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VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

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SAIF CLAIM NO. DC 336719 JULY 7, 1978

FRANK M. ESSY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury on November 4, 1971. His claim was closed by a Determination Order dated January 10, 1972 which granted claimant compensation for temporary total disability only. Claimant's aggravation rights have expired.

On August 24, 1977 claimant consulted Dr. Bain, complaining of continued neck problems; he was referred to Dr. Tiley, an orthopedic surgeon, who, after consultation with Dr. Melgard, a neurosurgeon, performed a myelography on September 21, 1977. On December 19, 1977 the Fund voluntarily reopened the claim with compensation for temporary total disability to commence September 21, 1977.

Dr. Melgard performed a C5-6 anterior discectomy, nerve compression and anterior interbody fusion on October 7, 1977. On October 18, 1977 he reported that claimant had returned to work "somewhat"; the Fund characterized this as a return to regular work. On March 24, 1978 Dr. Tiley's closing report indicated a solid fusion, cervical ranges of motion were somewhat decreased and claimant's right arm strength was mildly reduced.

The Fund, on April 3, 1978, requested a determination and the Evaluation Division of the Workers' Compensation Department recommended that the claim be closed with an additional award of compensation for temporary total disability from August 24, 1977 through October 9, 1977, less time worked, and for temporary partial disability from October 10, 1977 through March 23, 1978 and an additional award of 48° for 15% unscheduled neck disability and 9.6° for 5% loss function of the right arm.

The Board concurs with these recommendations.

ORDER

Claimant is awarded compensation for temporary total disability from August 24, 1977 through October 9, 1977, less time worked, and for temporary partial disability from October 10, 1977 through March 23, 1978. Claimant is also awarded 48° for 15% unscheduled neck disability and 9.6° for 5% loss function of the right arm. These awards are in addition to any previous awards received by claimant for his injury of November 4, 1971.

WCB CASE NO. 77-3976 JULY 10, 1978

ROBERT BIGSBY, CLAIMANT
John D. Peterson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Remand

On November 28, 1977 the Referee issued an Opinion and Order in the above entitled matter which remanded the claimant's claim to the State Accident Insurance Fund and denied the Fund's motion to dismiss the hearing on the grounds that it was untimely requested.

On December 27, 1977 the Referee set aside this order, denied the Fund's motion to reconsider his denial of its original motion to dismiss but allowed claimant's motion raising the issue of abuse of discretion in the award of attorney's fees without a stipulation.

On January 19, 1978 the Referee issued a reinstating order which recited that claimant had provided an affidavit supporting the attorney's fees on January 4, 1978 and which reaffirmed in its entirety the order of November 28, 1977, with the right to appeal to commence from the date of the January 19, 1978 order. The Fund requested Board review on February 17, 1978.

The Board, after de novo review of the record, finds that the case has been incompletely heard by the Referee and, therefore, it should be remanded to the Hearings Division to set for a hearing on all of the issues involved. Furthermore, the Board finds that the remanding of this matter for additional and necessary evidence shall not be construed as staying payment of compensation to claimant as provided by the Referee's order from which the Fund requested Board review.

IT IS SO ORDERED.

SAIF CLAIM NO. KC 42782 JULY 10, 1978

DONALD BLUE, CLAIMANT
Ingram & Schmauder, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant, a laborer for Baker County, suffered a compensable injury on October 7, 1966 when a steel beam dropped on him. Claimant sustained a concussion, a fractured jaw, a fractured left ankle and broken ribs. On November 30, 1966 Dr. Blickenstaff removed the loose bodies from the left ankle and the claim was closed on June 13, 1967 by a Determination Order

which awarded claimant 30% loss function of the left foot, 10% loss of an arm by separation for unscheduled disability, and 30% loss hearing on the left ear.

Dr. D. D. Smith, on September 30, 1968, reported that claimant would probably eventually need arthrodesis and that permanent impairment should be 50% of the foot. Pursuant to a stipulation dated December 5, 1968 the claim was again reopened. It was closed by a Determination Order dated December 21, 1973 which awarded claimant time loss benefits from December 1, 1972 to November 6, 1973, less time worked. Claimant requested a hearing and on April 12, 1974, after a hearing, the Referee awarded an additional 20°, making a total of 70° of a maximum of 100° for loss function of the left foot.

Dr. Blickenstaff fused the ankle on June 29, 1977; the Fund reopened the claim for this surgery. On March 6, 1978 Dr. Blickenstaff reported that the claimant could be considered surgically healed with the fusion solid in a 10% equinus position. There was some grating on passively moving the tarsal joints but the circulation appeared good. It was his opinion that claimant had a permanent impairment of 45% loss of the leg at the hip.

On March 27, 1978 the Fund requested a determination of claimant's condition and the Evaluation Division of the Workers' Compensation Board recommended that the claim be closed with compensation for temporary total disability from June 27, 1977 through December 18, 1977 only.

The Board concurs in this recommendation.

ORDER

Claimant is awarded compensation for temporary total disability from June 27, 1977 through December 18, 1977.

Claimant's attorney is awarded as a reasonable attorney's fee for his services a sum equal to 25% of the additional compensation for temporary total disability granted by this order, payable out of said compensation as paid, not to exceed $500.

WCB CASE NO. 77-4746 JULY 10, 1978

ROBERT DeROOS, CLAIMANT
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which denied his request for time loss benefits from September 9, 1976 to February 1, 1977.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated January 25, 1978, is affirmed.

WCB CASE NO. 76-5233 JULY 10, 1978

PHILIP FERRIS, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith, Defense Attys.
Order

On June 16, 1978 the Board received from the employer in the above entitled matter a motion requesting that a recently received medical report from Dr. Campagna which was not available or obtainable at the time of the hearing be received into evidence and made a part of record in the above entitled matter. The report is based upon an examination of claimant by Dr. Campagna on May 19, 1978.

On June 20, 1978 claimant responded in opposition to the motion, stating that originally briefs were due from all parties in the above entitled matter on April 27, 1978, that two extensions of time have been sought by the employer, and that the medical evidence now asked to be received and made a part of the record is based upon an examination taken subsequent to the expiration of the original time for filing briefs.

The Board finds that the evidence is insufficient to justify remanding the medical report back to the Administrative Law Judge who heard the case and there is no agreement between the parties to receive the evidence on Board review; to the contrary, the claimant opposes the motion to receive such evidence.

Therefore, the Board concludes that the motion to receive evidence in the above entitled matter received from the employer on June 16, 1978 should be denied.

IT IS SO ORDERED.

SAIF CLAIM NO. HB 133167   JULY 10, 1978

RICHARD A. HANSEN, CLAIMANT
William F. Gross, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On June 20, 1978 the claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for an injury suffered on June 30, 1965 while employed by Mellow Equipment Company. Claimant's claim was accepted and closed on December 16, 1969 with an award equal to 55% loss function of an arm for his unscheduled disability. Claimant's aggravation rights have expired.

On April 6, 1978 claimant sought medical care and treatment from Dr. Franks who hospitalized claimant for surgery on April 4, 1978.

Claimant supported his request for own motion relief with a medical report from Dr. Franks, dated May 1, 1978, and also the operative report of April 4, 1978. Dr. Franks report states that the necessity for reopening the claim for surgery was that claimant had chronic osteomyelitis which he believes to be related to claimant's laminectomy and fusion at L5-6-S1 in 1966. The claimant has not had any recent job injuries and Dr. Franks' opinion is that the claimant's present condition is directly related to his old surgery which was necessitated by the injury of June 30, 1965.

On June 26, 1978 the Fund was requested to advise the Board within 20 days of its position relative to claimant's request, a copy of which had previously been forwarded to it. On June 27 the Fund responded, stating that it would not oppose a reopening of claimant's claim.

ORDER

Claimant's claim is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing March 30, 1978, the date claimant was admitted to the hospital for the surgery performed by Dr. Franks, and until the claim is again closed pursuant to the provisions of ORS 656.278.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to 25% of the compensation for temporary total disability and permanent partial disability which claimant may receive as a result of this order, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-1801 JULY 10, 1978

KATHERINE INGWERSON, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Attys.
Roger R. Warren, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the January 21, 1977 Determination whereby she was granted temporary total disability benefits only.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated February 2, 1978, is affirmed.

CLAIM NO. 425 JULY 10, 1978

ARCHIE I. KEPHART, CLAIMANT
David A. Vinson, Claimant's Atty.
Cheney & Kelley, Defense Attys.
Own Motion Determination

Claimant suffered a compensable injury to his back while employed by the Edward Hines Lumber Company, a self insurer. The claim was closed by a Determination Order dated July 10, 1970 which awarded claimant 32° for 10% unscheduled low back disability. This award was affirmed at hearing, Board and circuit court levels. The judgment order of the circuit court was dated September 24, 1971.

On January 10, 1972 Dr. Golden reported claimant might have a mild nerve root compression plus back strain. The employer, on February 25, 1972, denied the claim for aggravation. On November 29, 1972 a hearing officer remanded the aggravation claim for payment from January 10, 1972. Claimant's condition became medically stationary and a second Determination Order awarded an additional 5% unscheduled low back disability. Claimant again appealed and another hearing officer, on July 9, 1975, awarded claimant an additional 15%, giving claimant, at that time, a total of 30% unscheduled low back disability.

On June 10, 1976, Dr. Golden performed a laminectomy L5-S1, right; he stated that claimant had had continuing pain since the 1969 injury. The employer, on July 1, 1976, denied

further benefits, stating, in part, that claimant's aggravation rights have expired.

Pursuant to an Own Motion Order dated August 25, 1976 the claim was referred to the Hearings Division to determine the merits of claimant's request for own motion relief pursuant to ORS 656.278. On January 20, 1977 the Referee recommended the claim be reopened for medical services and compensation; he also entered an order directing the employer to pay claimant's medical services.

An Own Motion Order dated February 24, 1977 remanded the claim to the employer for payment of compensation, as provided by law, commencing June 2, 1976 and until closed pursuant to ORS 656.278.

The employer refused to pay the compensation ordered and on March 21, 1977 requested a hearing, contending that it was not obligated to commence payment of compensation for temporary total disability after expiration of the five-year aggravation period. On May 13, 1977 a stipulated order was entered by a Referee directing the employer to pay a penalty for delay in payment of compensation for temporary total disability from June 6, 1976 through March 14, 1977 and to continue to pay claimant benefits hereafter as provided by law promptly.

The employer also requested Board review of the Referee's order of January 20, 1977. The Board affirmed the Referee's order and also assessed a penalty against the employer amounting to 25% of the cost of the medical services due and owing claimant.

On May 24, 1977 claimant had a lumbar laminectomy and fusion performed; on April 3, 1978 Dr. Rockey recommended claim closure, stating claimant's back function appeared relatively good and he was unable to substantiate claimant's complaints by any physical findings.

On April 7, 1978 the employer requested a determination of claimant's present condition and the Evaluation Division of the Workers' Compensation Department recommended that claimant be granted additional compensation for temporary total disability from June 6, 1976, per the stipulated order of May 13, 1977, through April 3, 1978 and additional compensation equal to 10% unscheduled low back disability.

The Board concurs with these recommendations.

ORDER

Claimant is awarded compensation for temporary total disability from June 6, 1976 through April 3, 1978 and 32° for 10% unscheduled low back disability.

These awards are in addition to all previous awards received by claimant for his injury of December 5, 1969.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $2,300.

SAIF CLAIM NO. DC 140764 JULY 10, 1978

KENNETH S. LAWSON, CLAIMANT
Tom Hanlon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On May 26, 1978 claimant, by and through his attorney, requested that the Board exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an industrial injury suffered on July 25, 1968 while in the employ of W.R. Stanyer Logging Company whose carrier was the State Accident Insurance Fund. Claimant's aggravation rights have expired.

On June 12, 1978 the Fund was requested to advise the Board of its position; the Board noted that the Fund had already been furnished copies of the request for own motion relief and medical reports in support thereof. On June 21, 1978 the Fund advised the Board it would not oppose reopening of claimant's claim.

ORDER

Claimant's claim for an industrial injury suffered on July 25, 1968 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on March 16, 1978 and until the claim is closed pursuant to the provisions of ORS 656.278, less time worked.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services a sum equal to 25% of the temporary total disability compensation granted by this order, payable out of said compensation as paid, not to exceed $500.

SAIF CLAIM NO. AC 162632 JULY 10, 1978

DWAYNE LISONBEE, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On June 15, 1978 the Board received from claimant, by and through his attorney, a request that his claim be re-opened pursuant to the provisions of ORS 656.278. Claimant sustained a compensable industrial injury on December 6, 1968. He is presently under the care of Dr. Knox, a neurologist, for industrially related conditions as well as multiple sclerosis.

Claimant alleges that his back condition was worsened substantially and that Dr. Knox has recommended that he be enrolled at the Northwest Pain Center in Portland.

The State Accident Insurance Fund was furnished a copy of claimant's request and asked to advise the Board within 20 days of its position. On June 21, 1978 the Fund responded, stating that claimant has a persistent pain problem and it felt that claimant was entitled to necessary medical treatment at the Pain Center under ORS 656.245; however, it opposed reopening the claim.

The Board finds that it is the policy of the Center to treat in-patnents only. The Board finds that claimant's condition justified his enrollment at the Center and, therefore, concludes that claimant should be enrolled at the earliest possible time and that claimant should receive compensation for temporary total disability during the time he is an in-patient at the Northwest Pain Center.

Claimant's attorney should be awarded as a reasonable attorney's fee for his services a sum equal to 25% of the temporary total disability compensation granted by this order, payable out of said compensation as paid, not to exceed $500.

IT IS SO ORDERED.

CLAIM NO. I-010730 JULY 10, 1978

JAMES M. STANDARD, CLAIMANT
Cater & Johnson, Claimant's Attys.
Own Motion Determination

Claimant suffered a compensable injury to his left knee on March 17, 1970. On June 12, 1970 a medial meniscectomy was performed and in October Dr. Smith reported the condition to be medically stationary with some loss of motion and evidence of arthritis change in the knee joint. The claim was closed initial-

ly on November 23, 1970 with an award of 23° for partial loss of the left leg.

On April 8, 1971 a repeat medial meniscectomy with reconstruction of the knee joint by ligament repair and pes anserinus transfer was performed by Dr. Johnson. On August 18, 1971 Dr. Johnson reported claimant was again stationary with full range of motion and good stability in the knee. The claim was again closed by a second Determination Order dated September 21, 1971 whereby claimant was awarded an additional 8°.

Claimant continued to have difficulty and the claim was reopened in 1972 for physical therapy treatments. It was closed for the third time on October 30, 1972 with no additional award for permanent partial disability.

On July 8, 1977 Dr. German reported that claimant had a cellulitis condition in the left knee which he attributed to two staples which had been placed in the medial femoral condyle during the reconstructive surgery of April 1971. Initially, time loss was authorized from June 22, 1977 to July 18, 1977, however, on August 25, 1977, the carrier denied claimant's request to reopen the claim on the ground that claimant's aggravation rights had expired. Claimant requested a hearing on the denial and also requested the Board to afford him own motion relief pursuant to ORS 656.278. Thereafter, the carrier voluntarily reopened the claim on October 20, 1977 and the requests were dismissed.

On January 3, 1978 Dr. German removed the staples from the knee joint and claimant was authorized to return to work on January 30, 1978. On April 29, 1978 Dr. German stated that as of the date of his report he considered claimant's condition to be medically stationary and claimant had no permanent disability beyond that for which he had been previously awarded.

Claim closure was requested for the determination of claimant's present disability and the Evaluation Division of the Workers' Compensation Department recommended that claimant be awarded compensation only for temporary total disability from June 22, 1977 through July 18, 1977 and from January 3, 1978 through January 29, 1978.

The Board concurs in this recommendation.

ORDER

Claimant is awarded compensation for temporary total disability from June 22, 1977 through July 18, 1977 and from January 3, 1978 through January 29, 1978.

These awards are in addition to all previous awards received by claimant for his industrial injury suffered on March 17, 1970.

Claimant's attorney is awarded as a reasonable attorney's fee for his services a sum equal to 25% of the compensation awarded claimant by this order, payable out of said compensation as paid, not to exceed $500.

SAIF CLAIM NO. BC 419847 JULY 10, 1978

RUBY WEBSTER, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On June 23, 1978 the claimant, by and through her attorney, requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen her claim for an industrial injury sustained on January 25, 1973 while employed by Century Centers whose carrier was the State Accident Insurance Fund. Claimant's claim was accepted and initially closed by a Determination Order dated April 5, 1973. Claimant's aggravation rights have expired although her claim had been reopened and closed subsequent to the date of the initial closure.

Claimant alleges that since the last award or arrangement of compensation which was a settlement stipulation, dated February 9, 1977, her back claim has deteriorated and worsened to the point that she required medical care and treatment from Dr. Lowrey who had instructed her to remain in bed. Claimant further alleges that as a result of this instruction she has sustained time loss and incurred medical benefits and is entitled to be paid compensation for time loss and to be reimbursed for the medical benefits.

Dr. Lowrey told claimant to remain off work from February 28, 1978 until March 15, 1978. On the latter date he felt that claimant was improving and he referred her to Dr. Fitchett who had previously taken care of her. Dr. Fitchett felt claimant's condition was stable and further home rest was not advised.

The Board concludes that claimant is entitled to receive compensation for temporary total disability from February 28, 1978 through March 15, 1978 and to have the cost of the medical care and treatment which she received from Dr. Lowrey paid by the State Accident Insurance Fund.

Claimant's attorney should be granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $500.

IT IS SO ORDERED.

WCB CASE NO. 77-4779 JULY 13, 1978

LENORA R. ADAMS, CLAIMANT
Harold W. Adams, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which found claimant to be permanently and totally disabled.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated February 3, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $150, payable by the Fund.

WCB CASE NO. 77-268 JULY 13, 1978

ALTA M. AMON, CLAIMANT
Milo Pope, Claimant's Atty.
SAIF, Legal Services, 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 denial of claimant's claim on December 28, 1976 by the State Accident Insurance Fund.

Claimant is approximately 51 years old. She started to work for the employer on September 2, 1976 as a cook but later was offered, and accepted, a position as a nurse's aide. Initially, she worked the 7:00 a.m. to 3:00 p.m. shift and later requested transfer to the 11:00 p.m. to 7:00 a.m. shift; she also asked for weekends off because of religious reasons.

The Referee found that the hospital type beds are higher than a normal bed and that there were approximately 40 patients to a wing. At least two nurse's aides were assigned to each wing; often an aide would work alone but on the rare occasions which required heavy lifting the two aides would assist each other.

The Referee found no evidence that claimant did any heavy lifting on Thursday, November 4, 1976. About 2:00 a.m. claimant said she felt a backache but she said nothing at the coffee break. Later claimant testified she told another nurse that her back ached but she was unable to identify which nurse. At the end of her shift claimant went home and went to bed at approximately 8:00 a.m., Friday, November 5. Claimant did nothing at home on that day and went to bed early that night. The following day, her lower back hurt more and claimant was unable to get out of bed and required help from her husband. On Sunday she had to be carried.

Claimant made an appointment to see Dr. Trapani on Monday. The claim form and the initial physician's report indicate the injury occurred on November 6, 1976. Claimant contends that she was not thinking straight because of the pain and gave Dr. Trapani the incorrect date. Dr. Trapani saw claimant on November 8, 1976 and diagnosed a spinal subluxation, L4 and L5, with disc wedging and also rotation of L5. He gave her chiropractic treatment and felt that further treatment would be required. He stated that the injury at that time would prevent claimant's return to employment.

Claimant testified she had no way of filling out an accident report but that she did telephone her employer as soon as she discovered from Dr. Trapani that the pain would be more than just temporary and that she would not be able to return to work.

The Referee concluded that claimant's failure to report or mention the low back pain when it first came on during the shift Thursday night cast doubt on claimant's contention that the low back pain arose as she contended. He gave little weight to claimant's statement that she mentioned her low back pain later during the shift to another nurse's aide inasmuch as claimant failed to identify that person. The only corroboration offered by claimant was the testimony of her husband and he could remember no discussion on Friday morning. Claimant was still in bedclothes on Friday evening when her husband returned from work but he stated that many times claimant became tired during the day and he was used to getting his own meals. Claimant did not tell him that she had been hurt on the job.

The Referee found that the evidence indicated that claimant had given the employer timely notice but she had failed to prove her case.

The Board, after de novo review, finds many inconsistencies between claimant's testimony and the other witnesses' testimony and this could very well raise the issue of credibility. However, based upon the totality of the evidence, the Board concludes that claimant clearly failed to meet her burden of proof that the injury occurred within the course and scope of her employment. Therefore, the claim was properly denied.

ORDER

The order of the Referee, dated November 4, 1977, is affirmed.

WCB CASE NO. 77-2953 JULY 13, 1978

GARRISON CANDEE, CLAIMANT
Jones, Lang, Klein, Wolf & Smith,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross-appeal by the SAIF

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which granted her time loss benefits from May 12, 1976 through July 15, 1976 and September 23, 1976 through October 4, 1976 in addition to penalties and attorney fees. Claimant contends she is entitled to permanent partial disability for her condition; the Fund, on cross-appeal, contends that she is not entitled to temporary total disability benefits from May 12, 1976 through July 15, 1976 as she was receiving full wages for that period of time.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated October 20, 1977, is affirmed.

WCB CASE NO. 77-5404 JULY 13, 1978

JESSIE CASTLE, CLAIMANT
Allen G. Owen, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson &
Schwabe, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the Referee's order which affirmed the employer's denial of her claim for an aggravation.

Claimant was a nurse's aide when she sustained an in= jury on September 14, 1973 to her low back, diagnosed by Dr. Begg as a chronic lumbosacral strain with degenerative changes in the lumbar area. In March 1974 claimant was still complain= ing of pain, however, she had not lost weight, as recommended by Dr. Begg, and this complicated her recovery.

In April 1974 claimant was admitted to the Disability Prevention Division. The three members of the Back Consultation Clinic, after examining claimant, diagnosed chronic lumbar strain, left, aggravating degenerative joint disease, L4-5. They recom= mended weight loss, diet and continuation of claimant's present conservative regimen. Her condition was considered stationary; she could not return to her usual occupation but she could do work with limitations on bending, lifting and stooping. The loss of function of the back due to the injury was considered minimal.

Hal J. May, a psychological resident under Dr. Perkins, a clinical psychologist, evaluated claimant and found moderate anxiety with some focus on her physical problems, however, it did not contribute to her inability to return to work.

On June 10, 1974 a Determination Order awarded claim= ant 64° for 20% unscheduled low back disability.

In August 1975 Dr. Begg again saw claimant who was complaining of severe pain in her low back. He diagnosed recur= rent persistent lumbosacral strain and felt that claimant would improve with therapy. He felt that the permanency of the condi- tion would prevent claimant's return to any of her former duties and related this condition to the industrial injury and to de- generative changes plus obesity and the normal aging process. It was his opinion that she would probably get worse as she aged and that she was totally disabled. On February 12, 1976 a stipulation was approved whereby claimant's award was increased from 20% to 40% for unscheduled low back disability.

In August 1977 Dr. Carr examined claimant and also re= viewed Dr. Begg's notes. It was his opinion that claimant's con= dition had not become appreciably worse over the past few years but no curative treatment was available. Claimant was 60 years old at the time of her injury in 1973. She testified that her back was worse than it was when she received her last award in February 1976, she also testified she had not worked nor looked for work since her injury in 1973, stating she had been under the doctor's care during that time.

The Referee found the medical evidence showed that claim- ant might be further impaired but impairment, by and of itself, is not compensable as far as unscheduled injuries are concerned un- less such impairment affects the claimant's wage earning capacity. The Referee believed that claimant had been permanently and totally disabled prior to the last award of compensation which was in Feb= ruary 1976 and, therefore, he could not find that she had suffered

any decrease in her earning capacity. The increased impairment appeared to be related solely to the aging process rather than the industrial injury.

The Board, after de novo review, finds that the medical evidence does not indicate that claimant's present earning capacity has been diminished since she was awarded 128° for 40% unscheduled low back disability on February 12, 1976. The Referee expresses his opinion that claimant had been permanently and totally disabled prior to the date of that stipulation, nevertheless, claimant's loss of wage earning capacity at that time was evaluated at 40%. Whether the Referee is or is not correct in his assessment, he cannot substitute his evaluation for that of the parties to the stipulation of February 12, 1976.

On December 20, 1976 Dr. Begg doubted that claimant would ever return to her former job and he did not feel that she had made any progress. Claimant, in his opinion, was gradually getting worse due to her old injury, plus aggravation by rather extensive hypotrophic osteoarthritic degenerative changes in the lumbosacral region. On August 11, 1977 Dr. Carr reported, based upon his review of Dr. Begg's notes, that he did not think claimant's condition had become appreciably worse over the past few years. He stated that there was no further treatment that could be furnished claimant other than palliative.

The Board concludes that claimant has failed to prove by a preponderance of the evidence that her condition at the present time represents a worsening since February 12, 1976.

ORDER

The order of the Referee, dated December 27, 1977, is affirmed.

WCB CASE NO. 77-1452 JULY 13, 1978

DALE GREGORY, CLAIMANT
Pickens & Webber, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which found claimant to be permanently and totally disabled.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated January 13, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $150, payable by the Fund.

WCB CASE NO. 76-6012 JULY 13, 1978

LOWELL A. HANSON, CLAIMANT
Anderson, Fulton, Lavis & Van Thiel, Claimant's Attys.
SAIF, Legal Services, 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 October 26, 1976 Determination Order whereby he was granted compensation equal to 64° for 20% unscheduled back disability. Claimant contends that he is permanently and totally disabled.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated January 6, 1978, is affirmed.

WCB CASE NO. 77-5656 JULY 13, 1978

LESTER R. HERNDON, CLAIMANT
Marvin S. Nepom, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson, Moore and Phillips.

The employer seeks Board review of the Referee's order which reversed its denial of responsibility for claimant's pulmonary embolus and infarction of January 27, 1977, directed it to accept the care and treatment of claimant's pulmonary embolus and pay claimant compensation, as provided by law, until the claim is closed pursuant to ORS 656.268.

Claimant was a 52-year-old core layer who felt a sudden severe sharp pain in his left knee while attempting to move a load of plywood on January 27, 1977. His knee gave way and he fell. He was initially seen by Dr. Hansen at the emergency room and then hospitalized under the care of Dr. Blessing.

Dr. Hansen's diagnosis was probable rupture of plantaris longus muscle or rupture of a varicose vein. Dr. Blessing found the left leg was moderately swollen with pitting edema at the ankle site. He felt that the possibility of a deep vein thrombosis of the left leg should be ruled out. There was also a possibility of a ruptured Baker's cyst but this was doubtful due to the fact that the patient had noticed no previous mass or symptoms behind his knee. The most likely diagnosis was deep pain thrombosis and he started claimant on an anticoagulant therapy. Chest x-rays indicated no evidence of pleural fluid or pulmonary infarction nor any indication of active cardiopulmonary, pleural, mediastinal or bony disease.

In March 1977 Dr. Schuler saw claimant and reported objective fingings but did not make a diagnosis. At approximately the same time claimant was examined by Dr. Ironside, an internist, who felt that the events of January 27, 1977 were most compatible with a torn or ruptured muscle or tendon. The nature of the onset of pain and swelling and the claimant's medical history were not compatible to thrombophlebitis. In April 1977 claimant was released to return to his regular employment, however, the plant was no longer in operation.

On June 11, 1977 claimant was hospitalized with a left-sided chest pain ultimately diagnosed as a pulmonary embolus. While in the hospital, it was discovered that claimant also had a deep pain thrombosis of the right leg. Dr. Wysham, a cardiologist, reviewed claimant's medical records and concurred with Dr. Ironside's opinion initially; however, after reviewing additional medical records he expressed his opinion that the likelihood that claimant also had a venous thrombosis of the left calf, secondary to the industrial injury, was increased.

Dr. Rabiner, a hemotologist and chief of medicine at Good Samaritan Hospital, in November 1977, concluded that claimant had probably torn a muscle in the January 1977 incident and may have subsequently developed thrombophlebitis in that leg. The Referee found that Dr. Rabiner had mistakenly dated the pulmonary embolus in March 1977 rather than June 1977, the latter date being approximately six months after the industrial injury. A phlebogram was made of claimant's right leg in June which revealed thrombophlebitis; a phlebogram of the left leg was never made.

Dr. Blessing believed that the results of the industrial injury in January 1977 included a deep pain thrombosis and that that injury and the thrombosis caused the right leg

thrombosis to develop and that the pulmonary embolus in June 1977 resulted from the right leg thrombophlebitis.

Dr. Rabiner's opinion was that the right leg thrombophlebitis could only be related to the compensable injury if claimant had been inactive for a long period of time, and by inactivity he essentially meant complete bed rest. The fact that claimant had remained fairly active caused Dr. Rabiner to express his opinion that the right leg thrombophlebitis and the pulmonary embolus were not related to the industrial injury.

The Referee found that claimant ruptured a muscle, tendon or ligament on January 27, 1977 and thereafter he developed a deep pain thrombosis. The Referee based his finding on the suddenness and traumatic impact of the injury. The Referee found that, based upon the opinion expressed by Dr. Blessing and reinforced by Dr. Wysham, claimant subsequently and as a result of his industrial injury developed a deep vein thrombosis. He concluded that the more believable medical evidence supported claimant's contention and that the denial was improper.

The majority of the Board, on de novo review, finds that the Referee relied primarily on Dr. Blessing's opinion that claimant had suffered a pulmonary embolus and right leg thrombosis as a result of the industrial injury in January 1977 to his left leg. Claimant must prove by a preponderance of the evidence that he sustained a compensable injury on June 11, 1977, the date of claimant's pulmonary embolus and thrombophlebitis of the left leg and if compensability of a claim turns upon some medical issue which is beyond the general knowledge and skill of a lay person, expert testimony must be produced. Uris v. State Compensation Department, 247 Or 420. In the instant case claimant had to prove by a preponderance of the medical testimony that it was medically probable that his industrial injury of January 27, 1977 was a material contributing factor to producing his pulmonary embolus and right leg thrombophlebitis of June 1977.

The majority of the Board finds that Dr. Blessing has made various diagnoses which are not consistent with each other nor supported by any other medical opinions. The initial diagnosis by Dr. Hansen made no mention of left or right leg thrombophlebitis. Dr. Rabiner, in November 1977, felt, based upon the symptoms described by claimant, that the January 1977 injury was probably followed by a hemorrhage which caused the swelling in his left leg. The x-rays taken on January 28, the day following the injury, indicated no evidence of pleural fluid or pulmonary infarction at that time. Dr. Schuler examined claimant on March 8, 1977 and made no mention of any left or right leg thrombophlebitis. In March 1977 Dr. Ironside confirmed Dr. Hansen's initial diagnosis, indicating that the swelling in the claimant's left leg was compatible with a torn

or ruptured muscle or tendon. Claimant had no history compatible with thrombophlebitis and Dr. Ironside stated that it was immaterial whether or not claimant was treated for such condition at the hospital. Even if claimant had experienced phlebitis of the left leg, according to Dr. Blessing, on April 12, this had resolved itself and claimant had been released to modified work on April 7 and on April 22 released without any restriction to return to regular work.

Dr. Wysham concurred with Dr. Ironside that there was no reason to suspect that claimant had a deep venous thrombosis and he concluded that claimant did not have any cardiac condition based upon the electrocardiograms taken. Later, he re-evaluated his original opinion somewhat based on the evidence of venous thrombosis in claimant's right leg but he unequivocally stated that he did not feel that it was reasonable to assume that there was any causal connection between the industrial accident of January 27, 1977 and the hospitalization for the pulmonary embolism and thrombophlebitis on June 11, 1977. Dr. Rabiner concurred.

The majority of the Board concludes that the preponderance of the medical evidence supports a finding that there was no causal relationship between the industrial injury to claimant's left knee suffered on January 27, 1977 and the pulmonary embolus and thrombophlebitis of the right leg for which he was hospitalized on June 11, 1977. The Referee found that only Dr. Blessing had examined claimant; this is not true. Dr. Rabiner examined claimant as indicated by his November 21, 1977 report.

The majority of the Board also finds, based on claimant's testimony that he had never had any problems with his right leg prior to June 1977, that the hospitalization was clearly precipitated by his work activity while mowing his lawn at home.

The majority of the Board finds that claimant has failed to prove by a preponderance of the evidence that the January 27, 1977 injury was a material contributing factor to the problem for which claimant was hospitalized on June 11, 1977 and that the denial should be affirmed.

ORDER

The order of the Referee, dated December 21, 1977, is reversed.

The denial by the employer of responsibility for claimant's pulmonary embolism and subsequent hospitalization therefor in June 1977 is approved.

Board Member Kenneth V. Phillips dissents as follows:

As the only doctor who was totally familiar with the claimant's problems and treatment, Dr. Blessing's opinion is

most persuasive. The reports of Dr. Wysham and Dr. Schuler seem to support Dr. Blessing's opinion. Although Dr. Rabiner did examine claimant it was only a few weeks prior to the hearing and the testimony seems to indicate that the doctor didn't listen to claimant's history of events.

Claimant did have a recurring problem in his leg the evening before he was hospitalized for the pulmonary embolism which makes Dr. Blessing's diagnosis most logical as opposed to the hypotheticals suggested by the opposing doctors. This reviewer would affirm the Referee's decision.

/s/ Kenneth V. Phillips, Board Member

WCB CASE NO. 76-460 JULY 13, 1978

DALE HOWELL, CLAIMANT
Bettis & Reif, Claimant's Attys.
SAIF, Legal Services, 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 dated July 29, 1975 awarding claimant 160° for 50% unscheduled neck disability and the Stipulation dated July 11, 1977 granting claimant an additional 48° for unscheduled neck disability; the order also set aside the partial denial by the State Accident Insurance Fund on July 18, 1977 for responsibility of claimant's cardiac symptoms in December 1976 and again in March 1977 and directed the Fund to pay all medical expenses incurred by claimant in connection with said cardiac symptoms.

Claimant, who is now 64 years old, suffered a compensable injury on June 14, 1977 while working as a maintenance man. He was struck on the head by a four-pound piece of metal which had fallen at least 20 feet before it hit claimant. Since that date claimant has complained of headaches, neck pain, dizziness, visual and aural problems and low back pain.

Claimant admits that in the past years he had suffered significant injuries to his back and neck but denied that he had any substantial residuals although he had missed some time from work as a result of these injuries. The June 1974 claim was closed by a Determination Order of July 29, 1975 with an award of 160°, based on pain and limitation in neck motion and aggravation of low back pain caused by lifting, stooping, bending, etc.

Since the claim closure claimant has been treated by Dr. Kadwell and Dr. Danielson, the former an osteopathic physician, the latter a neurosurgeon. It was the opinion of Dr. Donald T. Smith that claimant could engage in some lesser type of work, however, neither claimant nor his service coordinator appeared to have spent much time in pursuing any form of vocational rehabilitation for claimant.

At the present time both Dr. Kadwell and Dr. Danielson believe that claimant is totally disabled. Dr. Danielson feels that claimant was already permanently and totally disabled in December 1976 when he was afflicted with an "idiopathic" heart condition that has required considerable medical attention, including a pneumomylography attempted by Dr. Danielson on March 9, 1977.

Dr. Kadwell believes that the original cardiac onset of December 1976 was related to claimant's extreme mental distress over his physical condition and financial problems. Dr. Danielson diagnosed the cardiac problem as a supraventricular tachycardia associated with longstanding history of the industrial injury in June 1974. He felt that claimant was totally disabled and that there was absolutely nothing that could be done to improve claimant's position from an operative standpoint because of his cardiac difficulties.

Claimant contends that he is permanently and totally disabled and was so before his cardiac symptoms surfaced in December 1976; that his cardiac symptoms are causally related to his industrial injury.

The Referee found that the medical evidence tended to support both positions and was not directly contradicted by any expert medical testimony. He found that the nature and degree of claimant's ongoing symptoms (referred to earlier in this order) should make up for the apparent lack of motivation on the part of claimant, especially at his age. However, the Referee found that claimant did have the background and the adaptability to do many things. He has a tenth grade education, he has worked as a farmer, rancher, mill hand and artificial inseminator. Claimant also ran a route selling veterinarian supplies to dairymen and has done some small engine repair. He still engages in deer hunting, occasionally on horseback, and is able to travel between Canby and Hood River for visits with his son.

The Referee concluded that claimant had failed to prove that his personal disability was any greater than that for which he had received awards totaling 65%.

With respect to the "idiopathic"cardiac condition, the Referee found the medical evidence supported a conclusion that these symptoms were brought forth as remote, but not insignificant, consequences of the industrial injury, therefore, the partial denial by the fund was not justified.

The Board, on de novo review, finds the medical evidence is more than sufficient to support a conclusion that on the date claimant's condition was found to be medically stationary and his claim closed by the Determination Order of July 29, 1975 claimant was permanently and totally disabled. The Board concludes that claimant should be paid compensation for permanent total disability as of July 29, 1975 with credits allowed to the Fund for payment of compensation for permanent partial disability previously paid claimant pursuant to the Determination Order of July 29, 1975 and the Stipulation of July 11, 1975.

ORDER

The order of the Referee, dated December 5, 1977, is modified.

Claimant is considered to be permanently and totally disabled as of July 29, 1975 and shall receive payments for such disability from that date forward with credit being allowed the State Accident Insurance Fund for payments it has made to claimant for permanent partial disability pursuant to the Determination Order of July 29, 1975 and the Stipulation of July 11, 1977.

That portion of the Referee's order which set aside the partial denial of July 18, 1977 and awarded claimant's attorney a fee of $800 payable by the State Accident Insurance Fund is affirmed.

Claimant's counsel is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the additional compensation granted claimant by said order, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-3642 JULY 13, 1978

WAYNE D. HUIRAS, CLAIMANT
A. C. Roll, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which found claimant to be permanently and totally disabled.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated January 6, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $350, payable by the Fund.

WCB CASE NO. 77-5347-B JULY 13, 1978

JOHN H. JOHNSTON, CLAIMANT
Richardson, Murphy & Nelson, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by EBI Co.

Reviewed by Board Members Wilson and Moore.

The Employee Benefits Insurance Company seeks Board review of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation to which he is entitled and affirmed the denial issued by the State Accident Insurance Fund.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated January 26, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $200, payable by the EBI Company.

WCB CASE NO. 77-1184 JULY 13, 1978

CARROLL LANE, JR., CLAIMANT
Joel Reeder, Claimant's Atty.
Luvaas, Cobb, Richards & Fraser,
Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson, Moore and Phillips.

The claimant seeks Board review of the Referee's or-

der which found his claim for an industrial injury on January 4, 1977 was not compensable.

Claimant is a line mechanic who normally drives his car to work and parks it in the employee designated parking area located northeast of the work area. Educational or job training meetings were held at the place of employment on various occasions. Neither claimant nor the other employees were paid to attend these meetings, however, the service manager advised them of the meetings and, although the meetings were not mandatory, the employees were expected to be present.

Following the first meeting on January 4, 1977, the service manager told the attending employees that he would buy them a pizza. Behind the back door of the shop building in which claimant had attended the meeting was a fenced-in area used for the storage of automobiles by the employer; once a person left the building by the back door, he entered this lot and the only exit from the lot was through a back gate or else to return into the shop. There are other doors from the shop building that do not lead into the fenced area. The back door bolted from the inside and the gate leading from the fenced-in area to the employees' parking lot normally is locked when the shop is closed. The fence is made of chain link and is approximately seven feet high. Claimant customarily used the exit way leading from the back door of the shop through the fenced-in area and out the gate to his car.

After the night meeting claimant left the shop by the back door as usual. He now thinks that after he left the building someone had closed the shop door behind him although he stated that he might have been able to get back into the shop through that door. The fact remains that he did not attempt to do so but walked to the gate and finding it locked decided to climb the fence to enable him to get to his own truck on the parking lot more quickly than if he went around to the front and walked through a permanent opening located near another company building.

When claimant attempted to climb the fence he fell and fractured his leg.

After the service manager made his offer to buy pizza for the group, he returned to his office; he was there when he learned of claimant's injury. The shop foreman, also present at the meeting, left with another employee by the front door. They heard claimant's moans and advised the service manager.

The employer contends that claimant was outside the course and scope of his employment, stating that claimant's injury was a result of claimant's choice to scale the 7-foot fence and jump down to the employees' parking lot rather than to walk back to the main building and attempt a less hazardous exit. There was no question that while claimant was engaged in the training activity he was within the course and scope of his em-

ployment and an injury during that period would have been compensable.

The Referee could find no Oregon case on point nor were any cited by either party, however, he did rely upon cases cited by Professor Larson, all of which supported the contentions of the employer. Larson, The Law of Workmen's Compensation, Volume 1, Sections 15.13, 21.81 and Volume 1A, Section 30.21.

The Referee distinguished the facts before him from the facts in Olson v. State Accident Insurance Fund, 29 Or App 235. In Olson, the claimant's supervisor observed the activity and passively acquiesced in it by not objecting thereto; furthermore, the employees used bikes for transportation to and from work and regularly parked them in the area where claimant was injured. In the case before him, the Referee found no evidence that the employer observed or acquiesced in any of its employees climbing over a locked fence to get to the parking lot. The mere existence of a 7-foot fence with a gate for ingress and egress which was kept locked during non-working hours would indicate the employer's disapproval of the method chosen by the claimant for his exit. He found no evidence that it was customary for claimant or any of the other employees to gain entrance to the parking lot in the manner chosen by the claimant. He concluded that the claim was not compensable.

The majority of the Board, on de novo review, finds that claimant was in the course and scope of his employment at the time of his injury and that the claim was compensable. It is not questioned that the training meeting which claimant was attending was a part of his employment; the employees were asked to attend and were expected to be there. At the time of his injury claimant was on his way from the meeting to his car which was parked in an area designated as the employee's parking lot located on the employer's premises. The course taken by claimant was the course that the employees normally took when they left the work place to return to their cars at the end of the day's shift and the gate was open at all times during regular working hours.

In this case, after the meeting concluded, claimant left the building and entered the fenced-in area; it is not known whether or not claimant could have returned to the building; it is only known that only the night lights were on which makes it logical to assume that the back part of the building was locked.

The majority of the Board concludes that although claimant may have been imprudent in his choice of methods of exit he was not so to the point of removing himself from the course and scope of his employment.

ORDER

The order of the Referee, dated October 12, 1977, is reversed.

Claimant's claim for an injury suffered on January 4, 1977 is hereby remanded to the employer, Gleaves Volkswagen, and its carrier, Universal Underwriters Insurance, to be accepted and for the payment of compensation, as provided by law, commencing on January 4, 1977 and until the claim shall be closed pursuant to the provisions of ORS 656.268.

Claimant's attorney is awarded as a reasonable attorney's fee for his services before the Referee at the hearing a sum equal to $800, payable by the employer and its carrier.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to $200, payable by the employer and its carrier.

Chairman M. Keith Wilson dissents as follows:

The well reasoned opinion of the Referee should be affirmed by the Board, and I respectfully dissent from the majority opinion.

The cases cited by the Referee from other jurisdictions and the discussion of Professor Larson, set forth in the opinion, establish a reasonable limitation in this difficult area of application of the "going and coming" rule.

This case is clearly distinguishable from Olson (29 Or App 235) as the element of employer's acquiescence and/or tacit approval is totally absent here.

To adopt the holding of the majority will be to extend coverage to employees on the premises of the employer, regardless of the activity of the employee, unless it retains the status of an intentional injury (ORS 656.156(1)). The concept of application of Workers' Compensation coverage has been vastly enlarged since the original adoption of the law in Oregon as well as in other jurisdictions, but the line drawn by Professor Larson and the cases cited by him, provide a logical line of limitation, beyond which coverage should not be extended.

/s/ M. Keith Wilson, Chairman

WCB CASE NO. 77-2614 JULY 13, 1978

WILLIAM H. MANDLEY, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, 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 granted claimant 128° for 40% unscheduled low back disability. Claimant contends that he is entitled to a greater award for his unscheduled disability and also to a scheduled award for each of his legs.

Claimant was a 61-year-old laborer when he strained his low back on September 26, 1976, lifting a heavy lawn mower into a truck. He had previously injured his lower back in 1946 and has had intermittent back problems since that date. He also had degenerative joint disease in his lumbar spine. Approximately one month before his injury, claimant had complained of low back pain to Dr. Satyanarayan; on September 27, 1976 he mentioned to Dr. Martin the occurrence of an injury on August 25, 1976 while shoveling dirt.

The Referee found that claimant had worked as a heavy laborer in the construction industry for years and for several years he had worked two jobs simultaneously, one involving construction and the other janitorial work. In 1969 he had to abandon heavy labor due to a combination of a hiatal hernia, angina and intermittent low back problems.

The Referee found that after claimant had recovered from the 1976 injury he could not return to any work that was physically strenuous; the Referee further found that the employer had no lighter work available for claimant.

Claimant had previously worked with this employer as a janitor and at the time of his injury he was a caretaker for the golf course. Claimant is 62 years old and has a fifth grade education. He has not worked since the date of his injury although he has looked for work through his labor union, the employment office and a couple of janitorial services without any success. Claimant appears not to have made any contact with the vocational rehabilitation services.

Dr. Martin diagnosed a chronic significant degenerative lumbar disc disease with occasional right sciatic nerve involvement. Dr. Satyanarayan felt that claimant would continue to have recurrent back pain with any kind of activity which involved bending, lifting, carrying anything and that his problem would always be aggravated with heavy physical labor.

Dr. Pasquesi felt that claimant probably should minimize repetitive bending, stooping, and twisting and lifting more than 30 pounds. He rated his impairment at 10% of the whole man.

Dr. Cherry examined claimant on October 26, 1977. After he was given the history including the 1946 back problems and the ones that followed, he stated that, ". . . the present episode is the worst he has ever had.". Based on claimant's age, education, past work experience, retrainability, and current physical condition, Dr. Cherry said claimant was permanently and totally disabled. On November 30, 1977 Dr. Satyanarayan agreed with Dr. Cherry's finding in each and every particular.

The Referee found that claimant apparently has retired from the work force. It was necessary to resolve whether or not claimant's increased back wymptoms were the result of the degenerative spine disease or aggravation by the September 1976 accident. The expert medical evidence needed to determine this matter was supplied by reports from Dr. Cherry and Dr. Satyanarayan.

The Referee came close to rating claimant's loss of earning capacity the same as Dr. Cherry, but concluded that the preponderance of the evidence indicated that an award equal to 40% of the maximum allowable by law for unscheduled disability would adequately compensate claimant for his loss of wage earning capacity.

The Board, on de novo review, finds that claimant's loss of wage earning capacity is considerable. The medical evidence is uncontradicted that claimant cannot engage in any work which involves bending, stooping, lifting, nor can he engage in any of his pre-accident employment capacities. Claimant has worked in heavy construction for the majority of his life and for 17 years he was able to handle two jobs at the same time. Claimant's industrial injury of September 1976 has effectively terminated his employability in the labor market. With respect to claimant's motivation, the evidence indicates he has made numerous attempts to obtain other employment but met with no success.

The medical evidence indicates that claimant's injury is moderately severe and the non-medical evidence demonstrates that claimant's abiltiy to perform physical labor has always been claimant's sole employment asset. Claimant has now lost this asset and his services have little, if any, marketable value.

The Board concludes, based upon both the medical and non-medical evidence, that to adequately compensate claimant for his loss of wage earning capacity resulting from his industrial injury of September 26, 1976 claimant is entitled to an award of 244° which represents 7-% of the maximum allowable by statute for his unscheduled disability.

The Board finds no justification for granting claimant an award for loss of function of either of his lower extremities.

ORDER

The order of the Referee, dated January 12, 1978, is modified.

Claimant is awarded 244° of a maximum of 320° for his unscheduled low back disability. This award is in lieu of the award made by the Referee's order which in all other respects is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted claimant pursuant to this order, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-4823 JULY 13, 1978

ROBERT RIMER, CLAIMANT
Myrick, Coulter, Seagraves, Nealy & Myrick, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which granted him compensation equal to 256° for 80% unscheduled disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated November 23, 1977, is affirmed.

WCB CASE NO. 77-737 JULY 13, 1978

MARIA SALINAS, CLAIMANT
Wendell Gronso, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests review by the Board of the Referee's order which set aside its partial denial dated December 30, 1976 and remanded the claimant's claim to it.

The issue is whether claimant's psychological problems allegedly arising out of an industrial injury occurring in September 1974 are compensable. The Fund has not disputed that claimant suffered a compensable industrial injury in September 1974 when a motor fell striking claimant on the side of her head. Initially, it was thought that claimant had suffered a fractured skull. Claimant alleges she was knocked unconscious for a substantial period of time. Dr. O'Brien, a neurologist who examined claimant within two weeks of the original accident, first accepted this history but as time passed elected to disregard it and ultimately concluded that claimant had simply bumped her head and that it was actually a seemingly trivial accident.

Claimant is of Mexican origin and speaks no English. She has a fifth grade education obtained in Mexico. Because of the "language barrier" claimant was eventually referred to a Spanish speaking psychiatrist, Dr. Proano, who resided in Vancouver, Washington. He hospitalized claimant in January 1976 and apparently achieved excellent results, discharging claimant as completely recovered on March 26, 1976. However, soon thereafter, claimant began seeing Dr. O'Brien again on a regular basis. When Dr. O'Brien finally decided that further treatment was useless, the Fund advised claimant that it "fulfilled our responsibility fully for the original accident" and denied further responsibility for treatment of the alleged unrelated disorders, to-wit: mental, emotional, psychiatric and/or psychological conditions.

The Referee found that claimant had sustained an accepted industrial injury and that since that injury she had manifested extreme psychophysiological disorders and hysterical reaction. Claimant alleges these conditions which are considered to be permanent are the direct result of her industrial injury; the Fund contends they are not.

The Referee stated it was interesting to note that both Dr. O'Brien and Dr. Proano took the position that because

each could not assist claimant, therefore, her condition was non-compensable. He felt that the doctors reached legal, rather than medical, conclusions. He also found it interesting that neither physician practiced in the state of Oregon except for a "border privilege" exercised by Dr. O'Brien.

Claimant had been regularly and steadily employed up until the date of her injury and there was no showing that either psychiatric or physiological problems were pre-existing, and the Referee concluded that although claimant's industrial injury might have been minor in its origin, it was responsible for claimant's present psychological problems. He found complete absence of testimony indicating any pre-existing psychological problems. He felt that Dr. O'Brien's contention that claimant's condition was simply waiting to occur and would therefore have been caused by any "triggering" episode was not sufficient to justify a finding that claimant's condition was not compensable because regardless of claimant's underlying personality disorder, it was, in fact, the industrial injury that caused or materially contributed to her hysterical neurosis.

The Board, on de novo review, finds that claimant has failed to meet her burden of establishing by a preponderance of the evidence that her claim was compensable. Claimant's testimony was that she had been knocked unconscious when the motor fell striking her on the back of her head. The record indicates that Dr. O'Brien's report of October 3, 1974 makes no mention of claimant being unconscious, it merely states that she was examined on that date because of a skull injury which had occurred apparently on September 23 when a motor fell on top of her head. X-rays of the skull were reviewed and Dr. O'Brien suggested that claimant be treated conservatively. He had performed a neurological examination and, with the help of an interpreter, found no neurological deficits. None of the other medical reports indicate that claimant was unconscious. Claimant testified that she did not regain consciousness until after she had been in the hospital, however, the hospital admissions sheet indicates that at the exact time of her admission claimant signed the consent for treatment.

Apparently, the Referee decided to either ignore or give little weight to the reports from Dr. Proano and the reports and testimony of Dr. O'Brien. He stated that because each felt he could not assist claimant, therefore each felt claimant's condition was non-compensable. There is nothing in the record which would support such a statement. The Board fails to understand why it was necessary to state, "neither physician practices in the state of Oregon, except for 'border privileges' exercised by Dr. O'Brien." A license to practice in the state of Oregon has nothing to do with a doctor's competence to evaluate and determine the results of an injury. The Referee was of the opinion that Dr. O'Brien

was not aware of the intervening treatment afforded claimant by Dr. Proano, however, the evidence indicates that Dr. O'Brien reviewed all of Dr. Proano's reports (Exhibit 50).

The Board finds that the only expert medical testimony in this case is that of Dr. Proano and Dr. O'Brien and both agree that the industrial accident was not a significant factor in claimant's element of the psychopathology but, rather, that the claimant has an underlying dependent personality and is unable to cope with her life situation.

Complete review of the medical evidence indicates that claimant had underlying psychopathology and that she was waiting for some specific instance upon which to base it. If it had not been the industrial injury, it was a reasonable medical probability that she would have found another "vehicle" to use to exhibit these or similar symptoms. Claimant wished to avoid facing the realities of life; her industrial injury provided her an excuse to do so.

The fact that claimant's psychological problems followed her industrial injury, absent any medical evidence to establish causal relationship, is not sufficient to find such psychological problems compensable and the responsibility of the Fund.

ORDER

The order of the Referee, dated January 31, 1978, is reversed.

The denial of the Fund, dated December 30, 1976, is affirmed.

WCB CASE NO. 77-5209 JULY 13, 1978

LESTER A. TIPTON, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which granted him compensation equal to 90° for 60% loss of the left leg. Claimant contends that he is permanently and totally disabled.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated March 3, 1978, is affirmed.

WCB CASE NO. 77-3840 JULY 14, 1978

KENNETH J. BOSELL, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Bemis & Breathouwer, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the July 1, 1976 Determination Order whereby he was granted compensation equal to 48° for 15% unscheduled low back disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof. However, there is an error in the order which should be corrected. On page 3, paragraph 2, the words "SAIF investigator" should be changed to read "Mission Insurance Company investigator".

ORDER

The order of the Referee, dated November 29, 1977, is affirmed.

WCB CASE NO. 77-5650 JULY 14, 1978

DOROTHY COZAD, CLAIMANT
Chandler, Walberg, Whitty &
Stokes, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the carrier's denial of her claim for an alleged back injury.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is at-

tached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated December 29, 1977, is affirmed.

WCB CASE NO. 77-4729 JULY 14, 1978

SANDRA EVANS, CLAIMANT
Rader & Rader, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which granted her compensation equal to 30° for 20% loss of the left leg. Claimant contends that she is entitled to at least 50% disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated January 30, 1978, is affirmed.

CLAIM NO. C604/8759 HOD JULY 14, 1978

DARRELL D. FULTON, CLAIMANT
Own Motion Determination

Claimant, a press man for the Oregonian, sustained a compensable injury on November 14, 1968 when he stepped across a plate track, slipped and wrenched his back. The diagnosis was a herniated intervertebral disc at the lumbosacral level on the right. The claim was closed on April 10, 1969 with no award of compensation.

A laminectomy, related to the 1968 injury, was performed on May 13, 1974. A Board's Own Motion Order, dated October 10, 1974, reopened claimant's claim. It was closed by an Own Motion Determination, dated May 8, 1975, which granted claimant 48° for 15% unscheduled disability.

Based upon a letter from Dr. Colletti, the Board reopened the claim in May 1977 by an Own Motion Order, with temporary total disability compensation commencing on February 8, 1977, the date claimant was unable to work because of recurrent sciatica and disc disease. On January 27, 1978 Dr. Colletti indicated claimant could do his job without a noticeable amount of discomfort, stating that claimant was restricted from stooping, bending, and lifting, especially weights over forty pounds.

On February 3, 1978 the carrier requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted no additional compensation.

The Board concurs in this recommendation only insofar as it relates to permanent partial disability but finds claimant is entitled to compensation for temporary total disability from February 8, 1977 to January 27, 1978, less time worked.

ORDER

Claimant is granted compensation for temporary total disability from February 8, 1977 through January 27, 1978, less time worked.

WCB CASE NO. 77-875 JULY 14, 1978

EUGENE C. GORA, CLAIMANT
Sidman & Smith, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which granted him compensation equal to 28.8° for 15% loss of the right arm. Claimant contends that this award is inadequate.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated January 31, 1978, is affirmed.

WCB CASE NO. 76-5945 JULY 14, 1978

GARY G. HILL, CLAIMANT
Colley, Johnson & Nokes, Claimant's Attys.
Rhoten, Rhoten & Speerstra, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the carrier's denial of his claim for aggravation

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated February 10, 1978, is affirmed.

WCB CASE NO. 77-3347 JULY 14, 1978

HAROLD HOHLFELD, CLAIMANT
Carney, Probst & Levak, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks Board review of the Referee's order which granted claimant compensation for 64° for 20% unscheduled disability. The employer contends that the 5% award of the Determination Order should be reaffirmed.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated November 28, 1977, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $350, payable by the carrier.

SAIF CLAIM NO. FC 80795 JULY 14, 1978

JAMES W. HUTCHINSON, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On August 22, 1977 claimant, by and through his attorney, requested the Board to reopen his claim for an industrial injury suffered on June 6, 1967 through the exercise of its own motion jurisdiction pursuant to ORS 656.278. In support of the request claimant supplied the Board with copies of Dr. Mickel's report of April 18, 1977 and Dr. Cherry's report of August 1, 1977.

After being advised by the Board to present its position with respect to the request, the Fund responded stating that it needed additional time to make a more complete investigation. On October 5, 1977 claimant's attorney again requested own motion relief, indicating by an attached copy that the Fund had denied claimant's later claim on the basis of Dr. Mickel's conclusion that claimant's present problems were a result of the original injury of 1967.

The Fund was again asked to respond and on October 17, 1977 the Fund informed the Board that it interpreted Dr. Mickel's September 19, 1977 report to mean that claimant's present condition was actually an aggravation of his September 14, 1975 injury. The Board requested that the Fund furnish it a copy of this report and to clarify what appeared to be contradictory sets of conclusions set forth in the Fund's denial letter of September 16, 1977 and indicated by the Fund's letter of October 17, 1977. Eventually, the Board received a copy of Dr. Mickel's report and the Fund's interpretation thereof. The Fund felt claimant's original claim should be combined with a later claim and set for a hearing. The Board, after due consideration, concluded there was not enough medical information presented to it to enable the Board to make an accurate determination of all issues and it agreed that the two claims should be consolidated for a hearing.

