER SINCE WORLD WAR II. ON NOVEMBER 27, 1972, WHILE WORKING OVERHEAD, CLAIMANT NOTICED A SUDDEN LOSS OF STRENGTH IN HIS RIGHT ARM. AFTER FIRST SEEKING CHIROPRACTIC TREATMENT, CLAIMANT WAS EXAMINED BY DR. SCHACHNER ON SEPTEMBER 5, 1973 AND AN UNDERLYING DEGENERATIVE DISC DISEASE AT LEVEL C6-7 WITH INTEROSSEOUS ATROPHY AND WEAKNESS STEMMING FROM C-8 NERVE ROOT WAS NOTED. DR. SCHACHNER FELT NO FURTHER TREATMENT WAS NEEDED AND CLAIMANT RETURNED TO HIS CHIROPRACTOR FOR SOME ADJUSTMENT TREATMENTS.

ON JULY 15, 1974 DR. SCHACHNER AGAIN EXAMINED CLAIMANT WHO WAS COMPLAINING OF LOSS OF POWER IN THE RIGHT ARM AND HAND. DR. SCHACHNER REPORTED SUCH A DEFICIT TO A MODERATE DEGREE BUT NOTED NO CHANGE OVER THE PREVIOUS EXAMINATION AND RECOMMENDED CLAIM CLOSURE. HE FELT THAT THE DEGREE OF FORAMINAL ENCROACHMENT HAD PRODUCED IRREVERSIBLE CHANGES IN THE EIGHTH CERVICAL NERVE AND SINCE, BASICALLY, CLAIMANT HAD NOT SHOWN ANY PROGRESSION, WAS OF THE OPINION THAT HE WOULD NOT BE IMPROVED BY A FORAMINOTOMY. THEREAFTER THE CLAIM WAS CLOSED WITH AN AWARD OF 128 DEGREES FOR THE UNSCHEDULED DISABILITY AND 67.2 DEGREES FOR THE SCHEDULED DISABILITY.

THE REFEREE FOUND THAT CLAIMANT HAD MISSED NO WORK AS A RESULT OF THE INDUSTRIAL INJURY AND THAT ON THE DATE OF THE INJURY HE SIGNED AND DATED AN APPLICATION FOR RETIREMENT BENEFITS UNDER HIS UNION PENSION FUND. CLAIMANT CONTINUED TO WORK THEREAFTER UNTIL HE VOLUNTARILY RETIRED ON FEBRUARY 12, 1973 AND HIS RETIREMENT HAD NOTHING TO DO WITH THE INDUSTRIAL INJURY. BETWEEN THE DATE OF HIS INJURY AND THE DATE OF RETIREMENT, CLAIMANT WAS OBSERVED BY FELLOW EMPLOYES PERFORMING HIS USUAL WORK WITHOUT OBSERVABLE PROBLEMS OR PHYSICAL COMPLAINTS. AFTER CLAIMANT'S RETIREMENT, HE MOVED TO LAPINE, WHERE HE HAD PREVIOUSLY PURCHASED SOME LAND, AND HELPED BUILD A WELDING SHOP WHICH HE HAS CONTINUED TO OPERATE.

THE REFEREE WAS CONVINCED THAT CLAIMANT COULD HAVE CONTINUED TO WORK FOR THE EMPLOYER WITHOUT INTERRUPTION DESPITE HIS JOB INJURY. HE FOUND THAT WHILE HE SUFFERED A COMPENSABLE INJURY ON NOVEMBER 27, 1972 AND DOES HAVE SOME RESIDUAL PERMANENT DISABILITY AS A RESULT THEREOF, THE PRIMARY DISABLING EFFECT OF THE INJURY HAS BEEN TO CLAIMANT'S RIGHT ARM AND HAND.

THE REFEREE OBSERVED CERTAIN ACTIVITIES ON THE PART OF CLAIMANT WHICH WERE RECORDED BY FILM AND WHICH INDICATE THAT CLAIMANT WAS CAPABLE OF DOING CONSIDERABLE PHYSICAL WORK INCLUDING LIFTING, WITHOUT ANY SIGN OF PHYSICAL DISCOMFORT OF HIS HAND, ARM OR SHOULDER

OR NECK. THE FILMS, TOGETHER WITH THE CLAIMANT'S TESTIMONY THAT HE DID NOT DO ANY OF THE PHYSICAL WORK ASSOCIATED WITH THE WELDING BUSINESS, WHICH WAS CONTRADICTED BY TWO WITNESSES, LED THE REFEREE TO THE CONCLUSION THAT CLAIMANT COULD NOT BE CONSIDERED AS A CREDIBLE WITNESS.

THE REFEREE CONCLUDED THERE WAS ABSOLUTELY NO EVIDENCE OF ANY LOSS OF WAGE EARNING CAPACITY RESULTING FROM THE INDUSTRIAL INJURY AND, THEREFORE, THE AWARD FOR THE UNSCHEDULED DISABILITY WAS NOT JUSTIFIED.

WITH RESPECT TO THE SCHEDULED DISABILITY, THE EVIDENCE INDICATED THAT THERE WAS SOME LOSS OF FUNCTION. AGAIN, THE MOVIES AND TESTIMONY OF THE OTHER WITNESSES INDICATED THAT CLAIMANT DID NOT HAVE AS SERIOUS AN IMPAIRMENT OF HIS RIGHT HAND AND ARM AS HE CONTENDED. THE REFEREE FELT THE AWARD OF 35 PER CENT WAS QUITE GENEROUS, HOWEVER, GRANTING CLAIMANT THE BENEFIT OF ANY DOUBT IN THE MATTER, HE AFFIRMED THAT AWARD ON THE BASIS OF THE MEDICAL EVIDENCE.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 20, 1975 IS AFFIRMED.

WCB CASE NO. 75-3797 FEBRUARY 26, 1976

JOHN A. BARBUR, CLAIMANT
POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
OWN MOTION ORDER

ON OCTOBER 14, 1975 THE BOARD RECEIVED A REQUEST FROM CLAIMANT TO INVOKE ITS OWN MOTION JURISDICTION AND GRANT CLAIMANT FURTHER MEDICAL CARE AND TREATMENT AND TIME LOSS AND, OR PERMANENT DISABILITY TO WHICH HE MAY BE ENTITLED.

THE REQUEST WAS, INITIALLY, SUPPORTED BY A REPORT FROM DR. RINEHART DATED JULY 28, 1975. THE BOARD REQUESTED CLAIMANT TO FURNISH ADDITIONAL MEDICAL INFORMATION IN SUPPORT OF HIS REQUEST TO REOPEN HIS CLAIM AND SUCH FURTHER MEDICAL WAS RECEIVED BY THE BOARD ON FEBRUARY 3, 1976.

THE BOARD, AFTER STUDYING THE REPORTS OF DR. RINEHART, DR. MATSUDA AND DR. FAGAN, FINDS THAT ALL THREE AGREE CLAIMANT IS CURRENTLY TOTALLY DISABLED BUT ONLY DR. RINEHART RELATES THE TOTAL DISABILITY TO CLAIMANT'S ORIGINAL INJURY ON MARCH 18, 1969.

THE BOARD FURTHER FINDS THAT DR. RINEHART'S REPORT DID NOT CLEARLY STATE THAT CLAIMANT'S PRESENT CONDITION IS AN AGGRAVATION OF THE PREVIOUS LOW BACK STRAIN.

THE BOARD CONCLUDES THAT THE MEDICAL EVIDENCE SUBMITTED IS NOT SUFFICIENT TO JUSTIFY REOPENING CLAIMANT'S CLAIM UNDER THE PROVISIONS OF ORS 656.278.

ORDER

THE REQUEST FOR THE BOARD TO EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 IS HEREBY DENIED.

WCB CASE NO. 72-3362 FEBRUARY 26, 1976

DON A. CONGER, CLAIMANT

MYRICK, COULTER, SEAGRAVES AND NEALY,
CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE,
DEFENSE ATTYS.
MC MENAMIN, JONES, JOSEPH AND LANG,
DEFENSE ATTYS.
OWN MOTION ORDER

ON FEBRUARY 17, 1976 THE CLAIMANT PETITIONED THE BOARD TO EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 AND READJUST AND REDETERMINE THE EXTENT OF HIS PERMANENT PARTIAL DISABILITY. THE REQUEST WAS BASED UPON CLAIMANT'S CONTENTION THAT THE PERMANENT PARTIAL DISABILITY GRANTED BY THE DETERMINATION ORDER MAILED AUGUST 26, 1974 WAS NOT IN CONFORMANCE WITH THE RULES FOR DETERMINING HEARING LOSS DISABILITY AS ESTABLISHED BY THE WORKMEN'S COMPENSATION BOARD IN THE MATTER OF THE COMPENSATION OF OSCAR PRIVETTE, CLAIMANT (UNDERSCORED), WCB CASE NO. 73-1563 AND IN THE MATTER OF THE COMPENSATION OF CONAN OLSON (UNDERSCORED), WCB CASE NO. 74-3365. BOTH OF THESE CASES HELD THAT 'NORMAL' HEARING LOSS INCLUDED LOSS AT HIGH FREQUENCY RANGES AS WELL AS LOSS AT THE 500, 1000 AND 2000 RANGES.

CLAIMANT HAD THE OPPORTUNITY TO PRESENT THIS CONTENTION TO THE REFEREE AT HIS HEARING. HE ALSO HAD THE OPPORTUNITY TO PRESENT IT UPON BOARD REVIEW. CLAIMANT DID NOT CHOOSE TO AVAIL HIMSELF OF EITHER OF THESE OPPORTUNITIES AND THE BOARD CONCLUDES THAT THE MATTER, THEREFORE, IS RES JUDICATA.

ORDER

THE REQUEST BY CLAIMANT THAT THE BOARD EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 IS HEREBY DENIED.

WCB CASE NO. 72-3313 FEBRUARY 26, 1976

RONALD C. CALLERMAN, CLAIMANT

MYRICK, COULTER, SEAGRAVES AND NEALY,
CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE,
DEFENSE ATTYS.
MC MENAMIN, JONES, JOSEPH AND LANG,
DEFENSE ATTYS.
OWN MOTION ORDER

ON FEBRUARY 17, 1976 THE CLAIMANT PETITIONED THE BOARD TO EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 AND READJUST AND REDETERMINE THE EXTENT OF HIS PERMANENT PARTIAL DISABILITY. THE REQUEST WAS BASED UPON CLAIMANT'S CONTENTION THAT

THE PERMANENT PARTIAL DISABILITY GRANTED BY THE DETERMINATION ORDER MAILED SEPTEMBER 10, 1974 WAS NOT IN CONFORMANCE WITH THE RULES FOR DETERMINING HEARING LOSS DISABILITY AS ESTABLISHED BY THE WORKMEN'S COMPENSATION BOARD IN THE MATTER OF THE COMPENSATION OF OSCAR PRIVETTE, CLAIMANT (UNDERSCORED), WCB CASE NO. 73-1563 AND IN THE MATTER OF THE COMPENSATION OF CONAN OLSON (UNDERSCORED), WCB CASE NO. 74-3365. BOTH OF THESE CASES HELD THAT 'NORMAL' HEARING LOSS INCLUDED LOSS AT HIGH FREQUENCY RANGES AS WELL AS LOSS AT THE 500, 1000 AND 2000 RANGES.

CLAIMANT HAD THE OPPORTUNITY TO PRESENT THIS CONTENTION TO THE REFEREE AT HIS HEARING. HE ALSO HAD THE OPPORTUNITY TO PRESENT IT UPON BOARD REVIEW. CLAIMANT DID NOT CHOOSE TO AVAIL HIMSELF OF EITHER OF THESE OPPORTUNITIES AND THE BOARD CONCLUDES THAT THE MATTER, THEREFORE, IS RES JUDICATA.

ORDER

THE REQUEST BY CLAIMANT THAT THE BOARD EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 IS HEREBY DENIED.

SAIF CLAIM NO. DC 148488 FEBRUARY 27, 1976

HARRY A. STRONG, CLAIMANT

NOREEN A. SALTVEIT, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
OWN MOTION ORDER

ON SEPTEMBER 30, 1975, CLAIMANT REQUESTED THE BOARD TO EXERCISE ITS OWN MOTION JURISDICTION UNDER THE PROVISIONS OF ORS 656.278 AND REOPEN HIS CLAIM.

A PREVIOUS REQUEST HAD BEEN DENIED BY AN OWN MOTION ORDER ENTERED JUNE 25, 1975, BASED UPON A REPORT FROM DR. EDWIN G. ROBINSON WHICH INDICATED CLAIMANT'S SHOULDER AND ARM CONDITION WAS APPROXIMATELY THE SAME AT THE TIME OF HIS EXAMINATION ON APRIL 24, 1975 AS IT WAS AT THE TIME THE CLAIM WAS CLOSED.

ON OCTOBER 1, 1975 CLAIMANT WAS ADVISED TO FURNISH CURRENT MEDICAL INFORMATION WHICH MIGHT ESTABLISH THAT HIS PRESENT CONDITION WAS AGGRAVATED OR HAD WORSENED SINCE THE LAST ARRANGEMENT OR AWARD OF COMPENSATION RECEIVED IN 1970 AND THAT SUCH AGGRAVATION OR WORSENED CONDITION WAS ATTRIBUTABLE TO THE ORIGINAL RIGHT ARM INJURY.

ON FEBRUARY 17, 1976, DR. GILMORE ADVISED THE BOARD THAT HIS OBJECTIVE EXAMINATION OF CLAIMANT DID NOT REVEAL ANY SUBSTANTIAL DETERIORATION OF MUSCLE MASS, OR STRENGTH OR DEXTERITY. HE THOUGHT THE LOSS OF STRENGTH AND CONTROL WHICH CLAIMANT FELT HE HAD WAS PROBABLY DUE TO HIS ARTERIOSCLEROSIS WHICH GIVES HIM DISTRESSING SYMPTOMS IN BOTH ARMS AND LEGS.

THE BOARD CONCLUDES, BASED UPON DR. GILMORE'S REPORT, THAT CLAIMANT'S PRESENT CONDITION IS NOT ATTRIBUTABLE TO HIS ORIGINAL INJURY SUSTAINED SEPTEMBER 17, 1968.

ORDER

IT IS THEREFORE ORDERED THAT CLAIMANT'S REQUEST THAT THE BOARD EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 AND REOPEN HIS CLAIM IS HEREBY DENIED.

WCB CASE NO. 75-1385 FEBRUARY 27, 1976

ROBERT GRIMES, CLAIMANT
EMMONS, KYLE, KROPP AND KRYGER,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 48 DEGREES FOR 25 PER CENT PARTIAL LOSS OF THE LEFT ARM AND 112 DEGREES FOR 35 PER CENT UNSCHEDULED MID AND LOW BACK DISABILITY.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON NOVEMBER 7, 1973 WHEN HE WAS STRUCK BY A LOG WHILE SETTING CHOKERS. HIS CONDITION WAS DIAGNOSED AS MULTIPLE COMPRESSION FRACTURES OF THE DORSAL SPINE AND STRETCH INJURY TO THE BRACHIAL PLEXUS (THE BRUNT OF THE INJURY FALLING ON THE POSTERIOR CORD BUT ALL RADICULAR GROUPS WERE INVOLVED). UPON RELEASE FROM THE HOSPITAL, CLAIMANT ENGAGED IN PHYSIOTHERAPY AND RECOMMENDED HOME EXERCISES.

DR. MELSON, A NEUROLOGIST, REFERRED CLAIMANT TO DR. YOUNG, AN ORTHOPEDIC SURGEON, ON DECEMBER 30, 1974. IT WAS DETERMINED THAT CLAIMANT WAS MAKING EXCELLENT RECOVERY AND GAINING PROGRESSIVE STRENGTH IN THE USE OF HIS LEFT UPPER EXTREMITY, HOWEVER, THERE WAS SOME HYPESTHESIA OVER THE POSTERIOR ASPECT OF THE ARM, THE RADIAL ASPECT OF THE FOREARM AND THE DORSORADIAL ASPECT OF THE HAND AND FINGERS. CLAIMANT STILL EXPERIENCED PAIN AND DISCOMFORT IN HIS BACK ALTHOUGH THE FREQUENCY WAS DECREASING. THE CLAIM WAS CLOSED BY DETERMINATION ORDER MAILED MARCH 19, 1975 WHEREBY CLAIMANT WAS AWARDED 64 DEGREES FOR 20 PER CENT UNSCHEDULED MID AND LOW BACK DISABILITY AND 19.2 DEGREES FOR 10 PER CENT LOSS OF LEFT ARM.

CLAIMANT IS NOW 28 YEARS OLD, HE HAS A HIGH SCHOOL DIPLOMA AND HAS ATTENDED THE UNIVERSITY OF OREGON FOR THREE YEARS MAJORING IN PSYCHOLOGY AND A JUVENILE DELINQUENCY PROGRAM. CLAIMANT DID NOT OBTAIN A DEGREE FROM THE UNIVERSITY AND, AT THE PRESENT TIME, IS ATTENDING UMPQUA COMMUNITY COLLEGE MAJORING IN AUTOMOTIVE TECHNOLOGY UNDER THE AUSPICES OF VOCATIONAL REHABILITATION. HE WILL COMPLETE HIS COURSE IN THE SPRING OF 1976 AND, IF SUCCESSFUL, WILL RECEIVE A GENERAL DEGREE IN AUTOMOTIVE TECHNOLOGY.

PRIOR TO HIS INJURY CLAIMANT HAD NO PHYSICAL LIMITATIONS REGARDING HIS JOB OR OTHER ACTIVITIES - CLAIMANT HAS NOT RETURNED TO WORK SINCE HIS INDUSTRIAL INJURY, HE HAS SPENT MOST OF THE TIME ENROLLED IN RETRAINING PROGRAMS WITH THE APPROVAL OF DIVISION OF VOCATIONAL REHABILITATION AND CONCURRENCE OF HIS TREATING PHYSICIAN, DR. MELSON.

THE REFEREE FOUND THAT CLAIMANT'S LEFT ARM HAD BEEN IMPAIRED BECAUSE OF THE PAIN AND DISCOMFORT AND THAT THERE WAS SOME ATROPHY AND WEAKNESS AND LOSS OF STRENGTH AS WELL AS A NUMBNESS OR LOSS OF SENSATION IN HIS LEFT HAND PARTICULARLY THE THUMB, INDEX AND MIDDLE FINGERS, ALL OF WHICH WAS MATERIALLY DISABLING. THE REFEREE CONCLUDED THAT CLAIMANT'S LOSS OF FUNCTION OF HIS LEFT ARM, AS WELL AS HIS REDUCED RESERVE PHYSICAL CAPACITY, WAS EQUAL TO 25 PER CENT LOSS OF THE LEFT ARM AND HE INCREASED THE AWARD TO 48 DEGREES OF A MAXIMUM OF 192 DEGREES.

WITH RESPECT TO THE MID AND LOW BACK PAIN AND DISCOMFORT, THE REFEREE FOUND THAT MANY ACTIVITIES WHICH INVOLVED BENDING AND STOOPING AND HEAVY LIFTING AS WELL AS PROLONGED SITTING, EXACERBATED SUCH PAIN AND DISCOMFORT TO THE EXTENT THAT IT LIMITED CLAIMANT'S PHYSICAL ACTIVITIES. CONSIDERING THESE PHYSICAL LIMITATIONS, AGE EDUCATION, TRAINING AND EXPERIENCE, AS WELL AS CLAIMANT'S PROGRESS IN THE VOCATIONAL RETRAINING PROGRAM, THE REFEREE CONCLUDED THAT CLAIMANT STILL HAD BEEN EXCLUDED FROM HIS USUAL AND ORDINARY OCCUPATIONS IN THE LUMBER INDUSTRY WHICH REQUIRED REPETITIVE BENDING AND STOOPING AND LIFTING WHICH CLAIMANT NO LONGER WAS ABLE TO DO. CLAIMANT WAS ENTITLED TO AN AWARD OF 35 PER CENT OF THE MAXIMUM ALLOWABLE BY STATUTE FOR HIS UNSCHEDULED DISABILITY TO ADEQUATELY COMPENSATE HIM FOR HIS LOSS IN EARNING CAPACITY.

THE BOARD, ON DE NOVO REVIEW, AGREES WITH THE REFEREE IN HIS ASSESSMENT OF CLAIMANT'S UNSCHEDULED DISABILITY - HOWEVER, IT FINDS THAT THE LOSS OF FUNCTION OF THE LEFT ARM IS GREATER THAN 25 PER CENT AND CONCLUDES THAT TO ADEQUATELY COMPENSATE CLAIMANT FOR THE LOSS OF FUNCTION OF HIS LEFT ARM HE IS ENTITLED TO AN AWARD EQUAL TO 40 PER CENT OF THE MAXIMUM EQUAL TO 76.8 DEGREES OF A MAXIMUM OF 192 DEGREES.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 5, 1975 IS MODIFIED.

CLAIMANT IS AWARDED 76.8 DEGREES OF A MAXIMUM OF 192 DEGREES FOR PARTIAL LOSS OF THE LEFT ARM.

IN ALL OTHER RESPECTS THE ORDER OF THE REFEREE IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, 25 PER CENT OF THE COMPENSATION INCREASED BY THIS ORDER, PAYABLE FROM SUCH COMPENSATION AS PAID, TO A MAXIMUM OF 2,300 DOLLARS.

WCB CASE NO. 75-1974 FEBRUARY 27, 1976

THERESA HOFFMAN, CLAIMANT

GALTON AND POPICK, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S AMENDED ORDER WHICH AWARDED CLAIMANT 75 DEGREES FOR PARTIAL LOSS OF THE RIGHT HAND.

CLAIMANT SUFFERED A COMPENSABLE INJURY TO HER RIGHT HAND ON JANUARY 15, 1974 WHEN A HEAVY BRASS POLE FELL ON IT. SHE WAS TAKEN TO ST. VINCENT'S HOSPITAL, THE DIAGNOSIS WAS LACERATION AND FRACTURE OF THE RIGHT HAND. A CAST WAS APPLIED AFTER THE WOUND HAD BEEN CLEANED AND DRESSED, HOWEVER, A PUNCTURE WOUND APPARENTLY SATURATED THE CAST AND DR. JOHNSON HAD TO REMOVE THE CAST. THE HAND WAS SWOLLEN AND AFTER A WEEK THE HAND WAS CAST AGAIN AND CLAIMANT WORE IT FOR SIX WEEKS. UPON REMOVAL SHE WAS UNABLE TO CLOSE HER FIST. HER PROGRESS WAS SLOW AND SHE WAS SEEN BY DR. GILL, AN ORTHOPEDIC SPECIALIST, WHO DESCRIBED THE INJURY AS RATHER SERIOUS.

IN OCTOBER 1974 DR. STRUCKMAN, WHO HAD TREATED CLAIMANT INITIALLY, STATED HE HAD NOTHING FURTHER TO OFFER CLAIMANT AND CONSIDERED HER TO BE MEDICALLY STATIONARY. NERVE CONDUCTION STUDIES REVEALED, AT MOST, A MILD DELAY IN SENSORY LATENCY TIME AT THE WRIST, AND THERE WAS NO MEDICAL EVIDENCE THAT THIS WAS ATTRIBUTABLE TO THE ACCIDENT.

AT THE REQUEST OF THE FUND, DR. NATHAN EXAMINED CLAIMANT ON TWO DIFFERENT OCCASIONS AND DIAGNOSED, AMONG OTHER THINGS, CARPAL TUNNEL SYNDROME WHICH WAS NOT CONFIRMED BY ANY SUBSTANTIAL MEDICAL EXAMINATION. LABORATORY STUDIES MADE BY DR. NATHAN INDICATED THAT HER COMPLAINTS IN THE EXTREMITIES WERE CAUSED BY DIABETES. ON MAY 13, 1975 A DETERMINATION ORDER WAS MAILED GRANTING CLAIMANT 37.5 DEGREES FOR PARTIAL RIGHT HAND DISABILITY.

THE REFEREE FOUND THAT THROUGH SOME MISUNDERSTANDING CLAIMANT BELIEVED AFTER SHE WAS FOUND TO BE MEDICALLY STATIONARY THAT NO FURTHER TREATMENT WOULD BE OF HELP. THE REFEREE FOUND THAT WHEN CLAIMANT DOES NOT USE HER RIGHT HAND TOO MUCH HER SYMPTOMS SUBSIDE BUT UPON USE IT FEELS NUMB OR TIGHTENS AND SWELLS. HER HAND IS WEAK AND SHE IS UNABLE TO LIFT A FULL COFFEE POT, ALSO OTHER HOUSEHOLD CHORES CAUSE A SWELLING. AT THE PRESENT TIME CLAIMANT IS RECEIVING UNEMPLOYMENT COMPENSATION - SHE FEELS THAT SHE CAN DO LIGHT WORK BUT CANNOT DO THE KIND OF WORK REQUIRED AT HER FORMER EMPLOYMENT.

THE REFEREE CONCLUDED THAT CLAIMANT HAD LOST 50 PER CENT FUNCTION OF HER RIGHT HAND AND INCREASED THE AWARD TO 75 DEGREES.

THE BOARD, ON DE NOVO REVIEW, FINDS THAT THE MEDICAL EVIDENCE DOES NOT SUPPORT A CONCLUSION THAT CLAIMANT HAS LOST 50 PER CENT OF THE FUNCTION OF HER RIGHT HAND. THE BOARD CONCLUDES THAT CLAIMANT WAS ADEQUATELY COMPENSATED FOR HER LOSS OF FUNCTION OF THE RIGHT HAND BY THE DETERMINATION ORDER DATED MAY 13, 1975 AND THE SAME SHOULD THEREFORE BE REINSTATED.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 23, 1975, AS AMENDED BY THE ORDER DATED OCTOBER 28, 1975, IS REVERSED.

THE DETERMINATION ORDER MAILED MAY 13, 1975, IS AFFIRMED.

SAIF CLAIM NO. ZC 120738 FEBRUARY 27, 1976

SAMUEL D. GUDMUNDSON, CLAIMANT

DEPT. OF JUSTICE, DEFENSE ATTY.
OWN MOTION DETERMINATION

THIS CLAIMANT SUSTAINED A COMPENSABLE INJURY DECEMBER 27, 1967. HIS CLAIM WAS CLOSED IN JULY 1968 WITH NO AWARD FOR PERMANENT PARTIAL DISABILITY.

IN 1970, AFTER SUFFERING A MINOR AGGRAVATION OF HIS CONDITION, THE CLAIM WAS REOPENED AND CLOSED BY A SECOND DETERMINATION ORDER AWARDING 5 PER CENT UNSCHEDULED LOW BACK DISABILITY.

IN 1974 CLAIMANT HAD RECURRENCE OF BACK PAIN FOR WHICH HE RECEIVED MEDICAL CARE AND TREATMENT AND, PURSUANT TO THE ADVISORY

OPINION OF THE EVALUATION DIVISION, THE BOARD'S OWN MOTION DETERMINATION ISSUED DECEMBER 9, 1974 GRANTING CLAIMANT AN ADDITIONAL PERMANENT PARTIAL DISABILITY AWARD OF 60 PER CENT MAKING A TOTAL OF 65 PER CENT OF THE MAXIMUM FOR UNSCHEDULED LOW BACK DISABILITY.

CLAIMANT'S CLAIM WAS VOLUNTARILY REOPENED BY THE STATE ACCIDENT INSURANCE FUND ON JANUARY 21, 1975 AND CLAIMANT'S LUMBOSACRAL DISC WAS SURGICALLY REMOVED FOR THE RELIEF OF LUMBAR DISCOMFORT. UPON SUBMISSION FOR CLOSURE, THE EVALUATION DIVISION RECOMMENDS CLAIMANT IS NOT ENTITLED TO ANY FURTHER AWARD OF PERMANENT DISABILITY.

ORDER

IT IS HEREBY ORDERED THAT CLAIMANT IS GRANTED TEMPORARY TOTAL DISABILITY COMPENSATION FROM JANUARY 21, 1975 THROUGH JANUARY 5, 1976.

WCB CASE NO. 74-4470 FEBRUARY 27, 1976

DONNA BRECHT, CLAIMANT
MOORE, WURTZ AND LOGAN,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

THE CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH APPROVED THE DENIAL OF CLAIMANT'S CLAIM BY THE FUND.

CLAIMANT, A WAITRESS, ALLEGES THAT ON SEPTEMBER 23, 1974 WHILE AT WORK SHE SLIPPED BECAUSE OF WATER ON THE BATHROOM FLOOR AND IN TRYING TO PREVENT A FALL TO THE GROUND SHE FELT A PULL IN HER BACK, SHOULDERS AND ARMS. CLAIMANT ALLEGED THAT SHE TOLD THE COOK ON HER SHIFT ABOUT THE INCIDENT, STATING SHE DIDN'T KNOW WHETHER SHE WAS HURT AT THAT TIME - TWO OR THREE DAYS LATER SHE TOLD HER EMPLOYER THAT SHE HAD SLIPPED AND THAT HER BACK WAS BOTHERING HER.

CLAIMANT CONTINUED WITH SUCH ACTIVITY AS WASHING WINDOWS AND BENDING OVER TO WASH DISHES AND LIFTING HEAVY PLATTERS BUT SUFFERED PAIN AS A RESULT OF SUCH ACTIVITIES. SHE DID NOT CONSULT A DOCTOR NOR DID SHE LOSE ANY TIME FROM WORK.

ON OCTOBER 22, 1974 WHILE AT HOME CLAIMANT, ACCORDING TO HER TESTIMONY, AWOKE AND HER BACK WAS REALLY BOTHERING HER. SHE HAD AN APPOINTMENT TO HAVE HER HAIR FIXED AND THEN RETURNED TO THE TRAILER PARK WHERE SHE LIVED AND BEGAN TO DO HER WASHING. SHE TESTIFIED THAT WHEN SHE STOOPED OVER TO PICK UP THE CLOTHES HER BACK HURT AND HER HUSBAND HAD TO HELP HER DO THE WASH. CLAIMANT ALSO TESTIFIED THAT WHILE WALKING DOWN THE STEPS OF THE WASH HOUSE SHE MADE A MISSTEP AND SHE JARRED HERSELF A LITTLE BUT DID NOT SLIP, FALL OR TWIST NOR EVEN DROP THE BASKET OF WASH SHE WAS CARRYING. HOWEVER, THE NEXT MORNING HER BACK HURT SO BADLY THAT SHE DID MAKE AN APPOINTMENT TO SEE A DOCTOR. SHE THEN CALLED HER EMPLOYER AND TOLD HER THAT SHE HAD BEEN CARRYING CLOTHES DOWN THE WASH HOUSE STEPS, HAD MISSED A STEP AND WAS HAVING A LOT OF PAIN AND ASKED HER EMPLOYER TO GET SOMEONE TO REPLACE HER AT WORK UNTIL SHE COULD SEE THE DOCTOR.

DR. DEDERER SAW CLAIMANT ON OCTOBER 28, 1974. HE NOTED LOW BACK PAIN WHICH HAD EXISTED FOR APPROXIMATELY SIX DAYS AND HIS CHART NOTES INDICATE A HISTORY FROM CLAIMANT THAT SHE SLIPPED AND TWISTED HER BACK ABOUT A MONTH PREVIOUSLY WHILE AT WORK AND THAT THE PRESENT EPISODE BEGAN AFTER WASHING CLOTHES ON TUESDAY (OCTOBER 22, 1974). HE DIAGNOSED MUSCLE AND LIGAMENT STRAIN OF THE LUMBAR SPINE. THE FOLLOWING DAY CLAIMANT FILED A CLAIM STATING SHE HAD INJURED HERSELF WHEN SHE SLIPPED AT WORK IN THE BATHROOM AT THE RESTAURANT. THE FUND DENIED THE CLAIM.

DR. DEDERER REFERRED CLAIMANT TO DR. ROCKEY, AN ORTHOPEDIST, WHO EXAMINED CLAIMANT ON NOVEMBER 15, 1974 - HOWEVER, THE ONLY HISTORY TAKEN BY DR. ROCKEY REFERRED TO CLAIMANT'S SLIPPING AT WORK, SHE MADE NO MENTION OF THE INCIDENT AT HOME IN OCTOBER.

THE REFEREE FOUND THAT AN INCIDENT DID OCCUR IN THE BATHROOM AT THE RESTAURANT SOMETIME IN SEPTEMBER 1974 ALTHOUGH PROBABLY NOT ON SEPTEMBER 23 - THAT TIME CLAIMANT SLIPPED AND GRABBED A PIPE TO KEEP FROM FALLING. SHE FURTHER FOUND THAT SHE DID REPORT THE INCIDENT TO SEVERAL PEOPLE INCLUDING HER EMPLOYER. BECAUSE OF THE INABILITY OF CLAIMANT TO RECALL THE EXACT DAY OF THE INCIDENT, THE REFEREE FELT HER CREDIBILITY AS A WITNESS AS WELL AS THE CREDIBILITY OF HER HUSBAND AS A WITNESS WAS QUESTIONABLE.

THE REFEREE FOUND CLAIMANT DID NOT SEEK MEDICAL ATTENTION, MISSED NO TIME FROM WORK AND CONTINUED TO DO HER NORMAL DUTIES WHICH WERE FAIRLY HEAVY IN NATURE AND INCLUDED WALKING AS MUCH AS 20 MILES A DAY AND THAT IT WAS NOT UNTIL AFTER THE SECOND INCIDENT ON OCTOBER 22, 1974 THAT CLAIMANT SOUGHT MEDICAL ATTENTION, AND FROM THAT DATE ON SHE DID NOT WORK.

THE REFEREE CONCLUDED THAT THIS WAS NOT THE TYPE OF CASE IN WHICH A LAYMAN COULD CLEARLY AND REASONABLY INFER, WITHOUT MEDICAL TESTIMONY, THAT THE INCIDENT CAUSED CLAIMANT'S SUBSEQUENT DISABILITY AND NEED TO SEEK MEDICAL TREATMENT. SHE FURTHER CONCLUDED THAT THIS WAS NOT THE KIND OF UNCOMPLICATED SITUATION AS DESCRIBED IN URIS V. SCD (UNDERSCORED), 217 OR 420 OR SERIGANIS V. FLEMING (UNDERSCORED), 75 ADV SH 1010 (1975). THE INSTANT CASE INVOLVED TWO SEPARATE INCIDENTS AND THE FAILURE TO SEEK MEDICAL TREATMENT OR LOSE TIME FROM WORK UNTIL IMMEDIATELY FOLLOWING THE SECOND INCIDENT - THERE IS NO MEDICAL EVIDENCE ON THE ISSUE OF CAUSATION AND THE REFEREE FELT THAT SUCH MEDICAL EVIDENCE WAS ABSOLUTELY NECESSARY - THEREFORE, CLAIMANT HAD FAILED TO MEET HER BURDEN OF PROVING SHE HAS SUSTAINED A COMPENSABLE INJURY ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 15, 1975 IS AFFIRMED.

WCB CASE NO. 74-3931 MARCH 1, 1976

LOLA BARNES, CLAIMANT
COONS, COLE AND ANDERSON,
CLAIMANT'S ATTYS.
PHILIP A. MONGRAIN, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH FOUND THAT ON FEBRUARY 12, 1974 CLAIMANT HAD INCURRED AN AGGRAVATION OF THE INDUSTRIAL INJURY SHE SUFFERED ON AUGUST 14, 1970 RATHER THAN A NEW AND SEPARATE INJURY.

CLAIMANT HAD BEEN EMPLOYED BY THE EMPLOYER FOR SEVERAL YEARS PRIOR TO THE INCIDENT OF FEBRUARY 12, 1974. ON AUGUST 14, 1970, WHILE OPERATING A RAIMANN MACHINE, CLAIMANT SUFFERED A LOW BACK INJURY WHICH REQUIRED A LAMINOTOMY AND FORAMINOTOMY AT L5 BY DR. LUCE ON SEPTEMBER 2, 1970. SUBSEQUENT EXAMINATIONS OF CLAIMANT REVEALED LUMBOSACRAL INSTABILITY AND ON JUNE 2, 1971 DR. MC INTOSH PERFORMED A SPINAL FUSION AT L5-S1.

IN AUGUST 1972 CLAIMANT RETURNED TO WORK AS A RAIMANN OPERATOR DESPITE THE FACT THAT DR. MC INTOSH, HER TREATING PHYSICIAN, WAS OF THE OPINION THAT THE WORK WAS TOO HEAVY FOR HER. CLAIMANT ALSO PERFORMED RELIEF CHORES ON THE DRY CHAIN, DRYER AND EDGER AFTER SHE RETURNED TO WORK. AT THE TIME SHE WAS EXAMINED FOR CLAIM CLOSURE CLAIMANT COMPLAINED OF LOW BACK AND RIGHT LEG SYMPTOMS. HER CLAIM WAS CLOSED WITH AN AWARD OF 80 DEGREES FOR 25 PER CENT UNSCHEDULED LOW BACK DISABILITY BY A DETERMINATION ORDER MAILED SEPTEMBER 22, 1972.

WHEN CLAIMANT WORKED RELIEF ON THE DRY CHAIN SHE WAS INVOLVED IN CONSIDERABLE TWISTING AND EXPERIENCED SOME BACK PAIN, HOWEVER, SHE MISSED NO WORK UNTIL MAY 1973 WHEN HER LOW BACK SYMPTOMS BECAME EXACERBATED AND SHE WAS OFF WORK A MONTH. INITIALLY, THIS INCIDENT WAS ACCEPTED BY THE EMPLOYER AS A NEW INJURY AND A DETERMINATION ORDER SUBSEQUENTLY ISSUED AWARDED NO PERMANENT PARTIAL DISABILITY - HOWEVER, BY WAY OF STIPULATION THE PARTIES AGREED THAT THE INCIDENT WAS, IN FACT, AN AGGRAVATION OF THE AUGUST 1970 INJURY WHICH TEMPORARILY EXACERBATED CLAIMANT'S DISABILITY BUT DID NOT ADD TO THE DEGREE OF PERMANENT IMPAIRMENT. THIS STIPULATION PROVIDED FOR AN INCREASE IN THE AWARD OF PERMANENT DISABILITY OF 32 DEGREES FOR THE LOW BACK DISABILITY AND 15 DEGREES FOR EACH LEG.

DR. MATTHEWS EXAMINED CLAIMANT IN JANUARY 1974, CLAIMANT WAS STILL COMPLAINING OF RESIDUAL LOW BACK AND LEG PAIN AND DR. MATTHEWS FELT CLAIMANT COULD CONTINUE TO TOLERATE LIGHT WORK BUT THAT HEAVY WORK WOULD PROBABLY INCREASE HER SYMPTOMS. ON FEBRUARY 23, 1974 A REPORT FROM DR. BEBER STATED THAT CLAIMANT ON FEBRUARY 12, 1974, DEVELOPED FURTHER PAIN IN THE RIGHT LEG AND THIGH AND HAD BEEN UNABLE TO WORK SINCE THAT DATE. CLAIMANT WAS REFERRED TO DR. LUCE AND ADMITTED TO THE MEDFORD HOSPITAL WHERE A MYELOGRAM REVEALED NO CURRENT EVIDENCE OF DISC PROTRUSION. SHE WAS THEN REFERRED TO DR. MC INTOSH WHO, ON JULY 5, 1974, REPORTED THAT CLAIMANT, WHILE WORKING ON FEBRUARY 12, APPARENTLY HAD A PROGRESSIVE INCREASE OF BACK PAIN. ON JULY 9, 1974 CLAIMANT UNDERWENT A FURTHER LAMINECTOMY AND A SPINAL FUSION WAS CARRIED UP ONE LEVEL TO L4.

CLAIMANT FILED A NEW INJURY CLAIM IN OCTOBER 1974. THIS CLAIM WAS DENIED ON THE GROUNDS THAT CLAIMANT'S SYMPTOMS RESULTED AS AN AGGRAVATION OF HER 1970 INJURY AND DID NOT CONSTITUTE A NEW INJURY.

DR. LUCE, ON OCTOBER 7, 1974, REPORTED THAT THE HISTORY AND SURGICAL FINDINGS WERE COMPATIBLE WITH EXACERBATION RATHER THAN A NEW INJURY. DR. MC INTOSH WAS ASKED IF THE FEBRUARY 12 INCIDENT REPRESENTED AN AGGRAVATION OR NEW INJURY. HE FELT THAT THE PRIOR FUSION WAS SOLID AND NO DISC PROTRUSION EXISTED. THERE WAS A DEGENERATIVE RIDGE PRESENT AND TIGHTNESS OF THE NEURAL FORAMEN WHICH WAS RELIEVED WITH THE LAMINECTOMY AND THE FUSION EXTENSION, BUT AS TO WHETHER IT WAS A NEW OR OLD INJURY, HE STATED IT WAS DIFFICULT TO DETERMINE.

THE REFEREE FOUND THAT CLAIMANT CLEARLY CONTINUED TO DEMONSTRATE SIGNIFICANT SYMPTOMS FOLLOWING HER RETURN TO WORK AFTER HER 1970 INJURY AND THE TWO SURGERIES. SHE TESTIFIED THAT SHE EXPERIENCED PAIN IN HER BACK AND SOMETIMES DOWN HER LEGS AND THAT SUCH DISCOMFORT WAS WORSE ON SOME DAYS THAN ON OTHERS EVEN THOUGH SHE ENGAGED IN MUCH THE SAME PHYSICAL ACTIVITY. THE EVIDENCE INDICATES THAT CLAIMANT'S PAIN WAS OFTEN AGGRAVATED WHEN SHE WORKED ON THE DRY CHAIN, ESPECIALLY WHEN THE MATERIAL ON THE CHAIN WAS HEAVY. THE REFEREE FOUND THAT THE MEDICAL REPORTS CONFIRMED THE CONTINUOUS SYMPTOMS AND, EXPRESSEDLY OR IMPLIEDLY, RELATED THEM TO THE 1970 INJURY AND THE SUBSEQUENT SURGERIES.

THE REFEREE FURTHER FOUND THAT DR. MC INTOSH HAD STATED THAT THE MILL WORK TO WHICH CLAIMANT HAD RETURNED COULD VERY WELL BE MORE THAN SHE COULD HANDLE - HIS OPINION WAS THAT THIS WAS HEAVIER WORK THAN SHE SHOULD BE DOING. THE REFEREE FOUND THAT THIS RESTRICTION SUGGESTED BY DR. MC INTOSH WAS RELATED TO THE CLAIMANT'S 1970 INJURY. FURTHERMORE, DR. MATTHEWS REPORTED THAT HEAVIER TYPES OF WORK WOULD PROBABLY CAUSE CLAIMANT INCREASED SYMPTOMS AND THAT THIS PROGNOSIS WAS APPARENTLY RELATED TO THE 1970 INJURY.

DR. LUCE'S INITIAL REPORT OF THE INCIDENT OF FEBRUARY 12, 1974 INDICATES A GRADUAL ONSET OF PAIN ON THAT DATE WHILE AT WORK. DR. LUCE'S DEPOSITION WAS TAKEN ON MAY 27, 1975. DR. MC INTOSH DECLINED TO GIVE AN EXPLICIT ANSWER TO THE QUERY - WAS IT AGGRAVATION OR A NEW INJURY?

THE REFEREE, RELYING TO A GREAT EXTENT ON THE DEPOSITION OF DR. LUCE, CONCLUDED THAT THE INCIDENT OF FEBRUARY 12, 1974 WAS, IN FACT, AN AGGRAVATION OF THE AUGUST, 1970 INJURY AND NOT A NEW INJURY. THE DENIAL OF CLAIMANT'S CLAIM FOR NEW INJURY SUFFERED ON FEBRUARY 12, 1974 WAS PROPER.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE. THE ACTIVITY OF FEBRUARY 12, 1974 WAS NOTHING MORE THAN A CONVENIENT VEHICLE FOR THE EXPRESSION OF SYMPTOMS LARGELY AND VERY MATERIALLY RELATED TO AND RESULTING FROM THE CLAIMANT'S 1970 INJURY AND SUBSEQUENT SURGERIES.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 18, 1975 IS AFFIRMED.

WCB CASE NO. 75-1021 MARCH 1, 1976

NEIL KRINGEN, CLAIMANT
VINCENT IERULLI, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH APPROVED THE STATE ACCIDENT INSURANCE FUND'S DENIAL OF CLAIMANT'S CLAIM.