Thereafter, the matter was referred to the Hearings Division with instructions to hold a consolidated hearing to determine whether claimant's present condition was causally related to his June 6, 1967 industrial injury or was an aggravation of his September 14, 1975 injury.

On June 9, 1978 a hearing was held before H. Don Fink, Administrative Law Judge (ALJ), and, based upon the evidence received at the hearing, the ALJ entered an Opinion and Order on June 19, 1978 and also recommended that the Board not grant claimant the requested own motion relief and reopen his claim for the June 6, 1967 injury.

The ALJ found that Dr. Mickel causally connected claimant's condition to the June 6, 1967 industrial injury; however, he also found that claimant was a very poor historian and that it was not easy to tell what history the physician was basing his opinion on. Claimant was examined by the physicians at Orthopaedic Consultants; their report of September 28, 1977 stated that claimant's condition had deteriorated, however, they were unable to determine the cause of such deterioration because the only history they had received was claimant's allegation that he had not sustained any new injury since 1967. The ALJ found that claimant had run a horse stable in 1977 and 1978 and that he had been able to repair fences and trim the horses' hoofs and, although claimant testified that he was not able to do such activities at the present time, the ALJ observed that claimant still had callouses and stains on his right hand.

The ALJ also considered the fact that although a myelogram was recommended by Dr. Cherry, claimant had not agreed to submit to that.

The Board, after a de novo review of the transcript of the proceedings and a study of the Opinion and Order of the ALJ and his recommendation with respect to the request for own motion relief, concludes that claimant's request that the Board exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an industrial injury which occurred on June 6, 1967 should be denied.

IT IS SO ORDERED.

SAIF CLAIM NO. FC 183362 JULY 14, 1978

W. GEORGE KRUEGER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order Referred for Hearing

On May 8, 1978 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim for an industrial injury suffered on April 17, 1969. Claimant's claim was closed on April 15, 1970 and his aggravation rights have expired.

In support of the request for own motion relief were reports from Dr. Burnham dated December 13, 1977 and from Dr. Gritzka dated March 24, 1978.

On May 22, 1978 the Board advised the Fund, which had received a copy of the request and the attached medical reports to it, to inform the Board of its position within 20 days.

On June 22, 1978 the Fund responded, stating it opposed reopening claimant's claim based on the report from the Rehabilitation Institute of Oregon, dated May 3, 1976; also, stating that the matter was presently in litigation (WCB Case No. 75-1351).

The Board, after thorough consideration of the evidence before it, finds there is a conflict in the medical reports. Both Dr. Gritzka and Dr. Burnham believe claimant is in need of further medical care and treatment and directly relate his present condition to the 1969 industrial injury. Dr. Gritzka indicated that claimant's condition was such that a job change would be necessary and recommended vocational rehabilitation. The Rehabilitation Institute report found claimant had a chronic low back pain syndrome of a mild degree and that he should be limited only in heavy lifting. They found that claimant was uninterested in any type of retraining, seeming to be satisfied with his present life style. They felt it was impossible to directly relate claimant's condition to the 1969 industrial injury although it could have exacerbated his problem.

Because of the conflicting medical opinions, the Board hereby refers claimant's request for own motion relief for his 1969 industrial injury to its Hearings Division to set for hearing before an Administrative Law Judge (ALJ) who shall determine, based upon the evidence, whether claimant's present condition is causally related to his injury of April 17, 1969 and, if so, represents a worsening since the date of the last award or arrangement of compensation which claimant has received for said injury.

Upon conclusion of the hearing, the ALJ shall cause a transcript of the proceedings to be prepared and submitted to the Board together with his recommendation on claimant's request for own motion relief.

CLAIM NO. B830C 378942 JULY 14, 1978

KAREN SUE MORGAN, CLAIMANT
Own Motion Determination

Claimant suffered a compensable injury to her right knee on June 6, 1971 when she slipped and fell while employed as a laundry attendant. Dr. Fitch diagnosed possible internal derangement of the right knee; the prognosis was guarded due to claimant's extreme obesity. He performed an arthrotomy with excision of the medial meniscus on August 19, 1971 and released her for work on October 4, 1971.

As the result of a fall in December 1971 further surgery was performed on February 3, 1972. A closing examination

on May 5, 1972 revealed a loss of motion and moderate instability of the knee. The claim was closed on August 16, 1972 with an award of 45° for 30% loss of the right leg. This award was increased after a hearing in November 1972 to 65° for loss of the right leg.

Claimant continued to have problems and was treated intermittently by Dr. Lawton during 1975. In his notes of August 3, 1977 he indicated that he found post-traumatic and degenerative arthritic changes of a slowly progressive degree.

Further surgery was performed by Dr. Lawton on September 19, 1977 and the insurance carrier voluntarily reopened claimant's claim with time loss benefits commencing on that dated.

Dr. Lawton, after a final examination on March 28, 1978, found that claimant had a good recovery and was able to return to light work on January 30, 1978. Her knee was stable and it had a full range of motion with only mild tenderness along the medial joint line and a very slight valgus instability. Dr. Lawton stated claimant would continue to have arthritis involving the patellofemoral and medial knee joint which would prevent her from doing any strenuous activity.

On April 14, 1978 the carrier requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted time loss benefits from September 17, 1977 through January 29, 1978 and temporary partial disability compensation from January 30, 1978 through February 28, 1978. No additional compensation for claimant's permanent disability was recommended.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability compensation from September 17, 1977 through January 29, 1978 and temporary partial disability compensation from January 30, 1978 through February 28, 1978.

CLAIM NO. 941C235604 JULY 14, 1978

HORACE E. PEABODY, CLAIMANT
Own Motion Determination

Claimant, then a 28-year-old truck driver, sustained a compensable injury to his lower back on February 10, 1972 while moving an oil drum. His employer's carrier was Insurance

Company of North America. After conservative treatment he returned to work on February 28, 1972. The June 7, 1972 Determination Order granted time loss benefits only.

Claimant re-injured his back on June 8, 1972 and his claim was reopened. A June 26 myelogram was found to be negative and claimant was released to lighter work and/or rehabilitation. After surgery in November 1972 he was enrolled in a rehabilitation program. Claimant attempted two programs, neither successfully, and he returned to work as a truck driver. His back condition forced him to quit in October 1973. A left kidney stone was diagnosed on September 4, 1973 as having resulted from his back condition and the surgery. He was found to be medically stationary on November 12, 1973 and the December 24, 1973 Determination Order granted him 64° for 20% unscheduled low back disability.

An accident suffered on August 18, 1975 resulted in a claim against Employers Insurance of Wausau which was closed on December 16, 1975 with an award to claimant for temporary total disability only.

A urologist recommended that claimant's left kidney stone be removed and both claims were re-opened; this surgery was performed on March 2, 1976. Subsequently, Wausau requested a determination of its claim and the Second Determination Order of January 18, 1977 granted claimant further temporary total disability benefits.

The file of Insurance Company of North America indicates that claimant never returned to the urologist for treatment after April 7, 1976 and an orthopedist's report of December 8, 1977 shows that claimant had been working as a truck driver in California for about one year, that he was having problems and that he wanted to get back into a rehabilitation program. The file also indicates that claimant had called the insurance company, reporting that he had gone back to work on January 30, 1978 and was doing fine. He felt that his recent back problems were due to too much weight gain.

The Insurance Company of North America requested a determination of claimant's claim on March 15, 1978. The Evaluation Division of the Workers' Compensation Department finds that claimant has lost no wage earning capacity in excess of the 20% he has already received, but is entitled to temporary total disability compensation from February 19, 1976 (for treatment of the kidney stone) through January 29, 1978, less time worked.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from February 19, 1976 through January 29, 1978, less time worked.

SAIF CLAIM NO. F 894065 JULY 14, 1978
SAIF CLAIM NO. FC 133449

LOREN W. RADFORD, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On March 24, 1978 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an injury suffered on February 18, 1944 and also his claim for an injury suffered on June 29, 1968. Both claims have been closed and claimant's aggravation rights have expired. In support of the request, the claimant submitted reports from Dr. Kemper.

On March 27, 1978 the Board asked the Fund to advise the Board within 20 days of its position with respect to claimant's request. The Fund had already been furnished a copy of claimant's request and the medical attachments. On March 30, 1978 the Fund responded, stating that although the claimant had suffered severe disability as the result of the two accidents it felt that Dr. Kemper's report of December 17, 1976 did not provide the detailed findings necessary to determine whether or not aggravation rights had occurred. The Fund requested that claimant be examined to determine the extent of his physical disability relating to those accidents.

On April 26, 1978 claimant was examined by the Orthopaedic Consultants. In a very detailed report which included claimant's present illness, his past history, his social economic data and chief complaints and, based upon a physical examination of claimant by Drs. Robinson and Holm, both orthopedic surgeons, and Dr. Watson, a neurologist, it was their conclusion that claimant's greatest disability is related to his incontinence and poor bowel function and control and urinary problems. Claimant has not had a good urological or bowel work-up for many years and the physicians felt that an EMG and a bladder test should be made at this point in time, particularly to find if there was progression of his problems and also evaluation attempts to improve the bowel control. If this problem can be helped claimant can return to sales work. Claimant's present urological problem is the primary reason claimant may be permanently and totally disabled, but they were not in

a position to evaluate claimant's bowel and urinary tract situation nor its amenability to treatment.

On June 27, 1978 the Fund, after receiving the report from the Orthopaedic Consultants dated May 4, 1978, agreed claimant's current problems were the result of his February 18, 1944 injury and that a urological examination should be carried out to determine whether or not further treatment would be of value to claimant; it had no objection to reopening the claim for such examination, treatment and time loss.

The Board, after full consideration of this matter, concludes that claimant's claim for an injury suffered on February 18, 1944 should be reopened for a urological examination to determine if further medical treatment, as suggested by the physicians at the Orthopaedic Consultants, would be of value to claimant and that claimant should receive compensation, as provided by law, commencing on the date the urological examination is made and until the claim is again closed pursuant to ORS 656.278, less time worked.

The Board further concludes that the claimant's attorney should be awarded as a reasonable attorney's fee for his services in obtaining the reopening of this claim a sum equal to 25% of any compensation claimant shall receive as a result of this order, payable out of said compensation as paid, not to exceed $2,300.

IT IS SO ORDERED.

WCB CASE NO. 71-725 JULY 14, 1978
WCB CASE NO. 74-1008

FLOYD WILHELM, CLAIMANT
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Claimant's Attys.
Own Motion Order

On June 5, 1978 the Board received a request from Patricia N. Sorn, Administrative Law Paralegal, Eastern Oregon Community Development Council, that the Board exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen claimant's claim for a compensable injury suffered while employed by Boise Cascade Corporation on February 1, 1970. Attached to the request was a report from Dr. Bradford A. Stephens, an orthopedic surgeon, offered in support of the request for own motion relief.

Boise Cascade Corporation was advised by letter dated June 16, 1978 of the claimant's request and a copy thereof with the attached medical reports from Dr. Stephens was furnished to

it and requested to advise the Board within 20 days of its position with respect to the request.

On June 22, 1978 Boise Cascade responded, enclosing a conformed copy of a full and final settlement document approved by Referee James P. Leahy on March 31, 1975. This document entitled "Joint Petition and Order of Bone [sic] Fide Settlement" recites that claimant's claim was closed by a Determination Order dated July 12, 1972 whereby claimant was awarded 64° for 20% unscheduled low back disability; that claimant appealed from this Determination Order (WCB Case No. 73-1012) and the claim was reopened and further medical care and treatment and time loss benefits were paid retroactive from November 30, 1972 and the unpaid portion of the award for permanent partial disability was suspended. It further recites that on February 20, 1973 a Referee dismissed the request for hearing on WCB Case No. 73-1012 and a second Determination Order was entered on March 18, 1974 which awarded claimant additional time loss benefits but no additional award for permanent partial disability. On August 16, 1974 claimant executed a request for a lump sum payment which was approved by the Board and thereby precluded claimant's right to appeal the adequacy of the Determination Order of March 18, 1974.

The document further recites that on or about November 11, 1974 claimant suffered a new non-compensable injury to his back; that he filed a claim for aggravation which was denied by the employer on March 7, 1975. (WCB Case No. 74-1008).

Thereafter, the bona fide dispute settlement was consummated whereby the parties agreed to dispose of claimant's claim for the total sum of $8,226.95 and further agreed that all issues raised under WCB Case No. 74-1008 were resolved and claimant's request for hearing should be dismissed. Claimant, his attorney, and the attorney for the carrier, signed this document on March 21, 1975 which was approved by Referee Leahy on March 31, 1975.

The Board, after full consideration of all the issues involved in this rather complicated matter, concludes that claimant has no further remedy with respect to his February 1, 1970 injury and, therefore, that the request made in his behalf to reopen his claim for that industrial injury must be denied.

IT IS SO ORDERED.

WCB CASE NO. 77-386 JULY 14, 1978

CECIL L. WILLIAMS, CLAIMANT
Flaxel, Todd & Nylander, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order

On June 16, 1978 the Board entered its order in the above entitled matter which affirmed and adopted as its own the Referee's findings and conclusions relating to the compensability of claimant's claim and added, based upon the ruling of the Oregon Supreme Court in Jones v. Emanuel Hospital, 280 Or 147, that the Fund's failure to pay claimant "interim compensation" subjected it to the payment of such compensation and also to penalties and attorney's fees.

On June 22, 1978 claimant, by and through his attorney, requested the Board to reconsider its order, stating that the payment of temporary total disability should commence from the date of the injury, October 26, 1976, rather than the date the claim was filed, November 18, 1976.

On June 28, 1978 the Fund responded to claimant's request, stating that the Oregon Supreme Court in Jones specifically stated that "interim compensation" should be paid from the date claimant's claim was filed and until the claim was denied.

The Board, after reconsideration, concludes that the Oregon Supreme Court clearly intended that "interim compensation" commence on the date the employer or the Fund, as the case may be, had notice or knowledge of the claim. In this case that would have been November 18, 1976. Therefore, the Board concludes that the claimant's motion for reconsideration of the Order on Review issued in the above entitled matter should be denied.

IT IS SO ORDERED.

WCB CASE NO. 77-5290 JULY 14, 1978

THOMAS P. ZINK, CLAIMANT
Nash & Margolin, Claimant's Attys.
Jones, Lang, Klein, Wolf &
Smith, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the August 12, 1977 Determination Order whereby

he received temporary total disability compensation only.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof. However, an error does occur in the order which should be corrected. On page 3, in the fourth full paragraph, "July 13, 1977" should be changed to read "June 13, 1977".

ORDER

The order of the Referee, dated November 30, 1977, is affirmed.

WCB CASE NO. 77-3466 JULY 18, 1978

SERGIO ANTALO, CLAIMANT
Merten & Saltveit, Claimant's Attys.
Cheney & Kelley, Defense Attys.
Order of Dismissal

A request for review, having been duly filed with the Workers' 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 Administrative Law Judge is final by operation of law.

WCB CASE NO. 76-6091 JULY 18, 1978

LARRY BARKER, CLAIMANT
Coons & Anderson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the March 17, 1977 Determination Order whereby claimant was granted compensation for time loss only. Claimant contends that he is entitled to some permanent partial disability benefits.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated January 9, 1978, is affirmed.

WCB CASE NO. 77-4514 JULY 18, 1978

MICHAEL J. CROUCH, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the June 17, 1977 Determination Order whereby he was granted time loss benefits only.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated November 21, 1977, is affirmed.

WCB CASE NO. 77-5173 JULY 18, 1978

LEO C. FLEMING, CLAIMANT
Richardson, Murphy & Nelson,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

The claimant seeks Board review of the Referee's order which dismissed his request for hearing.

At the hearing, claimant stated that the issues to be presented before the Referee were: (1) payment of temporary total disability benefits; (2) payment of medical bills; and (3) payment of penalties and attorney fees.

Claimant worked as a jackhammer operator for the employer from December 7 through December 15, 1976. On December 17, 1976 claimant was examined by Dr. Enloe who diagnosed hypertension/gastric ulcer and reported that claimant would

lose time from work and would be released for modified work on approximately January 28, 1977. Claimant did not work after December 15, 1976. On February 25, 1977 he filed a claim for "high blood pressure/ulcer" and on February 28, 1977, the employer received notice of this claim. On August 10, 1977 the Fund made a partial acceptance of claimant's claim, to-wit: (1) irritative acute temporary bronchitis; (2) temporary increase in high blood pressure; and (3) temporary elevation in pre-existing hypertension. In its letter of acceptance the Fund stated that the three conditions could have been aggravated by work exposure but that all the doctors had agreed that less than three day's time loss would have resulted from aggravation of these symptoms. The letter further stated that although the Fund was aware that claimant was off work for more than 14 days and that he was hospitalized that this was not due to the conditions for which it had accepted responsibility.

At the hearing the attorney for the Fund stated that he had advised claimant's attorney before the hearing that he would stipulate that the Fund had paid no time loss benefits to claimant during the course of this claim although the Fund did pay for some medical examinations and diagnostic work-ups, but has not otherwise paid any hospital billings or bills of that nature. It was further stipulated by the Fund's attorney that claimant filed a claim on February 25 and the employer had notice of it on the 28th; also, that it received a form 827 from Dr. Enloe which notified the Fund that the claimant was released for modified employment.

The Referee found that although ORS 656.262 requires compensation to be paid to the worker within 14 days after knowledge or notice and that written notice of acceptance or denial must be furnished within 60 days and unreasonable delay in either instance may cause the imposition of a penalty and award of attorney fees, that there is no disabling industrial incident involved in this case. There was no contention that claimant did not receive a form 393 "Notice of Claim Acceptance" dated August 4, 1977 which classified claimant's injury as non-disabling and indicated on the lower part of said form claimant's rights.

The Referee found no evidence of unpaid causally related medical bills and concluded that the ruling of the Oregon Supreme Court in Jones v. Emanuel Hospital, 280 Or 147, was not applicable and claimant was not entitled to any compensation for temporary total disability because there was no causally related time loss. The Referee further found that the Fund had paid all of the pertinent medical bills. Claimant was not entitled to any compensation so there was no basis for a penalty and having failed to prevail on any issue, claimant was not entitled to attorney fees. He dismissed the request for hearing.

The Board, after de novo review, relying especially upon the medical reports of Dr. Enloe, finds that claimant's condition of bronchitis and temporary exacerbation of hypertension were related to his work exposure. Dr. Enloe states in his first physician's report, after diagnosing hypertension/gastric ulcer, that the industrial exposure certainly contributed to the worsening of claimant's condition. He further said that claimant would lose time from work, that he would be released for modified work on January 28, 1977, although he did not indicate regular employment. The evidence indicates that claimant was hospitalized on December 21, 1976 and discharged on December 24, 1976.

The Referee states in his order that claimant, at the hearing, conceded that his claim was for a non-disabling illness. The Board finds no evidence of such a concession either in the opening statements of counsel or in any of the admitted exhibits.

The Fund, on August 10, 1977, did accept claimant's conditions of irritable, acute, temporary bronchitis, temporary increase in high blood pressure, and temporary elevation in pre-existing hypertension, but at no time did the Fund ever issue the required statutory denial for the conditions for which claimant was hospitalized and which caused him to lose time from work.

The Board concludes that Dr. Enloe's remarks on his initial physician's report definitely indicate that claimant's exposure at work contributed to the worsening of his hypertension and gastric ulcer condition. Furthermore, this report from Dr. Enloe was a sufficient showing that the condition for which claimant was hospitalized and which caused him to lose time from work was related to his industrial injury of December 15, 1976 and the Fund should have either denied the claim or commenced payment of temporary total disability.

Therefore, claimant's claim should be remanded to the Fund for the payment of compensation, as provided by law, commencing February 28, 1977, the date the employer became aware of claimant's industrial injury, and until the claim is closed pursuant to ORS 656.268.

The Board finds that the failure of the Fund to accept or deny claimant's claim within 60 days subjects it to a penalty based upon the compensation due claimant from February 28, 1977, the date the employer first had knowledge of the industrial injury, to August 10, 1977, the date of the de facto denial and to an attorney's fee.

ORDER

The order of the Referee, dated December 8, 1977, is reversed.

Claimant's claim for a compensable injury suffered on December 15, 1976 is remanded to the State Accident Insurance Fund for acceptance and for the payment of compensation, as provided by law, commencing February 28, 1977 and until closed pursuant to the provisions of ORS 656.268, less time worked.

Claimant is awarded a sum equal to 15% of the compensation due to him from February 28, 1977 to August 10, 1977 pursuant to the provisions of ORS 656.262(8).

Claimant's attorney is awarded as a reasonable attorney's fee for his services both before the Referee and at Board review a sum of $750, payable by the State Accident Insurance Fund.

WCB CASE NO. 77-2982 JULY 18, 1978
WCB CASE NO. 77-2983

RAYMOND GIBB, CLAIMANT
Green & Griswold, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation to which he is entitled and affirmed the denial of claimant's aggravation claim issued by Crown Zellerbach, a self-insurer.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated January 23, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for her services in connection with this Board review in the amount of $50, payable by the Fund.

WCB CASE NO. 77-6867 JULY 18, 1978

IRWIN HEATH, CLAIMANT
Don Swink, Claimant's Atty.
Gearin, Landis & Aebi, Defense Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Request for Review by the Home Ins.

Reviewed by Board Members Moore and Phillips.

The Home Insurance Company seeks Board review of the Referee's order which granted claimant compensation equal to 64° for 20% unscheduled low back disability above and beyond the awards previously granted claimant.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated January 16, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $100, payable by The Home Insurance.

WCB CASE NO. 77-6494 JULY 18, 1978

CLAIR OWEN, CLAIMANT
Merten & Saltveit, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Referee's order which found he was not entitled to compensation withheld by the Fund between the date of the Referee's order (December 30, 1976), when he was found to be permanently and totally disabled, and the date of the Board's order (August 16, 1977), when his award was reduced to 50%. The Fund offset all permanent disability compensation paid up to the date of the Board's order against the permanent partial disability award made by the Board and claimant contends this is in error.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated February 21, 1978, is affirmed.

WCB CASE NO. 77-498 JULY 18, 1978

In the Matter of the Compensation
of the Beneficiaries of
AUGUSTINE J. ROSSI, DECEASED
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson,
& Schwabe, Defense Attys.
Request for Review by the Beneficiaries

Reviewed by Board Members Moore and Phillips.

The beneficiaries of Augustine J. Rossi seek Board review of the Referee's order which affirmed the September 16, 1976 Determination Order whereby the workman was granted compensation for time loss only. The beneficiaries contend that claimant was permanently and totally disabled at the time of his death.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated August 25, 1977, is affirmed.

WCB CASE NO. 76-6812 JULY 18, 1978

DONALD E. SIMPSON, CLAIMANT
Bloom, Ruben, Marandas, Berg, Sly
& Barnett, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
William F. Thomas, Defense Atty.
Order

On June 22, 1978 the Board entered its Order on Review in the above entitled matter. Because the Referee's order which upheld the denial of claimant's claim was reversed by the Board's order, attorney fees to claimant's attorney were awarded by the Board's order for claimant's attorney's services both at

the hearing and on Board review. In this particular case, the claimant's attorney was awarded $650 for his services at the hearing and $350 for his services at Board review for a total of $1,000.

On June 30, 1978 the Board received a motion from claimant's attorney asking for an increase of attorney's fees and stating that claimant had been represented by one attorney at the hearing before the Referee and another attorney at Board review. Claimant's attorney (the one which represented him at Board review) moved the Board for an order clarifying which attorney was entitled to which fee and in what particular amounts.

The Board feels that the attorney's fees awarded were appropriate and in line with the awards of attorney's fees in cases of a similar nature. The aggregate sum is $1,000; if the two attorneys wish to make a different allocation between themselves of that amount awarded they may do so.

The motion to increase the attorney's fees should be denied.

IT IS SO ORDERED.

WCB CASE NO. 77-2191 JULY 18, 1978

BILLY H. SMITH, CLAIMANT
Jerry E. Gastineau, Claimant's Atty.
R. Ray Heysell, Defense Atty.
Stipulation and Order of Settlement

The parties stipulate that the above matter may be dismissed with prejudice.

IT IS SO ORDERED.

WCB CASE NO. 77-5702 JULY 18, 1978

WILLIAM TOWNSEND, CLAIMANT
Dye & Olson, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Attys.
Amended Order on Review

On June 15, 1978 an Order on Review was entered in the above entitled matter which affirmed and adopted the Opinion and Order of the Referee dated December 8, 1977. Briefs were submitted late by both parties and neither were considered by the

Board in its de novo review.

On June 29, 1978 the employer, by and through its counsel, requested the Board to reconsider its Order on Review by either considering the briefs which were furnished late or, if the Board did not wish to consider the briefs, then to withdraw the award of an attorney's fee payable to claimant's attorney.

The Board, after considering the matter, finds that the request for reconsideration of its order is justified only to the extent that the award of a reasonable attorney's fee to claimant's attorney at Board review should be reduced from $350 to $100.

ORDER

The Order on Review entered in the above entitled matter on June 15, 1978 is amended by substituting the figure "$100" for the figure "$350" on line 3 of the fourth paragraph on page 1 of said order, which in all other respects is ratified and reaffirmed.

SAIF CLAIM NO. GB 66126 JULY 19, 1978

BARBARA FOSS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant, a 27-year-old shirt finisher, sustained a compensable low back injury when she slipped and fell on June 22, 1964. Her claim was closed on November 24, 1964 with compensation for temporary total disability only.

Upon Dr. Cherry's recommendation, the claim was reopened on July 12, 1965 for further treatment of claimant's back pain. A hysterectomy was performed on August 6, 1965 because of a possible relationship between the malposition of her uterus and her back pain; however, this surgery did not improve claimant's condition. A myelogram performed on November 23, 1965 was negative. The January 11, 1966 Determination Order granted claimant compensation for 16% loss of function of an arm for unscheduled disability.

The State Compensation Department ordered the claim reopened on January 10, 1967. After further surgery, which helped, but did not eliminate,the pain, the claim was again closed on November 6, 1967 with an additional award for 19%, giving claimant a total award for 35% loss of function of an arm for her unscheduled disability.

Claimant returned to work in 1969 and did quite well until 1975 when-her symptoms returned and she had to quit work in July 1976.

Dr. Cherry, on September 22, 1977, advised the Fund that claimant's condition was worse and asked that her claim be reopened. A Board's Own Motion Order was issued directing the claim to be reopened as of July 1, 1976.

Dr. Cherry performed a myelogram on January 29, 1978 which showed no significant abnormality. Claimant was hospitalized for 2-1/2 weeks for medication, traction and physical therapy treatments. During this time, Dr. Paxton, a neurosurgeon, indicated that he felt claimant's problems were psychosomatic and he did not recommend surgery. Dr. Colbach, on April 10, 1978, indicated the same basic finding, stating that her psychological disability was mild and was stationary.

Dr. Cherry noted on April 21, 1978 that claimant was doing much better due to the use of a neuromod electrical stimulator.

The Orthopaedic Consultants, who examined claimant on April 25, 1978, diagnosed: (1) residuals secondary to lumbosacral laminectomy, (2) complaint of chronic lumbar pain, (3) no neurological deficits, and (4) marked functional overlay. They recommended no further treatment and indicated that claimant could return to some type of employment. They felt that the previous awards were adequate.

On May 15, 1978 the Fund requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant only be granted compensation for temporary total disability from July 1, 1976 through April 25, 1978.

ORDER

Claimant is hereby granted compensation for temporary total disability from July 1, 1976 through April 25, 1978, less time worked.

WCB CASE NO. 76-5090 JULY 19, 1978

EARL O. GERBER, CLAIMANT
Vernon Cook, Claimant's Atty.
Rankin, McMurry, Osburn & Gallagher,
Defense Attys.
Order

On June 27, 1978 the Board entered its Order on Review in the above entitled matter which affirmed and adopted

the Opinion and Order of the Referee dated January 20, 1978.

On July 5, 1978 the Board received a motion from claimant, by and through his attorney, requesting that the Board vacate its order of June 27, 1978 and allow the parties to submit briefs on the issues involved within 50 days after the date of a medical report from Dr. Post. In support of the motion the claimant submitted a proposed stipulated order extending time for submission of briefs which was signed only by his attorney, not the attorney for the carrier. This proposed stipulation indicates that during the pendency of the hearing before the Referee claimant had requested a medical report from his physician but that the Referee closed the hearing prior to the receipt of the report and, in fact, the report still has not been received. It also indicates that during the period that the hearing was held open claimant had discharged his former attorney and retained his present one. Claimant was examined by Dr. Post, an orthopedic physician, on June 28, 1978.

On July 6, 1978 the Board received a response from the carrier's attorney which stated the carrier opposed the motion on the grounds that such medical evidence could have been presented before the hearing was closed and specifically stating that the carrier did not agree to allow submission of further medical evidence.

The Board may directly consider evidence not of record at the time of the hearing only upon agreement of the parties. OAR 436-83-720(1).

ORDER

The claimant's motion is denied.

WCB CASE NO. 76-6336 JULY 19, 1978

WAYNE D. MILLER, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson, Moore and Phillips.

The employer requests review of the Referee's order which remanded claimant's claim to it for acceptance and payment of benefits from the date of claimant's admission to the

V.A. hospital, approximately September 20, 1976, until closure is authorized.

Claimant sustained a compensable knee injury in 1973 and subsequently was hospitalized for surgery. During the administering of the anesthesia claimant developed bradycardia (slow heartbeat) and the knee surgery was never carried out.

A hearing was thereafter held on the extent of disability of claimant's knee condition and also the denial of cardiac problems. The Referee held that the heart problem was compensable.

Meanwhile, a Second Determination Order was appealed and another Referee received evidence on the extent of claimant's disability. On July 31, 1975 he found no permanent disability had been suffered to claimant's heart. On November 10, 1975 the Board remanded the first Referee's order to him to further develop the cardiac problem and to determine whether the anesthesia had temporarily or permanently affected claimant's heart. Before any further hearing could be held the employer dismissed its request for Board review and the first Referee's order became final by operation of law.

In October 1973 Dr. Keene, a cardiologist, had recommended that claimant have an insertion of a pacemaker but claimant decided to wait awhile.

In May 1974 Dr. White indicated that the pacemaker would correct claimant's bradycardia condition.

On October 21, 1976 Dr. Sayre diagnosed thoracic outlet syndrome. He felt corrective surgery could not be performed until claimant had a pacemaker. Thereafter, Dr. Sayre performed the implant surgery; however, after this surgery the thoracic outlet syndrome surgery was deemed unnecessary.

The medical reports of record reveal Dr. Ames, a cardiologist, indicates that claimant's disturbances are always temporary and that claimant's rhythm disturbances were exhibited prior to the knee surgery as shown by the nurses' chart notes. Dr. Ames felt claimant suffered no damage either as a result of the anesthesia or the industrial injury to his knee. Dr. Keene concurred.

Dr. Sayre stated the implant was performed so that claimant could undergo the thoracic outlet surgery, "otherwise no thoracic outlet surgery could be performed at all".

Claimant testified his heart condition had worsened over the past 1-1/2 years as he was weaker, suffers from blackout spells and nausea. He denied the pacemaker was implanted

soley to enable him to have the thoracic outlet syndrome surgery.

The Referee found that claimant had proven an aggravation and the claim for such must be accepted. He found no basis for assessing a penalty and attorney fee in this case.

The Board, on de novo review, finds that there is no evidence that the industrial injury of July 12, 1973 was a material contributing factor to the worsening of claimant's heart problem. In order to find aggravation claimant must show a worsening of his heart condition between the date of the second Referee's order on July 31, 1975 and March 15, 1977, the date of the hearing. The first Referee found the heart problem to be compensable, however, the Board remanded the order for further hearing on whether the incident in surgery, i.e., episode of bradycardia, was of a permanent nature or only transient. Before this was accomplished, the second Referee found that claimant's heart problems were not permanently disabling. Both these orders are res judicata.

Neither Dr. Keene nor Dr. Ames found any causal relationship between claimant's heart problem and his industrial injury.

The Board concludes that although claimant's heart condition may have worsened there is no evidence that this worsening was related to his industrial injury to his knee on July 12, 1973.

ORDER

The order of the Referee, dated June 6, 1977, is reversed.

The carrier's denial is hereby affirmed.

Board Member Kenneth V. Phillips dissents as follows:

At the time of the 1973 proposed surgery and the near tragic results of the anesthesia, Dr. Keene recommended a permanent pace maker. Because of the discomfort from the temporary pace maker, claimant elected not to have it done at that time.

Since claimant's last hearing unrefuted testimony indicates more frequent and more severe episodes of dizziness, blackout spells and nausea. Physicians were of the opinion that the pace maker would relieve the bradyarrythmia and would be essential for another operation. The fact that it hasn't been particularly successful does not have any bearing on its

having been advised to relieve a worsening condition.

This reviewer would affirm and adopt the Opinion and Order of the Referee.

/s/ Kenneth V. Phillips, Board Member

WCB CASE NO. 77-7846 JULY 19, 1978

MICHAEL S. O'NEILL, CLAIMANT
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's order which affirmed the September 20, 1977 Determination Order whereby he was granted time loss benefits only.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Administrative Law Judge, a copy of which is attached hereto and, by this reference, is made a part hereof. However, the Board advises claimant that he is entitled to receive such physical therapy as may be recommended by his doctor and this treatment will be paid for by the carrier (Fund) under the provisions of ORS 656.245.

ORDER

The order of the Administrative Law Judge, dated February 16, 1978, is affirmed.

SAIF CLAIM NO. C 171222 JULY 19, 1978

FRANK H. REID, CLAIMANT
Allen G. Owen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On September 26, 1968 claimant sustained a compensable industrial injury to his right knee while in the employ of Howard Furniture Company whose workers' compensation coverage was furnished by the State Accident Insurance Fund.

Dr. Gambee performed a medial meniscectomy on the right knee on March 27, 1969, a patella shave and distal transplant of the vastus medialis on August 21, 1969, and a fossa patellectomy

on April 22, 1970. Dr. Charles M. Hickman, on July 22, 1970, was of the opinion that claimant's knee injury was stationary and recommended claim closure. Claimant was examined by Dr. Puziss on July 30, 1970 who found claimant's condition was stationary.

Claimant's claim was closed on August 14, 1970 by a Determination Order which awarded claimant 45° for loss of the right leg and 30° for loss of wage earning capacity.

Claimant requested a hearing on the Determination Order of August 14, 1970, contending that Dr. Gambee's report of September 16, 1970 had indicated he was not medically stationary. A stipulation approved on February 3, 1971 increased claimant's award for loss of his right leg from 45° to 72°.

Dr. Hickman, on July 18, 1972, reported that claimant's left knee was starting to cause problems and Dr. Paluska examined claimant on September 21, 1972 and found that the left knee joint had crepitation in the patello-femoral joint on active motion.

Dr. Gambee, on December 22, 1972, gave his opinion that both knee problems were related to claimant's industrial accident.

On January 29, 1976 Dr. Hickman reported that claimant's left knee was giving him continued problems, however, Oregon City Orthopaedic Consultants examined claimant on November 29, 1976 and found nothing unusual. An arthrogram of the left knee in December 1976 showed chondromalacia of the patella on the medial facet, but there was no evidence of meniscal injury.

On January 19, 1977 the Fund denied responsibility for claimant's left knee condition and on March 8, 1977 Dr. Baldwin performed an arthroscopy and patellectomy of the left leg with a diagnosis of severe chondromalacia of the left patella.

On June 3, 1977 the Board was requested by the claimant, through his attorney, to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen the September 26, 1968 claim. On June 13, 1977 the Board referred the matter to its Hearings Division to take evidence on the issue of whether or not claimant's left leg surgery of March 8, 1977 was related to his September 26, 1968 industrial injury.

The Administrative Law Judge, after hearing all the evidence, concluded that it was more probable than not that claimant's September 26, 1968 accidental injury caused, or was a material contributing factor to, his November 26, 1976 disabling leg condition. He recommended that the Board remand the claim to the Fund for acceptance and the Board did so by its own motion order dated January 12, 1978, with payment of compensation commencing on March 8, 1977.

Dr. Baldwin performed a closing evaluation of claimant's condition on March 6, 1978; claimant continued to have pain and buckling in the left knee anteriorly, he also stated he had difficulty climbing stairs. The doctor found full extension and active flexion to 125° and one-inch atrophy of the left quadriceps as compared to the right.

Claim closure was requested and the Evaluation Division of the Workers' Compensation Department recommended that the claimant be awarded compensation for temporary total disability from March 8, 1977 through July 17, 1977, less time worked, and to an additional 45° for loss of the left leg.

The Board concurs in these recommendations.

ORDER

Claimant is granted compensation for temporary total disability from March 8, 1977 through July 17, 1977, less time worked, and to 45° for 30% loss of the left leg.

Claimant's counsel is awarded as a reasonable attorney's fee for his services in behalf of claimant a sum equal to 25% of the compensation awarded claimant by this order, payable out of said compensation as paid, not to exceed a total of $2,300. This attorney's fee includes that granted to claimant's counsel as a result of the January 12, 1978 Own Motion Order issued by the Board.

WCB CASE NO. 77-2230 JULY 19, 1978

THEOLA ROBINSON, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund appeals the Administrative Law Judge's (ALJ) order which disapproved its denial of claimant's claim and remanded it to them for acceptance and payment of compensation, as provided by law, and awarded claimant's attorney a fee of $850. The Fund contends that claimant did not sustain a compensable injury.

Claimant, a 38-year-old presser in a cleaning business, alleges that on February 18, 1977 at approximately 11:00 a.m. she slipped in some water and fell injuring her low back and right ankle. She alleges that after her fall she laid on the floor for 2-3 minutes and cried out "at the top of her

lungs" for assistance. She testified her slacks were wet and dirty from her fall and she had to change them.

Tom Miller, a co-employee, who was within ten feet of claimant, neither heard her cry out nor saw her fall. He testified the area was not particularly noisy and any unusual noise could be heard. He agreed there was water on the floor but it could not have been the area claimant allegedly fell in since it drained away from that area.

Another co-employee, Curtis Chubbuck, who was within twenty to thirty feet of claimant, neither heard her cry out nor saw her fall. He noticed claimant appeared to "hobble" around. Mr. Chubbuck agreed the work area was noisy, but one could detect any out of the ordinary noise. He testified claimant did not report her fall to him until an hour and a half after it allegedly took place and that he did observe grease and dirt on claimant's pantlegs, but did not notice any on the seat of her pants, where she would have landed if she had fallen as she alleged. He added the noise from the steam press lasted only six seconds. He opined that if claimant fell where she said she did she would have hit her head on some machinerybecause the space was so narrow.

Employees received free cleaning and often wore dirty clothes to work and changed them; claimant's changing her clothes was not unusual.

The area in which claimant fell was described by Mr. Chubbuck as being very small. Claimant is 5'9" tall and weighs 194 pounds.

Claimant testified that her ankle became quite swollen and turned blue and that she had to leave the hospital on crutches. The medical reports by Dr. Goluban indicate claimant's right ankle was slightly swollen and she had tenderness over the low back. There is no indication claimant was advised to use crutches.

Claimant filed her claim on February 23, 1977 and it was denied by the Fund on March 16, 1977.

Claimant alleges she developed rectal bleeding as a result of her fall. Claimant terminated her work after her injury and moved to Portland.

The ALJ found that while it was possible claimant did not fall, he concluded she had carried her burden of proof of establishing that she did slip and fall suffering a compensable injury to her right ankle and tailbone on February 18, 1977. He noted the probability of the truth of her testimony had been established and that the Fund's denial was incorrect. Therefore, he remanded the claim to the Fund.

The Board, after de novo review, reverses the ALJ. Claimant is not a credible witness. There are many inconsistencies in her testimony. It is unlikely that claimant fell where she said she did. Claimant is a large woman and if she had fallen as she alleges she would have struck some machinery because of the narrowness of the area. The two co-employees' testimony as to the conditions in the area of the alleged fall and claimant's clothing contradict her testimony.

The two co-worker witnesses agreed the work area was noisy when the presses were going, but it lasts only six seconds and the Board finds it hard to believe claimant could lay on the floor two to three minutes yelling at the "top of her lungs" for assistance and not be heard by any of her co-employees.

The Board concludes, considering all the evidence, that claimant has not met her burden of proof in establishing she sustained a compensable injury on February 18, 1977. The denial by the Fund was proper.

ORDER

The Administrative Law Judge's order, dated December 19, 1977, is reversed.

The denial, issued on March 16, 1977, by the Fund is affirmed.

SAIF CLAIM NO. KC 223350 JULY 19, 1978

THEODORE D. RODRIGUEZ, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On June 29, 1976 the Board issued an Own Motion Determination awarding claimant compensation for temporary total disability from August 28, 1975 through February 8, 1976 and 30° for 20% loss of the right leg.

Subsequently, claimant contacted the State Accident Insurance Fund and requested that his claim for an industrial injury which occurred on December 8, 1969 be reopened. The claimant furnished the Fund medical reports which were delivered by the Fund to the Board on July 3, 1978 together with the statement that the Fund would not oppose reopening the claim if the Board found the medical reports so justified.

The Board, after studying the attached medical and surgical reports, all of which post-dated the issuance of its

Own Motion Determination, concludes that there is sufficient medical evidence to justify the reopening of claimant's claim as of February 1, 1978, the date claimant was seen by Dr. Corbett complaining of his right knee problems.

ORDER

Claimant's claim for a compensable injury to his right knee which occurred on December 8, 1969 is hereby remanded to the Fund for acceptance and for the payment of compensation, as provided by law, commencing February 1, 1978 and until the claim is again closed pursuant to the provisions of ORS 656.278, less time worked.

SAIF CLAIM NO. NC 332608 JULY 19, 1978

TERRY L. TOUREEN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury to his back on October 14, 1971 when he slipped and fell while setting chokers. The initial diagnosis was back strain with muscle spasm. After three closures, in 1972, 1974 and 1976, claimant had received awards totaling 96° for 30% unscheduled disability. A Stipulated Order, dated November 19, 1976, granted an additional 48°, giving claimant awards totaling 144° for 45% low back disability.

A Board's Own Motion Order on May 2, 1978 reopened claimant's claim.

Claimant was released to return to regular work on May 11, 1978 by Dr. Fax. The doctor's chart notes of June 9, 1978 found claimant's condition medically stationary and stated that he was "roughly about the same" as he had been prior to his latest flare-up.

On June 26, 1978 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Board recommended that claimant be granted temporary total disability benefits from April 4, 1978 through May 10, 1978; they felt he had been adequately compensated for his permanent disability by the prior awards.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from April 4, 1978 through May 10, 1978, less time worked.

SAIF CLAIM NO. SC 267826   JULY 21, 1978

DARRLYN I. ARMSTRONG, CLAIMANT
C. H. Seagraves, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable head injury on September 16, 1970 while working for Pratt Logging Company. On September 30, 1970 a bilateral cerebral angiography was performed and the diagnosis was a subdural hematoma. He was released for work and the claim was first closed on May 21, 1971 with an award of compensation for temporary total disability only.

In 1974 claimant began experiencing major motor seizures and headaches and the claim was reopened. On July 12, 1975 a psychological evaluation was done with no apparent intellectual impairment found although the claimant continued to have headaches and ringing in his ears. On February 15, 1977 Dr. Nelson indicated that claimant was cured of his seizures and released for work.

The Second Determination Order, dated April 6, 1977, granted claimant 16° for 5% unscheduled disability for injury to the central nervous system.

By a stipulation, dated April 21, 1978, the claim was reopened with time loss benefits commencing on December 12, 1977. Dr. Nelson was treating claimant for recurring seizures while on anticonvulsants. His closing report of May 16, 1978 indicated that claimant had suffered his last seizure on February 10, 1978.

On June 1, 1978 the Fund requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted compensation equal to 96° for 30% unscheduled disability. They also recommended that claimant receive temporary total disability benefits from December 12, 1977 (per the April 21, 1978 stipulation) through May 16, 1978.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted temporary total disability compensation from December 12, 1977 through May 16, 1978, less time worked.

Claimant is also granted compensation equal to 96° for 30% unscheduled disability for injury to the central ner-

vous system. This award is in addition to the awards previously granted to claimant.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-6192 JULY 21, 1978

In the Matter of the Compensation of the Beneficiaries of
CHARLES F. BAKER, DECEASED
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross-appealed by the SAIF

Reviewed by Board Members Wilson, Moore and Phillips.

The beneficiaries of Charles F. Baker, deceased, hereinafter referred to as claimant, requests Board review of the Referee's order which approved the denial by the Fund on September 28, 1977 of claimant's claim, but directed the Fund to pay claimant compensation benefits she should have received from June 15, 1977 to the date of the denial, September 28, 1977, to pay as a penalty an amount equal to 25% of all compensation due from June 15, 1977 to September 28, 1977, and to pay claimant's attorney $750 as a reasonable attorney's fee.

The Fund also requested Board review of the Referee's order, presumably on the award by the Referee of compensation, penalties and attorney's fees.

The deceased worker had been employed as a real property officer by Douglas County when he suffered a compensable injury on January 10, 1977. He had filed a claim which had been accepted and the diagnosis had been a cervical strain (later it was determined that claimant, in fact, had suffered a ruptured aneurysm).

The worker had lost approximately two weeks from work and then had returned to work and had had no time loss until May 3, 1977. On that date he had reported that his back bothered him and that he had a headache and felt nauseous. He had been hospitalized on May 11, 1977 suffering from increased symptoms and he died on May 13 of a rupture of an intercranial aneurysm of the right internal carotid artery.

The surviving spouse (claimant) filed a claim for benefits on June 15, 1977 which was denied by the Fund on

September 28, 1977 on the grounds that the aneurysm was congenital and not work-related and would have ruptured on that date or shortly thereafter without any exertion.

The Referee found that following the worker's return to work, he had occasionally complained of headaches. On April 30, 1977 he had been assigned to open the gate for visitors to a wild flower show located in a rural area about three miles west of Glide. This required sitting in a pickup and opening the gate whenever visitors approached. No other county employee was there and there are no witnesses as to what actually occurred on that date.

Claimant stated that her husband had come home on April 30 with a terrible headache and feeling nauseous. She also testified that she could not remember whether or not he had gone out on Sunday because she had a migraine headache herself but she did remember that her husband had not felt well and had continued to feel poorly on Monday when he had returned to work because he felt he had to do so.

The Referee found that the county budget officer had asked the worker to help him move on Sunday, May 1, and that the worker had come over and helped him move approximately one-and-a-half to two hours. While doing this it was necessary to unload from a U-Haul truck household furniture, a refrigerator, freezer and other heavy pieces of furniture and equipment. Mr. Jensen, a county budget officer, testified that the worker had not complained to him of any physical problems at that time and it was on the following day that he learned for the first time from the worker's supervisor that claimant had had a prior injury.

The worker's supervisor testified that he had talked with the worker on Monday and the worker had told him that it had rained all day Saturday and no people had shown for the wild flower show and that he had sat in the pickup drinking coffee and smoking cigarettes. He did state that it was important for the worker to be at work on Monday, May 2, and that the worker had complained of headaches on that day. A secretary in the office stated that on May 3 the worker had told her he thought he had hurt his back while moving the furniture.

The Referee concluded that there was insufficient evidence to find that the worker had suffered a specific work-related re-injury on April 30, 1977. Dr. Norris-Pearce, in his report of July 1, 1977, expressed the opinion that the the worker's subarachnoid hemorrhage which caused his death on May 13 was directly related to his injury of January 10, 1977 and an apparent subsequent re-injury, also work-related, suffered while cleaning up after the wild flower show on May 7, 1977 (actually April 30, 1977). He stated that rupture of aneurysms is frequently associated with straining such as lifting. It was his conclusion that the rupture of the worker's aneurysm

was directly related to the two episodes referred to; the first probably resulted in minor leakage, however, the second episode resulted in some leakage from the aneurysm initially with subsequent massive hemorrhage which caused death.

Dr. Parsons, a neurosurgeon, after reviewing the medical records, stated that the physical exertion on January 10, 1977 may have caused the congenital aneurysm to rupture on that date but that it would have ruptured spontaneously on that date or shortly thereafter without any exertion. He found the aneursym did rupture again spontaneously and the work did not contribute in any significant way to the medical problem. It was his opinion, and he so testified at the hearing, that the worker's employment had not significantly contributed to the hemorrhage of his aneurysm and his cause of death.

After considering the sequence of events and relying primarily on the medical evidence of Dr. Parsons, the Referee concluded that the claimant had not proven by a preponderance of the evidence that her husband's work activity was a material contributing cause of his death.

The Referee did find, however, that the Fund had failed to pay compensation within 14 days after it had notice or knowledge of the claim and further that the written denial by the Fund was not issued until after 60 days had expired from the date the Fund had notice or knowledge of the claim. Based upon the Oregon Supreme Court's ruling in Jones v. Emanuel Hospital, 280 Or 147 (1977), the Referee ordered the Fund to pay claimant compensation from the date the claim was filed to the date of the denial and also to pay 25% of that compensation as a penalty and to pay claimant's attorney $750.

The Board agrees with the Referee's conclusion that the claimant failed to prove by a preponderance of the evidence that the worker's work activity was a material contributing cause of his death and the majority of the Board also agrees that the Referee was correct in ordering the payment to claimant of interim compensation, imposing penalties and awarding attorney fees.

ORDER

The order of the Referee, dated December 30, 1977, is affirmed.

Board Member George A. Moore dissents as follows:

This reviewer respectfully dissents from that portion of the Referee's order which directed the State Accident Insurance Fund to pay claimant's compensation from the date the claim was filed to the date of the denial and also to pay 25% of that

compensation as a penalty and awarded claimant's attorney's fee of $750, relying upon the ruling of the Oregon Supreme Court in Jones v. Emanuel Hospital, 280 Or 147 (October 18, 1977).

On April 20, 1977 the Court of Appeals ruled that it was not the intent of the Legislature under the provisions of ORS 656.262(8) to penalize an employer for dilatory processing of a non-compensable claim. This ruling of the Court of Appeals was reversed by the Supreme Court on October 18, 1977. However, the Referee in his order directed that penalties be paid from June 15, 1977, the date the claim was denied, and this reviewer takes the position that the State Accident Insurance Fund was entitled to rely upon the ruling of the Court of Appeals until such ruling was reversed and the period of time upon which interim compensation and penalties thereon were awarded falls directly between the date of the Court of Appeals ruling and the Supreme Court's decision. For that reason, I would reverse that portion of the Referee's order which awarded the penalties, reduce the attorney's fee to $300, and affirm the balance of the order.

/s/ George A. Moore, Board Member

WCB CASE NO. 77-5491 JULY 21, 1978

ROBERT BRODERICK, CLAIMANT
Gearin, Landis, Aebi, Claimant's Attys.
A. Thomas Cavanaugh, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer appeals the Administrative Law Judge's (ALJ) order which found claimant was entitled to temporary total disability from October 15, 1976 to the date of his order, less compensation already paid; assessed a penalty equal to 10% of the temporary total disability from July 18, 1977 to the date of the order; granted an increased award of 32° for 10% unscheduled disability for left shoulder injury; credited any temporary total disability paid subsequent to February 9, 1977 from the increased permanent partial disability and awarded an attorney's fee of $500.

The employer contends the award of temporary total disability benefits, assessment of penalties and attorney's fees and increased permanent partial disability were not warranted.

Claimant cross-appealed, alleging that the award for permanent partial disability for his left shoulder disability was not adequate.

Claimant, a 47-year-old long haul truck driver, sustained a compensable injury to his right shoulder and arm on November 14, 1973 when he slipped while getting out of the truck. Dr. Hoevet diagnosed a right rotator cuff tear. Claimant underwent surgery on his right shoulder on February 19, 1974; he returned to work in April 1974.

A Determination Order, dated February 24, 1975, awarded claimant temporary total disability benefits and 48° for 15% unscheduled disability for right shoulder injury.

Claimant managed to work until October 17, 1975 when he quit driving truck. He testified his ability to drive gradually deteriorated because of his shoulder inability to handle the work.

Dr. Specht reported in March 1976 that claimant's hand became numb at times, vibrations from the steering wheel bothered his shoulder and claimant's pain was increased by reaching out and attempting to hold things. Claimant was right handed and he had a deformity of the right shoulder with loss of normal fullness. Dr. Specht opined it was doubtful if claimant could ever return to truck driving. He found claimant medically stationary, but not vocationally stationary and suggested retraining as a truck dispatcher. He felt claimant's limitations would be lifting over 25 pounds or using his hands to work above the shoulder.

A Second Determination Order, dated August 3, 1976, granted claimant compensation for additional temporary total disability and an additional 32° for 10% unscheduled disability for his right shoulder injury.

Claimant began to work with Vocational Rehabilitation in November 1976. Claimant has graduated from high school and has received training in welding. He has worked as a truck driver, welder, millwright, service mechanic, and logger. Claimant has started a 5-space trailer park on his land. He rented three spaces and he and his son live on the other two spaces. In addition, he has started a lawn and garden supply type business and sells fertilizers, bark dust, etc. He has built four or five buildings and has plans for a stable facility. Vocational Rehabilitation closed his file on the basis they were unable to assist claimant in developing his business.

On January 11, 1977 Page Pferdner, ALJ, approved a stipulation which provided that claimant had enrolled in vocational rehabilitation, effective October 15, 1976, and that the employer would commence temporary total disability effective upon his date of enrollment, which would continue until the claim was again processed for closure. The stipulation further provided for claimant's attorney's fees and dismissal of a request for hearing.

The employer, on February 15, 1977, requested reimbursement from the Rehabilitation Reserve Fund for the temporary total disability it had paid from October 15 to December 31, 1976. The Compliance Division of the Workers' Compensation Department informed the employer that this was not possible since the date of the injury was prior to January 1, 1974. A representative of the employer contacted the Hearings Division of the Workers' Compensation Board and was advised to obtain a formal denial and then apply for relief from the stipulation. The employer did this on April 14, 1977. The ALJ replied on July 14, 1977 that he had no jurisdiction over the matter because the stipulation was not appealed and had become final.

The claims manager for the employer, after receiving erroneous information, stopped payments of temporary total disability on March 16, 1977 and did not submit the claim for closure.

The ALJ found that his order was final and the employer was bound by it. He found claimant was medically stationary as of June 28, 1976 and his vocational rehabilitation plan was terminated on February 9, 1977 and he amended the stipulation by an order terminating temporary total disability as of the date of his order (December 28, 1977).

He further found that no penalties [on any temporary total disability payable prior to July 14, 1977 (the date of his letter)] were due because of the employer's receipt of erroneous information. However, he assessed a penalty equal to 10% of the temporary total disability compensation from July 14, 1977 to December 28, 1977.

After reviewing all the evidence, he concluded that there was no evidence that claimant would benefit from further medical care and treatment, and granted claimant an increase of 32° for 10% unscheduled disability.

The Board, after de novo review, affirms the ALJ's order. Based on all the evidence, the Board finds, as did the ALJ, that the claimant is entitled to compensation for temporary total disability from July 14, 1977 to December 28, 1977 plus a 10% penalty and an attorney's fee.

The Board concurs with the ALJ's rating of claimant's unscheduled disability for his right shoulder injury. Claimant is barred from returning to his former employment as a truck driver. He has a deformity in his right shoulder and has limitations on lifting and use of his hand above his shoulder.

ORDER

The ALJ's order, dated December 28, 1977, is affirmed.

Claimant's attorney is granted the sum of $400 as and for an attorney's fee at Board level.

WCB CASE NO. 77-6076 JULY 21, 1978

WAYNE O. FOX, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
SAIF, Legal Services, 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 ruled that claimant was not entitled to the relief he sought and that the State Accident Insurance Fund's denial of September 8, 1977 should be approved and the Determination Order of October 4, 1977 affirmed.

Claimant, a laborer, suffered a compensable injury to his back on February 10, 1977 when he was knocked from a flatbed truck. He was initially treated by Dr. Childs who diagnosed a contusion of his left ribs. Claimant was then examined by Dr. Cruickshank, a neurologist, who had been claimant's treating physician since 1963.

Claimant contends that the Fund's partial denial of his claim on September 8, 1977 was improper and also that his claim should not have been closed by a Determination Order issued on October 4, 1977 which granted him compensation for temporary total disability from February 11, 1977 through April 4, 1977. At no time did claimant claim any permanent partial disability as a result of his industrial injury.

The denial by the Fund on September 8, 1977 stated that claimant's injury was diagnosed as "contusion left ribs" and the injury which claimant sustained was described as "slipping off the back edge of a flatbed truck four foot high, landing on your feet and hitting your low back on some pipe stacks approximately eighteen inches high behind the truck". The denial letter states that claimant's treating physician released him for regular work on April 4, 1977 and concurred with an orthopedic specialist that claimant's condition was stationary and had reached its pre-injury status; also, that claimant's condition indicated that he had significant medical problems unrelated to any job activities. The letter recited some of these problems and stated it denied responsibility for any disability or treatment due to these "pre-existing injuries and conditions" but stated that the partial denial would not affect the processing of his compensable claim for the injury of February 10, 1977. Considered in its entirety, the letter of denial is ambiguous at best.

After Dr. Cruickshank released claimant to return to work on April 4, 1977 claimant was seen by Dr. Pasquesi, an orthopedist, to whom he complained about pain in both his knees, his left shoulder, popping neck, headaches and weak handgrip as well as other conditions. Since claimant's claim was closed in October 1977 claimant has been examined by Dr. Crumpacker, a neurologist, and Dr. McKay, an internist, to whom he related complaints of spinal pain, headaches, crying spells and so forth.