CLAIMANT IS A 48 YEAR OLD PRESS OPERATOR WHO WAS STRUCK BY AN AUTOMOBILE ON JANUARY 23, 1975 AT APPROXIMATELY 7.20 A.M. WHILE HE WAS CROSSING AIRPORT WAY, A FOUR LANE HIGHWAY IN PORTLAND, ON HIS WAY TO HIS JOB. AS A RESULT OF THE ACCIDENT, CLAIMANT'S RIGHT LEG WAS AMPUTATED. CLAIMANT FILED A CLAIM AND ON MARCH 6, 1975 THE FUND DENIED IT.

THE SOLE ISSUE BEFORE THE REFEREE WAS WHETHER THE INJURY AROSE IN AND OUT OF THE COURSE OF CLAIMANT'S EMPLOYMENT, MORE SPECIFICALLY, WHETHER CLAIMANT HAD BROUGHT HIMSELF WITHIN ONE OF THE EXCEPTIONS TO THE 'GOING AND COMING' RULE.

THE REFEREE FOUND THAT CLAIMANT HAD BEEN WORKING FOR THE EMPLOYER FOR APPROXIMATELY ONE YEAR PRIOR TO THE ACCIDENT AND THAT HE HAD DRIVEN TO WORK BY AUTOMOBILE UNTIL OCTOBER 1974 WHEN HE SOLD HIS CAR AND STARTED USING THE BUS. CLAIMANT MADE INQUIRIES AS TO THE BEST WAY TO GET TO WORK BY BUS AND WAS TOLD TO TAKE THE SANDY BOULEVARD TO 82 ND AVENUE BUS AND THEN TRANSFER TO THE 82 ND AVENUE BUS. THE TRI-MET BUS DRIVER STOPPED THE BUS ENROUTE TO THE AIRPORT AND DISCHARGED THE EMPLOYES OF THE EMPLOYER ON THE EAST SIDE OF AIRPORT WAY. THIS WAS A LONG ESTABLISHED PATTERN AND MANY EMPLOYES OTHER THAN CLAIMANT USED THE BUS - IN FACT, THIS WAS THE ONLY METHOD OF BUS TRANSPORTATION. CLAIMANT HAD TO BE AT WORK AT 7.45 A.M. AT THE TIME OF THE INJURY, IT WAS A MISERABLE DAY WEATHER-WISE, THE LOCATION OF THE EMPLOYER'S OPERATION WAS ABOUT 100 YARDS WEST OF AIRPORT WAY AND TO CROSS AT THAT POINT WAS VERY DANGEROUS. THERE WAS A STOP LIGHT LOCATED ABOUT ONE-HALF MILE FROM THAT POINT OF CROSSING, BUT THERE WAS NO PROTECTED CROSSING AT THE POINT WHERE CLAIMANT CROSSED.

THE REFEREE FOUND THAT CLAIMANT WAS NOT PAID FOR TRAVEL TIME NOR WAS HE ON ANY ERRAND FOR THE BENEFIT OF THE EMPLOYER NOR ENGAGED IN ANY ACTIVITIES WHICH WOULD BENEFIT THE EMPLOYER. THE REFEREE FOUND THAT CLAIMANT WAS NOT TRAVELLING BETWEEN AREAS OVER WHICH THE EMPLOYER EXERCISED CONTROL. CLAIMANT CHOSE TO EXPOSE HIMSELF TO AN UNUSUAL HAZARD BY CROSSING AT THIS RATHER DANGEROUS POINT RATHER THAN WALKING TO THE PROTECTED CROSSING.

THE REFEREE CONCLUDED THAT THE VOLUNTARY EXPOSURE BY THE WORKMAN DID NOT SHIFT THE RISK OF INJURY FROM THE WORKMAN TO THE EMPLOYER. THE EMPLOYER HAD NOT CREATED ANY HAZARD OR SUFFERED ANY HAZARD TO REMAIN TO WHICH THE CLAIMANT HAD TO EXPOSE HIMSELF IN ORDER TO GET TO OR FROM HIS PLACE OF WORK.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE. THE EVIDENCE INDICATES THAT CLAIMANT HAD OTHER METHODS OF TRANSPORTING HIMSELF TO AND FROM HIS PLACE OF WORK - IN FACT, UNTIL OCTOBER 1974 HE HAD DRIVEN TO WORK IN HIS OWN CAR. HE CHOSE TO USE THE BUS AS TRANSPORTATION AND HE ALSO CHOSE TO

BE DISCHARGED FROM THE BUS AT A SPOT WHERE THE CROSSING WAS NOT PROTECTED. THE ENTIRE EXPOSURE TO HAZARD OR RISK WAS THE VOLUNTARY CHOICE OF THE CLAIMANT.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 23, 1975 IS AFFIRMED.

WCB CASE NO. 75-2045 MARCH 1, 1976

ROBERT J. PIERCE, CLAIMANT
POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS REVIEW BY THE BOARD OF A REFEREE'S ORDER WHICH GRANTED CLAIMANT 208 DEGREES FOR 65 PER CENT UNSCHEDULED LOW BACK DISABILITY, CONTENDING HE IS ENTITLED TO AN AWARD OF PERMANENT TOTAL DISABILITY.

CLAIMANT WAS A DRILL PRESS OPERATOR WHO FELL FROM A SCAFFOLDING INJURING HIS LOW BACK ON SEPTEMBER 10, 1973. ON DECEMBER 14, 1973 SURGERY WAS PERFORMED WITH A LAMINECTOMY AND DISC EXCISION AT L4-5 ON THE RIGHT AND BILATERAL HEMI-LAMINECTOMY AND DISC EXPLORATION AT L5-S1. ON NOVEMBER 25, 1974 DR. PASQUESI CONSIDERED CLAIMANT'S CONDITION STATIONARY WITH A CONSIDERABLE LOSS OF MOTION, SEVERE LUMBAR AND LEFT SCIATIC PAIN AND LOSS OF LUMBAR MUSCLE POWER. THE DETERMINATION ORDER OF MAY 7, 1975 AWARDED CLAIMANT 128 DEGREES FOR 40 PER CENT UNSCHEDULED LOW BACK DISABILITY.

DR. MASON AT THE DISABILITY PREVENTION DIVISION REPORTED, ON MARCH 11, 1975, THAT CLAIMANT EXHIBITED GROSS EMOTIONAL OVERLAY EXAGGERATION, HOWEVER, DR. MICHAEL FLEMING, A CLINICAL PSYCHOLOGIST, CONCLUDED THAT ALTHOUGH CLAIMANT WAS DEPRESSED, HE WOULD STILL BE WORKING WERE IT NOT FOR HIS INDUSTRIAL INJURY. DR. FLEMING CONTINUED COUNSELING CLAIMANT BUT HIS PROGNOSIS WAS GUARDED BECAUSE OF CLAIMANT'S SEVERE EDUCATIONAL DEPRIVATION AND THE LACK OF VOCATIONAL OPTIONS OPEN TO HIM.

CLAIMANT DID ATTEMPT TO RETURN TO WORK IN MAY OF 1975 BUT QUIT AFTER A FEW DAYS BECAUSE EVEN LIGHT DUTY ACTIVATED HIS SYMPTOMS.

THE REFEREE FOUND THE EVIDENCE PRECLUDED A FINDING THAT CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED, ODD-LOT OR OTHERWISE - HOWEVER, CLAIMANT HAS A SUBSTANTIAL LOSS OF EARNING CAPACITY. HE CONCLUDED CLAIMANT WAS ENTITLED TO 65 PER CENT OF MAXIMUM TO COMPENSATE FOR THE LOSS.

THE BOARD, ON DE NOVO REVIEW, AGREES WITH THE FINDINGS OF THE REFEREE AND RECOMMENDS THAT THIS WORKMAN BE AFFORDED MAXIMUM ASSISTANCE IN THE AREAS OF VOCATIONAL RETRAINING AND PSYCHIATRIC TREATMENT. AN EMPHASIS ON CLAIMANT'S REMAINING CAPABILITIES SHOULD BE MADE, AND THE BOARD IS HOPEFUL THAT CLAIMANT WILL TAKE ADVANTAGE OF THE PSYCHIATRIC TREATMENT WHICH IS AVAILABLE TO HIM UNDER 656.245, AND VOCATIONAL REHABILITATION AVAILABLE TO HIM FROM THE BOARD'S DISABILITY PREVENTION DIVISION.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 23, 1975 IS AFFIRMED.

WCB CASE NO. 75-1214 MARCH 1, 1976

BEATRICE CLAWSON, CLAIMANT

RINGO, WALTON AND EVES,
CLAIMANT'S ATTYS.
THWING, ATHERLY AND BUTLER,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON, PHILLIPS AND MOORE.

THE EMPLOYER REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH GRANTED CLAIMANT COMPENSATION FOR PERMANENT TOTAL DISABILITY AS PROVIDED BY STATUTE, PAYABLE FROM THE DATE OF TERMINATION OF TEMPORARY TOTAL DISABILITY WITH CREDIT FOR PAYMENTS MADE ON THE AWARD OF PERMANENT PARTIAL DISABILITY BY THE DETERMINATION ORDER MAILED JANUARY 6, 1975.

CLAIMANT SUSTAINED A COMPENSABLE INJURY ON MARCH 19, 1974 WHEN SHE SLIPPED ON A WET FLOOR AND FELL AGAINST THE WALL. SHE EXPERIENCED PAIN IN HER NECK, LEFT ARM AND BACK. AT THE TIME CLAIMANT WAS A 51 YEAR OLD HOUSEKEEPER AND HAD BEEN EMPLOYED BY THE EMPLOYER FOR APPROXIMATELY SIX WEEKS. HER FIRST TREATMENT WAS CHIROPRACTIC - SUBSEQUENTLY, SHE CONSULTED DR. MARTENS, HER FAMILY DOCTOR WHO IS AN ORTHOPEDIC SURGEON. CLAIMANT COMPLAINED OF PAIN IN HER NECK, PRIMARILY, ON THE LEFT SIDE WITH A NUMBNESS AND TINGLING OF THE LEFT UPPER LIMB EXTENDING INTO THE HAND AND ALSO A BURNING SENSATION AND A 'KNOT' IN THE LOWER BACK. DR. MARTENS DIAGNOSED A CHRONIC LUMBOSACRAL STRAIN, STRAIN OF THE CERVICAL SPINE AND POSSIBLE CARPAL TUNNEL SYNDROME ON THE LEFT AND REFERRED CLAIMANT TO DR. KNOX, A NEUROLOGIST. DR. MARTENS RECOMMENDED CLAIMANT NOT RETURN TO ANY WORK REQUIRING BENDING, STOOPING, LIFTING, SWEEPING OR MOPPING.

DR. KNOX FOUND NO EVIDENCE OF CARPAL TUNNEL SYNDROME BUT SOME MINOR DENERVATION CONSISTENT WITH C8-T1 RADICULOPATHY.

ON JUNE 10, 1974, DR. MARTENS, IN HIS CLOSING EVALUATION, FOUND CLAIMANT TO BE MEDICALLY STATIONARY AND RECOMMENDED REFERRAL TO THE DEPARTMENT OF VOCATIONAL REHABILITATION FOR RETRAINING IN A LESS STRENUOUS OCCUPATION AND ALSO FOR POSSIBLE EVALUATION BY THE BACK CLINIC. CLAIMANT REPORTED TO DISABILITY PREVENTION DIVISION ON SEPTEMBER 10, 1974 AND DR. MASON, AFTER EXAMINATION OF CLAIMANT, FOUND NO DISC PROBLEMS OR NERVE ROOT COMPRESSION - GROSS ANXIETY WAS NOTED WITH MAGNIFICATION OF HER SYMPTOMS AND SOME ELEMENTS OF CONVERSION-REACTION IS MANIFESTED BY HER SENSORY FINDINGS. DR. MASON FOUND CLAIMANT HAD A HISTORY OF PREVIOUS LOW BACK STRAIN IN 1971 AND 1973 CAUSED BY LIFTING PATIENTS, ALSO PTERYGIUMS, BILATERALLY, NOT DISABLING BUT WHICH CAUSED CLAIMANT SUBSTANTIAL FEAR AND ALSO A HISTORY OF ANXIETY, TENSION AND NERVOUSNESS DATING BACK TO WHEN CLAIMANT WAS 21 YEARS OF AGE. HE FELT IT WAS ESSENTIAL THAT CLAIMANT RETURN TO A DIFFERENT TYPE OF WORK WHICH INCLUDED NO LIFTING, BENDING, OR TWISTING STRESSES NOR ANY WORK WITH HER ARMS OVERHEAD.

AS A RESULT OF A PSYCHOLOGICAL EVALUATION, CLAIMANT'S PSYCHOPATHOLOGY AS RELATED TO THE INDUSTRIAL INJURY WAS RATED MILD. THE PROGNOSIS FOR RESTORATION AND REHABILITATION FROM A PSYCHOLOGICAL

STANDPOINT WAS VERY POOR. CLAIMANT WAS QUITE CONCERNED ABOUT HER EYE PROBLEMS (PTERYGIUMS). ON OCTOBER 11, 1974 CLAIMANT WAS DISCHARGED FROM THE DISABILITY PREVENTION DIVISION AND ON JANUARY 6, 1975 A DETERMINATION ORDER WAS MAILED WHICH AWARDED CLAIMANT 192 DEGREES FOR 60 PER CENT UNSCHEDULED DISABILITY.

CLAIMANT HAS A THIRD GRADE EDUCATION, SHE HAS DONE SOME HOUSEKEEPING FOR HIRE, WASHED DISHES AND WAITED ON TABLES BUT THE MAJORITY OF HER WORK BACKGROUND CONSISTS OF WORKING AS A NURSE'S AIDE IN PRIVATE HOMES AND NURSING HOMES. AT THE PRESENT TIME CLAIMANT HAS LOW BACK PAIN, A PAINFUL KNOT IN HER UPPER LEFT ARM WHICH BREAKS AND BLEEDS IF SHE DOES ANY HEAVY WORK, A SWELLING ON BOTH SIDES OF HER NECK AND NECK PAIN, A GROWTH ON BOTH EYES, NOT ALL OF WHICH ARE RELATED TO HER INDUSTRIAL INJURY.

THE REFEREE FOUND CLAIMANT TO BE A CREDIBLE WITNESS AND BELIEVED HER TESTIMONY THAT SHE WOULD LIKE TO WORK BUT SHE DOES NOT KNOW OF ANY KIND OF WORK THAT SHE IS NOW CAPABLE OF PERFORMING AND THAT IS THE REASON SHE HAS NOT LOOKED FOR WORK SINCE HER INJURY ALTHOUGH SHE DID TALK WITH THE VOCATIONAL COUNSELOR IN CORVALLIS BUT WAS UNABLE TO KEEP APPOINTMENTS BECAUSE OF PHYSICAL PROBLEMS.

THE REFEREE FOUND THAT THE MEDICAL FACTS, WHEN CONSIDERED IN CONJUNCTION WITH CLAIMANT'S AGE, LIMITED EDUCATION, MENTAL CAPACITY, APTITUDES, EXPERIENCE AND TRAINING, PLACED CLAIMANT PRIMA FACIE IN THE 'ODD-LOT' CATEGORY OF THE WORK FORCE AND, THEREFORE, PROOF OF MOTIVATION TO WORK IS NOT NECESSARY. DEATON V. SAIF (UNDERSCORED), 13 OR APP 298. THE REFEREE FOUND CLAIMANT HAVING ESTABLISHED HER PRIMA FACIE CASE, THE BURDEN SHIFTED TO THE EMPLOYER TO SHOW SOME KIND OF SUITABLE WORK IS REGULARLY AND CONTINUOUSLY AVAILABLE TO CLAIMANT AND THAT THE EMPLOYER FAILED TO PRESENT ANY SUCH EVIDENCE.

THE REFEREE CONCLUDED THAT CLAIMANT IS PERMANENTLY INCAPACITATED FROM REGULARLY PERFORMING ANY WORK AT A GAINFUL AND SUITABLE OCCUPATION AND IS ENTITLED TO AN AWARD OF PERMANENT TOTAL DISABILITY.

AFTER DE NOVO REVIEW, THE MAJORITY OF THE BOARD AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED JULY 28, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW THE SUM OF 400 DOLLARS, PAYABLE BY THE EMPLOYER.

DISSENT

BOARD MEMBER GEORGE A. MOORE DISSENTS AS FOLLOWS -

IT IS THIS REVIEWER'S OPINION THAT THE RELATIVELY MINOR DIAGNOSED BACK, NECK AND ARM INJURIES WHICH WERE TREATED ONLY ON A CONSERVATIVE AND PALLIATIVE BASIS AND THE LIMITED ASSESSMENT OF PERMANENT PHYSICAL DISABILITY BY HER ORTHOPEDIC AND NEUROLOGICAL PHYSICIANS, COUPLED WITH THE PSYCHOLOGICAL OPINION THAT HER GROSS ANXIETY TENSION AND MAGNIFICATION OF SYMPTOMS ARE ONLY MILDLY RELATED TO HER ACCIDENT DO NOT SATISFY THE BURDEN THAT THE CLAIMANT HAS DESIGNATED PRIMA FACIE ODD-LOT CONSIDERATION AND DOES NOT HAVE TO SHOW MOTIVATION TOWARD WORK RETURN.

THERE IS AMPLE EVIDENCE THAT THE CLAIMANT SKIPPED APPOINTMENTS WITH VOCATIONAL COUNSELORS AND HAS MADE NO ATTEMPT TOWARD EXPLORING

THE POSSIBILITIES OF RETRAINING AND REEMPLOYMENT ALTHOUGH REHABILITATION OPPORTUNITIES HAVE BEEN OFFERED.

FOR THE ABOVE REASONS, THIS REVIEWER WOULD RECOMMEND SETTING ASIDE THE REFEREE'S ORDER AND RESTORING THE ADJUDICATION OF THE BOARD'S EVALUATION DIVISION AND URGE THE CLAIMANT TO AVAIL HERSELF OF VOCATIONAL REHABILITATION AND OR REEMPLOYMENT ASSISTANCE.

I RESPECTFULLY DISSENT FROM THE BOARD AND WOULD AFFIRM THE DENIAL.

-S- GEORGE A. MOORE, BOARD MEMBER

WCB CASE NO. 75-2149 MARCH 1, 1976

JOHN M. KOHLER, CLAIMANT

SMITH AND LEE, CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER OF MAY 22, 1975 AWARDING CLAIMANT NO PERMANENT PARTIAL DISABILITY.

CLAIMANT WAS EMPLOYED BY WEYERHAEUSER'S AND SUSTAINED A COMPENSABLE INJURY JULY 6, 1973 WHEN HIT IN THE HEAD BY A BOARD. THE PRIMARY INJURY WAS A FRACTURED NOSE BUT CLAIMANT ALSO COMPLAINED OF HEADACHES AND NECK COMPLAINTS. HE RETURNED ON AUGUST 7, 1973 TO HIS CLEANUP JOB AT THE MILL. ABOUT THREE MONTHS LATER CLAIMANT ASSUMED A LIGHTER TYPE JOB AS EDGER OFF-BEARER, A JOB WHICH HE APPLIED FOR AND RECEIVED WHEN HE DEMONSTRATED HE COULD PERFORM THE REQUIRED PHYSICAL DUTIES. FROM AUGUST 7, 1973 UNTIL APRIL 15, 1974 CLAIMANT PERFORMED HIS JOB WITHOUT SIGNIFICANT DIFFICULTIES, BUT DID HAVE SOME INTERMITTENT PERIODS OF INCREASED PAIN WHICH DR. CONN, HIS TREATING PHYSICIAN, FELT WAS TO BE EXPECTED AND WAS IN NO WAY DISABLING TO THE EXTENT CLAIMANT COULD NOT WORK.

ON APRIL 15, 1974 CLAIMANT WAS INJURED IN AN AUTOMOBILE ACCIDENT AND SUFFERED SIGNIFICANT INJURY TO HIS NECK AND BACK. HE WAS OFF WORK UNTIL JANUARY, 1975. UPON RETURNING TO WORK, CLAIMANT'S JOB PERFORMANCE CHANGED DRAMATICALLY AND HE COULD NOT KEEP UP WITH HIS PART OF THE WORK. IN APRIL 1975 THE EMPLOYER FOUND CLAIMANT'S PERFORMANCE SO UNSATISFACTORY IT GAVE HIM CONDITIONAL TERMINATION, CONTINGENT UPON HIS RETURNING WHEN HE FELT HE WAS PHYSICALLY ABLE TO PERFORM THE JOB. CLAIMANT HAS NOT RETURNED TO WEYERHAEUSER OR ANY OTHER EMPLOYMENT SINCE THAT TIME.

THE REFEREE FOUND, AND THE BOARD, ON DE NOVO REVIEW, AGREES, THAT THE EVIDENCE ON RECORD REFLECTS THAT ANY LIMITATION OF CLAIMANT'S ABILITY TO WORK AND ANY IMPAIRMENT OF HIS FUTURE EARNING CAPACITY IS ATTRIBUTABLE ONLY TO THE DISABLING EFFECTS OF THE APRIL 15, 1974 OFF-THE-JOB AUTOMOBILE ACCIDENT, AND THE DETERMINATION ORDER OF MAY 22, 1975 SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 16, 1975 IS AFFIRMED.

CLAIM NO. 05X-010632 MARCH 1, 1976

CLEVE CLAPP, CLAIMANT

DAVID A. VINSON, CLAIMANT'S ATTY.
ORDER

ON FEBRUARY 20, 1976 THE BOARD RECEIVED FROM THE CLAIMANT A PETITION FOR RECONSIDERATION OF LUMP SUM PAYMENT. CLAIMANT HAD SUSTAINED A COMPENSABLE INJURY ON NOVEMBER 6, 1969 AND THE CLAIM HAD BEEN CLOSED BY A DETERMINATION ORDER MAILED SEPTEMBER 3, 1974 WHEREBY CLAIMANT WAS AWARDED 192 DEGREES FOR 100 PER CENT LOSS OF THE RIGHT ARM AND 288 DEGREES FOR 90 PER CENT UNSCHEDULED RIGHT SHOULDER DISABILITY.

A 50 PER CENT LUMP SUM PAYMENT WAS REQUESTED BY CLAIMANT AND APPROVED BY THE COMPLIANCE DIVISION OF THE BOARD ON OCTOBER 31, 1974. ON NOVEMBER 20, 1974 THE EMPLOYER'S CARRIER ISSUED A CHECK IN THE AMOUNT OF 16,467.46 DOLLARS PURSUANT TO THE APPROVED REQUEST.

PRIOR TO OCTOBER 5, 1973, ORS 656.230 ALLOWED A WORKMAN TO RECEIVE UP TO 50 PER CENT OF HIS PERMANENT PARTIAL DISABILITY AWARD IN AN ADVANCE LUMP SUM PAYMENT RATHER THAN TAKING ALL OF IT IN MONTHLY PAYMENTS. ALL REMAINING PAYMENTS WERE PROPORTIONATELY REDUCED SO THAT THE LENGTH OF TIME THE WORKMAN CONTINUED TO RECEIVE PAYMENTS REMAINED THE SAME. THE 1973 LEGISLATURE ENACTED SENATE BILL 524 (CH 221 O.L. 1973) WHEREBY ORS 656.230 WAS AMENDED TO PERMIT, WITH BOARD APPROVAL, ADVANCE PAYMENT IN A LUMP SUM OF UP TO 100 PER CENT OF THE WORKMAN'S PERMANENT PARTIAL DISABILITY AWARD WITHOUT CONVERSION TO ITS 'PRESENT VALUE'. THE LAW BECAME EFFECTIVE OCTOBER 5, 1973. IT IS PURSUANT TO THIS AMENDED PROVISION THAT CLAIMANT SEEKS TO INVOKE THE BOARD'S APPROVAL OF A LUMP SUM PAYMENT OF 100 PER CENT OF THE AMOUNT REMAINING DUE CLAIMANT.

THE BOARD HAS NO AUTHORITY TO ORDER THE LUMP SUM PAYMENT OF MORE THAN ONE-HALF OF THE PERMANENT PARTIAL DISABILITY AWARDED CLAIMANT FOR HIS 1969 INJURY - HOWEVER, SHOULD BOTH PARTIES VOLUNTARILY AGREE TO LUMP SUM PAYMENT OF MORE THAN ONE-HALF OF THE PERMANENT PARTIAL DISABILITY AWARD, THE BOARD MAY APPROVE IT IN ITS DISCRETION.

THE LAW IN EFFECT AT THE TIME OF THE INJURY IS CONTROLLING.

IN THE INSTANT CASE, THE REQUEST FOR PAYMENT OF 100 PER CENT OF THE AMOUNT REMAINING DUE CLAIMANT WAS MADE BY THE CLAIMANT BUT OPPOSED BY THE EMPLOYER AND ITS CARRIER - OBVIOUSLY, THERE IS NO VOLUNTARY AGREEMENT OF THE PARTIES TO AWARD CLAIMANT A LUMP SUM PAYMENT OF MORE THAN ONE-HALF OF THE AWARD WHICH HE RECEIVED BY VIRTUE OF THE DETERMINATION ORDER OF SEPTEMBER 3, 1974, AND WHICH WAS PAID TO CLAIMANT PURSUANT TO HIS REQUEST ON NOVEMBER 20, 1974.

ORDER

THE PETITION FOR RECONSIDERATION OF LUMP SUM PAYMENTS RECEIVED FROM THE CLAIMANT IN THE ABOVE ENTITLED MATTER ON FEBRUARY 20, 1976 IS DENIED.

FRED F. DOUGLAS, CLAIMANT

FRANKLIN, BENNETT, OFELT AND JOLLES,
CLAIMANT'S ATTYS.
JONES, LANG, KLEIN, WOLF AND SMITH,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE SECOND DETERMINATION ORDER MAILED JULY 8, 1975 WHEREBY CLAIMANT WAS AWARDED 7.5 DEGREES FOR 5 PER CENT LOSS OF THE LEFT FOREARM AND ADDITIONAL TEMPORARY TOTAL DISABILITY COMPENSATION FROM MARCH 24, 1975 THROUGH APRIL 21, 1975.

CLAIMANT SUFFERED A COMPENSABLE INJURY TO HIS LEFT WRIST DIAGNOSED AS A CONTUSION, HE WAS RELEASED ON JANUARY 28, 1974 TO RETURN TO WORK AND ADVISED TO REPORT BACK TO THE INDUSTRIAL CLINIC IF HIS PAIN AND DISABILITY INCREASED. CLAIMANT RETURNED TO WORK FOR THREE OR FOUR WEEKS AFTER THE INJURY BUT CONTINUED TO SUFFER PAIN AS HE HANDLED THE VARIOUS TOOLS OF HIS TRADE. IN EITHER APRIL OR MAY 1974 HIS EMPLOYMENT WAS TERMINATED - THERE WAS SOME DISAGREEMENT AS TO THE CAUSE FOR SUCH TERMINATION.

IN FEBRUARY 1975 CLAIMANT CONSULTED DR. SHLIM WHO DISCOVERED A SMALL GANGLION ON THE DORSUM OF THE LEFT WRIST WHICH HE SURGICALLY REMOVED ON MARCH 24, 1975. CLAIMANT'S CLAIM HAD BEEN ORIGINALLY CLOSED BY A DETERMINATION ORDER MAILED JUNE 28, 1974 WHICH ONLY AUTHORIZED TIME LOSS BENEFITS FROM JANUARY 4 THROUGH JANUARY 28, 1974. AFTER THE SURGERY THE CLAIM WAS AGAIN CLOSED BY THE SECOND DETERMINATION ORDER.

IN MAY 1975 DR. RINEHART SAW CLAIMANT AND RECOMMENDED CLAIMANT SHOULD NOT WORK AND THAT HE SHOULD HAVE PROLONGED TREATMENT AND TRAINING. DR. RINEHART NOTED 'ELECTROMYOGRAPHIC EVIDENCE OF ABNORMAL MUSCLE FUNCTION PARTICULARLY LEFT SHOULDER, ARM AND WRIST... DUE TO A COMMON CLINICAL SYNDROME WHICH IS POORLY UNDERSTOOD BY THE MAJORITY OF THE MEDICAL PROFESSION. IT CONSISTS OF REFLEX (AUTOMATIC) BRACING OF MUSCLES LEADING TO MUSCLE FATIGUE AND MUSCLE SPASM - AND THENCE DAMAGE OF VARYING DEGREE TO TENDONS AND JOINTS BECAUSE OF THIS SPASM.'

THE REFEREE FOUND IT VERY DIFFICULT TO COMPREHEND FULLY WHAT IT WAS THAT PREVENTED CLAIMANT FROM USING HIS LEFT WRIST - SO DID DR. SHLIM AND DR. REIKE. DR. SHLIM ON FEBRUARY 5, 1975 HAD STATED THAT CLAIMANT WAS OFF WORK A MONTH BECAUSE OF THE WRIST PAIN AND THAT A FEW MONTHS LATER BECAUSE OF SOME DIFFICULTY AT WORK HE EITHER RESIGNED OR WAS FIRED. DR. REIKE ON MARCH 29, 1974 HAD STATED THAT CLAIMANT HAD A LITTLE TENDERNESS ACROSS THE REAR OF THE WRIST AND IN THE EXTENSOR TENDONS BUT SUGGESTED THAT HE RESUME WORK AND USE A LEATHER WRIST BAND ON THE LEFT WRIST WHEN AT WORK. HE FOUND NO EVIDENCE TO SUGGEST LONG TERM IMPAIRMENT WOULD CONTINUE OR THAT SURGICAL INTERVENTION WAS NECESSARY.

DR. SHLIM, COMMENTING UPON DR. RINEHART'S RECOMMENDATION FOR ADDITIONAL TREATMENT, STATED THAT THERE WAS NO INVOLVEMENT OF CLAIMANT'S SHOULDER OR UPPER ARM AND DR. RINEHART'S REPORT FAILED TO INDICATE WHETHER THERE WAS ANY LACK OF MOTION IN THE LEFT WRIST. WITH RESPECT TO THE CLAIMANT'S DISABILITY, DR. SHLIM STATED THAT IT WAS HIS FEELING THAT THERE WAS A TREMENDOUS FUNCTIONAL OVERLAY, THAT CLAIMANT HAD NO SIGNIFICANT DISABILITY AND SHOULD GO BACK TO WORK.

DR. ROBINSON, IN HIS REPORT OF AUGUST 25, 1975, AGREED WITH DR. SHLIM AND FELT THAT CLAIMANT WAS ABLE TO WORK AND THAT HE CERTAINLY DID NOT CONSIDER CLAIMANT TOTALLY DISABLED OR IN NEED OF A YEAR'S TREATMENT AS HAD BEEN SUGGESTED.

THE REFEREE, AFTER FULL CONSIDERATION TO ALL OF THE EVIDENCE, FOUND NO BASIS ON WHICH TO MODIFY THE SECOND DETERMINATION ORDER. THE REFEREE CONCLUDED THAT THE CLAIM SHOULD NOT BE REOPENED, THAT NO ADDITIONAL COMPENSATION FOR TEMPORARY TOTAL DISABILITY SHOULD BE ORDERED (CLAIMANT HAD CONTENDED HE WAS ENTITLED TO ADDITIONAL TEMPORARY TOTAL DISABILITY COMPENSATION FOR A CERTAIN PERIOD PRIOR TO THE GANGLION SURGERY AND FOR CERTAIN PERIOD OF TIME SUBSEQUENT THERETO) AND THAT THE AWARD OF PERMANENT PARTIAL DISABILITY ADEQUATELY COMPENSATED CLAIMANT FOR ANY RESIDUAL DISABILITY IN HIS LEFT WRIST RESULTING FROM THE INDUSTRIAL INJURY OF JANUARY 4, 1974.

THE BOARD, ON DE NOVO REVIEW, AGREES WITH THE FINDINGS AND CONCLUSIONS OF THE REFEREE. WITH THE EXCEPTION OF THE RATHER BIZARRE DIAGNOSIS MADE BY DR. RINEHART TOGETHER WITH HIS RECOMMENDATION OF LONG THERAPY, THERE IS NO MEDICAL EVIDENCE WHICH WOULD INDICATE ANY IMPAIRMENT OTHER THAN IN THE CLAIMANT'S LEFT WRIST AND THAT PHYSICAL IMPAIRMENT IS MINIMAL.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 24, 1975 IS AFFIRMED.

WCB CASE NO. 74-3654 MARCH 1, 1976

DONALD PETERSON, CLAIMANT

BOIVIN AND BOIVIN, CLAIMANT'S ATTYS.
COLLINS, FERRIS AND VELURE,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

THE CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED DENIAL OF CLAIMANT'S CLAIM BY THE EMPLOYER.

CLAIMANT IS A 57 YEAR OLD SALESMAN, HE HAS BEEN EMPLOYED IN THE MEN'S DEPARTMENT OF THE EMPLOYER'S RETAIL STORE SINCE DECEMBER 1972.

CLAIMANT APPARENTLY ENJOYED HIS JOB AND HAD BEEN PUTTING FORTH CONSIDERABLE EFFORT TO ENDEAVOR TO BECOME A MANAGER IN THE MEN'S DEPARTMENT, HOWEVER, A RELATIVELY NEW EMPLOYE IN THE DEPARTMENT WAS FELT BY CLAIMANT TO BE A RIVAL FOR THIS POSITION AND ON OCCASION CLAIMANT AND THIS OTHER SALESMAN WOULD ENGAGE IN A DISPUTE AT THE STORE, THESE INCIDENTS TENDED TO IRRITATE CLAIMANT.

ON JULY 29, 1974 CLAIMANT WENT TO WORK AT HIS USUAL TIME AND PERFORMED HIS USUAL DUTIES - AT APPROXIMATELY 3.00, AS HE WAS CARRYING A 30 TO 40 POUND 3' X 2' BOX OF WORK CLOTHING TO ANOTHER AREA IN THE STORE, CLAIMANT FELT A GRIPPING PAIN IN THE MID CHEST SOMEWHAT TO THE LEFT SIDE. HE DISMISSED THIS AS INDIGESTION AND SAT DOWN FOR APPROXIMATELY FIVE MINUTES. THEREAFTER HE RESUMED WORK UNTIL HE AGAIN FELT POORLY. HE RETIRED TO THE BACK OF THE STORE AND LAID DOWN FOR 15 TO 30 MINUTES BEFORE HE AGAIN RETURNED TO WORK, COMPLETED HIS SHIFT AND DROVE HOME BY HIMSELF. THAT EVENING HE ATE A NORMAL TYPE

DINNER AND RETIRED - EARLY THE NEXT MORNING CLAIMANT DID NOT FEEL WELL AND COMPLAINED OF SEVERE CHEST PAINS. HIS WIFE TOOK HIM TO SEE DR. PETERSON WHO FELT CLAIMANT WAS DEVELOPING BRONCHOPNEUMONIA, PERICARDITIS OR MYOCARDIAL INFARCTION AND ORDERED CLAIMANT HOSPITALIZED.

SHORTLY BEFORE THIS INCIDENT CLAIMANT HAD DEVELOPED A CHEST COLD AND ALSO SOME NECK PAIN AND STIFFNESS AND HAD BEEN SEEN BY A DOCTOR FOR THESE PROBLEMS. DR. PETERSON, AFTER HOSPITALIZING CLAIMANT, MADE A DIAGNOSIS OF ACUTE INFARCT.

DR. OELKE FOUND PROBABLY EXTENSIVE BILATERAL LEFT AND RIGHT CORONARY ARTERY DISEASE. CLAIMANT REMAINED IN THE HOSPITAL FOR 18 DAYS AND COMPLAINED CONTINUOUSLY OF UNRELIEVED PAIN. ON SEPTEMBER 16, 1974 HE WAS ADMITTED TO A EUGENE HOSPITAL AND ARTERIOSCLEROTIC CORONARY VASCULAR DISEASE, STATUS POST MYOCARDIAL INFARCTION WAS DIAGNOSED. AN ANEURYSM WAS ALSO DISCOVERED AND OPEN HEART TWO VESSEL SURGERY WITH RESECTION OF THE ANEURYSM WAS PERFORMED.

ON THE QUESTION OF WHETHER THE HEART ATTACK WAS CAUSALLY RELATED TO CLAIMANT'S WORK ACTIVITY SEVERAL DOCTORS EXPRESSED THEIR OPINIONS. THE ONLY OPINION WHICH SUPPORTED CLAIMANT'S CONTENTION WAS MADE BY DR. PETERSON AND WAS BASED UPON AN ASSUMPTION THAT CLAIMANT WAS WORKING SIGNIFICANTLY LONGER THAN THE USUAL 40 HOURS PER WEEK AND UNDER HIGHLY STRESSFUL CONDITIONS. THE REFEREE FOUND THAT THIS HISTORY AS RELATED TO DR. PETERSON WAS NOT ENTIRELY BORNE OUT BY THE TESTIMONY.

DR. OELKE, AN INTERNAL MEDICINE SPECIALIST, TREATED CLAIMANT DURING HIS HOSPITALIZATION IN COOS BAY - HIS REPORTS INDICATED HE WAS UNABLE TO SAY WHETHER OR NOT THE WORK ACTIVITY WAS A SIGNIFICANT CONTRIBUTING FACTOR TO THE HEART ATTACK. DR. HAWN, A CARDIOLOGIST, WHO WAS CLAIMANT'S TREATING PHYSICIAN WHILE IN THE EUGENE HOSPITAL, STATED THAT THE CORONARY ARTERY DISEASE COULD NOT BE SHOWN TO BE RELATED TO CLAIMANT'S JOB. DR. SUTHERLAND, WHO TESTIFIED AT THE HEARING, ALSO EXPRESSED AN OPINION THAT CLAIMANT'S WORK ACTIVITY WAS NOT A CONTRIBUTING FACTOR TO THE MYOCARDIAL INFARCTION.

THE REFEREE, FOUND THE MEDICAL EVIDENCE WITH RESPECT TO CAUSATION PREPONDERATED QUITE HEAVILY IN FAVOR OF AFFIRMING THE DENIAL. THE REFEREE WAS ESPECIALLY PERSUADED BY THE CLEAR AND CONVINCING TESTIMONY OF DR. SUTHERLAND WHO SUPPORTED HIS OPINION IN A VERY CONCLUSIVE MANNER.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE REFEREE'S FINDINGS AND CONCLUSIONS AS ITS OWN.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 26, 1975 IS AFFIRMED.

WCB CASE NO. 75-2856 MARCH 1, 1976

RASS INGLE, JR., CLAIMANT

FRANKLIN, BENNETT, OFELT AND JOLLES,
CLAIMANT'S ATTYS.
JAQUA AND WHEATLEY, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

CLAIMANT REQUESTS BOARD REVIEW OF A REFEREE'S ORDER WHICH AFFIRMED A DETERMINATION ORDER MAILED MAY 22, 1975 AWARDING CLAIMANT 15 PER CENT OF THE MAXIMUM ALLOWABLE FOR UNSCHEDULED LOW BACK DISABILITY.

CLAIMANT SUSTAINED A COMPENSABLE INJURY ON JUNE 29, 1974, WHILE EMPLOYED AS A MILLWRIGHT ASSISTANT AT INTERNATIONAL PAPER CO., WHERE HE HAD BEEN EMPLOYED FOR 11 YEARS. CLAIMANT WAS TREATED CONSERVATIVELY FOR SIX WEEKS AND THEN RETURNED TO WORK. HIS BACK PAIN INCREASED AND HE WAS THEN SEEN BY DR. SERBU, WHO, ON SEPTEMBER 11, 1974, PERFORMED SURGERY FOR REMOVAL OF A HERNIATED LUMBAR DISC. CLAIMANT MADE A GOOD RECOVERY, RETURNED TO WORK IN JANUARY 1974 AND HAS WORKED STEADILY SINCE. DR. SERBU EVALUATED CLAIMANT'S PERMANENT DISABILITY AS MINIMAL.

CLAIMANT IS ABLE TO PERFORM HIS JOB BUT DOES HAVE SOME PAIN, WHICH OF COURSE, IS NOT COMPENSABLE UNLESS DISABLING. HE ENJOYS THE GAME OF GOLF AND PLAYS REGULARLY.

THE REFEREE FOUND CLAIMANT HAD BEEN ADEQUATELY COMPENSATED FOR HIS LOSS OF EARNING CAPACITY BY THE AWARD MADE BY THE DETERMINATION.

ON DE NOVO REVIEW, THE BOARD AFFIRMS AND ADOPTS THE ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 29, 1975 IS AFFIRMED.

CLAIM NO. E 42 CC 72219 RG MARCH 1, 1976

LESTER ROBUCK, CLAIMANT

OWN MOTION DETERMINATION

THIS CLAIMANT SUSTAINED A COMPENSABLE INJURY IN AUGUST, 1966. BY STIPULATED SETTLEMENT HE RECEIVED AN AWARD OF 10 PER CENT LOSS OF AN ARM BY SEPARATION FOR UNSCHEDULED LEFT SHOULDER INJURY.

THE CLAIM WAS VOLUNTARILY REOPENED BY THE CARRIER TO PROVIDE CLAIMANT WITH SURGERY RECOMMENDED BY DR. BECKER. ON FEBRUARY 20, 1975, DR. BECKER PERFORMED A RESECTION OF THE DISTAL LEFT CLAVICLE WITH GOOD RESULTS. CLAIMANT'S CONDITION WAS FOUND TO BE STATIONARY ON JULY 1, 1975 AND, BASED ON DR. BECKER'S CLOSING REPORT, THE EVALUATION DIVISION RECOMMENDED THAT CLAIMANT BE AWARDED TEMPORARY TOTAL DISABILITY COMPENSATION FROM FEBRUARY 19, 1975 THROUGH JULY 1, 1975, BUT NO ADDITIONAL AWARD FOR HIS UNSCHEDULED DISABILITY.

ORDER

CLAIMANT IS ENTITLED TO TEMPORARY TOTAL DISABILITY FROM FEBRUARY 19, 1975 THROUGH JULY 1, 1975.

WCB CASE NO. 75-2080 MARCH 2, 1976

JAMES H. BELK, CLAIMANT
REITER, WALL, BRICKER, ZAKOVICS,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

CLAIMANT REQUESTS BOARD REVIEW OF A REFEREE'S ORDER WHICH GRANTED CLAIMANT AN ADDITIONAL AWARD OF 64 DEGREES FOR 20 PER CENT UNSCHEDULED CERVICAL DISABILITY. CLAIMANT CONTENDS HIS CLAIM WAS PREMATURELY CLOSED ON DR. SMITH'S REPORT, ASKS FOR PENALTIES AND ATTORNEY'S FEES AND AN AWARD OF PERMANENT TOTAL DISABILITY.

ON NOVEMBER 7, 1968, CLAIMANT SUFFERED A COMPENSABLE INJURY TO HIS LEFT SHOULDER AND CERVICAL SPINE. HE CONSULTED A CHIROPRACTOR AND ON MARCH 27, 1969 HIS CLAIM WAS CLOSED WITH TEMPORARY TOTAL DISABILITY COMPENSATION BUT NO AWARD FOR PERMANENT DISABILITY.

CLAIMANT WORKED BRIEFLY THEREAFTER. HE SOUGHT FURTHER MEDICAL CARE AND TREATMENT AND, ON OCTOBER 14, 1971, DR. DONALD SMITH PERFORMED A CERVICAL LAMINECTOMY AT C6-7 WITH GOOD RESULTS AND ADVISED CLAIMANT TO SEEK EMPLOYMENT OTHER THAN TRUCK DRIVING. BY A SECOND DETERMINATION ORDER MAILED SEPTEMBER 20, 1972, CLAIMANT WAS AWARDED 48 DEGREES FOR 15 PER CENT UNSCHEDULED CERVICAL DISABILITY AND 15 DEGREES FOR 10 PER CENT LOSS OF THE LEFT FOREARM.

ON MARCH 22, 1972 THE DIVISION OF VOCATIONAL REHABILITATION WAS PREPARED TO TRAIN CLAIMANT AS A SEWAGE PLANT OPERATOR, HOWEVER, CLAIMANT SAID HE WAS RETURNING TO TRUCK DRIVING - DIVISION OF VOCATIONAL REHABILITATION DISCHARGED HIM FOR LACK OF COOPERATION. CLAIMANT REFUSED DIVISION OF VOCATIONAL REHABILITATION SERVICES AGAIN ON AUGUST 25, 1972.