The Referee found that claimant has had a number of prior back and neck injuries resulting from different experiences not necessary to recite in this order. Dr. Pasquesi, in June 1977, reported claimant had a considerable amount of impairment based on the pre-existing compression fractures and should not have been doing the heavy work he was doing at the time he was injured. He then stated, "No doubt the injury sustained aggravated his previous condition". It was Dr. Pasquesi's opinion, however, that claimant's latest accident was probably a minor factor in the total picture. Dr. Cruickshank agreed with this.

The Referee felt that Dr. Pasquesi's report indicated at least some pre-existing condition might have been aggravated to a minor extent but that he did not specify what was aggravated or if whatever was aggravated would be aggravated permanently. She interpreted his report to say that claimant had returned to his pre-injury status. X-rays taken in 1970 showed the same changes which Dr. Pasquesi noted and he thought claimant should change jobs because of his x-ray findings, previous injuries and epilepsy rather than because of his latest injury.

The Referee found that no doctor who had seen and/ or examined claimant since April 1977 had proposed treating claimant or suggested he could not work because of the 1977 injury.

The Referee concluded that even if the conditions found aggravated by Dr. Pasquesi were determinable, the Fund might or might not have denied them in their ambiguous denial letter of September 8, 1977. Claimant had not sustained his burden of proving that the Fund's denial was improper and, inasmuch as claimant had been found to be medically stationary and released to return to work without any finding of permanent impairment, therefore, even if the Referee found that the denial was improper, she felt it would have a minimal effect.

The Referee further concluded that the claim was properly closed on October 4, 1977. Dr. Cruickshank had released claimant to return to regular work on April 4, 1977 and had found him to be medically stationary on April 14, 1977. Dr. Pasquesi examined claimant after he had returned to work for

a very short time and found him medically stationary and Dr. Cruickshank agreed with this finding on June 16, 1977. Neither Dr. Crumpacker nor Dr. McKay, each of whom saw and/or examined claimant after the closure of his claim, felt that claimant needed any additional treatment.

The Board, after de novo review, finds that at no time did claimant deny that he had had prior injuries. However, he did testify, and this is supported by the documentary evidence, that he had been able to work after each of these injuries and was actually working up until the date of his injury on February 10, 1977. Claimant has always worked as a general laborer, using jackhammers, digging ditches, carrying loads of material, sweeping floors and doing other required jobs in the building construction trade. He has worked as a general laborer since 1958 and continued in that capacity until his injury on February 10, 1977.

The Fund takes the position that claimant returned to a pre-injury status on the date that he attempted to go back to work; however, the evidence shows that claimant asked Dr. Cruickshank to release him to go back to work so that he would be able to determine if he could perform his old job. Claimant works out of the labor union hall and is dispatched to jobs and receives a dispatch slip for every job. In order for claimant to get a release to go back to the labor union hall it was necessary for him to obtain a complete release from his doctor. This was the reason claimant requested a full release even though he was returning to work on a trial basis insofar as he was concerned. After claimant attempted to return to work, he found he was only able to work about six hours and then had to quit. Therefore, the release received by claimant from Dr. Cruickshank should not be interpreted as a return by claimant to his pre-injury status.

The Board finds the evidence indicates that claimant has been self-supporting all of his life and has worked hard as a laborer even though he has worked at times in pain, therefore, it can be concluded that if claimant had been able to return to his job and do a full day's work that he would have done so and would have continued to work. Claimant has a good record as a worker. The evidence, however, shows that claimant was unable to do a full day's work and had to return to his doctor for further medical care.

The Fund contends that claimant had underlying conditions which were causing his back pain. The evidence indicates that the injury on February 10, 1977 aggravated these underlying conditions and, although Dr. Pasquesi could have been a little clearer in his report as to which condition was aggravated and to what extent, nevertheless, under the Oregon Workers' Compensation system a claimant is entitled to compensation if an industrial injury aggravated, precipitated, or

accelerated the underlying condition to the extent that the condition becomes debilitating. That is exactly what happened in the instant case and claimant's claim was improperly denied by the Fund.

The Board finds, however, that claimant was medically stationary prior to the issuance of the Determination Order on October 4, 1977. Both his treating physician and Dr. Pasquesi examined claimant for a closing evaluation and each found him medically stationary. Therefore, the Determination Order properly closed claimant's claim and should be affirmed.

The Board notes that Dr. Cruickshank had referred claimant to the Callahan Center for vocational rehabilitation but such referral was never acted upon. It is quite possible that had claimant gone to the Callahan Center, further medical study would have indicated whether or not claimant had reached his pre-injury status. In fact, it is reasonable to believe that if Dr. Cruickshank, who was claimant's treating physician for many years, had felt that claimant had reached his pre-injury status, he would not have referred him to the Callahan Center on June 9, 1977.

The Board suggests that now that the claimant's claim is found to be compensable and the partial denial improper that the request to refer claimant to the Callahan Center for vocational rehabilitation should be given reconsideration.

The claimant contends that he is entitled to penalties and attorney fees because the denial was so broad, sweeping, and ambiguous that neither the Fund nor anyone else really knew what had been denied. The Board finds that the context of the letter of denial by the Fund leaves much to be desired but, nevertheless, the denial was timely made and penalties will not be assessed. However, the denial was improper, therefore, claimant's attorney is entitled to an attorney fee, payable by the Fund, for his services at the hearing before the Referee and at Board review.

ORDER

The order of the Referee, dated December 20, 1977, is modified.

Claimant's claim for a compensable injury suffered on February 10, 1977 is remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on February 10, 1977 and until the claim is closed pursuant to the provisions of ORS 656.268.

The denial of the claim by the State Accident Insurance Fund on September 8, 1977 is set aside but the Determination Order entered on October 4, 1977 is affirmed.

Claimant's counsel is awarded as a reasonable attorney's fee for his services in behalf of claimant both at the hearing before the Referee and on Board review the sum of $1,000, payable by the State Accident Insurance Fund.

CLAIM NO. SS543-68-2250 JULY 21, 1978

TERRY L. HARPER, CLAIMANT
Own Motion Order

In 1969, while claimant was employed by West Foods, he suffered a compensable injury when he fell from a scaffold and caused two cysts located near his tail bone to erupt. The claim was apparently accepted and closed and claimant now seeks to have his claim reopened pursuant to the Board's own motion jurisdiction granted by ORS 656.278. Claimant states in his letter of June 13, 1978 that the cysts have started to swell and drain and are causing him substantial pain.

On June 13, 1978 the Board received a letter report from Dr. McCallum, under date of June 7, 1978, which stated that he had examined claimant on that date and that claimant's present complaint is a recurrent pilonidal sinus. He further stated that he had operated on claimant on April 30, 1970 and marsupialized two moderate sized pilonidal sinuses; at that time claimant was employed by West Foods whose insurance adjusters were Giesy, Greer and Gunn (d/i: 2-11-70, file no. S02016 WC). Dr. McCallum saw claimant on June 1, 1970; at that time one wound had healed and the other had not completed closed. Claimant was not seen by Dr. McCallum from that date until June 7, 1978.

After examination on June 7, 1978 the present pilonidal sinus was located at the proximal end of the other operative scar; Dr. McCallum believed it is quite consistent that the proximal scar closed with a small pocket extending into the subcutaneous tissue and that claimant had developed another pilonidal sinus in that area. His examination revealed no sign of active infection and it was his opinion that the lesion, which was quite small, could be surgically repaired probably in his office. Dr. McCallum stated that as near as he could determine the present condition is a consequence of claimant's pilonidal sinus procedures of April 1970 which were accepted as a compensable industrial injury.

On June 16, 1978 the Board advised Giesy, Greer and Gunn of the request for reopening the claim for surgery and possible additional time loss benefits and were furnished a copy of Dr. McCallum's letter. Subsequently, the Board was advised that West Foods is now a subsidiary of Castle and Cooke and their carrier is Employers Self Insurance Service.

Because of the apparent emergency and the rather minor, although painful, nature of the claimant's problem, the Board concludes that it should exercise its own motion jurisdiction pursuant to ORS 656.278 and direct the employer and its carrier to accept claimant's claim for such surgery as Dr. McCallum feels is necessary and for the payment of compensation, as provided by law, commencing on the date Dr. McCallum performs the surgery and until the claim is closed pursuant to the provisions of ORS 656.278, less time worked.

IT IS SO ORDERED.

WCB CASE NO. 76-5192 JULY 21, 1978
WCB CASE NO. 77-2293
WCB CASE NO. 77-3575

DENNIS C. HENRY, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Gearin, Landis & Aebi, Defense Attys.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
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 approved the denial of claimant's claim for an industrial injury of August 16, 1976 by the Home Insurance Company, dated December 21, 1976, and also approved the denial by Employee Benefits Insurance Companies of claimant's injury of March 1, 1977, dated May 17, 1977.

Initially, the hearing involved three separate cases to be heard in tandem. However, claimant's request for a hearing on the adequacy of the Determination Order of April 4, 1977 relating to a hernia suffered on November 27, 1976 (WCB Case No. 77-2293 and Claim No. C-762793) was settled by a stipulation approved on November 14, 1977.

On August 16, 1976 while claimant was working for Art Knight, Inc., whose carrier was the Home Insurance Company (Home), he bent over to pick up a pallet to load on a truck and experienced what he described as "electrical shocks". He stated he could not move until he was able to throw the pallet aside and straighten up to lessen the pain, however, he was able to drive a short distance to a truck stop in Kingsburg, California where he took a hot shower and took some codeine. He continued driving north and while in the Siskiyou summit area he had engine failure which forced him to hitchhike to Medford to obtain parts to repair the engine. Claim-

ant then continued to Portland, reported in, and was sent to a town in Washington to pick up a load of shakes. He did so and then returned to Portland. He left later that week for Los Angeles and on about 5:00 Sunday, August 22 he again felt the "electrical shocks". He continued to drive on south but at the hearing he testified that the bumpy roads caused back pain so severe that he stopped near Sacramento and had another truck driver take him to the Sutter Hospital; this was six days after the initial pallet incident. The diagnosis was recurrent back pain. Claimant was later transferred to the University of Oregon Hospital and underwent a laminectomy on September 1, 1976.

Dr. Waller, who treated claimant, felt there was no suggestion of a herniated lumbar disc, the nerve root itself appeared entirely normal, the laminectomy was extensive and the nerve was decompressed over a wide range. Claimant was released to work on November 1, 1976. Dr. Waller's medical opinion was that claimant's initial back problems started in December 1975 and that the subsequent problems he had had were simply recurrence of the initial difficulties he had experienced. He stated that an injury on August 16, 1976 might have been the precipitating cause of an exacerbation of claimant's difficulties but it was certainly well documented that it was not the initial event.

Based upon this report Home denied claimant's claim on September 21, 1976.

Claimant returned to work feeling fairly well. On March 1, 1977 claimant was driving for Mellow Truck Express, whose carrier was Employee Benefits Insurance Companies (EBI), on a trip between Bend and Portland. He stopped at Mt. Hood to install tire chains and he stated that his back was tired from having been up and down, on and off the trailer numerous times securing the load and making sure that the hardware was provided to keep tie-down cables from biting into the edge of the lumber load. As he stepped from the cab his foot slipped on the icy pavement and he fell. Claimant admitted on cross examination that he did not think this fall caused any additional pain. He was able to get up and continued on the trip to Portland where he discharged his load at the Barker Company. At 2:00 p.m. he was back at the yard and went home and to bed. The employer called and requested claimant to drive a truck to a town in Washington and claimant testified that when he tried to get out of bed he discovered that his back hurt and he couldn't take the job.

He was readmitted to the University of Oregon Medical School Hospital. He filed a claim which did not refer to a fall but indicated that he had been hurt lifting at work on and off the truck. The carrier denied the claim on May 17, 1977.

Claimant testified that he has not yet been released by Dr. Paxton to return to work but he could not afford further hospitalization. Claimant went to Vancouver, Washington on May 27, 1977 and commenced working full time for Armour Oil Company as a driver although he stated he was in constant low back and left leg pain. At the present time claimant is the branch manager of the Seattle office of Armour.

The Referee applied the last injurious exposure rule in successive injury cases which places full liability on the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability. He found that the incident of March 1, 1977 had not been proven by claimant to be a compensable industrial injury; claimant testified he did not feel that the fall affected him and Dr. Paxton did not even mention the incident in his report.

The Referee also found that the lifting of the pallet onto the truck in August 1976 was not convincingly connected by claimant to his present symptoms. Dr. Waller, who performed the laminectomy, was not sure whether the pallet incident served to aggravate claimant's pre-existing condition. Furthermore, claimant continued working after that incident which is very convincing evidence that he had suffered no severe permanent injury.

The Referee concluded that the preponderance of the evidence indicated that both the incident of August 16, 1976 and the incident of March 1, 1977 merely represented temporary recurrences of a pre-existing condition and could not be construed as new injuries. He approved both denials.

The Board, on de novo review, agrees with the findings and conclusions of the Referee and affirms his order.

With respect to the August 16, 1976 incident, the strongest evidence is given by Dr. Waller, Chief Resident of the Division of Neurosurgery at the University of Oregon Medical School, and his opinion which is quoted in the Referee's order and indicates that the injury which was suffered by claimant on August 16, 1976 was not the onset of claimant's subsequent complaints of low back and left leg pain. There is no medical evidence in the record which would contradict this opinion.

With respect to the incident of March 1, 1977, claimant failed to produce any evidence which would indicate that he had suffered more than an aggravation of his previous 1975 injury to which Dr. Waller referred. Claimant testified that he questioned whether the slip had caused his back pains to flare up and indicated in the claim which he filed subsequently that it was due to his lifting while loading his truck. Claimant's treating physician, Dr. Paxton, indicated in his report that claimant related no history of any specific inci-

dent precipitating pain in March 1977, he further noted that the pain which claimant experienced occurred spontaneously and was not due to the industrial incident.

Therefore, the Board concludes that the claimant experienced no new injury in March 1977 but again suffered what must be interpreted as a temporary recurrence of his symptomatology which originated with the 1975 back injury and from which claimant had never fully recovered.

ORDER

The order of the Referee, dated November 30, 1977, is affirmed.

CLAIM NO. 280-013-9362 JULY 21, 1978

ROBERT L. INMAN, CLAIMANT
Own Motion Determination

On November 6, 1969 claimant, while working for Georgia-Pacific, a self-insurer, suffered an injury to his left knee. The injury was diagnosed as a sprained medial collateral ligament and claimant returned to work on December 28, 1969. The claim was closed by a Determination Order of April 10, 1970 which granted claimant compensation for temporary total disability only.

On August 14, 1975 Dr. Casey found claimant's condition to be worsening and requested that the claim be reopened and recommended an orthopedic referral.

The employer denied the request on April 8, 1975 and, inasmuch as claimant's aggravation rights have expired, he petitioned the Board to exercise its own motion jurisdiction and reopen his claim pursuant to ORS 656.278.

On November 12, 1975 the Board reopened the claim and claimant was hospitalized and on December 10, 1975 Dr. Spady performed an arthrotomy of the left knee with excision of the medial meniscus. Dr. Spady also found early osteoarthritic changes and chondromalacia in the knee. The claim was closed by the Board under its own motion jurisdiction on May 13, 1976 and claimant was awarded compensation for temporary total disability from December 9, 1975 through February 15, 1976 and an award equal to 15% of the left leg.

On January 10, 1978, after an arthrogram had been performed on December 8, 1977 which indicated possible retained medial meniscus in the joint and a probable torn lateral meniscus, Dr. Spady performed surgery and removed a small retained fragment of the posterior medial meniscus. He found consider-

able osteoarthritic change along the articular margin of the posterior portion of the medial femoral condyle but he said the only real abnormality in the knee was the arthritic change and a retained posterior fragment which he removed.

On April 10, 1978 Dr. Spady reported that claimant continued to complain of pain and weakness in his knee, particularly when required to do any squatting at his work. He also walked and kneeled with pain. He had a normal range of motion; there was no knee joint diffusion present. In Dr. Spady's opinion, claimant's condition was stationary and he recommended the claim be closed.

On January 9, 1978 claimant had requested the Board to reopen his claim pursuant to its own motion jurisdiction and Georgia-Pacific had advised the Board that it had no opposition to such reopening and an Own Motion Order remanding the claim to Georgia-Pacific for payment of compensation for temporary total disability from December 8, 1978 and until the claim was closed pursuant to ORS 656.278 was entered on April 14, 1978. Based upon Dr. Spady's April 10, 1978 report the employer requested a closing evaluation on May 1, 1978. The Evaluation Division of the Workers' Compensation Department recommended that the claim be closed with compensation for temporary total disability from December 8, 1977 through April 9, 1978, less time worked, only.

The Board concurs with this recommendation.

ORDER

Claimant is awarded compensation for temporary total disability from December 8, 1977 through April 9, 1978, less time worked.

WCB CASE NO. 76-3382 JULY 21, 1978

MARVIN C. MACK, CLAIMANT
Richardson, Murphy & Nelson, Claimant's Attys.
SAIF, Legal Services, 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 him 32° for 10% unscheduled back disability. Claimant contends he is entitled to a greater award for his disability.

Claimant suffered a compensable injury on June 18, 1975 when he slipped and fell to the floor while modifying truck frame rails. The diagnosis was a mild acute lum-

bosacral strain and claimant was released to return to work on June 24, 1975.

Claimant testified he saw a chiropractor for some manipulative treatments but that such treatment hurt his back more than the fall. In July 1975 claimant came under the treatment of Dr. Wisdom, an orthopedic surgeon, who prescribed analgesics and muscle relaxants; however, the disabling symptoms continued although physical therapy in August provided some temporary relief.

In October 1975 Dr. Davis performed a closing evaluation and found claimant to be medically stationary; he recommended claim closure. Dr. Wisdom agreed; he thought claimant could work at his part time restoration shop but would not be able to return to his previous job.

Claimant's claim was first closed on May 25, 1976 with an award for temporary total disability from June 18, 1975 through April 6, 1976, less time worked.

The Referee found that claimant did not return to his old job but reported to Dr. Holm that it was not available and the Referee got the impression during the hearing that claimant did not care to return to that particular job.

In February 1976 claimant was confined for 15 days in pelvic traction treatment for an exacerbation of back pain. Upon discharge claimant was unable to return to work. Claimant was seen by the physicians at the Disability Prevention Division in March 1976 and the diagnosis was chronic thoracic and lumbosacral spine strain with functional overlay. Dr. Perkins, a clinical psychologist who examined claimant, found him to be bright with many excellent vocational aptitudes although he was overly focused on physical symptoms with a mild neurosis.

The Referee found that claimant had the physical capacity for medium or light work but that re-employment attempts had failed.

A Second Determination Order, dated September 29, 1976, awarded claimant additional compensation for temporary total disability from June 30, 1976 through August 30, 1976, less time worked.

In December 1976 Dr. Kiest stated that neither he nor other members of his profession who had examined claimant had a clear explanation for claimant's continued symptoms but that the relief which was received by claimant through the use of the transcutaneous stimulator was reasonable evidence to him that claimant did have an underlying organic disease. In his opinion, people with only psychological problems or people who simply do not want to get well will not continue

to use this transcutaneous stimulator.

The Referee, after considering all the evidence, concluded that claimant was capable of doing many types of work if he chose to do such work but that the medical reports did indicate that he has some mild permanent partial disability. Therefore, the Referee awarded claimant 32° for unscheduled back disability.

The Board, after de novo review, agrees with the conclusion reached by the Referee and affirms his order.

ORDER

The order of the Referee, dated December 15, 1977, is affirmed.

CLAIM NO. B104C322036 JULY 21, 1978

JAMES B. PINKARD, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Attys.
Jaqua & Wheatley, Defense Attys.
Own Motion Order

On June 8, 1967 while in the employ of Huntington Shingle Company, whose carrier is Fireman's Fund Insurance Company, claimant suffered a compensable injury. The claim was accepted and closed by a Determination Order dated August 21, 1967 whereby claimant was awarded compensation for temporary total disability and temporary partial disability only.

On May 1, 1978 the claimant, by and through his attorney, petitioned the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen claimant's claim. Claimant alleges that his present condition is related to his June 8, 1967 industrial injury and that his condition has worsened since the last award or arrangement of compensation and he has been unable to seek further medical care and treatment. In support of the request for own motion relief, claimant furnished the Board medical reports from his treating physician, Dr. Stainsby.

Dr. Stainsby states in a letter dated December 20, 1977, addressed to the Fireman's Fund, that he had examined claimant on November 1, 1977 and was sending a copy of the original history and physical along with copies of all progress notes and a discharge summary from the hospital to the carrier; also, a copy of the myelogram operative note. In his letter, Dr. Stainsby expressed his opinion that claimant's present symptoms are a continuation of his industrial injury which occurred nine or ten years previously while working for the

Huntington Shingle mill. Initially, surgery was proposed, however, after undergoing the myelogram which indicated possible extruded disc at L5-S1, Dr. Stainsby's chart notes indicated that claimant had made excellent improvement and would be seen again in three weeks. At that time, if he has continued to improve, Dr. Stainsby felt that he could be considered medically stationary.

On May 3, 1978 the Fireman's Fund was informed by the Board of claimant's request for own motion relief and asked to respond within 20 days, stating its position with respect to claimant's request. On May 19, 1978 the Fireman's Fund responded, stating that it was still attempting to gather information to base an investigation of claimant's claim and requested an additional 20 days or so to respond. On June 16, 1978 the Board advised Fireman's Fund that it would be necessary for the Board to make a decision on claimant's request without further delay; the additional 20 days requested by the Fireman's Fund had expired on June 8, 1978. On July 11, 1978, Fireman's Fund responded, denying responsibility except under ORS 656.245.

The Board, based upon Dr. Stainsby's reports, concludes that there is sufficient justification to direct the employer and its carrier to reopen claimant's claim and to pay for all medical treatment and hospital expenses incurred by claimant which relates to his 1967 industrial injury, commencing on November 1, 1977 when claimant was examined by Dr. Stainsby and for the payment to claimant of such compensation to which he may be entitled under the provisions of law as a result of his hospitalization and medical care and treatment from Dr. Stainsby. Claimant's attorney should receive as a reasonable attorney's fee for his services a sum equal to 25% of all compensation which claimant may receive as a result of this order, payable out of said compensation as paid, not to exceed $2,300.

IT IS SO ORDERED.

WCB CASE NO. 77-1815 JULY 21, 1978

JERRY RUSSELL, CLAIMANT
Merten & Saltveit, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson, Moore and Phillips.

Claimant seeks review by the Board of the Referee's order which affirmed the Determination Order dated March 11, 1977 whereby claimant was granted compensation for temporary

total disability only. Claimant contends his claim should have been reopened for psychotherapy or, in the alternative, claimant should have been referred for vocational rehabilitation or, in the alternative, the extent of claimant's permanent disability resulting from his occupational disease was greater than that for which he received an award.

Claimant, a 34-year-old dishwasher, was employed in about mid-August 1976 and after about one week his pre-existing eczema and dermatitis allegedly were exacerbated when he had put his hands in hot water and used detergents. Claimant had had prior itching, however, it had not caused him to lose any time from work nor had any doctor told him that it was disabling. On August 22, 1976, while cleaning and using a strong solution in dishwashing claimant developed blisters on his hands which caused him to seek medical care. He filed a claim which was accepted.

Dr. Utterback, upon examining claimant, found all of his fingers to be swollen and red with evidence of early cellulitis, especially in the right hand. On September 30, 1976, Dr. Martin reported the impairment was "undetermined at present - the impairment would probably be one of necessitating job retraining or placement, not involved with water - if any impairment". By October 21, 1976 all the lesions were clear.

Claimant's claim was closed on March 11, 1977 with an award of compensation for temporary total disability only.

After the claim was closed, the condition flared up again with lesions of the hand, arms and body and Dr. Olsen stated that claimant's condition needed further treatment and he was not medically stationary. He also noted "acute anxiety depressive reaction".

The Referee found that this diagnosis of acute anxiety, depressive reaction was not made until four and a half months after claimant's condition was medically stationary. Furthermore, claimant has a history of psychiatric dysfunction pre-existing his employment with the defendant/employer. Neither Dr. Olsen, in May 1977, nor Dr. Horne, a psychiatrist, in November 1977, were aware of the pre-existing psychiatric problems of claimant.

The Referee concluded that the medical evidence causally relating claimant's present symptoms to the temporary exacerbation of the pre-existing condition which occurred in August 1976 could not be accorded any great weight. Because claimant's psychiatric problems were related to the itching caused by his eczema and dermatitis and those conditions pre-exist his employment, there was no persuasive evidence that claimant's need for psychiatric treatment was causally related to the temporary aggravation of his pre-existing condition in August 1976.

The Referee found claimant was not vocationally handicapped. His only restriction is that he cannot work in hot water, with soap and chemicals. He cannot work as a dishwasher but he is not precluded from seeking numerous entry-level jobs which do not require contact with any of the restricted substances. The Referee was not persuaded that claimant sincerely desired vocational rehabilitation nor did he find that claimant was vocationally handicapped by the exacerbation of his pre-existing condition.

The Referee found that claimant's allergic reaction to detergents, chemicals and hot water and his psychiatric dysfunction all pre-existed his employment and there was no evidence that any of these problems were increased, other than temporarily, by his employment. He concluded that claimant did not have any permanent disability which did not pre-exist his employment.

The majority of the Board, on de novo review, finds that claimant's claim for an occupational disease was accepted by the Fund and there is no evidence that the Fund has ever denied that there was an acute aggravation of claimant's underlying psychiatric problems. Claimant's psychiatric condition was clearly related on an aggravation basis by Dr. Olsen and by Dr. Horne, claimant's treating psychiatrist, yet no denial was issued by the Fund. The Referee found no aggravation of claimant's underlying psychiatric condition; he only found that they pre-existed his employment by the defendant/ employer.

The majority of the Board agrees that the medical evidence does indicate that both the psychiatric problem and the dermatitis were pre-existing; however, claimant's employment exacerbated the dermatitis and the resulting constant unbearable itching activated his psychiatric problem and agitated his depression. Contrary to the findings of the Referee, Dr. Horne's deposition indicates that he was aware of claimant's two previous psychiatric hospitalizations prior to rendering his opinion that although claimant may have had some previous mood depressions as such preceeding the injury, he had been able to work prior to the on-the-job occupational disease but with a phobia and marked agitated depression from this occupational disease, to-wit: itching and inability to work. He felt that there definitely had been an aggravation and that claimant currently needed psychotherapy. He stated that as a result of claimant's current condition he was unable to work or seek work although he was highly motivated and wanted very much to get back to work. Dr. Horne's opinion was that claimant's preoccupation with his itching, his concern about it and his concern about not being able to get a job were, in part, the basis for his belief that claimant was in need of psychotherapy.

The majority of the Board concludes that the claim

should be reopened for the psychiatric treatment recommended by Dr. Horne and also for the treatment of his chronic dermatitis.

The majority of the Board finds no evidence that the Disability Prevention Division abused its discretion in not placing him in an authorized rehabilitation program. Claimant contends that all the doctors indicated that he should be retrained, that he had a disability and could not return to his former occupation. Granted this might be true, the decision of the DPD can only be reversed on the grounds set forth in ORS 436-61-060(2) and no such grounds have been set forth by claimant in this case.

ORDER

The order of the Referee, dated January 16, 1978, is reversed.

Claimant's claim is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing December 20, 1976, the date claimant's compensation for temporary total disability was terminated by the Determination Order of March 11, 1977, and for such psychiatric treatment as Dr. Horne may recommend and for the medical care and treatment required for claimant's condition of chronic dermatitis. The claim shall remain open until closed pursuant to the provisions of ORS 656.268.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation claimant may receive from this order, payable out of said compensation as paid, not to exceed $2,300.

Board Member George A. Moore dissents as follows:

Claimant's eczema, dermatitis and psychiatric dysfunction all pre-existed his employment in this case and were temporarily exacerbated by his work exposure. Claimant had completely recovered from these by December 1976. It is true claimant needs a job change and psychiatric counseling, but this reviewer finds this claimant needed both prior to his work exposure in this incident. Claimant's depression was not diagnosed until almost one and a half years after claimant was found to be medically stationary. Therefore, I would affirm the Referee.

/s/ George A. Moore, Board Member

WCB CASE NO. 77-5353 JULY 21, 1978

JAMES SILSBY, CLAIMANT
Hoffman, Morris, Van Rysselberghe &
Giustina, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund seeks Board review of the Referee's Opinion and Order which remanded claimant's aggravation claim to it and awarded penalties equal to 25% of the compensation due and payable during the period from May 19, 1977 to the date of his order, January 20, 1978, plus an attorney's fee of $1,000. The Fund contends no aggravation claim was proven.

Claimant, at the age of 38, sustained a compensable back injury on July 15, 1974 while lifting a compressor. This injury was diagnosed as an acute lumbosacral sprain. Claimant was found medically stationary on August 22, 1974 by Dr. Robertson. His claim was closed by a Determination Order of November 4, 1974 which granted claimant temporary total disability from July 15, 1974 through August 22, 1974 with no award for permanent disability.

Claimant continued to experience periodically low backache which did not disable him. Dr. Robertson opined claimant's back pain in August 1975 was related to his industrial injury.

In October of 1975, claimant testified that because of his worsening condition quit his job and went to Iowa to work on his family's farm.

Dr. Fellows reported in March 1977 that claimant had continued to have intermittent dull aching pain in his back. His examination found muscle spasm or tightness in the lower lumbar region and a reduced range of motion. A myelogram revealed a small anterior disc protrusion at L4-5. Dr. Fellow's diagnosis was generalized degenerative disc disease of the low back and probable central midline disc L4-5.

Claimant wrote the Fund on May 19, 1977 requesting his claim be reopened for aggravation. Claimant's request was denied on July 13, 1977, based on Drs. Fellows' and Hayne's reports which it felt indicated claimant's continued need for care was more related to degenerative disc disease than claimant's industrial injury.

Dr. Stainsby reported on October 26, 1977 that claimant had complaints of constant pain in the low back, dull and

aching in character. At times the pain increased and spread down both sides. There was no relationship between claimant's activity and the increased low back pain. Claimant reported that he could bend and lift, but a few hours later his back pain would increase. Dr. Stainsby noted that claimant had trouble walking. He felt that claimant's present complaints were the result of claimant's industrial injury of July 1974.

The Referee found claimant had proven he had suffered an aggravation of his July 15, 1974 industrial injury and remanded claimant's claim to the Fund to be accepted and for payment of compensation, including the cost of medical services, as provided by law.

He also assessed a penalty equal to 25% of the compensation due and payable during the period from May 19, 1977, the date claimant wrote to the Fund, to the date of his order (January 20, 1978). The Referee later issued a supplemental order awarding claimant's attorney a fee of $1,000 based upon the claimant's attorney's affidavit.

The Board, after de novo review, agrees that claimant did prove his aggravation claim; however, the Board modifies the period of time loss awarded by the Referee.

The medical reports of Drs. Fellows and Hayne did not relate claimant's back problems to his industrial injury. The first medical verification of claimant's back problem and relationship to his industrial injury of July 1974 was Dr. Stainsby's report of October 26, 1977. Therefore, the Board concludes claimant's entitlement to temporary total disability benefits commences on the date of Dr. Stainsby's report. ORS 656.273(6).

The Board finds that the Referee awarded penalties on the compensation due from May 19, 1977 to the date of his order. Penalties are terminated on the date a claim is denied. The Board found claimant's aggravation claim was not verified medically until October 26, 1977, which was after the Fund's denial; therefore, there is no basis for penalties.

Based on the length of the hearing and the amount of time spent by claimant's counsel in preparation for the hearing, the Board finds that the attorney fee granted by the Referee is excessive. The Board finds an attorney's fee of $500 is adequate for a reasonable attorney's fee at hearing level.

ORDER

The Referee's order, dated January 28, 1978, as supplemented by an order dated February 7, 1978 is affirmed only on the issue of compensability of the aggravation claim; the payment of compensation to claimant, the assessment of

penalties, and the award of attorney's fees at the hearings level are modified as set forth below.

The State Accident Insurance Fund shall pay compensation, as provided by law, commencing on October 26, 1978 and until the claim is again closed pursuant to ORS 656.268.

The State Accident Insurance Fund shall pay to claimant's attorney the sum of $500 as and for a reasonable attorney fee at the hearing level.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $350, payable by the Fund.

WCB CASE NO. 76-6812

WCB CASE NO. 76-6812 JULY 24, 1978

DONALD E. SIMPSON, CLAIMANT
Bloom, Ruben, Marandas, Berg, Sly & Barnett, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith, Defense Attys.
Order

On June 22, 1978 the Board entered its Order on Review in the above entitled matter which reversed the Administrative Law Judge's (ALJ) Opinion and Order and held that the denial of claimant's claim was improper.

On July 11, 1978 the Board received from the employer, by and through its attorney, a Motion for Reconsideration based upon its contention that the ALJ at the hearing had correctly found that claimant failed to provide an accurate history of any work activity precipitating his symptoms and that the testimony of Dr. Foggia should be given greater weight than that of Dr. Yasui.

The Board, after considering the motion, concludes that there is nothing contained therein which would justify altering the conclusion reached by the Board in its Order on Review, therefore, the Motion for Reconsideration should be denied.

IT IS SO ORDERED.

SAIF CLAIM NO. DB 98943 JULY 28, 1978

RONALD V. BERNARD, CLAIMANT
SAIF, Legal Services, Defense Attys.
Own Motion Determination

Claimant sustained a compensable injury on December 15, 1964 when he was knocked down by a tree limb while working as a logger. The diagnosis was extensive comminuted fracture of the pelvis, including the acetabulum. Surgery was performed.

Claimant returned to work in June 1965, but was not able to do any heavy logging work; he was able to drive a small truck and do the bookkeeping. The closing medical examination by the carrier's medical examiner revealed a noticeable left hip atalgic limp, some atrophy above and below the left knee; virtually no external rotation hip motion, and 30% loss of flexion and limited abduction. The fractures had healed well.

The claim was closed on April 5, 1966 with time loss benefits to June 4, 1965 and compensation equal to 75% loss of function of the left leg and 25% loss of an arm for unscheduled disability to compensate for his abdominal and chest problems.

Claimant's hip pain became progressively worse and his claim was reopened on November 26, 1976 when he entered the hospital for a total left hip replacement. He returned to modified work on March 31, 1977 with continuing low back problems which Dr. Fagan felt were related to his old hip injury. Dr. Pasquesi, on April 24, 1978, found claimant to be medically stationary with no additional disability in excess of that already compensated.

Claimant is doing modified work in a supervisory capacity at his regular pay rate.

On May 15, 1978 the Fund requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department recommend that claimant only be granted compensation for time loss from November 26, 1976 through March 30, 1977.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from November 26, 1976 through March 30, 1977, less time worked.

WCB CASE NO. 77-3632 JULY 28, 1978

CLARENCE F. BOYEAS, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the Administrative Law Judge's (ALJ) order which sustained the employer's denial of claimant's claim for an injury which occurred on March 3, 1977.

Claimant was a 43-year-old glazer who had worked for the employer for approximately 2-1/2 years although the present owners had only taken over the business recently.

The ALJ found that on March 3, 1977 claimant, with the assistance of Cathie Londahl, one of the co-owners, was attempting to replace a windshield in a large automobile. Mrs. Londahl's hair became entangled in the antenna on the car and claimant was left holding the weight of the entire windshield; he continued to do so until the wife's hair was freed. Then the windshield was installed. Claimant finished his shift and also worked the following day. On the evening of the second day Mark Londahl, the other co-owner, telephoned claimant's residence and informed claimant's wife that claimant's employment would be terminated as soon as they could contact him directly. On the following day, a Saturday, claimant was treated as an out-patient in the emergency room at Holladay Park Hospital. A lumbosacral muscle strain was diagnosed. On Sunday Mr. Londahl telephoned claimant and notified him that he had been terminated.

Claimant sought medical attention from his family physician, Dr. Brown, on March 7, 1977 and in his report dated October 11, 1977 Dr. Brown stated that when he first saw claimant he was complaining of pain in his back which he claimed started on or about March 3, 1977. The initial examination revealed no findings compatible with an injury and there did not appear to be any basis for belief that claimant had, in fact, a new injury or had any need for treatment. Dr. Brown sent claimant to Dr. McNeil to document the fact that there was no injury.

Dr. McNeil examined claimant on March 16, 1977 and diagnosed an acute lumbosacral strain; he felt that claimant had sustained a benign muscle strain and that he would eventually recover from it.

On May 17,1977 the claim for a back injury on March 3, 1977 was denied by the employer's carrier.

The ALJ concluded, based upon all the evidence presented, that claimant has been symptomatic on a relatively regular basis over the years and that he has learned to live and work in spite of fairly regular pain. Furthermore, the objective medical findings of March 5 and March 7 were probably present both before and after March 3, 1977.

The ALJ concluded that claimant's symptoms were momentarily increased by the windshield incident but that the increased symptomatology dissipated within a few minutes and that the necessity for claimant to seek medical attention later was not related to the incident of March 3, 1977.

The Board, on de novo review, agrees with the conclusion reached by the ALJ that claimant merely suffered a temporary exacerbation of a pre-existing problem which claimant had.

ORDER

The order of the Administrative Law Judge, dated November 7, 1977, is affirmed.

SAIF CLAIM NO. A 535871 JULY 28, 1978

DOROTHY J. DAVIS, CLAIMANT
John D. Ryan, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant, by and through her attorney, requested that the Board exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen her claim for an industrial injury sustained on April 4, 1956 while in the employ of Western Wirebound Box Company, whose workers' compensation coverage was furnished by the State Accident Insurance Fund. Claimant ultimately received an award equivalent to 40% loss function of an arm for unscheduled disability on May 7, 1959 and her aggravation rights have long expired.

On July 10, 1978 the Fund advised the Board that claimant's attorney had requested that his client's claim be reopened because of aggravation and because her aggravation rights had expired the Fund referred the matter to the Board for own motion consideration. Enclosed with the Fund's letter were copies of all pertinent information contained in the Fund's file.

A letter dated April 28, 1978 from Dr. Langston, an

orthopedic surgeon, stated he had examined claimant on January 10, 1978 for a complaint of a gradual onset of low back pain which had been present for approximately three months. Claimant has had a previous fusion of L4 through S1 and there was a pseudoarthrosis above the fusion. Dr. Langston recommended reopening of her claim for further treatment.

On May 11, 1978, at the request of the Fund, claimant was examined by the Drs. Hafner, Robinson and Gallo of the Orthopaedic Consultants. A very comprehensive report, dated May 23, 1978, indicates that claimant's main difficulty at the present time is centered in the lumbosacral area and is present most of the time. It was the conclusion of the examining physicians that claimant's present condition was related to her compensable industrial injury of April 4, 1956. There was no history of any incurrent injury to account for the exacerbation of her symptoms.

The doctors felt the presence of a pseudoarthrosis which has become symptomatic requires consideration of surgical repair; however, claimant has high blood pressure with symptoms of dyspnea and angina and she would be an increased risk from the standpoint of surgery. It was further recommended that claimant's cardiac status be thoroughly evaluated prior to surgery and if possible her blood pressure brought under control. The physicians also felt that claimant should go on a weight reduction program; she is 5'2" and weighs 174 pounds which is about 60 pounds more than she weighed three years ago. The doctors felt that claimant's claim should be reopened for the recommended treatment.

Inasmuch as the file was forwarded to the Board by the Fund it is presumed that it has no objections to reopening the claim and the Board concludes that the claim should be reopened, based upon all of the medical evidence which was furnished to it from the files of the Fund, commencing on January 10, 1978, the date claimant was first examined by Dr. Langston, and until the claim is closed pursuant to the provisions of ORS 656.278, less any time worked in the interim.

The Board also concludes that the claimant's attorney should be awarded as a reasonable attorney's fee for his services in behalf of claimant a sum equal to 25% of any compensation, either for temporary total disability or permanent partial disability, which claimant may receive as a result of this own motion order, payable out of such compensation as paid, not to exceed $2,300.

IT IS SO ORDERED.

WCB CASE NO. 77=2029 JULY 28, 1978

ROBERT FINLEY, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which increased the award for claimant's 1971 injury to 72° for 22.5% unscheduled disability and the award for his 1975 injury to 48° for 15% unscheduled disability.

Claimant sustained two compensable injuries to his head. The first occurred on October 31, 1971 when claimant was knocked off a bulldozer by a falling limb. Claimant suffered a fractured rib and contusion to the head area. Claimant continued to experience pain in his head and neck area, but returned to his regular work as a foreman, laborer, and heavy equipment operator. Dr. Thompson reported in March 1972 that claimant continued to experience neck pain and noted in July 1972 that claimant's neck pain was constant on his right side and radiated into the right shoulder. His examination revealed 30% of normal motion to the right and slight muscle spasm on the right. He opined claimant would have some permanent disability and was medically stationary.

A Determination Order, dated August 30, 1972, awarded claimant compensation for temporary total disability and 32° for 10% unscheduled disability for his upper back and right shoulder injury.

Claimant sustained the second compensable injury to his head while working on December 29, 1975 as a backhoe operator and fell from the equipment landing on his head.

Dr. Rosenbaum reported that claimant tended to veer off to the right side, had pain in his left shoulder, severe headaches and back pain. An EEG test was abnormal, but an EMI was normal.

Dr. Eiler diagnosed claimant's injury as an AC joint first degree separation on January 29, 1976.

A brain scan done on February 24, 1976 was normal.

In April 1976 claimant underwent another EEG with abnormal results. Dr. Rosenbaum noted claimant still had headaches and was having difficulty thinking clearly and comprehending when he was reading.

Dr. Reiter examined claimant and found no organic brain syndrome.

Dr. Rosenbaum, in May 1976, felt that the abnormal results of the EEG tests could be the result of his two head injuries.

Dr. Eiler released claimant back to work on May 4, 1976. He noted that claimant had mild difficulty with his left shoulder and some headaches and anxiety, but felt claimant was medically stationary.

Dr. Zieverink reported in October 1976 that claimant believed that he had lost some of his ability to understand his work tasks after his first injury. Claimant complained that after his second injury he had trouble with headaches, was unable to concentrate, had lost his conception and lost his motor skills. He told Dr. Zieverink he had a high school education and the doctor noted claimant relied heavily on his intellect to function in the construction industry in a supervisory role. Claimant felt that after his two injuries he was unable to plan and to supervise as well as he could prior to his injury. Dr. Zieverink believed claimant suffered loss of brain function in both cortices which resulted from his two head injuries. He felt that claimant's loss of motor skills, inability to conceptualize as well as before, loss of mastery of language, resulted in claimant's depression.

A Determination Order, dated November 3, 1976, closed the claim for this injury by awarding claimant compensation only for temporary total disability.

Dr. Berger evaluated claimant on November 3, 1976 and reported that claimant had relied on his intellect all of his life and was very intelligent. He felt claimant's brain injury and loss of some of his intellectual capacity was very traumatic.

Dr. Rosenbaum again administered claimant an EEG on January 20, 1977 with abnormal results. Claimant continued to have headaches. Claimant had stopped working in December 1976 and had trouble with his mind drifting. Dr. Rosenbaum thought that claimant's two injuries caused his brain damage.

Dr. Eiler reported claimant's shoulder had good range of motion, free of pain and was medically stationary on September 30, 1977. Claimant continued to have difficulty with his neck and headaches and was using medication.

The ALJ found claimant had suffered a substantial loss of earning capacity after the second injury based on his inability to continue to work as a supervisor and perform intellectual computations on the job. Additionally, based on Dr. Eiler's report of September 30, 1977, the ALJ found claimant had not suffered any permanent disability to his left shoulder and neck. The ALJ awarded claimant an additional 16° for his brain damage resulting from his 1971 injury and awarded him 48° for 15% unscheduled disability caused by his 1975 injury.

The Board, after de novo review, concurs with the additional award granted by the ALJ for the 1971 injury, but would increase the award of unscheduled disability to which claimant is entitled as a result of the 1975 injury to 35% of the maximum.

Claimant is a very intelligent individual and had relied on his intellectual ability to enable him to work in construction as a supervisor. Now, because of the injuries resulting in brain damage, he is unable to work as before. He no longer can do computations in his head and is unable to memorize plans. As Dr. Berger noted, this loss has had a very traumatic affect on claimant. This loss also has caused him to suffer a loss of wage earning capacity greater than that which he has been compensated.

The award of 48° for the 1971 injury is adequate; it gives claimant a total award of 72°.

ORDER

The Administrative Law Judge's order, dated January 20, 1978, is modified.

Claimant is granted 64° of a maximum of 320° for 20% unscheduled brain damage disability resulting from his 1975 industrial injury. This is in addition to all prior awards for the 1975 injury, including the award granted by the ALJ.

The remainder of the ALJ's order is affirmed in all respects.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-3124 JULY 28, 1978

WILLIAM GALLOWAY, CLAIMANT
Richard O. Nesting, Claimant's Atty.
Roger R. Warren, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant appeals from the Administrative Law Judge's (ALJ) order which affirmed the Determination Order, dated August 10, 1976, awarding him compensation equal to 22.5° for 15% loss of the right leg and temporary total disability. Claimant contends he is entitled to a greater award.

Claimant, at the age of 39, while employed as a

sheet metal fabricator, sustained a compensable injury to his right knee on November 11, 1975.

Dr. Schilling, on December 1, 1975, did an arthrogram which revealed a loose body, anterior and lateral to the lateral meniscus, a Baker's cyst, chondromalacia of the medial tibial plateau of the right knee. Dr. Fitch performed an arthroscopy and arthrotomy of the right knee with the removal of the medial meniscus on December 4, 1975. Dr. Fitch's diagnosis was a torn medial meniscus of the right knee.

On December 15, 1975, Dr. Fitch reported that claimant's employment required considerable squatting and full knee bending and claimant noticed that his right knee locked and required a twisting effort to unlock it. Claimant related that his right knee became swollen and tended to give away with pain on the inner side of the right knee. Dr. Fitch reported claimant had suffered an injury to his right knee while playing soccer in 1954 and had had occasional pain on the medial side of the knee since that time. He opined claimant sustained a torn medial meniscus in his industrial injury of November 11, 1975. Claimant had had problems with his knee stiffening up in 1973. This was treated with cortisone and claimant returned to work without any problems. Dr. Fitch did not feel claimant's 1975 injury was related to the 1973 incident.

Claimant was found to be medically stationary on June 14, 1976 by Dr. Fitch.

Dr. Fitch reported in July 1976 that claimant complained of numbness in his knee and that the knee still gave away and had some ache with activity. Dr. Fitch found claimant had full range of motion in his right knee with medial stability, anterior cruciate instability, increased rotatory instability, some crepitation on movement of his knee, moderate wearing of the articular surface.

The Determination Order was entered on August 10, 1976.

Claimant testified he had been employed for 25 years in the sheet metal industry. He has had to restrict his recreation activities since the incident. Claimant is still working as a sheet metal fabricator, but he feels he is slower, unable to bend, and is being tolerated by his employer. He thought he was 50% to 70% worse since the injury as far as his restrictions are concerned and has had to use different methods to his work and he is unable to do his yard work.

Claimant returned to work about February 21, 1976 and has not sustained any time loss since. He returned to his regular employment.

The ALJ found claimant was able to play golf, hike, squat, go up and down stairs, but still had physical restrictions, such as running and kneeling. He concluded that claimant did have some discomfort and certain limitations, but claimant's loss of function did not exceed that for which he was awarded by the Determination Order.

The Board, after de novo review, would affirm the ALJ's conclusions. Claimant has been awarded 22.5° for 15% loss of the right leg. Claimant has returned to his former employment in February 1976. Although claimant does have some limitations due to his right knee injury, the Board concludes his loss of use of the right leg does not represent any greater disability than that for which claimant already has been compensated.

ORDER

The Administrative Law Judge's order, dated August 31, 1977, is affirmed.

WCB CASE NO. 77-4147 JULY 28, 1978

GORDON HAGLER, CLAIMANT
Carney, Probst & Levak, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which granted claimant compensation equal to 22.5° for 15% of the right hand and 22.5° for 15% of the left hand.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this refernece, is made a part hereof.

ORDER

The order of the ALJ, dated March 3, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $200, payable by the Fund.

WCB CASE NO. 77-1103 JULY 28, 1978

EVELYN C. MOON, CLAIMANT
Edwin Harris, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the carrier's denial of her claim for aggravation and dismissed the matter.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated October 18, 1977, is affirmed.

WCB CASE NO. 76-6194 JULY 28, 1978

MARY OBER, CLAIMANT
Richard A. Carlson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which awarded claimant an increase equal to 10% for her unscheduled back disability but did not award any additional compensation for temporary total disability.

The first Determination Order, dated July 23, 1975, awarded claimant compensation for temporary total disability from June 4 through June 18, 1975, less time worked; the Second Determination Order awarded compensation for temporary total disability from April 20, 1976 to September 14, 1976 and 32° equal to 10% for unscheduled back disability. Claimant contends she is entitled to temporary total disability from May 19, 1977 through October 19, 1977, vocational rehabilitation, and a greater award for her unscheduled disability.

Claimant, a 30-year-old meat slicer operator, sustained a compensable injury to her back on May 23, 1975 when she fell and struck her back on a table. Her injury was diagnosed as an

acute dorso-lumbar strain and was classified as a non-disabling injury.

Dr. Brown found claimant medically stationary on June 19, 1975 and the first Determination Order was issued. Claimant had returned to work on June 19, 1975.

Claimant was laid off work in November 1975 but, in March 1976, upon her return, she began to experience back pain which became progressively worse. During the time she was laid off she was asymptomatic.

Dr. Brown treated claimant from April 28, 1976 through May 4, 1976. He found she had no permanent partial impairment and expected she would be able to continue work with her employer without further aggravation. He authorized time loss from April 28, 1976 to May 10, 1976.

Dr. Berselli, who began treating claimant in May 1976, diagnosed chronic lumbosacral strain and reported claimant complained of low back pain. He prescribed conservative treatment. Dr. Berselli is considered as claimant's primary treating physician.

On August 16, 1976 Dr. Pasquesi noted that claimant complained of a constant ache in her low back. His diagnosis was chronic lumbosacral instability. It was his opinion that claimant's medical condition was stationary and he felt claimant should attempt employment in some occupation not requiring repetitive bending, stooping and twisting of the trunk and not requiring her to be on her feet nor to sit fully for an eight hour shift without changing positions as she needed. Claimant's lifting limitation was 30 pounds. He did not believe claimant was vocationally stationary. Later, he rated claimant's impairment at 10% of the whole man on the basis of chronic moderate pain. Dr. Berselli concurred with this report.

The Second Determination Order was issued on October 22, 1976.

Dr. Berselli wrote claimant's attorney on June 27, 1977 advising him that claimant had been seen on May 19, 1977 with complaints of back pain. He provided conservative treatment, including hospitalization for 1 week commencing June 13, 1977.

Claimant is now 32 years old and has a GED. Her work experience is limited to clerking type occupations, except for her operating machinery for one year making sleeping bags and her employment as a meat slicer. Claimant did not work for seven years during her first marriage.

The ALJ found, after reviewing all the evidence, that

claimant had had a high paying job at her last employer's and is an intelligent person. He concluded claimant has the ability to compete favorably in the general labor market but has sustained some loss of wage earning capacity. He increased her award to 20% of the maximum for unscheduled disability.

The ALJ would not allow any additional time loss. He found the one-week hospitalization did not warrant a general reopening of her claim. Claimant had been paid for the period of her hospitalization.

The Board, after de novo review, modifies the ALJ's order. Dr. Berselli's report of June 22, 1977 establishes that claimant is entitled compensation for temporary total disability from May 19, 1977 and until she was released from the hospital on June 20, 1977.

The Board finds claimant is entitled to an additional award of unscheduled disability. Claimant is barred from returning to many previous lines of employment. The limitations placed on her by Dr. Berselli will lessen the types of work she now can do. Therefore, the Board concludes she has sustained a greater loss of wage-earning capacity than that for which she has been compensated and feels an award for 30% of the maximum would be more adequate to compensate claimant for her loss.

The Board recommends that claimant request reconsideration from the Disability Prevention Division of her previous request for job placement. However, the issue of vocational rehabilitation, although raised in claimant's brief, was not presented to the ALJ; therefore, the Board cannot consider this issue on review.

ORDER

The Administrative Law Judge's order, dated February 15, 1978, is modified.

Claimant is entitled to compensation for temporary total disability from May 19, 1977 through June 20, 1977, less compensation already paid. This is in addition to the compensation for temporary total disability granted by the Determination Orders of July 23, 1975 and October 22, 1976.

Claimant is entitled to an award of compensation equal to 96° for 30% unscheduled disability for her low back injury. This is in lieu of any prior awards.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the total increased compensation granted claimant as a result of the ALJ's order and this order, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 75-4945 JULY 28, 1978
WCB CASE NO. 76-6087

BRINGFRIED RATTAY, CLAIMANT
Martin, Bischoff, Templeton & Biggs,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order

On December 27, 1977 the Board issued its Order on Review in the above entitled matter which affirmed and adopted the Opinion and Order of the Administrative Law Judge (ALJ), dated May 4, 1977, a copy of which was attached to the Board's Order on Review and made a part thereof. The ALJ's Opinion and Order had affirmed the denial by the State Accident Insurance Fund of claimant's request for aggravation. The Board's Order on Review was appealed to the Court of Appeals on January 30, 1978 and on March 6, 1978 the Court of Appeals dismissed, on its own motion, the petition by claimant for lack of jurisdiction as not timely filed, pursuant to ORS 656.295(8).

On June 1, 1978 claimant, by and through his attorney, moved the Board for an order modifying, changing or terminating its former Order on Review entered in the above entitled matter on April 29, 1975. In that case, the Board also concurred with the finding of the ALJ that claimant had not met his burden of proof that his alleged back problems were precipitated by the industrial accident.

Claimant now contends that there is newly discovered evidence which has been acquired that clearly establishes that claimant's back problems were caused by his industrial accident.

The Board finds that the question of causal relationship of claimant's back condition to his industrial injury of November 22, 1971 has been litigated twice and each time it has been found by both the ALJ and the Board, after de novo review, that the back condition was not the result of this industrial injury.

The newly discovered evidence which is set forth in the motion does not justify reopening this matter for further hearings and, therefore, the Board concludes that the claimant's request for it to exercise its own motion jurisdiction pursuant to ORS 656.278 and modify, change or terminate its former Order on Review entered on April 29, 1975 should be denied.

IT IS SO ORDERED.

WCB CASE NO. 77-7305 JULY 28, 1978

GARY WINSLOW, CLAIMANT
Hoffman, Morris, Van Rysselberghe & Guistina, Claimant's Attys.
Collins, Velure & Heysell, Defense Attys.
John L. Klor, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks review by the Board of the Administrative Law Judge's (ALJ) order which awarded claimant 64° for 20% unscheduled low back disability.

Claimant suffered an industrial injury on May 15, 1974 when he tripped on a stairway and injured his left knee and low back. An acute sacroiliac strain was diagnosed.

Claimant was seen by Dr. Schroeder in June 1974, complaining of moderately severe pain in his low back. In September 1974 Dr. Schroeder felt that claimant would be unable to return to his lumber mill job but that he should be started on a job change training program as soon as possible.

The claim was closed in January 1975 with an award of compensation for temporary total disability only. It was later reopened for vocational rehabilitation assistance which he received from the Vocational Rehabilitation Division and was enrolled at Lane Community College in a two year course of training in diesel mechanics. Claimant completed the first year with a "B" grade average. During the following year in the fall semester he received knife wounds to his left arm as a result of a fight which apparently he did not start. Claimant says that his failure to complete the diesel mechanic course was due to losing almost two months of school as the result of his wounds. Claimant is a high school graduate and had worked quite regularly in laboring type employment from the time of his graduation to the time of his industrial injury.

After his vocational rehabilitation program was terminated a Second Determination Order was entered in November 1977 which awarded claimant 16° for 5% unscheduled low back disability.

When claimant had been seen by Dr. Schroeder in May 1977 the doctor reiterated his opinion that claimant should probably attempt to find some type of lighter work. He also indicated that claimant was not in the best physical shape and many of his problems had been muscular in nature and claimant was aware of this.

The ALJ found evidence that even though claimant had

been forced to miss substantial time from school during the second year, the impression of the claimant's vocational counselor was that claimant had difficulties in the academic situation and had certainly lost confidence in his ability to handle the program. It was the counselor's opinion that job placement efforts would be more beneficial for claimant. The Vocational Rehabilitation Division placed claimant on an on-the-job training program at Tru-Line Automotive to obtain mechanical training. He worked briefly at this employment and then quit because, according to claimant, he was having difficulty with the son of the owner; also, he was blamed by the owner for poor housekeeping around the work site. The owner testified that none of his employees were required to put up with any difficulties from his son and he attributed claimant's termination to the fact that claimant simply did not want to work at that particular job. According to the owner claimant performed a substantial amount of heavy physical labor while working for him and did so without any difficulty.

Claimant testified at the hearing that he had made several attempts to secure work and attributed his failure to gain employment primarily to his back injury.

The ALJ found that despite the fact that claimant had rather minimal objective findings and subjective complaints, Dr. Schroeder consistently stated that claimant should not return to heavy mill work. Apparently claimant did some heavy work while he was at Tru-Line but this seemed inconsistent with the level of physical activity appropriate to his physical status as recognized by Dr. Schroeder.

The ALJ further found that claimant had made a legitimate attempt to return to work; he is only 26 years old, he is married, has a three-year-old child and his wife is five months pregnant. Claimant has been on welfare for the last two or three months. The fact that he unsuccessfully followed a vocational rehabilitation program which resulted in an extended period of compensation for temporary total disability and other returning expenditures, did not impress the ALJ as overturning the conclusion reached by Dr. Schroeder that claimant should not return to mill work.

The ALJ concluded that it was a matter of common knowledge that back injuries severely limit a workman's reemployability, however, he did not believe that all employers automatically excluded all workers with back injuries from reemployment. In this case claimant had been awarded 16° which represents only 5% of the maximum allowable for unscheduled disability. The ALJ felt that claimant, if he would do his part in seeking employment and try to convince potential employers that he no longer has any severe back problems, would ultimately secure employment consistent with the type recommended by Dr. Schroeder.