CLAIMANT RETURNED TO DR. SMITH ON FEBRUARY 10, 1974 AT THE FUND'S INSISTENCE. ALTHOUGH MYELOGRAPHIC STUDIES DID NOT WHOLLY JUSTIFY SURGERY, DR. SMITH POSTULATED A CERVICAL FUSION AS A WAY OF POSSIBLY RELIEVING CLAIMANT'S COMPLAINTS BUT ONLY IF CLAIMANT WOULD LOSE WEIGHT. ALTHOUGH CLAIMANT SUBMITTED TO A MEDICAL DIET PLAN, HE CONTINUED TO WEIGH 286 POUNDS AND DR. SMITH DID NOT PERFORM THE SURGERY. BASED ON DR. SMITH'S REPORT OF FEBRUARY 19, 1975, A THIRD DETERMINATION ORDER DATED MAY 15, 1975 CLOSED THE CLAIM WITH NO AWARD OF PERMANENT DISABILITY.

THE REFEREE FOUND THAT THE CLAIM WAS PROPERLY CLOSED AS OF FEBRUARY 19, 1975, THAT, EXCEPT FOR VERY BRIEF PERIODS OF TIME, CLAIMANT HAS RECEIVED TEMPORARY TOTAL DISABILITY COMPENSATION FOR OVER 6 YEARS. CLAIMANT HAS RECEIVED MEDICAL SERVICES FROM MORE THAN 15 PHYSICIANS, MANY OF WHOM ARE QUALIFIED SPECIALISTS IN VARIED FIELDS OF MEDICINE AND PSYCHIATRY, ONLY ONE SAYS CLAIMANT CAN'T WORK, ONLY ONE COUNSELOR SAYS CLAIMANT ISN'T TRAINABLE.

THE BOARD, ON DE NOVO REVIEW, RELYING ON THE FACT THAT CLAIMANT

HAS BEEN SEEN THREE TIMES BY THE EVALUATION DIVISION AND SEEN AND HEARD BY THE REFEREE, CONCLUDES CLAIMANT IS NOT ENTITLED TO A FURTHER AWARD OF PERMANENT PARTIAL DISABILITY. THE BOARD CONCLUDES THAT CLAIMANT'S CLAIM WAS PROPERLY CLOSED BASED ON DR. SMITH'S REPORTS AND PENALTIES AND ATTORNEY FEES ARE NOT APPLICABLE.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 17, 1975 IS AFFIRMED.

WCB CASE NO. 75-1719 MARCH 2, 1976

WILLIAM NORRIS, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON, MOORE AND PHILLIPS.

THE CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE DENIAL OF CLAIMANT'S CLAIM BY THE FUND.

CLAIMANT HAS BEEN A FIREMAN FOR THE TUALATIN FIRE DISTRICT FOR APPROXIMATELY 17 YEARS, FOR MOST OF THAT TIME HE WAS A FIRE FIGHTER. THE LAST TWO OR THREE YEARS, AS AN ENGINEER, HIS DUTIES INCLUDED DRIVING THE FIRE TRUCK TO THE SCENE OF THE EMERGENCY, CHECKING OVER THE EQUIPMENT AT THE FIRE AND AT THE FIREHOUSE UPON RETURN, BUT VERY LITTLE FIRE-FIGHTING DUTIES.

ON JANUARY 25, 1975 AN ALARM WAS RECEIVED SHORTLY AFTER NOON, ON THE WAY TO THE SCENE, THE FIREFIGHTERS WERE ADVISED 'FALSE ALARM', AND CLAIMANT RETURNED THE VEHICLE TO THE FIRE STATION. AS HE BACKED THE TRUCK INTO ITS REGULAR LOCATION, HE HAD A TIGHTNESS IN HIS CHEST WHICH LASTED FOR ALMOST AN HOUR.

AT THE CONCLUSION OF HIS SHIFT ON THE FOLLOWING DAY, CLAIMANT FELT FINE AND JOINED OTHER MEMBERS OF THE FIRE DEPARTMENT FOR COFFEE. LATER HE WAS ASKED TO HELP MOVE SOME FURNITURE - CLAIMANT ASSISTED IN CARRYING TWO PIECES OF A THREE-PIECE SECTIONAL AND AN EMPTY CHINA CABINET DOWN ONE FLIGHT OF STAIRS AND LOADING THEM INTO A PICKUP. AT THIS TIME CLAIMANT AGAIN BEGAN TO ACHE, HIS GIRL FRIEND DROVE HIM TO THE HOSPITAL WHERE A MYOCARDIAL INFARCTION WAS DIAGNOSED. CLAIMANT SUBMITTED A CLAIM WHICH WAS DENIED BY THE FUND ON APRIL 21, 1975.

WHILE IN THE HOSPITAL CLAIMANT WAS CARED FOR BY HIS OWN PHYSICIAN, DR. TARRO, A SPECIALIST IN INTERNAL MEDICINE AND DIAGNOSES. DR. TARRO HAD BEEN GIVING CLAIMANT ANNUAL MEDICAL EXAMINATIONS SINCE MARCH 1971. IT WAS DR. TARRO'S OPINION THAT THE INFARCT WAS CAUSALLY RELATED TO CLAIMANT'S INDUSTRIAL EMPLOYMENT AS A FIREMAN. HE FELT THAT CLAIMANT WAS UNDER STRESS AT WORK AND THAT LONG TERM STRESS WOULD BE AN ETIOLOGICAL FACTOR IN CORONARY ARTERY DISEASE. HE ALSO FELT THAT THE EPISODE OF JANUARY 25, WAS NOT AN ATTACK OF ANGINA AS IT LASTED NEARLY AN HOUR - AN ATTACK OF ANGINA NORMALLY LASTS ONLY A FEW MINUTES.

DR. GRISWOLD AND DR. KLOSTER, BOTH PROFESSORS IN THE CARDIOLOGY DEPARTMENT AT THE UNIVERSITY OF OREGON MEDICAL SCHOOL, EACH EXPRESSED THE OPINION THAT THERE WAS NO CAUSAL CONNECTION TO THE INDUSTRIAL ACTIVITY, EACH FELT THAT IT WAS MORE LIKELY THAT THE FURNITURE MOVING

WAS THE PRECIPITATING EVENT IN THE DEVELOPMENT OF CLAIMANT'S ACUTE MYOCARDIAL INFARCTION.

THE REFEREE FOUND LITTLE IN THE DOCUMENTARY EVIDENCE OR IN CLAIMANT'S TESTIMONY THAT WOULD INDICATE THE CAUSE OF HIS ALLEGED STRESS. CLAIMANT TESTIFIED THAT WAITING AROUND FOR ALARMS WAS STRESSFUL AND WHEN THE ALARMS CAME IN HE FELT 'SCARED AND EXCITED' - HE ALSO WORRIED THAT HE WOULDN'T MAKE THE PROPER TURNS AND THEREBY DELAY THE ARRIVAL OF THE TRUCK AT THE SCENE OF THE PARTICULAR EMERGENCY.

THE REFEREE FOUND THAT THE DAILY LOG BOOK FOR THE YEAR 1974 INDICATED VERY FEW MAJOR FIRES, THAT CLAIMANT HAD FOUR CALLS IN OCTOBER, ONE IN NOVEMBER AND ANOTHER IN DECEMBER, 1974. HE CONCLUDED THAT DR. TARRO'S TESTIMONY WAS RATHER EQUIVOCAL AND, FOR THE MOST PART, CONCLUSIONARY. HE FURTHER CONCLUDED THAT EVEN THOUGH DR. TARRO WAS THE TREATING PHYSICIAN, THE OPINIONS OF DR. GRISWOLD AND DR. KLOSTER WERE ENTITLED TO A GREATER WEIGHT AND THAT THE PREPONDERANCE OF THE EVIDENCE DID NOT FAVOR THE THEORY ADVANCED BY CLAIMANT AS TO THE ETIOLOGY OF HIS MYOCARDIAL INFARCTION AND THE CLAIM WAS PROPERLY DENIED.

THE MAJORITY OF THE BOARD, ON DE NOVO REVIEW, FINDS THAT UNDER THE PROVISIONS OF ORS 656.802, CLAIMANT IS ENTITLED TO A PRESUMPTION THAT HIS MYOCARDIAL INFARCTION, REGARDLESS OF WHETHER IT OCCURRED DURING HIS HOURS OFF DUTY, IS RELATED TO HIS OCCUPATION AND IT IS INCUMBENT UPON THE FUND TO ESTABLISH THAT THERE IS NO CAUSAL RELATIONSHIP BETWEEN CLAIMANT'S OCCUPATIONAL ACTIVITIES AND HIS ENSUING CARDIAC DISABILITY.

IN THE INSTANT CASE, DR. GRISWOLD AND DR. KLOSTER BOTH EXPRESSED AN OPINION THAT CLAIMANT'S MYOCARDIAL INFARCTION WAS ATTRIBUTABLE TO HIS SUBSEQUENT FURNITURE MOVING ACTIVITIES BUT SUCH OPINIONS DO NOT EXPLAIN THE SIGNIFICANCE OF THE EXTENSIVE AND PROLONGED ANGINA WHICH CLAIMANT SUFFERED DURING THE COURSE OF HIS EMPLOYMENT AND WHICH WAS CLASSIFIED BY DR. TARRO, CLAIMANT'S TREATING PHYSICIAN FOR MANY YEARS, AS A PRE-INFARCTION SYNDROME, INDICATIVE OF A CURRENT AND EMMINENT HEART ATTACK.

THE BOARD CONCLUDES THAT THE EVIDENCE PRESENTED BY THE FUND, I.E., THE OPINIONS OF DR. GRISWOLD AND DR. KLOSTER, NEITHER OF WHOM HAD TREATED THE CLAIMANT BUT HAD SIMPLY REVIEWED THE HOSPITAL RECORDS ASSOCIATED WITH CLAIMANT'S HOSPITALIZATION FOR THE MYOCARDIAL INFARCTION, WAS NOT SUFFICIENT TO REBUT THE STATUTORY PRESUMPTION - THEREFORE, CLAIMANT'S CLAIM SHOULD BE REMANDED TO THE FUND FOR PAYMENT OF COMPENSATION AS PROVIDED BY LAW.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 21, 1975 IS REVERSED.

CLAIMANT'S CLAIM IS REMANDED TO THE STATE ACCIDENT INSURANCE FUND FOR THE PAYMENT OF COMPENSATION AS PROVIDED BY LAW COMMENCING JANUARY 26, 1975 AND UNTIL CLOSED PURSUANT TO ORS 656.268.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES AT THE HEARING, THE SUM OF 750 DOLLARS PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH BOARD REVIEW, THE SUM OF 400 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

DISSENT

CHAIRMAN WILSON DISSENTS AS FOLLOWS =

I RESPECTFULLY DISSENT FROM THE MAJORITY HOLDING OF THE BOARD AND WOULD AFFIRM THE REFEREE'S AFFIRMANCE OF THE DENIAL OF APRIL 21, 1975.

CLAIMANT COMES INTO THIS CASE FORTIFIED WITH THE SO-CALLED 'FIREMAN'S PRESUMPTION' THAT HIS EMPLOYMENT IS DISPUTABLY PRESUMED TO BE THE CAUSE OF THE CARDIOVASCULAR DISEASE. THE BURDEN OF OVERCOMING THE PRESUMPTION IS UPON THE FUND. MY EVALUATION OF THE EVIDENCE PERSUADES ME THAT THE PRESUMPTION HAS BEEN SUCCESSFULLY OVERCOME AND THAT THE WEIGHT OF THE EVIDENCE SUPPORTS THE PROPRIETY OF THE DENIAL.

THE MAJORITY OPINION APPEARS TO BE CONTRARY TO HOLDINGS IN TWO PRECEDING CASES CONSIDERED BY THE BOARD. IN THE MATTER OF THE COMPENSATION OF WALTER PFLUGHAUPT, CLAIMANT (UNDERSCORED), WCB CASE NO. 73-3525, (1975) AND IN THE MATTER OF THE COMPENSATION OF KENNETH HARMON, CLAIMANT (UNDERSCORED), WCB CASE NO. 74-1455 (1975).

-S- M. KEITH WILSON, CHAIRMAN

WCB CASE NO. 75-1026 MARCH 3, 1976

THOMAS C. LEDWITH, CLAIMANT
POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

CLAIMANT REQUESTS REVIEW BY THE BOARD OF A REFEREE'S ORDER WHEREIN HE AFFIRMED AN AWARD OF 45 DEGREES FOR 30 PER CENT LEFT LEG DISABILITY MADE BY DETERMINATION ORDER OF MARCH 3, 1975 AND INCREASED THE UNSCHEDULED DISABILITY AWARD FROM 32 DEGREES TO 96 DEGREES FOR 30 PER CENT OF THE MAXIMUM FOR UNSCHEDULED DISABILITY. THE ISSUE ON REVIEW IS THE EXTENT OF BOTH SCHEDULED AND UNSCHEDULED DISABILITY.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON NOVEMBER 5, 1971 WHEN HE STEPPED IN A HOLE AND STRAINED HIS LEFT KNEE AND LOW BACK. CLAIMANT THEN UNDERWENT FOUR KNEE SURGERIES = IN JANUARY 1972, A MENISCECTOMY = IN AUGUST 1972, AN ARTHROTOMY = IN SEPTEMBER 1973, A FACETECTOMY OF THE PATELLA = AND IN JANUARY 1974, A PATELLECTOMY.

THE CLAIM WAS CLOSED MARCH 3, 1975 AWARDING CLAIMANT 45 DEGREES FOR 30 PER CENT LOSS OF LEFT LEG PLUS 32 DEGREES FOR 10 PER CENT UNSCHEDULED DISABILITY.

CLAIMANT HAS HAD CONTINUING LEG AND BACK PROBLEMS. HE DEMONSTRATES DIFFICULTY IN USING STAIRS, SITTING OR STANDING TOO LONG. ANY EXCESSIVE ACTIVITY INCREASES THE PAIN, CAUSES SOME SWELLING AND STIFFNESS. BACK PAIN BECOMES CHRONIC UPON EXERTION OR ACTIVITY.

CLAIMANT CANNOT RETURN TO HIS JOB AT THE FABRIC MILL AND HIS REHABILITATION HAS BEEN HINDERED BY HIS RECURRING MEDICAL PROBLEMS. AT THE PRESENT TIME, CLAIMANT IS ENROLLED IN A BOOKKEEPING COURSE WHICH SHOULD BE COMPLETED BY MARCH, 1976.

THE BOARD AGREES THAT CLAIMANT HAS SUSTAINED SOME LOSS OF EARNING CAPACITY AND CONCURS WITH THE FINDINGS OF THE REFEREE THAT IT IS EQUAL TO 30 PER CENT OF THE MAXIMUM ALLOWABLE FOR UNSCHEDULED DISABILITY.

WITH RESPECT TO THE AWARD FOR SCHEDULED DISABILITY, THE BOARD FINDS THAT CLAIMANT HAS SUFFERED A GREATER DEGREE OF LOSS OF PHYSICAL FUNCTION THAN THAT FOR WHICH HE HAS BEEN AWARDED AND THAT HE IS ENTITLED TO 45 PER CENT LOSS FUNCTION OF THE LEFT LEG.

ORDER

THE REFEREE'S ORDER DATED SEPTEMBER 22, 1975 IS MODIFIED. CLAIMANT IS AWARDED 67.5 DEGREES OF A MAXIMUM OF 150 DEGREES FOR LOSS FUNCTION LEFT LEG. THIS AWARD FOR THE SCHEDULED DISABILITY IS IN LIEU OF AND NOT IN ADDITION TO THE AWARD MADE BY THE REFEREE. IN ALL OTHER RESPECTS THE ORDER OF THE REFEREE IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, 25 PER CENT OF THE INCREASED COMPENSATION MADE PAYABLE BY THIS ORDER NOT TO EXCEED 2,300 DOLLARS.

WCB CASE NO. 75-49 MARCH 3, 1976

STEPHAN L. POWELL, CLAIMANT

RINGO, WALTON AND EVES,
CLAIMANT'S ATTYS.
RALPH TODD, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED A DETERMINATION ORDER DATED SEPTEMBER 9, 1975 AWARDING CLAIMANT 96 DEGREES FOR UNSCHEDULED LOW BACK DISABILITY AND 37.5 DEGREES FOR SCHEDULED LEFT LEG DISABILITY.

CLAIMANT WAS EMPLOYED BY A SOFT DRINK COMPANY WHEN HE SUSTAINED A COMPENSABLE BACK INJURY IN JULY 1973. A MYELOGRAM INDICATED A HERNIATED L4-5 LEFT-SIDED NUCLEUS PULPOSIS AND A LAMINECTOMY WAS PERFORMED IN AUGUST 1973. POSTOPERATIVELY, CLAIMANT HAD RESIDUAL LOW BACK AND LEFT LEG PAIN ALONG WITH CONSIDERABLE PERSISTENT FOOT DROP. A SECOND LUMBAR LAMINECTOMY WAS PERFORMED AT THE L3-4 LEVEL IN DECEMBER 1973. CLAIMANT CONTINUED TO HAVE LOW BACK AND LEFT LEG PAIN WHICH WAS EXACERBATED BY ACTIVITY. A THIRD MYELOGRAM REVEALED NO DEFINITE ABNORMALITIES.

IN JUNE 1975 CLAIMANT'S COMPLAINTS WERE CONTINUED LOW BACK PAIN, CRAMPS IN THE LEFT LEG, TINGLING AND NUMBNESS IN THE FOOT AND LEG COMBINED WITH FOOT DROP. THE INJURY AFFECTED HIS ABILITY TO WALK AND PRECLUDED LIFTING AND BENDING ACTIVITY. CLAIMANT DID NOT RETURN TO THE SOFT DRINK COMPANY, BUT IS NOW EMPLOYED AS A TRANSPORTATION SUPERVISOR OF A BUS COMPANY. CLAIMANT HAS A BACHELOR'S DEGREE AND HAS ALMOST COMPLETED A FIFTH YEAR.

THE REFEREE FOUND THAT CLAIMANT'S WORK HISTORY DID NOT INDICATE THAT HIS EARNING CAPACITY WAS SUBSTANTIALLY DEPENDENT UPON HIS ABILITY TO PERFORM STRENUOUS PHYSICAL WORK - CLAIMANT HAS TRAINING AND EXPERIENCE IN LIGHT AND SEDENTARY WORK WHICH HE HAS SHOWN ABILITY

TO ADEQUATELY PERFORM. EARNING CAPACITY IS DETERMINED IN RELATION TO CLAIMANT'S ABILITY TO GAIN AND HOLD WORK IN THE BROAD FIELD OF GENERAL INDUSTRIAL OCCUPATIONS.

THE REFEREE CONCLUDED THAT CLAIMANT HAD SUFFERED A LOSS OF EARNING CAPACITY BUT, AFTER CONSIDERING SUCH FACTORS AS AGE, ABILITIES AND EDUCATION, THE AWARD OF 96 DEGREES MADE BY THE DETERMINATION ORDER ADEQUATELY COMPENSATED CLAIMANT.

THE REFEREE FOUND THAT COMPARING CLAIMANT'S LEG CONDITION NOW WITH ITS CONDITION BEFORE THE INJURY, THE AWARD FOR LEFT LEG MADE BY THE DETERMINATION ORDER WAS ADEQUATE.

THE BOARD, ON DE NOVO REVIEW, CONCURS WITH THE FINDINGS MADE BY THE REFEREE AND AFFIRMS HIS ORDER.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 15, 1975 IS AFFIRMED.

WCB CASE NO. 75-2288 MARCH 3, 1976

GEORGE E. FINNEY, CLAIMANT

EVOHL F. MALAGON, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS REVIEW BY THE BOARD OF A REFEREE'S ORDER IN WHICH HE AWARDED CLAIMANT AN ADDITIONAL 30 DEGREES (MAKING A TOTAL OF 120 DEGREES) FOR SCHEDULED RIGHT LEG DISABILITY - AWARDED 64 DEGREES FOR 20 PER CENT UNSCHEDULED LOW BACK DISABILITY - AND FOUND THAT THE FIVE YEAR AGGRAVATION PERIOD PROPERLY BEGAN APRIL 2, 1970. THE ONLY ISSUE ON REVIEW IS THE EXTENT OF CLAIMANT'S UNSCHEDULED DISABILITY.

WHILE WORKING IN A SAWMILL, CLAIMANT SUFFERED A COMPENSABLE INJURY IN JULY 1969 WHEN HE FRACTURED HIS RIGHT ANKLE. CLAIMANT HAD SURGERY AND IN APRIL 1970 A DETERMINATION ORDER AWARDED 20 DEGREES FOR LOSS OF RIGHT FOOT.

IN 1972, CLAIMANT'S ANKLE CONDITION WORSENED AND IN JULY 1972 AN ANKLE FUSION WAS PERFORMED, FOLLOWED BY A RE-FUSION IN MAY 1973. A SECOND DETERMINATION ORDER ENTERED IN MAY 1975 AWARDED TEMPORARY TOTAL DISABILITY AND 90 DEGREES FOR PARTIAL LOSS OF THE RIGHT LEG.

CLAIMANT'S RIGHT FOOT IS BENT INWARD. HE WEARS AN ELEVATED SHOE, LIMPS, CANNOT WALK OVER TWO BLOCKS AND CANNOT DRIVE OR SIT FOR MORE THAN A SHORT PERIOD OF TIME. DR. COHEN RATES CLAIMANT'S RIGHT FOOT DISABILITY AS SEVERE. THE REFEREE FOUND CLAIMANT HAD BUT 20 PER CENT OF USE REMAINING.

DR. COHEN ALSO RELATES CLAIMANT'S HIP AND LOW BACK DIFFICULTIES TO CLAIMANT'S LIMP CAUSED BY THE FOOT POSITION AND SHORTENING OF THE RIGHT LOWER EXTREMITY. CONSEQUENTLY, THE REFEREE FOUND CLAIMANT HAD UNSCHEDULED LOW BACK DISABILITY EQUAL TO 64 DEGREES OF A MAXIMUM OF 320 DEGREES. CLAIMANT'S COUNSEL CONTENDS CLAIMANT'S LOSS OF EARNING CAPACITY HAS BEEN DIMINISHED BY A MUCH HIGHER DEGREE.

CLAIMANT, WHO IS 30 YEARS OF AGE, HAS A GED AND HAS HAD SOME TECHNICAL TRAINING IN PREPARING TO BECOME AN ELECTRONIC TECHNICIAN. LATER AT UMPQUA COMMUNITY COLLEGE HE TOOK ACCOUNTING CLASSES. IT APPEARS CLAIMANT HAS ABANDONED THESE PROGRAMS TO BECOME SELF-EMPLOYED, BRONZE-PLATING ITEMS SUCH AS BABY SHOES - HE DOES NOT WISH ANY FURTHER SCHOOLING OR TRAINING.

THE REFEREE FOUND IT DIFFICULT TO ASSESS CLAIMANT'S LOSS OF WAGE EARNING CAPACITY SINCE THERE WAS LITTLE DOCUMENTATION OF CLAIMANT'S EARNING DATA, AND A PROJECTION OF HIS EARNINGS FROM HIS PROPOSED BUSINESS VENTURE WAS SPECULATIVE. HOWEVER, CLAIMANT DOES HAVE LIMITED USE OF HIS BACK AND HIS BACK HAD BEEN ONE OF CLAIMANT'S MORE IMPORTANT ASSETS IN THE LABOR MARKET BEFORE HIS INJURY, THEREFORE, CLAIMANT, THE REFEREE CONCLUDED, WAS ENTITLED TO AN AWARD OF 64 DEGREES FOR HIS LOSS OF EARNING CAPACITY.

THE BOARD, ON DE NOVO REVIEW, CONCURS WITH THE FINDINGS AND CONCLUSIONS OF THE REFEREE AND AFFIRMS HIS ORDER.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 26, 1975 IS AFFIRMED.

WCB CASE NO. 74-768 MARCH 3, 1976

EDITH MORGAN, CLAIMANT
GLENN RAMIREZ, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF A REFEREE'S ORDER WHEREIN SHE FOUND CLAIMANT'S CLAIM HAD NOT BEEN PREMATURELY CLOSED, THAT CLAIMANT WAS NOT ENTITLED TO FURTHER MEDICAL CARE AND TREATMENT, AND AWARDED 32 DEGREES FOR 10 PER CENT UNSCHEDULED DISABILITY. THESE ARE THE ISSUES ON REVIEW.

CLAIMANT, A POTATO SIZER, SUSTAINED A COMPENSABLE INJURY ON JANUARY 11, 1973 WHEN SHE REACHED ACROSS THE BELT IN FRONT OF HER. DR. PALZINSKI DIAGNOSED A STRAIN OF THE DORSAL SPINE. SHE WAS REFERRED TO DR. KLUMP FOR NEUROLOGICAL EVALUATION, HE CONCLUDED ON MAY 1, 1973 THAT HER DIFFICULTY WAS NOT ON A NEUROLOGICAL BASIS AND REFERRED HER TO DR. LILLY, FOR ORTHOPEDIC CONSULTATION. DR. LILLY FOUND SOME DEGENERATIVE DISC DISEASE, NORMAL FOR A PERSON HER AGE - THAT THERE APPEARED TO BE SOME FUNCTIONAL OVERLAY WITH RESPECT TO HER ARM COMPLAINTS AND THAT PERHAPS SHE HAD STRETCHED THE BRACHIAL PLEXUS. HE REFERRED CLAIMANT TO THE DISABILITY PREVENTION DIVISION.

DR. JULIA PERKINS REPORTED CLAIMANT HAD CONSIDERABLE INTELLECTUAL POTENTIAL WHICH HAD NEVER BEEN DEVELOPED. ALTHOUGH A VOCATIONAL COUNSELOR CONTACTED CLAIMANT, IT WAS INDICATED CLAIMANT'S RETIRED HUSBAND DID NOT WISH HER TO RETURN TO WORK SO SHE DID NOT AVAIL HERSELF OF VOCATIONAL RETRAINING SERVICES.

CLAIMANT ALSO WAS SEEN AT THE BACK EVALUATION CLINIC ON NOVEMBER 29, 1973. IT WAS THE MEMBERS OPINION THAT CLAIMANT'S CONDITION WAS STATIONARY - THAT, ALTHOUGH SHE COULD NOT RETURN TO HER SAME OCCUPATION, SHE SHOULD CONSIDER SOME OTHER OCCUPATION, AND THAT THE TOTAL LOSS OF FUNCTION TO THE BACK DUE TO THE INJURY WAS MINIMAL.

IN JANUARY 1974, DR. PALZINSKI CONCURRED AND THE DETERMINATION ORDER ISSUED FEBRUARY 25, 1974 AWARDED CLAIMANT NO COMPENSATION FOR PERMANENT PARTIAL DISABILITY.

THE REFEREE FOUND THE CLAIMANT'S CLAIM HAD BEEN PROPERLY CLOSED ON FEBRUARY 25, 1974. DR. KLUMP HAD FOUND NOTHING NEUROLOGICALLY WRONG WITH CLAIMANT, DR. LILLY HAD FOUND NOTHING WRONG ORTHOPEDICALLY AND BACK EVALUATION CLINIC, AFTER EXAMINING CLAIMANT ON NOVEMBER 29, 1973 FOUND HER TO BE MEDICALLY STATIONARY AND RECOMMENDED CLAIM CLOSURE.

THE REFEREE CONCLUDED, BASED ON CLAIMANT'S AGE, EDUCATION, MENTAL CAPACITY AND OTHER RELEVANT FACTORS, THAT CLAIMANT HAD SUFFERED A LOSS OF WAGE EARNING CAPACITY WHICH WOULD BE COMPENSATED BY AN AWARD OF 32 DEGREES FOR 10 PER CENT UNSCHEDULED DISABILITY.

THE REFEREE FOUND THE CIRCUMSTANCES OF THIS CASE DID NOT JUSTIFY IMPOSITION OF ATTORNEY'S FEES OR PENALTIES.

ALTHOUGH CLAIMANT SOUGHT AND RECEIVED MEDICAL CARE SUBSEQUENT TO THE CLOSURE OF HER CLAIM, THERE HAS BEEN NO REQUEST FROM A DOCTOR FOR AUTHORIZATION OF TREATMENT OR A STATEMENT THAT FURTHER MEDICAL TREATMENT IS DEEMED NECESSARY FOR CONDITIONS CAUSALLY RELATED TO CLAIMANT'S COMPENSABLE INJURY. WITHOUT SUCH THE REFEREE FOUND NO BASIS TO ORDER SUCH TREATMENT UNDER ORS 656.245.

THE BOARD, ON-DE NOVO REVIEW, CONCURS WITH THE FINDINGS AND CONCLUSIONS OF THE REFEREE ON ALL ISSUES AND AFFIRMS AND ADOPTS HER ORDER.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 22, 1975 IS AFFIRMED.

WCB CASE NO. 74-2749 MARCH 4, 1976

DARRELL BARCLAY, CLAIMANT

WILLIVER AND FORCUM, CLAIMANT'S ATTYS.
JONES, LANG, KLEIN, WOLF AND SMITH,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

THE EMPLOYER SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH DISPROVED ITS DENIAL OF CLAIMANT'S AGGRAVATION CLAIM, ORDERED IT TO ACCEPT THE CLAIM FOR PAYMENT OF BENEFITS PROVIDED BY LAW AND TO PAY THE REASONABLE MEDICAL EXPENSES INCURRED BY CLAIMANT FROM AND AFTER MAY 18, 1973.

ON DECEMBER 3, 1971 CLAIMANT RECEIVED A COMPENSABLE INJURY TO HIS NECK AND UPPER BACK WHICH WAS MEDICALLY DIAGNOSED AS A CONTUSION, SPRAIN AND STRAIN TO THE NECK, HEAD, UPPER BACK AND POSTERIOR SHOULDER GIRDLES, SUPERIMPOSED ON SEVERE DEGENERATIVE DISC DISEASE AT C6-C7. CLAIMANT, AT THAT TIME, WAS WORKING FOR ESCO CORPORATION AND CONTINUED SAID EMPLOYMENT WITHOUT MISSING ANY TIME FROM WORK UNTIL AUGUST 1972 WHEN HE TERMINATED TO BEGIN WORKING FOR BROOKS-WILLAMETTE CORPORATION IN BEND.

ON JUNE 4, 1973 CLAIMANT'S CLAIM WAS CLOSED BY A DETERMINATION

ORDER WHICH AWARDED CLAIMANT 32 DEGREES FOR 10 PER CENT UNSCHEDULED NECK, HEAD AND UPPER BACK DISABILITY.

ON FEBRUARY 26, 1973 CLAIMANT RECEIVED A COMPENSABLE INJURY TO HIS RIGHT SHOULDER RESULTING FROM A FALL WHILE WORKING FOR BROOKS-WILLAMETTE CORPORATION - THIS INJURY WAS DIAGNOSED AS A POST-TRAUMATIC TENDINITIS IN THE RIGHT SHOULDER INVOLVING THE ROTATOR CUFF AND ALSO THE LONG HEAD OF THE BICEPS. CLAIMANT RECEIVED CONSERVATIVE TREATMENT AND HIS CLAIM WAS CLOSED ON JULY 30, 1973 WITH AN AWARD OF 16 DEGREES FOR 5 PER CENT UNSCHEDULED DISABILITY. ON MARCH 30, 1973 CLAIMANT RECEIVED A COMPENSABLE INJURY TO HIS RIBS AND HIS CLAIM WAS REOPENED AND AGAIN CLOSED ON MAY 28, 1973 WITH ADDITIONAL AWARD OF 48 DEGREES MAKING A TOTAL OF 64 DEGREES FOR UNSCHEDULED DISABILITY RESULTING FROM THE TWO 1973 INJURIES.

ON APRIL 3, 1974 DR. WATTLEWORTH, WHO HAD BEEN ONE OF CLAIMANT'S TREATING PHYSICIANS, HAD NOTIFIED ESCO'S WORKMEN'S COMPENSATION CARRIER THAT CLAIMANT HAD PERSISTENT NECK PAIN AND HEADACHES WHICH SEEMED TO BE GETTING WORSE AND HE RECOMMENDED FURTHER CARE AND TREATMENT. ON JULY 17, 1974 THE CARRIER ISSUED A DENIAL.

IT IS THE EMPLOYER'S CONTENTION THAT CLAIMANT'S PRESENT CONDITION IS NOT RELATED TO THE INJURY WHICH HE SUFFERED WHILE EMPLOYED BY ESCO BUT IS THE RESULT OF THE INJURY SUFFERED WHILE EMPLOYED BY BROOKS-WILLAMETTE.

CLAIMANT HAS BEEN EXAMINED AND, OR TREATED BY DRS. SHLIM, POST, WATTLEWORTH, AND CORRIGAN. BOTH DR. WATTLEWORTH AND DR. CORRIGAN HAVE EXPRESSED OPINIONS REGARDING THE RELATIONSHIP BETWEEN THE RIGHT SHOULDER INJURY OF FEBRUARY 26, 1973 AND THE UPPER BACK AND NECK INJURY OF DECEMBER 3, 1971. THE FORMER FELT THAT BECAUSE CLAIMANT'S COMPLAINTS HAD ALWAYS BEEN NECK PAIN, POSTERIOR HEADACHES AND LEFT SHOULDER PAIN THAT THE INJURIES TREATED BY DR. CORRIGAN FOR THE 1973 INJURIES TO CLAIMANT'S RIGHT SHOULDER AND RIB WOULD REPRESENT A COMPLETELY SEPARATE EPISODE. DR. CORRIGAN'S OPINION WAS THAT CLAIMANT HAD SUFFERED TWO SEPARATE INJURIES, WITHOUT EITHER ONE OF THEM TRULY AGGRAVATING THE OTHER EITHER AT THE TIME OF OCCURRENCE OR PRESENTLY.

THE REFEREE FOUND THAT THE EMPLOYER'S REFUSAL TO REOPEN THE CLAIM WAS IMPROPER. THE MEDICAL FINDINGS CLEARLY INDICATED THAT CLAIMANT'S NECK AND UPPER BACK INJURY OF DECEMBER 3, 1971 AGGRAVATED A PREEXISTING ARTHRITIC CONDITION AND SAID CLAIM WAS ACCEPTED AND BENEFITS PAID - SINCE THE CLOSURE OF THAT CLAIM, BOTH DR. WATTLEWORTH AND DR. CORRIGAN HAD EXPRESSED OPINIONS THAT CLAIMANT'S PRESENT NECK AND UPPER BACK CONDITION RESIDUALS ARE SEPARATE AND DISTINCT FROM THE RIGHT SHOULDER CONDITION AND THAT THERE HAD BEEN A WORSENING OF CLAIMANT'S CONDITION ATTRIBUTABLE TO THE 1971 INDUSTRIAL INJURY WHICH HAD OCCURRED SINCE JUNE 4, 1973, THE DATE OF THE LAST AWARD OR ARRANGEMENT OF COMPENSATION FOR THAT CLAIM.

HAVING FOUND THAT CLAIMANT'S AGGRAVATION WAS COMPENSABLE, THE REFEREE CONCLUDED THAT CLAIMANT'S CLAIM FOR MEDICAL EXPENSES, WHICH WERE NECESSARILY INCURRED AS A RESULT OF THE AGGRAVATION, SHOULD BE ALLOWED. HOWEVER, THE REFEREE DID NOT IMPOSE PENALTIES AS REQUESTED BY CLAIMANT. CLAIMANT HAD LOST NO TIME FROM WORK AS A RESULT OF THE DECEMBER 3, 1971 INJURY UNTIL HIS SHOULDER INJURY OF FEBRUARY 26, 1973, THERE WAS A CONFLICT OF EVIDENCE REGARDING CLAIMANT'S MOTIVATION FOR TERMINATING HIS EMPLOYMENT AT ESCO. ALSO, BECAUSE OF THE COMPLICATIONS, FACTUALLY, DUE TO THE SUBSEQUENT SHOULDER AND RIB INJURIES, THE DENIAL BY THE EMPLOYER OF THE CLAIM OR REFUSAL TO REOPEN THE CLAIM, WHICHEVER IT MIGHT BE, DID NOT AMOUNT TO UNREASONABLE DENIAL, DELAY OR RESISTANCE TO THE PAYMENT OF

COMPENSATION. BECAUSE THE DENIAL WAS IMPROPER THE REFEREE DIRECTED THE EMPLOYER TO PAY CLAIMANT'S ATTORNEY A REASONABLE ATTORNEY'S FEE.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 26, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW THE SUM OF 350 DOLLARS, PAYABLE BY THE EMPLOYER.

WCB CASE NO. 75-1940 MARCH 4, 1976

ORAL J. LOVE, CLAIMANT

JACK, GOODWIN AND URBIGKEIT,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW OF THE REFEREE'S ORDER WHICH FOUND CLAIMANT TO BE PERMANENTLY AND TOTALLY DISABLED ON JANUARY 25, 1973, THE DATE OF THE DETERMINATION ORDER, AND DIRECTED THE FUND TO PAY CLAIMANT COMPENSATION ACCORDINGLY, TAKING CREDIT, HOWEVER, FOR PERMANENT PARTIAL DISABILITY AND PERMANENT TOTAL DISABILITY PAYMENTS WHICH IT HAD ALREADY MADE.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON OCTOBER 14, 1971 AND THE CLAIM WAS CLOSED BY A DETERMINATION ORDER MAILED JANUARY 25, 1973 WHEREBY CLAIMANT WAS AWARDED 30 DEGREES FOR 20 PER CENT LOSS OF THE LEFT LEG AND 40 DEGREES FOR 15 PER CENT UNSCHEDULED LOW BACK DISABILITY. A REQUEST FOR HEARING WAS MADE BY THE CLAIMANT AND, AFTER HEARING, AN OPINION AND ORDER WAS ENTERED ON MARCH 19, 1975 BY REFEREE H. DON FINK WHEREBY CLAIMANT WAS FOUND TO BE PERMANENTLY AND TOTALLY DISABLED. THE FUND COMMENCED PAYING CLAIMANT TOTAL DISABILITY AS OF THE DATE OF REFEREE FINK'S ORDER.

THE QUESTION IS WHETHER OR NOT CLAIMANT'S PERMANENT TOTAL DISABILITY SHOULD BE PAID AS OF THE DATE OF THE ORIGINAL DETERMINATION ORDER MAILED JANUARY 25, 1973 AND, IF SO, WHETHER THE FUND'S FAILURE TO PAY PERMANENT TOTAL DISABILITY COMPENSATION AS OF THAT DATE AMOUNTED TO A DENIAL WHICH WOULD ENTITLE CLAIMANT TO AN AWARD OF ATTORNEY'S FEES.

THE REFEREE CITED THE RULING OF THE WORKMEN'S COMPENSATION BOARD IN EZRA E. ZINN, CLAIMANT (UNDERSCORED), WCB CASE NO. 72-3028 THAT WHEN A REFEREE GRANTS PERMANENT TOTAL DISABILITY WITHOUT SPECIFYING THE DATE OF COMMENCEMENT OF SUCH DISABILITY, THE ACTUAL DATE A WORKMAN BECOMES PERMANENTLY AND TOTALLY DISABLED SHOULD BE CONTROLLING - AN EARLIER ORDER OF PERMANENT TOTAL DISABILITY IS NOT RES JUDICATA ON THE ISSUE OF WHEN THE PERMANENT TOTAL DISABILITY AWARD SHOULD BEGIN IF THAT ISSUE DID NOT ARISE UNTIL AFTER THE INITIAL HEARING OFFICER'S ORDER WAS ISSUED, AND THE FUND'S REFUSAL TO PAY COMPENSATION FOR THE INTERIM PERIOD MUST BE CONSIDERED AS A DE FACTO DENIAL ENTITLING CLAIMANT TO PAYMENT OF HIS ATTORNEY'S FEES.

THE REFEREE FOUND THAT FROM A READING OF THE OPINION AND ORDER OF REFEREE FINK IT WAS MORE LIKELY THAT CLAIMANT HAD BEEN TOTALLY DISABLED SINCE SHORTLY AFTER THE COMPENSABLE INJURY THAN HE HAD BECOME PERMANENTLY AND TOTALLY DISABLED BETWEEN THE DETERMINATION ORDER AND THE OPINION AND ORDER ENTERED BY REFEREE FINK.

THE REFEREE CONCLUDED THAT CLAIMANT BECAME PERMANENTLY AND TOTALLY DISABLED ON JANUARY 25, 1973 THE DATE OF THE DETERMINATION ORDER - HOWEVER, HE ALLOWED THE FUND TO TAKE CREDIT FOR SUCH PAYMENTS OF PERMANENT PARTIAL DISABILITY AND PERMANENT TOTAL DISABILITY THAT IT HAD ALREADY MADE.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 16, 1975 IS AFFIRMED.

WCB CASE NO. 73-4103 MARCH 4, 1976

IVAN B. SMITH, CLAIMANT

EMMONS, KYLE, KROPP AND KRYGER,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 64 DEGREES FOR 20 PER CENT UNSCHEDULED DISABILITY.

CLAIMANT SUFFERED A COMPENSABLE INJURY TO HIS LOW BACK ON JANUARY 31, 1973, HIS CLAIM WAS ACCEPTED AND SUBSEQUENTLY CLOSED ON MAY 17, 1973 BY A DETERMINATION ORDER WHICH GRANTED CLAIMANT TIME LOSS COMPENSATION BUT NO AWARD FOR PERMANENT PARTIAL DISABILITY.

CLAIMANT WAS ORIGINALLY RELEASED TO RESTRICTED WORK INVOLVING NO LIFTING. CLAIMANT'S REGULAR WORK WAS AS A DEPARTMENT HEAD FOR FRED MEYER AND HE TESTIFIED THAT AFTER HE RETURNED TO WORK FOLLOWING HIS INJURY HE DID CONTINUE THAT PARTICULAR JOB BUT WITHIN THE WORK RESTRICTIONS IMPOSED BY HIS DOCTOR AND DID NOT ENGAGE IN ANY LIFTING FOR A CONSIDERABLE PERIOD OF TIME. APPARENTLY HE LOST SOME HELP AT THE STORE AND HAD TO RESUME FULL DUTIES WHICH DID INCLUDE LIFTING AND THEREAFTER HE EXPERIENCED INCREASED BACK PAIN WHICH EVENTUALLY REQUIRED HIM TO QUIT HIS JOB. CLAIMANT HAS NOT BEEN ABLE TO ENGAGE IN ANY FURTHER WORK ACTIVITIES FOR ANY PERIOD OF TIME WHICH REQUIRE HEAVY LIFTING OR REPETITIVE BENDING WITHOUT HAVING SOME DISABLING PAIN.

THE REFEREE FOUND THAT CLAIMANT HAD PERMANENT PHYSICAL DISABILITY WHICH WAS THE RESIDUAL CONSEQUENCE OF NERVE ROOT COMPRESSION AT L5 ON THE LEFT DUE TO TRAUMATIC DISC HERNIATION RELATED TO THE INJURY HE SUSTAINED ON JANUARY 31, 1973. HE FOUND THAT THE PHYSICAL LIMITATIONS IMPOSED UPON CLAIMANT AS A RESULT OF HIS INJURY REQUIRED HIM TO CHANGE JOBS AND LIMITED THE WORK WHICH HE COULD PERFORM TO JOBS WHICH DID NOT REQUIRE ANY HEAVY LIFTING OR ONLY VERY MINIMAL AMOUNTS OF REPETITIVE BENDING OR LIFTING. CLAIMANT HAS HAD

TO CHANGE JOBS ON TWO SEPARATE OCCASIONS, EACH TIME TO SEEK LIGHTER TYPE WORK. CLAIMANT IS NOW SELF-EMPLOYED IN THE MERCHANDISING BUSINESS WHERE HE IS ABLE TO CONTROL HIS PACE AND EXTEND HIMSELF ONLY TO THE EXTENT HE FEELS HE IS ABLE WITHOUT SUFFERING DISABLING PAIN.

THE REFEREE FOUND THAT ALTHOUGH CLAIMANT, INITIALLY, HAD RETURNED TO HIS REGULAR OCCUPATION WHEN HE WAS REQUIRED TO RESUME THE ACTIVITIES WHICH THE DOCTOR TOLD HIM NOT TO ENGAGE IN, HIS DISTRESS INCREASED TO THE EXTENT THAT HE HAD TO TERMINATE HIS EMPLOYMENT. CLAIMANT SOUGHT A LIGHTER JOB AND THAT EVENTUALLY PROVED TO BE MORE THAN HE COULD HANDLE PHYSICALLY AND AGAIN HE SOUGHT A JOB WHICH DID NOT REQUIRE THE RESTRICTED MOTIONS.