The ALJ felt, after considering claimant's age, education, intelligence, and retrainability and also the work activity limitations imposed upon him by Dr. Schroeder, that claimant has sustained a greater loss of potential wage earning capacity than that which he had been awarded, therefore, he increased the award from 16° to 64°.

The Board, on de novo review, finds that Dr. Schroeder, who was claimant's treating physician, stated that claimant had persistent discomfort in his back and he anticipated claimant would have a mild residual disability; Dr. Schroeder also indicated that a job change would benefit claimant. At the time claimant was injured he was working as a line-up man in the sawmill. The evidence indicates that claimant was enrolled in a vocational rehabilitation program which he was unable to complete. Whether claimant was forced to quit school because he had missed so much time or whether it was because of lack of interest or aptitude cannot be determined with any great accuracy from the record. Claimant states it was because of the time lost from school; on the other hand, his counselor believed that claimant was really tired of school and had somewhat lost confidence in his ability to handle the program. Further schooling was discontinued and claimant was put on an on-the-job training program where he lasted for a short period of time. Again there is a dispute. Claimant says he couldn't get along with the owner's son and that the owner bawled him out for poor housekeeping around his work site. The owner testified this was not true; that claimant's resignation was due to the fact that he did not want to continue to work at that particular job.

There is also evidence in the record based on the owner of Tru-Line Automotive that claimant was able at that time to perform a substantial amount of heavy physical labor without any difficulty.

Claimant testified that he made numerous attempts to seek employment but was not hired because of his back condition. There is no evidence to verify this; no employers were produced to testify that claimant had sought employment with them.

The Board concludes, based upon Dr. Schroeder's statement that claimant could do many types of work but that he could not return to heavy mill work, and the fact that claimant, in spite of Dr. Schroeder's opinion, did perform heavy physical labor without any particular problems, that claimant has not lost a substantial amount of his potential wage earning capacity as a result of the industrial injury.

The Board concludes that claimant would be adequately compensated for his loss of wage earning capacity by an award of 32° which represents 10% of the maximum allowable for unscheduled disability.

ORDER

The order of the ALJ, dated February 27, 1978, is modified.

Claimant is awarded 32° of a maximum of 320° for unscheduled low back disability. This award is in lieu of the award made by the ALJ in his order which in all other respects is affirmed.

SAIF CLAIM NO. GODC 1075 JULY 28, 1978

CLYDE C. WYANT, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant filed a claim for right elbow pain on May 10, 1967, stating that it had been occurring over the past two months. The diagnosis was acute radial humeral bursitis and the State Compensation Department accepted the claim as an occupational disease. The claim was closed by a December 26, 1967 Determination Order which granted claimant compensation for 10% loss of the right arm.

Claimant fell from the back of a pickup on June 28, 1976 and the State Accident Insurance Fund accepted his claim for the resulting low back injury (Claim No. GD 166755).

On July 14, 1976 a right carpal tunnel syndrome was diagnosed and surgically treated on July 22. Dr. Curtis Hill, claimant's treating physician, indicated on September 15, 1976 that the right hand symptoms were basically the result of the 1967 industrial injury. Based upon this report, the Fund reopened claimant's claim for the 1967 injury.

Claimant was examined by the Orthopaedic Consultants on June 13, 1977 and April 6, 1978 and the Northwest Pain Center on November 3, 1977. Their examinations were directed primarily to a low back condition claimant had as a result of the industrial injury claimant suffered on June 28, 1976 but they also indicated that claimant's right hand and wrist had not improved since March 1967 and the findings were essentially the same as those reported on December 14, 1967 with the addition of some possible intermittent weakness of right grip and stiffness of the right wrist.

Claimant has recently been granted 5% of the right forearm for the residuals of the June 28, 1976 aggravation of a pre-existing condition (Claim No. GD 166755).

On May 5, 1978 the Fund requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department finds that claimant is being paid time loss benefits for the carpal tunnel syndrome and its treatment under the claim for his low back condition; his medical expenses have also been paid and compensation equal to 5% of the right forearm (for aggravation of a pre-existing condition) has been awarded in the most recent claim (GD 166755).

Therefore, they recommend that claimant be granted no additional temporary total disability or permanent partial disability for his May 10, 1967 injury in excess of that granted by the December 26, 1967 Determination Order.

The Board concurs in this recommendation.

ORDER

The Determination Order, dated December 26, 1967, is reaffirmed.

WCB CASE NO. 77-6743 JULY 31, 1978

DARWIN L. DAVIDSON, CLAIMANT
Alan M. Scott, Claimant's Atty.
Daniel L. Meyers, Defense Atty.
Stipulation and Order of Dismissal

This matter coming on before this Board upon Request for Review by the Claimant challenging the Opinion and Order of the Administrative Law Judge made and entered on April 7, 1978, said Order granting Claimant an additional 45% unscheduled disability for total unscheduled disability to date in the sum of 60%.

The Claimant now appearing in person and through his attorney, Alan M. Scott of Galton, Popick & Scott and the Employer/Carrier appearing through Daniel Meyers of Its attorneys and it appearing that the issues on appeal have been resolved, now, therefore

IT IS HEREBY ORDERED that the Employer/Carrier shall pay to Claimant an additional 10% (32°) unscheduled disability being a total disability to Claimant to date of 70% unscheduled low back.

IT IS FURTHER ORDERED that pursuant to Claimant's Retainer Agreement with his Counsel, Galton, Popick & Scott, and in conformance with OAR Chapter 436-82-060 (1), Claimant's Counsel is awarded attorneys' fees of $300.00 from this increased award and this sum shall be paid out of the increase and not in addition thereto.

IT IS FURTHER ORDERED that the Carrier shall pay the balance due on Claimant's total award, including the additional sum made payable by this Order forthwith, in a lump sum, without any annuity discount, in order that Claimant may liquidate his outstanding debts and for other family uses.

IT IS FINALLY ORDERED that claimant's Request for Review being fully settled, is dismissed.

IT IS SO STIPULATED.

WCB CASE NO. 77-5074 JULY 31, 1978

EDITH DOUGLAS, CLAIMANT
Edward L. Daniels, Claimant's Atty.
G. Howard Cliff, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks review of the Administrative Law Judge's (ALJ) order which directed it to accept claimant's aggravation claim, pay claimant additional compensation equal to 128° for 40% unscheduled low back disability and pay claimant's attorney $900 as a reasonable attorney's fee.

Claimant, a 53-year-old cannery worker, suffered a compensable injury to her lower back on September 1, 1972. Dr. Kimberley, an orthopedic physician, found spondylolisthesis of L-5, degenerative atrophy of the intervertebral disc L-5 to S-1 and obesity. He did a spinal fusion and laminectomy L5-S1 on April 2, 1973. He found claimant was medically stationary on January 16, 1974 and that her disability was moderate. The claim was closed by a Determination Order of March 28, 1974 which awarded claimant 112° for 35% unscheduled low back disability.

Claimant returned in February 1974 to a job which involved reaching, lining and moving boxes. Later that season, she worked on "finals", a much easier job which involved removal of bad fruit from a belt. Claimant was able to either stand or sit on a stool while doing this work.

On October 19, 1974 claimant was seen by Dr. Fitchett, an orthopedic physician, stating she had pains in her back and left thigh. Dr. Fitchett felt claimant's condition was an aggravation caused by her return to work. Claimant worked several months in 1975 and in 1976; she missed some time from work because of her back pain.

On January 7, 1976 claimant was examined by Dr. Gripekoven, another orthopedic physician, who believed that claimant had a spinal deformity activated by the industrial injury and further surgery; she could do sedentary work. Claimant was also seen by Dr. Tsai, a neurological surgeon, who on January 6, 1977 found left L5-S1 radicular irritation related to the injury. Dr. Gripekoven, in a later report, indicated that when he had examined claimant on February 24, 1977 he found little change in the condition since his examination of claimant on June 22, 1976. He stated she was objectively worse and disabled for any type of physical labor.

A notice of non-referral for vocational assistance was issued on March 31, 1977 because claimant was employable at that time.

On September 26, 1977 claimant's claim for aggravation was denied by the employer.

The ALJ found claimant's complaints and limitations were corroborated by credible testimony of several other witnesses; that during her work in 1977 she was engaged in modified work situation, to-wit; she was given favored, easier jobs because of her limitations and she was not required to rotate duties with the other employees and was able to use a stool and pillow at times during her work hours.

The ALJ found that claimant's early employment background included picking turkeys and working in a sawmill (Dr. Kimberley in his 1974 report indicated claimant would not be able to return to work in a sawmill). Claimant also attended bar for approximately 11 years and has worked for the employer in the canning business for approximately 24 years.

The ALJ found that claimant had established that her condition had worsened since March 28, 1974 when her claim was closed with an award of 112° for 35% unscheduled low back disability. The medical and lay evidence indicated a deterioration in her condition and capacity to work and a substantial portion of the general industrial labor market is now precluded to claimant although she can work and did work through November 7, 1977 for short hours and in the easiest job available.

The ALJ concluded that claimant's condition was medically stationary at the time of the hearing, therefore, he increased her award from 35% to 75% of the maximum allowable by statute for unscheduled disability to adequately compensate her for her permanent loss of wage earning capacity and reversed the denial of her claim for aggravation.

The Board, after de novo review, finds that claimant has failed to prove that her condition has worsened since the last award or arrangement of compensation on March 28, 1974.

Dr. Kimberley, on January 16, 1974, indicated claimant was moderately disabled and recommended that her claim be closed on that basis. At that time he advised claimant to lose weight and also advised her to return to her work in the cannery.

Dr. Gripekoven, on January 29, 1976, stated that because of claimant's current problem, he felt she was disabled for heavy physical work but could be employed on a full time basis in a sedentary-type job. His examination of claimant on February 24, 1974 revealed little change in claimant's condition since his last examination in January 1976. He stated that although claimant was subjectively somewhat worse, her condition remained relatively the same and there had been no specific reinjury. Again, he said that although claimant could not do heavy physical work she could perform more protected sedentary work and, indeed, appeared to tolerate the seasonal work when available without any difficulty. He recommended specific treatment at that time.

As indicated in the ALJ's order, when claimant first returned to work after her surgery she was assigned to a job which proved to be too difficult for her to handle and she was later transferred to a lighter-type job indicated as "finals" (the last inspection job of processing vegetables). A co-worker, who had known claimant for 10 years and worked with her in the cannery, stated that claimant performed the same job she had and in the same way that she did; claimant performed 100% just like everyone else. Claimant was told by the other workers that she didn't have to rotate belts but could stay on what was considered an easier belt but even though the belt was easier claimant still did the same amount of work as the others. Based on her co-worker's observations of claimant's work, it appears that claimant stayed on the job all day, but she did sit down once in a while while working.

The personnel manager stated that claimant had seniority with the organization and could work year around if she performed the functions of a "repack operator"; the company is unionized and seniority principles are followed. He testified that claimant could work as little as one to two days a week but that in 1977 claimant had worked six days in some weeks and once in a while worked overtime. He further testified there had been no complaints about claimant's work, that she had a good record with the company and was well liked.

The Board concludes that there has been no definitive evidence produced in behalf of claimant to indicate that her condition has materially changed since the Determination Order of March 28, 1974. ORS 656.273(1) provides that after the last award or arrangement of compensation an injured worker is entitled to additional compensation, including medical services for worsened conditions resulting from the original injury. X-rays taken by Dr. Kimberley in 1973 indicated a solid fusion L5-S1.

Dr. Fitchett, in 1974, found that the fusion was quite solid, however, claimant was still complaining of low back and left thigh pain. Dr. Fitchett did not indicate there was any need to reopen claimant's claim although he placed certain limitations upon her work activity.

The Board relies heavily on the reports of Dr. Gripekoven, especially his last report in which he indicated unequivocally that the claim need not be reopened for treatment, that there was no basis for reopening and refrained from commenting upon the fact that claimant's disability should have been greater than that for which she had received benefits. In fact, there is no medical evidence that indicates that claimant's disability is greater than that awarded her in 1974.

Aside from Dr. Gripekoven's reports, the medical documentation merely restates the fact that claimant continued to have recurrent low back pain but does not support her claim for aggravation.

Claimant has worked from 1974 through the season in 1977, limiting herself to seasonal work involving the processing of fresh vegetables. It appears that many of the limitations relating to claimant's work activities have been placed upon claimant by herself and of her own choice rather than pursuant to the directions or instructions of her doctors or employer.

The Board concludes that claimant has not sustained the burden of proving her condition has worsened since the last arrangement or award of compensation in 1974 and therefore the denial of her claim for aggravation was properly denied.

The Board further concludes that the medical evidence indicates that the award of 112° for 35% of the maximum allowable by statute for an unscheduled disability adequately compensates claimant for any loss of wage earning capacity suffered as a result of her industrial injury which occurred on September 1, 1972.

ORDER

The order of the ALJ, dated December 16, 1977, is reversed.

The denial of claimant's claim for aggravation made by the employer on September 26, 1977 is approved and the Determination Order of March 28, 1977 which awarded claimant 112° for 35% unscheduled low back disability is reaffirmed.

SAIF CLAIM NO. ZC 323179 JULY 31, 1978

WILLIAM L. GATENS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his left foot on August 26, 1971 including laceration between the first and second toes, a transverse and vertical fracture of the distal phalanx of the great toe and a transverse fracture of the distal end of the first phalanx of the second toe. After hospitalization for this problem claimant was released on September 2, 1971. He had to use crutches. Claimant returned to work on November 1, 1971 and the claim was closed on November 30 with compensation for time loss benefits only.

Dr. Robert Fry requested that claimant's claim be reopened on April 4, 1972 for examination and treatment; there is no record of any time loss being paid.

Dr. Fry again requested reopening of claimant's claim on March 20, 1975 which was done. On November 13, 1975 a partial proximal phalangectomy of the left second toe was performed. The claim was again closed on April 16, 1976 with time loss benefits paid from November 13, 1975 through January 14, 1976 and compensation equal to 25% of the left second toe.

Dr. Fry, on October 27, 1977, again requested reopening of the claim. A total phalangectomy of proximal phalanx of the second left toe was done on December 18, 1977. The Fund voluntarily reopened claimant's claim on January 24, 1978.

Claimant was released for work by Dr. Fry on January 9, 1978.

The Evaluation Division of the Workers' Compensation Department was requested on June 19, 1978 to issue a determination of claimant's disability. It recommended that claimant be granted time loss benefits from December 18, 1977 through January 9, 1978 and additional compensation equal to 25% of the left second toe.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability compensation from December 18, 1977 through January 9, 1978, less time worked.

Claimant is also granted an additional award of compensation equal to 1° for 25% of the left second toe. These awards are additional to previous awards received by claimant for this injury.

WCB CASE NO. 77-4090 JULY 31, 1978

MARK D. KITZMAN, CLAIMANT
James O'Neal, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer requests review by the Board of the Administrative Law Judge's (ALJ) order which remanded to it claimant's claim for a right knee condition resulting from an industrial accident on September 14, 1976. The carrier had denied the claim on May 20, 1977.

On September 14, 1976 claimant suffered a compensable injury and insofar as it related to his right ankle the claim had been immediately accepted and remains at the present time in an open state.

Claimant is 20 years old and has been employed by the employer for approximately 22 months. On September 14, 1976 while descending a ladder he slipped and fell to the ground, landing on his right side. He immediately filed a claim for a right ankle injury and was sent to the Douglas Community Hospital. X-rays were taken of the right foot and a diagnosis of right foot contusion was made by Dr. Alavezos. In all the early medical reports there was no mention made of a knee injury.

On April 5, 1977 claimant was admitted to the hospital for a right knee arthrogram and, allegedly, on that date, he gave a history to the anesthesiologist that he had been having occasional effusions of the right knee for some six months. The arthrogram indicated definite damage in the right knee and a medial meniscectomy was performed by Dr. Streitz, an orthopedic surgeon, who stated he was not aware of a possible industrial injury to the right knee when the surgical repair was undertaken. Dr. Michalek, a general practitioner, denies any knowledge of a knee injury during the time of his treatment of claimant through March 16, 1977.

The claimant contends that he discussed the knee injury with his co-workers, with his supervisory personnel at the plant and also with his parents and employees of a local health spa where he took whirlpool treatments. A co-worker testified on behalf of the defense and stated that as far as he could recall no mention of a knee problem had ever been made by claimant although he had heard claimant complain about his right ankle.

The ALJ found claimant was an avid skier, although he testified that in the winter of 1976-1977 he did not ski at all because of his right knee condition. It was also well known that during the 1976-1977 season there was very little snow in the skiing areas. Claimant contends that the right knee condition persisted throughout the winter months and, in fact, since the industrial injury of September 14, 1976. He denied any intervening traumatic event and any precipitating event involving the right leg and knee.

The ALJ found no dispute of the fact that on April 5, 1977 claimant suffered a longitudinal tear of the right medial meniscus which required surgery. This was 6-1/2 months after his industrial injury. Immediately following his injury in September 1976 claimant returned to work for about a week utilizing crutches. In February 1977 he suffered bronchial problems which were unrelated to his work but serious enough to require hospitalization which kept him from work. Claimant had not returned to work when the right knee condition was diagnosed on April 5, 1977, therefore, claimant had not been working from the middle of September 1976 to April 1977.

The ALJ found that claimant admitted that the right ankle gave him the most problem with respect to pain and weakness and he concluded that this condition could easily mask the condition of the right knee particularly to a lay person. Claimant testified that his "leg" hurt, including the knee area, but he assumed this was from the ankle injury and it was this injury that he reported and spoke about to his co-worker. As the ankle injury subsided claimant became more aware of his right knee condition and when he was taken off work in February for the bronchial problem, this stayed the necessity for making a decision on what to do about his right leg problems.

The ALJ found that when claimant knew that he soon would be released to return to work following his lung problems he felt he must determine what was causing his right knee pain and for that reason he made an appointment to see Dr. Streitz.

The ALJ concluded that the time span between September 14, 1976 and February 1977 did not prove that claimant had not sustained a knee injury in September 1976, absent a showing of any intervening traumatic event. Claimant had been able to perform his day to day duties for 22 months prior to the injury on September 14, 1976, indicating that he had no knee condition

at that time. When claimant fell from the ladder on his right side, he apparently injured both his right foot and right ankle and it is reasonable to accept the fact that he also injured his right knee at the same time.

The Board, on de novo review, finds that after the injury of September 14, 1976 claimant immediately filed a claim stating he had injured his right ankle and he was treated for this injury at the Douglas Community Hospital. X-rays were taken of his right foot but there is no hospital nor medical record which indicates any injury to the right knee. The lay evidence indicates that claimant made no complaint about his right knee for several months, in fact, it was not until February 16, 1977 when claimant was admitted to the hospital for a tonsillectomy that he began to make complaints about his knee. He then saw Dr. Streitz who performed an arthrogram. The Mercy Medical Center records of April 18, 1977 indicate, "This 20 year old gentleman was seen with a history of recurrent popping of his right knee without incident of injury."

The Board finds that although claimant testified that he discussed his knee injury with his co-workers and his parents and friends at a local health spa, none of these people appeared at the hearing to corroborate his testimony. Claimant had the opportunity to produce this corroborative testimony and, knowing that it was necessary to support his case, his failure to produce it raises a presumption that such testimony would have been adverse to his contention. In fact, a co-worker testified on behalf of the defense, stating claimant had made no complaints about a knee problem. Dr. Streitz said that no one had ever reported an industrial injury to him and Dr. Michalek had no report of any injury.

The Board finds there is an absolute lack of any evidence whatsoever connecting the knee condition to the injury. Claimant never complained to his doctors that he hurt his knee at the same time that he hurt his ankle and if he spoke about it to anyone else he did not produce these people to testify in his behalf.

The Board concludes that the medical evidence supports a finding that claimant injured his ankle on September 14, 1976, the claim for which has been accepted and is now in open status, but he did not, at the same time, suffer any injury to his right knee. Therefore, the denial of claimant's knee problem made by the carrier on May 20, 1977 should be approved.

ORDER

The order of the ALJ, dated January 25, 1978, is reversed.

The denial by Liberty Mutual Insurance Company of any responsibility for claimant's right knee problem resulting from an industrial injury on September 14, 1976 is approved.

WCB CASE NO. 77-4991 JULY 31, 1978

DOROTHY McIVER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order affirming the Determination Order, dated June 27, 1977, which awarded claimant additional compensation for temporary total disability but no additional compensation for permanent partial disability. Claimant's claim had been first closed by a Determination Order dated January 23, 1974 which awarded her compensation for temporary total disability and 32° for 10% unscheduled disability for her back injury. Claimant contends she did not refuse offered medical treatment and is entitled to an award of additional permanent partial disability.

Claimant, at the age of 41, while employed as a waitress, sustained a compensable injury to her back on June 17, 1972 while lifting a bus tray. This injury was diagnosed by Dr. Eckhardt as an acute low back strain. Claimant received conservative treatment and was released for light work on August 11, 1972. Dr. Eckhardt noted any bending or lifting aggravated her back discomfort and referred claimant to vocational rehabilitation in April 1973.

Dr. Gantenbein, after examining claimant, reported that she had intermittent aching in her low back, right hip and leg with no regular pattern and was aggravated by bending, vacuuming, or sitting. He felt claimant had a recurrent low back strain and advised a change of occupation. Too much lifting and twisting was required working as a waitress.

Claimant was found to be medically stationary on November 26, 1973 and the first Determination Order was entered on January 23, 1974 granting claimant 32° unscheduled disability.

In February 1975 claimant was hospitalized for back pain which radiated into her thoracic spine and into her neck. She also complained of pain in her legs and reported she would stumble and fall while walking. Her left leg would become cold and numb. Dr. Ragsdale diagnosed chronic lumbar strain possibly secondary to arthritis and suggested conservative treatment.

Dr. Eckhardt in August 1975 was unable to explain claimant's worsening condition. He felt claimant had been unable to work since November 1974 because of her back problem.

A stipulation approved on October 20, 1975 reopened claimant's claim for medical treatment with payment of time loss benefits to begin on December 9, 1974.

Claimant was again hospitalized on December 3, 1975 for back pain. Dr. Vigeland diagnosed chronic cervical, thoracic lumbosacral pain with no demonstrable neurologic deficit.

After being released, claimant was examined by the Orthopaedic Consultants in January 1976. They reported claimant had refused treatment at the Pain Clinic. Their diagnosis was lumbosacral sprain, probable narcotic addiction, and a hysterical neurotic personality. They thought claimant was medically stationary and needed psychiatric treatment. Dr. Eckhardt disagreed; he felt claimant needed further medical treatment and believed it was possible claimant was addicted to codeine, but claimant was not currently using any medication with codeine.

Dr. Parvaresh, in April 1976, opined claimant needed psychiatric treatment because of a neurotic disorder associated with psychophysiological musculoskeletal disorder. Her main problems were tension, feeling of depression and inability to ventilate her feelings. Claimant was hesistant to begin psychiatric care. Dr. Parvaresh felt claimant's industrial injury aggravated her pre-existing disorder and that if claimant refused psychiatric treatment, there was little anyone could do and she would be stationary with a disability of 20%. Dr. Eckhardt concurred that claimant would benefit from psychiatric treatment.

Claimant was hospitalized in September 1976 and Dr. Parvaresh suggested electro therapy for her depression which claimant refused. She was discharged after two weeks; her condition was improved but she needed continuing treatment.

Dr. Anderson reported in January 1977 claimant did not sustain a neurologic injury or a bony injury and all examinations failed to reveal neurologic abnormalities. He opined claimant had chronic post-traumatic anxiety depression with multiple somatic complaints centered upon her musculoskeletal system.

The Orthopaedic Consultants reported in April 1977 claimant continued to complain of constant low back pain radiating into her lower extremities, but more severe now than at the time of their last examination. Claimant also reported headaches. The doctors' diagnosis remained the same and they felt that the cervical pain related by claimant was not related to her injury. They were unable to determine if claimant was psychiatrically stationary and suggested psychiatric treatment and weaning from medication; she was found stationary neurologically and orthopedically with a mild loss of function of her back.

The Second Determination Order dated June 27, 1977 was entered granting no additional award for permanent partial disability.

Claimant again was hospitalized for 10 days in August 1977 for conservative treatment by Dr. Eckhardt, who suggested claimant might benefit from treatment at a pain clinic.

Claimant had worked almost all of her adult life as a waitress. She completed the ninth grade and did obtain a GED through vocational rehabilitation in November 1973 and returned to her employer and worked as a manager. Claimant has an apparent talent for writing children's stories and has completed on her own a writing course and desires to take a correspondence course specializing in writing children stories.

Claimant testified that because of her back problem she no longer drives and that walking, lifting, sitting in one position for a long period of time increase her pain and that she has trouble bending, or stooping and occasionally uses a cane.

The ALJ concluded, based on all the evidence, that claimant was not permanently and totally disabled and because she has refused treatment from a psychiatrist and shock therapy at the pain clinic, she was not entitled to any increased award for permanent partial disability.

The Board, after de novo review, does not find that the claimant ever rejected treatment at the Pain Clinic. She did apparently have trouble with Dr. Parvaresh and the treatments he suggested, such as electrotherapy. Dr. Parvaresh found that claimant's pre-existing condition was aggravated and opined that claimant had a 20% disability. Dr. Eckhardt found claimant was unable to return to any waitress type of work.

The Board concludes, based on all the evidence, claimant is entitled to an increased award to compensate her for her loss of wage earning capacity and increases her award of 10% to 40% of the maximum.

The Board recommends that claimant be referred to the Pain Clinic for treatment and that the Disability Prevention Division provide sufficient funds to pay for the correspondence course in writing children's stories which claimant desires to enroll in.

ORDER

The Administrative Law Judge's order, dated December 23, 1977, is reversed.

Claimant is hereby awarded compensation equal to 128° for 40% unscheduled disability for her back injury. This award is in lieu of and not in addition to any prior awards of compensation.

WCB CASE NO. 76-7189 JULY 31, 1978

RONALD D. McNUTT, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Davies, Biggs, Strayer, Stoel & Boley, Defense Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
SAIF, Legal Services, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant appeals the Administrative Law Judge's (ALJ) order which awarded him temporary total disability benefits for November 2-10, 1975, November 17-29, 1975, January 5-16, 1976 and March 18 through April 2, 1976; ordered the Fund's denial set aside; granted claimant 32° for 10% unscheduled disability; ordered the University of Oregon Medical School bill be paid by the Fund; and granted an attorney's fee to his attorney of $800. The ALJ denied claimant's request for any penalties.

Claimant contends he is entitled to: (1) an additional period of temporary total disability, (2) penalties for the Fund's unilateral termination of his benefits, (3) penalties for the Fund's failure to pay University of Oregon Health Sciences Center's bill, and (4) an increased award of permanent partial disability.

Claimant, 30 years old at the time of his injury, was employed on a full-time basis as an apartment manager for Beautihome Properties and on a part-time basis for Beautihome Services repairing and cleaning up buildings. He sustained an injury to the middle toe of his right foot on October 4, 1975 while cleaning up an apartment while in the employment of Beautihome Properties, which was a non-complying employer. Claimant filed claims with both employers. The Fund accepted the claim on July 12, 1976 and Fireman's Fund, the compensation carrier for Beautihome Services, accepted the claim on November 22, 1975.

Claimant cleaned and bandaged his toe after his injury, but later required medical treatment. Dr. Anderson found an infection on toes 2-5 of claimant's right foot diagnosed as severe pyoderma. He prescribed medication and soaking of the feet.

Claimant, after being treated for two weeks, did not respond and was transferred to the University of Oregon Medical School. Claimant's history revealed he had a previous problem of an eczema-like reaction on his hands and feet. Dr. Hanifin diagnosed generalized eczematous dermatitis; mixed bacterial toe web infection; also, external otitis; beta strep; Group A olecranon bursitis; impetigo of the left knee and alchoholism.

Dr. Chamales reported in February 1976 that claimant was hospitalized at the University of Oregon Health Sciences Center twice for severe eczema, gram negative toe web infection and an infection of his elbow which required surgery. He noted that claimant's skin was sensitive because of his eczema and especially sensitive and susceptible to skin infections. He opined claimant would be unable to do many jobs because handling of materials such as paint or chemicals might irritate his eczema.

On July 16, 1976 Beautihome Properties was declared to be a non-complying employer and the claim was referred to the Fund for processing and payment of benefits.

A report from the University of Oregon Health Sciences Center on September 20, 1976 related that claimant's injury of October 1975 led to his need for hospitalization. It also indicated the claimant's allergy condition was unrelated to his toe injury, but that the latter prolonged claimant's condition. The physician reported that claimant's work would have sensitized him and that his injury was resolved.

A Determination Order, dated November 12, 1976, awarded claimant compensation for temporary total disability from June 3, 1976 through August 11, 1976 only.

Drs. Taylor and Storrs both felt in March 1977 that it was reasonable to assume that the hospitalizations, and possibly the allergic contact dermatitis, were either caused or exacerbated by the type of work claimant was doing in October 1975. They noted claimant was extremely allergic to chemicals found in rubbers or paints.

On June 29, 1977 Drs. Chamales and Storrs reported claimant had been hospitalized on November 2-10, 1975 for infectious eczematous dermatitis; November 17-29, 1975 with an olecranon bursitis of the left elbow; January 5-16, 1976 for infectious dermatitis and gram negative toe web infection, and from March 18, 1976 to April 2, 1976 at which time claimant was found to have contact eczematous dermatitis. They felt claimant was unable to work until his condition improved and should not work as a painter because it would expose him to many substances to which he was allergic. Claimant had been treated on numerous occasions at a clinic. Drs. Chamales and Storrs noted that claimant's condition would stablize and then would flare up and take weeks to months to clear enough to allow claimant to work. They opined that between October 4, 1975 and March 28, 1977 claimant's contact allergic dermatitis had become secondarily infected numerous times and during a major portion of this time claimant was unable to work.

On September 1, 1977 the Fund acknowledged that claimant's injury of October 1975 aggravated his pre-existing dermatological problems but such aggravation was temporary. Therefore, it denied any responsibility for his subsequent dermatological problems after August 11, 1976, the date his claim was closed.

The University of Oregon Health Sciences Center bill for treating claimant amounting to $6,843 was denied by the Fund.

Dr. Chamales, senior resident dermatologist, testified at the hearing, that the cut claimant suffered in October 1975 allowed bacteria on the skin to enter his bloodstream and caused claimant's skin to erupt. He believed claimant had a permanent sensitization which will recur any time he contacts certain substances. He felt it was probable that the allergic contact dermatitis developed subsequently and after the infection.

Claimant now drives a bus; he has an 11th grade education and is now unable to return to any of his previous jobs due to his condition.

The ALJ found claimant was entitled to temporary total disability for the periods he was hospitalized as set forth in the June 29, 1977 letter from the University of Oregon Health Sciences Center. He refused to assess any penalties, but did order the Fund to pay $6,843.40 to the University of Oregon. He awarded claimant compensation equal to 32° for 10% unscheduled disability and set $800 as an attorney's fee, payable by the Fund to claimant's attorney.

The Board, after de novo review, finds claimant is entitled to time loss from June 6, 1976 to August 11, 1976, less time worked and less any compensation paid by Fireman's Fund during that period of time, but assesses no penalties.

The Board feels that the Fund's failure to pay the University of Oregon hospital bill was unreasonable and a penalty equal to 25% of the amount of that bill should be assessed.

The Board concludes claimant is entitled to a greater award for his permanent partial disability. Claimant's toe injury and resulting infections have resulted in contact dermatitis of a systemic nature. Claimant is barred from all of his prior forms of employment. He is unable to work where there is exposure to paint, rubber and plastics. He is unable to wear heavy boots and is required to keep his feet well aired. Therefore, he has suffered a greater loss of wage earning capacity than that for which he was awarded by the ALJ.

ORDER

The Administrative Law Judge's order, dated October 28, 1977, is modified.

Claimant is entitled to the award of compensation for temporary total disability from June 3, 1976 to August 11, 1977 made by the Determination Order of November 12, 1976, less time worked and less any compensation paid by the Fireman's Fund during the same time period.

Claimant is granted additional compensation in a sum equal to 25% of the University of Oregon Health Sciences Center's medical bill of $6,843.40 because of the Fund's failure to pay said bill.

Claimant is granted an award of compensation equal to 128° for 40% unscheduled disability for his dermatitis condition resulting from his October 4, 1975 injury. This award is in lieu of the award granted by the ALJ's order which is affirmed in all respects not in conflict with the directives of this order.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 76-4805 JULY 31, 1978

MARY H. OVERSTREET, CLAIMANT
Franklin, Bennett, Ofelt & Jolles,
Claimant's Attys.
Bruce Bottini, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

The claimant seeks review by the Board of the Administrative Law Judge's (ALJ) order which approved the Determination Order of August 26, 1976 whereby claimant was granted compensation for temporary total disability from March 22, 1975 through April 16, 1976.

Claimant initially injured her back during April 1974 while employed as a LPN. Claimant was still undergoing treatment, although she had returned to work, when she again injured her back on March 4, 1975; the injury was diagnosed as a chronic postural lumbosacral strain superimposed upon a partial sacralization of L5.

Claimant was offered postural and gait training programs at Emanuel Hospital; however, on June 10, 1977 a report from Dr. Gritzka indicated that claimant's therapist had stated claimant had attended only five of the twelve scheduled sessions. Claimant denies she was that lax in attendance, but the therapist's impression is that claimant really doesn't follow through well at home with the postural and gait training principles, if she does them at all.

Dr. Gritzka stated that enrollment in the Disability Prevention Division was indicated and, if an effort to decrease her somatic and subjective complaints was to be made, she should probably require enrollment in the Portland Pain Rehabilitation

Center. It was his opinion that claimant was nearing a medically stationary point and claim closure in the near future would be appropriate.

During January 1976, while claimant was at the Portland Pain Rehabilitation Center, marked psychophysiological musculoskeletal disorder was confirmed; claimant was found to be poorly motivated and the program was unsuccessful. Claimant was discharged in January, however, she received compensation for temporary total disability until April 16, 1976.

During February and March 1976 claimant was treated by Dr. Mueller for a January 1976 automobile accident in which she injured her left shoulder, knee and low back region. Claimant did not reveal to Dr. Mueller until her second visit that she had suffered an industrial back injury. Later, Dr. Mueller reported that claimant had made a recovery from her left knee and left shoulder automobile-related injuries but he suggested that Dr. Gritzka determine whether or not claimant had recovered from her industrial injury.

Claimant was seen by Dr. Reynolds between December 1976 and April 29, 1977, according to his records; according to claimant, Dr. Reynolds is still treating her. In August 1977 Dr. Reynolds reported the psychological overlay superimposed upon minor injury was not connected to the industrial injury.

The ALJ found that claimant steadfastly maintained that she has done her best to follow through on all the training programs but she refused to accept the recommendations or explanations of the doctors nor would she perform the exercises recommended by either Emanuel Hospital or the Portland Pain Rehabilitation Center.

The ALJ found the meager evidence of permanent partial disability was not convincing. Dr. Gritzka's report of August 31, 1976 did not refute his earlier report that claimant was medically stationary, it only illustrated claimant's refusal to work.

The Board, on de novo review, finds very little medical evidence of any permanent disability; however, there is evidence that in her present condition, claimant cannot continue to work full time as a licensed practical nurse and, therefore, she has lost a small portion of her potential wage earning capacity and for this she should be conpensated.

The Board concludes that an award of 32° which represents 10% of the maximum allowable by statute for this unscheduled disability would adequately compensate claimant for her potential loss of wage earning capacity resulting from her industrial injury.

ORDER

The order of the ALJ, dated November 30, 1977, is modified.

Claimant is granted 32° of a maximum of 320° for unscheduled low back disability.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the compensation granted claimant by this order, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-5639 JULY 31, 1978

WILLIAM SAUNDERS, CLAIMANT
Eldon M. Rosenthal, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks review by the Board of the Administrative Law Judge's (ALJ) order which affirmed the March 17, 1977 Determination Order whereby claimant received no additional permanent disability above the 48° awarded him by an earlier order.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated January 26, 1978, is affirmed.

WCB CASE NO. 77-7544 JULY 31, 1978

ROBERT M. SEATON, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

A request for review, having been duly filed with the Workers' 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 Administrative Law Judge is final by operation of law.

WCB CASE NO. 77-3622 JULY 31, 1978

RICHARD STRITT, CLAIMANT
Bryant & Guyett, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) Opinion and Order which ordered the Fund to assume the reasonable and necessary cost for claimant's move to Redmond, Oregon and to pay claimant's attorney $600 as a reasonable attorney fee, but did not assess any penalties. The Fund contends moving expenses incurred by claimant are not reimbursable under ORS 656.245.

Claimant, a 38-year-old chip truck driver, developed a contact dermatitis condition which he first noticed in January 1976. Claimant was found to be allergic to wood products. Dr. Maeyens advised claimant to move to central Oregon which he did in late 1976.

A Determination Order, dated May 17, 1977, awarded claimant compensation equal to 16° for 5% unscheduled disability resulting from dermatitis.

The claimant requested that the Fund pay for his moving expenses to Redmond and the Fund, on May 23, 1977, denied responsibility for these expenses.

After the parties stipulated to the facts, the ALJ found that ORS 656.245 which speaks of "medical services" as including "other related services" was broad enough to include the reasonable and necessary cost of claimant's move because of his industrial injury and which had been done upon the basis of expert medical advice. He found that due to the uncertainty of the law regarding such moving costs, the denial by the Fund was not unreasonable and did not assess penalties.

The ALJ ordered the Fund to assume the reasonable and necessary cost for claimant's move to Redmond and awarded the sum of $600 as and for a reasonable attorney fee to claimant's attorney.

The Board, after de novo review, affirms the ALJ's Opinion and Order. The parties did not make an issue out of claimant's need to move because of the dermatitis. The sole issue raised was the legal question of the Fund's responsibility for payment of moving expenses.

The Board concludes, based on the record, that ORS 656.245 is broad enough to provide for the payment of moving costs

where the moving is required because of claimant's condition which is work-related and is done pursuant to medical advice.

ORDER

The Administrative Law Judge's order, dated January 16, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $350, payable by the Fund.

WCB CASE NO. 77-473 AUGUST 3, 1978

JOSEPH ALBERT, CLAIMANT
Hess & Hess, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which found claimant to be permanently and totally disabled.

Claimant, a 40-year-old oyster shucker, sustained a compensable injury on May 16, 1974 when he twisted his right wrist opening oysters. Dr. Caron diagnosed sprain of the right wrist.

Dr. Stolzberg reported in July 1974 that he found injury to the nerves of claimant's right hand. He felt there was also some soft tissue involvement.

Claimant received conservative treatment consisting of a splint, a sling and physical therapy. Nerve conduction studies were normal.

Claimant was admitted to the Pain Clinic on January 20, 1975 with an admitting diagnosis of causalgia right hand. Dr. Newman found claimant was not motivated to return to work and had questionable motivation for rehabilitation. He diagnosed hysterical conversion with significant secondary gain in the form of disability benefits. He felt claimant was imitating his wife's disability (she is permanently and totally disabled). Claimant has a 4th grade education and is illiterate. Claimant, while employed, made $450-$475 per month, but indicated he would refuse any type of employment where he did not take home $1,000 per month.

Dr. Pasquesi reported in April 1975 that claimant complained of pain in the right wrist. Claimant was still wearing a splint, but there was no atrophy. Dr. Pasquesi found 100% impairment of the forearm or hand; claimant was medically stationary. Dr. Begg concurred.

A Determination Order, dated August 29, 1975, awarded claimant compensation for time loss from May 16, 1974 through August 11, 1975 and 135° for 90% loss of his right forearm. However, claimant entered an authorized vocational program and his claim was reopened on February 18, 1976.

Dr. Seres of the Pain Clinic reported in March 1976 that he had again examined claimant and suggested treatment with a transcutaneous stimulator. No neurological problems were found.

On March 17, 1976, the Disability Prevention Division withdrew their referral for vocational rehabilitation.

Dr. Begg indicated in April of 1976, based on the length of time he had treated claimant and the lack of any objective evidence, that he felt claimant's problem was psychological.

The Orthopaedic Consultants found claimant's condition to be stationary in September 1976 and recommended no further treatment. The diagnosis was a sprain of the right wrist, by history, and functional overlay. They felt claimant could return to the same occupation.

Dr. Perkins, a psychologist, indicated that, based on claimant's illiteracy, difficulty in working with numbers, lack of vocational skills, very poor vocational aptitudes, physical health problems and poor education, he was unemployable. Claimant had a moderate degree of depression and anxiety and related it to his industrial injury and subsequent predicament with emotional upset (primarily chronic neurotic adjustment) being related to causes apart from the accident. Dr. Begg concurred with this report.

A Determination Order, dated November 15, 1976, found claimant was not entitled to any additional award of compensation for permanent partial disability but granted him additional compensation for time loss from January 15, 1976 through September 8, 1976.

Dr. Gritzka reported in May 1977 that he felt claimant's primary impairment was psychiatric in nature. He found claimant had the behavior of a person with a causalgia of the hand, but did not have any physical findings to support this. The use of a transcutaneous nerve stimulator had not benefited

him. Dr. Gritzka opined claimant was totally disabled but he had nothing to suggest in the way of treatment.

Claimant, in March 1976, had been in a sheltered workshop for four days, but refused to return because of the wage he was being paid, his inability to leave when he wanted to take his medicine, he felt that other people "looked funny", and he was encouraged to use his right hand. It was the counselor's opinion that the sheltered workshop would be the highest level of employment he could obtain due to his multiple handicaps.

Claimant is now 44 years old. His entire work experience has been cleaning fish and shucking oysters.

The ALJ found that, based on the evidence, claimant's psychological condition prevented him from returning to work. He felt claimant's motivation was suspect, but because of his multiple handicaps motivation was immaterial. Therefore, based on claimant's age, lack of intellectual resources, illiteracy, poor vocational aptitude, work experience and psychological impairment, the claimant was permanently and totally disabled.

The Board, after de novo review, finds the claimant is not permanently and totally disabled. The preponderance of the medical evidence indicates that claimant refuses to use his right arm. Claimant's right arm has no atrophy. There is no evidence of any bone injury to or disease associated with claimant's right arm problem. The consensus opinion of the medical doctors is that there is no muscle or bony atrophy in his right arm which would indicate that there is no impairment in his arm.

Only Dr. Perkins relates claimant's depression and anxiety to claimant's industrial injury. However, she does not relate the subsequent chronic neurotic adjustment to his industrial injury.

Dr. Newman's diagnosis was hysterical conversion reaction with significant secondary gain in the form of disability benefits. He noted that compensation was paramount in claimant's case, since his wife was receiving compensation for permanent total disability for a similar injury. Dr. Newman did not feel claimant was motivated to return to work or for rehabilitation.

Therefore, the Board concludes, based on all the evidence, that claimant is not permanently and totally disabled, although he has sustained a significant loss of use of his right arm. The Board would affirm the Determination Order which granted claimant compensation equal to 135° for 90% loss of use of his right arm.

ORDER

The ALJ's order, dated February 27, 1978, is reversed.

The Determination Order, dated August 29, 1975, is affirmed.

WCB CASE NO. 77-4924 AUGUST 3, 1978

RICK AUTRY, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the carrier's denial of his claim for neck and right leg injuries.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated March 30, 1978, is affirmed.

WCB CASE NO. 77-5810 AUGUST 3, 1978

EILEEN BENNIGHT COX, CLAIMANT
Franklin, Bennett, Ofelt & Jolles, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the Fund's denial of her request to be referred to the Northwest Pain Center.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached

hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated January 27, 1978, is affirmed.

WCB CASE NO. 76-4547 AUGUST 3, 1978

ROBIN CRAWFORD, CLAIMANT
Claussen, Billman, Coleman & Stewart, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Charles Paulson, Defense Atty.
Request for Review by Claimant
Cross-request by Liberty Mutual

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which reversed the denial of claimant's claim by the employer, The Hervin Company, and its carrier, Liberty Mutual Insurance Company; approved the denial by the employer, Quality Plastics Company, Inc., and its carrier, North Pacific Insurance Company, of claimant's claim for aggravation; and approved the Determination Order dated June 3, 1977. Claimant appeals that portion of the order which did not grant claimant a greater award for his permanent partial disability. The employer, The Hervin Company, requests that the Board determine which employer and carrier is responsible for claimant's condition.

Claimant, a 23-year-old married woman, injured her neck on March 20, 1973 while employed by Quality Plastics. Claimant missed work for two weeks; she suffered headaches on the right and also had pain in her right arm and right hand. She returned to work in August 1973 and a Determination Order, dated September 4, 1973, awarded claimant compensation for temporary total disability only.

Approximately a year later, while still working for Quality Plastics, claimant took a part time job at The Hervin Company. While working at Quality Plastics, claimant was allowed to set her own hours and at Hervin she was "on call" to fill in if another employee should become ill. Her neck pains ceased about June 1975 and during August 1975 claimant went to work full time for Hervin.

During January 1976 Hervin installed new machinery and claimant acquired new duties. Thereafter, her neck pain resumed and she saw Dr. Berselli in April 1976 who put her in Meridian Park Hospital for two weeks. Claimant filed a claim against Hervin on June 1, 1976 which indicated the injury date to be "about January 1976".

Claimant testified that her neck pain episode was worse than before and that she had to give up all outside activities including piano playing. It pained her to raise her arms above her head and to fold clothes and to vacuum and to type. Dr. Berselli continued to treat claimant and released her to return to work on May 25, 1976, noting that her discomfort was "a bit better". Claimant was laid off for lack of work in the fall of 1976 and she alleges that when she returned after the lay-off her neck problems also returned.

Claimant was examined by Dr. Stainsby on May 7, 1976 who diagnosed a chronic sprain of the cervical musculature which he felt was an aggravation of the 1973 injury, pointing out that claimant had a long and slender neck which was quite vulnerable to injury. He recommended resumption of claimant's cervical traction from the initial injury. Dr. Berselli concurred and expressed his opinion that claimant's problems began with her accident in March 1973 while working at the Quality Plastics. He did not think that her current job at Hervin was the cause of her present neck symptoms.

On August 5, 1976 Liberty Mutual, which had paid claimant time loss benefits slightly more than eight weeks, advised claimant, based upon Dr. Berselli's report, that it no longer would pay further compensation for the problems claimant had in January and April of 1976 as it appeared that those problems were an aggravation of claimant's 1973 injury.

On November 15, 1976 claimant filed a claim for aggravation against Quality Plastics which was denied by North Pacific on February 2, 1977.

On February 25, 1977 the Compliance Division of the Workers' Compensation Department issued an order pursuant to ORS 656.307, designating Liberty Mutual as the paying agent pending determination of responsibility between the two carriers.

On June 3, 1977 a Determination Order was entered whereby claimant was awarded 32° for 10% unscheduled disability resulting from upper back injury.

The ALJ found that when Dr. Stainsby's deposition was taken during November 1977 he had been advised that Dr. Berselli blamed Quality Plastics for claimant's present condition. He found that Dr. Stainsby thought the Hervin job

was a contributing cause, that it would never be known whether or not claimant would have remained symptom free but for that job. In his deposition, Dr. Stainsby stated that, based on the history related to him by claimant, he would say that the work she was performing at Hervin materially contributed to her conplaints at the time she came to see him.

The ALJ concluded that the statements made by Dr. Stainsby in his deposition indicated that claimant had suffered a new injury while working for The Hervin Company.

On the issue of claimant's extent of disability, the ALJ found that the preponderance of the evidence indicated that claimant's award of 32° for such disability was at least fair. He found part of claimant's symptoms were emotionally-induced and were not causally related to either injury. Nor did he feel that penalties were appropriate as the denials were not arbitrary.

The Board, on de novo review, finds that Dr. Stainsby on May 7, 1976 diagnosed chronic cervical sprain which he felt was an aggravation of the 1973 injury. He based this on the fact that claimant's neck structure was such that made it quite vulnerable to injury. Dr. Berselli, on July 20, 1976, concurred in Dr. Stainsby's diagnosis of a chronic sprain of the cervical musculature and stated his opinion that claimant's problem began with her accident in March 1973. In his deposition taken on November 4, 1977 Dr. Stainsby did state that, based upon the history given to him by claimant, he would say that the work that claimant was performing at Hervin materially contributed to her complaints at the time she had come to see him; however, a complete reading of Dr. Stainsby's deposition strongly indicates that claimant related inconsistent medical histories. During Dr. Stainsby's deposition, he was asked if he would challenge Dr. Berselli's conclusion that claimant's neck condition was the result of her 1973 injury. He stated, "I would certainly say that her job with Hervin, from the story she gave me was a contributing cause to her problem. We will never know whether she would have remained symptom free during that period of time or not without the job at Hervin." In response to this question by the attorney for Liberty Mutual, " . . . are you able to say that she would not have had difficulty if she had not gone to work for Hervin?", Dr. Stainsby replied, "No".

Oregon follows the "last injurious exposure rule" which places liability on the carrier on the risk at the time of the most recent injury causing disability. There are many recent decisions on cases involving the issue of whether the workperson's present condition represents aggravation or is the result of a new injury. In each of the cases where a "new injury" was found there was a specific industrial accident involving an identifiable, fairly acute trauma. No

cases have been cited which held that a second or last employer was found to be liable under the last injurious exposure rule where there had been a prior industrial injury and a subsequent gradual recurrence of symptoms with the last employer.

The Board concludes that in this case claimant was asymptomatic for a short period of time, however, based upon Dr. Stainsby's original diagnosis, concurred in by Dr. Berselli, the claimant never fully recovered from her 1973 injury and the work which she did at Hervin was an aggravation of her original injury sustained while in the employ of Quality Plastics.

With respect to the extent of claimant's permanent disability, the Board finds that the medical evidence clearly indicates that claimant has suffered a substantial amount of potential wage earning capacity. The very fact that her work at Hervin aggravated her initial injury presents a strong indication that claimant cannot continue in types of work which would involve repeated movements of her neck without recurring pain which would be sufficient to disable her. The Board concludes that the award of 32° which represents 10% of the maximum is insufficient and should be increased to 80° which is 25% of the maximum allowable for claimant's unscheduled disability.

The Board further concludes that North Pacific Insurance must reimburse Liberty Mutual for all compensation which it has paid to claimant as a result of the .307 order of February 25, 1977 and must pay claimant compensation for temporary total disability from November 15, 1976, the date the carrier received Dr. Stainsby's report of aggravation and until February 2, 1977, the date of claimant's claim against Quality Plastics. The Board agrees that the assessment of penalties would not be appropriate under the circumstances of this case.

The Board also finds that claimant's condition is medically stationary as indicated by the Determination Order of June 3, 1977, therefore, the Board by its order will increase the award for permanent partial disability granted by that Determination Order which was affirmed by the ALJ in his order.

ORDER

The order of the ALJ, dated December 21, 1977, as reissued on January 20, 1978, is reversed.

Claimant is granted 80° for unscheduled upper back disability which shall be paid to claimant by the employer, Quality Plastics, Inc., and its carrier, North Pacific Insurance Company.

North Pacific Insurance Company shall reimburse Liberty Mutual for all monies which it has paid to claimant

pursuant to the order issued under the provisions of ORS 656.307 on February 25, 1977 and pursuant to the Determination Order dated June 3, 1977. The balance of any compensation remaining due claimant under the provisions of the Determination Order shall be paid by North Pacific Insurance Company and claimant's aggravation rights shall run from the date of that order.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted to claimant by this order, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-3224 AUGUST 3, 1978

RICHARD DOWELL, CLAIMANT
John H. Hingson III, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

The claimant seeks review by the Board of the Administrative Law Judge's (ALJ) order which granted him an additional award of 48°; claimant had been awarded 96° by a Determination Order dated March 3, 1977. Claimant contends that he is permanently and totally disabled.

Claimant suffered a compensable injury on August 15, 1975 while working as a laborer on a dairy farm. One month later Dr. Fry performed a laminectomy L3, L4 with disc excision.

Claimant, who is 35 years old, was involved in another industrial injury on February 17, 1969 while working in a plywood mill and as a result of this injury received an award of 32° for 10% unscheduled low back disability.

After the September 15, 1975 surgery claimant never recovered to the point that he could do any type of work which involved repetitive bending, stooping and twisting of the trunk, nor could he lift more than 30 pounds. Claimant was unable to do any work requiring him to sit or stand throughout an eight-hour shift without being able to change positions when necessary.

Dr. Fry felt that claimant should be given some assistance by the Disability Prevention Division and that some effort should be made to gain some type of employment or retraining for claimant. Although claimant had one year of high school education he is unable to either read nor write

which would make it very difficult, if not impossible, to retrain claimant for some type of work within his physical limitations.

On March 3, 1977 a Determination Order awarded claimant 96° for 30% unscheduled disability.

The ALJ found that claimant had not made very many actual job applications and that his several contacts with DPD and the Department of Vocational Rehabilitation had been unproductive. The option most promising was developing an on-the-job training program, however, none had been found at the time of the hearing. The claimant's file was closed with a note that if a reasonable goal could be selected claimant could return and his claim would be reopened so that proposed objectives could be explored.

The ALJ found that claimant had spent some time looking into the possibility of mobile butchering on a self-employed basis. Claimant feels that he could do the work if he were able to hire someone to do the heavy lifting. Claimant also indicated he would be willing to move to any part of the state of Oregon in order to find a job which he could do.

The ALJ concluded that claimant failed to persuade him that he was permanently and totally disabled; however, with regard to his unscheduled disability he found that claimant had done primarily manual labor since he left school after the 9th grade, was of limited intelligence (functionally illiterate) and his aptitudes were few. The ALJ doubted that the claimant's desire to seek self employment as a mobile butcher was practical. He recommended that claimant return to his DVR counselor for further efforts towards job placement.

At the present time claimant has received 32° for his 1969 injury and 96° for his 1975 injury, a total of 128° for 40% of the maximum allowable by statute for unscheduled disability. The ALJ found claimant was entitled to an additional 48° to adequately compensate him for his loss of potential wage earning capacity. He accordingly increased the award made by the Determination Order of 96° to 144° for 45% unscheduled low back disability.

The Board, after de novo review, finds that claimant's work background consisted primarily of heavy manual labor; e.g., loading box cars, pulling on the green chain, feeding dryers, turning sheets of plywood and laying core in plywood mills. He had worked in a scrap mill in a steel warehouse where he used his back extensively and, at the time he was injured in 1975, he was working on a dairy farm which also required extensive use of his back.

After his surgery in September 1975 Dr. Fry concluded that any job requiring lifting, straining, or standing for long periods of time or jobs requiring him to sit in a fixed position causing him to bend over for a prolonged period of time would be "out of the question". When this limitation on claimant's work activities is considered together with his illiteracy and educational background, it becomes readily apparent that claimant has lost a substantial amount of the labor market which was available to him prior to his industrial injury.

The evidence indicates that claimant has sought employment but without success; claimant is conscientious and willing to do whatever he can to enable him to return to work.

The Board concludes that claimant has suffered a substantially greater loss of his wage earning capacity than is represented by the award of 144°, however, the evidence does not support a finding that claimant is permanently and totally disabled. To adequately compensate claimant for his loss of wage earning capacity an award of 240° equal to 75% of the maximum allowable by statute for an unscheduled disability is indicated.

The Board also recommends that the Field Services Division of the Workers' Compensation Department do all that it can to assist claimant to obtain employment which is within his physical and mental limitations.

ORDER

The order of the ALJ, dated January 31, 1978, is modified.

Claimant is awarded 240° of a maximum of 320° for unscheduled low back disability. This award is in lieu of the award made by the ALJ's order which in all other respects is affirmed.

Claimant's counsel is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted claimant by this order, payable out of such increased compensation as paid, not to exceed $2,300.

WCB CASE NO. 76-4760 AUGUST 3, 1978

CATHERINE HANKINS, CLAIMANT
Robert S. Gardner, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the August 30, 1976 Determination Order whereby she was granted compensation equal to 16° for 5% unscheduled right shoulder disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated November 9, 1977, is affirmed.

WCB CASE NO. 77-6362 AUGUST 3, 1978

JOHN LOE, CLAIMANT
Kennedy, King & McClurg, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted him compensation equal to 3° for loss of the right ring finger and 4.5° [sic] for loss of opposition of the right thumb.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof. A correction should be made, however, on page 2 of the order in the second full paragraph. The figure "4.5°" should be changed to read "4.8°".

ORDER

The order of the ALJ, dated February 28, 1978, is affirmed.

WCB CASE NO. 77-4490 AUGUST 3, 1978

BECKY PIERCEY, CLAIMANT
Sid Brockley, Claimant's Atty.
Bruce A. Bottini, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's order which affirmed the carrier's denial of her claim for a dermatitis condition.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated February 24, 1978, is affirmed.

WCB CASE NO. 77-2376 AUGUST 3, 1978

CHARLES C. TACKETT, CLAIMANT
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted him temporary total disability benefits from October 14, 1976 through December 27, 1976.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated January 13, 1978, is affirmed.

WCB CASE NO. 77-1724 AUGUST 3, 1978

GLADYS J. WEHINGER, CLAIMANT
A. C. Roll, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the Fund's denial of her claim for an occupational disease.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof. The ALJ found the claimant and her husband were maintaining a dairy farm in 1971, however, the evidence reveals that all of the dairy cows had been sold in 1968.

ORDER

The order of the ALJ, dated November 28, 1977, is affirmed.

WCB CASE NO. 77-3973 AUGUST 4, 1978

EUGENE M. ALSMAN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which found claimant to be permanently and totally disabled.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated January 30, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $200, payable by the Fund.

WCB CASE NO. 77-358 AUGUST 4, 1978

JOHN T. BARKER, CLAIMANT
Harry R. Kraus, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which found claimant's claim compensable and remanded it to the Fund for acceptance and payment of benefits pursuant to Oregon Workers' Compensation Law. The Fund contends that claimant's claim is not compensable and that its denial should be affirmed.