THE REFEREE CONCLUDED THAT WHILE THE FULL AMOUNT OF REDUCTION OF ACTUAL EARNINGS HAD NOT BEEN SHOWN TO BE A PERMANENT STATE, AN ATTEMPT TO ESTIMATE WHAT CLAIMANT'S FUTURE ACTUAL EARNINGS MIGHT BE IN HIS SELF-EMPLOYMENT VENTURE WOULD BE PURELY SPECULATIVE - HOWEVER, THERE HAD BEEN A DEFINITE REDUCTION OF CLAIMANT'S ABILITY TO WORK AS A RESULT OF HIS INDUSTRIAL INJURY. CLAIMANT'S LOSS OF EARNING CAPACITY JUSTIFIED AN AWARD OF 64 DEGREES WHICH IS 20 PER CENT OF THE MAXIMUM ALLOWABLE BY STATUTE FOR UNSCHEDULED DISABILITY.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE REFEREE'S FINDINGS AND CONCLUSIONS.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 5, 1975 IS AFFIRMED.

WCB CASE NO. 75-2861 MARCH 4, 1976

JOSEPHUS J. PRETTYMAN, CLAIMANT

WILLNER, BENNETT, RIGGS AND SKARSTAD,
CLAIMANT'S ATTYS.
KEITH D. SKELTON, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

THE EMPLOYER REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH FOUND THE EMPLOYER'S DENIAL OF CLAIMANT'S CLAIM TO BE IMPROPER AND ORDERED THE CLAIM TO BE ACCEPTED BY THE EMPLOYER FOR PAYMENT OF BENEFITS, AS PROVIDED BY LAW, UNTIL THE CLAIM IS CLOSED UNDER THE PROVISIONS OF ORS 656.268.

CLAIMANT FILED A CLAIM FOR OCCUPATIONAL DISEASE OF THE LEFT KNEE. THE EMPLOYER MOVED TO JOIN THE STATE ACCIDENT INSURANCE FUND AND THE WORKMEN'S COMPENSATION BOARD ON THE GROUNDS THAT CLAIMANT'S CLAIM WAS ONE WHICH SHOULD BE AGAINST THE FUND AND SHOULD BE REOPENED BY THE BOARD ON ITS 'OWN MOTION'. THE REFEREE PROPERLY DENIED THE MOTION. THE MOTION RELATED TO AN INDUSTRIAL INJURY SUFFERED BY CLAIMANT IN 1961 AND SHOULD HAVE BEEN DIRECTED TO THE BOARD FOR CONSIDERATION UNDER THE PROVISIONS OF ORS 656.278.

CLAIMANT HAD BEEN EMPLOYED BY HIS EMPLOYER SINCE 1950 AND IN 1961 CLAIMANT INJURED HIS RIGHT KNEE, AT THAT TIME THE EMPLOYER WAS COVERED BY THE FUND. OVER A PERIOD OF YEARS THE CONDITION OF CLAIMANT'S RIGHT KNEE DETERIORATED AND IN 1965 A LATERAL MENISCECTOMY AND PATELLECTOMY WAS PERFORMED ON THE RIGHT KNEE. A COUPLE OF YEARS LATER THE LEFT KNEE 'STARTED TO ACT UP' AND ABOUT

A YEAR AND A HALF PRIOR TO THE HEARING THE LEFT KNEE CAUSED CLAIMANT SIGNIFICANT PROBLEMS. IN 1973 CLAIMANT HAD BECOME A CRANE OPERATOR. PRIOR TO THAT TIME HE HAD BEEN EMPLOYED AS A CARBON SETTER.

ON MAY 5, 1975 CLAIMANT'S LEFT KNEE WAS DIAGNOSED BY DR. MEULLER AS A DEGENERATIVE ARTHRITIS OF THE LEFT KNEE JOINT. DR. MEULLER WAS OF THE OPINION THAT THE LEFT KNEE DETERIORATED BECAUSE OF INCREASED STRESS ON THE LEFT KNEE DUE TO PROLONGED DISABILITY OVER THE YEARS FROM THE RIGHT KNEE INJURY. THE EMPLOYER CONTENDED THAT THIS WAS MEDICAL PROOF THAT CLAIMANT'S LEFT KNEE SYMPTOMS CONSTITUTED AN AGGRAVATION OF HIS 1961 INJURY AND AGAIN BROUGHT UP THE CONTENTION THAT RELIEF SHOULD BE GRANTED UNDER THE BOARD'S OWN MOTION JURISDICTION AND BE FOUND TO BE THE RESPONSIBILITY OF THE FUND.

THE REFEREE FOUND THAT THE SOURCE OF CLAIMANT'S RIGHT KNEE DISABILITY WAS IRRELEVANT, THE EMPLOYER TAKES THE WORKMAN AS HE FINDS HIM. THE REFEREE FURTHER FOUND THAT IF THE ORIGIN OF CLAIMANT'S RIGHT KNEE DISABILITY WAS CONGENITAL OR CAUSED BY AN OFF-THE-JOB ACCIDENT THAT THE CLAIM WOULD STILL BE CHARGEABLE TO THE PRESENT INSURER. UNDER THE LAST INJURIOUS EXPOSURE RULE, CLAIMANT'S LEFT KNEE PROBLEMS ARE CHARGEABLE TO LIBERTY MUTUAL INSURANCE COMPANY, THE PRESENT WORKMEN'S COMPENSATION INSURER OF THE EMPLOYER.

ALTHOUGH CLAIMANT CONTENDED HIS SYMPTOMS WERE CAUSED BY AN OCCUPATIONAL DISEASE, THE REFEREE WAS MORE INCLINED TO FIND THAT THE FACTS INDICATED AN INDUSTRIAL INJURY OF GRADUAL ONSET AND APPLYING THE THEORY OF REPETITIVE TRAUMA, FOUND THAT CLAIMANT'S CLAIM FOR HIS RIGHT KNEE CONDITION SHOULD HAVE BEEN ACCEPTED BY THE EMPLOYER AS A COMPENSABLE CLAIM.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 2, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 300 DOLLARS, PAYABLE BY THE EMPLOYER.

WCB CASE NO. 75-3104 MARCH 5, 1976

JOHN D. BRUNER, CLAIMANT

DAVID R. VANDENBERG, JR.,
CLAIMANT'S ATTY.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER AFFIRMING THE DETERMINATION ORDER MAILED AUGUST 15, 1974 WHICH AWARDED CLAIMANT TEMPORARY DISABILITY BENEFITS BUT NO COMPENSATION FOR PERMANENT PARTIAL DISABILITY.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON JUNE 6, 1972. THE INJURY WAS ORIGINALLY DIAGNOSED AS A STRAIN OF THE THORACIC AND CERVICAL SPINE, SUPERIMPOSED ON A PREEXISTING CONDITION KNOWN AS

SCHEUERMANN'S DISEASE. PRIOR TO THE INDUSTRIAL INJURY CLAIMANT'S TREATING PHYSICIAN HAD, IN THE COURSE OF TREATING THIS DISEASE, SUGGESTED TO CLAIMANT THAT THE WORK EFFORT REQUIRED BY HIS JOB WAS TOO MUCH FOR HIM WITH THAT TYPE OF MEDICAL CONDITION AND ADVISED CLAIMANT TO SEEK A LIGHTER TYPE OF WORK WHICH WOULD NOT REQUIRE SO MUCH USE OF THE BACK. THERE WAS NO INDICATION AT THAT TIME BY THE DOCTOR, HOWEVER, THAT THE SERIES OF PAIN EPISODES WHICH CLAIMANT SUFFERED IN JUNE 1972 WERE THE PRECIPITATING FACTORS WHICH NECESSITATED A CHANGE OF JOBS.

THE REFEREE REVIEWED FILMS OF CLAIMANT'S ACTIVITIES WHICH REVEALED THAT CLAIMANT WAS ABLE TO ENGAGE IN MANY ACTIVITIES WITH HIS LEFT ARM WITHOUT ANY OBSERVABLE DIFFICULTY ALTHOUGH CLAIMANT HAD SAID THAT HE COULD NOT DO THESE ACTIVITIES AND ALSO THAT VARIOUS FORMS OF ACTIVITIES IN WHICH CLAIMANT ENGAGED REFLECTED NO OBSERVABLE PHYSICAL LIMITATIONS. CLAIMANT IS 31 YEARS OF AGE, HE HAS GOOD INTELLECTUAL RESOURCES AND CONSIDERABLE FORMAL EDUCATION. CLAIMANT IS QUITE OVERWEIGHT WHICH CAUSES ADDITIONAL STRESS ON HIS BACK AND ALSO CAUSES HIM SOME BACK DISTRESS.

THE REFEREE FOUND NO MEDICAL EVIDENCE OF ANY FURTHER CURATIVE MEDICAL TREATMENT NECESSARY FOR THE TREATMENT OF CLAIMANT'S CONDITION EVEN THOUGH HE HAD BEEN KEPT UNDER MEDICAL OBSERVATION BY DR. CAMPAGNA FOR SOME TIME AFTER THE DETERMINATION ORDER HAD BEEN ISSUED IN 1974. THIS WAS MERELY TO OBSERVE WHETHER OR NOT THERE WAS ANY IMPROVEMENT OR WORSENING OF CLAIMANT'S CONDITION AFTER HE HAD BEEN REFERRED TO DISABILITY PREVENTION DIVISION BY DR. CAMPAGNA.

THE REFEREE CONCLUDED THE CLAIMANT'S CONDITION WAS MEDICALLY STATIONARY IN JULY 1974 AND CLAIMANT WAS NOT ENTITLED TO ANY FURTHER COMPENSATION FOR FURTHER MEDICAL TREATMENT OR FURTHER TEMPORARY DISABILITY BENEFITS.

WITH RESPECT TO THE EXTENT OF PERMANENT DISABILITY, CLAIMANT CONTENDED HE WAS ENTITLED TO COMPENSATION FOR PERMANENT DISABILITY FOR BOTH SCHEDULED LEFT ARM DISABILITY AND UNSCHEDULED DISABILITY FOR IMPAIRMENT OF HIS EARNING CAPACITY. THE REFEREE FOUND THAT THE PERMANENT IMPAIRMENT OF CLAIMANT'S LEFT ARM WAS BASED PRIMARILY ON CLAIMANT'S SUBJECTIVE COMPLAINTS WHICH WERE NOT CONSISTENT WITH THE FILMED EVIDENCE OF HIS ABILITY TO ENGAGE IN PHYSICAL ACTIVITIES USING THIS APPENDAGE. HE CONCLUDED CLAIMANT HAD FAILED TO PRODUCE SUFFICIENT PERSUASIVE EVIDENCE OF ANY PERMANENT IMPAIRMENT OF THE LEFT ARM WHICH WOULD ENTITLED HIM TO AN AWARD THEREFOR.

WITH RESPECT TO ANY IMPAIRMENT OR DETERMINATION OF EARNING CAPACITY, THE REFEREE FOUND THAT IF CLAIMANT HAD SUFFERED SUCH A LOSS OF EARNING CAPACITY IT WAS PRIMARILY ATTRIBUTABLE TO THE NATURE OF HIS PREEXISTING CONDITION RATHER THAN THE CONSEQUENCE OF THE PARTICULAR EPISODES OF TRAUMA-INDUCED PAIN IN JUNE 1972. THE CLAIMANT HAD BEEN ADVISED BY HIS TREATING PHYSICIAN THAT HE SHOULD CEASE DOING HEAVY WORK AND THAT IF HE CONTINUED TO DO SO HE WOULD NORMALLY EXPECT EPISODES OF PAIN. THE REFEREE FOUND THAT THE MEDICAL EVIDENCE FAILED TO INDICATE THAT THERE WAS ANY PERMANENT IMPAIRMENT OF CLAIMANT'S ABILITY TO PERFORM HEAVY WORK AS A DIRECT RESULT OF THE INDUSTRIAL INJURY AND THERE WAS NO EVIDENCE THAT THERE WERE ANY PERMANENT RESIDUAL EFFECTS THEREFROM.

THE REFEREE CONCLUDED THAT CLAIMANT HAD FAILED TO ESTABLISH HE HAD SUSTAINED ANY PERMANENT IMPAIRMENT OF HIS EARNING CAPACITY DIRECTLY TRACEABLE TO THE SYMPTOMATOLOGY ARISING IN JUNE 1972 AND, THEREFORE, WAS NOT ENTITLED TO ANY PERMANENT DISABILITY COMPENSATION, EITHER SCHEDULED OR UNSCHEDULED, AS A RESULT OF THE INDUSTRIAL INJURY OF JUNE 6, 1972.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE WHICH ARE CLEARLY SET FORTH IN HIS OPINION AND ORDER.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 6, 1975 IS AFFIRMED.

WCB CASE NO. 75-1284 MARCH 5, 1976
WCB CASE NO. 75-1679

HELEN M. PRINCE, CLAIMANT
STEVEN PICKENS, CLAIMANT'S ATTY.
MERLIN MILLER, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF TWO ORDERS ISSUED BY THE REFEREE ON AUGUST 29, 1975. THE FIRST ORDER (WCB CASE NO. 75-1284) REMANDED CLAIMANT'S CLAIM FOR AGGRAVATION TO THE FUND FOR ACCEPTANCE AND PAYMENT OF COMPENSATION AS PROVIDED BY LAW. THE SECOND ORDER (WCB CASE NO. 75-1679) DENIED CLAIMANT'S CLAIM FOR COMPENSATION FOR A LOW BACK CONDITION ALLEGEDLY SUSTAINED ON JUNE 22, 1974 AND ARISING OUT OF AND IN THE COURSE OF CLAIMANT'S EMPLOYMENT WITH 3M COMPANY.

CLAIMANT SUSTAINED A COMPENSABLE INJURY TO HER LOW BACK ON OCTOBER 11, 1973 WHILE EMPLOYED BY NU-WAY CLEANERS, WHOSE WORKMEN'S COMPENSATION COVERAGE WAS FURNISHED BY THE FUND. ON DECEMBER 3, 1973 A DECOMPRESSIVE LAMINOTOMY L6-S1, WITH REMOVAL OF PROTRUDED LUMBOSACRAL DISC, RIGHT, WAS PERFORMED BY DR. CAMPAGNA, WHOSE OPINION WAS THAT CLAIMANT HAD MILD BACK IMPAIRMENT AND HE RELEASED HER TO RETURN TO WORK WITHOUT RESTRICTIONS IN APRIL 1974. ON OCTOBER 24, 1974 THE CLAIM WAS CLOSED BY A DETERMINATION ORDER WHICH AWARDED CLAIMANT 16 DEGREES FOR 5 PER CENT UNSCHEDULED DISABILITY TO HER LOW BACK.

ON APRIL 30, 1974 CLAIMANT HAD SECURED EMPLOYMENT WITH 3M COMPANY - SHE STILL HAD PERSISTENT LOW BACK PAIN AND SOME PAIN IN THE LEFT LEG WHICH, AT TIMES, WOULD ALSO BECOME NUMB. AT 3M COMPANY CLAIMANT FIRST STACKED PAPER AND THEN WAS GIVEN THE JOB OF ROLL PACKING WHICH REQUIRED HER TO PUSH LOADED CARTS, LIFT UP TO 20 POUNDS AND DO REPETITIVE BENDING AND TWISTING. CLAIMANT WORKED REGULARLY AND DID NOT SEEK ANY MEDICAL TREATMENT UNTIL JUNE 22, 1974 WHEN SHE SUSTAINED ANOTHER COMPENSABLE INJURY WHILE LIFTING AND CARRYING A HEAVY BOX OF SUPPLIES. SHE FILED A CLAIM WHICH WAS ACCEPTED BY 3M AND, AFTER A MONTH OF CONSERVATIVE MEDICAL TREATMENT, RETURNED TO WORK FOR THAT COMPANY DOING A LIGHTER TYPE JOB.

CLAIMANT GOT ALONG FAIRLY WELL UNTIL SHE WAS REQUIRED TO DO HEAVIER WORK IN AUGUST WHICH CAUSED HER TO EXPERIENCE AN INCREASE IN BACK PAIN. THE JUNE 22, 1974 INJURY HAD, INITIALLY, BEEN CONSIDERED AS A DORSAL SPRAIN IN THE AREA OF THE LOWER THORACIC SPINE - AFTER THE INCREASED BACK PAIN IN AUGUST, CLAIMANT AGAIN SOUGHT MEDICAL TREATMENT AND WAS REFERRED TO DR. WEINMAN, AN ORTHOPEDIC SURGEON, WHO PERFORMED A LAMINECTOMY AT L5-6 AND EXCISION OF L6-S1 DISC FROM THE LEFT SIDE AND ALSO A TRANSVERSE PROCESS SPINAL FUSION LUMBOSACRAL ON JANUARY 15, 1975. ON MARCH 3, 1975, 3M,

THROUGH ITS WORKMEN'S COMPENSATION CARRIER, TRAVELERS INSURANCE COMPANY, DENIED RESPONSIBILITY FOR CLAIMANT'S LOW BACK SURGERY, STATING IT WOULD CONTINUE TO ACCEPT THE MID BACK OR DORSAL SPINE STRAIN INJURY RESULTING FROM THE JUNE 22, 1974 INCIDENT. THE CARRIER'S BASIS FOR THE DENIAL WAS THAT CLAIMANT'S CONDITION AND THE SURGERY WAS A CONTINUATION OF CLAIMANT'S INJURY OF OCTOBER 11, 1973, WHILE IN THE EMPLOY OF NU-WAY CLEANERS AND, THEREFORE, THE RESPONSIBILITY OF THE FUND.

ON APRIL 3, 1975 CLAIMANT FILED A CLAIM FOR AGGRAVATION OF HER OCTOBER 11, 1973 INDUSTRIAL INJURY. THIS WAS DENIED BY THE FUND ON APRIL 29, 1975 ON THE GROUND THAT CLAIMANT HAD SUSTAINED A NEW INJURY ON JUNE 22, 1974 WHICH WAS THE RESPONSIBILITY OF 3M.

THE ISSUE OF WHETHER THE JANUARY 1975 SURGERY AND THE DISABILITY, WHETHER TEMPORARY OR PERMANENT, ASSOCIATED THEREWITH WAS ATTRIBUTABLE TO A GENERAL WORSENING CONDITION PRESENTING AN AGGRAVATION OF CLAIMANT'S OCTOBER 11, 1973 INJURY OR THE RESULT OF AN EXACERBATION OF HER PREEXISTING CONDITION BY THE JUNE 22, 1974 INJURY. DR. WEINMAN'S OPINION WAS THAT THE JANUARY 1975 SURGERY WAS THE RESPONSIBILITY OF 3M AS IT RELATED TO THE JUNE 22, 1974 INJURY - HE PREDICATED HIS OPINION ON THE FACT THAT CLAIMANT'S PREEXISTING LOW BACK CONDITION FROM THE OCTOBER 1973 INJURY WAS AGGRAVATED BY THE DORSAL STRAIN INJURY SUSTAINED IN JUNE 1974, INDICATING THAT THE INCREASED LOW BACK PAIN RIGHT AFTER THE JUNE 1974 INJURY WOULD BE A VERY KEY FACTOR IN ESTABLISHING SUCH AN EXACERBATION.

THE REFEREE FOUND THAT THERE WAS NOT SUFFICIENT EVIDENCE TO ESTABLISH THAT THE SURGERY IN THE LOW LUMBAR AND LUMBOSACRAL AREA, THE SAME AREA INJURED IN OCTOBER 1973, WAS SPECIFICALLY REQUIRED AS A RESULT OF AN AGGRAVATING EFFECT OF THE JUNE 22, 1974 INJURY. HE CONCLUDED THAT CLAIMANT'S 1975 SURGERY WAS THE RESULT OF A WORSENED CONDITION OF HER LOW BACK STEMMING FROM THE OCTOBER 11, 1973 INJURY AND THE RESPONSIBILITY OF THE FUND. HE REMANDED THE CLAIM TO THE FUND IN ONE ORDER AND DENIED CLAIMANT'S CLAIM FOR AN ALLEGED NEW INJURY ON JUNE 22, 1974 IN THE OTHER.

THE BOARD, ON DE NOVO REVIEW, DISAGREES WITH THE FINDINGS AND CONCLUSIONS OF THE REFEREE IN BOTH ORDERS. ON MARCH 14, 1975 DR. WEINMAN STATED THAT CLAIMANT HAD UPPER BACK PAIN AND INCREASED LOWER BACK PAIN AFTER HER INJURY ON JUNE 22, 1974 - BASED ON CLAIMANT'S HISTORY, HER LOW BACK PAIN WHICH SHE HAD HAD SINCE THE TIME OF HER ORIGINAL INJURY OF OCTOBER 11, 1973 WAS MUCH WORSE AFTER THE JUNE 22, 1974 INJURY. IT WAS HIS OPINION THAT THIS CONSTITUTED AN AGGRAVATION OF A PREEXISTING CONDITION FOR WHICH HER SUBSEQUENT HOSPITALIZATION AND TREATMENT WAS CARRIED OUT AND THAT RESPONSIBILITY THEREFOR WAS THAT OF 3M. THE BOARD FINDS NO OTHER MEDICAL OPINION WHICH CONTRADICTS THIS. THE EVIDENCE CLEARLY INDICATES THAT CLAIMANT'S ACTIVITIES WHILE EMPLOYED BY 3M CAUSED HER TO SEEK MEDICAL TREATMENT IN SEPTEMBER 1974. THE EVIDENCE ALSO INDICATES THAT CLAIMANT HAD BEEN ABLE TO WORK LONG HOURS DOING THE TYPE OF WORK WHICH WOULD AGGRAVATE A LOW BACK CONDITION UNTIL THE TIME OF HER JUNE 22, 1974 INJURY.

THE BOARD CONCLUDES THAT THE EVIDENCE INDICATES THAT CLAIMANT'S LOW BACK CONDITION FROM THE TIME SHE WENT TO WORK FOR 3M REMAINED SUBSTANTIALLY UNCHANGED UNTIL THE ACCIDENT OF JUNE 22, 1974 AND THAT, TO SOME EXTENT, SHE RECOVERED FROM THAT ACCIDENT BUT THE HEAVIER WORK IN WHICH SHE ENGAGED DURING SEPTEMBER 1974 WAS THE ULTIMATE CAUSE THAT REQUIRED HER TO SEEK MEDICAL ATTENTION FROM DR. WEINMAN AND THE SUBSEQUENT SURGERY. THE BOARD FURTHER CONCLUDES THAT CLAIMANT SUFFERED A NEW COMPENSABLE INJURY ON JUNE 22, 1974 WHICH HAD BEEN ACCEPTED BY HER EMPLOYER, 3M COMPANY,

AND THAT ITS SUBSEQUENT DENIAL OF RESPONSIBILITY FOR THE RESULTING SURGERY AND DISABILITY WAS IMPROPER. CLAIMANT DID NOT SUFFER A COMPENSABLE AGGRAVATION OF HER OCTOBER 11, 1973 INJURY. BOTH ORDERS OF THE REFEREE SHOULD BE REVERSED.

ORDER

THE ORDERS OF THE REFEREE RELATING TO WCB CASE NO. 75-1284 AND WCB CASE NO. 75-1679 ENTERED ON AUGUST 29, 1975 ARE REVERSED.

CLAIMANT'S CLAIM FOR HER INDUSTRIAL INJURY OF JUNE 22, 1974 IS REMANDED TO THE EMPLOYER 3M COMPANY, AND ITS CARRIER, FOR ACCEPTANCE AND PAYMENT OF COMPENSATION, AS PROVIDED BY LAW, COMMENCING SEPTEMBER 9, 1975 AND UNTIL THE CLAIM IS CLOSED PURSUANT TO THE PROVISIONS OF ORS 656.268.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 400 DOLLARS, PAYABLE BY THE EMPLOYER, 3M COMPANY.

WCB CASE NO. 75-1787 MARCH 5, 1976

WILLIAM WISHERD, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
SCHOUBOE AND CAVANAUGH,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

THE EMPLOYER SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH DIRECTED IT TO PAY CERTAIN ACCRUED MEDICAL EXPENSES, TEMPORARY TOTAL DISABILITY COMPENSATION FOR THE PERIOD OF MARCH 1, 1974 TO MARCH 14, 1975, IMPOSED A PENALTY OF 25 PER CENT OF THE AFORESAID AMOUNTS DUE AND ASSESSED ATTORNEY'S FEE PAYABLE BY THE EMPLOYER, IN THE AMOUNT OF 2,000 DOLLARS.

ON MARCH 14, 1975 AN ORDER WAS ENTERED BY REFEREE JOSEPH D. ST. MARTIN WHICH REMANDED CLAIMANT'S CLAIM TO THE EMPLOYER FOR ACCEPTANCE AND PAYMENT OF BENEFITS PROVIDED BY LAW UNTIL THE CLAIM WAS CLOSED UNDER THE PROVISIONS OF ORS 656.268. THIS ORDER WAS AFFIRMED BY THE BOARD ON JULY 15, 1975 AND AN APPEAL FROM THE ORDER ON REVIEW IS PRESENTLY PENDING IN THE CIRCUIT COURT FOR THE COUNTY OF CLACKAMAS.

THE EMPLOYER HAS PAID COMPENSATION FROM THE DATE OF THE REFEREE'S ORDER (MARCH 14, 1975) TO THE PRESENT - HOWEVER, NO COMPENSATION WAS PAID BETWEEN MARCH 1, 1974, THE DATE CLAIMANT'S DISABILITY BEGAN, AND MARCH 14, 1975. THE SUM OF 9,211.89 DOLLARS WHICH WAS INCURRED BY CLAIMANT BETWEEN MARCH 1, 1974 AND MARCH 14, 1975 FOR MEDICAL EXPENSES RESULTING FROM HIS INDUSTRIAL INJURY ALSO HAS NOT BEEN PAID.

THE CLAIMANT CONTENDS THAT BOTH THE COMPENSATION AND THE MEDICAL EXPENSES SHOULD HAVE BEEN PAID PURSUANT TO THE REFEREE'S ORDER AND THAT FAILURE TO DO SO SUBJECTS THEM TO A PENALTY AND PAYMENT OF ATTORNEY'S FEES - THE EMPLOYER CONTENDS THAT NEITHER THE REFEREE'S ORDER NOR THE LAW REQUIRES THAT EITHER SUM BE PAID PENDING APPEAL AND THAT ORS 656.313 IS UNCONSTITUTIONAL.

THE REFEREE CORRECTLY HELD THAT ADMINISTRATIVE AGENCIES DO NOT DETERMINE THE CONSTITUTIONALITY OF STATUTES UNDER WHICH THEY ACT AND MUST ASSUME THEM CONSTITUTIONAL UNTIL A JUDICIAL DECLARATION TO THE CONTRARY.

THE REFEREE FOUND THAT THE EARLIER ORDER OF MARCH 14, 1975 DIRECTED THE EMPLOYER'S CARRIER TO PAY BENEFITS AS PROVIDED BY LAW AND ORS 656.262(2) AND (4) REQUIRE AN EMPLOYER TO PROMPTLY AND PERIODICALLY PAY COMPENSATION TO INJURED WORKMEN UPON NOTICE OR KNOWLEDGE OF THE CLAIM UNLESS THE CLAIM IS DENIED. IN THIS CASE THE CLAIM HAD BEEN DENIED BUT THE DENIAL HAD BEEN OVERRULED BY THE ORDER OF MARCH 14, 1975.

THE REFEREE FURTHER FOUND THAT ORS 656.313(1) PROVIDED THAT THE FILING BY AN EMPLOYER OR THE FUND OF A REQUEST FOR REVIEW OR COURT APPEAL SHALL NOT STAY PAYMENT OF COMPENSATION TO CLAIMANT AND ORS 656.262(8) PROVIDES FOR THE IMPOSITION OF A PENALTY UP TO 25 PER CENT OF THE AMOUNT DUE FOR UNREASONABLE DELAY OR UNREASONABLE REFUSAL TO PAY COMPENSATION PLUS AN ATTORNEY FEE WHICH MAY BE ASSESSED UNDER ORS 656.382(1). ORS 656.002(8) DEFINES 'COMPENSATION' TO INCLUDE MEDICAL SERVICES PROVIDED TO AN INJURED WORKMAN.

THE REFEREE CONCLUDED THAT THE EMPLOYER'S REFUSAL TO PAY COMPENSATION IN THIS CASE WAS OBVIOUSLY INTENTIONAL AND PREJUDICIAL TO THE CLAIMANT AS WELL - THAT CLAIMANT WAS DEPRIVED OF TIME LOSS COMPENSATION WHEN HE NEEDED IT MOST. HE CONCLUDED THAT THE CONTESTED COMPENSATION MUST BE PAID FORTHWITH PLUS A PENALTY AND PAYMENT OF AN ATTORNEY FEE BECAUSE OF UNREASONABLE REFUSAL AND RESISTANCE TO PAYMENT OF SAID COMPENSATION WITHOUT REGARD TO THE ULTIMATE OUTCOME OF THE CASE ON FINAL APPEAL.

THE BOARD, ON DE NOVO REVIEW, FINDS THAT THE LEGISLATURE OBVIOUSLY INTENDED, IN PROMULGATING ORS 656.313, THAT A CLAIMANT WAS TO RECEIVE BENEFITS (UNDERSCORED) PENDING APPEAL NOT JUST A 'PAPER JUDGMENT' FOR PENALTIES TO BE FILED WITH THE ORIGINAL REFEREE'S ORDER FOR POSSIBLE FUTURE REFERENCE, FOLLOWING THE ULTIMATE APPELLATE OUTCOME OF THE CASE."

THE BOARD CONCURS IN THE FINDINGS AND CONCLUSIONS REACHED BY THE REFEREE. THE BOARD IS NOT AWARE OF ANY AUTHORITY FOR IT TO REDUCE AN AWARD OF AN ATTORNEY FEE MADE BY THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 28, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW THE SUM OF 500 DOLLARS PAYABLE BY THE EMPLOYER.

WCB CASE NO. 74-4157 MARCH 5, 1976

IN THE MATTER OF THE COMPENSATION OF
JEANETTE A. MILKS, CLAIMANT
AND IN THE MATTER OF COMPLYING STATUS OF
EUGENE MELVIN WAYT AND ORA M. WAYT,
DBA E. M. WAYT AND CO.
MARTIN, ROBERTSON AND NEILL,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH HELD THAT EUGENE M. WAYT AND ORA M. WAYT, DBA E. M. WAYT AND CO., A PARTNERSHIP, WERE SUBJECT NONCOMPLYING EMPLOYERS FROM APRIL 12, 1974 TO MAY 7, 1974.

IT WAS STIPULATED BY THE PARTIES THAT RAYMOND D. MILKS WAS KILLED AS A RESULT OF A COMPENSABLE OCCUPATIONAL ACCIDENT ARISING OUT OF AND IN THE COURSE OF HIS EMPLOYMENT BY EUGENE M. WAYT AND ORA M. WAYT AND THAT THE BENEFICIARIES OF RAYMOND D. MILKS WERE ENTITLED TO BENEFITS AS PROVIDED BY LAW AND FURTHER THAT THE BENEFICIARIES' CLAIM BE REMANDED TO THE STATE ACCIDENT INSURANCE FUND FOR PROCESSING IN ACCORDANCE WITH ORS 656.054(1).

THE ISSUES BEFORE THE REFEREE AROSE FROM A PROPOSED AND FINAL ORDER ISSUED BY THE COMPLIANCE DIVISION OF THE BOARD ON MAY 16, 1974 DECLARING EUGENE M. WAYT AND ORA M. WAYT, DBA E. M. WAYT AND CO., A PARTNERSHIP, TO HAVE EMPLOYED SUBJECT WORKMEN DURING THE PERIOD FROM APRIL 12, 1974 TO MAY 7, 1974 AND TO HAVE BEEN A NONCOMPLYING EMPLOYER DURING THAT PERIOD. ON NOVEMBER 5, 1974 EUGENE M. WAYT REQUESTED A HEARING CONTENDING THAT ORA M. WAYT WAS NOT CONNECTED WITH E. M. WAYT AND CO. IN ANY WAY, THAT THE BUSINESS WAS NOT A PARTNERSHIP AND THAT HE WAS NOT A NONCOMPLYING EMPLOYER DURING THE PERIOD SPECIFIED.

THE REFEREE FOUND THAT CERTIFICATION FROM THE DEPARTMENT OF COMMERCE, CORPORATION DIVISION, ESTABLISHED THAT THE ASSUMED NAME, E. M. WAYT AND CO. WITH THE PARTIES OF INTEREST BEING E. M. WAYT AND ORA M. WAYT WAS FILED ON JANUARY 28, 1966 AND CANCELLED ON JANUARY 9, 1975. FURTHERMORE, A P.U.C. PERMIT WAS ISSUED IN THE NAME OF BOTH E. M. WAYT AND ORA M. WAYT DURING THE PERIOD OF MAY 6, 1971 TO DECEMBER 20, 1974 - AFTER THIS PERMIT WAS DISCONTINUED A P.U.C. PERMIT WAS ISSUED ON JANUARY 3, 1975 TO E. M. WAYT ALONE.

E. M. WAYT STATED HE AND HIS WIFE SPLIT THE PARTNERSHIP TWO YEARS PRIOR TO THE HEARING - THE WIFE ALSO TESTIFIED THAT THERE NEVER HAD BEEN ANY WRITTEN PARTNERSHIP AGREEMENT NOR ANY WRITTEN DISSOLUTION BUT THAT THE PARTNERSHIP HAD BEEN DISSOLVED IN 1973. THE REFEREE FOUND THAT VOLUMINOUS CORRESPONDENCE WAS EXCHANGED BETWEEN THE FUND AND THE PARTNERSHIP, ALL DIRECTED TO E. M. WAYT AND CO.

THE REFEREE CONCLUDED THAT THE EVIDENCE INDICATED THE PARTIES AT ALL RELEVANT TIMES HELD THEMSELVES OUT TO THE GENERAL PUBLIC AS A PARTNERSHIP AND HE CONCLUDED THAT THEY WERE A PARTNERSHIP DURING ALL TIMES RELEVANT TO THIS CASE.

WITH RESPECT TO THE NONCOMPLYING STATUS OF THE EMPLOYER, THE REFEREE FOUND SUSBSTANTIAL EXHIBITS TO ESTABLISH THAT DURING THE PERIOD IN QUESTION, THE PARTNERSHIP WAS IN DEFAULT IN THE PAYMENT OF PREMIUMS AND HAD RECEIVED A CANCELLATION NOTICE FROM THE FUND. THE

FUND HAD EXERCISED ITS RIGHT TO ATTEMPT TO COLLECT FROM THE PARTNERSHIP ACCRUED AND UNPAID PREMIUMS. THE REFEREE CONCLUDED THAT THE CORRESPONDENCE BETWEEN THE PARTNERSHIP AND THE FUND WHICH ATTEMPTED TO COLLECT ACCRUED AND UNPAID PREMIUMS DID NOT GIVE RISE TO ANY ELEMENTS OF WAIVER OR ESTOPPEL AND THAT AT ALL RELEVANT TIMES THE PARTNERSHIP WAS IN THE STATUS OF A NONCOMPLYING EMPLOYER.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED APRIL 25, 1975 IS AFFIRMED.

WCB CASE NO. 75-738 MARCH 5, 1976

LOUISE FARNHAM, CLAIMANT

GALTON AND POPICK, CLAIMANT'S ATTYS.
RAY MIZE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH DIRECTED THE EMPLOYER TO PAY 25 PER CENT OF THE BILLINGS OF DR. CROMWELL, DR. FISHER AND THE GRESHAM PHYSICAL THERAPY CENTER, INCURRED AFTER MARCH 6, 1974 AND TO PAY CLAIMANT'S ATTORNEY A REASONABLE FEE, FINDING THAT THE EMPLOYER'S UNREASONABLE DELAY IN PAYING THE AFORESAID BILLS AMOUNTED TO UNREASONABLE RESISTANCE TO PAYMENT OF COMPENSATION.

THE ISSUES BEFORE THE REFEREE WERE - (1) FURTHER MEDICAL CARE AND TEMPORARY TOTAL DISABILITY - (2) REFUSAL TO PAY TEMPORARY TOTAL DISABILITY WITHIN 14 DAYS OF THE OPINION AND ORDER, REFUSAL TO PAY TEMPORARY TOTAL DISABILITY OR TEMPORARY PARTIAL DISABILITY - (3) UNREASONABLE RESISTANCE TO PAYMENT OF MEDICAL EXPENSES - AND (4) PENALTIES AND ATTORNEY'S FEES.

THE REFEREE FOUND THAT CLAIMANT HAD SUSTAINED A COMPENSABLE INJURY IN NOVEMBER 1969, WHILE WORKING FOR THE EMPLOYER AS A NURSE'S AIDE. SHE HAD ALLEGED SHE SUFFERED ANOTHER COMPENSABLE INJURY ON NOVEMBER 27, 1973. THIS CLAIM HAD BEEN DENIED AND, AFTER A HEARING ON THE MERITS, THE REFEREE HAD FOUND THAT CLAIMANT HAD NOT SUFFERED A NEW COMPENSABLE INJURY BUT HAD ESTABLISHED A VALID AGGRAVATION OF THE ORIGINAL 1969 INJURY. HE REMANDED THE CLAIM TO THE EMPLOYER FOR PAYMENT OF BENEFITS COMMENCING ON NOVEMBER 29, 1973. HIS OPINION AND ORDER WAS ENTERED JANUARY 31, 1975. (WCB CASE NO. 74-234) SUBSEQUENTLY, IT WAS MODIFIED TO TERMINATE TEMPORARY TOTAL DISABILITY COMPENSATION ON MARCH 6, 1974. AFTER THE ENTRY OF THIS OPINION AND ORDER THE MATTER WAS SUBMITTED TO THE EVALUATION DIVISION ON APRIL 24, 1975.

THE REFEREE WAS OF THE OPINION THAT INASMUCH AS THE MODIFIED OPINION AND ORDER IN WCB CASE NO. 74-234 WAS AFFIRMED BY THE BOARD AND THE ENTIRE QUESTION WAS NOW BEFORE THE EVALUATION DIVISION FOR AN ISSUANCE OF A DETERMINATION ORDER THAT A REFEREE'S RULING AT THE PRESENT TIME WOULD BE INAPPROPRIATE. HE CONCLUDED THAT THE ONLY VIABLE ISSUE BEFORE HIM WAS THE TIMELY PAYMENT OF COMPENSATION.

THE EVIDENCE INDICATED THAT THE COST OF THE MYELOGRAM PERFORMED

AT THE HOSPITAL WAS NOT TIMELY PAID DUE TO THE CARRIER'S USE OF CLAIMANT'S FORMER NAME. THE REFEREE DID NOT FEEL THAT THIS WAS SUFFICIENT TO JUSTIFY A FINDING THAT IT WAS UNREASONABLE DELAY IN PAYMENT. HOWEVER, WITH RESPECT TO THE BILLS SUBMITTED BY DR. CROMWELL, DR. FISHER AND THE GRESHAM PHYSICAL THERAPY CENTER, THE REFEREE FOUND NO EVIDENCE WHICH WOULD JUSTIFY OR EXCUSE THE EMPLOYER FOR ITS DELAY IN PAYMENT OF SUCH BILLS AND, ACCORDINGLY, HE ASSESSED A 25 PER CENT PENALTY FOR UNREASONABLE DELAY AND UNREASONABLE RESISTANCE TO THE PAYMENT OF COMPENSATION.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE ENTIRE ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 17, 1975 IS AFFIRMED.

WCB CASE NO. 75-1143 MARCH 9, 1976

FRANK BLANTON, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
ORDER DENYING MOTION

ON FEBRUARY 26, 1976 THE STATE ACCIDENT INSURANCE FUND MOVED TO DISMISS CLAIMANT'S REQUEST FOR REVIEW IN THE ABOVE ENTITLED MATTER ON THE GROUNDS THAT THE REQUEST FOR REVIEW WAS NOT ACTUALLY DEPOSITED IN THE POST OFFICE UNTIL JANUARY 16, 1976 WHICH WAS THE 31ST DAY AFTER THE REFEREE'S OPINION AND ORDER WAS ISSUED. ATTACHED TO THE MOTION WAS A PHOTOCOPY OF THE ENVELOPE IN WHICH THE FUND'S COPY OF THE REQUEST WAS ENCLOSED. THE POSTAGE METER STAMP WAS DATED JANUARY 15, 1976, SUPERIMPOSED UPON THAT STAMP WAS THE POSTMARK OF THE PORTLAND POST OFFICE WITH THE DATE OF JANUARY 16, 1976.

THE PROOF OF SERVICE WAS EXECUTED BY DONALD N. ATCHISON, ONE OF CLAIMANT'S ATTORNEYS, AND CERTIFIED THAT HE MAILED TO THE PROPER PARTIES A CERTIFIED COPY OF THE REQUEST FOR REVIEW AND THE SAME WERE DEPOSITED IN THE POST OFFICE AT PORTLAND, OREGON ON JANUARY 15, 1976 AND THE POSTAGE THEREON WAS PREPAID.

THE BOARD CONCLUDES THAT THE PROOF OF SERVICE EXECUTED BY MR. ATCHISON IS SUFFICIENT AND THE REQUEST FOR REVIEW SHOULD BE CONSIDERED AS TIMELY FILED. THERE COULD BE MANY PLAUSIBLE EXPLANATIONS FOR TWO DIFFERENT POSTMARK DATES ON THE ENVELOPE IN WHICH THE FUND RECEIVED ITS COPY OF THE REQUEST FOR REVIEW - THERE IS NO PROOF THAT THE FAULT WAS THAT OF CLAIMANT'S ATTORNEY.

ORDER

THE MOTION TO DISMISS RECEIVED FROM THE STATE ACCIDENT INSURANCE FUND ON FEBRUARY 26, 1976 IS HEREBY DENIED.

WCB CASE NO. 75-668 MARCH 9, 1976

HAROLD CURRY, CLAIMANT

JAMES FOURNIER, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

CLAIMANT REQUESTS BOARD REVIEW OF A REFEREE'S ORDER WHICH AFFIRMED A DETERMINATION ORDER DATED FEBRUARY 11, 1975 AWARDING CLAIMANT 10 PER CENT UNSCHEDULED LOW BACK DISABILITY EQUAL TO 32 DEGREES. THIS WAS IN ADDITION TO AN AWARD OF 45 PER CENT UNSCHEDULED DISABILITY EQUAL TO 144 DEGREES CLAIMANT HAD PREVIOUSLY RECEIVED.

CLAIMANT, A 32 YEAR OLD LABORER, RECEIVED A COMPENSABLE INJURY OCTOBER 25, 1968. ON MARCH 5, 1969, DR. WHITE PERFORMED AN EXPLORATORY LAMINECTOMY AND EXCISION OF A DEGENERATIVE DISC AT L4-5. ON JUNE 5, 1969 DR. RAAF PERFORMED A LAMINECTOMY AND REMOVAL OF A PROTRUDED DISC AT L4-5, PLUS A FUSION OF L4 TO THE SACRUM. ON DECEMBER 3, 1969 DR. SHORT FOUND A PSEUDOARTHROSIS IN THE SPINAL FUSION.

IT IS THE CONSENSUS OF MEDICAL OPINION THAT CLAIMANT CANNOT RETURN TO HIS FORMER TYPE OF EMPLOYMENT. ALL AGREED CLAIMANT SHOULD SEEK VOCATIONAL REHABILITATION, HOWEVER, NOT MUCH IN THIS AREA HAS BEEN ACCOMPLISHED.

ON MAY 25, 1975 CLAIMANT WAS SEEN BY DR. JERRY BECKER. X-RAYS SHOWED WHAT APPEARED TO BE A SOLID L5-S1 FUSION AND IT WAS HIS IMPRESSION CLAIMANT HAD A CHRONIC LUMBOSACRAL STRAIN WITH DEGENERATIVE DISC DISEASE AT SEVERAL LUMBAR LEVELS. DR. BECKER CONCLUDED THAT IF CLAIMANT WERE TO LOSE HIS ABDOMINAL OBESITY, RECONSTITUTE HIS ABDOMINAL MUSCULATURE, BE FITTED WITH A GOOD LUMBOSACRAL CORSET OF A FLEXION BODY CAST, AND LEARN TO MAKE THE MOVES WITH HIS LOW BACK CORRECTLY FOR ALL ACTIVITIES, CLAIMANT WOULD BE ABLE TO HANDLE SOME LIGHT WORK NOT REQUIRING REPETITIOUS STOOPING OR BENDING AT THE WAIST.

THE REFEREE SAW AND HEARD THE CLAIMANT, EXAMINED ALL OF THE MEDICAL EVIDENCE AND CONCLUDED CLAIMANT HAD NOT SUFFERED PERMANENT PARTIAL DISABILITY GREATER THAN THAT FOR WHICH HE HAD BEEN AWARDED. THE BOARD, ON DE NOVO REVIEW, CONCURS.

THE BOARD IS ALSO OF THE OPINION THAT A CONCENTRATED EFFORT SHOULD BE MADE ON CLAIMANT'S BEHALF BY VOCATIONAL REHABILITATION FACILITIES TO RETRAIN AND ASSIST CLAIMANT IN SECURING SOME TYPE OF EMPLOYMENT WITHIN HIS PHYSICAL CAPABILITIES. CLAIMANT IS STILL A YOUNG MAN WITH AVERAGE INTELLIGENCE AND GOOD APTITUDES, WHO, IF HE TAKES ADVANTAGE OF VOCATIONAL RETRAINING, COULD HAVE MANY PRODUCTIVE YEARS IN THE LABOR MARKET.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 20, 1975 IS AFFIRMED.

WCB CASE NO. 75-2679 MARCH 9, 1976

AKIRA NISHIMURA, CLAIMANT
JONES, LANG, KLEIN, WOLF AND SMITH,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

THE STATE ACCIDENT INSURANCE FUND SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH FOUND CLAIMANT'S CLAIM TO BE COMPENSABLE AND DIRECTED THE FUND TO PAY CLAIMANT'S ATTORNEY A REASONABLE ATTORNEY'S FEE.

CLAIMANT IS A VICE PRINCIPAL OF BENSON HIGH SCHOOL IN PORTLAND. JUST PRIOR TO THE ACCIDENT SUFFERED ON MARCH 6, 1975, CLAIMANT WAS ATTENDING A MEETING OF THE PORTLAND ASSOCIATION OF SCHOOL ADMINISTRATORS AS A REPRESENTATIVE OF THE PORTLAND HIGH SCHOOL PRINCIPALS ASSOCIATION. ATTENDANCE AT THIS MEETING WAS ONE OF THE DUTIES OF HIS EMPLOYMENT. CLAIMANT WAS PAID A LUMP SUM ANNUALLY FOR TRAVEL EXPENSES. IN COMPUTING TRAVEL EXPENSES WITH RESPECT TO MEETINGS SUCH AS THIS THE MILEAGE WAS COMPUTED AND PAID FOR NOT ONLY FROM THE SCHOOL TO THE MEETING PLACE BUT ALSO FROM THE MEETING PLACE TO THE ADMINISTRATOR'S HOME.

CLAIMANT LEFT BENSON AT APPROXIMATELY 3.00 P. M. ON MARCH 6, 1975 TO ATTEND THE AFORESAID MEETING WHICH LASTED TILL APPROXIMATELY 5.00 P. M. AFTER THE MEETING HE PROCEEDED TO HIS HOME. NEAR N. E. 88TH AVENUE AND WASHINGTON STREET HE WAS INVOLVED IN AN AUTOMOBILE ACCIDENT AND SUSTAINED HEAD INJURIES. THE QUESTION BEFORE THE REFEREE WAS WHETHER OR NOT THE JOURNEY ITSELF WAS PART OF THE SERVICES RENDERED BY THE CLAIMANT.

THE REFEREE FOUND THAT THIS CASE DID NOT FALL WITHIN THE GENERAL 'COMING AND GOING' RULE, BUT RATHER WAS A SITUATION WHERE THE JOURNEY ITSELF WAS A PART OF THE SERVICE RENDERED BY THE CLAIMANT IN THE COURSE OF HIS EMPLOYMENT, THEREFORE, THE CLAIM WAS COMPENSABLE.

THE REFEREE FURTHER FOUND THAT THE EMPLOYER HAD ACTUAL KNOWLEDGE OF THE INJURY ON MAY 6, HOWEVER, BECAUSE OF THE FACT THAT THE INJURY DID NOT OCCUR ON THE SCHOOL PREMISES AND BECAUSE OF THE UNIQUE FACTUAL CIRCUMSTANCES WITH THE CLOSE LEGAL ATTENDANT CIRCUMSTANCES, HE CONCLUDED NO PENALTIES SHOULD BE ASSESSED. THE FUND MUST PAY CLAIMANT'S COUNSEL AN ATTORNEY FEE BECAUSE THE CLAIM SHOULD NOT HAVE BEEN DENIED.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE ORDER OF THE REFEREE AS ITS OWN.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 24, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 400 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 75-2241 MARCH 9, 1976

JOYCE E. KLINGBEIL, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH GRANTED CLAIMANT 25 PER CENT FOR UNSCHEDULED LOW BACK DISABILITY EQUAL TO 80 DEGREES.

CLAIMANT WAS COMPENSABLY INJURED JULY 19, 1974 WHILE WORKING AS A MEAT PACKER. DR. MCGOUGH DIAGNOSED A PROBABLE HERNIATED NUCLEUS PULPOSUS OF THE LOWER LUMBAR SPINE ON THE RIGHT. CONSERVATIVE CARE HAS BEEN OF LIMITED BENEFIT, BUT CLAIMANT DECLINED THE SURGERY WHICH MIGHT HAVE ALLEVIATED HER SYMPTOMS.

CLAIMANT HAS A HIGH SCHOOL EDUCATION AND HAD WORKED AS A LICENSED BEAUTICIAN FOR SEVERAL YEARS, THEREAFTER, SHE THEN SPENT TEN YEARS AS A MOTHER AND HOMEMAKER BEFORE BECOMING EMPLOYED AS A MEAT PACKER.

THE REFEREE WAS OF THE OPINION THAT CLAIMANT'S SYMPTOMS WOULD CONTINUE TO BE EXACERBATED BY ACTIVITY UNLESS CLAIMANT AGREED TO THE RECOMMENDED SURGERY. HE ALSO AGREED SHE WAS NOT REALLY MOTIVATED TO BECOME REEMPLOYED.

CLAIMANT HAD RECEIVED AN AWARD OF 32 DEGREES FOR 10 PER CENT UNSCHEDULED LOW BACK DISABILITY BY A DETERMINATION ORDER MAILED APRIL 24, 1975 - THE REFEREE CONCLUDED THIS AWARD SHOULD BE INCREASED TO 80 DEGREES FOR 25 PER CENT UNSCHEDULED LOW BACK DISABILITY BECAUSE CLAIMANT'S LOSS OF WAGE EARNING CAPACITY WAS GREATER THAN THE INITIAL AWARD INDICATED.

THE BOARD, ON DE NOVO REVIEW, AGREES WITH THE FINDINGS AND CONCLUSIONS OF THE REFEREE AND AFFIRMS HIS ORDER.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 23, 1975 IS AFFIRMED.

WCB CASE NO. 74-3039 MARCH 9, 1976

AL TEMPLETON, CLAIMANT

SAM MCKENN, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH REMANDED CLAIMANT'S CLAIM TO IT FOR ACCEPTANCE AND PAYMENT OF COMPENSATION, AWARDED CLAIMANT PENALTIES AND ATTORNEY FEES FOR UNREASONABLE REFUSAL TO PAY COMPENSATION AND FOR UNREASONABLE DELAY IN THE ACCEPTANCE OR DENIAL OF THE CLAIM AND AWARDED CLAIMANT'S ATTORNEY A FEE OF 900 DOLLARS.

ON SEPTEMBER 21, 1973 CLAIMANT WAS EMPLOYED BY KEECH SALVAGE CO. TO HELP UNLOAD BOXCARS OF A WRECKED FREIGHT TRAIN. HE WAS HIRED OFF THE STREET AND PAID BY CHECK DAILY BY A MAN HE ONLY KNEW AS BUD. AS CLAIMANT WAS PULLING 16 FOOT, 2X12 BOARDS OUT OF THE CAR, HE SLIPPED AND FELL, LANDING ON HIS BACK IN A PILE OF BOARDS AND IRON DEBRIS. THE WORKMAN APPROACHED BUD, TOLD HIM HE HAD HURT HIS BACK AND WAS ADVISED BY BUD TO GO SEE A DOCTOR, THAT ALL HIS MEDICAL BILLS WOULD BE PAID. CLAIMANT CONSULTED DR. PALZINSKI WHO DIAGNOSED A SPRAINED LEFT HIP AND CONTUSIONS, ABRASIONS OF DORSAL AND LUMBAR SPINE DUE TO TRAUMA. DR. PALZINSKI'S CHART NOTES FOR SEPTEMBER 21, 1973 NOTED PATIENT FELL OFF A HOUSE APPROXIMATELY 8 FEET.

CLAIMANT'S DOCTOR BILLS WERE PAID, HE ASSUMED, BY THE EMPLOYER. NO FORM 801 WAS EVER FILLED OUT. SINCE HE WAS NOT FAMILIAR WITH WORKMEN'S COMPENSATION, HE CONSULTED AN ATTORNEY ON JULY 23, 1974. FROM THIS DATE FORWARD, A LONG, IRREGULAR CLAIM PROCESSING BEGAN, WHEREIN IT WAS FINALLY DETERMINED BY A WORKMEN'S COMPENSATION BOARD FIELD REPRESENTATIVE THAT KEECH SALVAGE WAS A COMPLYING EMPLOYER COVERED BY THE FUND. THE REPRESENTATIVE ASSISTED CLAIMANT IN FILLING OUT A FORM 801 ON SEPTEMBER 16, 1974, WHICH HE FORWARDED, TOGETHER WITH HIS REPORT, TO HIS SUPERVISOR AT THE BOARD. AT THIS POINT THE CLAIM HAD BEEN FORWARDED TO THE FUND FOR ACTION, HOWEVER, BY NOVEMBER 22, 1974, STATE ACCIDENT INSURANCE FUND HAD NO RECORD OF HAVING RECEIVED A CLAIM AND ONE OF ITS REPRESENTATIVES WAS SENT TO CLAIMANT'S COUNSEL'S OFFICE WHERE HE INTERVIEWED CLAIMANT AND TOOK NAMES OF WITNESSES.

ON DECEMBER 31, 1974, THE STATE ACCIDENT INSURANCE FUND ISSUED A DENIAL OF CLAIMANT'S CLAIM.

DR. PALZINSKI'S CHART NOTES SHOW CLAIMANT WAS SEEN BY HIM ON SEPTEMBER 21, 1973 FOR BACK INJURY. CLAIMANT RELATED TO THE DOCTOR HE FELL 8 FEET, THE HEIGHT OF A BOXCAR ON ITS SIDE - HE SOMETIMES REFERRED TO HIS FALL AS FROM THE 'ROOF' OF A BOXCAR. THE DOCTOR'S NOTES INDICATED CLAIMANT HAD SUSTAINED A FALL FROM THE ROOF OF A 'HOUSE' BUT THE REFEREE BELIEVED THE DOCTOR WAS ONLY ASSUMING IT WAS A HOUSE, ACTUALLY CLAIMANT OWNED NO HOUSE NOR DID HE HAVE ANY REASON TO REPAIR A ROOF ON A RENTED HOUSE.

AT THE HEARING, CLAIMANT'S 12 YEAR OLD SON, WHO LIVES WITH HIS FATHER, TESTIFIED THAT HE HAD GONE TO WORK WITH HIS FATHER ON SEPTEMBER 21, 1973, THE DATE OF THE ACCIDENT, AND THAT HE SAW HIS FATHER FALL FROM THE ROOF OF THE BOXCAR TO THE FLOOR.

THE REFEREE FOUND CLAIMANT'S TESTIMONY UNCONTROVERTED THAT HE ADVISED HIS SUPERVISOR ON TWO OCCASIONS ON SEPTEMBER 21, 1973, OF THE INJURY. SHE RULED, THEREFORE, CLAIMANT'S CLAIM WAS NOT BARRED BECAUSE OF LATE FILING SINCE THE EMPLOYER DID HAVE KNOWLEDGE ON THAT DATE. SHE ALSO FOUND CLAIMANT TO BE A CREDIBLE WITNESS AND HIS TESTIMONY CORROBORATED BY THE TESTIMONY OF HIS SON AND ANOTHER WITNESS. THE EMPLOYER DID NOT COME FORTH WITH ANY PAYROLL RECORDS TO DISPUTE THE FACT THAT CLAIMANT WAS AT WORK ON THE DAY OF HIS INJURY. NEITHER DID THE FUND'S REPRESENTATIVE, EVEN THOUGH SUBPOENAED, APPEAR AT THE HEARING TO JUSTIFY THE CLAIM HANDLING BY THE FUND.

THE REFEREE CONCLUDED THE CLAIM WAS COMPENSABLE AND REMANDED IT TO THE FUND FOR PAYMENT OF COMPENSATION, AS PROVIDED BY LAW, UNTIL CLOSED PURSUANT TO ORS 656.268.

THE REFEREE FURTHER CONCLUDED THERE WAS UNREASONABLE REFUSAL TO PAY COMPENSATION AND AN UNREASONABLE DELAY IN THE ACCEPTANCE OR DENIAL OF THIS CLAIM AND ORDERED THE FUND TO PAY CLAIMANT AN ADDITIONAL AMOUNT EQUAL TO 25 PER CENT OF ALL COMPENSATION DUE AND OWING BETWEEN OCTOBER 5, 1973 AND DECEMBER 31, 1974 AS A PENALTY AND FURTHER

DIRECTED THAT THAT PORTION OF THE PENALTY ASSESSED ON COMPENSATION DUE AND OWING BETWEEN OCTOBER 5, 1973 AND SEPTEMBER 21, 1975 BE REIMBURSED BY THE EMPLOYER TO THE FUND PURSUANT TO ORS 656.262(3)(D).

THE BOARD, ON DE NOVO REVIEW, CONCURS WITH THE FINDINGS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 22, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 400 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 75-1284 MARCH 10, 1976
WCB CASE NO. 75-1679

HELEN M. PRINCE, CLAIMANT

STEVEN PICKENS, CLAIMANT'S ATTY.
MERLIN MILLER, DEFENSE ATTY.
AMENDED ORDER

THE ABOVE-ENTITLED MATTER WAS THE SUBJECT OF AN ORDER ON REVIEW DATED MARCH 5, 1976.

IN THE FIRST PARAGRAPH ON PAGE 4, THE ORDER ERRONEOUSLY RECITES PAYMENT OF COMPENSATION IS TO COMMENCE SEPTEMBER 9, 1975.

THE SOLE PURPOSE OF THIS ORDER IS TO CORRECT THE RECORD AND CONFIRM THE ORDER SHOULD RECITE, '... COMMENCING SEPTEMBER 9, 1974...'

THE ORDER OF MARCH 5, 1976, SHOULD BE, AND IT IS HEREBY AMENDED TO REFLECT THAT CORRECTION.

WCB CASE NO. 75-2457 MARCH 11, 1976

TROY GUECK, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED APRIL 14, 1975 WHEREBY CLAIMANT WAS GRANTED TEMPORARY TOTAL DISABILITY COMPENSATION BUT RECEIVED NO AWARD FOR PERMANENT PARTIAL DISABILITY.

CLAIMANT SUSTAINED A COMPENSABLE INJURY ON FEBRUARY 8, 1974. HE WAS WORKING ON THE FRONT END OF AN AUTOMOBILE WHEN THE CAR SLIPPED OFF THE JACK AND FELL, HITTING CLAIMANT ON THE LEFT SIDE OF HIS HEAD AND FACE. CLAIMANT WAS TAKEN TO THE HOSPITAL WHERE THE DIAGNOSIS WAS SEVERE AND MULTIPLE LACERATIONS OF THE FACE AND SKULL, CLAIMANT ALSO LOST A TOOTH. SURGICAL REPAIR OF THE LACERATIONS AND OPEN REDUCTION

OF THE FRACTURES WERE DONE AND CLAIMANT RECEIVED FOLLOW UP CARE FROM DR. PERRIN. AGAIN, APRIL 1974 CLAIMANT WAS HOSPITALIZED FOR THE REMOVAL OF FACIAL WIRES WHEN HIS CHEEK BECAME INFECTED.

CLAIMANT RETURNED ON MAY 8, 1974 TO HIS SAME JOB AS AN AUTO ELECTRICIAN AND HAS WORKED STEADILY AT THAT JOB WITH NO TIME LOSS FROM WORK DUE TO HIS INJURY. HE CONTINUED TO SEE DR. PERRIN COMPLAINING OF HEADACHES AND OF DIFFICULTY WITH VISION IN HIS LEFT EYE. DR. PERRIN REFERRED CLAIMANT TO DR. CHAN FOR AN EYE EVALUATION. DR. CHAN REPORTED NO RESIDUAL DAMAGE TO THE EYE, HOWEVER, CLAIMANT DID NEED AN INCREASE OF POWER FOR READING TO GIVE THE OPTIMAL NEAR VISION AND, ACCORDINGLY, HE CHANGED THE CORRECTION.

THE REFEREE FOUND THAT CLAIMANT'S CURRENT SYMPTOMS WHILE OF AN IRRITATING NATURE, DID NOT DIMINISH HIS WAGE EARNING CAPACITY. THE REFEREE FURTHER FOUND NO MEDICAL EVIDENCE SUFFICIENT TO JUSTIFY AN AWARD OF SCHEDULED DISABILITY RELATIVE TO CLAIMANT'S LEFT EYE.

THE REFEREE CONCLUDED THAT CLAIMANT WAS A CREDIBLE WITNESS AND SHE FELT THAT HIS COMPLAINTS WERE REAL, HOWEVER, PAIN AND DISCOMFORT, BY AND OF THEMSELVES, ARE NOT COMPENSABLE - THEY MUST BE DISABLING AND THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONCLUSION THAT THEY WERE.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE AS ITS OWN.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 29, 1975 IS AFFIRMED.

WCB CASE NO. 75-2189 MARCH 11, 1976

MYRTLE M. BASL, CLAIMANT

RHOTEN, RHOTEN AND SPEERSTRA,
CLAIMANT'S ATTYS.
MERLIN L. MILLER, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

CLAIMANT REQUESTS BOARD REVIEW OF A REFEREE'S ORDER WHICH INCREASED CLAIMANT'S AWARD OF PERMANENT PARTIAL DISABILITY FROM 32 DEGREES TO 96 DEGREES FOR 30 PER CENT UNSCHEDULED DISABILITY. CLAIMANT SEEKS A GREATER AWARD OF PERMANENT PARTIAL DISABILITY.

CLAIMANT SUFFERED AN INJURY TO HER LOW BACK ON OCTOBER 19, 1973 WHILE EMPLOYED AS A CHECKER AT SAFEWAY. SHE WAS 50 AT THE TIME OF THE HEARING AND HAD A STABLE WORK RECORD WHICH INCLUDED MANAGEMENT OF A DEPARTMENT FOR J. C. PENNEY'S, DRIVING A SCHOOL BUS FOR 11 YEARS AND ABOUT 8 YEARS WITH SAFEWAY.

CLAIMANT FIRST SOUGHT MEDICAL TREATMENT ATTENTION FROM DR. NICKILA, D. C. FOR CHIROPRACTIC TREATMENTS. AT THE CARRIER'S REQUEST, SHE CONSULTED DR. SPADY WHO HOSPITALIZED HER FOR BED REST AND TRACTION. WHEN HER SYMPTOMS CONTINUED, A MYELOGRAM WAS PERFORMED WHICH WAS NORMAL. SHE WAS REFERRED TO THE UNIVERSITY OF OREGON MEDICAL SCHOOL FOR EVALUATION - IT WAS FELT THERE WAS CHRONIC LOW BACK STRAIN WITH LARGE FUNCTIONAL COMPONENT AND MINIMAL POSITIVE FINDINGS. DR. WHITE FOUND NO EVIDENCE OF NEUROLOGICAL DEFECT. CLAIMANT SUBSEQUENTLY HAS HAD CHIROPRACTIC TREATMENTS BI-WEEKLY.

ON DE NOVO REVIEW, IT APPEARS TO THE BOARD THAT CLAIMANT HAS BEEN AFFORDED MAXIMUM TREATMENT WHICH HAS PRODUCED ONLY MINIMAL POSITIVE FINDINGS. THE BOARD CONCLUDES THAT CLAIMANT HAS NOT INCURRED ANY PERMANENT PARTIAL DISABILITY IN EXCESS OF THAT FOR WHICH SHE HAS ALREADY BEEN AWARDED.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 12, 1975 IS AFFIRMED.

WCB CASE NO. 75-781 MARCH 11, 1976

STANLEY HOLLINGSWORTH, CLAIMANT

RICHARDSON AND MURPHY, CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

THE CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH APPROVED THE EMPLOYER'S DENIAL OF CLAIMANT'S CLAIM.

CLAIMANT SUFFERED AN INJURY ON SEPTEMBER 20, 1973 WHICH WAS ACCEPTED AND CLOSED ON JUNE 14, 1974 BY A DETERMINATION ORDER AWARDING COMPENSATION FOR TEMPORARY TOTAL DISABILITY BUT NONE FOR PERMANENT PARTIAL DISABILITY. THE CLAIMANT REQUESTED A HEARING, STATING THE ISSUE TO BE PRIMARILY A REOPENING FOR VOCATIONAL REHABILITATION OR THE EXTENT OF DISABILITY DEPENDING UPON THE REPORTS FROM DISABILITY PREVENTION DIVISION AND VOCATIONAL REHABILITATION. HOWEVER, ON FEBRUARY 20, 1975 THE EMPLOYER DENIED CLAIMANT'S 'CLAIM FOR AGGRAVATION'. THIS DENIAL WAS MADE WITHIN ONE YEAR FROM THE DATE OF THE DETERMINATION ORDER.

THE REFEREE FOUND THAT NEITHER THE MEDICAL NOR LAY TESTIMONY JUSTIFIED A FINDING OF ANY PERMANENT PARTIAL DISABILITY WITHOUT SPECULATION. CLAIMANT HAD BEEN SEEN BY MANY MEDICAL DOCTORS, A CHIROPRACTIC PHYSICIAN AND A PSYCHOLOGIST. DR. MEULLER RELEASED CLAIMANT TO RETURN TO REGULAR WORK ON OCTOBER 30, 1973 AND HE DID RETURN, BUT BECAUSE OF SO MUCH ABSENTEEISM WAS FIRED IN EARLY MAY 1974. CLAIMANT WAS DISAPPOINTED WITH THE TREATMENT HE HAD RECEIVED FROM DR. MEULLER SO HE WENT TO DR. ECKHARDT WHO SENT HIM TO THE VOCATIONAL REHABILITATION DIVISION. ULTIMATELY, DR. ECKHARDT, LIKE DR. MEULLER, COMMENTED HE WAS UNABLE TO EXPLAIN THE SEVERITY OR LONGEVITY OF THE APPARENT BACK DISABILITY BASED UPON ANY OBJECTIVE FINDINGS.

CLAIMANT CONTENDED THAT THE EMPLOYER'S DENIAL LETTER WAS AN OBVIOUS ATTEMPT TO LIMIT CLAIMANT'S APPEAL TIME TO 60 DAYS RATHER THAN THE ONE YEAR WHICH HE HAD FROM THE DATE OF THE DETERMINATION ORDER. THE REFEREE FELT THE DENIAL COULD POSSIBLY MISLEAD CLAIMANT BUT THAT IT WAS NOT A MATTER FOR THE HEARINGS DIVISION BUT SHOULD BE DETERMINED BY THE BOARD.

THE REFEREE CONCLUDED CLAIMANT HAD NOT ESTABLISHED THAT HE HAD SUFFERED ANY PERMANENT DISABILITY, BUT INSTEAD OF AFFIRMING THE DETERMINATION ORDER HE APPROVED THE DENIAL AND DISMISSED THE CASE.

THE BOARD, ON DE NOVO REVIEW, AGREES WITH THE REFEREE THAT THE MEDICAL AND LAY TESTIMONY WAS NOT SUFFICIENT TO JUSTIFY A FINDING OF ANY PERMANENT PARTIAL DISABILITY RESULTING FROM THE INDUSTRIAL

INJURY OF SEPTEMBER 20, 1973. HOWEVER, THE BOARD FINDS THAT IT WAS IMPROPER FOR THE EMPLOYER TO ISSUE A DENIAL WITHIN ONE YEAR OF THE DETERMINATION ORDER ON THE BASIS THAT CLAIMANT WAS CLAIMING AGGRAVATION.

ORS 656.268(4) PROVIDES THAT A COPY OF THE DETERMINATION ORDER SHALL BE MAILED TO ALL INTERESTED PARTIES AND ANY SUCH PARTY MAY REQUEST A HEARING UNDER ORS 656.283 ON THE DETERMINATION MADE UNDER SUBSECTION (3) OF ORS 656.268 WITHIN ONE YEAR AFTER COPIES OF THE DETERMINATION ORDER ARE MAILED.

THE BOARD FINDS NO EVIDENCE THAT CLAIMANT HAS EVER FILED A CLAIM FOR AGGRAVATION - TO THE CONTRARY, IT IS OBVIOUS THAT THE CLAIMANT WAS NOT SATISFIED WITH THE DETERMINATION ORDER MAILED JUNE 14, 1974 AND HAD REQUESTED A HEARING SEEKING EITHER A REOPENING FOR VOCATIONAL REHABILITATION OR, IN THE ALTERNATIVE, A FURTHER DETERMINATION OF THE EXTENT OF PERMANENT DISABILITY.

THE BOARD CONCLUDES THAT THE DENIAL SHOULD NOT HAVE BEEN APPROVED.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 29, 1975 IS REVERSED.

THE DETERMINATION ORDER MAILED JUNE 14, 1974 IS AFFIRMED.

WCB CASE NO. 74-3818 MARCH 11, 1976

MELVIN LUSTER, CLAIMANT

BANTA, YOUNG, SILVEN AND MARLETTE,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

CLAIMANT REQUESTS BOARD REVIEW OF A REFEREE'S ORDER WHICH INCREASED CLAIMANT'S AWARD OF PERMANENT PARTIAL DISABILITY FROM 40 PER CENT TO 75 PER CENT OF THE MAXIMUM FOR UNSCHEDULED LOW BACK DISABILITY. CLAIMANT URGES HE IS ENTITLED TO AN AWARD OF PERMANENT TOTAL DISABILITY.

CLAIMANT WAS INJURED IN OCTOBER 1973 WHEN HE WAS 60 YEARS OLD. HE HAD WORKED FOR 22 YEARS FOR THE EMPLOYER AS A SAWYER, SCALER AND LOG BUCKER. CONSERVATIVE TREATMENT WAS NOT SUCCESSFUL AND A LAMINECTOMY AT L4-5 WAS PERFORMED ON FEBRUARY 11, 1974. CLAIMANT CONTINUED TO HAVE PAIN AND EXPERIENCED WEAKNESS IN THE LEG WHICH CAUSED HIM TO FALL ON OCCASION. ADDITIONAL CORRECTIVE SURGERY WAS CONSIDERED, BUT CLAIMANT REFUSED IT AND ELECTED TO RETIRE.

THE EMPLOYER, ACTING GRATUITOUSLY, HAD OFFERED CLAIMANT LIGHTER TYPE JOBS. ALTHOUGH CLAIMANT TESTIFIED HE COULD NOT DO ANY OF THEM, HE ADMITTED HE HAD NOT TRIED.

IN CIRCUMSTANCES SUCH AS THIS, WHERE THE CLAIMANT VOLUNTARILY HAS REMOVED HIMSELF FROM THE LABOR MARKET AND RETIRED ON SOCIAL SECURITY, THE FACT THAT THE CLAIMANT IS NO LONGER WORKING MAY HAVE LITTLE BEARING ON WHETHER THE CLAIMANT IS STILL ABLE TO WORK. HIS MOTIVATION, OBVIOUSLY, WAS TO RETIRE FROM THE LABOR MARKET.

ON DE NOVO REVIEW, THE BOARD FINDS THAT DESPITE CLAIMANT'S MOTIVATION, OR LACK OF IT, HE DOES HAVE A SUBSTANTIAL DEGREE OF DISABILITY AND HE WOULD BE SEVERELY RESTRICTED IN ANY JOB HE MIGHT TRY TO PERFORM. THE BOARD AGREES WITH THE FINDING MADE BY THE REFEREE THAT CLAIMANT IS ENTITLED TO 75 PER CENT OF THE MAXIMUM ALLOWABLE BY STATUTE FOR HIS LOSS OF WAGE EARNING CAPACITY.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 10, 1975 IS AFFIRMED.

WCB CASE NO. 74-2833 MARCH 11, 1976

RUBY PARMENTER, CLAIMANT

EVOHL F. MALAGON, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
AMENDED ORDER

THE ABOVE ENTITLED MATTER WAS THE SUBJECT OF AN ORDER ON REVIEW DATED FEBRUARY 25, 1976.

THE SOLE PURPOSE OF THIS ORDER IS TO CORRECT THE RECORD BY DELETING THEREFROM THE LAST SENTENCE IN THE NEXT TO THE LAST PARAGRAPH ON PAGE 2, WHICH STATES -

> '... THE BOARD STRONGLY SUGGESTS THAT CLAIMANT SHALL CONTINUE THE GROUP THERAPY SUGGESTED BY DR. CARTER AND ADVISES CLAIMANT THAT SHE IS ENTITLED TO SUCH TREATMENT UNDER THE PROVISIONS OF ORS 656.245.'

THE ORDER OF FEBRUARY 25, 1976, SHOULD BE, AND IT IS HEREBY AMENDED TO REFLECT THIS CORRECTION.

WCB CASE NO. 75-020 MARCH 11, 1976

WILLIAM H. MILLER, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
ROGER WARREN, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

THE EMPLOYER ASKS BOARD REVIEW OF THE REFEREE'S ORDER DIRECTING THE EMPLOYER TO ACCEPT CLAIMANT'S CLAIM, PAY CLAIMANT BENEFITS TO WHICH HE IS ENTITLED BY LAW AND TO PAY CLAIMANT'S ATTORNEY A REASONABLE ATTORNEY'S FEE.

CLAIMANT ALLEGED HE SUFFERED A COMPENSABLE LOW BACK AND RIGHT LEG INJURY ON EITHER OCTOBER 3 OR 4, 1974 WHEN HE TRIPPED OVER A PIECE OF REBAR STEEL AND FELL ON HIS RIGHT SIDE ONTO A GRATING. CLAIMANT CONTINUED TO WORK BUT HAD INCREASING PAIN IN HIS LOW BACK AND RIGHT LEG AREA. ON OCTOBER 10 HE CEASED WORKING BECAUSE OF THIS PAIN AND ON THIS DATE FOR THE FIRST TIME REPORTED THE INJURY TO HIS FOREMAN WHO REFERRED HIM TO THE EMPLOYER'S DOCTOR AT THE INDUSTRIAL CLINIC. DR. TORRES GAVE CLAIMANT A 'NO WORK' SLIP AND REFERRED HIM, FIRST, TO ST. JOSEPH HOSPITAL FOR THERAPY AND THEN TO DR. CASE, AN ORTHOPEDIST, WHO PRESCRIBED

A BACK BRACE, BED REST AND USE OF CRUTCHES FOR A WEEK. CLAIMANT RETURNED TO WORK ON DECEMBER 31, 1974, THE WEEK PRIOR THERETO WAS CONSIDERED AS VACATION TIME. CLAIMANT WAS PAID TEMPORARY TOTAL DISABILITY FOR THE REMAINDER OF THE TIME OFF BUT ON JANUARY 14, 1975 THE CARRIER DENIED CLAIMANT'S CLAIM.

CLAIMANT HAD SUSTAINED AN INDUSTRIAL INJURY IN NOVEMBER 1973 WHILE WORKING FOR THE SAME EMPLOYER, HOWEVER, HE DID NOT FILE A CLAIM AS HE HAD SUFFERED NO TIME LOSS. CLAIMANT WAS ALSO INVOLVED IN AN AUTOMOBILE ACCIDENT IN DECEMBER 1974 WITH HEAD INJURIES. THE EMPLOYER CONTENDS THAT CLAIMANT HAD BEEN OBSERVED LIMPING EXTENSIVELY PRIOR TO THE OCTOBER 3, 1974 INJURY AND THAT CLAIMANT HAD SAID HE HAD A BAD HIP - ALSO CLAIMANT DID NOT TELL THE EMPLOYER ABOUT ANY INDUSTRIAL INJURY.

THE REFEREE FOUND THAT THE ALLEGED FALL WAS UNWITNESSED AND WAS NOT REPORTED UNTIL A WEEK LATER BUT THAT THE DELAY WAS EXPLAINED BY THE FACT THAT CLAIMANT'S CONDITION BECAME PROGRESSIVELY WORSE FOLLOWING THE FALL CAUSING CLAIMANT, ON OCTOBER 10, TO DISCONTINUE WORKING COMPLETELY. THE REFEREE GAVE SUBSTANTIAL WEIGHT TO THIS EXPLANATION TAKING INTO CONSIDERATION THE FACT THAT CLAIMANT HAD FAILED TO MAKE ANY CLAIM AT ALL FOLLOWING HIS NOVEMBER 1973 INDUSTRIAL INJURY.

THE REFEREE FOUND THAT DR. TORRES' INITIAL REPORT NOT ONLY CONTAINED THE SAME HISTORY GIVEN BY CLAIMANT BUT INCLUDED A FINDING OF 'RIGHT LATERAL GLUTEAL CONTUSION'.

THE REFEREE FOUND CLAIMANT'S TESTIMONY TO BE ESSENTIALLY CREDIBLE AND THAT THE CIRCUMSTANCES OF HIS INJURY WERE CONSISTENT WITH THE NATURE OF HIS JOB. HE CONCLUDED THAT CLAIMANT HAD SUSTAINED HIS BURDEN OF PROVING HE HAD SUSTAINED A COMPENSABLE INJURY.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE REFEREE'S ORDER.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 1, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 350 DOLLARS, PAYABLE BY THE EMPLOYER.

WCB CASE NO. 74-4117 MARCH 11, 1976

FINLEY HAMMOND, CLAIMANT

MERTEN AND SALTVEIT, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

THE CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED FEBRUARY 12, 1974 WHEREBY CLAIMANT WAS GRANTED TEMPORARY TOTAL DISABILITY COMPENSATION FROM DECEMBER 22, 1973 TO DECEMBER 25, 1973 BUT NO AWARD FOR PERMANENT PARTIAL DISABILITY.

CLAIMANT SUSTAINED AN INJURY TO HIS LOW BACK ON DECEMBER 18, 1973 WHILE LIFTING A HEAVY ROLL OF PAPER. DR. FRANT RELEASED CLAIMANT

TO REGULAR WORK AS OF DECEMBER 22, 1974 WITH NO PERMANENT IMPAIRMENT. SINCE THAT TIME CLAIMANT HAS CONTINUED TO COMPLAIN OF LOW BACK PROBLEMS AND OF THORACIC CERVICAL BACK PAIN AND HEADACHES.

ON JUNE 30, 1975 CLAIMANT WAS EXAMINED BY DR. RUSCH WHO CONCLUDED THAT CLAIMANT SUFFERED CHRONIC BACK PAIN ASSOCIATED WITH CHRONIC BACK STRAIN, PROBABLY SECONDARY TO THE DECEMBER 18, 1973 INJURY. HE RECOMMENDED PHYSICAL THERAPY FOLLOWED BY PROGRESSIVE INVOLVEMENT IN ATHLETIC ACTIVITIES, HOWEVER, HIS PROGNOSIS WAS GUARDED BECAUSE OF THE LAPSE OF APPROXIMATELY 18 MONTHS SINCE THE INJURY.

CLAIMANT IS NOW BACK AT HIS REGULAR WORK AND IS ALSO ATTENDING PORTLAND STATE UNIVERSITY.

THE REFEREE FOUND CLAIMANT TO BE CREDIBLE - HOWEVER, BECAUSE OF THE DISPARITY IN THE DESCRIPTION OF THE ACCIDENT AS ORIGINALLY REPORTED AND THE DESCRIPTION OF IT GIVEN TO DR. RUSCH, HE CONCLUDED THAT CLAIMANT HAD FAILED TO PROVE THAT THE CHRONIC STRAIN IN HIS LOW BACK RESULTED FROM HIS COMPENSABLE INJURY OF DECEMBER 18, 1973.

THE BOARD, ON DE NOVO REVIEW, FINDS NO EVIDENCE THAT, AS A RESULT OF THE INDUSTRIAL INJURY OF DECEMBER 18, 1973, CLAIMANT HAS SUFFERED ANY DIMINUTION OF HIS WAGE EARNING CAPACITY, THE SOLE CRITERION FOR DETERMINING UNSCHEDULED DISABILITY. THE BOARD CONCLUDES THAT CLAIMANT IS NOT ENTITLED TO AN AWARD OF COMPENSATION FOR ANY PERMANENT PARTIAL DISABILITY AND THE DETERMINATION ORDER MAILED FEBRUARY 12, 1974 SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 27, 1975 IS AFFIRMED.

WCB CASE NO. 74-4128 MARCH 11, 1976

ARTHUR SORBER, CLAIMANT

FRANKLIN, BENNETT, OFELT AND JOLLES,
CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE EMPLOYER'S DENIAL OF CLAIMANT'S CLAIM FOR GRADUAL ONSET OF BACK INJURIES SIX TO EIGHT MONTHS PRIOR TO OCTOBER 2, 1974.

CLAIMANT, 61 YEARS OLD AT THE TIME OF HEARING, HAD SOUGHT TREATMENT FOR A NUMB LEFT LEG WHILE ON VACATION IN JACKSON, WYOMING DURING AUGUST 1974. CLAIMANT HAD BEEN HAVING LOW BACK PAIN FOR APPROXIMATELY TWO YEARS BUT HE DID NOT CONNECT THE LEG NUMBNESS WITH HIS BACK. HE RECEIVED CHIROPRACTIC MANIPULATION IN JACKSON WHICH GAVE HIM SOME RELIEF ALTHOUGH HE WAS UNABLE TO WALK BY HIMSELF.

AFTER CLAIMANT RETURNED TO PORTLAND, HE WAS TREATED BY DR. KEIZER ON AUGUST 20, 1974 FOR LUMBAR SPINAL STENOSIS, A CONDITION THAT CAN CAUSE PINCHING OF THE NERVES. CLAIMANT UNDERWENT TWO SURGERIES FOR THIS CONDITION AND PRESENTLY IS SHOWING SOME IMPROVEMENT ALTHOUGH HE CANNOT WALK ANY DISTANCE WITHOUT HELP AND THE PROGNOSIS FOR FUTURE IMPROVEMENT IS POOR. CLAIMANT PROBABLY WILL NOT BE ABLE TO RETURN TO ANY GAINFUL EMPLOYMENT.

THE REFEREE WAS PERSUADED BY THE MEDICAL EVIDENCE THAT CLAIMANT HAD A DEGENERATIVE OSTEOARTHRITIC CONDITION WHICH WAS NOT JOB-INDUCED AND, THEREFORE, WAS NOT COMPENSABLE.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 9, 1975 IS AFFIRMED.

CLAIM NO. E 42 CC 83602 RG MARCH 11, 1976

LUTHER M. JACOBSON, SR., CLAIMANT

OWN MOTION ORDER

BY THE BOARD'S OWN MOTION ORDER DATED NOVEMBER 15, 1974, THIS CLAIM WAS ORDERED REOPENED TO PROVIDE FURTHER MEDICAL CARE AND TREATMENT RELATED TO CLAIMANT'S INDUSTRIAL INJURY SUSTAINED JULY 11, 1967.

FOLLOWING THREE SURGERIES, CLAIMANT HAD RECEIVED PERMANENT PARTIAL DISABILITY AWARDS TOTALING 70 PER CENT OF THE MAXIMUM FOR UNSCHEDULED DISABILITY AND 10 PER CENT LOSS OF THE LEFT FOOT.

ON SEPTEMBER 17, 1974 DR. N.J. WILSON ADVISED THE EMPLOYER'S CARRIER THAT A FOURTH SURGERY, NAMELY, A REPAIR OF A PSEUDOARTHROSIS AT THE L3-4 LEVEL WOULD HAVE TO BE PERFORMED. THIS WAS DONE.

DR. WILSON'S REPORT OF NOVEMBER 13, 1975 STATES CLAIMANT'S CONDITION IS STATIONARY - CLAIMANT HAS AN APPARENT SOLID FUSION FROM L3 TO THE SACRUM AND CAN RETURN TO SEDENTARY WORK.

THE EVALUATION DIVISION HAS RECOMMENDED THAT CLAIMANT BE AWARDED APPROPRIATE TEMPORARY TOTAL DISABILITY, BUT NO FURTHER AWARD FOR PERMANENT PARTIAL DISABILITY.

ORDER

IT IS ORDERED THAT CLAIMANT BE GRANTED TEMPORARY TOTAL DISABILITY COMPENSATION FROM SEPTEMBER 17, 1974 THROUGH NOVEMBER 13, 1975.

WCB CASE NO. 75-369 MARCH 11, 1976
WCB CASE NO. 75-2251

THOMAS MURPHY, CLAIMANT

BRAND, LEE, FERRIS AND EMBICK,
CLAIMANT'S ATTYS.
PHILIP A. MONGRAIN, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER
CROSS REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON, MOORE AND PHILLIPS.

THE EMPLOYER REQUESTED BOARD REVIEW OF THE ORDER OF THE REFEREE DATED SEPTEMBER 29, 1975 WHEREBY THE REFEREE DENIED CLAIMANT'S CLAIM FOR AGGRAVATION IN WCB CASE NO. 75-2251 BUT REMANDED CLAIMANT'S DENIED CLAIM TO THE EMPLOYER FOR PAYMENT OF COMPENSATION

AS PROVIDED BY LAW UNTIL THE CLAIM WAS CLOSED PURSUANT TO ORS 656.268 AND ASSESSED A PENALTY OF 25 PER CENT OF DR. DELANEY'S BILL OF 125 DOLLARS AND DIRECTED THE EMPLOYER TO PAY CLAIMANT'S ATTORNEY A REASONABLE ATTORNEY'S FEE IN WCB CASE NO. 75-369.

THE CLAIMANT CROSS REQUESTED REVIEW OF THAT PORTION OF THE REFEREE'S ORDER WHICH FOUND THE CLAIMANT'S WAIVER OF ANY CLAIM FOR PENALTIES ARISING OUT OF THE DENIAL LETTER DATED NOVEMBER 26, 1974 WAS AN EFFECTIVE WAIVER.

ON JANUARY 27, 1976 THE EMPLOYER ADVISED THE BOARD IT WISHED TO WITHDRAW ITS REQUEST FOR BOARD REVIEW, HOWEVER, CLAIMANT DID NOT WISH TO WITHDRAW HIS CROSS REQUEST FOR REVIEW AND, THEREFORE, THE SOLE ISSUE TO BE DETERMINED BY THE BOARD IS THE PROPRIETY OF CLAIMANT'S FINDING WITH RESPECT TO THE WAIVER OF PENALTIES.

CLAIMANT HAD SUFFERED A COMPENSABLE INJURY ON APRIL 27, 1973. NO REQUEST FOR A DETERMINATION HAD EVER BEEN MADE NOR HAD A DETERMINATION ORDER BEEN ISSUED WITH RESPECT TO SAID CLAIM, THEREFORE, THE REFEREE FOUND THAT THE REQUEST FOR AGGRAVATION FILED ON APRIL 3, 1975 WAS PREMATURE AND SHOULD BE DENIED.

BASED UPON THE MEDICAL EVIDENCE, THE REFEREE FOUND THAT CLAIMANT'S 1973 ACCIDENT AGGRAVATED A PREEXISTING DEGENERATIVE ARTHRITIC CONDITION WHICH CLAIMANT HAD AND CAUSED IT TO BECOME SYMPTOMATIC LEADING TO HIS TREATMENT AND SURGERY IN 1975 AND, THEREFORE, THE DENIAL OF DECEMBER 17, 1974 WAS IMPROPER.

ON OCTOBER 1, 1974 CLAIMANT CONSULTED DR. ABRAHAM, A CALIFORNIA ORTHOPEDIST, WHO REQUESTED AUTHORIZATION FROM THE CARRIER TO TREAT THE CLAIMANT. HE LATER WROTE THE CARRIER DIAGNOSING DEGENERATIVE ARTHRITIS OF BOTH HIPS AND ASKED FOR PAST RECORDS AND X-RAYS. DR. ABRAHAM HAD RECOMMENDED A TOTAL HIP ARTHROPLASTY OF THE LEFT HIP.