Claimant, at the age of 36, alleges he developed pneumonia as a result of his work exposure. Claimant worked at the Veteran's Thrift Store as a cloth-rag salvager and alleges he developed pneumonia in November 1976 for which he was hospitalized.

Claimant's work area is an area about 20' x 20' in size. One end has two large doors which were sometimes open or partially open. Claimant testified his work was strenuous causing him to perspire. He would then take a break and stand around until he cooled down.

In November 1976 claimant developed a cough, shortness of breath and his head hurt and he became dizzy. Dr. Hansen diagnosed pleuritis and possible early pneumonitis. Dr. Lloyd in December 1976 diagnosed pneumonia and reported the cause of his pneumonia was his working in the back of the store with the doors open.

Claimant filed his claim on December 6, 1976 which the Fund denied on January 11, 1977.

The ALJ found that based on Dr. Hansen and Dr. Lloyd's reports that claimant developed his pneumonia due to his industrial exposure.

The Board, after de novo review, concurs with the ALJ's order, Drs. Lloyd and Hansen both clearly relate claimant's work exposure to his development of his pneumonia. Therefore, the Board finds, as did the ALJ, that claimant's claim for his pneumonia is compensable.

ORDER

The ALJ's order, dated February 27, 1978, is affirmed.

Claimant's attorney is hereby granted as a reasonable

attorney's fee for his services at Board review a sum equal to $300, payable by the Fund.

WCB CASE NO. 77-4079 AUGUST 4, 1978

JOHN BEAN, CLAIMANT
Kirkpatrick & Howe, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Keith D. Evans, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the denial issued by Mt. Calvary Cemetary (Mt. Calvary) and the denial of Triple R Enterprises (Triple R). Claimant contends he was an employee of Mt. Calvary when he was injured.

Claimant, at the age of 27, alleges that on April 22, 1977 he sustained a compression fracture of his back which resulted in paraplegia while employed by Mt. Calvary as a laborer. Claimant had been employed approximately 10 days prior to his injury. He worked with another employee of Mt. Calvary who had been with the employer for a longer period of time.

On April 22, 1977 claimant and the co-employee had finished one job and were returning to the employer's office when they were asked by the president of Triple R to assist with the erection of a wall on property across the street from Mt. Calvary's property. They both responded and, while assisting, the wall collapsed and claimant sustained a compression fracture at L1 with resulting paraplegia.

On June 3, 1977 Mt. Calvary issued its denial on the basis that claimant's injury did not arise out of or in the course of employment with Mt. Calvary.

On July 8, 1977 Mt. Calvary moved to join Triple R, alleging it was the employer of claimant at the time of his injury. Claimant objected to the joinder, claiming that Triple R was not his employer at the time of his injury. On September 13, 1977 Triple R was joined as a necessary party and on October 3, 1977 it denied that claimant was employed by it.

Claimant and the co-employee had both proceeded on their own to the Triple R worksite. Triple R had offered to buy some beer after the end of the work day, however, there was not any employment agreement or arrangement between claimant and Triple R. The co-employee who was with claimant was

not his supervisor. Claimant's employment at Mt. Calvary did not include the performance of any construction projects.

The superintendent for Mt. Calvary testified that its employees were required to request permission to leave the premises and were required to obtain permission from their employer prior to assisting visitors who experienced car trouble or other difficulties on its property. The superintendent testified he would not have given permission to the employees of Mt. Calvary to assist Triple R.

No claim ever has been filed by claimant against Triple R.

The ALJ found that claimant's injury did not arise out of or in the course of his employment at Mt. Calvary. Therefore, he approved its denial. Based on the fact that claimant never filed a claim against Triple R, he also approved their denial.

The Board, after de novo review, concurs with the ALJ's order. The injury sustained by claimant did not arise out of nor was it in the course of his employment with Mt. Calvary. The Board finds claimant's assistance in helping to erect a wall for Triple R was not for the benefit of his employer, Mt. Calvary; it was an activity not contemplated by the employer or claimant at the time he was hired or later and it was not an ordinary risk of claimant incidental to the employment.

The wall erection did not take place on the Mt. Calvary property and was not directed by or acquiesced in by Mt. Calvary nor was claimant paid for his assistance; he voluntarily undertook this unauthorized activity in assisting Triple R.

Therefore, the Board finds claimant's injury did not arise out of or in the course of his employment with Mt. Calvary.

ORDER

The Administrative Law Judge's order, dated January 27, 1978, is affirmed.

WCB CASE NO. 76-2970 AUGUST 4, 1978

HERSCHEL BEAUPRE, CLAIMANT
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the Adminis-

trative Law Judge's (ALJ) order directing the employer to pay claimant awards equal to 35% of the left forearm, 35% of the right forearm, 35% of the maximum allowable for unscheduled head, chest and abdomen disability; affirming the Determination Order of June 25, 1975 which had granted claimant an award equal to 15% loss of the right leg; and sustaining the denial by the employer of claimant's heart and stomach problems.

Claimant does not contend that he is permanently and totally disabled but he does feel that the awards for his several disabilities are insufficent.

Claimant suffered a compensable industrial injury on December 27, 1967 when he was involved in a head-on collision with another vehicle. He sustained extensive and serious injuries. On June 25, 1975, after claimant had had a personal interview with the evaluation team, a Determination Order directed the carrier to pay claimant 30° for 20% loss of his left forearm, 22.5° for 15% loss of his right forearm, 22.5° for 15% loss of his right leg and 64° for 20% unscheduled disability resulting from injury to his head, chest and abdomen.

Claimant requested a hearing on the adequacy of the Determination Order and at the hearing the employer hand-delivered to claimant a letter denying any responsibility for claimant's heart condition or ongoing stomach problems. Claimant acknowledged that he was aware that the employer had taken this position and he was prepared to proceed on to hearing on the issue of the denial as well as the adequacy of the awards.

Claimant was 58 years old at the time he suffered the injuries which were diagnosed as "fracture, both wrists, comminuted fractures of the right tibia and femur, nasal fracture, possible internal injuries, multiple abrasions and contusions". Claimant was first treated by his family physician, Dr. Jackson, and then transferred by ambulance to the Good Samaritan Hospital in Portland and was under the care of Dr. Cottrell, an orthopedic physician, who became claimant's principal treating doctor for his orthopedic problems.

After extensive care at the hospital, claimant was initially released on February 10, 1968 to return to Forest Grove Hospital under the care of Dr. Jackson. A month later he was returned to Good Samaritan and after a prolonged stay he was an in-patient at the Rehabilitation Institute of Oregon on two occasions.

Claimant has had two surgeries on his nose to repair the fracture damage and free the nasal passages; results of the surgery were acceptable but there was some mild residual deformity. Dr. Parsons, a neurologist, also treated claimant at this time. He performed nerve conduction studies and, after waiting for a possible natural healing of the left wrist, performed sur-

gery on the right wrist on December 28, 1970. Dr. Roger G. Smith treated claimant for his internal problems.

The ALJ found that claimant had complained of irregular heartbeat to Dr. Jackson and also to Dr. Leonard Rose. Dr. Wysham, a cardiologist who examined claimant, stated that there was no definite evidence that claimant has any coronary artery disease or myocardial damage. The only significant cardiac abnormality was the presence of occasional and sometimes frequent ventricular extra systoles. When asked if this was caused by claimant's industrial injury in December 1967, Dr. Wysham replied that the evidence indicated that frequent ventricular extra systoles occurred in November 1965, therefore, there was no reason to feel that the persistence of the same abnormality in 1967 could be attributed to the industrial injury at that time. He concluded that in all probability there was no causal connection between claimant's cardiac rhythm disturbance and his injury of December 1967.

The ALJ found that the evidence indicated claimant had to use almost superhuman effort to recover from the affects of his industrial injury. Claimant returned to work on January 6, 1969 which was slightly more than a year after the accident. He had been working as a general manager but returned to the position of fleet manager, a job which involved selling on bids to governmental agencies and other large enterprises that require a volume of cars at a very low price. In this type of business the competition is very stiff.

The ALJ found that after claimant returned to work and until he retired at age 64 he lost time for surgeries but there had been no apparent problem concerning the payment of benefits for these periods of temporary total disability. Claimant contended that he retired early because of his general health which, of course, had been severely affected by his industrial injury. After retirement, claimant remained with the employer and receives $250 a month for part time work; this is below the limit and does not prevent claimant from receiving his full social security benefits. Claimant is also furnished the use of a motor vehicle by his employer.

Claimant testified that his leg still pains him but states that it is no worse now than it has been; both of his wrists bother him, the left more than the right. He testified that at times the pain would wake him at night and he also testified that he had been hospitalized because of problems with his wrist since the last medical report dated May 12, 1975; however, there was no medical evidence nor hospital records introduced to cover these problems. He has pain in the bridge of his nose, from both wrists, his leg and continuing discomfort in his abdomen. However, his biggest concern is the arrhythmia that affects his heart. He testified that he would like to be able to run as an "exercise and condition" method but because of his painful leg cannot do so.

The ALJ found that claimant, during the hearing, and while testifying, appeared to be physically at ease and able to move without limitation and without any noticeable limp. He showed no physical disability either in lifting various items which he had before him at his table and there was nothing that the ALJ could detect that would disclose any physical limitation whatever.

The ALJ found claimant had worked with only short absences since first returning to his job on January 9, 1969.

The ALJ, after carefully considering the testimony of claimant and the documentary evidence received, found that the denial of claimant's heart problems and stomach problems was justified. He found no medical testimony concerning any disability from stomach problems and the most authoritative report concerning claimant's arrhythmia condition was that of Dr. Wysham who stated in all probability there was no causal connection between claimant's cardiac rhythm disturbance and his industrial injury.

With respect to claimant's loss of wage earning capacity resulting from his industrial injury, the ALJ, after taking into consideration the fact that claimant had to reduce his work activity from manager to salesman plus the fact that he was forced to retire early because of his health which had been seriously impaired as the result of the industrial injury (even though it had occurred six years before he retired it still left claimant with severe residual problems), concluded that claimant was entitled to receive a larger award for his unscheduled disability in order to compensate him for his loss of wage earning capacity. He increased the award from 20% to 35% of the maximum.

The ALJ also found that claimant's loss of function of both his left forearm and his right forearm was greater than that for which he had been awarded and he increased the award for the left forearm from 20% to 35% and the award of the right forearm from 15% to 35%. He felt that claimant had been adequately compensated for his loss of function of the right leg by the award of 15% made by the Determination Order of June 25, 1975.

The Board, on de novo review, agrees with the conclusions reached by the ALJ and affirms his order.

ORDER

The order of the Administrative Law Judge, dated March 10, 1978, is affirmed.

WCB CASE NO. 77-4468 AUGUST 4, 1978

CHARLES BILOW, CLAIMANT
Frank Mowry, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the Determination Order of June 26, 1974 whereby claimant was awarded 64° for 20% unscheduled low back disability. Claimant contends the award is inadequate.

Claimant is a 54-year-old long distance truck driver who sustained a compensable injury to his low back on January 10, 1973 when he slipped as he was stepping down from his truck and fell about four or five feet. Claimant landed on his back. He received conservative treatment from numerous doctors, the diagnoses in each case being characterized by lack of objective finding. Claimant has not been regularly employed since his injury. He is 6'5" and weighs 235 pounds; he has an eighth grade education but no specialized training. He has been an over-the-road long haul truck driver for 33 years and has been employed by the same employer for approximately 17 years.

Claimant testified that his present physical problems included episodes of "blacking out", constant back pain and a feeling of grinding and tightening in the back. He states he is unable to walk more than two blocks, that he has muscle spasms in his back and he is unable to ride any length of time in an automobile. He also stated that lifting caused pain.

At the direction of the employer, films were taken of claimant on September 21, 1977 and again on October 1, 1977 which showed claimant driving his pickup on the California freeways, operating a power band saw, doing gardening and walking in a normal unrestricted manner; he was also filmed working in the garden with a shovel.

Claimant testified that he and his wife wanted to start work in motel management on January 1, 1978. Their duties would require managing an 18-unit motel and they would receive $700 a month plus an apartment valued at $250 plus their utilities valued at $75 a month.

On May 26, 1977 claimant underwent a myelogram which was normal and Dr. Harris, an orthopedic surgeon, concluded that the pains in claimant's back were due to arthritis and there was no significant change in his condition from 1973 until July

1977. Claimant's claim had been closed on June 26, 1974 with an award of 64°. Dr. Graham, also an orthopedic surgeon, had stated in his March 22, 1977 report that claimant's complaints were largely functional and that his subjective symptoms were much more than his objective findings would suggest.

The ALJ found that the medical evidence indicated only a minimal permanent impairment and that although claimant would not be able to return to his work as a truck driver, surgery would be considered only if his symptoms continued to worsen. The ALJ found that claimant's credibility was weakened by the contradiction in the evidence and he concluded that inasmuch as the whole disability was founded primarily on subjective complaints coupled with minimal objective findings and impaired by claimant's poor credibility, that claimant had failed to sustain the burden of proving that he was entitled to a greater award than that granted him by the Determination Order of June 26, 1974.

The Board, after de novo review, finds that claimant is a 54-year-old man who has been employed as a long haul truck driver for 33 years and has no training in any other field. The medical evidence indicates that claimant cannot return to his former occupation as a long haul truck driver.

Therefore, the Board concludes, based upon the medical evidence, claimant's restricted work background, his age, his education and adaptability for retraining at age 54, that claimant has suffered a greater loss of wage earning capacity than the award for 20% of the maximum allowable by statute indicates.

The Board concludes that claimant is entitled to an award of 96° for 30% unscheduled low back disability to adequately compensate him for the loss of wage earning capacity resulting from his industrial injury of January 10, 1973.

ORDER

The order of the ALJ, dated January 17, 1978, is modified.

Claimant is awarded 96° of a maximum of 320° for unscheduled low back disability. This is in lieu of the ALJ's order which affirmed the Determination Order of June 26, 1974 which awarded claimant 64° for 20% unscheduled low back disability.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted to claimant by this order, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-2683 AUGUST 4, 1978

KENNETH BRANDON, CLAIMANT
Paul L. Roess, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which remanded claimant's claim to it for payment of medical expenses related to claimant's cervical condition, from September 7, 1976 on forward.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated March 9, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $400, payable by the Fund.

WCB CASE NO. 77-1521 AUGUST 4, 1978

MICKIE M. GOINS, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Attys.
Request for Review by Employer
Cross-appealed by Claimant

Reviewed by Board Members Wilson and Phillips.

The employer seeks review by the Board of the Administrative Law Judge's (ALJ) order which granted claimant 240° for 75% unscheduled disability.

Claimant cross-appeals seeking review by the Board of that portion of the ALJ's order which related to the extent of permanent partial disability.

The issues before the ALJ were whether claimant was medically stationary and should the refusal to refer claimant

for vocational rehabilitation be overturned and, finally, if claimant is found to be vocationally stationary, the extent of her permanent disability. Claimant has worked for the employer for 13 years at various jobs. She has been a cashier, made plastics, worked as a data machine operator, flex writer, and done general office work. Claimant apparently had no problems the last few years as a clerk; she was able to pull files and her work was fairly well restricted to the employer's program.

On July 24, 1975 claimant tripped over hyster forks and fell to the concrete floor injuring her back and right hip. She was seen by Dr. Spady, an orthopedic surgeon, who reported to the employer on August 12, 1975 that it appeared that claimant had a probable herniated disc and he would start her on conservative treatment. He anticipated time loss at approximately four weeks. After a myelogram failed to reveal any conclusive results, a discogram was performed on January 6, 1977 which showed some evidence of degeneration of the disc at L5-4 and L5-S1.

On January 23, 1976 claimant underwent surgery for excision of the lumbosacral disc and interbody fusion at L5-1. Dr. Poulson, who performed the surgery, noted on February 26, 1976 that claimant was moving easier and was progressing, although he predicted some pain with disability and a slow recovery because of her mental make-up and sensitivity to pain. In May 1976 Dr. Poulson thought claimant could return to work in two to three months although she had aggravated her condition by falling over a cat.

On October 5, 1976, after examining claimant, Dr. Poulson found her condition to be medically stationary with an impairment which he rated at 23%. He stated that claimant was capable of doing her usual work though she was "resisting it terribly". On October 8, 1976 claimant claimed she was unable to continue work and her employment was terminated on October 12.

On November 29, 1976 a counselor from the Vocational Rehabilitation Division advised claimant's attorney that claimant's claim was closed in the status '08' on October 27, 1976 after he had interviewed her. During the interview claimant had reported her medical condition and her current limitations and it appeared to the counselor that claimant was unable to participate in any vocational rehabilitation program. This decision was made jointly with claimant and she was informed that she could re-apply for services when she felt she was medically able to do so.

On February 9, 1977 claimant was informed by a vocational specialist with the Disability Prevention Division that they had been asked by the carrier to determine whether claimant was in need of vocational assistance. Claimant was advised that

a review of her file indicated she had extensive experience in the secretarial/clerical field and the medical reports indicate that she was both mentally and physically capable of returning to her regular work or work of a similar type. Due to the fact that claimant had marketable employment skills, no vocational handicap appeared to exist at that time, therefore, the Disability Prevention Division could not sponsor any type of vocational assistance program for her.

The ALJ found that at first the refusal to refer claimant for retraining might be considered arbitrary, however, it was ultimately turned over to a regular vocational specialist and reaffirmed by a letter from him. The ALJ was not convinced that claimant had all the secretarial skills that the DPD felt she had, however, she was able to do clerical work and inasmuch as the second refusal was based on her ability to do clerical work, he concluded that the refusal by DPD was not arbitrary.

Based upon the medical evidence, the ALJ found that claimant was medically stationary, but she did have permanent disability which would restrict her from doing any type of work which required bending, twisting, lifting, prolonged standing, walking, driving or sitting. Dr. Martens had indicated that there was some indication of functional overlay in addition to the physical pain but he felt that a trial use of a transcutaneous nerve stimulator to determine if it would help manage her pain would be advisable. If claimant could attain management of her pain, Dr. Martens felt that she would be able to return to her work as a secretary.

Dr. Poulson indicated that claimant was capable of returning to the type of work she had done before her injury inasmuch as such work was rather light; however, he indicated that because of severe psychological overlay she was unwilling to return to this type of work.

Dr. Seres, on May 13, 1977, reported that it was doubtful that there would be much change in claimant's ability to deal with her rather significant emotional difficulty. He felt that in many circumstances similar to this pain served as a solution to many other difficulties and when this exists the patient was not willing to deal with those solutions on a more appropriate basis little could be gained by trying to change the person's present state. Only if the person with this type of problem is ready to make a change can they be helped with this pain program. He doubted that any benefits could be gained by claimant.

The ALJ found that claimant submitted a list of jobs that she had made inquiries about and places at which she had made the inquiries since she terminated.

The ALJ concluded, based upon the medical reports,

that claimant had many physical problems; these problems may very well have been compounded by functional overlay or psychological problems but most of the doctors who have examined/treated claimant felt that she will have to restrict her future work activities to those which do not require substantial bending, lifting, or twisting. Claimant cannot stand or walk or drive for prolonged periods of time. He found that claimant has pain constantly and does very little during the day including housework. As a result of her industrial injury claimant will be forced to live with a certain amount of pain and certainly will enter the general labor market with substantial restrictions on her activities.

The ALJ concluded that claimant's potential wage earning capacity had been substantially affected and that she should be compensated therefor by an award of 240° which represents 75% of the maximum allowable by statute for unscheduled disability.

The Board, after de novo review, agrees with the ALJ's finding that the action on the part of DPD in refusing to refer claimant to an authorized program for vocational rehabilitation was not arbitrary. However, the Board finds that the medical reports simply do not support a conclusion that claimant's potential wage earning capacity has been reduced to the extent that an award of 75% of the maximum is justified.

The evidence indicates that claimant has extensive experience in the field of light work which is within her physical capacity. At the hearing, claimant's service coordinator testified that she had been unable to find a job for claimant because every time a suggestion for work was made claimant would have some excuse why she couldn't do it. Claimant appeared to be uncooperative and very choosey with respect to seeking re-employment, although her work background is basically in the light type work and her experience covers numerous types of jobs. Apparently, claimant refuses to consider any job which has a starting salary less than $550-$600 per month. A clerical assistant starts at $400-$450 a month;this is a job which claimant is qualified to do and could do in her present physical condition, yet she chose to refuse it because of the salary range.

All of claimant's "excuses" plus the psychological testimony presented at the hearing indicate a lack of willing motivation on the part of claimant to really get out and return to work and lack of motivation is a proper consideration in evaluating loss of wage earning capacity. This is emphasized by Dr. Seres' statement that he did not feel that claimant was sufficiently motivated to deal with her own problems, therefore, his program could not be of any value to her.

The Board finds, based upon the totality of the evi-

dence, that claimant has a physical impairment which is classified as mildly moderate; most of her claimed disabilities are mainly attributable to pre-existing psychological problems and lack of motivation to return to work.

The Board concludes that although some of claimant's loss of potential wage earning capacity is the result of her own lack of motivation, nevertheless, the industrial injury has precluded claimant from returning to a large segment of the labor market in which she could be suitably and gainfully employed, therefore, she should be compensated for such loss. The Board feels that an award of 128° which represents 40% of the maximum is much more appropriate compensation for claimant's potential wage earning capacity than the award granted by the ALJ in his order and such award should be reduced accordingly.

ORDER

The order of the ALJ, dated February 27, 1978, is modified.

Claimant is granted an award of compensation equal to 128° for 40% unscheduled disability. This award is in lieu of the award made by the ALJ's order which in all other respects is affirmed.

WCB CASE NO. 77-5788 AUGUST 4, 1978
WCB CASE NO. 77-6664

ROBERT D. HAGEN, CLAIMANT
Hoffman, Morris, Van Rysselberghe & Guistina, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith, Defense Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund requests review by the Board of the Administrative Law Judge's (ALJ) order which directed it to accept claimant's claim for aggravation of his January 4, 1976 injury and pay compensation to claimant as provided by law.

On January 4, 1976, while in the employ of The Valley River Inn as a night bellman, claimant suffered a compensable injury to his right wrist when he slipped and fell while pursuing intruders. The claim was closed on May 24, 1976 with

an award of compensation for temporary total disability only.

Claimant continued working for The Valley River Inn, whose carrier was the Fund, until the spring of 1976 when he went to work at the Emporium, one of the businesses located at The Valley River Center. He worked there until June 1976 and during that time used his hand only to manipulate the cash register which he did with some difficulty. Later he worked for Don's Mobile Service in August 1976 where he pumped gas, cleaned the station, but was unable to change tires because of weakness in his wrist.

Prior to the time claimant went to work for Safeway in August 1977 he had had minimal difficulty with the wrist. At Safeway he was being trained as a checker and to work in dairy supply. At that time he began to experience a worsening of his symptoms and on September 9, 1977 he filed a claim against Safeway whose carrier was Scott Wetzel Services, Inc. The carrier denied the claim on October 24, 1977, stating it was its opinion that his present disability was an aggravation of his original injury while working for The Valley River Inn.

After the January 4, 1976 industrial injury, claimant was treated by Dr. Bain who diagnosed an unresolved soft tissue injury to the right wrist. Dr. Bain felt that the wrist did not get an adequate trial immobilization and that it would take enclosure in a plaster cast to immobilize claimant, however, he first referred claimant to Dr. Moore, a colleague. Dr. Moore saw claimant on December 28, 1976 and his initial examination was unremarkable except for the right wrist where there was marked tenderness over the navicular bone and a suggestion of some possible tendinitis of the second extensor tendon on the right hand.

Claimant was again seen by Dr. Moore in January 1977 at which time he stated that most of the throbbing pain was gone. However, he returned in June, and told Dr. Moore that he was again having pain in the wrist. At that time, according to Dr. Moore, he demonstrated obvious changes of deQuervain's tenosynovitis. In a report dated August 2, 1977 Dr. Moore stated he had not seen claimant since June and he would be unable to state whether or not he was still having symptoms in the wrist. However, he definitely stated that claimant's wrist problems were directly related to his industrial injury.

Dr. Moore, on September 8, 1977, at claimant's request, advised the Fund that claimant had again developed right wrist pain which was essentially the same as the pain he had previously had and appeared to have been brought on by work claimant was doing at Safeway where he had to pick up produce and milk cartons. On September 29, 1977 Dr. Moore advised the carrier for Safeway that it was his impression that claimant's work at Safeway was probably responsible for the

acute recurrence of his deQuervain's tenosynovitis, however, he had clearly had it before in June and, as he stated previously, felt it was related to the injury of January 4, 1976.

The ALJ found that although claimant did not file a formal written claim for aggravation, nevertheless, the Fund was aware of the claim by virtue of claimant's having personally gone to the Fund's office because it had several medical reports indicating a compensable aggravation and also because the bills were sent to the Fund by claimant's attorney.

The ALJ concluded that claimant was credible and that his account of the pattern of symptoms squared with the medical evidence and, based upon the weight of that evidence, he found that the symptoms developed at Safeway were just a part of the recurring exacerbations occurring generally since the original injury and that claimant had suffered an aggravation of his January 4, 1976 injury while in the employ of The Valley River Inn and therefore responsibility of claimant's present condition is that of the Fund.

He found the evidence was not sufficient to justify subjecting either carrier to penalties; each had legitimate doubts of its respective responsibility.

The Board, on de novo review, agrees with the findings and conclusions of the ALJ.

ORDER

The order of the ALJ, dated March 3, 1978, is affirmed.

WCB CASE NO. 77-324 AUGUST 4, 1978

CLARENCE HARRIS, CLAIMANT
Hugh K. Cole, Jr., Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted him compensation equal to 272° for 85% unscheduled low back disability. Claimant contends that he is permanently and totally disabled.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated March 27, 1978, is affirmed.

WCB CASE NO. 76-4106 AUGUST 4, 1978

DOROTHY HOUDASHELT, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Don G. Swink, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

The claimant seeks review by the Board of the Administrative Law Judge's (ALJ) order which approved the June 24, 1976 denial by the employer's carrier of any responsibility for claimant's right knee injury and its denial of July 26, 1977 for further medical care and treatment and payment of temporary total disability for back injury and for gastritis.

Claimant, a 46-year-old secretary, slipped at work on October 23, 1975; the following day she called Dr. Done but was not able to see him until November 28, 1975. Dr. Done referred her to Dr. Lisac, an orthopedist, to examine her for low back pain and he diagnosed spondylolisthesis and obesity. At that time claimant did not mention any knee pain. In February 1976 Dr. Lisac prescribed use of a temporary back brace and suggested claimant do abdominal muscle exercises and reduce her weight. Two months later claimant complained for the first time to Dr. Lisac about pain in her right knee.

The ALJ found that Dr. Lisac seemed somewhat skeptical about the history claimant related to him about the accident and he did not believe claimant had actually fallen completely to the floor as claimant testified she had done with her right leg under her body. She had told Dr. Done that she had fallen. Claimant lost no time from work and awaited almost three months before she typed and filed an 801 which referred to the fall but did not state anything concerning her right knee.

After filing the report claimant quit to accept, according to her, a higher paying job. On her job application she listed no physical defects. In March 1977 Dr. Harder, an orthopedist who had once treated claimant for tendinitis, examined claimant and found spondylolisthesis of the lumbosacral joint and recommended a back brace, continued exercise and Norgesic. Later he reported that claimant's back pain was

no longer localized but had spread throughout her entire back area; he suggested she continue her exercises. During June claimant returned for further examination, however, this time she saw Dr. Duff (Dr. Harder was away) who recommended that claimant lose 30 pounds, have a physical examination and try immobilization in a plaster body cast. He was reluctant to do surgery before a trial of conservative treatment, as was Dr. Harder.

In July 1977 Dr. Done reported that claimant suffered gastritis from taking too many aspirin and pain pills.

The ALJ found that although Dr. Harder prescribed injections and medications and although claimant claimed she had gastritis on July 6, 1977, nevertheless, on the following day she admitted to the psychologist that she had taken no medication except some Darvon since the previous Christmas. The ALJ found that the consensus of medical opinion was that surgery would make claimant's condition worse rather than better.

The ALJ found that the back claim apparently was accepted on a medical only basis and was closed as such. On July 26, 1977 the carrier refused to reopen the claim, noting that claimant had quit her job voluntarily and had undergone no treatment for a long period of time.

The ALJ concluded that the medical evidence did not causally relate claimant's right knee injury to the industrial injury which occurred on October 23, 1975, the claim for which had been accepted. He further concluded that claimant had failed to prove by a preponderance of the evidence that her present problems were the result of the October 23, 1975 injury. To the contrary, he found that claimant is suffering from lumbosacral spondylolisthesis and also obesity. These conditions might be the sole cause of her back problems at the present time; the lapse of time between medical treatment is a strong indication that the problems claimant suffered as a result of her fall on October 23, 1975 had subsided and claimant's condition was asymptomatic and presently related to a natural progression of her condition contributed to by her overweight condition.

The ALJ further found that claimant's condition of gastritis was not proven by claimant to be causally related to her industrial injury.

The Board, on de novo review, finds that the denials of June 24, 1976 and July 26, 1977 were improper. When claimant first reported to Dr. Done on November 28, 1975 she complained of neck and knee pain but felt these symptoms were secondary to her low back strain which was caused by the fall. On March 30, 1976 claimant returned to see Dr. Lisac and stated

that her back was somewhat better but that her right knee had been giving away intermittently over recent months and that this was a problem which first began after her industrial injury. Dr. Lisac diagnosed either a torn lateral meniscus or chondromalacia of the patella; however, because claimant did not want to consider any type of surgery to her knee, Dr. Lisac prescribed quadriceps strenthening exercises.

In response to inquiries by the carrier, Dr. Lisac affirmed in two separate reports that claimant's knee symptomatology was related to her October 23, 1975 fall. Again in June 1976 the carrier inquired of Dr. Done whether claimant, at the time of his initial examination, had complained of any neck or knee pain and he replied in the affirmative, adding these symptoms were secondary to her lumbosacral strain. Yet after this report, the carrier issued a formal denial of responsibility, stating there was no evidence that the knee injury was sustained in the October 23, 1975 fall and also that no claim for a knee injury was made until five months after the accident at work. Claimant, who continued to see Dr. Done, assumed that he had reported his course of treatment to the carrier and the course of treatment obviously would include treating her complaints of neck and knee pain as well as the low back strain.

Claimant had been taking Darvon N-100 which was prescribed by Dr. Lisac for her back pain. She had also taken large quantities of aspirin and eventually developed severe stomach cramps and underwent an upper GI series study in September 1976. The bill for this study was submitted to the carrier and Dr. Done certified that claimant had acute gastritis as a result of "taking too many aspirin and pain pills". On July 26 the carrier denied responsibility for the upper GI series, further stating, "Your problems are not now as a result of your accident of October 23, 1975. . .".

Based primarily on Dr. Lisac's unequivocal opinion that claimant's knee symptomatology arose out of the industrial injury of October 23, 1975, the Board concludes that the carrier should have accepted responsibility for that condition. In spite of Dr. Lisac's reports the denial was made, although there were no medical reports in the record rebutting his opinion on the causal connection between the work accident and claimant's knee injury.

With respect to the July 26, 1977 denial of responsibility for claimant's condition of gastritis the evidence indicates that claimant's doctors gave her prescriptions for medications to relieve her discomfort beginning with the first treatment by Dr. Done on November 28, 1975. Later reports from Drs. Lisac, Done, Harder and Duff indicate claimant continued on pain medication, usually Darvon, throughout the course of this claim; furthermore, claimant testified that she took large

quantities of aspirin as well as the prescribed medication for her problems. As the result of all this medication, including the aspirin, claimant developed stomach cramps so severe that she underwent an upper GI series study and, upon the advice of Dr. Done, submitted the bill to the carrier. Dr. Done advised the carrier that the gastritis was caused because of the consumption of medication required as the result of the claimant's industrial injury, nevertheless, the carrier denied responsibility for this condition without any explanation.

The Board concludes that the carrier's denial on July 26, 1977 also was improper.

ORDER

The order of the ALJ, dated November 30, 1977, is reversed.

The carrier's denials dated June 24, 1976 and July 26, 1977 are set aside and claimant's claim for aggravation of her October 23, 1975 injury to her back and right knee as well as her claim for the condition of gastritis are hereby remanded to the employer and its carrier for acceptance and for the payment of compensation, as provided by law, commencing June 30, 1977, the date claimant was put in a body cast by Dr. Duff, and until her claims are closed pursuant to the provisions of ORS 656.268.

Claimant's attorney is awarded as a reasonable attorney's fee for his services both before the ALJ at the hearing and at Board review, a sum of $1,000, payable by the employer and its carrier.

WCB CASE NO. 77-2217 AUGUST 4, 1978
WCB CASE NO. 77-2218
WCB CASE NO. 76-6130
WCB CASE NO. 76-6915

JACQUE C. JAEGER, CLAIMANT
Richardson, Murphy & Nelson,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which remanded all four of claimant's claims to it for processing including submission to the Evaluation Division for a Determination Or-

der in each case and ordered compensation payable until closure was authorized pursuant to ORS 656.268.

Claimant, while employed as a vice principal of a high school, sustained four injuries for which she has filed claims. All four claims were accepted and classified as "medical only".

The first injury (Case No. 76-6915) occurred when claimant was accidentally struck in the right temple on March 15, 1972, causing claimant to have double vision. She now uses, alternately, three pairs of glasses with different prescriptions which constantly change. Her neck also was injured.

Dr. Snodgrass diagnosed this injury as a mild concussion. Claimant later saw Dr. Marquis who diagnosed marked convergence insufficiency and suggested eye exercises to attempt to correct the problem. The Fund paid all of the medical bills until the summer of 1976.

Claimant testified that her eye condition progressively worsened and she requested that this claim be reopened. The Fund denied this request on December 16, 1976.

The second injury (Case No. 77-2218) was sustained on December 14, 1972 when claimant tried to break up a fight between two students and she was struck on the right side of her jaw. Dr. Horenstein diagnosed a contusion of the left jaw, strain right temporomandibular joint and excoriation of the lateral canthus of the left eye area. Claimant testified her jaw was dislocated, her teeth were chipped and her low back and neck were again hurt. Claimant requested that this claim be reopened. The Fund denied this request on March 29, 1977.

The third injury (Case No. 77-2217) happened on June 6, 1974 when claimant attempted to stop another fight. She slipped and fell down a stairway. Dr. Courogen diagnosed a lumbosacral strain. Claimant reported she had pain in the low back and right leg and foot, in addition to stiffness and pain in her neck. Claimant did not suffer any time loss but treated herself with hot baths and aspirin which did not alleviate her pain. Claimant's request that this claim be reopened was denied by the Fund on March 29, 1977.

The fourth injury (Case No. 76-6130) occurred on September 24, 1975, when claimant, endeavoring to restrain a student from fighting with another student, sustained an injury to her back. Dr. Tahir diagnosed a possible cervical nerve root compression and recommended a cervical and lumbar myelogram. The cervical myelogram was normal, but the lumbar myelogram revealed a defect at L4-L5, on the right. Claimant finished the school year, but has not returned to employment as a vice principal or a teacher or counselor.

After the September 1975 injury, claimant complained of pain in her neck with radiation to her upper extremities, and pain in her low back with radiation into her right lower extremity.

Dr. Post reported on June 21, 1976 that claimant had been involved in an automobile accident in December 1959 which injured her neck and low back. After two years of unsuccessful conservative treatment, claimant underwent a laminectomy which had poor results and subsequently had other laminectomies. She had developed "osteomyelitis" and required additional treatment. After a fourth operation, claimant had better results.

Claimant reported from 1963 to 1974 she had minor neck and back problems. She indicated in addition to the four incidents for which she filed workers' compensation claims, she had at least three other incidents at school, to-wit: a fall on the stairs and breaking up two fights. Dr. Post, after examining claimant, felt she had to modify her employment and suggested she use a corset and begin back strengthening exercises.

Claimant continued to be treated by Dr. Post. In September of 1976, Dr. Post, after examining claimant and finding she continued to have low back discomfort and considerable incapacitation even though she was remaining at home, recommended a six month leave of absence. He said if she failed to improve with rest and inactivity, she should be enrolled at the Portland Pain Center.

On October 13, 1976 Dr. Post wrote to the Fund advising it that claimant had not improved and requested a referral to the Portland Pain Center. On November 11, 1976, the Fund denied this request and claimant's claim for aggravation of her September 1975 injury on the basis that her current problems were residuals of her 1959 automobile accident.

Dr. Post, in January 1977, felt that claimant for a period of ten years had had only minor spinal problems. His opinion was that after repeated on-the-job injuries, these injuries were material contributing factors to her present problems and represented aggravating circumstances upon her pre-existing condition.

Dr. Horenstein, claimant's family physician, reported in August 1977 that claimant's condition had deteriorated and felt this was due to her multiple on-the-job injuries. She opined claimant was not able to return to her position as vice principal or to any teaching position because standing aggravated her symptom complex of back pain, numbness of her right leg and neck pain with associated dizziness.

The ALJ concluded all the denials were improper and all four claims should be remanded to the Fund to be accepted and for payment of compensation until closed under ORS 656.268.

The Board, after de novo review, finds that the ALJ properly remanded Case Nos. 77-2217 and 77-2218 to the Fund for processing pursuant to the provisions of ORS 656.268. Neither the injury of December 14, 1972 (Case No. 77-2218) nor the injury of June 6, 1974 (Case No. 77-2217) resulted in any temporary total disability, however, neither has been closed except on an administrative basis, therefore, each must be closed pursuant to ORS 656.268 by a Determination Order from which claimant may appeal.

Concerning the injury of March 15, 1972 (Case No. 76-6915), the Board finds that the Fund should pay the outstanding bills for claimant's eye problems pursuant to the provisions of ORS 656.245 and that their unilateral action in ceasing to pay such medical benefits justifies the assessing of a penalty equal to 25% of the amount of said medical bills. The Board further finds, with respect to this claim, that claimant should be referred to the Portland Pain Clinic and the Fund should pay for the treatment recommended by Dr. Post. The evidence does not indicate that claimant suffered any time loss as a result of the eye injury, however, it does indicate that this condition is not stationary at the present time and there might be some permanent disability, therefore, the claim should be remanded to the Fund for acceptance and for closure pursuant to the provisions of ORS 656.268 when the condition is medically stationary.

With regard to the injury of September 24, 1975 (Case No. 76-6130), the Board finds that claimant has suffered time loss as a result of this injury and that the claim should be remanded to the Fund to be accepted and for the payment of compensation, as provided by law, commencing on September 24, 1975, the date claimant was injured, and until her claim was closed pursuant to ORS 656.268, less any time she may have worked.

ORDER

The order of the ALJ, dated October 31, 1977, is modified.

The State Accident Insurance Fund is ordered to pay the outstanding medical bills relating to claimant's eye problems (Case Co. 76-6915) pursuant to the provisions of ORS 656.245 and to also pay to claimant an amount equal to 25% of the said medical bills because of its unilateral termination of benefits pursuant to ORS 656.245.

The Fund is ordered to accept claimant's claim for her eye injury (Case No. 76-6915) and to pay claimant compen-

sation, as provided by law, from March 15, 1972 until closure pursuant to ORS 656.268, less all time worked.

The Fund is ordered to pay for the expenses incurred by claimant in attending the Portland Pain Clinic for the treatment recommended by Dr. Post.

Claimant's claim for her injury suffered on September 24, 1975 (Case No. 76-6130) is remanded to the Fund to be accepted and for the payment of compensation, as provided by law, commencing on September 24, 1975 and until the claim is closed pursuant to the provisions of ORS 656.268, less time worked.

In all other respects the ALJ's order is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum of $400, payable by the State Accident Insurance Fund.

WCB CASE NO. 70-2687 AUGUST 4, 1978

In the Matter of the Compensation
of the Beneficiaries of
FLOYD JOHLKE, DECEASED
Thomas J. Mortland, Defense Atty.
Own Motion Order

On June 14, 1978 the Board received a letter from Dorothy J. Johlke, the widow of Floyd Johlke, hereinafter referred to as claimant, stating that her husband had passed away on February 13, 1978 as the result of a heart condition which first occurred on May 31, 1970 when her husband had been employed by Hudson Stores whose carrier was the Travelers Insurance Company. This claim had been accepted as compensable and was closed by a December 21, 1971 Determination Order which had granted Mr. Johlke 32° for unscheduled heart disability. The award was later increased to 96° by an Opinion and Order entered by Hearing Officer George Rode on March 12, 1973.

Claimant requested own motion relief and furnished the Board with a medical report from Dr. Brandt dated March 27, 1978, an autopsy report, a letter from Dr. Starr to Dr. Brandt dated February 14, 1978 and a letter from the Travelers Insurance Company dated May 25, 1978 which offered a settlement but reiterated its denial of the claim.

The Travelers Insurance Company was furnished a copy of claimant's request and the attachments and asked to

advise the Board of its position. On July 17, 1978 the Travelers Insurance Company replied, stating it was denying claimant's request for benefits because more than 5 years had elapsed between the 1971 Determination Order and the notice to it which was given in the early part of 1978 and also because the compensable 1970 heart attack did not contribute materially and significantly to Mr. Johlke's death on February 13, 1978.

The Board, at this time, does not have sufficient evidence to determine the validity of claimant's claim, therefore, it refers this matter to its Hearings Division with instructions for it to be set down for hearing before an Administrative Law Judge (ALJ) to determine if Mr. Johlke's death was a direct result of his compensable injury and, if so, if claimant is entitled to compensation pursuant to the provisions of the Workers' Compensation Act.

Upon conclusion of the hearing, the ALJ shall cause to be submitted to the Board a certified transcript of the proceedings together with his recommendation on claimant's request.

SAIF CLAIM NO. PC 296570 AUGUST 4, 1978

RAMON D. MATA, CLAIMANT
Frohnmayer & Deatherage, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant filed a claim for a back injury which he had suffered on March 25, 1971. Dr. McGeary diagnosed a low back strain. This claim was accepted. A Determination Order dated November 22, 1972 closed this claim and granted claimant compensation equal to 48° for 15% unscheduled disability for his low back injury. A myelogram had revealed a defect at L4 on the right but claimant did not wish to have surgery.

The above Determination Order was appealed and, after a hearing, Referee Drake increased claimant's award to 240° for 75% unscheduled disability for his back injury by an order dated April 12, 1974. This order was affirmed by the Board on October 7, 1974 and by the circuit court for Jackson County on July 10, 1975.

On December 16, 1976 claimant was involved in a motor vehicle accident, sustaining multiple soft tissue bruises to his head, neck and back without underlying bony injury. Claimant continued to receive treatment for his injuries.

Dr. Campagna reported on October 17, 1977 that he felt claimant's condition had become worse. He diagnosed nerve root compression, S1, right, secondary to a protruded lumbar disc, secondary to the accident of March 21, 1971. After a positive myelogram of October 25, 1977, a laminectomy was performed on December 7, 1977. Dr. Campagna had requested claimant's claim be reopened based on claimant's worsened condition and need for further medical care, which the Fund apparently denied. After a hearing on this denial, the Referee dismissed the request for hearing on the denial of the aggravation claim since claimant was receiving temporary total disability.

Dr. Campagna reported in January 1978 claimant had made good progress from his surgery and recommended he return to work on April 1, 1978. In April 1978, Dr. Campagna found that claimant was medically stationary with moderate disability as the result of his March 1971 injury. Claimant was working at home doing small engine repairs. He occasionally took Tylenol for pain.

On May 8, 1978 the Fund requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department found that the factors affecting claimant's wage earning capacity have remained essentially the same. They recommended additional compensation for temporary total disability from October 25, 1977 through April 24, 1978 only.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from October 25, 1977 through April 24, 1978.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $500.

WCB CASE NO. 77-5864 AUGUST 4, 1978

RAMON D. MATA, CLAIMANT
Frohnmayer & Deatherage, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which found claimant's acupuncture treatment during January, February and March of 1974 was not compensable and denied claimant's travel expenses from Medford to Lincoln City to receive such treatment.

Claimant was originally injured on March 25, 1971. A Determination Order, dated November 22, 1972, awarded claimant compensation equal to 48° for 15% unscheduled low back disability.

It was stipulated at the hearing that although the Fund had not accepted claimant's aggravation claim it was currently paying claimant temporary total disability, and that claimant's request for hearing on his aggravation claim could be dismissed until such time as the Fund terminated temporary total disability or denied the claim. The remaining issues were the compensability of claimant's treatment and entitlement to travel expenses. It was also stipulated that Exhibit #2 reflected correctly that claimant had incurred expenses relating to his treatment from January through March 1974 as follows: lodging: $241.50, meals: $324.00, doctor: $480.00, and mileage: 3020 miles.

Claimant did not testify, but it was agreed that if he had he would have testified as follows: (1) that he went to Lincoln City from Medford on his own without a referral from any medical doctor in Medford for the purpose of receiving acupuncture treatment, (2) that he was examined by a Dr. O'Dell at the Lincoln City Clinic and under Dr. O'Dell's supervision, acupuncture treatment was started.

Dr. Luce's report of January 1974 revealed that he felt claimant was fit for light work which did not involve prolonged bending or heavy lifting. His impression was a degenerative disc disorder L4-5 and L5-S1 and no evidence of radiculopathy.

The ALJ, after reviewing ORS 656.245 which provides for continuing medical treatment and allows claimant to choose his own attending doctor or physician within the state of Oregon, concluded that since the acupuncture treatments were not recommended by a treating physician, such treatments and the travel expenses were not the responsibility of the Fund.

The Board, after de novo review, reverses the ALJ. An injured worker has the right to choose his treating doctor or physician; in this case, claimant selected Dr. O'Dell. Dr. O'Dell did refer claimant for the acupuncture treatment, which is not prohibited as a form of medical treatment under Oregon law if certain conditions are met.

The Board concludes the expenses incurred by claim-

ant for his acupuncture treatment and his travel expenses from Medford to Lincoln City, Oregon, including his expenses incurred in Lincoln City, are reasonable and therefore, the Fund is responsible for such costs pursuant to ORS 656.245.

ORDER

The ALJ's order, dated February 13, 1978, is reversed.

The State Accident Insurance Fund is ordered to pay claimant's medical expenses incurred for the acupuncture treatment he received in January, February and March of 1974 and for his travel and living expenses connected with this treatment.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services both at the hearing and at Board review in the amount of $850, payable by the Fund.

WCB CASE NO. 76-3217 AUGUST 4, 1978

WILLIAM S. McCALL, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review of that portion of the Administrative Law Judge's (ALJ) order which affirmed the denial by the State Accident Insurance Fund of claimant's claim for an aneurysm.

Claimant is 42 years old, he is 6' tall and weighs approximately 204 pounds. He has been employed by his present employer as a truck driver since 1970. His duties consist of hauling building material on a dispatch system and in addition to driving the truck he must secure his own binders.

On February 20, 1976 claimant suffered an industrial injury when he assisted another truck driver to load 150 pound tire and wheel onto the back of a truck; he suffered severe pain in the right groin area and also fractured his ring finger on the right hand when the tire dropped on it. Claimant finished his shift and reported to the hospital where his finger was splinted; he also complained of the groin pain and was told to see his doctor the following day. The next day he was seen by a doctor who put a new splint on his finger and diagnosed the groin pain as a vascular aneurysm.

Claimant was hospitalized at the Oregon Medical Center and Dr. Porter, Associate Professor of Surgery, Head, Division of Vascular Surgery, after diagnosing bilateral iliac artery aneurysm, etiology unknown, performed surgery. Dr. Porter stated that even though the etiology was unknown he would suspect it was traumatic. The surgery was performed on March 3, 1976 and on April 9, 1976 claimant filed a claim for vascular aneurysm.

On June 18, 1976 the Fund denied responsibility for the aneurysms, stating they were not caused or worsened by a lifting incident, that the aneurysms pre-existed claimant's lifting incident of February 20, and the pains felt were symptoms of the condition, not an indication that the condition had worsened.

The ALJ found that this was not an uncomplicated medical case in which claimant had had prior good health; the medical reports indicate that claimant had suffered an attack of nosebleed in 1971 and had been treated with Valium for high blood pressure since that time. Also, while claimant was at the Medical School he gave the doctors a history of cygomatic episode and he had an unexplained bizarre episode of numbness on one side of his body which occurred prior to his industrial injury.

Dr. Brossart, a surgeon, evaluated claimant on December 7, 1976 and obtained a history from him regarding his vascular disease process. He was aware that claimant had experienced pain in the right groin region in March 1975 and again in December 1975 after a vigorous physical activity. He also knew that claimant had been examined by Dr. Bowen for an ICC exam in February 1976 at which time a large right lower quadrant abdominal mass was noted. After performing a vascular examination of claimant Dr. Brossart concluded, purely on speculation, that the lifting on February 20, 1976 could be associated with development of symptoms in the right groin and also probably cause expansion of the aneurysms that was subsequently documented on physical examination. He found some question about the pathology of claimant's aneurysms; he stated that the lifting could have aggravated the aneurysmal condition and led to expansion but he felt there was no way to prove this.

Dr. Porter, in a report dated January 14, 1977, stated that at that time he did not think that there was any reasonable medical probability that the lifting episode aggravated the aneurysmal condition. Had the lifting episode been causally related to the aneurysms or to the worsening of the aneurysms, Dr. Porter felt there would have been evidence of aneurysmal leakage or tear with hemorrhage at the time of the surgery and absolutely none was found. He had no medical proof that the pursuit of vigorous physical activity or heavy manual labor would adversely affect claimant's present medical condition; he said that if the only employment which claimant could finds was truck driving,

hopefully without lifting heavy weights, he would support claimant's return to such employment. However, he would leave such advice to claimant's treating physician, Dr. Thomas.

The ALJ concluded, based upon all the medical evidence, that there was only a possibility, not a probability, that the injury which occurred on February 20, 1976 might have been a contributing factor to claimant's artery aneurysms and this is not sufficient to find them compensable. Although the aneurysms did occur on the day of the lifting incident, according to claimant's testimony, he had had pain in the groin over a year prior to this industrial injury which claimant had assumed might be caused by a hernia.

The ALJ found that the medical evidence was not sufficient to support the finding of causal relationship between claimant's aneurysmal conditions and his employment, especially on December 20, 1976.

The Board, on de novo review, agrees with the conclusion reached by the ALJ on the issue of compensability of the claimant's aneurysm. There were other issues presented to the ALJ which were disposed of by his order; however, the only issue before the Board on review was the propriety of the Fund's denial of claimant's aneurysmal condition.

ORDER

The order of the ALJ, dated January 25, 1978, is affirmed.

WCB CASE NO. 75-2908 AUGUST 4, 1978

FRANK MULLENBERG, CLAIMANT
Starr & Vinson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the carrier's denial of his claim for an occupational disease.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

WCB CASE NO. 77-7084 AUGUST 4, 1978

TAMARA JOAN PAPEN, CLAIMANT
Lachman & Henninger, Claimant's Attys.
Gearin, Landis & Aebi, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the Administrative Law Judge's (ALJ) order which granted the employer's motion to dismiss the hearing on the grounds that claimant failed to file her claim within the time limits prescribed by ORS 656.265.

The issues before the ALJ were timeliness, compensability and attorney's fees.

Claimant, a 17-year-old worker in a fast food restaurant, alleges that she suffered a hernia while lifting liquid shortening on September 2, 1977. She filed a claim on October 20, 1977 which was denied on November 17, 1977.

The ALJ found that even if claimant had suffered a hernia while lifting at work on September 2, 1977, she did not inform her employer or supervisor of the alleged injury within 30 days. The ALJ also found that claimant failed to prove that her employer paid her any compensation under this claim and, rather than show good cause for failure to give the employer notice of the injury within 30 days, claimant's conduct in this regard was characterized by apparent carelessness and neglect. He found that claimant's mother was aware of claimant's hernia and of her filing a claim therefor and she had advised claimant to see a doctor but, in fact, claimant did not see a doctor until October 20, 1977.

The ALJ concluded that the employer had proved that it had been prejudiced by the delay in giving notice and, therefore, all excuses for late filing provided under ORS 656.265(4) were effectively cut off. Based on this he granted the employer's motion to dismiss.

On the merits, the ALJ concluded that while claimant's hernia could have occurred as the result of her work activity claimant had failed to prove that it did.

The Board, on de novo review, finds that claimant failed to prove that her hernia was work related and the denial of responsibility therefor by the employer on November 17, 1977 should be approved.

The Board concludes that the ALJ's order should be affirmed solely on the basis that claimant failed to prove by a preponderance of the evidence that she had suffered an industrial injury on September 2, 1977.

ORDER

The order of the Administrative Law Judge, dated February 28, 1978, is affirmed.

WCB CASE NO. 78-1009 AUGUST 4, 1978

ETHELYN RUSSELL, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Attys.
Rankin, McMurry, Osburn, Gallagher & VavRosky, Defense Attys.
Order of Dismissal

A request for review, having been duly filed with the Workers' 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 Administrative Law Judge is final by operation of law.

WCB CASE NO. 78-2098 AUGUST 4, 1978

BOBBY SCHIVERS, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith, Defense Attys.
Order of Dismissal

A request for review, having been duly filed with the Workers' 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 Administrative Law Judge is final by operation of law.

WCB CASE NO. 77-6343 AUGUST 4, 1978

RICHARD B. SEYMOUR, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests review by the Board of the Administrative Law Judge's (ALJ) order which ordered it to accept claimant's claim for "drop attack" problems but affirmed its denial of claimant's claim for cardiac and hypertension problems.

On June 8, 1973 claimant suffered a compensable industrial injury to his back. His claim was closed with an award of 160° on December 2, 1976. After a hearing, an ALJ increased claimant's award to 320° on August 26, 1977.

On October 6, 1977 the Fund wrote claimant, stating it had accepted claimant's claim for the low back condition but denied any responsibility for cardiac, hypertension or drop attack problems. Claimant requested a hearing.

Claimant testified that the drop attacks (a sudden giving away of a person's legs, causing him to drop to the ground) began after his industrial injury in June 1973; after his legs would give out from under him and cause him to drop to the ground, his entire body would feel as though it had been asleep and he had numbness and weakness in both legs.

Claimant also testified that the hypertension problem commenced soon after his back surgery necessitated by the June 1973 injury. Claimant is receiving no treatment for hypertension other than having his blood pressure checked on a routine basis. He does admit to some pre-existing cardiac conditions but alleges that an event involving chest pain which occurred while he was at the Pain Clinic was different than any pain he had previously experienced, both in the area and in intensity.

Dr. Boots reported on December 2, 1974 that claimant had given him a history of feeling numb or dead from the neck down; on November 20, 1974 claimant had told Dr. Boots of falling completely to the ground when his back gave out and a week later he told Dr. Boots that his falling due to loss of control of his legs was gradually increasing. Dr. Boots referred claimant to Dr. Nelson, an osteopathic physician specializing in neurology. Claimant recited basically the same history to Dr. Nelson who felt that these symptoms were suggestive of transient ischemia

to the spinal cord and indicated that further neurodiagnostic study could be necessary.

There is a gap in the medical records until January 1977 when Dr. Schostal, at the referral of Dr. Boots, examined claimant. On January 14, 1977, Dr. Schostal stated that claimant's history of drop attacks was most consistent with basilar artery transient ischemic attacks. Occasionally some compression of the anterior spinal artery could also cause this presentation but it is reportedly very rare.

In April 1977 Dr. Harwood, a medical consultant for the Fund, reviewed the medical reports and rendered an opinion similar to that expressed by Dr. Schostal. He felt claimant's condition was a pre-existing one and not compensable.

With respect to claimant's condition of hypertension, the ALJ found no medical evidence to support claimant's contention that this condition was caused by his industrial injury.

With respect to the cardiac condition, the ALJ found the medical reports indicated that claimant had this condition prior to his industrial injury. Claimant gave a history of severe chest pains, radiating under his sternum and causing his entire left arm to become numb which occurred prior to the employment which resulted in his industrial injury.

The ALJ relied primarily on the opinion expressed by Dr. Nelson that the frequent giving away of the legs, causing claimant to fall suggested transient ischemia to the spinal cord and was of a neurological nature. The ALJ found credible history dating back to November 1974 which connected the so-called "drop attacks" to the compensable injury.

Claimant testified he had never had this problem prior to the fall which resulted in the compression fracture in his mid-back; that he had been regularly and steadily employed and therefore it was reasonable to assume that such disabling condition did not exist prior to the injury. The ALJ felt that Dr. Schostal's opinion did not preclude the connection; he merely had stated that although compression could cause this presentation occasionally, it was reportedly very rare.

The ALJ concluded that the condition, designated as "drop attacks", did not increase claimant's disability which had been found to be 100% and at the moment claimant's condition was medically stationary and no treatment was recommended. He held, however, that should the condition worsen, claimant would have aggravation rights under the statute and that inasmuch as the claim was first closed on December 2, 1976 his opinion would not reopen claimant's claim but would, by setting aside the denial for the condition of drop attack problems, reinstate claimant's right to payment of medical ser-

vices for this condition under the provisions of ORS 656.245 and also reinstate and preserve his right of aggravation under ORS 656.273.

The Board, after de novo review, agrees with the ALJ's conclusion that the Fund's denial for cardiac and hypertension conditions should be affirmed, but it finds that there is not sufficient medical evidence to justify a finding that the claimant's "drop attack" problems are compensable.

Claimant was involved in an automobile accident on January 7, 1974 and Dr. Campagna reported on February 4, 1974 that claimant received some neck pain as a result of the accident but did not feel that his mid-back region had been aggravated to a very large extent. Earlier when claimant had been examined by Dr. Campagna in 1973 he complained of mid-back pain, buzzing noise in his left ear, spells of body numbness when lying down. At that time Dr. Campagna was not aware that claimant had had a previous injury resulting in a compression of T9 and his conclusion was that the claimant had a compression fracture of T9. However, there was no mention made to him of the drop attack symptoms in any of the reports the date of the industrial accident until a much later date.

After the 1974 automobile accident claimant had a rhizotomy to sever the sensory nerves but even after that the movement of claimant's clothing over his skin and the abdominal and lower back areas increased his discomfort considerably. Claimant was examined by Dr. Pasquesi on October 9, 1975 who felt claimant's condition was stationary from an orthopedic standpoint but he did not have any answer to his neurological problem following the neurectomies.

When claimant was at the Pain Clinic, he complained of these alleged drop attacks but there is nothing in any of the Pain Clinic's reports to indicate any causal connection between the June 1973 industrial accident and these complaints.

The evidence indicates that the drop attacks did not come on until after the automobile accident of January 7, 1974 and Dr. Greiser, who examined claimant at the request of his attorney, on September 20, 1976, stated that he felt claimant had aggravated his old compression fracture at T9, however, he also referred to Dr. Holbart's findings in 1962 which indicated the compression fracture. Dr. Greiser felt that claimant had a pre-existing thoracic spine injury, probably aggravated by his industrial injury and again aggravated by his automobile accident.

Only two doctors were directly asked if there was a causal connection between the alleged drop attacks and the industrial injury; Dr. Schostal and Dr. Harwood. Claimant's physician, Dr. Boots, referred claimant to Dr. Schostal who

is a neurologist. It was his opinion that the drop attacks were most consistent with a basilar artery transient ischemic attack; some compression of the anterior spinal artery could also cause this presentation, but it would be very rare. Dr. Harwood agreed and stated further that the problem is a part of the picture of generalized arteriosclerosis and could be contributed to by many factors. He found no indication of any causal connection between claimant's work and this particular problem.

The Board finds that the alleged drop attacks were not documented by any medical report indicating that anybody had actually observed claimant having one of these alleged drop attacks. Furthermore, Dr. Campagna's opinion indicated that among other things there were many functional elements involved in claimant's complaints.

In complicated medical situations such as those presented in this case, only expert medical evidence can determine the causal relationship between the industrial injury and the claimant's problems and the burden of proof is upon claimant.

The Board concluded that claimant has failed to sustain this burden of proof inasmuch as he has not provided expert medical evidence of causal connection between claimant's industrial injury of June 8, 1973 and his subsequent "drop attacks" problems. The Board concludes that the Fund's denial of October 6, 1977 should be affirmed in its entirety.

ORDER

The order of the Administrative Law Judge, dated February 28, 1978, is reversed.

The denial by the State Accident Insurance Fund on October 6, 1977 of responsibility for cardiac-hypertension or drop attack problems is affirmed.

WCB CASE NO. 77-2944 AUGUST 4, 1978

DOYLE D. STACEY, CLAIMANT
Franklin, Bennett, Ofelt & Jolles, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson, Moore and Phillips.

The employer seeks Board review of the Administrative Law Judge's (ALJ) order which granted claimant compensation for permenant total disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated March 7, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $350, payable by the carrier.

Chairman M. Keith Wilson dissents as follows:

The record does not, in my opinion, justify an award of permanent total disability. The medical evidence falls short of establishing that the claimant is precluded from engaging in full time and gainful employment. Motivation for employment appears to be lacking. Job search by the claimant was perfunctory at best and occurred only after receipt of notice of hearing. The claimant's interest in returning to the work force is premised on his own terms and,coupled with his lack of cooperation, precludes any realistic effort by the Field Services Division of the Workers' Compensation Department. I find that the claimant is not precluded physically or psychologically from return to modified full time gainful employment and conclude that the loss of earning capacity is 75% or 240°.

M. Keith Wilson, Chairman

INA CLAIM NO. 941-C242447 AUGUST 4, 1978

JUDY WITT, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Collins, Velure & Heysell, Claimant's Attys.
Roger Warren, Defense Atty.
Own Motion Order

On June 23, 1978 the Board received from claimant, by and through her attorney, a petition for the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen her claim for a compensable industrial injury suffered on September 20, 1972 while in the employ of GAF

Corporation whose carrier was Insurance Company of North American (INA). The claim was accepted and, according to the petition, " . . . handled as a medical only claim at that time". Therefore, there is also a question of whether claimant's claim ever has been closed pursuant to the provisions of ORS 656.268.

Subsequently, claimant filed a claim for pain in her right and left shoulders against Tektronix, Inc., whose carrier was Employers Insurance of Wausau (Wausau). This claim was denied and claimant requested a hearing (WCB Case No.78-1547).

In support of claimant's petition for own motion relief, claimant furnished reports from Dr. John Thompson dated April 25, 1977 and Orthopaedic Consultants dated December 7, 1977. Claimant alleges that these reports indicate that either one or both employers might be responsible for claimant's present condition.

Claimant petitioned the Board to grant own motion relief or, in the alternative, to set her request for own motion relief for hearing on a consolidated basis with her request on the propriety of the denial in WCB Case No. 78-1547. The petition indicates that Wausau has no objection to being joined as a party.

The Board, at the present time, does not have sufficient evidence to determine whether claimant's request for own motion relief is justified or if, in fact, her September 20, 1972 industrial claim has ever been closed pursuant to the provisions of ORS 656.268. Therefore, it is referring this request for own motion relief to its Hearing Division to be set for hearing before an Administrative Law Judge (ALJ) at the same time as claimant's request for a hearing in WCB Case No. 78-1547.

If the ALJ finds that claimant's present condition is the result of her September 20, 1972 injury and represents a worsening since the last award or arrangement of compensation therefor and, additionally, that it has been closed pursuant to ORS 656.268, the ALJ shall submit to the Board a complete transcript of the proceedings together with recommendations on the claimant's request for own motion relief. The ALJ shall also enter an appealable Opinion and Order on the denial of the claim by Tektronix (WCB Case No. 78-1547).

If the ALJ shall find from the evidence that the September 20, 1972 claim was never formally closed pursuant to ORS 656.268, said claim shall be submitted to the Evaluation Division of the Workers' Compensation Department for proper closure.

SAIF CLAIM NO. C 171222 AUGUST 7, 1978

FRANK REID, CLAIMANT
Allen G. Owen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

On July 19, 1978 the Board entered its Own Motion Determination in the above entitled matter whereby claimant was granted compensation for temporary total disability from March 8, 1977 through July 17, 1977, less time worked, and granted 45° for 30% loss of the left leg.

At the time of the closure, there was in the file a statement from Dr. John R. Hazel, claimant's treating physician, that he had instructed claimant to remain off work starting January 1, 1977, however, March 8, 1977, the date claimant had surgery on his left leg, was used as the commencement date for time loss.

The Board is now informed by Dr. Hazel that his instructions for claimant to cease working as of January 1, 1977 were based upon his left leg condition and that claimant was unable to work from that date forward. The Board is also advised that the Fund commenced payment of temporary total disability benefits to claimant as of that date and continued to pay them through July 17, 1977.

The Board concludes that its Own Motion Determination of July 19, 1978 should be amended by deleting therefrom the seventh paragraph on page two and substituting therefor the following:

> "Claimant is granted compensation for temporary total disability from January 1, 1977 through July 17, 1977, less time worked, and granted 45° for 30% loss of the left leg."

The Board has been advised by the Fund that it will not appeal this Amended Own Motion Determination, therefore, claimant may make an application for lump sum payment of the award of 45° for 30% loss of the left leg upon presentation of his copy of this determination to the Fund and, if Compliance Division of the Workers' Compensation Department approves said application, claimant may receive said compensation in a lump sum payment.

The Own Motion Determination of July 19, 1978, except where it is inconsistent with the above, is hereby reaffirmed.

IT IS SO ORDERED.

WCB CASE NO. 76-4682 AUGUST 10, 1978

MELVIN LEEDY, CLAIMANT
Dye & Olson, Claimant's Attys.
Keith D. Skelton, Defense Atty.
Order on Remand

On March 23, 1977, after a hearing, an Opinion and Order was entered in the above entitled matter which, inter alia, found claimant's condition was medically stationary as of May 31, 1976, did not disturb the Determination Order of July 28, 1976 awarding claimant only compensation for temporary total disability from March 2, 1976 through May 31, 1976, and stated that it would be premature to rule on the issue of permanent disability until after claimant undertook further consideration and evaluation for vocational rehabilitation and completed vocational rehabilitation if such was deemed appropriate by the Disability Prevention Division of the Workers' Compensation Board.

The Referee's Opinion and Order was affirmed and adopted by the Board, after de novo review, with a comment that the claim was properly closed pursuant to OAR 61-030(1)(c) and, therefore, reinstatement of time loss has to occur under the provisions of OAR 61-050(4).

The Board's Order on Review was appealed to the Oregon Court of Appeals which, on June 20, 1978, held:

> " . . . the determination of a claimant's permanent disability may not be delayed until completion of a post-closure rehabilitation program. Claimant was entitled to an award of permanent disability at the time his claim was closed, based upon then existing conditions. That award would be subject to review and adjustment when he completes or abandons his rehabilitation program."

The Court of Appeals remanded the case to the Board to determine the extent of claimant's disability at the time of the original Determination Order and to award compensation accordingly.

The Board, acting in accordance with the judgment and mandate from the Court of Appeals which it received July 25, 1978, hereby remands the above entitled matter to its Hearings Division, and more specifically to Lyle R. Wolff, Administrative Law Judge (ALJ), to determine claimant's permanent disability, if any, as of May 31, 1976. If the evidence previously presented to the ALJ is sufficient to enable him to make such evaluation without the taking of further

evidence he is hereby directed to issue an amended Opinion and Order dealing solely with the extent of claimant's permanent disability; if it is not he is directed to hold a hearing for the purpose of taking such evidence.

IT IS SO ORDERED.

CLAIM NO. B104C314863 AUGUST 11, 1978

LARRY D. BARKER, CLAIMANT
Coons & Anderson, Claimant's Attys.
Long, Neuner, Dole, Caley & Kolberg, Defense Attys.
Own Motion Determination

On April 8, 1967 claimant, while in the employ of Roseburg Lumber Company, whose workers' compensation coverage was furnished by Fireman's Fund Insurance Company, sustained an industrial injury resulting in a comminuted fracture of the right humerus with radial nerve involvement. After several surgeries, the claim was initially closed on February 13, 1971 by a Determination Order granting claimant 94° for partial loss of the right arm by use. Claimant requested a hearing and pursuant to a stipulation and order, dated November 30, 1971, was awarded an additional 10° for permanent partial disability. Claimant's rehabilitation was successful and he returned to full employment with substantial use of his arm.

On May 17, 1976 Dr. Young examined claimant for intermittent elbow discomfort and difficulty using his right thumb. He was later seen by Dr. Gill, who found the metacarpophalangeal joint of the right thumb was unstable with degenerative changes. An arthrodesis of the joint was suggested.

On May 24, 1977 a Board's Own Motion Order referred the claimant's request for own motion relief to its Hearings Division to set for hearing on a consolidated basis with the claimant's request for hearing on a 1975 injury. The Administrative Law Judge (ALJ), after taking evidence, found that claimant's request should be granted.

On October 18, 1977 a fusion of the metacarpophalangeal joint of the right thumb was done. Claimant was released to work on February 28, 1978 and on June 26, 1978 Dr. Young stated that the thumb was stable and pain-free. Claimant's hand function appeared to be improved over the preoperative status and he recommended claim closure.

On July 12, 1978 the carrier requested a determination of claimant's present condition and the Evaluation Divi-

sion of the Workers' Compensation Department recommended to the Board that claimant be granted compensation for temporary total disability beginning September 17, 1977 through February 27, 1978 only.

The Board concurs.

ORDER

Claimant is awarded compensation for temporary total disability commencing October 17, 1977 through February 27, 1978.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $500.

SAIF CLAIM NO. RC 157974 AUGUST 11, 1978

NORMA COLE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant has requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen her claim for a compensable industrial injury to her left middle finger sustained on November 25, 1968 while in the employ of Parsons Pine Products, Inc., whose carrier was the State Accident Insurance Fund.

Claimant's claim was closed by a Determination Order mailed September 8, 1969 which awarded claimant 15° of a maximum of 22° for partial loss of the left middle finger. Her aggravation rights have expired.

Claimant's request was supported by a report from Dr. Parrish which indicated that he had claimant admitted to the hospital on November 15, 1977 for an exploration of her left mid finger with tenolysis and possible PIP joint arthroplasty. The surgery was performed the following day by Dr. Parrish who reported that it was expected that four to six months time will elapse prior to graft procedure being done for the flexor tendons with removal of the silastic rod at that time.

All of the pertinent information regarding claimant's injury of November 25, 1968 and her present surgery and the projected surgery was furnished to the Board by the State Accident Insurance Fund. It was its position that the treatment appeared to be related to her 1968 injury and if the Board felt the medical evidence justified reopening the claim it would not oppose it.

The Board, after considering all of the medical reports, concludes that claimant's present condition is related to her November 25, 1968 injury and that claimant's claim should be reopened for payment of compensation, as provided by law, from November 15, 1977, the date that claimant was admitted to the hospital by Dr. Parrish until the claim is closed pursuant to ORS 656.278, less any time worked.

IT IS SO ORDERED.

SAIF CLAIM NO. KB 149515 AUGUST 11, 1978

JOHN D. CROY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable back injury on September 29, 1965 while employed with Percy E. Jellum, Contractor, Inc., at Lakeview, Oregon. His claim was accepted and after surgeries it was closed on July 31, 1969. Claimant's aggravation rights have expired.

On June 7, 1978 claimant asked the Board how he could reopen his claim and on June 16, was advised to furnish the Board, with a copy to the carrier, a current medical report commenting on his present condition, whether it was attributable to his industrial injury of 1965, and if his condition had worsened since he had last received an award of compensation for it.

On June 28, 1978 the Board received a report letter from Dr. Cherry, stating that he had written to the Fund several times and enclosed copies of said letters. He also enclosed letters relating to the treatment claimant received from him after the 1965 injury. Dr. Cherry stated that claimant was now hospitalized at St. Vincent Hospital and being treated conservatively; he expressed his opinion that he was more disabled now than he was at the time the claim was closed and he requested that the claim be reopened for both medical care and treatment and compensation as provided by law.

On July 7, 1978 the Board requested the Fund to advise it of its position with regard to claimant's request for own motion relief. On July 18, 1978 the Fund responded, stating it would not oppose payment of compensation for temporary total disability during the period of claimant's hospitalization although it was doubtful, in the Fund's opinion, that the claimant's condition had worsened to the extent that it was necessary to reopen the claim.

The Board, after giving due consideration to all of the medical reports relating to claimant's condition in 1965, when he was injured, in 1969, at the time his claim was closed, and the present medical reports indicating his present condition, concludes that claimant's claim for his September 29, 1965 compensable industrial injury should be reopened and compensation, as provided by law, commencing on the date that Dr. Cherry hospitalized claimant and until his claim is again closed pursuant to the provisions of ORS 656.278.

IT IS SO ORDERED.

SAIF CLAIM NO. EC 280757 AUGUST 11, 1978

DONALD C. HECK, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On June 5, 1978 the Board received a request from claimant to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for a compensable industrial injury suffered in December 1970. Claimant's claim has been closed and his aggravation rights have expired.

Claimant's request was supported by a report from Dr. John Thompson who hospitalized claimant on May 4 for a myelogram and is still treating claimant.

Claimant states that he had previously requested the Fund to reopen his claim and had been advised by it that his aggravation rights had expired and he should make direct inquiry to the Workers' Compensation Board. When the medical information was furnished by claimant it was referred to the Fund which replied on July 21, 1978 that it would not oppose the granting of own motion relief if the Board felt such action was warranted.

The Board concludes, based upon the reports from Dr. Thompson, that claimant is entitled to have his claim for a compensable injury suffered on December 10, 1970 while in the employ of Mercer Industries, said claim designated as EC 280757, reopened as of May 4, the date claimant was hospitalized for a lumbar myelogram by Dr. Thompson, and until his claim shall be closed pursuant to the provisions of ORS 656.278, less any time worked.

SAIF CLAIM NO. DC 176864 AUGUST 11, 1978

PAUL E. HOLMSTROM, CLAIMANT
Charles Paulson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury to his low back on March 25, 1969 while working for Hollywood Lights. After conservative treatment, claimant returned to full time work on August 11, 1969 and his claim was closed by a Determination Order dated April 6, 1970 which awarded claimant compensation for time loss and 48° for unscheduled low back disability.

Claimant continued to have low back pain radiating down his right lower leg and on January 25, 1973 a lumbar laminectomy L5-S1, with removal of a herniated intervertebral disc, L5-S1, and decompression of the S1 nerve root right was performed. The claim was then closed by a Second Determination Order on July 16, 1973 awarding additional compensation for time loss and an additional 5% for unscheduled low back disability and 5% loss of the right leg.

Surgery was again performed on December 9, 1974 and his claim was closed on May 12, 1975 by a Third Determination Order which awarded additional time loss benefits and additional compensation equal to 48° for unscheduled low back disability. Thereafter, claimant did fairly well although he did have recurrences of his old symptoms which required various treatments, none of which provided any permanent relief.

On January 27, 1978 Dr. Grimm, Dr. Woolpert, and Dr. Dresher examined claimant and reported a moderate loss of function due to his injury. Dr. Misko reported on June 15, 1978 that claimant was medically stationary.

A request for determination was made by the Fund on July 19, 1978 and the Evaluation Division of the Workers' Compensation Department recommended that the claim be closed with an award of compensation for temporary total disability from November 17, 1975 through June 15, 1978, less time worked, and an additional 80° for unscheduled low back disability.

The Board concurs.

ORDER

Claimant is awarded compensation for temporary total disability from November 17, 1975 through June 15, 1976, less time worked, and 80° of a maximum of 320° for unscheduled low

back disability. These awards shall be in addition to all previous awards received by claimant for his industrial injury of March 25, 1969.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $2,300.

SAIF CLAIM NO. C 89861 AUGUST 11, 1978

JOSEPH HUSTON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable industrial injury on August 31, 1967 while in the employ of Portland Wire and Iron Works whose carrier was the State Compensation Department, predecessor to the State Accident Insurance Fund. The claim was closed by a Determination Order dated April 4, 1968 which granted claimant 32° for 10% unscheduled disability. The claim was reopened for further medical care and treatment and closed again on September 15, 1971 by a Second Determination Order which granted claimant an additional award of 32°.

Claimant now seeks to have the Board exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim, alleging that his condition has worsened. The request is supported by substantial medical reports from Dr. Wisdom who performed a hemilaminectomy and discectomy, L4-5, left with decompression on January 16, 1978. The hospital reports indicate claimant was admitted to St. Vincent's Hospital on December 28, 1977.

On April 7, 1978 Dr. Wisdom advised the Fund that claimant was making a good recovery from his last surgery, that he had seen him on March 29, 1978 and claimant had returned to work approximately three weeks previous to that and was able to work full time. He recommended continuation with rehabilitative back exercises and said that he had suggested that claimant see him another month.

Claimant had first requested the Fund to reopen his 1967 claim and because his aggravation rights had expired, the Fund referred the matter to the Board for its consideration, forwarding all pertinent copies of its claim file and stating it would not oppose reopening.

The Board finds, based upon the medical evidence furnished to it by the Fund, that claimant's claim should be reopened and claimant paid compensation, as provided by law, commencing on December 28, 1977, the date claimant was admitted to St. Vincent's Hospital and continuing until the claim is closed pursuant to ORS 656.278, less time worked. The Board notes that Dr. Wisdom's letter of April 7, 1978 indicated claimant had returned to work on a full time basis during the first week of March 1978.

IT IS SO ORDERED.

SAIF CLAIM NO. GA 872730 AUGUST 11, 1978

JOHN D. MIZAR, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On October 10, 1977 claimant, by and through his attorney, had requested the Board, pursuant to ORS 656.278, to reopen his claim for an industrial injury suffered on July 25, 1966. The Board referred the matter to its Hearings Division to be heard on a consolidated basis with claimant's hearing on the denial of his claim for an alleged industrial injury sustained on August 15, 1977. This claim had been denied on the grounds that claimant had a pre-existing condition which his doctor said was an aggravation of his 1961 injury.

The Administrative Law Judge (ALJ) to whom the matter was assigned for hearing was directed to recommend to the Board whether claimant's present condition is the result of an aggravation of his 1966 injury or a new injury on August 15, 1977 and also if claimant's claim for a new injury on June 18, 1969, which had been denied, and the subsequent surgery necessitated thereby, and also the June 17, 1974 surgery were causally related to claimant's 1961 industrial injury.

After a hearing, the ALJ found, based upon the opinion of Dr. Nag, claimant's treating physician, that there was a causal relationship between the 1969 episode and the 1961 injury and there was no question but that the 1974 surgery on claimant's right leg was directly connected to the 1969 surgical procedure. He further found that the Fund had denied the 1969 claim on the grounds that claimant's back pain had existed prior to his employment with his then employer, Quality Brands. The ALJ was of the opinion that under those circumstances, the Fund could not, at the present time, deny the 1969 episode

was an aggravation of the 1961 injury because the denial in 1969 was based on the fact that the injury was an aggravation of a prior injury.

He concluded that if the Fund was now directed to accept the claim for aggravation it would only be doing what it should have done in 1969 and again in 1974. He recommended that the Board assume its own motion jurisdiction and remand claimant's 1961 claim to the Fund for processing.

The Board accepted the recommendation of the ALJ and remanded claimant's claim to the Fund.

On May 11, 1978 the Fund requested a determination of claimant's condition. On July 24, 1978 the Evaluation Division of the Workers' Compensation Department recommended that claimant be awarded compensation equal to 10% loss function of the right foot to cover all increased permanent partial disability as a result of the surgeries in 1969 and in 1974. It noted that compensation for temporary total disability from September 23, 1969 through April 7, 1970 and from June 3, 1974 through July 21, 1974 had been paid by the Fund.

The Board accepts the recommendation of the Evaluation Division of the Workers' Compensation Department.

ORDER

Claimant is awarded compensation equal to 10% loss function of the right foot. This award is in addition to any previous awards for compensation received by claimant as a result of his July 25, 1961 injury.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $2,300.

CLAIM NO. B830C 378942 AUGUST 11, 1978

KAREN SUE MORGAN, CLAIMANT
Dye & Olson, Claimant's Attys.
Order Rescinding Own Motion Determination

On July 14, 1978 the Board entered its Own Motion Determination in the above entitled matter whereby claimant was granted compensation for temporary total disability from September 17, 1977 through January 29, 1978 and for partial disability from January 30, 1978 through February 28, 1978.

The order was issued based upon an advisory recommendation from the Evaluation Division of the Workers' Compensation Department which, in turn, was based upon a request from the carrier, Fireman's Fund Insurance Company, for a determination of claimant's present disability.

Claimant's claim was initially closed on August 16, 1972 and claimant's aggravation rights expired on August 15, 1977. It has now been called to the attention of the Board that on August 12, 1977 claimant's attorney requested the carrier to reopen claimant's claim for aggravation; photostatic copies of the signed receipt for registered mail indicates that the carrier received the claim for aggravation on August 15, 1977 which would be within the five-year period. Therefore, the Board concludes that it has improperly closed claimant's claim under the provisions of ORS 656.278; she is entitled to have her claim closed pursuant to ORS 656.268.

The Board further concludes that it should rescind its Own Motion Determination dated July 14, 1978 and refer the matter to the Evaluation Division of the Workers' Compensation Department to issue a proper Determination Order pursuant to ORS 656.268.

IT IS SO ORDERED.

WCB CASE NO. 77-7266 AUGUST 11, 1978

CARL PENLAND, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On July 10, 1978 claimant, by and through his attorney, moved the Board for an order to remand the above entitled matter for the taking of further evidence, namely, a report from Dr. Ochs, dated April 24, 1978, which was not available at the time of the hearing or, in the alternative, to admit the report into evidence and order the claim reopened for the treatment recommended by Dr. Ochs.

On July 24, 1978 the State Accident Insurance Fund advised the Board that it would resist claimant's motion, stating that the matter was heard on February 15, 1978 and the file contained an updated evaluation by Dr. Renaud, dated January 3, 1978; Dr. Renaud had been claimant's treating orthopedist.

The Board finds that the claimant has not shown that the additional medicals could not have been presented at the hearing and in the absence of any specific recommendation for

treatment which would require time loss the Board concludes that this is an attempt on the part of claimant to relitigate his claim.

The Board concludes that the motion to remand should be denied.

IT IS SO ORDERED.

WCB CASE NO. 78-3042 AUGUST 11, 1978

DONALD B. ROWDEN, CLAIMANT
Grant, Ferguson & Carter, Claimant's Attys.
Collins, Velure & Heysell, Defense Attys.
Roger Warren, Defense Atty.
Own Motion Order Referring for Hearing

On June 30, 1978 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an injury suffered in December 1967 while in the employ of Fir Ply Company whose workers' compensation coverage was furnished by Employers Insurance of Wausau. Claimant's claim was closed initially by a Determination Order dated June 15, 1970 and his aggravation rights have expired.

Claimant has also filed a claim against his current employer, SWF Plywood, self insured, for an alleged injury suffered on or about March 22, 1978 while working as a clipper operator. This claim was denied by the employer on April 4, 1978 on the grounds that claimant had suffered an on-the-job injury to his back while working for Fir Ply Company, that there was no evidence of any specific trauma occurring while claimant was employed at SWF Plywood Company and claimant's present condition constituted a worsening of his condition resulting from the earlier accident.

Claimant requested a hearing on the denial of his claim against SWF on April 24, 1978 and subsequently the employer, SWF, requested that Employers Insurance of Wausau be joined as a party because it was the insurer for Fir Ply Company on December 27, 1967.

In support of claimant's request for own motion relief a letter from Dr. Wanek was furnished to the Board. Dr. Wanek indicated that a myelogram had been performed by Dr. Campagna and possibly surgery would be required. He also felt that in view of claimant's previous injuries and the physical findings which he made that claimant's present problems were the result of his previous on-the-job injury in December 1967.

Wausau objected to the motion of SWF to join it as a party, addressing the objection first to the Hearings Division on July 11, 1978 and renewing it in a letter addressed to the Board under date of July 20, 1978.

The Board, based primarily on Dr. Wanek's report, feels there is sufficient medical evidence to show a possible involvement of Fir Ply and its carrier, Wausau, and, therefore, they should be joined as parties defendant in the hearing requested by claimant on the denial by SWF of his claim filed against it for an injury on or about March 22, 1978.

The Board further finds that the evidence is not sufficient to enable it to make a determination at this time on the claimant's request for own motion relief, therefore, it refers this matter to the Hearings Division to join Fir Ply and Wausau as parties defendant and to set for hearing at the same time as the hearing on the denial of claimant's claim for an alleged 1978 injury.

If, after the hearing, the Administrative Law Judge (ALJ) finds that claimant's present condition is attributable to his 1967 industrial injury and represents a worsening since the last award or arrangement of compensation for that injury he shall cause a copy of the transcript of the proceeding to be furnished to the Board together with his recommendations on the request for own motion relief. The ALJ shall also dispose of the issue of the denial by SWF of claimant's claim for an industrial injury alleged to have been sustained on or about March 22, 1978 with an Opinion and Order which may be appealed.

SAIF CLAIM NO. A 915909 AUGUST 11, 1978

CHARLES A. THORN, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Attys.
Own Motion Order

On August 18, 1976 the State Accident Insurance Fund requested the Board, pursuant to its own motion jurisdiction granted by ORS 656.278, to cancel the award for permanent total disability granted claimant in the above entitled matter on December 27, 1965. Claimant was advised of the Fund's request and on September 3, 1976 claimant's attorney responded, stating that it was claimant's position that he was still permanently and totally disabled.

The Board did not have sufficient evidence before it upon which to make a determination upon the merits of the Fund's request, therefore, they referred the matter to its Hearings Division with instructions to hold a hearing and take evidence on this issue.

A hearing was set before Lyle R. Wolff, Administrative Law Judge, on August 9, 1978 and all parties were notified. On August 1, 1978 the Fund, by and through one of its attorneys, advised the Board that it wished to withdraw its request for own motion relief and requested that the hearing be dismissed.

The Board, being fully advised, concludes that the request made by the State Accident Insurance Fund on August 18, 1976 to cancel claimant's award of permanent total disability which had been granted on December 27, 1965 should be considered as withdrawn and the hearing set for August 9, 1978 should be dismissed.

IT IS SO ORDERED.

WCB CASE NO. 76-7070 AUGUST 11, 1978

FRANCIS VASBINDER, CLAIMANT
Ackerman & DeWenter, Claimant's Attys.
Collins, Velure & Heysell, Defense Attys.
Order of Dismissal

A request for review, having been duly filed with the Workers' 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 Administrative Law Judge is final by operation of law.

WCB CASE NO. 74-1910 AUGUST 11, 1978
WCB CASE NO. 77-7974-E

WILLIAM R. WHITT, CLAIMANT
Harold W. Adams, Claimant's Atty.
Cosgrave & Kester, Defense Attys.
Own Motion Order

A joint petition and order of dismissal of hearing upon settlement of bona fide dispute was signed by the involved parties in the above entitled matter and approved by Lyle R. Wolff, Administrative Law Judge (ALJ), on June 12, 1978.

The petition alleges that claimant, currently ajudicated as being permanently and totally disabled, was notified that a hearing was scheduled for June 20, 1978 before an ALJ

to determine whether claimant is still permanently and totally disabled or whether his disability was less than permanently and totally disabled. The petition further alleges that a bona fide dispute exists as to that issue, to-wit: Dr. Pasquesi, on or about November 15, 1977, stated his opinion that claimant would be capable of physically performing work of a sedentary nature but Dr. Bright expressed his opinion on or about March 30, 1978 that claimant was presently totally disabled and unable to work.

If the ALJ allowed the claim and hearing to be disposed on a "bona fide disputed claim" basis upon payment by the carrier to claimant and to his attorney the sum of $27,500 and upon approval of the "bona fide disputed claim" settlement and dismissal of the hearing, the parties involved agreed that ". . . all claims which claimant has or may have against Respondent, LIBBY, McNEILL & LIBBY, and its insurer, in connection with this claim No. 541 C 30 10 57-9, resulting from the injury of 12-11-74, for benefits under Oregon's Workers' Compensation Law are thereby and thereafter precluded and that the said Twenty-seven thousand Five hundred ($27,500.00) dollars is a full and final payment therefor."

The Board, on July 10, 1978, informed claimant's attorney and the attorney for the employer and its carrier that it was of the opinion that the document constituted a "release" which is prohibited by ORS 656.236 and also the references to respondent, Libby, McNeill & Libby in Claim No. 541 C 30 10 57-9, resulting from the injury of December 11, 1974 on page two of said document apparently are in error. The Board invited the two attorneys to file simultaneous written briefs within 10 days from the date of its letter in support of the submitted petition and setting forth respective theories as to why the Board should not countermand and reverse the approval of the petition by ALJ Wolff pursuant to its own motion jurisdiction granted by ORS 656.278.

Neither attorney submitted a brief and the Board, after careful consideration of the petition, concludes that it is nothing more than a compromise and release and is prohibited by the provisions of ORS 656.236. Therefore, the approval of the petition by the ALJ should be set aside by the Board pursuant to the authority granted to it by ORS 656.278.

IT IS SO ORDERED.

JOHN G. YOUNG, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant filed a claim on September 14, 1970 for a back injury sustained while lifting a gas heater. It was accepted by the State Accident Insurance Fund. The injury was diagnosed as an acute muscular spasm of the lumbar spine. A myelogram of October 15, 1970 revealed a defect at L4-5. An L-4 laminectomy and L4-5 discectomy were performed on the same date. Claimant continued to have discomfort including difficulty with urination and defecation. After a second positive myelogram, a laminectomy L4-5 and L5-S1 with removal of an epidural scar was performed on May 5, 1971.

A Determination Order dated November 8, 1971 awarded claimant compensation equal to 64° for 20% unscheduled low back disability.

In February 1972 Dr. Parvaresh opined claimant had a traumatic neurosis associated with conversion reaction involving the function of his lower bowels and bladder. He felt claimant needed psychiatric treatment.

Claimant developed hemorrhoids and a claim for this condition was filed.

On July 27, 1972, a stipulation and order provided for the reopening of the claim for psychiatric care and treatment. The hemorrhoid condition was denied along with all other conditions except the back injury and subsequent psychiatric treatment on November 8, 1972.

Psychiatric treatment was terminated in January 1973 and a second Determination Order, dated June 25, 1973, awarded claimant additional compensation for permanent partial disability equal to 96° for 30% unscheduled disability for post-traumatic neurosis. This gave claimant 160° for unscheduled disability.

Dr. Seres in June 1973 related claimant's continuing anal and urinary problems to the back surgery necessitated by his 1970 industrial injury. The problem was diagnosed as rectal prolapse.

After a hearing, the Hearing Officer affirmed the second Determination Order but ordered acceptance of the rectal prolapse condition and allowed claimant additional compensation for temporary total disability.

Claimant's condition was medically stationary on March 11, 1974. Claimant was released to work on April 1, 1974.

A third Determination Order dated April 23, 1974, awarded claimant only additional compensation for temporary total disability. Claimant appealed and an Opinion and Order entered on November 14, 1974 affirmed the Determination Order. After de novo review, the Board, by an order dated May 27, 1975, added 64° for a total of 224° for 70% unscheduled disability. This award was affirmed by the circuit court in October 1975.

Claimant continued to experience flare-ups of this problem. Dr.Kilgore in November 1975 felt claimant was permanently and totally disabled based on the organic damage or psychological factors which rendered claimant a chronic invalid.

The Fund denied claimant's aggravation claim on December 19, 1975. This denial was affirmed by Hearing Officer Drake by an order dated November 1, 1976 which was affirmed by the Board on June 2, 1977.

Claimant was hospitalized on September 15, 1977 for three days with severe back pain.

Claimant's claim was reopened on April 14, 1978 for payment of temporary total disability effective September 15, 1977 through September 10, 1978 and further medical care and treatment.

Dr. Klump, on April 24, 1978, indicated claimant continued to have pain in the rectal and genital areas and continued to have extreme difficulty with his bowels and bladder. He noted he had not released claimant for work and could not foresee a time when he would be able to release claimant for work.

Dr. Klump reported in June 1978 claimant was medically stationary. He found claimant had full range of motion of the lumbar spine. He felt claimant's medically stationary state was not likely permanent and that claimant would have continuing flare-ups of severe pain. Dr. Klump's prognosis for any reasonable recovery was poor. Claimant continues to have constant pain in the rectal area and abnormal bowel movements.

On June 19, 1978 the Fund requested an evaluation of claimant's condition. On July 14, 1978 the Evaluation Division of the Workers' Compensation Department recommended an additional award for temporary total disability, stating that, in their opinion, claimant's permanent partial disability was adequately compensated for by the awards aggregating 224° for

70% unscheduled disability which claimant has received.

The Board does not concur with the Evaluation Division's rating of claimant's permanent partial disability. Taking into consideration claimant's age, education, and work background together with the complete lack of relief claimant has been afforded by medical treatment, the Board concludes claimant is permanently and totally disabled.

ORDER

Claimant shall be considered as permanently and totally disabled as of the date of this order.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $2,300.

SAIF CLAIM NO. 585427 AUGUST 11, 1978

NELSON J. ZELLER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable industrial injury on January 21, 1937 when he injured his left knee while falling timber. Surgery was performed and the claim was closed on August 18, 1937 with an award equal to 15% loss of the left leg.

In 1976 claimant was seen by Dr. Collis and Dr. Vigeland, complaining of increased pain and decreased motion in his left knee. The Fund denied reopening for aggravation on March 9, 1977 and claimant's attorney requested own motion relief from the Board on April 21, 1977. At that time the Board did not have sufficient evidence to determine whether claimant's request was justified and it referred the matter to its Hearings Division by an order dated May 13, 1977.

After a hearing, the Administrative Law Judge (ALJ) recommended that the Board grant the requested relief and the Board issued an order on April 27, 1978 remanding the claim to the Fund for payment of compensation, as provided by law, commencing March 11, 1977.

On March 11, 1977 Dr. Collis performed a high tibial osteotomy. In his closing report of April 4, 1978 he stated the knee was much better, exhibited no swelling and only mild instability and some mild pain with heavy lifting. He said

claimant's knee lacked 30% of active flexion.

The Fund requested a determination of claimant's condition and the Evaluation Division of the Workers' Compensation Department recommended that the claim be closed with an award of compensation for temporary total disability from March 11, 1977 through April 4, 1978 only.

The Board concurs in these recommendations.

ORDER

Claimant is awarded compensation for temporary total disability from March 11, 1977 through April 4, 1978. This award is in addition to all previous awards which claimant may have been granted for his January 21, 1937 industrial injury.

WCB CASE NO. 77-2953 AUGUST 14, 1978

GARRISON CANDEE, CLAIMANT
Jones, Lang, Klein, Wolf & Smith,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order

On July 13, 1978 the Board, after de novo review, affirmed and adopted the Opinion and Order of the Administrative Law Judge (ALJ) which granted claimant time loss benefits from May 12, 1976 through July 15, 1976 and from September 23, 1976 through October 4, 1976 in addition to penalties and attorney fees.

Claimant, on appeal, contended she was entitled to permanent partial disability for her condition; the State Accident Insurance Fund, on cross-appeal, contended claimant was not entitled to temporary total disability benefits from May 12, 1976 through July 15, 1976 as she was receiving full wages for that period of time.

On July 28, 1978 the Fund requested the Board to reconsider its Order on Review of July 13, 1978 still contending claimant was not entitled to receive temporary total disability benefits during the period for which her non-complying employer had paid her certain monies, and requesting the Board, on reconsideration, to reverse that portion of the order of the ALJ which ordered payment of temporary total disability during the period claimant was receiving full wages from her employer and the penalty ordered for non-payment thereof or, in the alternative, for an explicit directive for future guidance should the

Board feel that temporary total disability benefits should be paid even though full wages have already been paid for the period in question in non-complying employer cases.

On August 4, 1978 the Board received response to the Fund's motion for reconsideration, stating it was not well taken; that neither ORS 656.018(4) or 656.262(9) stand for the proposition that credit should be given to a non-complying employer in a situation such as existed in the above entitled matter. Citing Douglas N. Feeney, WCB Case No. 69-1964, 5 Van Nattas 160 (August 24, 1970), counsel for the employer states that the Board has already ruled that a non-complying employer is not entitled to an offset of temporary total disability benefits paid under these cirsumstances. Furthermore, the Fund does not request a hearing on this issue.

Claimant also filed its motion for reconsideration of the Board's Order on Review, contending that the Board should have found that claimant was entitled to some award for permanent partial disability.

The Board, during its denovo review of the above entitled matter, read the arguments of each party on the issue of whether claimant for a certain period of time received "double compensation" or whether the monies received during that period of time by claimant from her non-complying employer could not be construed as wages. The additional arguments were offered on this issue in the July 28, 1978 request by the Fund to reconsider the Board's Order on Review and in the August 4, 1978 response by the employer.

The Board's Order on Review entered on July 13, 1978 will become final unless one of the parties gives notice of appeal thereof to the Court of Appeals on August 14, 1978. Therefore, the Board feels that to allow it to give full and complete reconsideration to claimant's arguments on this issue and to enter an Order on Review which will establish policy on this particular matter, that the Order on Review of July 13, 1978 should, at this time, be set aside and held in abeyance pending a complete re-review of this particular issue.

The Board's Order on Review upon Reconsideration may be appealed by either party within 30 days after the date thereof.

IT IS SO ORDERED.

WCB CASE NO. 77-1197 AUGUST 14, 1978

JAMES COZART, CLAIMANT
Tom Hanlon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Souther, Spaulding, et. al., Defense Attys.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which remanded claimant's aggravation claim to it for acceptance and payment of benefits; ordered reimbursement to Crown Zellerbach for all benefits it had paid pursuant to a .307 order; and directed the Fund to pay claimant's attorney $1,000 ($900 for prevailing on a denied claim and $100 for the Fund's improper denial).

Claimant sustained a compensable injury to his back on November 18, 1975 while employed as a logger for Crown Zellerbach (herinafter referred to as Crown). This injury was diagnosed as a lumbar strain and was classified as non-disabling. He received conservative treatment only.

Claimant had no history of any prior back injuries. He returned to work the day after the injury and continued to work until a shutdown of the logging operation. Claimant testified he continued to experience back pain and did miss a few days of work because of back pain.

Claimant, after the operations started again, returned to work at his regular job. He testified he didn't suffer any new injuries during the time he was off and the time he left work on February 7, 1977. Crown did place claimant on a tower job based on his seniority and his back pain.

Claimant left work on February 7, 1977 because of pain in his shoulders and upper back area, pain in the back of his leg down to his knees, and a tingling sensation in his legs.

Dr. Mason examined claimant on February 7, 1977 and felt claimant should be hospitalized for a period of conservative treatment. Claimant had a history of an injury in November 1975 and had experienced discomfort since that injury.

The Fund wrote to Dr. Mason advising him it did not feel claimant's present condition was its responsibility. A copy of this letter was sent to claimant. It did not contain any advice regarding claimant's appeal rights.

Dr. Mason opined on March 11, 1977 that claimant's accident in November 1975 contributed to his present condition.

After a period of conservative treatment and suggestion of a job change by Dr. Mason, claimant was released for work on August 1, 1977.

On the 26th of April, 1977, a hearing was held. Crown was not a party to it. It was indicated that Crown had become self-insured on July 1, 1976 and the Fund moved that Crown be joined. After some discussion, a stipulation was entered which provided that the hearing was to be continued; that claimant would file claims against both the Fund and Crown and the Fund would pay temporary total disability benefits for 60 days, commencing on April 26, 1977.

Claimant's deposition was taken on June 16, 1977 which was attended by the attorneys for the claimant, the Fund and Crown.

Claimant filed a claim against the Fund, which it denied on June 27, 1977 (this denial was in small letters) and a claim against Crown, which it denied on July 6, 1977.

An order pursuant to ORS 656.307 designated Crown to pay benefits to claimant. Crown paid temporary total disability benefits to claimant. Crown paid temporary total disability benefits from February 7 until July 19, 1977, excluding the temporary total disability the Fund paid.

After a second hearing, the ALJ found claimant had proven his aggravation claim and remanded it to the Fund for payment of benefits and directed the Fund to reimburse Crown for benefits it had paid. He awarded claimant's attorney attorney fees as indicated in the opening paragraph of this order. The ALJ did not find that the Fund's denial was frivolous, therefore, Crown was not entitled to an attorney's fee.

The Board, after de novo review, modifies the ALJ's order. The Board assesses a penalty in a sum equal to 25% of the compensation due to claimant from February 7, 1977, the date of Dr. Mason's report, to April 26, 1977, the date Crown started paying under ORS 656.307, for its unreasonable action in processing claimant's claim for aggravation and payment of compensation.

The Board concurs with the remainder of the ALJ's order.

ORDER

The ALJ's order, dated February 10, 1978, is modified.

The State Accident Insurance Fund shall pay to claimant a sum equal to 25% of the compensation he is entitled to from February 7, 1977 to April 25, 1977 as a penalty for its unreasonable actions in processing his claim for aggravation and payment of benefits.

The ALJ's order is affirmed in all other respects.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $300.

SAIF CLAIM NO. DB 155225 AUGUST 14, 1978

WELDON F. McFARLAND, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On October 14, 1975 the Board issued its Own Motion Order pursuant to ORS 656.278 and reopened claimant's claim for a compensable industrial injury sustained on October 12, 1965 for such medical care and treatment as may be required and for the payment to claimant of compensation, as provided by law, commencing on the date of that order and until the claim is closed pursuant to ORS 656.278. Said order also awarded claimant's attorney as a reasonable attorney's fee 25% of the increased compensation which claimant will receive as a result of that order and also 25% of any additional compensation he may receive upon closure pursuant to ORS 656.278.

On June 2, 1978 the Fund requested closure and the Evaluation Division of the Workers' Compensation Department recommended to the Board that the claim be closed with no additional award of permanent partial disability due to the October 12, 1975 industrial injury and also stated that claimant had already been paid all of the compensation for temporary total disability to which he was entitled.

ORDER

Claimant's claim for his industrial injury suffered on October 12, 1965 is hereby closed pursuant to the provisions of ORS 656.278.

WCB CASE NO. 77-5457 AUGUST 15, 1978

RICHARD C. BARTON, CLAIMANT
Dye & Olson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the Determination Order whereby claimant was granted compensation equal to 32° for 10% unscheduled neck disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated March 10, 1978 is affirmed.

SAIF CLAIM NO. FB 91918 AUGUST 15, 1978

ANTHONY J. BRUGATO, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On November 1, 1964 claimant suffered a compensable injury for which he filed a claim that was closed initially on October 28, 1968 with an award of 75% loss of function of the left leg, 30% loss of function of the right leg and 30% loss of an arm for unscheduled disability.

The claim was reopened and closed several times and after litigation a judgment order of the circuit court of Oregon for Multnomah County, dated November 15, 1971, increased claimant's awards to 95% loss of function of the left leg, 50% loss of function of the right leg, and 40% loss function of an arm for unscheduled disability.

From 1971 to 1975 claimant was employed buying and selling produce through the use of the telephone.

On April 21, 1975 claimant had surgery for removal of a hugh lipoma in the right groin which Dr. Cohen, claimant's treating physician, related to the pressure of the ring used in traction following claimant's industrial injury. Claimant saw Dr. Cohen frequently. On April 22, 1976 Dr. Cohen indi-

cated claimant was having more pain in both knees, in his hips, thighs and ankles; in his opinion claimant was gradually getting more infirm and having more difficulty getting around. He thought that claimant had some further disability in the form of pain in the knees and ankle and now in his hips than he had at any previous claim closure.

Based upon this report, the Evaluation Division of the Workers' Compensation Department, on August 30, 1976, recommended that the claimant be granted an award for permanent total disability.

On August 30, 1976 a Board's Own Motion Determination found claimant to be permanently and totally disabled as of the date of said order and the Fund requested a hearing. On April 28, 1977 an ALJ found that the claimant was not permanently and totally disabled but was entitled to an award of compensation equal to 105° for 70% loss of his right leg and an award of compensation equal to 90% of the maximum allowable by statute for his unscheduled permanent partial disability.

On July 10, 1978 claimant, by and through his attorney, requested the State Accident Insurance Fund to reopen claimant's claim for payments of all benefits, as provided by law, to pay temporary total disability benefits from June 19, 1978 until the claim is closed pursuant to ORS 656.278, and to pay for all accrued and accruing medical expenses for treatment causally related to claimant's industrial injury and pay claimant's attorney a reasonable attorney's fee.

The Fund furnished the Board copies of reports from Dr. Uhle, records from Holliday Park Hospital and a report of Dr. Cohen and indicated that it would not resist claimant's request for own motion relief as set forth in claimant's counsel's letter directed to the Fund on July 10, 1978.

The Board, having considered the medical evidence furnished to it, concludes that claimant's request for own motion relief should be granted.

ORDER

Claimant's claim for an industrial injury sustained on November 1, 1964 is remanded to the State Accident Insurance Fund for acceptance and payment of compensation, as provided by law, commencing June 19, 1978 and until closed pursuant to ORS 656.278, less time worked.

The Fund shall pay for all accrued and accruing medical expenses for treatment causally related to claimant's industrial injury.

Claimant's attorney is granted as a reasonable attorney's fee a sum equal to 25% of the compensation which claimant may receive as a result of this order, payable out of said compensation as paid; the fee from the award for temporary total disability shall not exceed $500, and the total fee not over $2,300.

SAIF CLAIM NO. DC 11033 AUGUST 15, 1978

LEONARD J. CHASE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury to his left leg on March 30, 1966, diagnosed as a comminuted fracture of the distal tibia and distal fibula, extending into the ankle joint. After surgeries his claim was closed on August 19, 1968 with an award equal to 45% loss use of the left leg.

Dr. Mueller, claimant's treating physician, was of the opinion that claimant would ultimately need an ankle fusion. Claimant was seen by him periodically over the next few years for the persisting problems; the recommended ankle fusion was refused.

On February 23, 1976 Dr. Groth recommended a total ankle replacement which was done on March 8, 1976. Claimant returned to work on July 21, 1976 but continued to have problems with his ankle; apparently the incision would not heal and the motion of the ankle was decreased. On October 25, 1976 Dr. Groth told claimant to cease working, hoping that inactivity might help heal the incision.

Subsequently, claimant developed dermatitis. The etiology of the dermatitis was not determined but it was suspected that certain contents of the prosthesis may have been the cause. This condition was resolved by December 14, 1977, although the doctors were of the opinion that claimant might need further therapy for recurrences in the future.

On May 25, 1978 Dr. Pasquesi examined claimant and found his condition to be stationary from an orthopedic standpoint; he found essentially no motion in the ankle joint with the ankle in a fused position of 10° of plantar flexion. Although claimant required no external support on the ankle, he could walk only a few blocks at a time.

Claimant is now retired and is drawing Social Security benefits. The record indicates that in 1972 claimant had sustained another injury to his left leg when he fell from a

platform approximately 30 feet resulting in fractures of the left as calcis and the left tibia just below the knee.

On June 16, 1978 the Fund requested an evaluation of claimant's condition and the Evaluation Division of the Workers' Compensation Department recommended that the claim be closed with an award of compensation for temporary total disability from March 8, 1976 through July 20, 1976 and from October 25, 1976 through May 25, 1978 and compensation equal to 15% for loss of use of the left leg.

The Board concurs in these recommendations.

ORDER

Claimant is awarded compensation for temporary total disability from March 8, 1976 through July 20, 1976 and from October 25, 1976 through May 25, 1978. Claimant is also awarded compensation equal to 15% for loss use of his left foot. These awards are in addition to any previous awards received by claimant for his industrial injury sustained on March 30, 1966.

SAIF CLAIM NO. RC 340816 AUGUST 15, 1978

DALE F. CLOUGH, CLAIMANT
Williams, Spooner & Graves, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant, an Oregon State Police Officer, sustained a compensable industrial injury on December 1, 1971 when he was shot while apprehending a person suspected of driving under the influence of alcohol. Claimant's claim was initially closed by a Determination Order dated February 23, 1972 which granted claimant compensation only for temporary total disability. Claimant continued to complain of discomfort, his claim was reopened, and a second Determination Order dated December 20, 1972 granted claimant 5% for unscheduled left pelvic disability.

On August 26, 1977 claimant, by and through his attorney, requested that his claim be reopened, submitted in support of said request a report from Dr. Boals. On September 14, 1977 the Fund denied the request to reopen for aggravation; however, on March 2, 1978 the Board issued an Own Motion Order remanding the claim to the Fund for payment of compensation, as provided by law, commencing on or about June 5, 1977, the approximate date claimant took sick leave from his employment as a member of the Oregon State Police, and until his claim was closed pursuant to the provisions of ORS 656.278.

The Fund's request that the Board reconsider its

Own Motion Order was denied and on March 29, 1978 the Fund requested a hearing on the March 2, 1978 Own Motion Order.

At the present time the results of the hearing are not known, however, the Fund has requested a closing order, submitting a report dated May 15, 1978 from John Raaf.

The Evaluation Division of the Workers' Compensation Department recommends that the claim be closed with an award for additional temporary total disability from June 5, 1977 through May 15, 1978 only.

The Board concurs in this recommendation.

ORDER

Claimant is awarded compensation for temporary total disability from June 5, 1977 through May 15, 1978. This award is in addition to any previous award for temporary total disability granted claimant as a result of his December 1, 1971 industrial injury.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $500.

WCB CASE NO. 77-4517 AUGUST 15, 1978

KATHERINE J. EMMERT, CLAIMANT
Coons & Anderson, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted her compensation equal to 50% loss of the right leg. Claimant contends that her claim was prematurely closed and that she should not have to pay for the privilege of cross-examining the treating orthopedist on reports used by the employer to determine an ending date for the payment of time loss benefits.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated February 7, 1978, is affirmed.

CLAIM NO. 23-71-135 AUGUST 15, 1978

DONALD L. FRY, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
Claimant's Attys.
Jaqua & Wheatley, Defense Attys.
Own Motion Determination

Claimant suffered a compensable injury on April 23, 1971. His claim was closed by a Determination Order dated January 19, 1972 whereby claimant was granted an award equal to 40% unscheduled head and neck disability. This award was increased to 50% unscheduled disability by a Board Order on Review dated August 10, 1973.

On May 24, 1978 the Board exercised its own motion jurisdiction pursuant to ORS 656.278 and ordered the claim reopened for aggravation commencing May 31, 1977. Surgery was performed and on June 19, 1978 Dr. Bert, who performed the surgery, reported claimant had a solid fusion but was complaining of black-out spells. He referred claimant to Dr. Schostal, a neurologist, who reported a normal EEG and inability to find any neurological or vestibular explanation for the black-outs. Dr. Schostal did state that it was not uncommon for patients with previous cervical spine injuries to complain of vertigo and dizziness and this might be the etiology of his symptoms.

On July 19, 1978 Georgia-Pacific Corporation requested a determination of claimant's present condition and the Evaluation Division of the Workers' Compensation Department recommended that the claim be closed with no additional compensation for permanent disability but compensation for temporary total disability from May 31, 1977 through July 17, 1978, the date Dr. Bert found claimant to be medically stationary.

The Board concurs in the recommendations of the Evaluation Division, however, it notes that on June 21, 1978 the employer had requested a hearing on the Board's Own Motion Order issued on May 24, 1978. Inasmuch as the request for a determination was made by the employer subsequent to its request for hearing, the Board assumes that the employer no longer desires a hearing on the Own Motion Order of May 24, 1978.

ORDER

Claimant is awarded compensation for temporary total disability from May 31, 1977 through July 17, 1978.

Claimant's attorney has already been awarded a reasonable attorney's fee by the Own Motion Order of May 24, 1978.

WCB CASE NO. 77-2256 AUGUST 15, 1978

GAYELORD GRANNELL, CLAIMANT
Coons & Anderson, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith, Defense Attys.
Order of Remand

On February 24, 1978 claimant requested Board review of the Opinion and Order of the Administrative Law Judge (ALJ) in the above entitled matter and on March 21, 1978 the employer cross-requested Board review. Both parties have submitted briefs and the matter is ready for review.

On August 3, 1978 the attorney for the employer requested the Board to receive certain medical reports which were unavailable at the time of the hearing before the ALJ or, in the alternative, remanded the case to the ALJ for the taking of this additional evidence. The request alleges that the new medical reports reflect the conclusion by Oregon doctors, to whom claimant had gone seeking additional medical treatment, that claimant should not have surgery and that there was no evidence of orthopedic pathology contributing to claimant's continuing symptoms.

On August 7, 1978 the attorney for claimant replied, stating that he would resist either remanding of the case to the ALJ for the taking of further evidence or the admitting of such evidence into the record for review by the Board. He stated that if the medical reports were admitted into the record it should only be done at a remanded hearing so that claimant would have the opportunity to cross-examine Dr. Carr and possibly Dr. Misko because a number of statements made by each should not be allowed to come into the record without such cross-examination.

The Board concludes that the medical reports and/or records which the attorney for the employer wishes to be made part of the record could be relevant and necessary to enable the ALJ to make a complete record on the basic issue of this case. Therefore, pursuant to ORS 656.295(5), the above entitled matter should be remanded to the Hearings Division to set for an expedited hearing before Nathan J. Ail, ALJ, and for the

sole purpose of taking the additional medical reports and/or records which the attorney for the employer desires to submit with full opportunity granted to the attorney for claimant to cross-examine the authors of said medical reports and/or records at the hearing or by deposition.

IT IS SO ORDERED.

WCB CASE NO. 77-4394 AUGUST 15, 1978

DIANNE GRAVES, CLAIMANT
Richard O. Nesting, Claimant's Atty.
Rankin, McMurry, Osburn & Gallahger, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the June 28, 1977 Determination Order whereby she was granted compensation equal to 32° for 10% unscheduled low back disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof. An error in the ALJ's order should be corrected, however. On page 2 in the second full paragraph, the date "June 20, 1976" should be changed to read "June 16, 1975".

ORDER

The order of the ALJ, dated October 14, 1977, is affirmed.

WCB CASE NO. 75-4910 AUGUST 15, 1978

WILLIAM HARDAGE, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Attys.
Roger Warren, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the denial by the employer.

Claimant, at the age of 52, filed a claim on September 10, 1975, alleging a loss of hearing in both ears due to his planer work in the employer's mill from 1950 to 1965. This claim was denied on November 12, 1975 on the basis that it was not filed within 5 years of the last possible industrial exposure (ORS 656.807).

Due to a mix-up at the hearing, claimant did not testify regarding his hearing loss. The parties agreed to submit the exhibits which the ALJ received and upon which he could decide this case without further testimony. The exhibits disclose the following evidence.

Claimant first sought treatment for his hearing loss on September 10, 1975 from Dr. Scott. Claimant had worked for his employer for 25 years and had been employed as a planerman until 1965 when he transferred to the shipping department where he was not subjected to as severe noise exposure as he had been previously. Claimant had complained of difficulty with progressive ringing in his ears and decreased hearing for a number of years.

An audiogram revealed bilateral high frequency neural hearing loss. Dr. Scott noted a hearing impairment of 5% hearing loss of his right ear and a 17.5% hearing loss of his left ear. It was his opinion that claimant's hearing loss was the result of previous noise exposure with acoustic trauma and presbycusis. He could not tell the specific degree of hearing loss due to either of these causes but felt that a significant part of claimant's hearing loss was related to the noise exposure of his employment as a planerman; a job which claimant ceased in 1965.

The ALJ found that his determination of the compensability of claimant's claim depended upon the interpretation of ORS 656.807 which states that the claim for an occupational disease shall be void unless the claimant's claim is filed with the Fund or direct responsibility employer within 5 years after the last exposure in employment. The ALJ interpreted exposure to mean "injurious" exposure and he found that the occasional times that claimant was exposed to the industrial noise around the planer after 1965 were not sufficient to be construed as an injurious exposure.

Having reached this interpretation of the statute, the ALJ concluded, based upon Dr. Scott's opinion that the hearing loss occurred while claimant was working as a planerman for the employer, that the claim should have been filed within 5 years after the claimant ceased working as a planerman on a regular basis, and the evidence indicated that claimant did not file his claim until a substantial time after the expiration of the five-year period. The noise from the planer to which claimant was occasionally exposed after 1965 did not extend the five-year period.