CLAIMANT CONTINUED TO RECEIVE LITTLE OR NO SATISFACTION FROM THE CARRIER AND IN NOVEMBER 1974 HE CONSULTED A CALIFORNIA ATTORNEY WITH RESPECT TO HIS PROBLEMS. CLAIMANT'S WIFE, THROUGH HER EMPLOYMENT, HAD INSURANCE COVERAGE WITH PRUDENTIAL WHICH ALSO COVERED HER HUSBAND. AFTER DISCUSSING THE SITUATION WITH THE ATTORNEY, CLAIMANT AUTHORIZED HIM TO REQUEST A DENIAL OF THE CLAIM BY THE EMPLOYER'S CARRIER SO THAT HE COULD USE THE COVERAGE OF HIS WIFE'S POLICY FOR HIS SURGERY. THE ATTORNEY ON NOVEMBER 26, 1974 WROTE TO THE CARRIER STATING THAT A DENIAL OF THE CLAIM WAS REQUESTED AND THAT IN RETURN NEITHER CLAIMANT NOR HE, AS CLAIMANT'S ATTORNEY, WOULD APPLY FOR ANY PENALTIES, SANCTION OR INTERESTS THAT MIGHT ACCRUE IN CLAIMANT'S BEHALF AGAINST THE CARRIER IF THE REQUESTED DENIAL SHOULD BE FOUND TO BE IMPROPER.

THE REFEREE, AS PREVIOUSLY STATED, CONCLUDED THAT THE DENIAL WAS IMPROPER BUT ALSO CONCLUDED THAT THE NOVEMBER 26, 1974 LETTER FROM CLAIMANT'S ATTORNEY TO THE CARRIER ON BEHALF OF CLAIMANT WAS AN EFFECTIVE WAIVER OF ANY CLAIM FOR PENALTIES ARISING OUT OF THE DENIAL OF HIS CLAIM.

THE CLAIMANT CONTENDS THAT UNDER THE PROVISIONS OF ORS 656.236 NO RELEASE BY A WORKMAN OF ANY RIGHT UNDER ORS 656.001 TO 656.794 IS VALID AND THAT, THEREFORE, THE LETTER FROM THE ATTORNEY IN CALIFORNIA WAIVING PENALTIES COULD NOT ADEQUATELY DO SO.

THE BOARD, UPON DE NOVO REVIEW, FINDS NOTHING IMPROPER WITH A WAIVER OF PENALTIES AND/OR ATTORNEY'S FEES WHICH MAY OR MAY NOT ARISE IN THE FUTURE. DISTINCTION BETWEEN ADDITIONAL COMPENSATION IN THE FORM OF PENALTIES AND COMPENSATION IN THE FORM OF DISABILITY BENEFITS

CAN, AND SHOULD BE LOGICALLY DRAWN. THE FORMER IS A FORM OF SANCTION AGAINST AN EMPLOYER OR CARRIER FOR MALFEASANCE OR MISFEASANCE WHICH CAN PROPERLY BE FORGIVEN - THE LATTER IS A RIGHT PERSONAL TO THE CLAIMANT, GUARANTEED BY STATUTE AND HAS NOTHING TO DO WITH CLAIM MANAGEMENT OR MISMANAGEMENT.

THE BOARD CONCLUDES THAT THE REFEREE WAS CORRECT IN FINDING THAT THE NOVEMBER 26, 1974 LETTER FROM CLAIMANT'S ATTORNEY WAS AN EFFECTIVE WAIVER OF ANY CLAIM FOR PENALTIES ARISING OUT OF THE DENIAL OF THE CLAIM. NEITHER PARTY REQUESTED BOARD REVIEW OF THE REMAINING ISSUES BEFORE THE REFEREE, THEREFORE, THE BOARD AFFIRMS THE REFEREE'S ORDER IN ITS ENTIRETY.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 29, 1975 IS AFFIRMED.

DISSENT

BOARD MEMBER KENNETH V. PHILLIPS DISSENTS AS FOLLOWS -

THE ISSUE TO BE DECIDED IS THE VALIDITY AND EFFECT OF CLAIMANT'S REQUEST FOR A DENIAL OF HIS CLAIM AND WAIVER OF ALL RIGHTS TO POSSIBLE FUTURE PENALTIES AND ATTORNEY'S FEES. SUCH REQUEST HAVING BEEN MADE IN A LETTER SENT BY CLAIMANT'S ATTORNEY TO THE STATE ACCIDENT INSURANCE FUND ON NOVEMBER 26, 1974.

THE PLAIN LANGUAGE OF ORS 656.236(1) STATES - 'NO RELEASE BY A WORKMAN OR HIS BENEFICIARY OF ANY RIGHTS UNDER ORS 656.001 TO 656.794 IS VALID.' PENALTIES AND ATTORNEY FEES ARE RIGHTS THAT CAN NOT BE WAIVED.

THE INTENT OF THE LEGISLATURE IN WRITING A WORKMEN'S COMPENSATION LAW WAS TO CREATE A SYSTEM BINDING ON ALL PARTIES. AGREEMENT BY THE EMPLOYER AND THE EMPLOYE TO SPECIFIC EXCEPTIONS TO THE STATUTE IS CLEARLY OUTSIDE THE INTENT OF THE LEGISLATURE AND THE LAW.

FOR THE ABOVE REASONS, I DISSENT.

-S- KENNETH V. PHILLIPS, BOARD MEMBER

WCB CASE NO. 75-821 MARCH 11, 1976

MARLENE WILSON (STECKLEY), CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
LINDSAY, NAHSTOLL, HART AND KRAUSE,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHEREIN HE FOUND THE CLAIM HAD BEEN TIMELY FILED, BUT THAT CLAIMANT HAD FAILED TO PROVE ITS COMPENSABILITY.

CLAIMANT, A 34 YEAR OLD EXECUTIVE SECRETARY, INJURED HER BACK ON DECEMBER 16, 1974, EITHER AT HOME OR AT WORK. WHILE IN HER ATTORNEY'S OFFICE ON ANOTHER MATTER ON JANUARY 30, 1975, CLAIMANT EXECUTED A FORM 801 FOR AN ALLEGED ON-THE-JOB INJURY. THE CLAIM WAS DENIED ON FEBRUARY 18, 1975 FOR THE REASON THE CLAIM HAD NOT BEEN TIMELY FILED,

NOR HAD THE INJURY ARISEN OUT OF OR WITHIN THE SCOPE OF HER EMPLOYMENT.

AT THE HEARING TWO CO-WORKERS TESTIFIED THAT WHEN CLAIMANT CAME TO WORK ON THE MORNING OF DECEMBER 16, SHE STATED THAT SHE HAD HURT HER BACK AT HOME WHILE REACHING ACROSS THE BREAKFAST TABLE OR PICKING UP SOMETHING FOR HER DAUGHTER AND THAT SHE WAS GOING TO CALL THE DOCTOR FOR AN APPOINTMENT. DIRECTLY IN CONFLICT WAS THE TESTIMONY OF BOTH CLAIMANT AND HER DAUGHTER INDICATING CLAIMANT HAD NOT SUFFERED ANY INJURY AT HOME THAT MORNING.

ACCORDING TO THE CHART NOTES OF DR. PHILIP E. BLATT, CLAIMANT RECEIVED DIATHERMY ON DECEMBER 16, 1974 - THERE WAS NO INDICATION OF A JOB-RELATED INJURY AND ORS WAS BILLED. DR. BLATT DID NOT ACTUALLY SEE CLAIMANT UNTIL JANUARY 21, 1975, AT THAT TIME HE RECEIVED A HISTORY FROM CLAIMANT OF HAVING DEVELOPED BACK PAIN IN DECEMBER WHILE AT WORK. AT THIS POINT IN TIME, CLAIMANT HAD BEEN TERMINATED BY HER EMPLOYER.

SINCE THIS MATTER RESTS PRIMARILY ON CREDIBILITY, THE BOARD, ON DE NOVO REVIEW, GIVES GREAT WEIGHT TO THE OPINION OF THE REFEREE WHO SAW AND HEARD THE WITNESSES, AND CONCLUDES HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 12, 1975 IS AFFIRMED.

CLAIM NO. 05X-008027 MARCH 11, 1976
751-C-511,444

JAMES BLETH, CLAIMANT

OWN MOTION ORDER REMANDING THE MATTER TO THE HEARINGS DIVISION AND DESIGNATING THE PAYING AGENCY PURSUANT TO ORS 656.307

ON DECEMBER 17, 1975 CLAIMANT REQUESTED THE BOARD EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 AND REOPEN HIS CLAIM FOR AN INDUSTRIAL INJURY SUFFERED ON JULY 23, 1968. CLAIMANT SUPPORTED HIS REQUEST WITH A MEDICAL REPORT FROM DR. BUMP DATED DECEMBER 11, 1975 WHICH EXPRESSED AN OPINION THAT CLAIMANT'S PRESENT CONDITION WAS MOST LIKELY A RESIDUAL OF HIS PREVIOUS KNEE INJURY, MOST LIKELY TO THE MEDICAL MENISCUS AND SHOULD BE COVERED UNDER HIS CLAIM. THE LETTER WAS ADDRESSED TO ARGONAUT INSURANCE COMPANIES.

ON DECEMBER 29, 1975 THE BOARD ADVISED ARGONAUT OF CLAIMANT'S REQUEST AND ARGONAUT RESPONDED BY A LETTER DATED JANUARY 5, 1976 STATING IT WOULD NOT REOPEN CLAIMANT'S CLAIM AND THAT CLAIMANT HAD BEEN SO ADVISED IN A DENIAL LETTER DATED DECEMBER 19, 1975. THE BASIS FOR ARGONAUT'S DENIAL WAS THAT CLAIMANT'S PRESENT CONDITION WAS THE RESULT OF A 1966 INJURY WHEN THE EMPLOYER HAD BEEN FURNISHED WORKMEN'S COMPENSATION BY THE HOME INSURANCE COMPANY AND, THEREFORE, CLAIMANT'S PRESENT CONDITION WAS THE RESPONSIBILITY OF HOME.

ON JANUARY 9, 1976, HOME WAS ADVISED BY THE BOARD OF CLAIMANT'S REQUEST FOR RELIEF UNDER ITS OWN MOTION JURISDICTION AND ALSO THAT THE REOPENING OF THE 1968 CLAIM WAS DENIED BY ARGONAUT. ON MARCH 3, 1976 HOME DENIED RESPONSIBILITY FOR CLAIMANT'S CONDITION, STATING

THAT, AFTER REVIEWING ITS FILES, IT FELT THAT CLAIMANT'S CURRENT CONDITION WAS RELATED TO THE 1968 INJURY.

THE BOARD DOES NOT HAVE SUFFICIENT MEDICAL AND LAY EVIDENCE UPON WHICH TO MAKE A DETERMINATION WITH RESPECT TO WHICH CARRIER IS RESPONSIBLE FOR CLAIMANT'S PRESENT CONDITION. THEREFORE, THIS MATTER IS REMANDED TO THE HEARINGS DIVISION WITH INSTRUCTIONS TO HOLD A HEARING ON SAID ISSUE. UPON CONCLUSION OF THE HEARING THE REFEREE SHALL FURNISH THE BOARD HIS RECOMMENDATION TOGETHER WITH A TRANSCRIPT OF THE PROCEEDINGS.

THE BOARD, EXERCISING THE AUTHORITY VESTED IN IT BY ORS 656.307, HEREBY DESIGNATES ARGONAUT INSURANCE COMPANIES AS THE CARRIER RESPONSIBLE FOR PAYMENT OF COMPENSATION, AS PROVIDED BY LAW. PAYMENT OF COMPENSATION SHALL COMMENCE AS OF NOVEMBER 26, 1975 AND CONTINUE UNTIL A DETERMINATION OF THE RESPONSIBLE PAYING PARTY HAS BEEN MADE. IN THE EVENT THAT IT IS DETERMINED THAT ARGONAUT INSURANCE COMPANIES IS NOT THE RESPONSIBLE PAYING PARTY THE BOARD'S ORDER SHALL CONTAIN A DIRECTIVE WITH RESPECT TO ANY NECESSARY MONETARY ADJUSTMENT BETWEEN THE HOME INSURANCE COMPANY AND ARGONAUT INSURANCE COMPANIES.

IT IS SO ORDERED.

SAIF CLAIM NO. NC 129652 MARCH 12, 1976

JAMES A. ANDERSON, CLAIMANT

SAHLSTROM, LOMBARD, STARR AND VINSON,
CLAIMANT'S ATTYS.
OWN MOTION ORDER

ON FEBRUARY 19, 1976 CLAIMANT REQUESTED THE BOARD EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 TO DETERMINE WHETHER CLAIMANT'S CONDITION AS A RESULT OF HIS INDUSTRIAL INJURY OF JULY 11, 1968 HAS BECOME AGGRAVATED AND WORSENED AND WHETHER CLAIMANT IS ENTITLED TO BENEFITS AS A PERMANENTLY TOTALLY DISABLED PERSON.

CLAIMANT'S 1968 CLAIM WAS CLOSED BY A DETERMINATION ORDER DATED MAY 16, 1969 WHICH AWARDED CLAIMANT 16 DEGREES FOR 5 PER CENT UNSCHEDULED DISABILITY. A HEARING WAS REQUESTED AND, AFTER HEARING, THE AWARD WAS INCREASED TO 48 DEGREES FOR 15 PER CENT UNSCHEDULED DISABILITY. THE BOARD, ON DE NOVO REVIEW, CONCURRED WITH THE HEARING OFFICER. AN APPEAL WAS TAKEN FROM THE ORDER ON REVIEW TO THE CIRCUIT COURT WHICH AFFIRMED THE BOARD'S ORDER. NEITHER THE HEARING OFFICER NOR THE BOARD FELT CLAIMANT COULD BE CONSIDERED PERMANENTLY AND TOTALLY DISABLED.

CLAIMANT'S REQUEST WAS ACCOMPANIED BY A MEDICAL REPORT FROM DR. STAINSBY DATED SEPTEMBER 12, 1975. DR. STAINSBY HAD FIRST EXAMINED CLAIMANT ON JANUARY 8, 1970 WHEN HE WAS COMPLAINING OF PAIN IN THE LOW BACK AND WEAKNESS OF THE LOWER LEGS FOLLOWING THE JULY 11, 1968 ACCIDENT. IN HIS REPORT DR. STAINSBY STATED, AFTER EXAMINATION, HE COULD FIND NO OBJECTIVE EVIDENCE OF AGGRAVATION OF CLAIMANT'S CONDITION FROM THAT WHICH WAS RECORDED BASED ON THE JANUARY 8, 1970 EXAMINATION AND NO INCREASE IN DISABILITY.

ON MARCH 2, 1976 THE STATE ACCIDENT INSURANCE FUND RESPONDED TO THE REQUEST FOR BOARD'S OWN MOTION, STATING DR. STAINSBY HAD BEEN UNABLE TO FIND ANY OBJECTIVE EVIDENCE OF AGGRAVATION OR INCREASE IN DISABILITY AND OPPOSED THE GRANTING OF ANY ADDITIONAL AWARD.

THE BOARD, AFTER STUDYING THE MEDICAL REPORT, CONCLUDES THAT THERE IS NOT SUFFICIENT EVIDENCE TO SUPPORT A FINDING OF EITHER AGGRAVATION OR PERMANENT TOTAL DISABILITY. AT THE PRESENT TIME CLAIMANT IS RECEIVING 75 PER CENT OF THE MAXIMUM ALLOWABLE FOR UNSCHEDULED DISABILITY - AS A RESULT OF AN AUGUST 24, 1965 INJURY (CLAIM B 142115) CLAIMANT HAD RECEIVED AN AWARD OF 50 PER CENT LOSS FUNCTION OF ARM FOR UNSCHEDULED DISABILITY WHICH ULTIMATELY WAS INCREASED TO 60 PER CENT LOSS FUNCTION OF AN ARM FOR THE UNSCHEDULED DISABILITY.

ORDER

THE REQUEST BY THE CLAIMANT THAT THE BOARD INVOKE ITS OWN MOTION JURISDICTION UNDER THE PROVISIONS OF ORS 656.278 TO DETERMINE WHETHER CLAIMANT'S INDUSTRIAL INJURY SUFFERED ON JUNE 11, 1968 HAS BECOME AGGRAVATED OR WORSENED AND WHETHER CLAIMANT IS ENTITLED TO BENEFITS AS A PERMANENTLY TOTALLY DISABLED PERSON WHICH WAS RECEIVED BY THE BOARD ON FEBRUARY 19, 1976, IS HEREBY DENIED.

WCB CASE NO. 75-1553 MARCH 12, 1976

ARNOLD ANDERSON, CLAIMANT

GALTON AND POPICK, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

THE CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH DIRECTED THE STATE ACCIDENT INSURANCE FUND TO PAY CLAIMANT A 25 PER CENT PENALTY ON TIME LOSS BENEFITS DUE AND PAYABLE TO CLAIMANT FROM DECEMBER 30, 1974 THROUGH APRIL 3, 1975 AND TO PAY CLAIMANT'S ATTORNEY A REASONABLE ATTORNEY'S FEE BUT FOUND THAT THE FUND WAS NOT REQUIRED TO PAY PENALTIES AND ATTORNEY'S FEES FOR ITS FAILURE TO PAY A PENALTY ASSESSED UNDER A PREVIOUS REFEREE'S ORDER ENTERED APRIL 3, 1975.

CLAIMANT HAD FILED A CLAIM FOR AGGRAVATION WHICH HAD BEEN DENIED AND, AFTER HEARING, THE REFEREE, ON APRIL 3, 1975, REMANDED THE CLAIM TO THE FUND FOR ACCEPTANCE AND PAYMENT OF BENEFITS AS PROVIDED BY LAW WITH COMPENSATION FOR TEMPORARY TOTAL DISABILITY TO COMMENCE JULY 1, 1974 AND TO CONTINUE UNTIL THE CLAIM WAS CLOSED UNDER THE PROVISIONS OF ORS 656.268.

ON OR ABOUT APRIL 14, 1975 THE FUND PAID CLAIMANT TIME LOSS FOR THE PERIOD FROM JULY 1, 1974 THROUGH DECEMBER 30, 1974. THERE WERE NO FURTHER PAYMENTS AND, ON APRIL 20, 1975, CLAIMANT'S COUNSEL OBJECTED TO THE TERMINATION OF TIME LOSS PAYMENTS AND REQUESTED THE FUND TO ISSUE ITS DRAFT ALONG WITH THE PENALTY WHICH HAD BEEN ASSESSED BY THE REFEREE IN HIS ORDER OF APRIL 3, 1975.

THE REFEREE FOUND THAT THE PREVIOUS REFEREE'S ORDER HAD DIRECTED THE PAYMENT OF A PENALTY OF 25 PER CENT OF THE COMPENSATION DUE FOR TEMPORARY TOTAL DISABILITY FROM JULY 1, 1974 UNTIL THE DATE OF HIS ORDER WHICH WAS APRIL 3, 1975. THE FUND APPEALED THIS PORTION OF THE REFEREE'S ORDER AND HAS NEVER PAID THE PENALTY. ON MAY 1, 1975 A DEMAND WAS MADE UPON THE FUND TO PAY THE PENALTY AND, SUBSEQUENTLY, CLAIMANT AMENDED HIS REQUEST FOR HEARING ASKING FOR PENALTIES AND ATTORNEY'S FEES FOR THE REFUSAL TO COMPLY WITH THE REFEREE'S OPINION AND ORDER OF APRIL 3, 1975.

THE REFEREE FOUND THE FUND'S FAILURE TO COMPLY WITH THE ORDER OF APRIL 3, 1975 WAS A CLEAR VIOLATION OF THE STATUTE AND, THEREFORE, CLAIMANT WAS ENTITLED TO BE PAID A PENALTY IN THE AMOUNT OF 25 PER CENT OF SUCH TIME LOSS DUE AND OWING CLAIMANT AND HE WAS ALSO ENTITLED TO HAVE HIS ATTORNEY PAID A REASONABLE FEE BY THE FUND. PAYMENT OF COMPENSATION ORDERED BY A REFEREE IS NOT STAYED BY AN APPEAL FROM SUCH ORDER. ORS 656.313(1). HOWEVER, WHETHER OR NOT THE PENALTY IMPOSED BY THAT ORDER IS STAYED BY AN APPEAL PRESENTS A RATHER DIFFICULT QUESTION.

THE REFEREE CONCLUDED THAT CLAIMANT WAS ENTITLED TO AN ATTORNEY'S FEE AND PENALTY BASED UPON THE FAILURE OF THE FUND TO PAY THE TIME LOSS ORDERED BY THE REFEREE'S ORDER OF APRIL 3, 1975. HE FURTHER CONCLUDED THAT ALTHOUGH ORS 656.262(8) DOES NOT SPECIFICALLY REFER TO PENALTIES EXCEPT IN THE HEADNOTE (WHICH IS NOT A PART OF THE STATUTE), THE LEGISLATIVE EXPRESSION SHOULD BE GIVEN IN ITS ORDINARY AND PLAIN MEANING AND THE PROVISION PROVIDED FOR A PENALTY NOT FOR COMPENSATION WHICH HAD TO BE PAID REGARDLESS OF AN APPEAL. CLAIMANT IS ENTITLED TO RECEIVE A PENALTY BASED UPON THE AMOUNT OF TEMPORARY TOTAL DISABILITY COMPENSATION WHICH WAS DUE HIM AND WHICH WAS NOT TIMELY PAID BY THE FUND BUT HE IS NOT ENTITLED TO PENALTY BASED UPON A PENALTY WHICH HAD BEEN PREVIOUSLY ASSESSED AGAINST THE FUND AS A SANCTION FOR ITS IMPROPER HANDLING OF CLAIMANT'S CLAIM.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE WELL WRITTEN ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 31, 1975 IS AFFIRMED.

WCB CASE NO. 73-3243 MARCH 12, 1976
WCB CASE NO. 74-2075
WCB CASE NO. 75-1989

PATSY CARPENTER, CLAIMANT
FROHNMAYER AND DEATHERAGE,
CLAIMANT'S ATTYS.
PHILIP MONGRAIN, DEFENSE ATTY.
ORDER

ON FEBRUARY 17, 1976 CLAIMANT REQUESTED THE BOARD TO EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO THE PROVISIONS OF ORS 656.278 AND MODIFY THE FORMER AWARDS MADE TO THE CLAIMANT FOR TWO SEPARATE COMPENSABLE INJURIES WHICH OCCURRED IN 1968.

PURSUANT TO BOARD RULE 83-810, THE EMPLOYER'S CARRIER ADVISED THE BOARD THAT IT WOULD, AT THE PRESENT TIME, OPPOSE SAID REQUEST.

IN THE MATTER OF THE COMPENSATION OF PATSY CARPENTER, CLAIMANT (UNDERSCORED), WCB CASE NO. 75-1989 IS PRESENTLY BEFORE THE BOARD UPON REQUEST BY THE EMPLOYER FOR REVIEW OF THE REFEREE'S OPINION AND ORDER. IF THE BOARD SHOULD, AFTER DE NOVO REVIEW, RULE ADVERSELY TO CLAIMANT THERE WOULD BE NO BASIS FOR THE OWN MOTION CLAIM INASMUCH AS IT IS BASED UPON A RELATIONSHIP BETWEEN CLAIMANT'S 1968 INJURY AND HER RECENT AND CURRENT CERVICAL PROBLEM.

THE BOARD, THEREFORE, CONCLUDES THAT CLAIMANT'S REQUEST FOR

OWN MOTION RELIEF IS PREMATURE. AFTER THE ISSUES BEFORE IT IN WCB CASE NO. 75-1989 HAVE BEEN FULLY RESOLVED CLAIMANT MAY, IF SHE DESIRES, RENEW HER REQUEST.

ORDER

THE REQUEST RECEIVED BY THE BOARD ON FEBRUARY 17, 1976 IS DENIED WITHOUT PREJUDICE.

WCB CASE NO. 75-1702 MARCH 12, 1976

FRED JOHNSON, CLAIMANT

EDGAR R. SMITH, CLAIMANT'S ATTY.
KEITH D. SKELTON, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

THE CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED APRIL 24, 1975 WHEREIN CLAIMANT WAS AWARDED COMPENSATION FOR TEMPORARY TOTAL DISABILITY FROM FEBRUARY 6, 1974 THROUGH MARCH 31, 1975, BUT WAS AWARDED NO COMPENSATION FOR PERMANENT PARTIAL DISABILITY.

CLAIMANT SUSTAINED AN OFF-THE-JOB BIMALLEOLAR FRACTURE OF THE RIGHT ANKLE IN JUNE, 1973. CLAIMANT RETURNED TO WORK IN JANUARY, 1974 FOR A SHORT PERIOD OF TIME AND ON FEBRUARY 6, 1974 SUSTAINED A COMPENSABLE INJURY WHEN A BELT BROKE AND A STACK OF BRICKS FELL STRIKING BOTH OF CLAIMANT'S LEGS.

DR. ECKHARDT'S ORIGINAL OPINION OF MAY 6, 1975 WAS THAT CLAIMANT'S INJURY ON FEBRUARY 6, 1974 AGGRAVATED THE PREEXISTING DAMAGE TO HIS ANKLE TO THE EXTENT THAT IT PREVENTED HIM FROM BECOMING GAINFULLY EMPLOYED FROM THAT DATE FORWARD. ON JULY 17, 1975, DR. ECKHARDT, THROUGH REPORTS TO COUNSEL FOR THE CLAIMANT AND COUNSEL FOR THE EMPLOYER, INDICATED THAT THE FEBRUARY 1974 INJURY WAS QUITE MINOR BOTH BY HISTORY AND UPON EXAMINATION SHORTLY THEREAFTER.

IN HIS LETTER DIRECTED TO THE EMPLOYER'S COUNSEL, DR. ECKHARDT STATED THAT CLAIMANT HAD BEEN HAVING REPEATED EPISODES OF PAIN AND SWELLING IN THE ANKLE BROUGHT ON BY PROLONGED WEIGHT BEARING AND HIS OVERALL CONDITION APPARENTLY HAD WORSENED SINCE HIS ACCIDENT OF FEBRUARY 1974 - HOWEVER, THE MAJOR DISABILITY WAS PRODUCED BY THE ANKLE FRACTURE. HE FELT IT WAS NOT LIKELY THAT THE RELATIVELY MINOR CONTUSION CLAIMANT SUFFERED IN FEBRUARY 1974 COULD HAVE SIGNIFICANTLY ALTERED CLAIMANT'S SYMPTOMS ON A PROLONGED BASIS.

IN HIS REPORT TO CLAIMANT'S COUNSEL, DR. ECKHARDT STATED THAT HE DID NOT BELIEVE THAT CLAIMANT'S CONDITION HAD STABILIZED AT THE PRESENT TIME - THAT CLAIMANT HAD A CHRONIC LOW GRADE SYNOVITIS OF HIS RIGHT ANKLE SECONDARY TO MODERATE LIGAMENTOUS INSTABILITY WHICH WAS PREVENTING HIM FROM WORKING. HIS IMPRESSION WAS THAT CLAIMANT HAD SUFFERED A MODERATE TO MILD CONTUSION ACROSS THE DORSUM OF THE ANKLE SECONDARY TO THE INJURY WHICH HAD PRODUCED SOME TEMPORARY INCREASED SWELLING AND LOSS OF JOINT MOTION.

THE REFEREE, AFTER REVIEWING THE MEDICAL REPORTS, FOUND THAT CLAIMANT HAD NOT MET HIS BURDEN OF PROVING THAT HIS ANKLE PROBLEMS WERE ATTRIBUTABLE TO THE FEBRUARY 1974 INJURY. THE REFEREE CONCLUDED, BASED UPON THE ULTIMATE ANALYSIS BY DR. ECKHARDT TOGETHER WITH

THE REPORTS FROM DR. SULLIVAN AND DR. DAAK, THAT CLAIMANT HAD NOT SUFFERED ANY PERMANENT DISABILITY AS A RESULT OF HIS FEBRUARY 6, 1974 INDUSTRIAL INJURY.

THE REFEREE FURTHER FOUND, BASED UPON THE MEDICAL EVIDENCE, THAT CLAIMANT'S CONDITION WAS MEDICALLY STATIONARY ON MARCH 13, 1975 AND HE AFFIRMED THE DETERMINATION ORDER MAILED APRIL 24, 1975.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 19, 1975 IS AFFIRMED.

WCB CASE NO. 74-1810 MARCH 12, 1976

CLARENCE H. MELLEN, CLAIMANT

RICHARDSON AND MURPHY, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

THE CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED MAY 3, 1974 AWARDING CLAIMANT SOME TIME LOSS AND 3 DEGREES FOR 5 PER CENT LOSS OF HEARING IN THE RIGHT EAR, BUT ORDERED THE STATE ACCIDENT INSURANCE FUND TO PAY CLAIMANT ALL THE TEMPORARY TOTAL DISABILITY COMPENSATION AWARDED BY THE AFORESAID DETERMINATION ORDER, PLUS 25 PER CENT OF SUCH UNPAID TEMPORARY TOTAL DISABILITY COMPENSATION AS A PENALTY PURSUANT TO ORS 656.262(8) AND TO PAY CLAIMANT'S ATTORNEY A REASONABLE ATTORNEY'S FEE.

CLAIMANT WAS A 53 YEAR OLD GRINDER IN A MACHINE SHOP - MOST OF HIS WORK BACKGROUND WAS THAT OF A MACHINIST. ON JANUARY 17, 1972 HE SUFFERED AN EPISODE OF HYPERVENTILATION WHILE AT WORK AND LATER QUIT BECAUSE OF A CONTINUING PSYCHOLOGICAL REACTION TO THE NOISE IN THE SHOP IN WHICH HE WORKED. THE CLAIM WAS ORIGINALLY DENIED BUT ORDERED ACCEPTED BY THE BOARD'S ORDER ON REVIEW, DATED SEPTEMBER 25, 1973 (WCB CASE NO. 72-1837).

CLAIMANT IS NO LONGER WORKING AS A MACHINIST BUT IS ENGAGED AS A FURNITURE UPHOLSTERER AND IS NOT EXPOSED TO THE EXCESSIVE NOISES ENCOUNTERED IN HIS FORMER JOB. CLAIMANT IS NOW WORKING REGULARLY AND, APPARENTLY, SUCCESSFULLY. ON JULY 28, 1975 DR. QUAN, A PSYCHIATRIST, EXAMINED CLAIMANT AND DIAGNOSED A PROBABLE PREEXISTING CHRONIC MILD ANXIETY NEUROSIS. HE FELT CLAIMANT WAS CHRONICALLY TENSE AND HAD A LOWER TOLERANCE THAN A NORMAL INDIVIDUAL TOWARDS STRESS - THEREFORE, THE NOISE FACTOR WAS A SIGNIFICANT PRECIPITATING CAUSE OF HIS DIFFICULTIES.

THE REFEREE FOUND THAT CLAIMANT IS NOW ABLE TO ENGAGE IN GAINFUL EMPLOYMENT IN ANOTHER ENVIRONMENTAL SETTING AND THAT HIS PSYCHIATRIC IMPAIRMENT DOES NOT PRECLUDE HIS PRESENT WORK. THE REFEREE RATED HIS IMPAIRMENT DUE TO THE ANXIETY AS CLOSE TO ZERO - THE WORK EXPOSURE AT THE PREVIOUS JOB HAD EXACERBATED AN UNDERLYING PROBLEM BUT HAD LEFT NO LASTING IMPAIRMENT, THEREFORE, CLAIMANT HAD FAILED TO PROVE PERMANENT UNSCHEDULED DISABILITY.

THE REFEREE FOUND THAT CLAIMANT HAD BEEN PAID ONLY ONCE FOR THE TIME LOSS AWARDED BY THE DETERMINATION ORDER OF MAY 3, 1974 AND THAT PAYMENT WAS IN THE AMOUNT OF 646 DOLLARS. CLAIMANT HAD BEEN

AWARDED TEMPORARY TOTAL DISABILITY COMPENSATION FROM JANUARY 17, 1972 THROUGH OCTOBER 10, 1972, LESS TIME WORKED. THE FUND'S COUNSEL CONCEDED THAT CLAIMANT HAD RECEIVED ONLY ONE PAYMENT BUT STATED HE WOULD INSTRUCT THE FUND TO BRING THE TIME LOSS COMPENSATION INTO BALANCE.

THE REFEREE, BY HIS ORDER, DIRECTED THE FUND TO DO SO. HE CONCLUDED THAT CLAIMANT HAD BEEN PREJUDICED BY THE FUND'S FAILURE TO PAY IN ACCORDANCE WITH THE DETERMINATION ORDER AND, THEREFORE, ORDERED PENALTIES AND ATTORNEY'S FEES BECAUSE OF SUCH FAILURE.

THE BOARD, ON DE NOVO REVIEW, FEELS THAT CLAIMANT'S ANXIETY NEUROSIS WAS RELATED TO HIS EMPLOYMENT AND THAT AS A RESULT OF SAID NEUROSIS CREATED BY THE NOISE EXPOSURE CLAIMANT HAS LOST SOME EARNING CAPACITY. THE BOARD CONCLUDES THAT TO ADEQUATELY COMPENSATE CLAIMANT FOR THIS LOSS OF EARNING CAPACITY HE SHOULD RECEIVE AN AWARD OF 32 DEGREES FOR 10 PER CENT OF THE MAXIMUM ALLOWABLE FOR UNSCHEDULED DISABILITY.

THE BOARD AFFIRMS THE REFEREE'S ASSESSMENT OF PENALTIES AND ALLOWANCE OF ATTORNEY'S FEES.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 27, 1975 IS MODIFIED.

CLAIMANT IS AWARDED 32 DEGREES OF A MAXIMUM OF 320 DEGREES FOR UNSCHEDULED (ANXIETY NEUROSIS) DISABILITY. THIS IS IN ADDITION TO AND NOT IN LIEU OF THE AWARDS MADE BY THE DETERMINATION ORDER MAILED MAY 3, 1974.

IN ALL OTHER RESPECTS THE ORDER OF THE REFEREE IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, 25 PER CENT OF THE COMPENSATION INCREASED BY THIS ORDER, PAYABLE FROM SAID COMPENSATION AS PAID, NOT TO EXCEED 2,300 DOLLARS.

WCB CASE NO. 75-1253 MARCH 12, 1976

MARION L. NELSON, CLAIMANT

DYE AND OLSON, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHEREIN THE CLAIMANT WAS DECLARED TO BE PERMANENTLY AND TOTALLY DISABLED AS OF THE DATE OF HIS ORDER, SEPTEMBER 25, 1975.

CLAIMANT IS NOW A 61 YEAR OLD WORKMAN, HE HAD WORKED STEADILY AS A PLASTERER FOR 30 YEARS. HE SUSTAINED A COMPENSABLE INJURY TO HIS LOW BACK ON APRIL 13, 1974 AND HAS BEEN UNABLE TO WORK SINCE. DR. TILEY, IN CONSULTATION WITH DR. MELGARD, DIAGNOSED CHRONIC MULTIPLE LEVEL DISC DEGENERATION - NEITHER WAS WILLING TO CONSIDER CLAIMANT A CANDIDATE FOR SURGERY. IT WAS THE MEDICAL OPINION OF BOTH THAT CLAIMANT COULD NOT RETURN TO HIS WORK AS A PLASTERER OR TO ANY OTHER KIND OF WORK INVOLVING HEAVY LABOR.

CLAIMANT WAS EVALUATED FOR RETRAINING BY TWO COUNSELORS OF THE DIVISION OF VOCATIONAL REHABILITATION. THEY FOUND HIS GENERAL APTITUDE TEST SCORES, WHEN COMBINED WITH HIS EDUCATIONAL HANDICAP, AGE AND PHYSICAL DISABILITY, MADE CLAIMANT INELIGIBLE FOR THIER SERVICES. ONE OF THE COUNSELORS APPEARED AT THE HEARING AND TESTIFIED IT WAS HIS OPINION THAT CLAIMANT WAS THROUGH WORKING IN THE LABOR MARKET FOR REMUNERATION. THE FUND ATTEMPTED TO DISCREDIT THIS TESTIMONY HOWEVER, THE BOARD FINDS IT CREDIBLE.

THE RECORD INDICATES THAT CLAIMANT IS ABLE TO DO A LITTLE YARD AND GARDEN WORK AND A LITTLE WOODWORKING IN HIS SHOP, HOWEVER, THIS IS NOT A DEMONSTRATION THAT CLAIMANT IS ABLE TO ENTER THE COMPETITIVE LABOR MARKET AND PERFORM REGULARLY AT A SUITABLE AND GAINFUL OCCUPATION.

THE BOARD, ON DE NOVO REVIEW, CONCURS WITH THE REFEREE'S FINDING THAT CLAIMANT IS PERMANENTLY AND TOTALLY DISABLED.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 25, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 400 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 75-2588 MARCH 12, 1976

DAVID H. ROBERTS, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH REMANDED CLAIMANT'S CLAIM TO IT TO BE ACCEPTED FOR PAYMENT OF COMPENSATION, AS PROVIDED BY LAW, UNTIL CLOSURE IS AUTHORIZED PURSUANT TO ORS 656.268 AND DIRECTED BY THE FUND TO PAY CLAIMANT'S ATTORNEY A REASONABLE ATTORNEY'S FEE.

CLAIMANT ALLEGED THAT ON DECEMBER 30, 1974 HE WAS MAKING A 5-8" TAP IN AN 8" WATER MAIN USING A TAP MACHINE WHICH IS SIMILAR TO A WRENCH - HE WAS IN SUCH A POSITION THAT IT WAS NECESSARY FOR HIM TO OPERATE WITH HIS LEFT HAND ALTHOUGH HIS DOMINANT HAND IS THE RIGHT AND NORMALLY HE OPERATES THIS TAP MACHINE USING BOTH HIS LEFT AND RIGHT ARMS. WHILE IN THIS AWKWARD POSITION, PULLING ON THE TAP MACHINE, CLAIMANT NOTICED A 'POPPING' SENSATION IN HIS LEFT SHOULDER. CLAIMANT STATED THAT HE TOLD TWO OF HIS CO-WORKERS AT THE TIME OF THE ACCIDENT THAT HE WAS HAVING SOME PROBLEM WITH HIS SHOULDER, HOWEVER, HE FINISHED THE DAY'S WORK AND THEN REPORTED HIS PROBLEM TO THE TEMPORARY FOREMAN AND SAID HE HAD TO SEEK MEDICAL AID. CLAIMANT WENT TO THE CLINIC FOR THE KEISER FOUNDATION WHERE HIS CONDITION WAS DIAGNOSED AS BURSITIS OF THE LEFT SHOULDER AND HIS ARM WAS PLACED IN A SLING.

CLAIMANT HAD A LONG HISTORY OF BURSITIS AND AFTER THE DECEMBER INCIDENT HE CONTINUED TO RECEIVE TREATMENT FOR BURSITIS OF THE LEFT SHOULDER UNTIL MARCH 17, 1975 WHEN A SECOND DIAGNOSIS, BASED UPON

AN INJECTED DYE AND X-RAY, REVEALED A ROTARY CUFF TEAR. AFTER THIS DIAGNOSIS THE CLAIMANT INQUIRED ABOUT FILING A CLAIM. PRIOR TO THAT TIME HE THOUGHT HIS PROBLEM WAS PURELY A CONTINUATION OF HIS BURSITIS AND WAS NOT WORK-RELATED.

THE REFEREE FOUND THAT CLAIMANT WAS A CREDIBLE WITNESS AND THAT HIS TESTIMONY THAT HE DID NOT FILE THE WORKMEN'S COMPENSATION CLAIM UNTIL AFTER THE SECOND DIAGNOSIS WAS BASED UPON A CONVICTION THAT IT WAS NOT WORK-RELATED BUT WAS A FLAREUP OF THE BURSITIS WHICH HE HAD HAD IN BOTH HIS RIGHT AND LEFT SHOULDER FOR SEVERAL YEARS.

THE REFEREE DID NOT QUESTION THE CONTENTION OF THE FUND THAT, UNDER THE CIRCUMSTANCES OF THIS PARTICULAR CASE, IT HAD BEEN PREJUDICED ESPECIALLY IN ITS OPPORTUNITY TO MAKE A PROPER INVESTIGATION, HOWEVER, HE FELT THAT CLAIMANT HAD SHOWN GOOD CAUSE FOR DELAYING IN PROVIDING THE FUND WITH NOTICE, I.E. HIS HONEST BELIEF THAT HE WAS SUFFERING FROM BURSITIS UNTIL THE SECOND DIAGNOSIS REVEALED A TORN ROTATOR CUFF.

CLAIMANT WENT TO WORK ON DECEMBER 30, 1974 IN MUCH THE SAME MANNER AS HE HAD DONE SINCE HE COMMENCED WORKING FOR THE EMPLOYER IN 1958, HE WORKED ALL DAY AND IMMEDIATELY SOUGHT MEDICAL ATTENTION AT THE CLOSE OF THE DAY. THE REFEREE FOUND THAT CLAIMANT HAD BEEN TREATED CONTINUOUSLY FOR BURSITIS UNTIL MARCH WHEN IT WAS DISCOVERED THAT HE ACTUALLY HAD A TORN ROTATOR CUFF. THE REFEREE CONCLUDED THAT THE BURSITIS COULD NOT HAVE CAUSED A TORN ROTATOR CUFF BUT THAT TRAUMA COULD HAVE DONE SO. THE EVIDENCE INDICATED THAT THE INJURY PROBABLY OCCURRED AS DESCRIBED BY THE CLAIMANT AND THERE WAS MERELY A MISUNDERSTANDING ON HIS PART WITH RESPECT TO HIS TRUE CONDITION, AND THE CAUSE OF IT, PREDICATED, PRIMARILY, ON AN ERRONEOUS DIAGNOSIS.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 27, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 400 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 75-2536 MARCH 12, 1976

RICHARD E. STEVENS, CLAIMANT

CARNEY, HALEY, PROBST AND LEVAK,
CLAIMANT'S ATTYS.
COSGRAVE AND KESTER, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER AFFIRMING THE DETERMINATION ORDER MAILED JULY 23, 1974 WHICH DID NOT AWARD CLAIMANT COMPENSATION FOR PERMANENT PARTIAL DISABILITY.

CLAIMANT SUSTAINED A COMPENSABLE INJURY ON JANUARY 27, 1974 WHILE EMPLOYED AS A MOBILE EQUIPMENT OPERATOR. THE SLAG POT CLAIMANT WAS LIFTING DROPPED AND CAUSED AN EXPLOSION WHEN THE HOT SLAG HIT THE WET GROUND. CLAIMANT WAS BURNED ON HIS FACE AND

WRIST. HE WAS ADMITTED TO EMANUEL HOSPITAL UNDER THE CARE OF DR. WEED WHO DIAGNOSED SECONDARY BURNS - IN MARCH 1974 DR. WEED RELEASED CLAIMANT TO RETURN TO WORK WHICH WOULD NOT EXPOSE HIM TO EXTREMES IN TEMPERATURE. IN JUNE 1974 DR. WEED STATED THAT THE NECESSARY TREATMENT HAD BEEN COMPLETED.

IN OCTOBER 1974 CLAIMANT CONSULTED DR. PIDGEON, A PSYCHIATRIST, WHO DIAGNOSED CLAIMANT'S SYMPTOMS AS ANXIETY AND DEPRESSIVE NEUROSIS CAUSED BY THE EMOTIONAL TRAUMA FROM THE ACCIDENT IN JANUARY 1974. HE FELT CLAIMANT WAS DISABLED DUE TO THIS PSYCHIATRIC CONDITION AND UNABLE TO WORK AT HIS FORMER JOB AND NEEDED FURTHER PSYCHIATRIC TREATMENT.

CLAIMANT HAD BEEN TREATED AT DAMMASCH HOSPITAL IN 1962 FOR A CONDITION DIAGNOSED AS SCHIZOPHRENIA, ACUTE PARANOID TYPE. IN 1973 HE AGAIN WAS HOSPITALIZED FOR A CONDITION DIAGNOSED AS PARANOID PERSONALITY.

THE REFEREE FOUND THAT BECAUSE OF THESE EARLIER INCIDENTS HE WAS NOT INCLINED TO ACCORD MUCH WEIGHT TO THE OPINION OF DR. PIDGEON AND HE CONCLUDED THAT THE MEDICAL EVIDENCE THAT CLAIMANT'S ANXIETY AND DEPRESSIVE NEUROSIS WAS CAUSED BY THE EMOTIONAL TRAUMA OF THE ACCIDENT ON JANUARY 27, 1974 WAS INADEQUATE. HE FURTHER CONCLUDED THAT CLAIMANT'S PARANOID AND SCHIZOID SYMPTOMS PREEXISTED HIS INDUSTRIAL INJURY.