The ALJ concluded that claimant's claim for an occupational disease was properly denied for failure to make a timely filing of his claim therefor, pursuant to the statute.

The Board, after de novo review, agrees with the findings and conclusions reached by the ALJ.

ORDER

The ALJ's order, dated March 27, 1978, is affirmed.

CLAIM NO. CA-628-7097-199-11-M AUGUST 15, 1978

EARL STANLEY HAZLETT, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Rankin, McMurry, Osburn, Gallagher, & VavRosky, Defense Attys.
Bruce Bottini, Defense Atty.
Own Motion Order Referring for Hearing

On April 13, 1978 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for a compensable injury suffered on February 5, 1968 while employed by Cascade Corporation whose carrier was Industrial Indemnity. The case was closed on or about June 4, 1970 and claimant's aggravation rights have expired.

Claimant's request recites that on or about June 3, 1973 claimant, while working for the Burns International Security Services, whose carrier was Underwriters Adjusting Company for Continental Insurance Company, suffered a compensable injury to his left ankle (the 1968 injury was also to the left ankle and resulted in severe infection and compromise of the vascular system in the left ankle).

Claimant states he has recently suffered an exacerbation and worsening of his left ankle condition which required extended medical treatment including surgery. Copies of medical reports from Dr. Simmons who performed the surgery were attached to the request and offered in support thereof.

The claimant's claim for aggravation of the June 3, 1973 injury he sustained while working for Burns International Security Services is presently pending hearing on claimant's request for reopening based on the same conditions described in Dr. Simmons reports (WCB Case No. 77-7639). Because of the possibility that the conditions presently requiring treatment may be related to the 1968 injury rather than to the 1973 injury, claimant asks that a hearing on his petition for own motion

relief be combined with the hearing on the propriety of the denial of his claim for aggravation of the 1973 injury.

The attorney for Industrial Indemnity, after exchange of correspondence with the Board concerning this matter, on July 19, 1978, requested that the Board decline to grant the own motion relief requested by claimant with regard to his claim of February 5, 1968.

The attorney for Underwriters Adjusting Company for Continental Insurance Company, advised the Board that his client denies responsibility for claimant's current condition and suggests that the matter be referred for a consolidated hearing as it had earlier indicated by a letter addressed to the Board under date of April 18, 1978.

The Board, at this time, does not have sufficient medical evidence upon which to make a determination on the merits of claimant's request for own motion relief and, therefore, remands said request to its Hearings Division with instructions to set the request for own motion relief for hearing at the same time the hearing on the propriety of the denial of claimant's claim for aggravation of his industrial injury of June 3, 1973 is held.

Upon conclusion of the hearing the ALJ shall cause to be prepared a copy of the transcript of the proceedings which shall be submitted to the Board together with the ALJ's recommendation relating to claimant's request for own motion relief.

If the ALJ shall find that claimant's present condition relates to the 1973 industrial injury, he shall enter his Opinion and Order on the propriety of the denial of claimant's claim for aggravation which may be appealed by either party.

WCB CASE NO. 76-4854 AUGUST 15, 1978

DAN HOLLAND, CLAIMANT
Douglas Green, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the carrier's denial of his claim for aggravation of his left shoulder condition.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated November 23, 1977, is affirmed.

WCB CASE NO. 77-7110 AUGUST 15, 1978

ROBERT HOWARD, CLAIMANT
Lachman & Henninger, Claimant's Attys.
Cheney & Kelley, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted him an award of compensation equal to 80° for 25% unscheduled disability for his rectal problems. Claimant contends this award was too low.

Claimant, a 30-year-old burner, sustained a compensable injury on April 4, 1973 while working for Zidell Explorations, Inc. He had assisted a co-worker in moving a pump and later felt pain in his rectum. Dr. Marshall found claimant had hemorrhoids; he reported in May 1973 that claimant was medically stationary.

A Determination Order, dated November 21, 1973, awarded claimant only compensation for temporary total disability to May 16, 1973.

Claimant returned to Dr. Marshall, complaining of recurrence of symptoms related to his on-the-job injury; he had been unable to work since May 29, 1974. Claimant was referred to Dr. Sullivan, a rectal surgeon.

On June 20, 1974 Dr. Sullivan performed a modified Whitehead amputative anorectoplasty. His diagnosis was prolapsing internal and external hemorrhoids. He felt no permanent impairment would result and he found claimant medically stationary as of August 19, 1974.

A Second Determination Order, dated September 12, 1974 awarded claimant additional compensation for temporary total disability from May 29, 1974 through August 18, 1974.

Claimant had gone to work for Consolidated Metco, Inc. (Consolidated) in November 1974.

Dr. Sullivan, in December 1974, opined that claimant's rectal pain was associated with heavy lifting and it was reasonable to believe these painful symptoms would continue with heavy work. He felt claimant should find an occupation requiring less physical activity.

A stipulation of December 31, 1974 awarded claimant compensation equal to 16° for 5% unscheduled disability.

Because of his continuing problems, claimant filed a claim against Consolidated on December 5, 1975 which was accepted and claimant was treated and released for work.

A Determination Order, dated April 8, 1976, awarded claimant additional compensation for temporary total disability from November 20, 1975 through November 21, 1975.

On June 7, 1976, claimant while working felt rectal pain and bleeding occur. Dr. Sullivan indicated on June 28, 1976 that he had been treating claimant for two years initially for prolapse of hemorrhoids and more recently for prolapsing of the rectum. He felt that since claimant had failed to respond to treatment, major surgery was needed; after this surgery claimant would require vocational training to avoid the possibility of tearing down the repair made with inordinate heavy work or strain.

Claimant underwent the surgery suggested by Dr. Sullivan on July 27, 1976. The final diagnosis was third-degree rectal procedentia (rectal intussusception).

On August 16, 1976 Dr. Sullivan reported the claimant had had intermittently continuing symptoms since 1972 which had not changed and had apparently been initiated by heavy work or lifting prior to his examining claimant in 1974. He felt claimant's symptoms after the first surgery had been aggravated by heavy lifting. He thought the symptoms were probably caused by a high rectal intussusception.

Consolidated felt claimant's present condition was an aggravation of his April 1973 injury and asked for a .307 order. On September 30, 1976 Consolidated was designated by a .307 order as the paying agent and the matter was referred for a hearing.

Dr. Sullivan stated on October 27, 1976 his opinion that a major portion of the cause for claimant's surgeries was the injury of 1973.

An Opinion and Order, dated May 11, 1977, remanded claimant's claim to Consolidated for acceptance and payment of compensation, as provided by law.

Claimant was found to be unable to return to his former employment as a burner, welder, metal worker or modified employment and was referred to Vocational Rehabilitation Division on May 31, 1977. Claimant completed a vocational training program in sales on October 28, 1977.

A Determination Order dated November 16, 1977 awarded claimant compensation for temporary total disability from June 7, 1976 through April 28, 1977, less time worked, and from April 29, 1977 through October 28, 1977, less amounts earned, and compensation equal to 48° for 15% unscheduled disability. Claimant requested a hearing on this award. At this hearing claimant testified he has not worked since the last surgery. He testified he cannot do any lifting, running or walking or sitting or standing too long. He has constant pain at the incision site except possibly when standing. He takes Empirin #3 or aspirin as needed. He also is no longer active in sports activities and must be careful of his diet.

Based on all the evidence, the ALJ concluded that claimant was entitled to a larger award and increased the total to 80° for 25% unscheduled disability.

The Board, after de novo review, finds claimant is unable to return to any of his prior forms of employment and has minimal ability to function as a salesman, the job for which he was retrained. His limitations include no continuous standing for more than four hours, no continuous sitting for more than four hours, no lifting of more than ten pounds. It was suggested that his work be primarily sedentary.

Claimant continued to have pain at the surgery site which is aggravated by lifting, walking or running. He cannot engage in any labor type form of employment. Therefore, the Board concludes that claimant is entitled to a greater award of permanent partial disability than that granted by the ALJ.

ORDER

The ALJ's order, dated March 22, 1978, is modified.

Claimant is hereby granted 112° of a maximum of 320° for 35% unscheduled disability. This is in lieu of any prior awards.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-1292 AUGUST 15, 1978

SUSAN JOHNSON, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
Order

Claimant filed a claim for an industrial injury sustained on May 12, 1975 while in the employ of Roseburg Lumber Company whose carrier was Employers Insurance of Wausau. On July 23, 1976 a partial denial was made by the carrier, denying responsibility for psychiatric and/or psychological difficulties. No appeal was made from this partial denial within 60 days.

Claimant contends that her current physical difficulties consist in large part of emotional, psychiatric and/or psychological difficulties occasioned by her industrial injury and she requests the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and set down for hearing the carrier's partial denial. Claimant alleges that the time for appeal from the denial was allowed to expire through no fault of hers but fails to state who was responsible for the failure to take a timely appeal.

The exercise of its own motion jurisdiction pursuant to ORS 656.278 is within the discretion of the Board. In this case, claimant requests the Board to set for hearing the issue of the propriety of the partial denial even though the 60 days set by statute for the requesting of a hearing on the denial has long since expired. The Board concludes, based upon the facts set forth in the motion, that there is no justification for exercising its own motion jurisdiction in this matter and that claimant's motion should be denied.

IT IS SO ORDERED.

WCB CASE NO. 77-5827 AUGUST 15, 1978

ALEX D. KELLEY, CLAIMANT
Carney, Probst, Levak &
Cornelius, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the carrier's denial of his claim for an injury sustained in late June or early July, 1977.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated March 3, 1978, is affirmed.

WCB CASE NO. 77-6713 AUGUST 15, 1978

KENNETH LARSEN, CLAIMANT
Coons & Anderson, Claimant's Attys.
McMenamin, Joseph, Herrell & Paulson, Defense Attys.
Jones, Lang, Klein, Wolf & Smith, Defense Attys.
Order of Dismissal

A request for review and a cross-request for review, having been duly filed with the Workers' Compensation Board in the above entitled matter, and both requests now having been withdrawn,

IT IS THEREFORE ORDERED that the request for review and the cross-request for review now pending before the Board are hereby dismissed and the order of the Administrative Law Judge is final by operation of law.

WCB CASE NO. 77-6727 AUGUST 15, 1978

BETTY LOU LEE, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the Fund's denial of her claim.

Claimant, a 45-year-old nursery attendant, filed a claim on March 24, 1977, alleging she had injured her back and leg on January 30, 1977 while lifting children in and out of baby cribs. This was accepted as a non-disabling claim.

Claimant testified that in March 1973 she had injured her back doing the same thing. Dr. H. Irvine, on February 21, 1977, reported that after the 1973 incident claimant continued to have persistent low back problems.

Claimant had also suffered a mild cervical strain when she was involved in an automobile accident in December of 1971; no residual impairment resulted.

In January 1976 claimant had picked up a 31-pound can and experienced extreme back pain, with pain into the left hip and down the leg with numbness and tingling of the whole left leg and numbness of the foot which Dr. Irvine diagnosed as acute severe lumbar and lumbosacral strain with a possible herniated intervertebral disc, with sciatica. She was hospitalized for eighteen days.

After the January 30, 1977 incident, claimant continued to work. At the end of her shift she returned home and went directly to bed. She worked that evening, but had pain.

Dr. Franks reported in February 1977 that claimant had daily sacral, low back and bilateral leg pain. He thought claimant had a disc compression on the left at L4-L5. A myelogram was negative.

Dr. Irvine, in April 1977, diagnosed a probable lumbosacral defect which was producing chronic lumbosacral strain, with possible herniated disc causing sciatic neuritis. Claimant was hospitalized for 20 days and received conservative treatment.

Dr. Franks reported in August 1977 that claimant had an abnormal range of motion in the lumbar area. He felt claimant still had a facet type mechanical low back pain.

On October 13, 1977, the Fund denied her claim.

Claimant had been working as a nursery attendant since March 1973. She has a 12th grade education. She testified that the number of children in the nursery had increased since she has been there.

On January 23, 1978, Dr. Irvine stated that claimant's work activity at the nursery exacerbated her pre-existing back injury and caused it to become disabling.

The ALJ, after reviewing all the evidence, found that claimant had failed to meet her burden or proof and he affirmed the Fund's denial.

The Board, after de novo review, reverses the ALJ. The preponderance of the medical evidence is that claimant had a pre-existing back condition which was exacerbated and became

disabling after a lifting incident on January 30, 1977. Dr. Irvine's opinion confirms this. Therefore, the Board concludes that claimant met her burden of proving she suffered a compensable injury.

ORDER

The ALJ's order, dated February 21, 1978, is reversed.

Claimant's claim is remanded to the State Accident Insurance Fund for acceptance and payment of compensation, pursuant to Oregon Worker's Compensation Law, until closure under ORS 656.268.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services in connection with the hearing and Board review the sum of $1,000, payable by the Fund.

WCB CASE NO. 77-1009 AUGUST 15, 1978

VICTOR POMEROY, CLAIMANT
Franklin, Bennett, Ofelt & Jolles, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the Fund's denial of his claim.

Claimant, while employed as a milker, alleges he sustained a compensable injury to his back on July 12, 1976 when he slipped on steel stairs and fell on his back. He advised his son, who finished the milking, that he was hurt and was going to lie down. Later, claimant called his girl friend, requesting pain medication which she brought to him. Claimant testified he told his employer of this incident, but the employer denies that he did. No accident form was filled out, although on the Physicians Initial Report (Form 827) claimant indicated that he had slipped on a steel grate step and landed in a prone position on his lower back. He also said it worsened, causing him extreme pain and loss of normal function in his lower extremities.

Claimant left this employment on or about July 15, 1976. The employer indicated that claimant did not report an accident to them nor did it believe he had one. Claimant did not appear to have any trouble or pain while doing five milkings after his alleged injury and when he left he had no

trouble moving out of the mobile home provided by the employer. On September 6, 1976 claimant sneezed, twisted around and fell to the floor. He was taken to the hospital.

Dr. Thomas reported in October 1976 that claimant had been first treated on September 8, 1976 for probable herniated disc L4-L5, right. He indicated claimant did not relate to him any on-the-job injury.

Claimant was hospitalized from September 8 to September 17, 1976 and from October 19 to October 21, 1976. While hospitalized in October, claimant underwent a couple of myelograms with different interpretations. Claimant received conservative treatment.

The employer reported that the steel grate steps were covered with rubber mats. Claimant's employer first had knowledge of claimant's claim on November 2, 1976. The claim, which was partially filled out by the employer, was denied by the Fund on December 13, 1976.

The ALJ found that claimant's witnesses were not credible. Upon claimant's admission to the hospital in September 1976, claimant alleged he slipped on a grate at work and injured his back a little bit but kept working and did not see a doctor or take any medication. Dr. Thomas reported that claimant had been well prior to the day of his hospitalization. The ALJ concluded, based on the inconsistencies in the evidence, that claimant had not met his burden of proof.

The Board, after de novo review, concurs with the ALJ's conclusions and findings. The medical reports do not show claimant had any problems with his back until approximately six weeks after he quit his employment. This coupled with claimant's lack of credibility as well as that of the other witnesses testifying in his behalf convinces the Board that claimant failed to prove that he had suffered a compensable industrial injury on July 12, 1976.

ORDER

The ALJ's order, dated November 21, 1977, is affirmed.

WCB CASE NO. 77-4035 AUGUST 15, 1978

GAIL ROSS, CLAIMANT
David Vandenberg, Jr., Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which awarded claimant compensation for permanent partial disability equal to 96° for 30% unscheduled disability for her low back injury.

Claimant, a 20-year-old nurse's aide, sustained a compensable injury to her low back on October 24, 1974 when she was taking a 20-pound traction weight off a pulley. She felt discomfort in her right low back and right leg. Dr. Kochevar diagnosed an acute back strain.

Dr. Conn reported in December 1975 that claimant was not capable of returning to work as he had expected earlier and he verified that claimant had been off work since her injury.

On January 2, 1977, Dr. Conn said that he did not feel any permanent disability would result from claimant's injury. On February 19, 1975 he found that claimant was medically stationary and had released her for modified work on February 3, 1975.

Dr. Lilly examined claimant in March 1975 and found that she had made a full recovery with no permanent disability. His diagnosis was a low back strain.

A Determination Order, dated April 20, 1975, awarded claimant compensation for temporary total disability from October 24, 1974 through January 31, 1975.

Claimant attempted to return to work but was not rehired.

In September 1976 Dr. Conn reported that claimant continued to have back pain and that her legs tingled and became numb. He suggested medication and ultrasound. In November 1976, he indicated that claimant continued to have back pain related to any activity requiring significant lifting, twisting or straining. He felt these problems were related to her original injury.

On November 16, 1976 the Fund denied claimant's aggravation claim.

Dr. Klump reported in February 1977 that claimant's

recent problems with her low back and leg were the result of an aggravation of a pre-existing low back and leg condition. He thought that claimant had not suffered any new injuries, but was experiencing a continuation of pain from her 1974 injury.

Dr. Conn indicated in March 1977 he had prescribed muscle relaxants for claimant's back and leg pain in 1974, 1975 and 1976.

Henry L. Seifert, ALJ, entered an Opinion and Order on April 15, 1977 which set aside the denial by the Fund and remanded claimant's aggravation claim to it for acceptance and payment of compensation from September 10, 1976 until it was closed pursuant to ORS 656.268.

A Determination Order, dated May 27, 1977, awarded claimant compensation only for additional temporary total disability from October 15, 1976 through January 7, 1977.

Dr. Balme indicated in November 1977 that claimant felt the back exercises he had prescribed for her aggravated her pain. He felt it was best for claimant to return to work and indicated that he did not find any evidence of a herniated disc or early arthritis. Dr. Balme recommended claimant continue with her exercises and use mild analgesics as needed for pain.

Dr. Conn said in January 1978 claimant should not do any work requiring lifting, twisting and straining. He suggested an evaluation by the Vocational Rehabilitation Division to determine if she could be gainfully employed at an occupation which did not require these activities. He felt she was intelligent and a good candidate for vocational rehabilitation.

Claimant has a high school education. She has worked as a veterinarian's assistant after her injury, but eventually was forced to quit because of low back pain.

Claimant testified that prolonged walking, sitting, or standing cause her back pain which radiates down both legs. She feels she would be unable to return to either the nurse's aide or veterinarian's assistant's job because of the lifting requirements. Claimant also feels she has no skills to do any other form of employment.

The ALJ, after considering the effect the industrial injury has had on claimant's potential wage earning capacity, granted claimant an award equal to 96° for 30% unscheduled disability for her low back injury.

The Board, after de novo review, finds that claimant

does not have a serious back injury. The limitations placed on her are no lifting, twisting and straining and based on these limitations, she will not be able to return to her former lines of employment. However, the totality of the evidence, indicates claimant is not well motivated to return to work, even though she is intelligent and even though this has been suggested as being in her best interest.

The Board concludes that claimant would be adequately compensated for her loss of wage earning capacity by an award equal to 32° for 10% unscheduled low back disability.

ORDER

The ALJ's order, dated March 7, 1978, is modified.

Claimant is entitled to an award of compensation equal to 32° for 10% unscheduled disability to her low back. This is in lieu of any prior awards.

The ALJ's order is affirmed in all other respects.

WCB CASE NO. 77-5037 AUGUST 15, 1978

DARRELL C. THOMPSON, CLAIMANT
J. David Coughlin, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the Fund's denial of his claim for aggravation.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated February 23, 1978, is affirmed.

WCB CASE NO. 76-5345 AUGUST 15, 1978

JAMES WOHLMACHER, CLAIMANT
Wheelock, Neihaus, Baines, Murphy
& Ogilvy, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.

A request for review, having been duly filed with the Workers' 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 Administrative Law Judge is final by operation of law.

SAIF CLAIM NO. KC 186886 AUGUST 15, 1978

JOHN D. WOOD, CLAIMANT
Bailey, Welch, Bruun & Green,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On August 10, 1977 claimant, by and through his attorney, had petitioned the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an industrial injury suffered on May 29, 1969. Claimant's claim had been closed on April 8, 1970 and his aggravation rights had expired. Medical reports were furnished to the Board in support of claimant's petition.

The Board, after considering all the medical reports, concluded that claimant's claim should be reopened for further treatment and surgery relating to his 1969 injury and by an Own Motion Order, dated September 19, 1977, remanded the claim to the Fund with compensation for temporary total disability to commence on the date claimant was hospitalized for surgery and until his claim was closed pursuant to ORS 656.278.

On July 19, 1978 the Fund requested a determination of claimant's condition and on August 8, 1978 the Evaluation Division of the Workers' Compensation Department recommended that the Board only award claimant compensation for time loss from January 30, 1977, the date the initial surgical procedures were performed, through June 12, 1977, the date claimant returned to work. On January 26, 1978 claimant had been examined by the Orthopaedic Consultants and found to have minimal impairment. Dr. Eastwood, claimant's treating physician, concurred.

The Board concurs in the recommendations of the Evaluation Division.

ORDER

Claimant is awarded compensation for temporary total disability commencing January 30, 1977 through June 12, 1977.

Claimant's attorney was previously awarded a reasonable attorney's fee for his services in the Own Motion Order of September 19, 1977.

WCB CASE NO. 77-5173 AUGUST 16, 1978

LEO C. FLEMING, CLAIMANT
Richardson, Murphy & Nelson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order Abating Order on Review

On July 18, 1978 the Board entered its Order on Review in the above entitled matter.

On August 15, 1978 the Board was advised that there was a basic misunderstanding of the issues involved at the time of the hearing before the Administrative Law Judge, therefore, the State Accident Insurance Fund, with the consent of the claimant's attorney, requested that the said Order on Review be held in abeyance for 30 days, pending a resolution of the matter by stipulation of the parties presently being processed.

The Board concludes that it would be in the best interests of all parties involved to abate its Order on Review until it has received a stipulation signed by all of the parties and submitted for approval by the members of the Board and it is the express intent of the Board that this order shall toll the provisions of ORS 656.295(8).

IT IS SO ORDERED.

WCB CASE NO. 77-4951 AUGUST 17, 1978

STEPHEN D. ALLISON, CLAIMANT
Dye & Olson, Claimant's Attys.
Rankin, McMurray, Osburn & Gallagher,
Defense Attys.
Request for Review by Claimant
Cross-appealed by Employer

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which remanded claimant's aggravation claim to it for acceptance and payment of compensation. Claimant contends that he is entitled to a penalty in addition to time loss prior to August 10, 1977. The employer contends that claimant did not suffer an aggravation but, in fact, an occupational disease which should be the responsibility of Modern Plumbing.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated March 22, 1978, is affirmed.

WCB CASE NO. 77-4561 AUGUST 17, 1978

ROY E. BLAIR, CLAIMANT
Ringo, Walton & Eves, Claimant's Attys.
SAIF, Legal Services, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted the Fund's motion to dismiss his request for hearing based on the fact that claimant had requested and received a lump sum award and, therefore, was not entitled to a hearing.

The Board, after de novo review, affirms and adopts the Order on Motion of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated January 13, 1978, is affirmed.

WCB CASE NO. 77-6031 AUGUST 17, 1978

SHARON LAMBERT, CLAIMANT
Dye & Olson, Claimant's Attys.
Bruce Bottini, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted her compensation equal to 32° for 10% unscheduled low back disability. Claimant contends this award is inadequate.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated March 10, 1978, is affirmed.

CLAIM NO. 133-CB-2148600 AUGUST 17, 1978

ARTHUR LeCLAIRE, CLAIMANT
Thomas J. Mortland, Claimant's Atty.
Own Motion Order

On July 12, 1978 the Board received a request from claimant to exercise its own motion jurisdiction and reopen his claim for a compensable industrial injury sustained on January 17, 1969 while in the employ of Wagner Mining Scoop whose workers' compensation coverage was furnished by The Travelers Insurance Company. Claimant's claim was closed by a Determination Order dated March 24, 1970 and his aggravation rights have expired.

In his request addressed to the Board, claimant stated that his problems worsened and on January 14, 1972 he had had another surgery and also a fusion (the first surgery was a laminectomy performed prior to the first closure of the claim). Claimant had additional back surgery on November 30, 1972 and his claim was again closed by another Determination Order.

Claimant was sent to school by Travelers until July 1974 at which time he returned to work. Claimant states that he re-injured his back in October 1975 and was told by Dr. Eckhardt that the injury had nothing to do with the ori-

ginal injury of January 17, 1969. Claimant states he has had trouble intermittently since October 1975 but it had not been severe enough to keep him from "normal functions" until this last year.

On June 20, 1978 claimant was examined by Dr. William Taylor in Austin, Texas, A copy of Dr. Taylor's report, addressed to Travelers, was attached to claimant's request.

On July 18, 1978 Travelers was advised of claimant's request and asked to respond stating its position.

On July 31, 1978 Travelers responded, stating that it opposed the reopening of the claim based upon claimant's statements in his request and the history obtained by Dr. Taylor, both of which indicated that claimant's present condition was related to a new injury suffered in October 1975 while claimant was employed by Lanier Brugh, Inc., and which had been accepted by that employer's carrier.

Travelers further alleged that claimant was medically stable following the last closure of his claim for the 1969 injury in June 1973 and until the new injury sustained in 1975, that since August 1974 claimant has been steadily employed as a truck driver, security guard and bus driver and that the physical stress of such employment and, in particular, the 1975 injury has caused claimant's current symptoms.

The Board, after giving consideration to the facts set forth in claimant's letter and Dr. Taylor's report as well as the information contained in the response from Travelers, concludes that claimant's present condition is not attributable to his January 17, 1969 injury; in fact, the evidence indicates that claimant had an independent intervening industrial injury in October 1975 which materially contributed to claimant's present physical condition.

The Board concludes that claimant's request that the Board reopen his claim for the industrial injury of January 17, 1969 should be denied.

IT IS SO ORDERED.

WCB CASE NO. 76-6334 AUGUST 17, 1978

FRANCIS R. LIVINGSTON, CLAIMANT
Luebke & Wallingford, Claimant's Attys.
Roger Warren, Defense Atty.
SAIF, Legal Services, Defense Atty.
Order of Remand

Reviewed by Board Members Wilson and Moore.

Claimant requests Board review of the Administrative Law Judge's (ALJ) order which affirmed the employer's denial of his claim for an occupational disease.

Stated briefly, the evidence indicates that claimant worked for the employer from 1969 until October 15, 1976, most of the time as a fork lift driver which required frequent lifting of heavy objects. Claimant's first back problem occurred on February 25, 1970 and he filed a claim against his employer's carrier, at that time the State Accident Insurance Fund. The disposition of this claim is not clearly set forth in the record.

During the years claimant continued working for the same employer with a constant tendency to become symptomatic depending upon the nature and extent of his activities. The ALJ found that claimant missed time from work periodically after 1970 because of his back symptoms which gradually worsened until claimant left his employment on October 15, 1976.

The ALJ, basically, finds that, based upon claimant's own testimony, he has not suffered a new industrial injury, that his main problem is related, essentially, to a back which can no longer meet the physical demands of his job. The ALJ indicates in his order that the Fund was never joined in these proceedings although the employer's present workers' compensation carrier, Employers Insurance of Wausau, had requested such joinder. He also states that had the Fund been properly joined it was very possible that it would have been to no purpose and that the only relief to which claimant might be entitled from the Fund would have to come through the Board's exercise of its own motion jurisdiction pursuant to ORS 656.278, depending upon the status of the 1970 Fund claim.

The Board, after reviewing de novo the record presented to it, finds that the Fund should have been joined and that the hearing should not have proceeded without the Fund as a party defendant.

In order for the ALJ to effectively determine whether claimant has suffered an aggravation of a 1970 injury which would be the responsibility of the Fund or

whether he has suffered from an occupational disease and the Employers Insurance of Wausau would be responsible under the "last injurious exposure" rule, the Fund must be a party.

Therefore, the Board, pursuant to the provisions of ORS 656.295(5) concludes that the above entitled matter should be remanded to its Hearings Division with instructions to join the State Accident Insurance Fund as a party defendant in the above entitled matter and to set said matter for hearing on the issue of whether claimant has suffered an occupational disease as a result of his continuous employment with the employer and that his present condition is the responsibility of Employers Insurance of Wausau or whether claimant has suffered an aggravation of his 1970 industrial injury which had been accepted and his present condition is the responsibility of the State Accident Insurance Fund.

The Board further concludes that the Opinion and Order of the ALJ dated January 24, 1978 should be set aside and held null and void.

IT IS SO ORDERED.

WCB CASE NO. 78-672 AUGUST 17, 1978
WCB CASE NO. 78-673

MELVIN D. LUTTRELL, CLAIMANT
Collins, Velure & Heysell, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order Referring for Hearing

On July 7, 1978 the Board received from claimant, by and through his attorney, a motion to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen claimant's claim for an industrial injury sustained on March 18, 1970 while employed by Klamath Road Department, whose carrier was the State Accident Insurance Fund. Attached to the request were reports from Dr. Davis, Dr. Gailis and Dr. Balme. Claimant's claim was initially closed on October 2, 1970 with an award of compensation for temporary total disability only. Claimant's aggravation rights have expired.

Claimant also suffered a compensable industrial injury on April 7, 1971 while in the employ of Klamath Plywood whose carrier also was the State Accident Insurance Fund. This claim was closed by a Determination Order dated February 1, 1972 whereby claimant was awarded 48° for unscheduled low back disability.

On January 25, 1978 claimant, by and through his at-

torney, requested a hearing on the Fund's unreasonable refusal to pay for medical care and treatment which was related both to the 1970 and 1971 industrial injuries and could have been provided under the provisions of ORS 656.245. The two requests originally were consolidated for hearing and, upon request of both parties, the hearing was postponed to enable claimant's request for own motion relief also to be heard at the same time as the two requests on the Fund's refusal to pay medicals.

Based upon the request from both parties and finding it to be in their best interests, the Board hereby refers to its Hearings Division claimant's request for own motion relief with instructions to set it for hearing on its merits at the same time as the in tandem hearing on WCB Case Nos. 78-672 and 78-673.

Upon conclusion of the hearing, if the Administrative Law Judge (ALJ) shall find that the evidence indicates claimant's present condition is related to his March 18, 1970 injury and it has worsened since the last arrangement or award of compensation which was May 1, 1974, he shall cause a transcript of the proceedings to be prepared and submitted to the Board together with his recommendation on the merits of claimant's request for own motion relief.

The ALJ shall also enter his Opinion and Order on the issue of unreasonable refusal to pay necessary medical care and treatment pursuant to the provisions of ORS 656.245 for conditions directly related to either or both the March 18, 1970 and April 41, 1971 industrial injuries.

WCB CASE NO. 76-3005 AUGUST 17, 1978

ROMA MARTIN, CLAIMANT
Thomas O. Carter, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which awarded claimant compensation equal to 112° for 35% unscheduled disability, an increase of 80° over the award by the Determination Order dated October 11, 1976. The Fund contends this award is excessive.

Claimant, a 23-year-old janitor, sustained a compensable injury to his back on March 12, 1975 when he was lifting a buffer into the back of a van. He attempted to work the next day, but was unable. Dr. Ferrante diagnosed an acute lumbosacral

sprain with associated myofascitis along with a concommitant mid-thoracic and cervical strain.

Dr. Ferrante released claimant for work as of March 29, 1975 with a request that he continue treating with Dr. Ferrante. Claimant returned to work as a janitor for 2-3 weeks but was fired. In June 1975 he began work on an assembly line putting gaskets on drums and rolling them off the assembly line; he left this job because he could not tolerate it.

Claimant continued to have back pains and Dr. Ferrante referred him to Dr. Davis in August 1975. Dr. Davis found no objective neurological changes to indicate nerve root compression. He felt claimant did not have a herniated disc, but had sustained a low back strain.

Dr. Ferrante reported in September 1975 that claimant was not medically stationary. He felt claimant still suffered from the residuals of his injury and needed vocational rehabilitation for some other type of employment. Claimant could not return to his former employment.

On October 1, 1975, Dr. Shlim opined that claimant's claim should be closed and that claimant demonstrated very little disability.

Dr. Torres examined claimant in October 1975. He found that claimant complained of severe low back pain with minimal range of motion and often mentioned his dizziness and headache. His diagnosis was chronic low back myofascial strain.

Claimant was referred to the Disability Prevention Division and examined by Dr. Van Osdel in November 1975 who diagnosed a chronic strain lumbar muscles and ligaments, superimposed on a mild lumbosacral scoliosis to the left and resolved chronic strain of the thoracic and cervical muscles and ligaments without any limitation of range of motion.

Dr. Munsey, a psycholgist, reported in November 1975, that claimant had a 10th grade education, had worked as a warehouseman, cook, machinist's helper, dishwasher and backhoe operator. Testing revealed claimant had a very serious reading deficiency. Dr. Munsey found claimant to be very defensive, having moderate to moderately severe anxiety tension reaction with depression. He felt claimant doubted he would be able to go back to work as a janitor and wanted to be retrained. Dr. Munsey concluded that the prognosis for restoration and rehabilitation were fair.

Claimant was discharged from the Disability Prevention Division on December 10, 1975. He did not need further orthopedic or neurosurgical treatment but should continue his exercises; a job change was indicated with no repetitive

lifting overhead of over 20 pounds, no lifting of over 50 pounds, no repetitive bending, stooping or twisting. Dr. Ferrante essentially concurred with these recommendations but felt claimant would need periodic care.

Claimant had been referred for vocational rehabilitation, but through an error this referral was withdrawn and then reinstated in May 1975. A Determination Order dated June 11, 1976 awarded claimant compensation for time loss and compensation equal to 32° for 10% unscheduled back disability; it was later set aside by a Determination Order dated July 14, 1976.

Dr. Butler, in August 1976, found only subjective lumbosacral discomfort, and no objective orthopedic findings nor evidence of a spondylolysis or a ruptured disc. He thought claimant did not have any permanent partial disability.

Claimant began to receive treatment from Dr. Cherry in September 1976. Dr. Cherry felt claimant had a severe, chronic low back strain and a neck strain. He indicated he would continue to treat claimant conservatively.

In September 1976, the referral to vocational rehabilitation was withdrawn, based on claimant's statements that he had continuing pain in his neck and back and was receiving treatment from a doctor three times per week and he felt it was unrealistic for him to participate in a vocational rehabilitation program.

A Determination Order, dated October 11, 1976, awarded claimant compensation for temporary total disability and compensation equal to 32° for 10% unscheduled disability resulting from his low back injury. It found claimant was medically stationary as of January 27, 1976.

On October 27, 1976 claimant was involved in an altercation with the police. This incident caused claimant to experience increased pain. Dr. Cherry felt this aggravated his previous injury and admitted claimant to a hospital for conservative treatment. While hospitalized a myelogram was performed which was negative. Claimant spent approximately nine days in the hospital.

Claimant was again hospitalized in December 1976 and examined by Dr. Zivin, a neurologist, who diagnosed chronic low back strain with possible sciatic irritation on the right, dating from his industrial injury and aggravated recently. He also found chronic cervical strain, tension headaches, associated with cervical strain, recent psychological trauma and recommended continued bedrest and medication.

Dr. Smith examined claimant and opined claimant

had some degree of an old chronic low back strain injury superimposed on a probable lordotic configuration of the low back. Claimant indicated to Dr. Smith that this condition had been recently aggravated with new symptoms which Dr. Smith could not substantiate by objective findings. He felt claimant most likely had a significant functional overlay to his problem.

By letter, dated January 4, 1977, the Fund denied claimant's request to reopen his claim because of aggravation.

Claimant does not contend he was entitled to medical treatment and care from the date of his incident with the police in October 1976 until after March 3, 1977. However, Dr. Cherry reported on March 3, 1977 that claimant was almost back to the same condition he was in prior to this October incident.

Dr. Cherry continued to treat claimant and in September 1977 said claimant had a total disability due to his original accident of 25% maximum of a whole man.

Claimant's work experience consists of laboring types of employment. Claimant's current complaints are of stiffness in his neck, headaches and pain in the low back and right leg aggravated by sitting.

The ALJ found claimant to be credible. She found that the Fund was not responsible for medical care and treatment subsequent to March 3, 1977 because claimant has not returned to the condition he was prior to the October 1976 incident and the medical care and treatment he is presently receiving is not related to his industrial injury.

The ALJ did find that claimant had sustained a greater loss of wage earning capacity, based on his limitations due to his industrial injury and, therefore, increased his award for permanent partial disability.

The Board, after de novo review, finds that claimant does have some limitations because of his industrial injury, however, the intervening incident of October 1976, the altercation with the police, has increased definitely claimant's problems. The preponderance of the medical evidence does not support an award of 112° for 35% unscheduled disability resulting from claimant's low back injury. The Board concludes, after reviewing all of the evidence, that claimant will be adequately compensated for his loss of wage earning capacity by 80° for 25% unscheduled low back disability.

ORDER

The ALJ's order, dated November 10, 1977, is modified.

Claimant is granted an award of compensation for permanent partial disability equal to 80° for 25% unscheduled disability resulting from his low back injury. This is in lieu of any prior awards.

The ALJ's order is affirmed in all other respects.

WCB CASE NO. 77-5730 AUGUST 17, 1978

BILL D. NICHOLSON, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which remanded claimant's claim to it for the payment of certain medical bills in addition to assessing penalties and attorney fees against it.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof. An error in the order should be corrected, however. On page one, paragraph two, the date "August 31, 1977" should be changed to read "August 31, 1971".

ORDER

The order of the ALJ, dated January 6, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $300, payable by the Fund.

WCB CASE NO. 77-5868 AUGUST 17, 1978

CLARA PEOPLES, CLAIMANT
Dwight Gerber, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which remanded

claimant's claim for psychological problems to it for acceptance and payment of compensation to which she is entitled.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated March 29, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $150, payable by the Fund.

WCB CASE NO. 77-5374 AUGUST 17, 1978

HERMAN ROE, CLAIMANT
Franklin, Bennett, Ofelt & Jolles, Claimant's Attys.
Roger Warren, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which approved the August 10, 1977 Determination Order. Claimant contends that he is permanently and totally disabled.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated February 13, 1978, is affirmed.

WCB CASE NO. 77-6597 AUGUST 17, 1978

LESTER E. SAUNDERS, CLAIMANT
Henry Kane, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which failed to find an abuse of discretion on the part of the Disability Prevention Division when it did not refer claimant for vocational rehabilitation and dismissed his request for hearing.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and by this reference is made a part hereof.

ORDER

The order of the ALJ, dated March 2, 1978, is affirmed.

WCB CASE NO. 77-5032 AUGUST 17, 1978

DANIEL C. STAHL, CLAIMANT
Elden M. Rosenthal, Claimant's Atty.
Cheney & Kelley, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the Disability Prevention Division's denial of referral for vocational rehabilitation. Claimant contends he is entitled to have his vocational rehabilitation reinstated.

Claimant, a 28-year-old truck mechanic, sustained a compensable injury to his left shoulder and back on November 26, 1974. The DPD made an official referral for vocational rehabilitation on August 31, 1976 but withdrew it on December 27, 1976 based on claimant's return to his employment as a truck mechanic.

Dr. Cherry, claimant's treating physician wrote to the Vocational Rehabilitation Division, explaining that claimant had tried several jobs with his employer but found that they caused him pain. Dr. Cherry felt that claimant's pursuit of computer programing training was desirable and this type of employment would be helpful to him.

On July 8, 1977 Dr. Cherry noted that claimant's back continued to hurt from the thoracic region into the left shoulder. He again indicated it would be helpful if claimant received assistance from Vocational Rehabilitation to complete his training in data processing and programing; that it was difficult for claimant to continue with his present job because of his physical problems.

On July 26, 1977, after reviewing claimant's file, the DPD advised claimant that no referral for vocational assistance was being made.

Claimant testified he has continued to receive medical care for his shoulder and back. He feels his condition has worsened. Claimant indicated that he felt he was entitled to vocational rehabilitation because his physical problems made it difficult for him to continue his job.

Claimant argued that OAR 436-61-005(4) violates the purpose of the Workers' Compensation Law because it precludes vocational rehabilitation training solely on the basis of a worker's return to work, without allowing consideration of other relevant circumstances. The ALJ found the Board's rule was rationally sound and within the purview of ORS 656.728(1). He concluded that the DPD had acted properly in this case and that no substantial rights of claimant had been prejudiced.

The Board, after de novo review, concurs with the findings of the ALJ. Under Section 61-060 of the Board's rules the actions which would allow an ALJ to reverse or modify the decision of the DPD are specifically set forth. The Board finds no such activity by the DPD in this case.

The Board finds that no substantial rights of claimant have been prejudiced because of the decision of the DPD and concludes the denial of referral for vocational rehabilitation was proper.

ORDER

The ALJ's order, dated March 27, 1978, is affirmed.

SAIF CLAIM NO. HC 158298 AUGUST 17, 1978

DEAN T. WRIGHT, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On June 16, 1978 the State Accident Insurance Fund provided the Board with all of the reports from claimant's file for his industrial injury of November 21, 1968; the claim for that industrial injury was closed by a Determination Order dated October 30, 1969 which granted claimant compensation for permanent total disability as of October 17, 1969. The Fund requested the Board to examine the file and make a determination on whether claimant, at the present time, was still permanently and totally disabled.

On June 23, 1978 claimant was advised by the Board that it had received this request from the Fund and was asked to respond thereto, stating his position. The claimant was further advised to seek advice on the matter from his attorney and if the Board did not have a response from either claimant or his attorney within 20 days from the date of said letter it would give full consideration to the request made by the Fund. As of the date of this order, claimant has made no response.

The Board, after considering all of the file, finds that claimant has been suitably employed by Tarbell's - Lloyd Center in Portland, Oregon since February 7, 1978. He is working 40 hours a week and as of April 20, 1978, when his vocational rehabilitation services were terminated, claimant was earning $1,100 a month acting as a real estate sales instructor. The Board finds that the job has reasonable permanency and that the claimant has the necessary skills to perform his job successfully and it is within his physical and mental capacities, interests and personal characteristics.

The Board concludes that claimant should not be considered as permanently and totally disabled after February 6, 1978 and that the award granted claimant by the Determination Order dated October 30, 1969 should be reduced to adequately reflect the claimant's present loss of wage earning capacity resulting from his industrial injury of November 20, 1968.

The Board further concludes that claimant would be adequately compensated for his potential wage earning capacity by an award equal to 160° which represents 50% of the maximum allowable for unscheduled disability.

The Board further concludes that the State Accident Insurance Fund should be allowed to offset all payments made to claimant for permanent total disability from February 7, 1978 to the date of this order against payments for permanent partial disability granted by this order.

ORDER

Claimant is awarded 160° of a maximum of 320° for unscheduled disability with payment for compensation therefor to commence February 7, 1978. The award of permanent total disability granted by the Determination Order of October 30, 1969 shall be effective from October 17, 1969 through February 6, 1978.

The State Accident Insurance Fund shall be entitled to offset against payment for the award of permanent partial disability commencing February 7, 1978, payments it has previously made pursuant to the Determination Order of October 30, 1969 for permanent total disability.

WCB CASE NO. 77-2340 AUGUST 17, 1978

PAUL ZEHNER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Order of Dismissal

On July 3, 1978 the Administrative Law Judge entered his order affirming the Determinations Orders in the above entitled matter.

On August 3, 1978, according to the United States Postal Service postmark on the envelope addressed to the Workers' Compensation Board, claimant requested review of the Administrative Law Judge's order.

More than 30 days have passed from the date of the issuance of the Administrative Law Judge's order, therefore, the order is final by operation of law and claimant's request for review must be dismissed. ORS 656.289(3).

IT IS SO ORDERED.

WCB CASE NO. 77-1951 AUGUST 22, 1978

FRED M. AYERS, CLAIMANT
Pippin & Bocci, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the December 10, 1976 Determination Order whereby he was granted no compensation for permanent disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated March 17, 1978, is affirmed.

WCB CASE NO. 77-3178 AUGUST 22, 1978

EMIL CHLOUPEK, CLAIMANT
Dale R. Drake, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

On May 31, 1978 the Board received from the State Accident Insurance Fund a motion to dismiss claimant's request for review filed in the above entitled matter on May 11, 1978 for the reason that said request raised no justiciable issue.

On June 5, 1978 claimant's attorney was advised of the Fund's motion to dismiss claimant's request and asked to respond. The Fund's letter of transmittal, dated May 25, 1978, also indicated that claimant's attorney had been advised that it was filing a motion to dismiss.

On August 2, claimant's attorney advised the Board that it had not received any letter from the Board, therefore, he was given an additional five days from that date in which to respond to the motion.

Claimant has not responded, therefore, the Board concludes that the claimant does not intend to oppose the Fund's motion.

ORDER

The motion received from the State Accident Insurance Fund to dismiss claimant's request for Board review in the above entitled matter is hereby granted.

WCB CASE NO. 77-3951 AUGUST 22, 1978

ROY DeVAULT, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer seeks Board review of the Administrative Law Judge's (ALJ) order which set aside its denial, remanded claimant's occupational disease claim to it for acceptance and payment of benefits and awarded claimant's counsel a $600 fee.

Claimant, a 53-year-old concrete finisher, alleges he developed a knee problem while employed by Del E. Webb Cor-

poration. The date of injury or exposure was March 4, 1976. The employer first knew of the injury on April 19, 1976, but signed the claim form on May 14, 1976. The claim was originally deferred and finally denied on June 3, 1977.

Claimant worked for Del Webb from July 23, 1975 until April 1976 and again in July 1976. Subsequently, he worked for other employers at jobs requiring claimant not to be on his knees very much.

Claimant testified that he had noticed some knee problems from time to time, but that the first severe and continuing knee pain was on the Del Webb job, which required him to work a great deal on his knees and to carry his own materials. He had to carry five-gallon buckets of water and other materials up the stairs.

Claimant, in May 1974, complained of knee ache and, on March 1976, complaining of knee pain, he went to Kaiser Hospital. The doctor reported claimant had chondromalacia of the patella, bilaterally, and some fairly severe crepitation on the left. The pain was associated with deep knee bending and severe pain with any prolonged bending which was required by his work. The doctor thought that the need for claimant to be on his knees so much in his type of work certainly was a significant contributing factor to the problems he had.

Claimant continued to receive conservative treatment from Dr. Long for his knee pains. Dr. Long indicated in March 1977 that claimant's symptomatology had worsened to the point that it precluded regular and work activities. An arthrogram performed in April 1977 was negative.

In April 1977 Dr. Long stated that claimant's type of work had been a significant contributing factor to his knee problem.

Dr. Pasquesi indicated in May 1977 that he felt claimant's problem was a progressive one and that his trade was primarily responsible for his condition and his work at Del Webb Corporation had further aggravated his condition. He found claimant was stationary and that it was unlikely that claimant, after surgery, would be able to return to work as a cement finisher.

Claimant, after his claim was denied by Del Webb, filed claims against all of his employers. Claimant requested the designation of a paying agent which was denied on July 18, 1977.

Claimant has worked in cement work all of his adult life.

The ALJ found that the last injurious exposure that resulted in a known medical problem requiring medical attention and the exploration and the consideration of surgery on claimant's knees occurred while claimant was in the employment of Del Webb.

Therefore, he concluded that the denial by the employer should be set aside and the claim accepted for payment of benefits.

The Board, after de novo review, agrees that claimant is entitled to compensation for temporary total disability from the date of his claim, March 4, 1976, through the date of the employer's denial, June 3, 1977, less time worked, but it also finds that the lapse of time between the filing of the claim and the denial of it was unreasonable and, therefore, would assess a penalty equal to 10% of the amount of compensation for temporary total disability claimant is entitled to from March 4, 1976 through June 3, 1977.

ORDER

The ALJ's order, dated December 14, 1977, is modified.

Claimant is hereby granted an award of compensation for temporary total disability from March 4, 1976 through June 3, 1977, less time worked.

Claimant is also granted, as a penalty, compensation equal to 10% of the above compensation for the unreasonable delay in processing of the claim.

The ALJ's order in all other respects is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services in connection with this Board review in the amount of $250, payable by the carrier.

WCB CASE NO. 77-4982 AUGUST 22, 1978

MELVIN FALLA, CLAIMANT
Davies, Biggs, Strayer, Stoel & Boley, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the carrier's denial of his claim for an occupational disease.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated March 10, 1978, is affirmed.

WCB CASE NO. 77-1676-B AUGUST 22, 1978

WAYMON GAROUTTE, CLAIMANT
Willner, Bennett, Riggs & Skarstad, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith, Defense Attys.
SAIF, Legal Services, Defense Attys.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which found claimant's present disability to be an aggravation of an earlier injury and remanded the claim to the Fund for acceptance and payment of compensation.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated November 16, 1977, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $50, payable by the State Accident Insurance Fund.

WCB CASE NO. 77-5498 AUGUST 22, 1978

RAYMOND MARTELL, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the March 7, 1977 Determination Order whereby claimant was granted time loss benefits only.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated March 20, 1978, is affirmed.

WCB CASE NO. 77-6840 AUGUST 22, 1978

EVA M. McCULLOUGH, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Attys.
Request for Review by the SAIF
Cross-appealed by Claimant

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which remanded claimant's aggravation claim to it for payment of compensation from March 30, 1977 to November 30, 1977 and for submission to the Evaluation Division, assessed a penalty of 25% of the above compensation and awarded claimant's attorney a fee of $750.

The Fund contends claimant did not prove an aggravation claim and that the award of penalties and an attorney's fee was improper. Claimant cross-appeals, contending she is entitled to compensation to December 23, 1977, payment by the Fund for a bone scan, and penalties and attorney's fees.

Claimant, now 60 years old, sustained a compensable injury to her back on October 21, 1971. Dr. Grewe diagnosed a contusion and strain of claimant's low back and contusion to her right leg.

Claimant's claim was first closed by a Determination Order dated October 22, 1973 whereby she was awarded compensation equal to 64° for 20% unscheduled low back disability. Her claim was later reopened, closed, reopened by a stipulation and again closed on March 5, 1976 by a Determination Order which awarded claimant additional compensation equal to 48° for 15% unscheduled low back disability. Claimant requested a hearing and, as a result thereof, the award was increased by an additional 64° which gave claimant at that time a total of 176° for 55% unscheduled low back disability. This award was affirmed by the Board and by the circuit court. The date of the judgment order, June 15, 1977, was the date of the last arrangement and award of compensation.

On March 21, 1977 Dr. Logan wrote to the Fund, reporting that claimant had continued to have back pain intermittently and had been in his office frequently. He had started claimant on physical therapy and medication and indicated claimant was unable to work.

Dr. Logan again wrote the Fund on September 20, 1977, enclosing a copy of his earlier letter. He reported claimant continued to have increasing low back pain and bilateral leg pain and was unable to work or do her housework. He opined claimant's condition had aggravated and worsened since September 1976 and requested her claim be reopened for payment of time loss and further medical care and treatment.

On October 17, 1977 a Fund representative wrote to Dr. Logan acknowledging receipt of his September 20 letter and asking him how claimant's impairment could be worse than 55%.

On November 8, 1977 Dr. Logan replied that claimant had worsened because she had been unable to do her housework since June 1977. He had done a bone scan to rule out cancer. He indicated claimant needed additional neurosurgical-neurological-orthopedic work-up, possibly including a repeated myelogram. Dr. Logan felt claimant was impaired more than 55% based on her inability to be on her feet for over an hour, to bend, to lift, and her limited back motion.

The Orthopaedic Consultants reported in December 1977 that they felt claimant was stationary, her condition essentially unchanged from that recorded in July 1975. Their diagnosis was chronic lumbosacral strain and mild degenerative osteoarthritis of the lumbar spine. They stated that claimant had a mildly moderate disability of her back.

The Fund denied claimant's aggravation claim on December 23, 1977. The Fund also denied payment of the bill for the bone scan.

The ALJ found claimant had proven her aggravation claim and remanded it to the Fund to be accepted for payment of compensation payable from March 30, 1977 to November 30, 1977 and for submission to the Evaluation Division. He assessed a penalty equal to 25% of the temporary total disability compensation due, and granted claimant's attorney a fee of $750.

The Board, after de novo review, finds that Dr. Logan's letter dated March 21, 1977 is a sufficient claim of aggravation and the Fund should have made the first installment of compensation to claimant no later than the 14th day after it received that letter, said compensation to start as of the date the doctor said claimant's condition had worsened. The Board further finds that the Fund neither denied this claim within 60 days after March 21, 1977 nor did it pay claimant any compensation for temporary total disability.

The evidence indicates that at the present time claimant's condition is still not medically stationary, therefore, the Board concludes that claimant is entitled to compensation for temporary total disability from March 21, 1977, the date of Dr. Logan's letter, and until her claim is closed pursuant to ORS 656.268. Furthermore, the claimant is entitled to additional compensation, in the nature of a penalty, for the Fund's unreasonable delay in paying compensation and also to payment of her attorney's fees by the Fund.

The Board finds that the preponderance of the medical evidence indicates that claimant's condition has worsened since June 15, 1977, therefore, claimant has met her burden of proof on her claim for aggravation and the Fund's denial must be set aside.

The Board concludes that claimant is entitled to have Dr. Logan's bill for the bone scan paid by the Fund inasmuch as Dr. Logan used the bone scan to rule out the possibility of cancer, rather than the industrial injury, as a cause of claimant's continuing back problems.

ORDER

The order of the ALJ, dated February 24, 1978, is modified.

Claimant's claim for aggravation of her October 21, 1971 industrial injury is remanded to the State Accident Insurance Fund for acceptance and for payment of compensation, as provided by law, commencing March 21, 1977 and until the claim is closed pursuant to ORS 656.268.

Claimant is awarded additional compensation equal to 25% of the compensation due her for temporary total disability from March 21, 1977 through December 23, 1977, the date of

the Fund's denial, because of the Fund's unreasonable delay in the payment of compensation. Claimant's attorney is awarded a fee of $750, payable by the State Accident Insurance Fund.

The State Accident Insurance Fund is directed to pay the medical bill for the bone scan ordered by Dr. Logan.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review the sum of $350, payable by the State Accident Insurance Fund.

WCB CASE NO. 76-7189 AUGUST 22, 1978

RONALD D. McNUTT, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
Davies, Biggs, Strayer, Stoel & Boley,
Defense Attys.
Souther, Spaulding, Kinsey, Williamson &
Schwabe, Defense Attys.
SAIF, Legal Services, Defense Attys.
Amended Order on Review

On July 31, 1978 the Board entered its Order on Review in the above entitled matter. On line two in the next to the last paragraph on page three of said order the number "3" should be substituted for the number "6" and on line two of the second paragraph of the "Order" portion of said order on page four the year "1976" should be substituted for the year "1977".

In all other respects the Order on Review entered on July 31, 1978 in the above entitled matter should be ratified and reaffirmed.

IT IS SO ORDERED.

WCB CASE NO. 77-1807 AUGUST 22, 1978

BERTHA McWILLIAMS, CLAIMANT
Nash & Margolin, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson &
Schwabe, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order affirming the second Determination Order, dated March 8, 1977, which awarded claimant compensation equal to 80° for 25% unscheduled low back disability.

Claimant, a 47-year-old shoe clerk, sustained an injury to her back on August 19, 1975 lifting a case of freight. Dr. Blaylock diagnosed this injury as lumbar strain. Claimant received conservative treatment and was found to be medically stationary and released for work as of September 1, 1975. The claim was closed by a Determination Order, dated August 19, 1975 whereby claimant was paid compensation for temporary total disability from August 26, 1975 through August 31, 1975.

Dr. Siever reported in Janaury 1976 that claimant's back had worsened and referred her to Dr. Fry who indicated claimant had pain in her low back, which radiated into her hip. His examination revealed claimant had discomfort with movement, bending over, squatting, and walking. She also reported stiffness when she awoke in the morning and headaches. Dr. Fry found some paraspinal muscle spasm.

Dr. Sloat, in February 1976, performed a psychological evaluation of claimant. He felt there was a psychological factor helping claimant maintain her pain symptoms. The injury gave her an excuse to "let up a little". Claimant's husband of 28 years had been disabled, forcing claimant to work. He felt she was being pressured by her family and employer to go back to work. Dr. Sloat felt claimant needed assistance to allow her to relax and vent her feeling that she was tired of carrying the burden for the whole family.

Dr. Cottrell, in March 1976, diagnosed chronic lumbosacral sprain with degenerative disc disease lumbosacral spine. He felt claimant was not medically stationary and required further medical treatment.

Dr. Fry, in April 1976, said claimant was being allowed to return to work with restrictions on heavy lifting, straining or on standing for long periods of time. On October 4, 1976 he found claimant was medically stationary with moderate impairment.

A Determination Order, dated March 8, 1977, awarded claimant compensation equal to 80° for 25% unscheduled disability resulting from back injury.

Dr. Fry reported in April 1977 he had continued to prescribe medication for her and felt the award was reasonable and commensurate with his evaluation.

On June 18, 1977 Dr. Quan indicated he felt claimant did not have any significant psychiatric disorder and concurred

with Dr. Sloat's report. Dr. Quan noted claimant was not strongly motivated to work and did not recognize she was anxious or tense.

Dr. Azavedo, a psychiatrist at the Disability Prevention Division, examined claimant. His diagnosis was chronic lumbosacral sprain, exogenous obesity, and status postoperative hysterectomy. Testing revealed claimant had an intelligence scale score of 101, an average reading rate of speed and above average comprehension. Claimant indicated she did not feel she would be able to go back to her store clerk job, which she had done for 12 years.

The consensus of the vocational team was that claimant was able to return to a modified sales job; claimant could do light-medium work, with no repetitive bending, lifting, climbing or twisting.

The ALJ, after reviewing the evidence, concluded the award of 80° was adequate.

The Board, after de novo review, concurs with the ALJ. Dr. Fry indicates that the award of 80° is reasonable. The consensus opinion is that claimant is able to return to light-medium work, such as a modified sales position and has been adequately compensated for her loss of wage earning capacity.

ORDER

The ALJ's order, dated January 19, 1978, is affirmed.