THE SOLE CRITERION FOR DETERMINING UNSCHEDULED DISABILITY IS LOSS OF EARNING CAPACITY, TAKING INTO CONSIDERATION AGE, EDUCATION, INTELLIGENCE AND ADAPTABILITY. THE REFEREE CONCLUDED THE MEDICAL EVIDENCE INDICATED THAT AT LEAST FOR A PERIOD OF TIME CLAIMANT WAS UNABLE TO WORK IN AREAS WHERE HE WOULD BE EXPOSED TO EXTREME HEAT BUT THERE WAS NO EVIDENCE THAT THIS CONDITION WOULD BE PERMANENT.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE ORDER OF THE REFEREE AS ITS OWN.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 24, 1975 IS AFFIRMED.

WCB CASE NO. 74-4709 MARCH 12, 1976

NOBLE WINTERS, CLAIMANT

LACHMAN AND HENNIGER,
CLAIMANT'S ATTYS.
MC MURRY AND NICHOLS,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

THE EMPLOYER SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH REMANDED CLAIMANT'S CLAIM TO IT FOR ACCEPTANCE AND PAYMENT OF BENEFITS, AS PROVIDED BY LAW, FROM AND AFTER NOVEMBER 1, 1974 AND UNTIL THE CLAIM IS CLOSED PURSUANT TO ORS 656.268 AND TO PAY CLAIMANT'S ATTORNEY A REASONABLE ATTORNEY'S FEE.

CLAIMANT HAS BEEN EMPLOYED BY THE EMPLOYER SINCE 1970 AND FOR APPROXIMATELY THE PAST TWO AND A HALF YEARS HAS BEEN WORKING AT THE TABLE SAW. HIS WORK CONSISTS OF PICKING UP, WITH THE HELP OF ANOTHER

EMPLOYE, 10 TO 12 SHEETS OF 4"X8" LUMBER AND CARRYING THEM APPROXIMATELY 12 FEET, PLACING THEM ON A TABLE AND SAWING OFF 6 INCHES. NORMALLY CLAIMANT WORKS AN 8 HOUR DAY. CLAIMANT ESTIMATED THE 10 TO 12 SHEETS WEIGHED BETWEEN 175 TO 200 POUNDS, HOWEVER, THE CLAIMANT'S FOREMAN TESTIFIED THAT 10 BOARDS WEIGHED APPROXIMATELY 100 POUNDS AND WITH TWO MEN LIFTING, EACH WOULD LIFT APPROXIMATELY 50 POUNDS.

IN NOVEMBER 1974 CLAIMANT WAS HOSPITALIZED FOR A HEMORRHOIDECTOMY. PRIOR TO THIS TIME CLAIMANT HAD HAD DIFFICULTY WITH BLEEDING HEMORRHOIDS WHILE WORKING BUT NOT TO THE EXTENT THAT PREVENTED HIM FROM CONTINUING TO WORK. CLAIMANT RETURNED TO WORK ON DECEMBER 2, 1974 - HE DID NOT REPORT AN ON-THE-JOB INJURY TO HIS EMPLOYER AND THE FIRST KNOWLEDGE BY EITHER THE EMPLOYER OR THE CARRIER OF A CLAIM FOR A JOB-RELATED INJURY WAS THE RECEIPT OF CLAIMANT'S REQUEST FOR HEARING FILED WITH THE BOARD ON DECEMBER 17, 1974.

THE ONLY MEDICAL EVIDENCE IN THE RECORD CONSISTS OF REPORTS FROM DR. HAGLAND WHO PERFORMED THE SURGERY. HIS FIRST REPORT OF DECEMBER 10, 1974 INDICATES CLAIMANT HAD A LONG HISTORY OF DIFFICULTY WITH HEMORRHOIDS AND THAT HEAVY LIFTING CERTAINLY MIGHT AGGRAVATE AND INCREASE THE SEVERITY OF THE PROLAPSE OF THE HEMORRHOIDS. IN HIS NEXT REPORT, DATED MARCH 31, 1974, DR. HAGLAND WAS MORE POSITIVE, STATING THERE WAS NO QUESTION BUT THAT SEVERE EXERTION SUCH AS LIFTING OR OTHER TYPES OF WORK INVOLVING STRAINING WOULD HAVE AGGRAVATED CLAIMANT'S CONDITION.

THE EMPLOYER CONTENDS THAT DR. HAGLAND'S REPORTS ARE SPECULATIVE IN NATURE AND, THEREFORE, SHOULD NOT BE GIVEN TOO MUCH WEIGHT. THE REFEREE DISAGREED AND, LOOKING AT THE TOTALITY OF DR. HAGLAND'S REPORTS, CONCLUDES THAT THE HEAVY LIFTING AND STRAINING REQUIRED BY CLAIMANT'S WORK DID HASTEN HIS NEED FOR THE HEMORRHOIDECTOMY.

REGARDING THE TIMELINESS OF THE FILING OF NOTICE OF INJURY, THE REFEREE FOUND THAT CLAIMANT'S CONDITION CAUSED HIM TO LEAVE HIS EMPLOYMENT ON NOVEMBER 1, 1974 AND SUBSEQUENTLY SURGERY WAS PERFORMED. CLAIMANT RETURNED TO WORK ON DECEMBER 2, 1974.

ORS 656.807 PROVIDES THAT A NON-FATAL OCCUPATIONAL DISEASE CLAIM MUST BE FILED WITHIN 5 YEARS AFTER THE LAST EXPOSURE IN EMPLOYMENT SUBJECT TO WORKMEN'S COMPENSATION LAW AND WITHIN 180 DAYS FROM THE DATE CLAIMANT BECOMES DISABLED OR IS INFORMED BY A PHYSICIAN THAT HE IS SUFFERING FROM AN OCCUPATIONAL DISEASE, WHICHEVER IS LATER.

THE REFEREE FOUND THAT CLAIMANT HAD BECOME DISABLED ON NOVEMBER 1, 1974 AND THE EMPLOYER HAD RECEIVED NOTICE OF THE CLAIM ON JANUARY 14, 1975 WHICH WAS WELL WITHIN THE 180 DAYS FROM THE DATE CLAIMANT BECAME DISABLED. SHE CONCLUDED THAT THE NOTICE TO THE EMPLOYER BY CLAIMANT WAS TIMELY GIVEN. THERE WAS NO EVIDENCE INDICATING THAT THE EMPLOYER'S CONDUCT WAS UNREASONABLE TO THE EXTENT THAT THE IMPOSITION OF PENALTIES AND ATTORNEY'S FEES WOULD BE JUSTIFIED.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 3, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 400 DOLLARS, PAYABLE BY THE EMPLOYER.

WCB CASE NO. 75—119 MARCH 15, 1976

KENNETH R. LEONARD, CLAIMANT
POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

THE CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER OF NOVEMBER 21, 1974 WHEREBY CLAIMANT RECEIVED 64 DEGREES FOR 20 PER CENT UNSCHEDULED LOW BACK DISABILITY.

CLAIMANT WAS A 32 YEAR OLD WELDER WHEN HE SUFFERED A COMPENSABLE LOW BACK INJURY ON AUGUST 1, 1973. HE FIRST CONSULTED DR. POST WHO HAD PREVIOUSLY TREATED HIM FOR A LOW BACK INJURY. AFTER CONSERVATIVE TREATMENT CLAIMANT RETURNED TO WORK. FOR THE NEXT SIX MONTHS HE WORKED FOR FIVE DIFFERENT COMPANIES FOR VARIOUS PERIODS OF TIME. IN SEPTEMBER 1974 CLAIMANT WAS ENROLLED AT THE DISABILITY PREVENTION DIVISION AND, UPON DISCHARGE, DR. VAN OSDEL STATED THE RESIDUALS OF THE STRAIN OF THE LUMBAR LIGAMENTS AND MUSCLES WERE MILD. CLAIMANT WAS REFERRED TO THE DIVISION OF VOCATIONAL REHABILITATION AND HE IS PRESENTLY PLANNING TO BEGIN A COURSE IN ELECTRIC MOTOR REWINDING.

THE REFEREE FOUND THAT CLAIMANT'S INTELLIGENCE WAS IN THE NORMAL RANGE, THAT HIS APTITUDE SCORES WERE POSITIVE IN THE MAJORITY OF THE AREAS TESTED AND HE HAS A GED CERTIFICATE. THE REFEREE, CONSIDERING CLAIMANT'S AGE, EDUCATION, INTELLIGENCE AND ADAPTABILITY TOGETHER WITH THE DIAGNOSIS MADE BY DR. VAN OSDEL, CONCLUDED THAT THE AWARD OF 64 DEGREES FOR 20 PER CENT UNSCHEDULED LOW BACK DISABILITY ADEQUATELY COMPENSATED CLAIMANT FOR HIS LOSS OF EARNING CAPACITY.

THE BOARD REMANDED THE MATTER TO THE REFEREE FOR THE SOLE PURPOSE OF INCLUDING AS AN 'EXHIBIT' FOR HIS CONSIDERATION A MEDICAL REPORT FROM DR. ROBERT H. POST. THIS REPORT, WHICH WAS THEN RECEIVED, MERELY STATED THAT DR. POST CONCURRED IN MOST OF THE OPINIONS EXPRESSED BY DR. VAN OSDEL BUT THAT HE WOULD RATE THE RESIDUALS FROM THE LUMBAR STRAIN AS 'MODERATE' RATHER THAN 'MILD'.

AFTER CONSIDERING THIS REPORT, THE REFEREE AFFIRMED HIS ORIGINAL OPINION AND ORDER.

THE BOARD, ON DE NOVO REVIEW, FINDS THAT THERE IS A SIGNIFICANT PSYCHOPATHOLOGY INVOLVED WHICH IS DIRECTLY RELATED TO CLAIMANT'S INDUSTRIAL INJURY AND ALTHOUGH THE EVIDENCE INDICATES THAT CLAIMANT HAS NOT COOPERATED TOO WELL WITH THE PEOPLE WHO HAVE TRIED TO HELP HIM, NOR HAS HE ENDEAVORED TO HELP HIMSELF, NEVERTHELESS, THE COMBINATION OF THE PHYSIOLOGICAL AND PSYCHOLOGICAL DISABILITY SUFFERED BY CLAIMANT AS A RESULT OF HIS INDUSTRIAL INJURY HAS CAUSED CLAIMANT TO LOSE A SUBSTANTIAL PORTION OF HIS EARNING CAPACITY.

THE BOARD CONCLUDES THAT CLAIMANT IS ENTITLED TO AN AWARD OF 96 DEGREES FOR 30 PER CENT OF THE MAXIMUM ALLOWABLE FOR UNSCHEDULED DISABILITY — THIS INCREASE IS BASED PRIMARILY ON THE PSYCHOPATHOLOGY INDICATED IN THE REPORT FROM DR. WILLIAM L. MUNSEY, A CLINICAL PSYCHOLOGIST. THE BOARD NOTES THE COMMENT OF THE REFEREE — 'BUT WHEN THE PREEXISTING DISABILITY IS SUBTRACTED IN ACCORDANCE WITH THE STATUTE,', AND IS AT LOSS TO UNDERSTAND THE BASIS FOR THIS STATEMENT. IF CLAIMANT HAD BEEN ABLE, AND THERE IS NO EVIDENCE TO THE CONTRARY,

TO WORK REGULARLY AND GAINFULLY PRIOR TO HIS INJURY OF AUGUST 1, 1973, THEN ANY PREEXISTING DISABILITY IS NOT A FACTOR TO TAKE INTO CONSIDERATION IN DETERMINING CLAIMANT'S DISABILITY AS A RESULT OF THE AUGUST 1, 1973 INDUSTRIAL INJURY.

ORDER

THE ORDER OF THE REFEREE DATED JUNE 9, 1975 AND THE ORDER ON REMAND DATED OCTOBER 31, 1975 ARE REVERSED.

CLAIMANT IS AWARDED 96 DEGREES OF A MAXIMUM OF 320 DEGREES FOR UNSCHEDULED LOW BACK AND PSYCHOLOGICAL DISABILITY. THIS IS IN LIEU OF AND NOT IN ADDITION TO THE AWARD MADE BY THE DETERMINATION ORDER MAILED NOVEMBER 21, 1974.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, 25 PER CENT OF THE COMPENSATION INCREASED BY THIS ORDER, PAYABLE OUT OF SUCH COMPENSATION AS PAID, TO A MAXIMUM OF 2,300 DOLLARS.

WCB CASE NO. 75-1936 MARCH 15, 1976
WCB CASE NO. 75-1935

NORMAN J. SHANKLIN, CLAIMANT

DAVID H. VANDENBERG, JR., CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
AMENDED ORDER ON REVIEW

ON FEBRUARY 25, 1976 AN ORDER ON REVIEW ENTERED IN THE ABOVE ENTITLED MATTER GRANTED CLAIMANT 52.5 DEGREES FOR 35 PER CENT PARTIAL LOSS OF THE LEFT LEG ATTRIBUTABLE TO HIS APRIL 8, 1974 INJURY AND 22.5 DEGREES FOR 15 PER CENT PARTIAL LOSS OF THE LEFT LEG ATTRIBUTABLE TO HIS APRIL 29, 1974 INJURY.

IT HAS NOW COME TO THE ATTENTION OF THE BOARD THAT AN INTERIM ORDER, DATED DECEMBER 11, 1975, REOPENED CLAIM NO. TD L4607, (WCB CASE NO. 75-1936) FOR VOCATIONAL REHABILITATION BENEFITS.

THIS ORDER SUSPENDS PAYMENT OF COMPENSATION UNDER THE DETERMINATION ORDER DATED APRIL 22, 1975 WHICH AWARDED CLAIMANT COMPENSATION EQUAL TO 7.5 DEGREES FOR 5 PER CENT LOSS OF HIS LEFT LEG AS A RESULT OF HIS INDUSTRIAL INJURY OF APRIL 8, 1974. THE REFEREE, AFTER HEARING, HAD INCREASED THE AWARD TO 33.75 DEGREES AND THE BOARD, ON DE NOVO REVIEW, HAD INCREASED IT TO 52.5 DEGREES.

OBVIOUSLY, THE INTERIM ORDER WHICH REOPENED CLAIM NO. TD 14607 (WCB CASE NO. 74-1936), EFFECTIVE DECEMBER 1, 1975 BECAUSE THE WORKMAN WAS IN AN AUTHORIZED PROGRAM OF VOCATIONAL REHABILITATION NECESSITATES THE SETTING ASIDE OF THE PORTION OF THE REFEREE'S ORDER AND THE PORTION OF THE BOARD'S ORDER ON REVIEW WHICH RELATES TO THE APRIL 8, 1974 INJURY AS THERE HAS NOT BEEN A CLOSURE OF THE CLAIM UNDER THE PROVISIONS OF ORS 656.268(1) AND CANNOT BE UNTIL THE CLAIMANT HAS COMPLETED, OR IS RELEASED FROM, THE AUTHORIZED PROGRAM OF VOCATIONAL REHABILITATION.

THAT PORTION OF THE ORDER ON REVIEW RELATING TO THE APRIL 29, 1974 INJURY IS NOT AFFECTED BY THE AFORESAID INTERIM ORDER AND PAYMENT OF THAT AWARD IS NOT SUSPENDED.

ORDER

THE ORDER ON REVIEW ENTERED FEBRUARY 25, 1976 IS AMENDED BY DELETING THEREFROM THE 'ORDER' PORTION AND SUBSTITUTING IN LIEU THEREOF THE FOLLOWING:

CLAIMANT'S CLAIM IS REMANDED TO THE STATE ACCIDENT INSURANCE FUND FOR THE PAYMENT OF COMPENSATION AS PROVIDED BY LAW, COMMENCING DECEMBER 1, 1975 AND UNTIL CLAIM CLOSURE IS AUTHORIZED PURSUANT TO ORS 656.268. (WCB CASE NO. 75-1936, SAIF CLAIM NO. TD14607.)

CLAIMANT IS AWARDED 22.5 DEGREES OF A MAXIMUM OF 150 DEGREES FOR PARTIAL LOSS OF THE LEFT LEG ATTRIBUTABLE TO THE INDUSTRIAL INJURY SUFFERED ON APRIL 29, 1974. THIS IS IN LIEU OF AND NOT IN ADDITION TO THE AWARD MADE BY THE DETERMINATION ORDER MAILED APRIL 22, 1975 RELATING TO THE APRIL 29, 1974 INJURY. (WCB CASE NO. 75-1935, SAIF CLAIM NO. TD 17766.)

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, 25 PER CENT OF THE INCREASE IN COMPENSATION AWARDED CLAIMANT FOR HIS APRIL 29, 1974 INDUSTRIAL INJURY BY THIS ORDER, PAYABLE OUT OF THE COMPENSATION AS PAID, NOT TO EXCEED 2,300 DOLLARS.

WCB CASE NO. 74-4062 MARCH 15, 1976
WCB CASE NO. 74-4639

BERNIE THOMPSON, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
PAUL L. ROESS, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE EMPLOYER'S DENIAL, DATED SEPTEMBER 27, 1974, OF CLAIMANT'S CLAIM (74-4062) AND AWARDED CLAIMANT ADDITIONAL COMPENSATION EQUAL TO 28.8 DEGREES FOR 15 PER CENT LOSS OF THE LEFT ARM, GIVING CLAIMANT A TOTAL LEFT ARM AWARD OF 38.4 DEGREES (74-4639).

CLAIMANT SUFFERED A COMPENSABLE INJURY DIAGNOSED AS A 'PROBABLE' ULNAR NERVE ENTRAPMENT BEHIND THE LEFT ELBOW WHICH DEVELOPED IN LATE 1973 AND EARLY 1974 AS A RESULT OF HER MOPPING ACTIVITIES AS A JANITRESS.

CLAIMANT WAS TREATED BY DR. ADAMS WHO, ON OCTOBER 29, 1974, STATED CLAIMANT HAD A MEDIAL EPICONDYLITIS WHICH HAD BEEN PRESENT FOR APPROXIMATELY A YEAR - IT HAD BEEN TREATED WITH INFLAMMATORY MEDICATIONS WITHOUT SATISFACTORY RESULTS. HE FELT CLAIMANT WAS STATIONARY AND THE CLAIM COULD BE CLOSED. ON DECEMBER 10, 1974 A DETERMINATION ORDER WAS MAILED AWARDING CLAIMANT TIME LOSS AND 9.6 DEGREES FOR 5 PER CENT LOSS OF LEFT ARM.

SOMETIME PRIOR TO JULY 15, 1974 CLAIMANT DEVELOPED A RIGHT HAND 'TRIGGER FINGER' PROBLEM WHICH WAS ALSO TREATED BY DR. ADAMS. ON SEPTEMBER 18, 1974 DR. ADAMS INDICATED HE DID NOT FEEL THIS PROBLEM WAS CAUSED BY CLAIMANT'S WORK ACTIVITY - SHE HAD NOT MENTIONED IT TO HIM UNTIL JUNE 4, 1974. DR. ADAMS TESTIFIED BY DEPOSITION THAT

HAD CLAIMANT COMPLAINED OF THE 'TRIGGER FINGER' PROBLEM AT THE INITIAL EXAMINATION HE WOULD HAVE BEEN MORE INCLINED TO BELIEVE IT WAS WORK RELATED.

THE REFEREE, RELYING PRIMARILY ON DR. ADAMS' TESTIMONY, FOUND THAT THE EMPLOYER WAS NOT RESPONSIBLE FOR THE RIGHT 'TRIGGER FINGER' SYMPTOMS AND TREATMENT THEREFOR - THE WEIGHT OF MEDICAL EVIDENCE WAS THAT THERE WAS NO CAUSAL CONNECTION BETWEEN THE PROBLEM AND CLAIMANT'S WORK. THE DENIAL BEING PROPER, THERE WAS NO BASIS FOR ASSESSMENT OF PENALTIES AND ATTORNEY FEES.

WITH RESPECT TO THE SCHEDULED DISABILITY, THE REFEREE FOUND THAT THE MEDICAL EVIDENCE CORROBORATED CLAIMANT'S SUBJECTIVE COMPLAINTS WITH RESPECT TO HER LEFT ELBOW. HE CONCLUDED THAT THE LOSS OF FUNCTION OF THE LEFT ELBOW WAS GREATER THAN THAT FOR WHICH CLAIMANT HAD RECEIVED AN AWARD AND HE INCREASED SAID AWARD FROM 5 PER CENT TO 20 PER CENT LOSS OF THE LEFT ARM.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 25, 1975 IS AFFIRMED.

WCB CASE NO. 75-499 MARCH 15, 1976

THOMAS B. TOMPKINS, CLAIMANT

RINGO, WALTON AND EVES,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF A REFEREE'S ORDER WHICH FOUND CLAIMANT TO BE PERMANENTLY AND TOTALLY DISABLED EFFECTIVE THE DATE OF HIS ORDER.

ON MAY 12, 1971, CLAIMANT, A 47 YEAR OLD HIGHWAY MAINTENANCE WORKER, INJURED HIS NECK AND LOW BACK. HE RECEIVED CONSERVATIVE TREATMENT AND HIS CLAIM WAS CLOSED BY A DETERMINATION ORDER DATED DECEMBER 3, 1971, AWARDING CLAIMANT 32 DEGREES FOR UNSCHEDULED NECK AND BACK DISABILITY. THE CLAIM WAS REOPENED WHEN CLAIMANT, ON JANUARY 5, 1973, HAD A BILATERAL LAMINECTOMY AT L4-5 AND A HEMILAMINECTOMY ON THE RIGHT SIDE AT L5-S1. A SECOND DETERMINATION ORDER OF OCTOBER 10, 1973 AWARDED CLAIMANT AN ADDITIONAL 48 DEGREES UNSCHEDULED DISABILITY.

AGAIN IN MAY 1974 THE CLAIM WAS REOPENED TO PROVIDE CLAIMANT FURTHER CONSERVATIVE TREATMENT. A THIRD DETERMINATION ORDER OF NOVEMBER 4, 1974 AWARDED CLAIMANT AN ADDITIONAL 80 DEGREES UNSCHEDULED DISABILITY, MAKING A TOTAL OF 160 DEGREES FOR 50 PER CENT OF THE MAXIMUM FOR UNSCHEDULED DISABILITY.

AT THE DISABILITY PREVENTION DIVISION CLAIMANT DEMONSTRATED INTELLECTUAL RESOURCES AND THE APTITUDES NECESSARY TO WORK IN A LARGE VARIETY OF OCCUPATIONS IN SKILLED AND TECHNICAL LEVELS. THE BACK EVALUATION CLINIC CONSIDERED CLAIMANT HAD SUFFERED MINIMAL LOSS FUNCTION TO HIS NECK AND MILD LOSS FUNCTION TO HIS BACK.

CLAIMANT, HIS WIFE AND THREE CHILDREN LIVE ON A 127 ACRE FARM MIDWAY BETWEEN CORVALLIS AND NEWPORT. THE FAMILY HAS A GARDEN AND RAISES SOME LIVESTOCK. CLAIMANT MAINTAINS VOCATIONAL REHABILITATION IS UNREALISTIC FOR HIM BECAUSE HE WOULD HAVE TO LEAVE HIS FARM. WHEN EMPLOYED CLAIMANT WAS EARNING 679 DOLLARS PER MONTH AND IS NOW RECEIVING 950 DOLLARS A MONTH, TAX FREE.

THE REFEREE FOUND CLAIMANT WAS PRIMA FACIE IN THE ODD-LOT CATEGORY AND ENTITLED TO AN AWARD OF PERMANENT TOTAL DISABILITY BECAUSE THE FUND FAILED TO SHOW ANY WORK AT WHICH CLAIMANT COULD BE REGULARLY AND GAINFULLY EMPLOYED.

AFTER A DE NOVO REVIEW OF THE RECORD, THE BOARD IS NOT CONVINCED THAT CLAIMANT IS PERMANENTLY AND TOTALLY DISABLED BASED PRIMARILY ON THE MEDICAL EVIDENCE IN THE RECORD AND THE LACK OF MOTIVATION SHOWN BY CLAIMANT. THE MEDICAL REPORT OF DR. ALAN RUSSAKOV OF THE PORTLAND PAIN REHABILITATION CENTER DATED MARCH 31, 1975 INDICATED CLAIMANT HAD A FULL RANGE OF MOTION IN HIS NECK AND BACK, THE DEEP TENDON REFLEXES WERE NORMAL, MUSCLE STRENGTH WAS NORMAL, AND THE CLAIMANT EXHIBITED NO PATHOLOGICAL REFLEXES. AT THAT TIME CLAIMANT WAS ON NO MEDICATION. THE DOCTOR NOTED A MULTIPLICITY OF COMPLAINTS UNRELATED TO THE INDUSTRIAL INJURY.

THEREFORE, THE BOARD CONCLUDES THAT CLAIMANT IS NOT PERMANENTLY AND TOTALLY DISABLED, BUT THAT HE IS ENTITLED TO AN AWARD OF PERMANENT DISABILITY OF 240 DEGREES FOR 75 PER CENT OF THE MAXIMUM FOR UNSCHEDULED DISABILITY BECAUSE HE HAS SUFFERED SUBSTANTIAL LOSS OF WAGE EARNING CAPACITY AS A RESULT OF HIS INDUSTRIAL INJURY.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 7, 1975 IS MODIFIED.

CLAIMANT IS AWARDED 240 DEGREES OF A MAXIMUM OF 320 DEGREES FOR UNSCHEDULED DISABILITY. THIS IS IN LIEU OF THE AWARD GRANTED BY THE REFEREE'S ORDER.

IN ALL OTHER RESPECTS THE ORDER OF THE REFEREE IS AFFIRMED.

WCB CASE NO. 75-2603 MARCH 15, 1976

PATRICIA PEARSON, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
CHRIS L. MULLMAN, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

THE EMPLOYER REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHEREBY THE EMPLOYER WAS REQUIRED TO PAY MEDICAL BILLS TOTALLING 801 DOLLARS, PAY CLAIMANT AS A PENALTY FOR UNREASONABLE RESISTANCE TO PAYMENT OF COMPENSATION 10 PER CENT OF THAT AMOUNT, AND AWARDED AN ATTORNEY FEE OF 550 DOLLARS.

CLAIMANT SUSTAINED A COMPENSABLE RIGHT ARM AND SHOULDER INJURY ON DECEMBER 7, 1971. A DETERMINATION ORDER AWARDED HER NO TEMPORARY TOTAL OR PERMANENT PARTIAL DISABILITY, AND SHE REQUESTED A HEARING. BY HIS OPINION AND ORDER DATED JUNE 28, 1973, THE REFEREE GRANTED CLAIMANT AN AWARD OF PERMANENT PARTIAL DISABILITY AND,

ADDITIONALLY, ORDERED THE EMPLOYER 'TO PAY FOR CLAIMANT'S CONTINUING MEDICAL TREATMENT AND PRESCRIPTIVE MEDICATIONS PRESCRIBED BY HER TREATING DOCTOR SO LONG AS DR. DAVIES IS OF THE OPINION SAID TREATMENT AND PRESCRIPTIVE MEDICATIONS ARE REQUIRED BY THE INJURY OF DECEMBER 7, 1971.'

FROM JANUARY TO MAY OF 1975, CLAIMANT RECEIVED MANIPULATIVE TREATMENTS FROM DR. EARL F. BRADFIELD, THE EMPLOYER REFUSED TO PAY HIS BILL OF 801 DOLLARS. THE EMPLOYER PRESENTED TWO ARGUMENTS FOR ITS FAILURE TO PAY DR. BRADFIELD'S BILL. FIRST, THE OPINION AND ORDER RENDERED BY THE REFEREE AT THE HEARING LIMITED THE EMPLOYER'S RESPONSIBILITY TO MEDICAL CARE AND TREATMENT APPROVED BY DR. DAVIES, CLAIMANT'S TREATING PHYSICIAN AT THE TIME OF THE HEARING. SECOND, DR. BRADFIELD'S TREATMENT OF THE CLAIMANT INCLUDED THE TREATMENT OF SYMPTOMS UNRELATED TO CLAIMANT'S COMPENSABLE INJURY.

THE REFEREE FOUND THAT ORS 656.245(1) ENTITLED CLAIMANT TO RECEIVE MEDICAL SERVICES FOR CONDITIONS RESULTING FROM THE INJURY FOR SUCH PERIOD AS THE NATURE OF THE INJURY REQUIRED, INCLUDING SUCH SERVICES AS MAY BE REQUIRED AFTER A DETERMINATION OF PERMANENT DISABILITY = AND THAT ORS 656.245(2) ALLOWED THE CLAIMANT TO CHOOSE HER OWN ATTENDING DOCTOR OR PHYSICIAN WITHIN THE STATE OF OREGON. THE RESTRICTIVE NATURE OF THE ORDER DATED JUNE 28, 1973 WAS NOT BINDING ON CLAIMANT NOR A PROPER BASIS FOR THE EMPLOYER'S REFUSAL TO PAY DR. BRADFIELD'S BILL.

WITH RESPECT TO THE TREATMENT AFFORDED CLAIMANT FOR SYMPTOMS UNRELATED TO THE INDUSTRIAL INJURY, DR. BRADFIELD HAD PERFORMED MANIPULATION OF CLAIMANT'S ARCHES, HOWEVER, HE DID NOT CHARGE HER FOR THIS SERVICE.

THE REFEREE ORDERED THE EMPLOYER TO PAY THE MEDICAL BILL OF 801 DOLLARS, ASSESSED, AS A PENALTY FOR UNREASONABLE RESISTANCE TO PAYMENT OF COMPENSATION, 10 PER CENT OF THAT AMOUNT, AND AWARDED CLAIMANT'S COUNSEL AN ATTORNEY FEE.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE REFEREE'S ORDER.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 15, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 400 DOLLARS, PAYABLE BY THE EMPLOYER.

WCB CASE NO. 74-1523 MARCH 15, 1976

JACK GREENAWALD, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

THE CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH UPHELD THE STATE ACCIDENT INSURANCE FUND'S DENIAL OF CLAIMANT'S CLAIM FOR A HEART CONDITION.

CLAIMANT WAS A 50 YEAR OLD CHEF AT THE TIME HE SUFFERED A

HEART CONDITION ON DECEMBER 16, 1973. NORMALLY, HE HAD AN ASSISTANT AND A DISHWASHER, HOWEVER, HE LOST THE SERVICES OF HIS ASSISTANT 17 DAYS PRIOR TO THE INCIDENT IN QUESTION. CLAIMANT USUALLY WORKED A 7 HOUR SHIFT WEDNESDAY THROUGH SUNDAY BUT DURING THE AFORESAID 17 DAY PERIOD HIS WORKING HOURS INCREASED TO 10 AND ONE HALF FOR THE WEEK-DAYS AND APPROXIMATELY 9 AND ONE HALF HOURS ON THE WEEKENDS. CLAIM-ANT HAD NOT BEEN ABLE TO TAKE ANY TIME OFF DURING THIS PERIOD - ALSO HIS WIFE HAD BEEN HOSPITALIZED FOR SURGERY ABOUT 5 OR 6 DAYS PRIOR TO DECEMBER 16, 1973.

CLAIMANT HAD WORKED UNTIL APPROXIMATELY 11.00 P.M. SATURDAY, DECEMBER 15, AND HAD A GOOD NIGHT'S REST. HE STARTED TO WORK SUNDAY, DECEMBER 16, AT APPROXIMATELY 2.00 P.M. AND AT 9.15 P.M., AFTER HE HAD SWABBED DOWN THE KITCHEN FLOOR, CLAIMANT WAS SITTING AT THE COUNTER DRINKING A CUP OF COFFEE WHEN HE 'PASSED OUT'. HIS NEXT RECOLLECTION WAS AWAKENING IN THE ST. VINCENT HOSPITAL.

DR. WYSHAM, A CARDIOLOGIST, TESTIFIED THAT CLAIMANT HAD A VEN-TRICULAR FIBRILLATION WITH CARDIAC ARREST AND A PROBABLE ACUTE MYO-CARDIAL INFARCTION, WITH CORONARY ATHEROSCLEROSIS AND BRONCHIAL PNEUMONIA. HE FELT THE INFARCTION WAS PROBABLY SMALL AND THERE WAS NO DIRECT EVIDENCE TO SUPPORT A CLINICAL DIAGNOSIS OF ATHEROSCLEROSIS. THE PNEUMONIA SYMPTOMS WERE CAUSED BY ASPIRATION OF SECRETIONS DURING THE UNCONSCIOUSNESS CAUSED BY THE CARDIAC ARREST. HE FELT THAT THE RECENT CHEST PAINS WHICH CLAIMANT HAD HAD PRIOR TO THE DECEMBER 16 INCIDENT, TOGETHER WITH THE WORK STRESSES AND FATIGUE, PRECIPITATED A RHYTHM DISTURBANCE OF THE HEART WHICH WAS SOMEHOW RELATED TO THE UNUSUAL WORKING CONDITIONS TO WHICH CLAIMANT WAS SUBJECTED FOR A PERIOD OF 17 DAYS PRIOR TO DECEMBER 16.

DR. HERBERT E. GRISWOLD, JR., A CARDIOLOGIST, WAS OF THE OPIN-ION THAT CLAIMANT'S WORK ACTIVITY WAS NOT A FACTOR IN THE DEVELOP-MENT OF HIS ACUTE VENTRICULAR FIBRILLATION. HE BASED HIS OPINION ON THE FACT THAT DURING THE 17 DAYS OF CONTINUOUS WORK CLAIMANT HAD HAD ADEQUATE SLEEP AND REST, THEREFORE, THE WORK HAD NOT DEPRIVED CLAIM-ANT OF ANY SLEEP NOR HAD THE PROLONGED ACTIVITIES CAUSED FATIGUE.

THE REFEREE, AFTER CONSIDERING THE CONTRADICTORY EXPERT MEDI-CAL TESTIMONY, CONCLUDED THAT CLAIMANT HAD FAILED TO MEET HIS BUR-DEN OF PROVING EITHER LEGAL CAUSATION OR MEDICAL CAUSATION AND THAT THE FUND'S DENIAL MUST THEREFORE BE SUSTAINED.

THE BOARD, ON DE NOVO REVIEW, FINDS THAT THE INCIDENT OF DECEM-BER 16, 1973 WHICH WAS IDENTIFIED BY DR. WYSHAM AS A VENTRICULAR FIBRILLATION WITH RELATING COMPLICATIONS OCCURRED WHILE CLAIMANT WAS ON THE JOB, THEREFORE, LEGAL CAUSATION HAD BEEN ESTABLISHED. IN SUS-TAINING HIS BURDEN OF PROOF, CLAIMANT CAN ESTABLISH LEGAL CAUSATION SIMPLY BY PROOF THAT HE WAS EXERTING HIMSELF IN THE USUAL OR NORMAL WAY IN THE PERFORMANCE OF HIS JOB. HE IS NOT REQUIRED TO SHOW THAT HE EXERTED UNUSUAL STRAIN OR EFFORT. MAYES V. COMPENSATION DEPARTMENT (UNDERSCORED), 1 OR APP 234. HOWEVER, THE BOARD AGREES THAT CLAIM-ANT HAS FAILED TO PROVE MEDICAL CAUSATION AND FOR THAT REASON, ONLY, THE FUND'S DENIAL WAS PROPER.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 7, 1975 IS AFFIRMED.

WCB CASE NO. 75-3416 MARCH 16, 1976

CARMA ANDERSON, CLAIMANT

GALTON AND POPICK, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH HELD THAT THE STATE ACCIDENT INSURANCE FUND SHOULD PREVAIL ON THE ISSUE OF WHETHER THE CLAIMANT WAS ENTITLED TO PENALTIES AND ATTORNEY FEES FOR FAILURE TO PAY A PENALTY ASSESSED UNDER A PRIOR REFEREE'S ORDER PENDING APPEAL.

THIS ISSUE WAS PREVIOUSLY RULED ON BY THE SAME REFEREE IN AN OPINION AND ORDER ENTERED ON OCTOBER 31, 1975, ARNOLD ANDERSON, CLAIMANT (UNDERSCORED), WCB CASE NO. 75-1553. IN THAT CASE THE REFEREE DECLINED TO IMPOSE PENALTIES AND ASSESS ATTORNEY FEES ON THE RATIONALE THAT THE LEGISLATIVE INTENTION WAS TO EFFECT A QUICK DELIVERY SYSTEM OF BENEFITS AND ONCE THE COMPENSATION DUE HAD BEEN PAID IT WOULD NOT BE NECESSARY TO DELIVER, IN ADDITION, A PENALTY TO CARRY OUT THE PURPOSES OF THE LEGISLATION PENDING APPEAL.

THE BOARD, ON DE NOVO REVIEW, NOTES THAT IT AFFIRMED THE REFEREE'S RULING IN THE ARNOLD ANDERSON CASE (UNDERSCORED) AND FINDS NO REASON TO CHANGE ITS POSITION WITH RESPECT TO THIS ISSUE. THE OPINION AND ORDER OF THE REFEREE SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE REFEREE DATED DECEMBER 22, 1975 IS AFFIRMED.

WCB CASE NO. 75-3872 MARCH 16, 1976

HARLEY SHORT, CLAIMANT

EVOHL F. MALAGON, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
ORDER DESIGNATING PAYING AGENCY PURSUANT TO ORS 656.307

ON JANUARY 30, 1976 THE BOARD, EXERCISING ITS OWN MOTION JURISDICTION UNDER THE PROVISIONS OF ORS 656.278, REMANDED CLAIMANT'S REQUEST TO REOPEN HIS JANUARY 11, 1968 CLAIM TO THE HEARINGS DIVISION TO BE HEARD ON A CONSOLIDATED BASIS WITH CLAIMANT'S REQUEST FOR HEARING ON THE STATE ACCIDENT INSURANCE FUND DENIAL OF HIS CLAIM FOR AN INJURY ALLEGED TO HAVE BEEN SUFFERED ON FEBRUARY 27, 1975. AT THE TIME OF THE 1968 INJURY THE WORKMEN'S COMPENSATION COVERAGE WAS FURNISHED BY AETNA CASUALTY AND SURETY COMPANY. IN 1975 THIS COVERAGE WAS FURNISHED BY THE FUND.

HEARING WAS SET FOR MARCH 12, 1976 AT EUGENE, OREGON AND ALL PARTIES WERE NOTIFIED. AT THE HEARING, COUNSEL FOR AETNA ADVISED THE REFEREE THAT HE WAS NOT READY TO PROCEED, STATING THAT AETNA WAS UNAWARE THAT THE MATTER HAD BEEN SET FOR HEARING. THE GROUNDS ASSERTED APPEARED REASONABLE AND THE REFEREE CONTINUED THE CASE, SAYING HE WOULD ENDEAVOR TO HAVE IT RESCHEDULED AS SOON AS POSSIBLE.

THE ISSUE TO BE DETERMINED WAS WHETHER CLAIMANT HAD SUFFERED

A NEW INJURY IN 1975 OR AN AGGRAVATION OF THE 1968 INJURY, IF THE FORMER, IT WOULD BE THE RESPONSIBILITY OF THE FUND, IF THE LATTER THE RESPONSIBILITY OF AETNA. CLAIMANT'S COUNSEL REQUESTED THAT ONE OF THE CARRIERS BE DESIGNATED AS PAYING AGENCY PENDING A DETERMINATION OF THIS RESPONSIBILITY.

THE BOARD, PURSUANT TO THE PROVISIONS OF ORS 656.307, DESIGNATES AETNA CASUALTY AND SURETY COMPANY TO PAY CLAIMANT COMPENSATION, AS PROVIDED BY LAW, COMMENCING MARCH 12, 1976 AND UNTIL A DETERMINATION OF THE RESPONSIBLE PAYING PARTY HAS BEEN MADE.

WCB CASE NO. 75-2770 MARCH 16, 1976
WCB CASE NO. 75-1729

EARL LARSON, CLAIMANT

GALTON AND POPICK, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF
CROSS REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH DIRECTED THE FUND TO REVERSE ITS BOOKKEEPING ENTRY WHEREIN IT CREDITED FROM MARCH 18, 1975 THE PERMANENT PARTIAL DISABILITY PAYMENTS TOWARDS PAYMENT DUE FOR TEMPORARY TOTAL DISABILITY UNDER CLAIM HC 426551 (WCB CASE NO. 75-2770) AND ORDERED IT TO PAY CLAIMANT'S ATTORNEY A REASONABLE ATTORNEY FEE. THE REFEREE FURTHER DIRECTED THAT THE CLAIM FOR AGGRAVATION UNDER SAIF CLAIM HC 305717 (WCB CASE NO. 75-1729) BE DENIED. THE CLAIMANT FILED A CROSS REQUEST FOR REVIEW.

A STIPULATION WAS APPROVED MARCH 18, 1975 WHICH REOPENED CLAIMANT'S BACK CLAIM DESIGNATED HC 426551 = THE FUND SUSPENDED PAYMENT UPON THE PERMANENT PARTIAL DISABILITY AWARD AS OF THAT DATE AND COMMENCED CREDITING IT TOWARDS TEMPORARY TOTAL DISABILITY.

THE REFEREE FOUND THAT THE STIPULATION PROVIDED THAT ALL ISSUES HAD BEEN FULLY COMPROMISED AND RESOLVED AND THAT NO MENTION HAD BEEN MADE OF A RIGHT TO OFFSET WHICH COULD HAVE BEEN MADE OR RESERVED AT THAT TIME. HE CONCLUDED THAT THE STIPULATION WHICH PURPORTED TO SETTLE ALL ISSUES BY WAY OF COMPROMISE TOOK THE MATTER OUT OF THE PROVISIONS OF ORS 656.268.(3) WHICH PROVIDES FOR THE CLOSURE OF CLAIMS UNDER NORMAL CIRCUMSTANCES.

CLAIMANT INJURED HIS RIGHT SHOULDER IN MAY 1971 AND ON NOVEMBER 10, 1971 HE WAS READMITTED TO ST. JOSEPH'S HOSPITAL FOR AN ACROMIONECTOMY AND REPAIR OF THE RIGHT SHOULDER ROTATOR CUFF. HE WAS ABLE TO RESUME WORK FOLLOWING SURGERY BUT HAD CONSIDERABLE PAIN.

IN OCTOBER 1972 CLAIMANT AGAIN INJURED HIMSELF AND IN MARCH 1973 UNDERWENT A MYELOGRAM AND A SECOND LAMINECTOMY. AFTER A HEARING, THE REFEREE FOUND THAT HAD IT NOT BEEN FOR THE COMPASSIONATE ATTITUDE OF CLAIMANT'S EMPLOYER AND THE FACT THAT CLAIMANT HAD A LONG RECORD OF SERVICE THAT CLAIMANT WOULD HAVE HAD DIFFICULTY FINDING ANY JOB. HE AWARDED CLAIMANT 160 DEGREES FOR UNSCHEDULED DISABILITY RESULTING FROM THE RIGHT SHOULDER INJURY. THIS AWARD WAS AFFIRMED BY THE BOARD AND THE CIRCUIT COURT.

ON MARCH 18, 1975 CLAIMANT WAS HOSPITALIZED AGAIN AND DISCHARGED

ON APRIL 1, 1975. THE DISCHARGE NOTE INDICATES CLAIMANT HAD A LONG HISTORY OF LOW BACK PAIN AND HAD BEEN ADMITTED AFTER AN ACUTE EXACERBATION. THE DISCHARGE ALSO INDICATED THAT CLAIMANT HAD A HISTORY OF AN OLD ROTATOR CUFF INJURY AND HAD HAD CONSIDERABLE PAIN IN THE RIGHT SHOULDER. THE FINAL DIAGNOSIS WAS LOW BACK STRAIN SUPERIMPOSED ON AN OLD DEGENERATIVE DISC DISEASE - ROTATOR CUFF TEAR, RIGHT SHOULDER, OLD.

ON APRIL 16, 1974 DR. MCGOUGH STATED THAT CLAIMANT'S CONDITION WAS, AT THAT TIME, CONSIDERABLY WORSE THAN IT WAS ON AUGUST 16, 1974. HE CAUSALLY RELATED CLAIMANT'S BACK SYMPTOMS TO HIS PREVIOUS BACK INJURY. BASED UPON THIS, THE BACK INJURY CLAIM WAS REOPENED FOR MEDICAL TREATMENT AND TEMPORARY TOTAL DISABILITY BENEFITS BEGINNING MARCH 18, 1975. IN A LETTER, DATED MAY 15, 1975, THE FUND INDICATED IT WAS LEAVING THE SHOULDER INJURY CLAIM IN ITS PRESENT STATUS, STATING THAT IF THE CLAIM WERE REOPENED THE PERMANENT PARTIAL DISABILITY AWARD WOULD BE CANCELLED AND CLAIMANT WOULD BE ENTITLED TO TEMPORARY TOTAL DISABILITY BENEFITS IN ONLY ONE CLAIM WHICH WOULD RESULT IN HIS MONTHLY BENEFIT BEING DECREASED. THE BACK CLAIM WAS REOPENED AND THE SHOULDER INJURY CLAIM REMAINED CLOSED.

ON JULY 9, 1975 THE CLAIMANT'S CLAIM FOR AGGRAVATION OF HIS RIGHT SHOULDER INJURY WAS DENIED BY THE FUND.

THE REFEREE FOUND THAT CLAIMANT HAD FAILED TO MEET HIS BURDEN OF PROOF THAT HIS RIGHT SHOULDER CONDITION HAD WORSENED AND, THEREFORE, HIS CLAIM FOR AGGRAVATION WAS PROPERLY DENIED.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 26, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 300 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 74-2699 MARCH 16, 1976

IMRE KASZA, CLAIMANT

FLINN, LAKE AND BROWN,
CLAIMANT'S ATTYS.
RALPH TODD, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

CLAIMANT REQUESTS REVIEW BY THE BOARD OF A REFEREE'S ORDER WHICH GRANTED CLAIMANT 60 PER CENT UNSCHEDULED LOW BACK DISABILITY EQUAL TO 192 DEGREES. CLAIMANT CONTENDS HE IS PERMANENTLY AND TOTALLY DISABLED.

CLAIMANT, WHO WAS 40 YEARS OF AGE AT THE TIME OF HEARING, WAS BORN AND RAISED IN A RURAL AREA OF HUNGARY WHERE HE HAD 8 YEARS OF PUBLIC SCHOOLING, WORKED ON THE FAMILY FARM AND ENTERED THE HUNGARIAN ARMY. HE CAME TO THE UNITED STATES IN 1957 AND WORKED AT UNSKILLED JOBS UNTIL HE LEARNED THE TRADE OF WELDING. WHILE EMPLOYED AS A WELDER, CLAIMANT SUSTAINED A COMPENSABLE INJURY ON APRIL 19, 1972.

CLAIMANT WAS TREATED ON MAY 5, 1972 BY DR. VARNEY FOR A BACK STRAIN. HE CONTINUED TO WORK UNTIL HIS JOB WAS TERMINATED ON MAY 31, 1972. AFTER CONSERVATIVE TREATMENT FAILED TO ALLEVIATE CLAIMANT'S SYMPTOMS, ON JUNE 15, 1973 HE UNDERWENT A LUMBOSACRAL FUSION AT L4-S1.

ON MAY 2, 1974 A DETERMINATION ORDER AWARDED CLAIMANT 40 PER CENT UNSCHEDULED LOW BACK DISABILITY EQUAL TO 128 DEGREES.

ON MARCH 6, 1975 DR. SCHROEDER SAW CLAIMANT AND FELT THAT REASONABLE RESULTS HAD BEEN OBTAINED FROM THE FUSION BUT CLAIMANT HAD SOME DISABLING PAIN. HE RECOMMENDED TRAINING IN SOME FORM OF LIGHT WORK. HE REFERRED CLAIMANT TO THE PAIN CLINIC WHERE HE PARTICIPATED IN THE CLINIC PROGRAM AT A LOW LEVEL BUT WAS UNABLE TO TOLERATE THE EXERCISES BECAUSE OF PAIN.

CLAIMANT WAS ENROLLED BY THE DIVISION OF VOCATIONAL REHABILITATION AT LANE COMMUNITY COLLEGE IN A COURSE OF MECHANICAL DRAFTING WHERE HE DID NOT PROGRESS DUE TO THE LANGUAGE BARRIER AND HIS PHYSICAL INABILITY TO WITHSTAND THE DEMANDS OF THE SCHOOLING. CLAIMANT WAS URGED TO CONTINUE HIS CLASS IN ENGLISH LANGUAGE AND HE DID REACH A 'FIFTH GRADE' READING LEVEL.

ON DE NOVO REVIEW OF THE RECORD BY THE BOARD, IT IS NOTED THAT CLAIMANT WAS EXAMINED ON JULY 17, 1975 BY THE ORTHOPEDIC CONSULTANTS WHO CONSIDERED CLAIMANT HAD SUFFERED A MODERATELY SEVERE DISABILITY TO THE BACK. THEREFORE, THE BOARD CONCLUDES THAT CLAIMANT IS ENTITLED TO AN AWARD OF 75 PER CENT OF THE MAXIMUM ALLOWABLE FOR UNSCHEDULED DISABILITY.

ORDER

THE ORDER OF THE REFEREE IS MODIFIED.

CLAIMANT IS AWARDED 75 PER CENT OF THE MAXIMUM ALLOWABLE FOR UNSCHEDULED DISABILITY. THIS IS IN LIEU OF AND NOT IN ADDITION TO PREVIOUS AWARDS.

CLAIMANT'S COUNSEL SHALL BE AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICE IN CONNECTION WITH THIS BOARD REVIEW, 25 PER CENT OF THE COMPENSATION INCREASED BY THIS AWARD PAYABLE OUT OF SUCH COMPENSATION, AS PAID, NOT TO EXCEED 2,300 DOLLARS.

WCB CASE NO. 75-1289 MARCH 16, 1976

VASILY BODUNOV, CLAIMANT

DYE AND OLSON, CLAIMANT'S ATTYS.
PHILIP A. MONGRAIN, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

THE EMPLOYER SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH REMANDED CLAIMANT'S CLAIM TO IT FOR PAYMENT OF COMPENSATION PURSUANT TO ORS 656.245 WITH SUCH COMPENSATION TO INCLUDE, BUT NOT NECESSARILY LIMITED TO, EXPENSES RELATED TO CLAIMANT'S RIGHT EYE TREATMENT, EXAMINATIONS, AND THE COST OF A PAIR OF GLASSES. THE ORDER AFFIRMED THE DETERMINATION ORDER DATED NOVEMBER 26, 1974 WHICH HAD AWARDED CLAIMANT TEMPORARY TOTAL DISABILITY COMPENSATION ONLY.

CLAIMANT SUFFERED A COMPENSABLE INJURY IN MARCH 1973 WHEN HE

WAS STRUCK BELOW THE RIGHT EYE BY A CHISEL HE WAS SHARPENING. HE SUFFERED A VERTICAL LACERATION BELOW THE RIGHT EYE AND THEREAFTER HAD DIFFICULTY WITH HIS RIGHT EYE VISION. IN APRIL 1973 SURGERY WAS PERFORMED FOR REDUCTION OF AN INFRA-ORBITAL RIM FRACTURE AND IT WAS RECOMMENDED THAT CLAIMANT OBTAIN GLASSES TO ALLEVIATE CLAIMANT'S DEMONSTRABLE NEAR AND FAR VISION DEFICIENCY.

IN SEPTEMBER 1973 CLAIMANT'S TREATING PHYSICIAN, DR. BETTS, INDICATED THAT CLAIMANT DID NOT THEN HAVE ANY PERMANENT IMPAIRMENT. AFTER CLAIMANT HAD TWICE FAILED TO KEEP APPOINTMENTS WITH DOCTORS FOR THE PURPOSES OF CLOSING EXAMINATION, IT WAS DETERMINED THAT INSUFFICIENT EVIDENCE EXISTED TO SUPPORT A DETERMINATION OF PERMANENT PARTIAL DISABILITY.

IN APRIL 1975 CLAIMANT WAS AGAIN EXAMINED BY DR. BETTS WHO INDICATED CLAIMANT HAD NO VISUAL DISABILITY WITH THE GLASSES, BUT THAT HE DID HAVE AN INFRA-ORBITAL NERVE DISTRIBUTION NUMBNESS AND TINGLING. DR. BAER, AN OPHTHALMOLOGIST, EXAMINED CLAIMANT IN JUNE 1975 AND STATED THAT THE CORRECTIVE VISUAL ACUITY WAS 20-20 AND CLAIMANT HAD NORMAL MUSCLE BALANCE, NORMAL INTEROCULAR PRESSURE AND NO LIMITATION OF MUSCLE FUNCTION OR EYE MOVEMENT. THE ONLY RESIDUAL WHICH DR. BAER FOUND WAS NUMBNESS IN THE RIGHT CHEEK.

THE REFEREE FOUND THE CLAIMANT, WHO DOES NOT NOW WEAR GLASSES, IS BOTHERED IN THE COLD WEATHER WHEN HE DEVELOPS NUMBNESS AND PAIN IN THE RIGHT SIDE OF HIS FACE. HE ALSO HAS SPEECH DIFFICULTIES AND VISION PROBLEMS WHICH INCLUDE BLURRING.

THE REFEREE FOUND THAT CLAIMANT DOES NOT HAVE A VISION LOSS IF HE WEARS HIS GLASSES - THAT HE DOES NOT WEAR GLASSES AT THE PRESENT TIME AS HE DOES NOT HAVE THE MONEY TO PURCHASE THEM. THERE IS SOME QUESTION IN THE MEDICAL EVIDENCE AS TO WHETHER OR NOT CLAIMANT'S VISION PROBLEMS ARE RELATED TO HIS INDUSTRIAL INJURY, HOWEVER, THE TESTIMONY OF CLAIMANT WAS THAT HIS VISION PROBLEMS BEGAN RIGHT AFTER THAT INJURY AND THERE IS NO EVIDENCE THAT HE HAD HAD ANY RIGHT EYE PROBLEMS PRIOR THERETO.

THE REFEREE FOUND CLAIMANT'S TESTIMONY CREDIBLE AND CONCLUDED THAT CLAIMANT WAS ENTITLED TO MEDICAL BENEFITS PURSUANT TO ORS 656.245, SPECIFICALLY AND, PRESENTLY, INCLUDING A PAIR OF GLASSES WHICH WILL RESTORE CLAIMANT'S VISION TO 20-20. BECAUSE OF THIS CORRECTION, HE CONCLUDED THAT CLAIMANT DOES NOT SUFFER ANY SCHEDULED DISABILITY. CLAIMANT HAS PAIN AND SOME NUMBNESS IN THE RIGHT SIDE OF HIS FACE BUT THERE IS NO EVIDENCE WHICH WOULD ESTABLISH THAT THIS PAIN IS DISABLING NOR WHICH WOULD ESTABLISH THAT CLAIMANT SUFFERED A LOSS OF EARNING CAPACITY AS A RESULT OF THIS UNSCHEDULED CONDITION. CLAIMANT HAS FAILED TO PROVE THAT HE IS ENTITLED TO EITHER A SCHEDULED OR UNSCHEDULED PERMANENT DISABILITY AWARD.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 17, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 300 DOLLARS, PAYABLE BY THE EMPLOYER.

EDWIN E. PETERSON, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
JONES, LANG, KLEIN, WOLF AND SMITH,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 192 DEGREES FOR 60 PER CENT UNSCHEDULED RIGHT SHOULDER DISABILITY AND 48 DEGREES FOR 25 PER CENT RIGHT ARM DISABILITY. CLAIMANT CONTENDS HE IS PERMANENTLY AND TOTALLY DISABLED.

CLAIMANT IS 65 YEARS OLD AND WAS EMPLOYED AS A MECHANIC-WELDER WHEN HE SUFFERED A COMPENSABLE INJURY ON OCTOBER 17, 1974. CLAIMANT'S ONLY TREATING PHYSICIAN HAS BEEN DR. MITCHELL, A CHIROPRACTOR, ALTHOUGH HE WAS EXAMINED IN FEBRUARY 1975 BY DR. SCHWARTZ, AN ORTHOPEDIC SURGEON, AND IN JUNE 1975 BY DR. VESSELY, ALSO AN ORTHOPEDIC SURGEON.

LITTLE INFORMATION CAN BE DERIVED FROM DR. MITCHELL'S REPORTS - IT WAS NOT UNTIL THE EXAMINATION BY DR. SCHWARTZ THAT IT WAS DETERMINED CLAIMANT HAD SUFFERED A TEAR OF THE LONG HEAD OF THE BICEPS OF HIS RIGHT SHOULDER. DR. SCHWARTZ, ADDITIONALLY, DIAGNOSED A CERVICAL SPONDYLOSIS, CALCIFIC BURITIS AND ADHESIVE CAPSULITIS OF THE RIGHT SHOULDER AND DEGENERATIVE JOINT DISEASE OF THE RIGHT ACROMIOCLAVICULAR AND GLENOHUMERAL JOINTS. DR. VESSELY REPORTED ABNORMAL CONTOURS OF THE RIGHT SHOULDER AND BRACHIAL AREA WITH DEFINITE ASYMMETRY OF THE BICEPS AREA 'COMPATIBLE WITH A REMOTE RUPTURE OF THE LONG HEAD OF THE RIGHT BICEPS'.

IN APRIL 1974 DR. SCHWARTZ FELT CLAIMANT WAS MEDICALLY STATIONARY AND THAT HIS PERMANENT IMPAIRMENT OF PHYSICAL FUNCTION SHOULD BE RATED AS MILD. DR. VESSELY SHARED THIS OPINION BUT FELT THAT CLAIMANT HAD A TOTAL OF 33 PER CENT IMPAIRMENT OF THE UPPER EXTREMITY EQUAL TO 20 PER CENT OF THE WHOLE MAN. DR. MITCHELL AGREED WITH DR. VESSELY'S FINDINGS ON IMPAIRMENT OF THE RIGHT SHOULDER BUT BELIEVED CLAIMANT ALSO HAD AN 8 PER CENT CERVICAL IMPAIRMENT ON A 'WHOLE MAN' BASIS - HE RECOMMENDED THAT THIS IMPAIRMENT BE CONSIDERED AS WELL AS THE IMPAIRMENT OF HIS SHOULDER.

CLAIMANT HAD BEEN EMPLOYED AS A MECHANIC AND WELDER FOR THE PAST 25 YEARS. HE HAD BEEN EMPLOYED BY THE EMPLOYER FOR THE LAST 2 AND ONE HALF YEARS AND CONTINUED TO WORK AFTER HIS INJURY UNTIL FEBRUARY 1975. HE HAS NOT WORKED SINCE THAT DATE. CLAIMANT RECEIVES 233 DOLLARS A MONTH FROM HIS UNION PENSION PLAN, 324 DOLLARS A MONTH FROM SOCIAL SECURITY DISABILITY AND 580 DOLLARS A MONTH WORKMEN'S COMPENSATION BENEFITS.

THE REFEREE WAS PERSUADED THAT CLAIMANT WAS NOT PERMANENTLY AND TOTALLY DISABLED, PRIMARILY, BECAUSE HE CONTINUED TO WORK FROM OCTOBER 17, 1974 TO FEBRUARY 1975 AND DROVE ROUND TRIP PORTLAND - THE DALLES TWO OR THREE TIMES A WEEK. IT WAS HIS OPINION THAT CLAIMANT HAD ELECTED TO RETIRE AND WAS NOT MOTIVATED TO RETURN TO WORK. THE REFEREE DID NOT IMPUGN CLAIMANT'S CREDIBILITY NOR DOUBT THAT CLAIMANT BELIEVED THE CONDITIONS IN HIS LEFT ARM AND SHOULDER ARE WORSE NOW THAN THEY WERE IN FEBRUARY 1975, BUT CLAIMANT'S TREATING PHYSICIAN HAS NOT REPORTED ANY INCREASE IN SYMPTOMS NOR ARE THERE ANY MEDICAL REPORTS WHICH WOULD SUPPORT CLAIMANT'S BELIEFS.

THE CLAIMANT'S CLAIM HAD BEEN CLOSED BY DETERMINATION ORDER MAILED JULY 21, 1975 WHEREBY CLAIMANT RECEIVED 112 DEGREES FOR 35 PER CENT UNSCHEDULED RIGHT SHOULDER DISABILITY AND 19.2 DEGREES FOR 10 PER CENT OF SCHEDULED RIGHT ARM DISABILITY. THE REFEREE CONCLUDED THAT TO ADEQUATELY COMPENSATE CLAIMANT FOR HIS LOSS OF EARNING CAPACITY THE UNSCHEDULED AWARD SHOULD BE INCREASED TO 192 DEGREES AND THAT THE EVIDENCE INDICATED THAT THE LOSS OF FUNCTION OF RIGHT ARM JUSTIFIED AN AWARD OF 48 PER CENT. ACCORDINGLY, HE INCREASED THE PREVIOUS AWARD.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 5, 1975 IS AFFIRMED.

WCB CASE NO. 74-3958 MARCH 16, 1976

FLORENCE LEISER, CLAIMANT

WILLIAM O. LEWIS, CLAIMANT'S ATTY.
COLLINS, FERRIS AND VELURE,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH GRANTED CLAIMANT AN ADDITIONAL AWARD OF 19.2 DEGREES FOR 10 PER CENT LOSS OF HER RIGHT ARM, MAKING A TOTAL AWARD OF 38.4 DEGREES.

CLAIMANT CONTENDS THAT SHE IS NOT MEDICALLY STATIONARY - ALSO, THAT SHE HAS SUFFERED OTHER INJURIES WHICH ENTITLE HER TO ADDITIONAL COMPENSATION.

CLAIMANT SUSTAINED A COMPENSABLE INJURY TO HER RIGHT HAND ON SEPTEMBER 23, 1971 WHICH WAS DIAGNOSED AS A SECOND DEGREE BURN. HER CLAIM, INITIALLY, WAS CLOSED ON JUNE 29, 1972 WITH SOME TIME LOSS BUT NO AWARD FOR PERMANENT PARTIAL DISABILITY. THE CLAIM WAS LATER REOPENED FOR ADDITIONAL MEDICAL TREATMENT AND AGAIN CLOSED ON NOVEMBER 1, 1973 WHEREBY CLAIMANT RECEIVED AN ADDITIONAL TIME LOSS BENEFIT TO SEPTEMBER 22, 1973 AND AN AWARD OF 19.2 DEGREES FOR 10 PER CENT LOSS OF HER RIGHT ARM.

TREATMENT FOR THE INJURY TO THE RIGHT ARM ULTIMATELY REQUIRED A THORACIC SYMPATHECTOMY - GANGLIONECTOMY, RIGHT TRANSAXILLARY RIGHT THORACOTOMY WHICH WAS PERFORMED ON APRIL 26, 1973 AND WHICH RELATED TO THE NERVE SYSTEM OF CLAIMANT'S RIGHT ARM. DURING THE COURSE OF TREATMENT FOR AND/OR EVALUATION OF THE NATURE AND EXTENT OF CLAIMANT'S RIGHT HAND INJURY, CERTAIN OTHER MEDICAL PROBLEMS WERE DIAGNOSED, HOWEVER, RESPONSIBILITY FOR THOSE CONDITIONS WERE DENIED BY THE EMPLOYER ON VARIOUS OCCASIONS AND CLAIMANT DID NOT PURSUE HER REMEDIES TO HAVE THE ISSUES RESOLVED.

THE REFEREE FOUND THAT THE APRIL 26, 1973 SURGERY WAS FOR THE RELIEF OF RIGHT ARM SYMPTOMS AND NO MEDICAL PROBLEMS TO ANY BODY AREA OTHER THAN HER RIGHT ARM HAD BEEN ESTABLISHED BY THE MEDICAL EVIDENCE TO BE CAUSALLY RELATED TO THAT SURGERY. THE REFEREE FURTHER FOUND THAT EVEN IF SUCH CONDITIONS SUCH AS DESCRIBED BY CLAIMANT INVOLVING THE RIGHT SIDE OF THE UNSCHEDULED AREA OF HER BODY WERE THE RESULT OF THE SURGICAL TREATMENT, THERE STILL WAS NO EVIDENCE

THAT SUCH CONDITIONS IMPAIRED CLAIMANT'S ABILITY TO WORK. CLAIMANT ALSO FAILED TO ESTABLISH THAT ANY EMOTIONAL PROBLEMS SHE HAD WERE CAUSED BY THE SEPTEMBER 23, 1971 INJURY OR REQUIRED TREATMENT OF THAT INJURY.

THE REFEREE FOUND NO EVIDENCE THAT ANY CURATIVE TREATMENT TO THE RIGHT HAND OR ARM, OR INVOLVING ANY OTHER BODY AREA, FOR ANY CONDITION RESULTING FROM THE SEPTEMBER 23, 1971 INJURY WAS RECOMMENDED AFTER NOVEMBER 1, 1973 = CLAIMANT'S CONDITION WAS MEDICALLY STATIONARY IN SEPTEMBER 1973 WHEN HER TREATING PHYSICIAN RELEASED HER FOR WORK. FURTHER DIAGNOSTIC WORKUP WAS SUGGESTED IN 1974 BUT THERE WAS NO EVIDENCE THAT ANY MEDICAL SERVICES, INCLUDING PALLIATIVE TREATMENT OR DIAGNOSTIC WORKUPS, HAD NOT BEEN PAID BY THE EMPLOYER.

THE REFEREE CONCLUDED THAT CLAIMANT WAS NOT ENTITLED TO ANY ADDITIONAL TIME LOSS BENEFITS AND ONLY A SMALL ADDITIONAL AWARD FOR HER PERMANENT DISABILITY. CLAIMANT'S CONTENTIONS CONCERNING THE LOSS OF USE OF HER RIGHT HAND AND ARM WERE NOT SUBSTANTIATED BY FILM INTRODUCED SHOWING CLAIMANT ENGAGED IN CERTAIN ACTIVITIES. THE REFEREE QUESTIONED THE CREDIBILITY OF THE LAY EVIDENCE PRESENTED IN HER BEHALF. THE REFEREE, RELYING SOLELY ON THE MEDICAL EVIDENCE, CONCLUDED CLAIMANT WAS ENTITLED TO 20 PER CENT LOSS OF USE OF THE RIGHT ARM RATHER THAN 10 PER CENT.

THE BOARD, ON DE NOVO REVIEW, CONFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 12, 1975 IS AFFIRMED.

WCB CASE NO. 75-2625 MARCH 17, 1976

CHARLIE WILKERSON, CLAIMANT

SANDERS, LIVELY AND WISWALL,
CLAIMANT'S ATTYS.
J. W. MC CRACKEN, JR., DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT.

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

CLAIMANT SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH APPROVED THE EMPLOYER'S DENIAL OF CLAIMANT'S CLAIM FOR COMPENSATION BENEFITS.

ON JUNE 5, 1975, CLAIMANT SIGNED A FORM 801, SHOWING THE DATE OF INJURY AS MAY 5, 1975. IN HIS TESTIMONY HE RELATED THE ACTUAL ONSET AS BEING MARCH 19, 1975.

CLAIMANT CONSULTED WITH DR. MOFFITT ON MAY 5 AND WAS GIVEN A PHYSICAL EXAMINATION. DR. MOFFITT'S REPORT MAKES NO MENTION OF CLAIMANT'S REFERENCE TO HIS BACK AT ANY TIME FROM MARCH THROUGH MAY 23. HE TREATED CLAIMANT FOR PLEURISY, BOWEL TROUBLES AND AN INJURED FOOT.

THE EMPLOYER'S MEDICAL DEPARTMENT HAD RECORD OF SIX VISITS WITH COMPLAINTS BY CLAIMANT OF AN INJURED FINGER, SHORTNESS OF BREATH AND CHEST PAINS. NO REFERENCE WAS EVER MADE TO CLAIMANT'S BACK.

THE FIRST INDICATION THAT CLAIMANT WAS HAVING A PROBLEM WITH

HIS BACK WAS CLAIMANT'S REQUEST FOR DR. MOFFITT TO REFER HIM TO AN ORTHOPEDIST. CLAIMANT WAS REFERRED TO DR. DEGGE AND IN HIS REPORT ON JULY 18, 1975, DR. DEGGE INDICATED THE CLAIMANT APPEARED TO HAVE SUSTAINED A STRAIN OF THE LUMBAR SPINE.

THE REFEREE FOUND INCONSISTENCIES AND DISCREPANCIES IN THE RECORD WHICH PRECLUDED A FINDING THAT CLAIMANT HAD SUSTAINED A WORK-RELATED INJURY. THE CLAIMANT WAS NOT CREDIBLE AND DR. DEGGE'S DIAGNOSIS WAS BASED ON A MEDICAL HISTORY GIVEN TO HIM BY CLAIMANT.

THE BOARD, ON DE NOVO REVIEW, CONCURS WITH THE FINDINGS OF THE REFEREE AND AFFIRMS AND ADOPTS HIS ORDER.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 3, 1975 IS AFFIRMED.

WCB CASE NO. 73-120 MARCH 17, 1976
WCB CASE NO. 74-2853

DONALD MORRIS, CLAIMANT

INGRAM AND SCHMAUDER,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

CLAIMANT REQUESTS BOARD REVIEW OF A REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER IN WCB CASE NO. 73-120 AND AWARDED CLAIMANT AN ADDITIONAL 64 DEGREES, MAKING A TOTAL OF 144 DEGREES FOR 45 PER CENT LOSS OF THE MAXIMUM FOR UNSCHEDULED DISABILITY IN WCB CASE NO. 74-2853. CLAIMANT ALLEGES THAT HE IS PERMANENTLY AND TOTALLY DISABLED.

CLAIMANT SUSTAINED AN INDUSTRIAL INJURY ON DECEMBER 11, 1971 WHILE EMPLOYED AT SAN JUAN LUMBER COMPANY. HE RECEIVED CHIROPRACTIC TREATMENT FOR LOW BACK STRAIN AND HIS CLAIM WAS CLOSED BY A DETERMINATION ORDER DATED NOVEMBER 13, 1972 AWARDING 16 DEGREES FOR 5 PER CENT UNSCHEDULED DISABILITY (WCB CASE NO. 73-120).

CLAIMANT RETURNED TO LOGGING FOR HIS BROTHER, AN INDEPENDENT LOGGER, AND ON JANUARY 8, 1973 SUSTAINED AN UPPER BACK INJURY. A LAMINECTOMY WAS PERFORMED WITH GOOD RESULTS AND A DETERMINATION ORDER DATED APRIL 15, 1974 AWARDED CLAIMANT 80 DEGREES FOR 25 PER CENT FOR UNSCHEDULED THORACIC INJURY (WCB CASE NO. 74-2853).

THE REFEREE HELD A CONSOLIDATED HEARING ON BOTH CASES.

BOTH DR. GALLO AND DR. CARROLL ANTICIPATED THAT CLAIMANT WOULD HAVE A GOOD RECOVERY, BUT EACH INDICATED HE SHOULD BE RETRAINED VOCATIONALLY BECAUSE HE CANNOT RETURN TO LOGGING.

WHEN CLAIMANT WAS SEEN BY THE DISABILITY PREVENTION DIVISION, DR. JULIA PERKINS REPORTED ON JANUARY 31, 1974 THAT, IN THE ABSENCE OF ANY CLEAR, OBJECTIVE PHYSICAL FINDINGS, IT WAS SUSPECTED THAT CLAIMANT WAS MALINGERING. THE BACK EVALUATION CLINIC FOUND A MILDLY-MODERATE TOTAL LOSS FUNCTION OF THE BACK DUE TO THE INDUSTRIAL INJURY AND SUBSEQUENT SURGERY.

BY SEPTEMBER 1974, DR. GALLO REPORTED CLAIMANT HAD A FULL RANGE

OF MOTION, DEEP TENDON REFLEXES WERE INTACT, HIS GAIT WAS GOOD, AND THERE WAS NO EVIDENCE OF SENSORY DEFICIT. IT APPEARED CLAIMANT'S MAJOR PROBLEMS WERE ANXIETY AND A HOST OF SOMATIC SYMPTOMS, INCLUDING CHEST PAIN, INTRASCAPULAR PAIN AND TREMOR IN HANDS AND SPEECH.

THE VOCATIONAL RETRAINING EFFORTS WERE NOT SUCCESSFUL BECAUSE OF MATH AND LANGUAGE DEFICITS - ALSO, THE LOCALE OF SENACA PRESENTED A NATURAL LIMITATION OF ALTERNATIVE JOB ACTIVITY AVAILABLE TO CLAIMANT.

THE REFEREE FOUND MANY INCONSISTENCIES IN CLAIMANT'S TESTIMONY AND, RELYING SOLELY ON THE MEDICAL REPORTS, CONCLUDED CLAIMANT CERTAINLY WAS NOT PERMANENTLY AND TOTALLY DISABLED BUT THE 30 PER CENT WHICH CLAIMANT HAD RECEIVED DID NOT ADEQUATELY COMPENSATE HIM FOR HIS LOSS OF EARNING CAPACITY, THEREFORE, HE INCREASED THE AWARD FOR THE JANUARY 8, 1973 INJURY BY 20 PER CENT EQUAL TO 64 DEGREES, GIVING CLAIMANT A TOTAL OF 50 PER CENT UNSCHEDULED DISABILITY FOR THE TWO INJURIES.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE REFEREE'S ORDER.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 25, 1975 IS AFFIRMED.

WCB CASE NO. 75-2024 MARCH 17, 1976

GERALD FRY, CLAIMANT

SCHLEGEL, MILBANK, WHEELER AND JARMAN,
CLAIMANT'S ATTYS.
KEITH D. SKELTON, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

CLAIMANT REQUESTS BOARD REVIEW OF A REFEREE'S ORDER WHICH AFFIRMED A DETERMINATION ORDER DATED MARCH 19, 1975, AWARDING CLAIMANT 10 PER CENT RIGHT LEG DISABILITY EQUAL TO 15 DEGREES. THE ISSUE ON REVIEW IS THE EXTENT OF DISABILITY.

CLAIMANT SUFFERED A COMPENSABLE RIGHT KNEE INJURY ON JULY 17, 1973, WHILE EMPLOYED AS AN OFF BEARER IN A LUMBER MILL. HE WAS HOSPITALIZED AUGUST 6, 1973 FOR AN ARTHROTOMY. DR. JOHN B. CHESTER REPORTED CLAIMANT IMPROVED SATISFACTORILY AND ON SEPTEMBER 10, 1973 HAD BEGUN LIGHTER WORK AT THE OREGON STATE PENITENTIARY.

CLAIMANT REQUESTED A HEARING ON THE AWARD. THE REFEREE FOUND CLAIMANT'S MAIN PROBLEMS, AT THAT TIME, WERE PAIN, WEAKNESS AND GRATING, ACHING AFTER LONG PERIODS OF WALKING AND DIFFICULTY CLIMBING STAIRS. DR. CHESTER CONSIDERED CLAIMANT'S KNEE FUNCTIONAL AND STATED THERE WERE MINIMAL FINDINGS OF PHYSICAL IMPAIRMENT.

COMPENSATION FOR INJURY TO A SCHEDULED MEMBER IS FIXED BY STATUTE AND LOSS OF PHYSICAL FUNCTION, NOT EARNING CAPACITY, IS THE SOLE CRITERION FOR DETERMINING SUCH DISABILITY, THEREFORE, THE REFEREE CONCLUDED THE AWARD MADE BY THE DETERMINATION ORDER OF MARCH 19, 1975 ADEQUATELY COMPENSATED CLAIMANT FOR HIS LOSS OF FUNCTION OF HIS RIGHT LEG.

THE BOARD, ON DE NOVO REVIEW, CONCURS WITH THE FINDING OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 30, 1975 IS AFFIRMED.

WCB CASE NO. 74-4193 MARCH 17, 1976

ODUS STILWELL, CLAIMANT
ANDERSON, DITTMAN AND ANDERSON,
CLAIMANT'S ATTYS.
JONES, LANG, KLEIN, WOLF AND SMITH,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

THE EMPLOYER SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH HELD THAT THE EMPLOYER'S DENIAL OF CLAIMANT'S CLAIM FOR A BACK INJURY WAS IMPROPER AND REMANDED THE CLAIM TO IT FOR THE PAYMENT OF BENEFITS WHICH CLAIMANT WAS ENTITLED BY VIRTUE OF THE AMENDED DETERMINATION ORDER, DATED SEPTEMBER 27, 1974 = ASSESSED PENALTIES IN THE AMOUNT OF 25 PER CENT OF THE COMPENSATION DUE CLAIMANT FROM SEPTEMBER 27, 1974 TO MARCH 5, 1975 AND AWARDED ATTORNEY FEES TO BE PAID BY THE EMPLOYER.

ON MAY 22, 1973 CLAIMANT SUSTAINED A COMPENSABLE BACK INJURY IN A TRAFFIC ACCIDENT. THE INJURY WAS DIAGNOSED AS A LUMBAR AND CERVICAL STRAIN = THEREAFTER, CLAIMANT RECEIVED TREATMENT FROM DR. BARNHOUSE, DR. GEARHARDT, DR. ALDROCK AND DR. NORRIS AT THE PERMANENTE CLINIC. THE TREATMENT RECOMMENDED BY ALL WAS PRIMARILY FOR WEIGHT REDUCTION. CLAIMANT WEIGHS 303 POUNDS AND IS 6 FOOT TALL.

AT THE REQUEST OF THE EMPLOYER CLAIMANT WAS EXAMINED BY DR. MCKILLOP, HE WAS ALSO SEEN FOR EVALUATION AND RECOMMENDATION BY THE MEDICAL DIVISION, THE PSYCHOLOGY CENTER AND THE BACK EVALUATION CLINIC OF THE DISABILITY PREVENTION DIVISION.

ON APRIL 18, 1974 THE BOARD ISSUED A DETERMINATION ORDER AWARDING TEMPORARY TOTAL DISABILITY COMPENSATION FROM MAY 22, 1973 TO MARCH 22, 1974 AND 32 DEGREES FOR 10 PER CENT UNSCHEDULED LOW BACK DISABILITY. CLAIMANT WAS NOT SATISFIED WITH THE AWARD AND COMPLAINED DIRECTLY TO THE EMPLOYER'S CARRIER WHICH AUTHORIZED CLAIMANT TO SEE DR. CHERRY, WHO HAD BEEN CLAIMANT'S TREATING DOCTOR ON AN EARLIER BACK INJURY.

ON MAY 6, 1974 DR. CHERRY FOUND THAT FURTHER TREATMENT WAS INDICATED AND PRESCRIBED MUSCLE RELAXANTS AND PAIN MEDICATION AND REQUESTED ADDITIONAL THERAPY. AFTER RECEIVING SEVERAL REPORTS FROM DR. CHERRY, THE EMPLOYER EARLY IN AUGUST 1974, COMMENCED AN INVESTIGATION OF CLAIMANT'S ACTIONS AND ACTIVITIES AND ALSO REQUESTED THAT CLAIMANT BE EXAMINED BY DR. LANGSTON.

ON SEPTEMBER 27, 1974 THE BOARD ISSUED AN ORDER SETTING ASIDE IN ITS ENTIRETY THE DETERMINATION ORDER OF APRIL 18, 1974 AND REOPENED THE CLAIM FOR FURTHER TREATMENT AND PAYMENT OF COMPENSATION BENEFITS. THE EMPLOYER, ON OCTOBER 2, 1974, RELYING ON THE REPORT FROM DR. LANGSTON AND ITS INVESTIGATION OF CLAIMANT'S ACTIONS AND ACTIVITIES, UNILATERALLY DENIED ALL PAYMENT OF FURTHER BENEFITS TO CLAIMANT.

THE REFEREE FOUND THAT THE TREATMENT RECOMMENDED BY ALL OF THE DOCTORS AT THE PERMANENTE CLINIC, THE FINDINGS OF DR. MCKILLOP

AND THE RECOMMENDATIONS MADE, AFTER EXAMINATION AND EVALUATION OF CLAIMANT, BY THE STAFF AT THE DISABILITY PREVENTION DIVISION WERE GENERALLY CONSISTENT. THE CONSENSUS WAS THAT CLAIMANT SHOULD TRY TO ENGAGE IN A DIFFERENT TYPE OF WORK. DR. LANGSTON'S EXAMINATION INDICATED THAT HE COULD FIND VERY LITTLE, IF ANYTHING, WRONG WITH CLAIMANT AND COULD FIND NO REASON WHY CLAIMANT WOULD NOT BE ABLE TO RETURN TO HIS FORMER OCCUPATION AS TRUCK DRIVER. THIS OPINION WAS THE ONLY CONTRADICTION OF ALL THE OTHER MEDICAL EVIDENCE AND THE REFEREE CONCLUDED HE WAS UNABLE TO ACCEPT THE CONCLUSIONS OF DR. LANGSTON IN VIEW OF THE OBJECTIVE FINDINGS MADE BY ALL OF THE OTHER PHYSICIANS WHO TREATED AND, OR EXAMINED CLAIMANT.

THE REFEREE FOUND THAT CLAIMANT WAS NOT A QUITTER OR A MALINGERER NOR DID HE APPEAR TO BE A TYPE OF PERSON WHO WOULD PURSUE A COURSE OF CONDUCT WHICH WOULD RESULT IN LOSING A WELL-PAYING STEADY JOB SOLELY ON THE REMOTE POSSIBILITY OF FUTURE COMPENSATION BENEFITS. ALTHOUGH THERE WAS CONFLICTING MEDICAL EVIDENCE, THE PREPONDERANCE SUPPORTS THE REOPENING OF CLAIMANT'S CLAIM ON SEPTEMBER 27, 1974. HE CONCLUDED THAT CLAIMANT SHOULD RECEIVE TREATMENT AND PAYMENT OF COMPENSATION, AS PROVIDED BY LAW, FROM THAT DATE UNTIL HIS CLAIM IS CLOSED UNDER THE PROVISIONS OF ORS 656.268.

THE REFEREE, CITING THE COURT'S RULING IN JACKSON V. SAIF (UNDERSCORED), 7 OR APP 109, FOUND THAT THE EMPLOYER HAD NO RIGHT TO SUSPEND BENEFITS ON ITS OWN MOTION ALTHOUGH HE ALWAYS HAS THE RIGHT TO REQUEST A HEARING UNDER THE PROVISIONS OF ORS 656.283(1). THE REFEREE CONCLUDED THAT WHEN THE EMPLOYER ON OCTOBER 2, 1974, UNILATERALLY DENIED ALL PAYMENT OF FURTHER BENEFITS TO CLAIMANT, RELYING SOLELY ON ITS OWN INVESTIGATION AND REPORT OF DR. LANGSTON WHICH DID NOT RELEASE CLAIMANT TO RETURN TO REGULAR WORK, SUCH REFUSAL WAS AN UNREASONABLE REFUSAL TO PAY COMPENSATION. THE EMPLOYER HAD MADE NO EFFORT TO SEEK DETERMINATION OF THE APPROPRIATE STATUTE.

THEREFORE, UNDER THE PROVISIONS OF ORS 656.262(8), THE IMPOSITION OF A PENALTY AND ATTORNEY FEES AWARDED UNDER THE PROVISIONS OF ORS 656.382(1) ON THE GROUNDS THAT THE EMPLOYER UNREASONABLY RESISTED THE PAYMENT OF COMPENSATION WERE PROPER.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 1, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 400 DOLLARS, PAYABLE BY THE EMPLOYER.

WCB CASE NO. 74-4690 MARCH 17, 1976

IN THE MATTER OF THE COMPENSATION OF

PETER J. GEIDL, CLAIMANT
AND THE COMPLYING STATUS OF
INTERNATIONAL RACEWAY PARKS, INC.,
DBA PORTLAND INTERNATIONAL RACEWAY, EMPLOYER
SANFORD KOWITT, CLAIMANT'S ATTY.
KEITH SKELTON, EMPLOYER'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
ORDER

ON FEBRUARY 25, 1976 AN ORDER ON REVIEW WAS ENTERED BY THE BOARD IN THE ABOVE ENTITLED MATTER. ON MARCH 11, 1976 A MOTION FOR RECONSIDERATION WAS RECEIVED FROM THE STATE ACCIDENT INSURANCE FUND.

THE BOARD CONCLUDES THAT ITS ORDER ON REVIEW ENTERED FEBRUARY 25, 1976 SHOULD BE SET ASIDE AND THAT THE NONCOMPLYING EMPLOYER, INTERNATIONAL RACEWAY PARKS, INC., DBA PORTLAND INTERNATIONAL RACEWAY, BE GIVEN 20 DAYS FROM THE DATE OF THIS ORDER WITHIN WHICH TO RESPOND TO THE FUND'S MOTION FOR RECONSIDERATION.

UPON RECEIPT OF THE RESPONSE THE BOARD WILL THEN CONSIDER THE POSITION OF BOTH PARTIES AND, THEREAFTER, AN ORDER ON REVIEW WILL BE ENTERED IN THE ABOVE ENTITLED MATTER.

IT IS SO ORDERED.

WCB CASE NO. 75-1011 MARCH 17, 1976

CARLOS MENKE, CLAIMANT
PANNER, JOHNSON AND MARCEAU,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH REQUIRED IT TO ACCEPT CLAIMANT'S CLAIM OF AGGRAVATION.

CLAIMANT RECEIVED A COMPENSABLE INJURY ON APRIL 18, 1974 AS HE WAS CARRYING LUMBER AND STEPPED IN A HOLE INJURING HIS BACK. DR. MACCLOSKEY FOUND NO EVIDENCE OF RECURRENT DISC PROBLEMS. ON AUGUST 20, 1974 THE CLAIM WAS CLOSED WITH NO AWARD OF PERMANENT PARTIAL DISABILITY.

ON FEBRUARY 18, 1975 CLAIMANT RETURNED TO DR. MACCLOSKEY WITH COMPLAINTS OF PAIN IN HIS LOW BACK RADIATING INTO THE BUTTOCK AND RIGHT LEG. DR. MACCLOSKEY REQUESTED CLAIMANT'S CLAIM TO BE REOPENED. ON MARCH 4, 1975 THE STATE ACCIDENT INSURANCE FUND DENIED REOPENING.

CLAIMANT HAD SUSTAINED A COMPENSABLE INDUSTRIAL INJURY IN 1969 TO HIS LOW BACK AND IN 1970 UNDERWENT A LAMINECTOMY. CLAIMANT HAD RECOVERED FROM HIS INJURY SUFFICIENTLY TO PERFORM HEAVY WORK DUTIES WITH ONLY A RESTRICTION ON HEAVY LIFTING. IT WAS DR. MACCLOSKEY'S OPINION THAT CLAIMANT'S COMPLAINTS MANIFESTED IN FEBRUARY 1975 WERE THE RESULT OF THE COMPENSABLE INJURY OF APRIL 18, 1974.

BASED UPON THE OBSERVATION OF CLAIMANT, THE MANNER IN WHICH HE TESTIFIED, AS WELL AS CORROBORATIVE EVIDENCE PERTAINING TO THE EXACERBATION OF HIS LOW BACK CONDITION, THE REFEREE FOUND CLAIMANT TO BE A CREDIBLE WITNESS.

THE BOARD, ON DE NOVO REVIEW, RELIES ON THE REFEREE'S FINDING OF CLAIMANT'S CREDIBILITY, AND CONCLUDES THAT DR. MACCLOSKEY'S MEDICAL REPORT SUPPORTS A FINDING THAT CLAIMANT HAS SUFFERED A COMPENSABLE AGGRAVATION OF HIS APRIL 1974 INDUSTRIAL INJURY.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 30, 1975 IS AFFIRMED.

COUNSEL FOR CLAIMANT IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH BOARD REVIEW, THE SUM OF 400 DOLLARS, PAYABLE BY STATE ACCIDENT INSURANCE FUND.

TABLE OF CASES

SUBJECT INDEX

VOL. 16

AGGRAVATION

AOE/COE

COMPLIANCE

DEATH BENEFITS

MEDICAL SERVICES

NOTICE OF INJURY

OCCUPATIONAL DISEASE

OWN MOTION JURISDICTION

PENALTIES AND FEES

PERMANENT PARTIAL DISABILITY

(1) Arm and Shoulder
(2) Back - Lumbar and Dorsal
(3) Hand
(4) Foot
(5) Leg
(6) Neck and Head
(7) Unclassified

(1) ARM AND SHOULDER

(2) BACK

REQUEST FOR REVIEW

SUBJECTIVITY

TEMPORARY TOTAL DISABILITY

TOTAL DISABILITY

VOCATIONAL REHABILITATION

ALPHABETICAL INDEX

VOLUME 16

ORS CITATIONS