SAIF CLAIM NO. YA 750071 AUGUST 22, 1978

JOHN W. SLONECKER, CLAIMANT
Coons & Anderson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On April 27, 1978 the Board received from claimant, by and through his attorney, a request to reopen his claim for a compensable industrial injury sustained on November 9, 1956. Medical reports were submitted in support of the request. Claimant's claim has been closed and his aggravation rights have expired.

On May 3, 1978 the State Accident Insurance Fund was advised by the Board of claimant's request for own motion relief and copies of the request and the attached medical documents were mailed to it. On May 18, 1978 the Fund responded, stating that it did not believe the evidence revealed an aggravation

since the Board's Own Motion Determination of May 25, 1977 (this Determination related to an injury to claimant's right leg sustained on August 18, 1959). The Fund stated it would like a neurological examination conducted and also to have the laboratory studies mentioned by Dr. Brooke in his letter of November 15, 1977 to claimant's attorney.

On June 5, 1978 the Board inquired from the Fund if it was their intention to have claimant examined further before advising the Board of its final position relating to claimant's request for own motion relief. On July 3, 1978 the Fund responded, stating that claimant was scheduled to be examined by the Orthopaedic Consultants in Portland on July 13, 1978 and it would advise the Board of its position upon receipt of the report based on said examination.

Claimant was examined by Drs. Kimberley, Jones and Anderson of the Orthopaedic Consultants on July 13, 1978 who, in their report dated July 25, 1978, based upon the examination and claimant's medical history, expressed their opinion that claimant's condition was stationary and that he would need palliative treatment much of his remaining life but is not in need of any surgical treatment; they further expressed their opinion that claimant was unable to engage in any gainful occupation and this inability is total and permanent and attributable to the two injuries claimant has had, namely the back injury in 1956 and the right leg injury in 1959. On August 7, 1978 the Fund advised the Board that, based upon the recommendation of the Orthopaedic Consultants it would not oppose own motion consideration of claimant's claim by the Board.

The Board, relying primarily, but not exclusively, on the report of the Orthopaedic Consultants, dated July 25, 1978, concludes that claimant is permanently and totally disabled and should be considered so as of July 13, 1978, the date he was examined by the three physicians at the Orthopaedic Consultants.

ORDER

Claimant is to be considered as permanently and totally disabled as a result of his industrial injury of November 9, 1956 and entitled to compensation for such disability commencing July 13, 1978.

Claimant's counsel is awarded as a reasonable attorney's fee for his services in connection with this matter a sum equal to 25% of the compensation claimant shall receive as a result of this order, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 72-225 AUGUST 22, 1978

WALTER P. SORENSON, CLAIMANT
Colin Lamb, Claimant's Atty.
Scott F. Gilman, Defense Atty.
Stipulation and Order

SECTION I

CONTENTIONS OF THE PARTIES

(A) CLAIMANT'S CONTENTIONS

Claimant Contends:

(1) That he is currently experiencing, or may experience in the future, the effects of a disability related to his industrial accident of April 8, 1971;

(2) That the effects of that disability could, or do, require additional medical treatment and time loss; and

(3) That the extent of his disability has increased since the Hearing Referee's Opinion and Order of April 25, 1972, the last award or arrangement for compensation relating to his claim.

(B) DEFENDANT'S CONTENTIONS

Defendant Contends:

(1) That any disability or discomfort that Claimant does or may experience is caused by pre-existing and unrelated degenerative disc disease (spondylosis);

(2) That claimant has completely and totally recovered from any injuries that he might have sustained as a result or consequence of the accident of April 8, 1971;

(3) That, as a result of the above, any future medical treatment that claimant might seek or need will have no relationship whatsoever to the accident of April 8, 1971, or the consequences thereof; and

(4) That, as a result of the previous awards and arrangements for compensation relating to his claims, Claimant has been more than adequately compensated for any disability or injuries that he may have received as a result of the accident of April 8, 1971.

(5) That the first determination made regarding injuries Claimant may have received as a result of the accident of April 8, 1971, was made on January 14, 1972 and that, pursuant to ORS 656.273 (4) (a), Claimant's aggravation rights expired on January 14, 1977, prior to the time that Claimant filed his claim for such benefits. Therefore, Claimant's claim for aggravated disability benefits is barred.

(6) That there is no justification for Board's Own Motion jurisdiction, pursuant to ORS 656.278, to be exercised in this case.

SECTION II

STIPULATIONS AND AGREEMENT OF THE PARTIES

The parties stipulate and agree that:

(1) In exchange for Claimant's stipulations and agreements as enumerated below, the defendant will pay to Claimant and his attorney the sum of Ten Thousand Dollars ($10,000);

(2) That Claimant shall withdraw and voluntarily dismiss his Request for Board's Own Motion relief;

(3) That in exchange for Claimant's Agreement to accept the above sum, the defendant shall move for a dismissal of its Request for Hearing Upon Board's Own Motion Order:

(4) That claimant's claim for Board's Own Motion relief is doubtful and disputed and ought to be, and may be settled and disposed of as a doubtful and disputed claim in the manner and upon the terms and conditions set forth in Section III below.

(5) It is specifically understood, agreed and stipulated that neither this settlement nor the terms of this settlement agreement shall have any effect, either beneficial or detrimental, upon Claimant's future right to request Board's Own Motion Relief (ORS 656.278) or future medical services (ORS 656.245). Nor shall this settlement or the agreement have any effect upon the defendant's right to contest such claims, if made.

SECTION III

FINDINGS AND ORDER OF WORKERS' COMPENSATION BOARD

The Administrative Law Judge having considered the matter and having noted both the contentions of the parties and the stipulations of the parties hereinbefore set forth plus all of the other documents in the file, finds that claimant's claim is doubtful and disputed and that the pending Request for Board's Own Motion relief and Request for Hearing should be settled and disposed of. Therefore, it is hereby ORDERED, that the matter is settled and disposed of upon the following conditions:

1. Defendant shall pay jointly to Claimant and to Claimant's attorney the sum of $10,000 and Claimant and Claimant's attorney shall receive from defendant the sum of $10,000 as a full and final settlement and disposition on a disputed claim basis of claimant's claim and defendant's Request for Hearing.
2. Claimant's attorney shall receive and have out of said $10,000 the sum of $2,200 as and for his attorney fees.
3. Neither the settlement of this matter nor the specific terms of the settlement agreement shall have any effect upon the future rights of the parties to this agreement.
4. Claimant's request for Board's Own Motion relief shall be, and is, in a finally denied status and he shall have no further rights of any kind whatsoever in relation to said claim.
5. Defendant's Request for Hearing is dismissed with prejudice.

WCB CASE NO. 77-6178 AUGUST 22, 1978

BERTHA VINSON, CLAIMANT
David Vandenberg, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which set aside its denial and remanded the claim to it. The Fund contends that claimant did not show good cause for her failure to file a timely request for a hearing on the denial.

Claimant, a 60-year-old salad maker, alleges she sustained two injuries: On July 20, 1976 she had four boxes of frozen food fall on her head, and missed a few days' work, but returned to her job without filing a claim. On February 7, 1977, while trying to reach an item on the top of a shelf, she fell and struck her head and low back against some other shelves. A claim was filed. Both injuries were accepted.

Dr. Balme opined claimant suffered from cervical spondylosis, lumbar degenerative disc disease and osteoarthritis and osteoarthritis involving both hands. He noted claimant had neck, low back and bilateral hand pain and indicated the relationship of her present pain to her industrial injuries was an aggravation of a pre-existing condition.

On June 14, 1977 the Fund advised claimant it denied any responsibility for claimant's lumbar disc disease and cervical spondylosis. This letter included advice of her appeal rights.

A Determination Order, dated September 13, 1977, awarded compensation for temporary total disability from February 10, 1977 through February 11, 1977.

Claimant did not appeal the Fund's denial until October 5, 1977. She testified that after receiving the Fund's letter of June 14, 1977, she went to the local Fund office and spoke with a man there who said he would write a letter for her to the Fund's office in Salem. Claimant felt that this action resolved the matter. The person who wrote the denial letter of June 14 did note in the file that claimant contacted her on September 12, 1977 and requested her claim be reopened because her condition had worsened. Claimant was advised to write a letter and have her doctor send in a report.

The ALJ found the denial letter to be confusing and misleading to claimant. He found claimant had made an effort

to determine what she needed to do after she had received the denial letter. The ALJ found that the letter of denial was at least misleading and despite any record by the Fund of claimant's contacts with it, claimant had operated under the honest belief that the matter had been cleared up. He concluded claimant had shown good cause and was entitled to a hearing.

The Board, after de novo review, concurs with the ALJ. The Board finds that claimant did take action after receipt of the denial letter and honestly believed the matter had been cleared up. The Board agrees with the ALJ that claimant did show good cause for her failure to file a timely request for a hearing.

ORDER

The ALJ's order, dated March 14, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $300, payable by the Fund.

WCB CASE NO. 77-4653 AUGUST 22, 1978

LYNN M. WAHNER, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Gearin, Landis & Aebi, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted him compensation equal to 80° for 25% unscheduled neck disability. Claimant contends this award is inadequate.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated December 8, 1977, is affirmed.

WCB CASE NO. 77-1724 AUGUST 22, 1978

GLADYS J. WEHINGER, CLAIMANT
A. C. Roll, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On August 9, 1978 the Board received claimant's petition for rehearing and reconsideration in the above entitled matter and also claimant's brief in support of said petition.

The Board, after giving full consideration to the claimant's brief, finds nothing contained therein which would justify reconsideration of the Order on Review entered in the above entitled matter on August 3, 1978 and therefore further concludes that said petition should be denied.

IT IS SO ORDERED.

WCB CASE NO. 77-5172 AUGUST 23, 1978

ROBERT W. BURKHART, CLAIMANT
Merten & Saltveit, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer seeks Board review of the Administrative Law Judge's (ALJ) order which granted claimant 96° for 30% unscheduled low back disability, an increase of 64° over the amount awarded by the Determination Order.

Claimant, then a 25-year-old sheet metal worker, sustained a compensable injury to his knee and low back on November 24, 1976 when he slid 4-5 feet down a roof, twisting his back and leg. He finished work that day and did not work over the Thanksgiving holiday. He attempted to return to work on Monday, but after a couple of hours he had to leave because of back pain.

On December 2, 1976 Dr. Best diagnosed an interspinous ligament pull L5-S1. Claimant thereafter received treatment from two chiropractors without relief and was referred to Dr. Butler.

Dr. Butler reported on January 6, 1977 that claimant should continue with conservative treatment but felt it was possible claimant had a central disc extrusion at L4-L5 and early spinal stenosis of the lower lumbar spine. He hospital-

ized claimant in late January and performed a myelogram which revealed a defect at L4,5 on the left. Claimant underwent a lumbar laminectomy.

Dr. Butler released claimant to return to work as of April 18, 1977.

A Determination Order dated July 29, 1977 granted claimant compensation for time loss and 32° for 10% unscheduled low back disability.

Dr. Butler reported in August 1977 claimant had done well but had occasional stiffness in his back. His examination disclosed that claimant had full painless range of motion of his lumbar spine while standing and was able to touch his finger-tips to his toes.

In September 1977 claimant had a flare-up of his back problem. He had been working for a plumbing firm. Dr. Butler found no objective symptoms and concluded that claimant had musculoligamentous pain in his back, which was probably related to his current work. He suggested claimant seek lighter work, because his current work required him to crawl under houses.

A Determination Order dated September 28, 1977 did not grant claimant any additional compensation.

Dr. Butler indicated in October and November 1977 that claimant continued to have low back pain, aggravated by sitting, getting up and down. He found some instability in the L4-5 interspace.

In November 1977 Dr. Butler's report stated claimant should not engage in any employment requiring lifting, bending or stooping. He had prescribed a chairback brace for claimant and said his total impairment was 15%; he felt claimant might need training in another occupation if his back pain continued. Dr. Butler's opinion was that if the instability in the L4-5 interspace continued, a fusion may be required.

Claimant is a high school graduate and has completed a four-year apprentice program. He testified that he has stopped working at three out of the four jobs he has had since his injury because of back pain, but he later indicated his employers had run out of work and he was laid off. He stated his current problem is back pain which is aggravated by sitting, bending, driving a car and heavy lifting. Claimant's wife corroborated his testimony that when he comes home from work he lies down.

Additionally, claimant testified he played golf 3-4 times per week, played tennis 3-4 times per week, swam and kayaked in the summer on weekends. He indicated he was also

playing full court basketball on a weekly basis.

The ALJ, after reviewing all the evidence, concluded claimant was entitled to an award equal to 96° for 30% unscheduled disability for his back injury to compensate him for his loss of wage earning capacity.

The Board, after de novo review, finds that the preponderance of the medical evidence and the lay testimony reveal that claimant is able to do much more than he testifies he is capable of doing. Dr. Butler's reports indicate he has some discomfort, but over-all indicate that claimant is capable of engaging in many types of work. Claimant's extracurricular activities appear to be quite strenuous, but claimant has no problems performing them.

Claimant has, however, sustained some loss of wage earning capacity and the Board concludes he is entitled to an award of compensation equal to 64° for 20% unscheduled disability for his back injury.

ORDER

The ALJ's order, dated January 19, 1978, is modified.

Claimant is hereby granted an award of compensation equal to 64° for 20% unscheduled disability for his back injury. This is in lieu of any prior awards.

The ALJ's order is affirmed in all other respects.

WCB CASE NO. 77-2875 AUGUST 23, 1978

MARIA CANDELLA, CLAIMANT
John Danner, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF
Cross Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which granted claimant compensation equal to 75° for 50% right leg disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof. The Board does not, however, agree with the ALJ's comment on the top of

page three that claimant's loss of function is based, in part, on "considerable speculation, guesswork and conjecture".

ORDER

The order of the ALJ, dated March 15, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney fee for his services in connection with this Board review in the amount of $300, payable by the Fund.

WCB CASE NO. 77-5173 AUGUST 23, 1978

LEO FLEMING, CLAIMANT
Allen T. Murphy, Claimant's Atty.
William H. Stockton, Defense Atty.
Stipulated Settlement

It is hereby stipulated and agreed by and between Leo C. Fleming, through his attorney, Allen T. Murphy and the State Accident Insurance Fund, acting by and through William H. Stockton, Associate Counsel, as follows:

The claimant Leo C. Fleming, filed a claim for Workers' Compensation benefits contending that his high blood pressure/ulcer condition had been aggravated by his work with Pelton Concrete Construction during December of 1976, that on August 10, 1977 the Fund accepted claimant's claim as a non-disabling injury; that claimant filed a Request for Hearing contending that the claim should be accepted as disabling; that at the time of hearing claimant, by and through counsel, amended the Request for Hearing to include only the issue of penalties, attorney fees and benefits available to claimant pursuant to the "interim compensation" decision of Jones v. Emanuel Hospital, 280 OR 147 (1977), that the Administrative Law Judge dismissed claimant's Request for Hearing on the merits; that the claimant appealed to the Workers' Compensation Board; that the Board's Order on Review dated July 18, 1978, attached hereto and by the reference made a part hereof, reversed the Law Judge's Order and provided for penalties, attorney's fees, and acceptance of the claim as disabling;

That the parties are desirous of settling this matter and in lieu of further litigation the State Accident Insurance Fund stipulates and agrees to pay claimant interim temporary total disability from February 28, 1977 to August 10, 1977, the 15% penalty allowed by the Board's Order on Review, and the attorney fee allowed by the same Order; that in consideration of the promise to pay said sums and to cease further litigation in the matter, claimant stipulates and agrees that the Fund's acceptance of the claim as non-disabling was a correct classification and the claim shall remain so classified.

The above stipulation is approved and the Order on Review dated July 18, 1978 is amended in accordance with the above stipulation.

WCB CASE NO. 77-4876 AUGUST 23, 1978

DAVID HARTSHORNE, CLAIMANT
John Svoboda, Claimant's Atty.
SAIF, Legal Division, Defense Atty.
Request for Review by Claimant
Cross Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

The claimant requests and the State Accident Insurance Fund cross requests Board review of the order of the Administrative Law Judge (ALJ) which granted claimant 37.5° for 25% permanent partial disability of the right leg.

Claimant, at the time of his injury, was an 18-year-old choker setter working on a summer job. He received a compensable injury to his right leg on August 3, 1976 when he slipped and fell. His claim was closed by a Determination Order dated June 24, 1977 which awarded claimant compensation for time loss and 15° for 10% loss of the right leg.

On August 6, 1976 claimant underwent surgical repair of the torn medial ligaments of his right knee. Dr. Slocum, who performed the surgery, examined claimant on April 29, 1977 and found claimant had sharp pain on lateral movements when attempting to squat, kneel or duck waddle. Claimant stated he had limitation of motion of his right leg as well as weakness in his right knee which limited his ability to walk on rough terrain, to climb, squat and had some adverse affect on his ability to pivot and jump. Dr. Slocum found claimant to be medically stationary; he rated his impairment as moderate.

Claimant plays basketball and also engages in other sports activities such as tennis, raquetball, handball and bowling.

After his injury, because of his right leg condition, claimant returned to a lighter job driving skidder.

After summer work, claimant returned to college and played on the University of Oregon basketball team. Films were taken of claimant's activities in one game which indicated that he had substantial mobility.

The ALJ felt that the lay testimony was credible and after observing claimant at the hearing and giving consideration to the films and the medical evidence, concluded that claimant

was entitled to a greater award than that representing 10% of the maximum. He increased claimant's award to 25% of the maximum.

The Board, on de novo review, finds that although claimant's injury was severe, he has, according to the operating surgeon, Dr. Slocum, made an excellent recovery from this injury. The ALJ's order mentions the fact that claimant played basketball on the University of Oregon basketball team. Claimant, in fact, is an outstanding basketball player on this team.

The evaluation of a scheduled injury is based solely upon loss of function of the scheduled member. In this case, the question is how much permanent impairment has claimant suffered as a result of his industrial injury. Although he testified at the hearing that he had numerous impairments which limit his ability to play basketball, a reporter for the Eugene Register Guard whose normal assignment is to cover all of the University of Oregon basketball games observed claimant in pre-season practice and testified that claimant had shown no ill effects from the injury but continued to show the quickness and agility that are remarkable for a player his size.

The Board realizes that claimant does suffer pain when he plays, however, this pain is not disabling, therefore, it does not result in an impairment of function. The Board is strongly persuaded by the films showing claimant playing in a regular basketball game against an opponent, not a practice game, that claimant has great mobility; he appears to be able to pivot as well as his team mates and he works well under the basket constantly going up in a high jump for rebounds and does not show any apparent distress in playing the game as a result of his injury.

The Board fully realizes that there is more in claimant's life than just playing basketball, however, his ability to play this strenuous game is certainly a good yardstick with which to measure any loss of function in claimant's leg.

The Board does not wish to belittle in any manner the severity of claimant's injury, but rather to congratulate him on his remarkable recovery therefrom. The Board concludes that, although claimant pays a certain price in playing basketball, to-wit: non-disabling pain, nevertheless, he has lost very little function of the right leg as a result of the injury.

The Board concludes that the award of 15° for 10% loss of the right leg granted by the Determination Order was adequate and that the increase granted by the ALJ is not justified.

ORDER

The order of the ALJ, dated April 12, 1978, is reversed.

The Determination Order, dated June 24, 1977, is reaffirmed.

CLAIM NO. 05X-014736 AUGUST 23, 1978

WINFRED E. HUSK, CLAIMANT
Own Motion Order

On January 20, 1978 the Board received a request from claimant to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an industrial injury sustained on July 7, 1971. Claimant's claim has been closed and his aggravation rights have expired. His request was supported by a report from Dr. Llewellyn, a chiropractic physician, dated November 25, 1977, which did not connect claimant's present condition with the earlier industrial injury.

The Board, on January 25, 1978, requested that claimant furnish medical evidence that his current condition was related to the original industrial injury and medical evidence that such condition represented a worsening since his claim was last closed; also, claimant was advised to furnish the carrier, Argonaut Insurance Company, copies of the medical reports.

Since the original request claimant has twice requested the Board to reopen his claim and in a later request stated that Argonaut had not paid the housekeeping bills which he had submitted to them. The claimant still failed to furnish the Board with current medical information, however, Argonaut was advised about the housekeeping bills.

On August 4, 1978 Dr. Cronk furnished the Board and Argonaut Insurance Company with a copy of the initial, June 19, 1978, evaluation of claimant, a July 7 follow-up notation and a copy of Dr. Throop's consultation report.

The Board, after giving full consideration to the reports from Dr. Cronk and Dr. Throop, concludes that there is insufficient medical evidence to justify reopening claimant's claim at this time and, therefore, claimant's request that the Board reopen his claim for the 1971 industrial injury should be denied.

IT IS SO ORDERED.

SAIF CLAIM NO. YB 127220 AUGUST 23, 1978

STEVEN E. HUTCHESON, CLAIMANT
Alan Scott, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On July 6, 1978 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for a compensable industrial injury suffered on June 7, 1965.

Apparently claimant's claim was closed with an award for compensation for temporary total disability only. Claimant denied receiving a Determination Order for this injury but did admit receiving a check. The original file has been misplaced and neither the Compliance Division of the Workers' Compensation Department nor the State Accident Insurance Fund was able to find sufficient material to reconstruct a file for the 1965 injury. The Board concludes it is reasonable to assume that the claim was closed and claimant's aggravation rights have expired.

Claimant's request for own motion relief was supported by medical reports from Dr. Coletti and also by a hospital report which indicated claimant was hospitalized on September 30, 1976 for a lumbar myelogram which indicated a disc prolapse on the left side.

This case was originally heard before an Administrative Law Judge (ALJ) on the issue of the propriety of the Fund's denial of claimant's claim for aggravation of his 1965 injury. The Board affirmed and adopted the ALJ's order which held that claimant's rights of aggravation had expired as a matter of law and that he had no recourse except through the Board's own motion jurisdiction. In that case, no brief was filed by the Fund although the Board specifically advised both parties that it would appreciate comments from each on claimant's entitlement to own motion relief pursuant to ORS 656.278. The Board concludes that the Fund does not oppose the granting of the claimant's request for own motion relief, therefore, the claim should be remanded to the State Accident Insurance Fund for acceptance and for payment of compensation, as provided by law, commencing on September 30, 1976, the date claimant was admitted by Dr. Coletti to the Tualaty Community Hospital, and until closed pursuant to the provisions of ORS 656.278, less time worked.

The Board further concludes that claimant's attorney should be granted as a reasonable attorney fee for his services in this matter, a sum equal to 25% of the compensation claimant shall receive for temporary total disability as a result of this order, payable out of said compensation as paid, not to exceed $500.

IT IS SO ORDERED.

WCB CASE NO. 77-4624 AUGUST 23, 1978

OPAL M. JOHNSTON, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the carrier's denial of her claim for aggravation.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated February 9, 1978, is affirmed.

WCB CASE NO. 77-727 AUGUST 23, 1978

KENT KALWEIT, CLAIMANT
Nick Chaivoe, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which remanded claimant's claim to it for acceptance and payment of compensation to which he is entitled.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated February 10, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $150, payable by the Fund.

WCB CASE NO. 77-5815 AUGUST 23, 1978

TERRY G. LOWE, CLAIMANT
John D. Ryan, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the carrier's denial of his alleged injury which occurred sometime in February 1977.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated February 2, 1978, is affirmed.

WCB CASE NO. 77-2847 AUGUST 23, 1978

WILLIAM L. MAHAFFEY, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which awarded claimant compensation for permanent total disability.

Claimant, a 59-year-old carpenter, sustained two injuries in 1974 while working for the same employer. It was agreed that one determination of disability could be made by the ALJ. On August 8 claimant fell 12 feet from a scaffold to the ground. On November 7 he fell backwards, striking the scapular area of the right shoulder against the end of a half inch "rebar" of reinforcing steel. After the second incident, he noticed a diminished grip in his right hand.

In December 1974 Dr. Lahiri indicated claimant complained of pain in his right shoulder and forearm and neck. Neck movements were free and fully performed and his shoulder movements were not restricted. Dr. Lahiri felt a lot of claimant's symptoms were functional in character.

Dr. Miller, a neurologist, could find no objective abnormal neurological finding. An EMG, nerve conduction study were negative. A cervical myelogram revealed spondylosis in the lower cervical area, otherwise it was within normal limits.

Claimant reported in March 1975 he had pain in his tailbone, but no neck or shoulder pain. He did have some elbow pain.

Dr. Miller, in August 1975, prescribed lumbosacral corset for claimant. He felt claimant had a degenerative disc disease, with a probable herniated disc at L5-S1 on the left. Conservative treatment was prescribed.

On December 15, 1975 Dr. Miller found no low back problems; claimant had full range of motion of the neck and was medically stationary in regard to his shoulder and low back injuries. Dr. Miller felt claimant should not do any work requiring repetitive bending at the waist or lifting anything over 25 pounds. He suggested an examination by an orthopedic surgeon in regard to any disease about claimant's right shoulder joint.

Dr. MacCloskey noted in April 1976 that claimant had been receiving physical therapy and had no pain in his neck and shoulder. He felt claimant was well motivated and wished to attempt to return to work. Later, Dr. MacCloskey said claimant thought he was too old to retrain and was thinking of retiring. Dr. MacCloskey agreed that it would not be feasible to retrain claimant. However, claimant wanted to continue working.

In June 1976, Dr. MacCloskey indicated that claimant continued to have limited range of motion in the neck. Claimant was still unable to return to work on a full time basis as a carpenter, but could do some light work.

On July 26, 1976 Dr. MacCloskey believed that claimant was moderately disabled but not 100% disabled, and in November 1976 he felt claimant's disability was permanent. Claimant's neck function was normal, but he continued to experience pain in his right shoulder.

A Determination Order, dated December 9, 1976, awarded claimant compensation equal to 80° for 25% unscheduled disability resulting from his right shoulder injury.

Claimant was provided with vocational assistance but without positive results.

In July 1977 the Orthopaedic Consultants, after examining claimant, diagnosed a contusion and strain of the right shoulder by history and cervical spondylosis at C4-5 and C5-6. Few objective findings supported the level of claimant's symp-

toms; they felt the inconsistencies in their examination suggested functional overlay. It was their opinion that claimant was medically stationary and capable of working with limitations of lifting no greater than 20-30 pounds or other heavy physical work involving the upper extremities. They felt the total loss of function of claimant's neck because of his injury was minimal and the total loss of function of his right shoulder was mildly-moderate. They felt the award of 80° was sufficient.

Claimant has an 8th grade education. His work background is confined to working as a blacksmith and as a heavy construction carpenter.

Claimant testified he has trouble sleeping, sitting and driving a car and has to get up and walk because of his neck and shoulder pain. He feels he cannot use his right arm because of the pain. The pain in the shoulder he feels is aggravated mostly by bending, stooping, lifting and twisting or turning.

Since his injury claimant had tried 6-8 light carpenter jobs. He testified that each caused him extreme pain, but he was able to complete them by doing the tasks slower than he normally would.

The ALJ found claimant was intelligent and motivated to go back to work. He concluded that considering all of the evidence was that claimant was permanently and totally disabled.

The Board, after de novo review, finds that the medical evidence indicates few objective findings to support claimant's subjective complaints. The Orthopaedic Consultants' report reveals inconsistencies in claimant's responses to their testing indicating functional overlay. They found claimant had a mild loss of function of his neck and mildly-moderate loss of function of his right shoulder. Dr. MacCloskey and the Orthopaedic Consultants both indicate claimant is capable of working within the limitations they impose on him. The evidence reveals a heavy functional overlay.

Therefore, the Board concludes that claimant is not permanently and totally disabled; however, he is entitled to an increased award of permanent partial disability for his injury because he has suffered loss of wage earning capacity as a result thereof.

Only the issue of extent of permanent partial disability was before the Board on review.

ORDER

The ALJ's order, dated September 16, 1977, is modified.

Claimant is hereby granted an award of compensation equal to 224° for 70% unscheduled disability resulting from his right shoulder injury. This is in lieu of the awards made by the ALJ in his order which in all other respects is affirmed.

WCB CASE NO. 77-6464 AUGUST 23, 1978

RICHARD McINTOSH, CLAIMANT
Brown, Burt & Swanson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the September 1, 1977 Determination Order whereby he was awarded no permanent disability compensation.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated March 2, 1978, is affirmed.

WCB CASE NO. 76-5120 AUGUST 23, 1978

THORVAL W. PATTEE, CLAIMANT
Anderson, Fulton, Lavis & VanThiel,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross Request for Review by SAIF

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted him compensation equal to 240° for 75% unscheduled permanent partial disability. Claimant contends that he is permanently and totally disabled.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated February 1, 1978, is affirmed.

WCB CASE NO. 77-5480 AUGUST 23, 1978

ONIS R. ROBERTSON, CLAIMANT
Dye & Olson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests Board review of the Administrative Law Judge's (ALJ) order which set aside its denial of claimant's claim and referred it to the Fund to be accepted and for the payment of compensation, as provided by law, until the claim was closed pursuant to ORS 656.268.

Claimant was returning from a delivery in Portland on June 7, 1977 when his lumber truck broke down. Claimant called his manager and waited for a towing vehicle; he was instructed to steer the disabled truck as it was being towed off the freeway. The towing truck was required to stop at a stop sign and claimant's vehicle, which had no air brakes, collided with it. Claimant alleges that he was forced forward and struck his shoulder on the door, however, he felt he had only bruised his shoulder and said nothing to his employer. The employer apparently was upset sufficiently because the truck had broken down and claimant was apprehensive that if he said anything more about the incident he would be fired.

Claimant worked the day following this incident and continued to work steadily for about a week except for days which were non-work days for him. The following Monday when he reported to work and was given a load to haul to Salem, claimant admitted that he had been to the hospital. That visit was necessitated by pain claimant had in his right side resulting from moving a TV the preceding Sunday. At the time he was examined for the side pain he made no complaint of problems with his shoulder; his side condition was just a muscle spasm and did not affect the shoulder.

Later, claimant made an appointment to see Dr. Dodds because the pain in his shoulder was increasing. Dr. Dodds reported he found an old abrasion in claimant's shoulder and he recommended heat therapy and modified work for four or five days. Claimant was not entirely satisfied with this and went

to see Dr. Sanford who reported claimant had a shoulder concussion, possible A-C joint separation. Claimant remained under the care of Dr. Sanford until June 24 when, at Dr. Sanford's recommendation, he was seen by Dr. Mayhall in Salem.

Both Dr. Dodds and Dr. Sanford filed physician's initial reports of injury (Form 827) which specifically related claimant's shoulder condition to the industrial injury of June 7. The fact that claimant had sustained an industrial injury on that day was also confirmed by Dr. Mayhall.

Claimant filed a claim on June 14, 1977 and the Fund commenced payment of compensation for temporary total disability on June 24, 1977 for the period June 13, 1977 through August 7, 1977. On August 22 the Fund denied claimant's claim, stating that it did not appear that claimant's diagnosed condition was related to the described incident in the claim nor did it arise out of or in the course and scope of claimant's employment.

The ALJ found that the reports from Dr. Sanford and Dr. Mayhall clearly indicate that claimant has an injured shoulder and that shoulder would undoubtedly need treatment; furthermore, the medical evidence reveals that the shoulder injury could have occurred approximately a week before he was seen by either Dr. Sanford or Dr. Mayhall which would be approximately the date claimant alleged he sustained the industrial injury.

Prior to the incident of June 7, 1977 claimant had experienced no significant injury to his left shoulder although he had seen a doctor in March 1977 complaining of shoulder pain which resulted when he slipped on a tomato in a grocery store. However, this visit apparently was only a precautionary measure because the doctor found a normal left shoulder at the time.

The ALJ found that although there were some inconsistencies in claimant's testimony, he apparently was able to explain them without too much difficulty. The ALJ relied strongly on a report from Dr. Sanford and Dr. Mayhall. He found that it would not be reasonable to find that the abrasion found by Dr. Dodds was the result of the March 1977 shoulder injury. Claimant had told no one but his wife about his shoulder but there was some justification for not doing so, to-wit: claimant had only worked for the employer for a day or two prior to the injury and it involved considerable damage to the truck and claimant was afraid of losing his job if he reported the injury.

Based on the medical evidence, the ALJ concluded that claimant suffered a compensable industrial injury to his shoulder on June 7, 1977. He was not overly concerned about the fact that the Fund did not deny claimant's claim within 60 days because compensation was paid promptly and continued to be paid to within 15 days of the letter of denial. Actually, one more payment should have been made by the Fund prior to its denial, but the

ALJ did not feel the circumstances warranted a penalty or attorneys fees for failure to pay compensation. He did remand the claim to the Fund to be accepted as a compensable industrial injury.

The Board, on de novo review, agrees with the findings and conclusions of the ALJ. When claimant was seen in March 1977 for his shoulder pain, no indication of an abrasion or bruise was noted. When claimant was seen by Dr. Dodds on June 13, 1977, after examining claimant, he found an abrasion, old, over left acromio-clavicular junction, no evidence of bone injury. He diagnosed contusion of the left shoulder. Dr. Sanford, at the same time, after examining claimant, diagnosed shoulder contusion, possible A-C joint separation. The fact that both doctors noted that the abrasion, at the time of the examination, appeared to be old yet still visible, would indicate that the cause of such abrasion would have had to happen within a week or less prior to that examination. There is no evidence of any trauma either on the job or off the job between June 7, 1977 and the date claimant was examined by Drs. Dodds and Sanford. This bolsters substantially claimant's testimony that he did suffer an injury to his shoulder on June 7, 1977.

Claimant's wife also testified that claimant commenced complaining of pain in his shoulder soon after the June 7, 1977 injury.

The Board concludes that claimant did suffer a compensable industrial injury on June 7, 1977 when he was jostled around in the cab of his truck when it rear-ended the vehicle which was towing it.

ORDER

The order of the ALJ, dated April 14, 1978, is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum of $350, payable by the Fund.

WCB CASE NO. 77-6085 AUGUST 23, 1978

LUCY SINK, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the September 13, 1977 Determination Order as to its finding as to claimant being medically stationary.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated March 20, 1978, is affirmed.

WCB CASE NO. 76-6987 AUGUST 23, 1978

VIRGINIA SMETS, CLAIMANT
Dennis Henninger, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which remanded claimant's claim to it for acceptance and payment of compensation to which she is entitled in addition to assessing a penalty and attorney fee against it.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated March 6, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $300, payable by the Fund.

WCB CASE NO. 77-3200 AUGUST 23, 1978
WCB CASE NO. 77-3201

DAVID D. STEWART, CLAIMANT
Virgil E. Dugger, Claimant's Atty.
Cosgrave & Kester, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the Determination Orders entered in each of two separate claims. In WCB Case No. 77-3200 a Determination Order, dated April 11, 1977, awarded claimant 10% disability for his January 13, 1975 right shoulder injury; in WCB Case No. 77-3201, the claim for a January 8, 1977 injury to the same area of claimant's body was closed with no award of compensation by a Determination Order of the same date. Claimant contends neither award is adequate.

Claimant, at the age of 29 years, while employed as a junior draftsman, sustained his first injury to his right shoulder on January 13, 1975 when he fell off of a ramp and caught himself. He continued to work and didn't see a doctor until August 1975. Dr. Newton diagnosed tendinitis of his right shoulder.

On December 17, 1975, Dr. Fax performed surgery to claimant's right shoulder; the diagnosis was impingement syndrome with probable partial thickness tear of the rotator cuff and area of ulceration of the rotator cuff.

On May 3, 1976 claimant was released by Dr. Fax for light work with no lifting over 30 pounds and no overhead work.

Dr. English, after claimant did not improve, performed a right shoulder arthrogram which revealed no abnormalities.

Claimant continued to have a painful shoulder, especially on elevating his right arm above shoulder level or in reaching behind himself.

In August, 1976, Dr. Struckman performed a partial acromioplasty on claimant's right shoulder. In September, 1976, Dr. Struckman indicated claimant continued to have shoulder pain, but had developed psychological problems and needed psychological counseling.

Claimant was examined by Dr. Bloch, a psychiatrist, in September, 1976. He found claimant felt that he needed to

produce to be accepted and when this ability to produce was diminished he developed a feeling of insecurity. Claimant felt he was being exploited; Dr. Bloch thought that claimant's injury caused all of his conflicts to intensify and claimant would need continuing treatment and care.

In April, 1977 Dr. Bloch found claimant was unable to return to work with his prior employer in any capacity because of emotional, psychological reactions to such a return. He felt claimant's industrial injury and re-injury caused claimant's psychological condition to crystalize. Dr. Bloch believed that claimant should be retrained as an independent or small establishment operator.

On January 8, 1977 claimant sustained a second injury to his shoulder when he grabbed a jackhammer he was operating to keep it from falling on another employee.

Claimant was referred for vocational rehabilitation on April 11, 1977.

Claimant testified he has constant pain in his shoulder which worsens with any exertion. He felt his shoulder had improved after his first operation, but that it has been worse since his second injury. He is unable to do heavy labor, farming or car repair and shifting and steering a car in city traffic causes him pain.

Claimant's job as a junior draftsman required him to climb and do measuring in the plant 80% of the time. The remainder of his time was spent doing paper work. He is fearful of returning to this work because he may re-injure his shoulder.

Claimant's vocational rehabilitation coordinator did find him a job as a maintenance clerk for his employer which he refused on the recommendation of Dr. Bloch. This job was basically an office type job, but did include taking inventory of tools, carrying items, walking and climbing.

Claimant is now unemployed but has done auto tune-ups and some auto wiring for friends. He has unsuccessfully sought employment as a parts counter man.

Claimant graduated from high school with honors and completed two years of college work majoring in physics and math. His work experience has covered operating a service station, physics lab teaching assistant, wind tunnel model-builder, project engineer and process engineer.

The ALJ found that claimant had not fully recovered from his right shoulder injury of January 13, 1975 when the second incident occurred causing an aggravation of his prior condition. He found the evidence did not support, either from

a physical or psychological standpoint; that a new independent injury had occurred. He concluded that claimant had suffered disability based on subjective findings of pain in his right shoulder, increased on lifting or marked abduction and as a result had been precluded from a portion of the heavy labor market but had been fully compensated therefor by the award for 10% unscheduled disability granted by the Determination Order of April 11, 1977 which related to his January 13, 1975 industrial injury. He also found claimant had suffered no compensable injury on January 8, 1977.

The ALJ found that claimant's psychiatric evaluation did not indicate his psychological condition has affected his future earning capacity.

The Board, after de novo review, finds that claimant actually suffered two compensable industrial injuries while working for the same employer. The preponderance of the evidence, however, indicates that the results of claimant's second injury were more severe than his first; also, his psychological problems were greater after the second injury.

The Board agrees that claimant has been amply compensated for his loss of wage earning capacity resulting from the January 13, 1975 industrial injury; however, it finds, based upon the medical evidence, that claimant's physical condition resulting from the January 8, 1977 injury combined with the related physical conditions and the residuals of his earlier industrial injury, justifies an award for loss of wage earning capacity resulting from the January 8, 1977 injury equal to 15% of the maximum allowable by statute for unscheduled disability.

The Board also concludes that claimant's claim for psychological problems should be remanded to the carrier for medical care and treatment pursuant to the provisions of ORS 656.245.

ORDER

The ALJ's order, dated February 24, 1978, is reversed.

The Determination Order of April 11, 1977 which awarded claimant 32° for 10% unscheduled right shoulder disability resulting from his industrial injury of January 13, 1975 is affirmed.

Claimant is awarded compensation equal to 48° for 15% unscheduled right shoulder disability resulting from his industrial injury of January 8, 1977.

Claimant's claim for medical care and treatment of his psychological problems is remanded to the carrier pursuant

to the provisions of ORS 656.245.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted claimant by this order payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-6822 AUGUST 23, 1978

MAYBELL TURNER, CLAIMANT
Luebke & Wallingford, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF
Cross-appeal by Claimant

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which granted claimant compensation for permanent total disability as of the date of her order. The Fund contends that claimant is not permanently and totally disabled. Claimant cross-appeals, requesting that her permanent total disability benefits commence as of the date of closure of her temporary total disability benefits, a request which the Board feels is unjustified.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated February 13, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $200, payable by the Fund.

WCB CASE NO. 77-5210 AUGUST 23, 1978

JERRY F. WILLIAMS, CLAIMANT
Mark Hendershott, Claimant's Atty.
Cosgrave & Kester, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted him compensation equal

to 112° for 35% unscheduled low back disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated March 31, 1978, is affirmed.

WCB CASE NO. 77-4141 AUGUST 29, 1978

EDWIN CREASON, CLAIMANT
Dennis Skarstad, Claimant's Atty.
SAIF, Legal Services, 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 and claimant cross requests, review by the Board of the Administrative Law Judge's (ALJ) order which granted claimant permanent total disability compensation as of April 3, 1978, the date of his order. Claimant contends that commencement of permanent total disability compensation should be the date he was medically stationary, or the date of Dr. Orenstein's report.

The Board, after de novo review, affirms and adopts the ALJ's order finding claimant is permanently and totally disabled. However, the Board concludes that the commencement date for this award should be June 23, 1977, the date Dr. Orenstein found claimant totally disabled. A copy of the ALJ's order is attached hereto and, by this reference made a part hereof.

ORDER

The order of the ALJ, dated April 3, 1978, is affirmed with the exception being the commencement date of permanent total disability being June 23, 1977.

Claimant's attorney is hereby granted, as a reasonable attorney fee for his services at Board review, the sum of $300, payable by the Fund.

WCB CASE NO. 77-3952 AUGUST 29, 1978

FRANK A. DRAPER, CLAIMANT
Donald Atchison, Claimant's Atty.
Delbert Brenneman, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer and its carrier seeks review of the order of the Administrative Law Judge (ALJ) entered on October 21, 1977 which ratified and affirmed his order of November 1, 1977 which reversed the defendant's denial of claimant's claim and remanded it to the defendant for acceptance and payment of compensation, pursuant to law, until claim closure pursuant to ORS 656.268.

Claimant, a 40 year old timber faller, was employed on a seasonal basis by the defendant. On March 23, 1977 claimant allegedly sustained a low back injury; this was the first day claimant had worked for the defendant since October, 1976.

Claimant had sustained a low back injury in 1970 but had made a good recovery. He had had low back symptoms in August, 1976 but there was no evidence that the symptoms required medical attention. On March 8, 1977 claimant saw Dr. Wilcox complaining of left hip pain which had commenced around the first part of February and was exacerbated by coughing. Dr. Wilcox diagnosed acute pain over the left thoracic area.

On March 23, 1977 claimant had been working approximately three hours when the wind caught the tree he was falling, causing it to fall across some power lines and into a farmer's field. Claimant quickly bucked the log into manageable pieces and carried or dragged them out from the field. His symptoms did not commence until he had completed his task, however, later he began to have sharp low back pain which he attributed to being out of condition, not having worked since the previous October. The following day he worked only a few hours before he was forced to go home because of the pain, and the next day he worked even a shorter period of time. He saw his family physician who referred him to Dr. Neufeld.

Claimant was hospitalized for conservative treatment which failed to alleviate his symptoms. A myelogram was performed which revealed a left filling defect at the L5-S1 level and a laminectomy and discectomy were performed correcting a left herniated nucleus pulposus.

The ALJ found that the defendant relied strongly on the history claimant had related to his various physicians, however, at the hearing, the ALJ formed an impression that the

claimant was a poor historian particularly as far as dates were concerned. In its closing arguments, the defendant quoted from a report from Dr. Schwartz which the ALJ was unable to find and therefore concluded that no report from Dr. Schwartz had been offered or admitted into evidence.

The defendant contends that claimant's herniated disc pre-existed the events of March 23, 1977. Although claimant stated he did not have any left leg pain prior to March 23, this is not borne out by the medical evidence and the ALJ concluded that the herniated disc did exist prior to March 23, 1977.

Claimant testified that he had made a rather quick recovery from the symptoms for which he consulted Dr. Wilcox on March 8 and the evidence clearly established that claimant had been able to fall trees for approximately three hours before falling one which dropped onto the power lines. The evidence also indicated that claimant was able to quickly buck the tree into small pieces and to carry and drag them out of the farmer's field. These chunks of log weighed 100 pounds or more and claimant worked at a rather frantic pace.

Based upon this evidence, the ALJ was convinced that claimant could not have performed such work if he had had low back symptoms as severe as they were when he was first examined by Dr. Neufeld, and now he concluded that although claimant had previously exhibited low back symptoms and probably had a herniated disc prior to March 23, he had been asymptomatic as a result of his work activities on that date. Aggravation of a pre-existing condition constitutes a compensable injury and the ALJ found that claimant's denial was improper. He felt the circumstances of the case did not justify the awarding of penalties.

On November 4, 1977 the defendant requested the ALJ to reopen the record and give consideration to the report from Dr. Schwartz which had been mentioned in defendant's brief but had not been received or admitted into evidence. This request was granted and the ALJ's second order is basically a recital of what Dr. Schwartz stated in his report. After claimant had consulted Dr. Wilcox in March, 1977 he was referred by him to Dr. Schwartz who diagnosed an acute lumbar strain and the possibility of a herniated nucleus pulposus. Claimant was given a return appointment for March 22, 1977 but did not appear.

The ALJ stated that no one could legitimately doubt claimant's activity level on March 23, 1977, based on the evidence presented and although he did not doubt that the claimant had symptoms suggestive of a herniated disc on March 8 the most crucial question was whether or not the treatment beginning March 28, 1977 was necessitated by the symptoms of March 8 or by the activities of March 23.

Despite the additional evidence, the ALJ's opinion remained unchanged from that expressed in his order of November 1, 1977, i.e., claimant could not have performed the strenuous work he did on March 23, 1977 if, at that time, he had low back symptoms as severe as he had when he was first examined by Dr. Neufeld on March 28, 1977 and ultimately resulted in the surgery on May 3, 1977.

The Board, after de novo review, agrees with the findings and conclusions made by the ALJ in both of his orders and affirms the order of November 21, 1977 which incorporates by reference all of the findings and conclusions and directives contained in the earlier order.

ORDER

The Second Opinion and Order of the ALJ, dated November 21, 1977, which incorporated by reference the findings, conclusions and orders contained in his Opinion and Order dated November 1, 1977, is hereby affirmed.

Claimant's attorney is awarded as a reasonable attorney fee for his services at Board review a sum of $300, payable by the defendant.

WCB CASE NO. 77-5715 AUGUST 29, 1978

KENNETH L. DVORAK, CLAIMANT
Gordon Price, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted him compensation equal to 54° for 40% loss of his left foot.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated May 2, 1978, is affirmed.

WCB CASE NO. 77-5233 AUGUST 29, 1978
WCB CASE NO. 77-1907

PHILLIP FERRIS, CLAIMANT
Evohl Malagon, Claimant's Atty.
R. Kenney Roberts, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer seeks Board review of the order of the Administrative Law Judge (ALJ) which disapproved the employer's denial of September 20, 1976 and remanded the claim to it to be accepted and for the payment of benefits, as provided by law, and also ordered it to pay claimant's attorney a reasonable attorney fee (WCB Case No. 76-5233). The employer also requests Board review of the ALJ's increase of claimant's award for permanent partial disability (WCB Case No. 77-1907).

On October 10, 1975 claimant suffered an injury to his left low back when he was knocked into a dye casting machine. The injury was originally diagnosed as a left low back contusion. Claimant had been employed by Ireco Industries for three years prior to this injury; before that his work experience was mainly as a chef or sub-chef in restaurants and clubs. This type of employment required very heavy lifting and, in general, substantial physical activity.

The ALJ found claimant had had several prior injuries of varying degrees of seriousness from which he recuperated promptly and returned to work; however, after the present injury claimant attempted for a brief period to return to his job at Ireco but was unsuccessful. He has not been able to work since.

Claimant has a 10th grade education, but can't read beyond the 2nd grade level; at the present time his wife is tutoring him. Claimant wants retraining, however, on February 14, 1977 the Board refused to refer him for vocational training because of his 15 years experience in the field of food service; also, medical reports indicate claimant should be physically able to return to such work.

Claimant testified that he can't return to either restaurant work or the type of work he was performing at Ireco because of the limitations imposed as a result of his injury.

On January 3, 1976 Dr. Davis, an orthopedic physician, found no definite neurological findings but there were many symptoms suggestive of a herniated disc. Later, he noted that the only significant symptom was that of fat atrophy at the location where claimant was struck and diagnosed a probable lumbar and gluteal contusion. Claimant was referred to evaluation by the Disability Prevention Division, including psychological evaluation.

At the Disability Prevention Division Dr. Halferty diagnosed a probable mild lumbosacral strain with severe functional overlay. He found it difficult to determine whether claimant was sincere or was exaggerating his difficulties.

In July, 1976 Dr. Myers, a neurologist, found no indication of neurological problems; later he found limitation of motion of claimant's spine and tenderness, however, Dr. Myers was unable to assess how much of that was due to psychological factors. He felt claimant was capable of performing light to moderate work but not heavy work.

Dr. Perkins, a clinical psychologist, had evaluated claimant in February, 1976 and found moderately severe psychopathology, largely related to claimant's personality prior to the injury and a chronic lifestyle although to a mild degree the injury had influenced nervous tension and mild depression. Claimant had also been seen in May, 1976 by Dr. Cook, a psychiatrist, who diagnosed depressive neurosis, psychophysiological musculoskeletal disorder and adjustment reaction of adult life. Claimant continued receiving psychotherapy from Dr. Cook until October 22, 1976 at which time his psychiatric condition was considered to be clinically stable.

Claimant was psychiatrically evaluated by Dr. Parvaresh in September, 1976 who expressed his opinion that claimant could return to gainful employment unless it was contraindicated because of his orthopedic problems. Dr. Cook did not agree, stating that at the time Dr. Parvaresh examined claimant he had achieved considerable psychiatric stability as a result of the psychotherapy.

In December, 1976 Dr. Bert found claimant to be medically stationary.

A Determination Order dated January 19, 1977 granted claimant 48° for 15% unscheduled disability (WCB Case No. 77-1907).

After the hearing claimant was evaluated by the Orthopaedic Consultants who considered his loss of function to be mild; they stated that claimant was capable of some other type of employment and should have job placement assistance.

The ALJ found that claimant's work was a material contributing cause to his psychophysiological musculoskeletal condition and that his exclusion from returning to his former types of employment plus his low level of literacy resulted in greater disability than that for which he had been compensated. The ALJ increased the award for permanent partial disability to 160° for 50% unscheduled low back disability. He also recommended that claimant be evaluated by the Disability Prevention Division for vocational rehabilitation.

On September 20, 1976 the employer and its carrier had denied claimant's claim for benefits for his psychiatric problems, stating such problems did not arise as a result of his industrial injury and were not related to claimant's employment.

The ALJ found the testimony of Dr. Parvaresh persuasive that claimant's psychological difficulties were basically a matter of passive-aggressive personality arrangement characteristic of an individual who is injured, fails to make a good recovery and files a claim with respect to his injury. The ALJ noted that Dr. Parvaresh did not agree with Dr. Cook's diagnosis of a psychophysiological musculoskeletal disorder attributable to the accident; he did not feel it was sufficiently severe to be disabling. The ALJ found the evidence was more supportive of the position taken by Dr. Cook and he set aside the denial of responsibility for claimant's psychiatric problems.

The Board, after de novo review, agrees with the ALJ that the denial of responsibility for claimant's psychiatric problems was improper and should be set aside. However, the Board feels that the award for permanent partial disability is not justified by either the medical or lay evidence.

Claimant has extensive experience as a chef or sub-chef working in restaurants and clubs and although he may not be physically able to carry out all of the duties of a chef or sub-chef because of his physical limitations, there are many of the duties which he could attend to without any difficulty, therefore, there is gainful and suitable employment available to claimant.

The doctors have stated that although claimant cannot return to heavy work he is capable of performing light to moderate work.

Based upon claimant's age, his limited educational background and his work experience and potential for retraining, the Board concludes that claimant would be adequately compensated for his loss of wage earning capacity resulting from his injury of October 10, 1975 by an award equal to 112° for 35% of the maximum for unscheduled disability.

The Board also finds that the attorney fee granted claimant's counsel in the amount of $1,000 is excessive.

ORDER

The order of the ALJ dated December 12, 1977 is modified.

Claimant is hereby granted 112° of a maximum 320° for 35% unscheduled disability. This is in lieu of the award made by the ALJ's order (WCB Case No. 77-1907).

Claimant's counsel is awarded as a reasonable attorney

fee for his services at the hearing before the ALJ and at Board review the sum of $750, payable by the employer and its carrier (WCB Case No. 76-5233).

In all other respects the ALJ's order relating to WCB Case Nos. 76-5233 & 77-1907 is affirmed.

WCB CASE NO. 76-3882 AUGUST 29, 1978

FARRY ALYCE GREEN, CLAIMANT
Richard Lancefield, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Administrative Law Judge's (ALJ) order which affirmed the denial of her claim for aggravation.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated February 16, 1978, is affirmed.

WCB CASE NO. 77-2733 AUGUST 29, 1978

CLAUDE HART, CLAIMANT
Dan O'Leary, Claimant's Atty.
Phil Mongrain, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Administrative Law Judge's (ALJ) order which affirmed the denial of claimant's claim for aggravation.

Claimant, a millworker, suffered a compensable injury on December 31, 1970 when 2,000 board feet of lumber fell off a forklift onto his back. Claimant was immediately hospitalized with a diagnosis of fresh compression fracture of the 1st lumbar vertebra.

Claimant saw many physicians, including Dr. Van Osdel at the Disability Prevention Division and the doctors at the Back Evaluation Clinic, with the concensus opinion being claimant's impairment from this injury was moderate.

On April 27, 1972 a Determination Order granted claimant 112° for 35% unscheduled disability. A stipulation of July 24, 1972 granted claimant an additional 150° for a total award to date of 262°, approximately 83% of the maximum.

On March 19, 1975 Dr. Post examined claimant for a "pop" in his back which occurred after claimant had mown his lawn. Dr. Post felt claimant's problems were related to his industrial injury but couldn't say whether claimant's condition would deteriorate from this episode of lawn mowing.

On August 15, 1975 claimant again experienced pain when he leaned forward to lift some light groceries and the "pop" occurred again. X-rays were taken and compared with those taken in 1971 or 1972; they indicated increased osteoporosis, compression of the 3rd vertebra and compression fracture of the 8th vertebra. Dr. Post felt the osteoporosis was not related to the injury. He felt claimant's condition had deteriorated but was due to claimant's disease process. However, on July 20, 1977 Dr. Post reported he found claimant totally disabled due to the disease process plus the residuals of his injury.

Dr. Post was deposed and testified that osteoporosis was a thinning out of the bone. He felt that claimant's fractures that were diagnosed were due to this osteoporosis condition.

The ALJ concluded that claimant had failed to carry his burden of proving an aggravation of his condition relating to his original industrial injury and he affirmed the denial of his claim for aggravation.

The Board, on de novo review, agrees with the conclusion reached by the ALJ.

ORDER

The order of the ALJ, dated August 31, 1977 is affirmed.

WCB CASE NO. 77-6204 AUGUST 29, 1978

LYLE HOLDEN, CLAIMANT
W. C. Schwenn, Claimant's Atty.
Frank Moscato, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant requests review by the Board of that portion of the Administrative Law Judge's (ALJ) order which denied claimant compensation for temporary total disability from April 4, 1977 to September 12, 1977.

Claimant, a mechanic working for an employer who processed filberts, on August 12, 1975 attempted to move a conveyor belt, twisted and suffered pain in his back.

On January 5, 1975 Dr. Coletti reported claimant could not return to heavy work. Restrictions were placed upon claimant, i.e., no excessive standing, prolonged sitting, repeated stooping, bending, climbing or lifting over 30 pounds. Claimant was, at that time, undertaking a bookkeeping course.

On September 24, 1976 Dr. Coletti performed back surgery on claimant. On April 3, 1977 claimant's condition was stationary but Dr. Coletti was unable to evaluate claimant's permanent impairment although claimant obviously did have some.

A Determination Order of August 16, 1977 granted claimant temporary total disability to April 4, 1977 and 32° for 10% unscheduled disability.

On September 19, 1977 Dr. Coletti reported that he had examined claimant on September 12, 1977 and he would rate claimant's impairment at 25%; claimant was released for work as of this date but had only been released at the earlier date for retraining purposes.

Dr. Coletti upon being deposed, testified that on April 4, 1977 he prescribed a program of exercises to improve claimant's condition and told claimant to report back in six months. By September, 1977 Dr. Coletti found, objectively, that claimant's condition had much improved through the use of the exercises, etc. Dr. Coletti was given the court's definition of "medically stationary" set forth in Dimitroff v SIAC, 209 Or 316 and asked, based upon this definition, when claimant was, in fact, medically stationary. Dr. Coletti stated that claimant was medically stationary on September 12, 1977. In April, 1977 he had found claimant's condition to be stable enough to allow claimant to undergo a vocational rehabilitation program only.

The ALJ felt claimant had failed to prove his entitle-

ment to temporary total disability compensation after April, 1977.

The sole issue before the Board is whether the claimant is entitled to additional compensation for temporary total disability and the Board, on de novo review, finds that Dr. Coletti, unequivocally, stated claimant was not, by legal definition, medically stationary until September 12, 1977. This evidence stands unrefuted and, therefore, the Board concludes claimant is entitled to additional compensation for temporary total disability from April 4, 1977 to September 12, 1977.

ORDER

The order of the ALJ, dated March 31, 1978, is modified.

Claimant is hereby granted compensation for temporary total disability from April 4, 1977 through September 11, 1977. In all other respects the ALJ's order is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney fee, 25% of the increased compensation for temporary total disability granted to claimant by this order, payable out of said compensation as paid, not to exceed $500.

WCB CASE NO. 77-1675 AUGUST 29, 1978

STEVEN E. HUTCHESON, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the Fund's denial of his claim for aggravation based on the fact that claimant's aggravation rights had expired.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated October 21, 1977, is affirmed.

NO NUMBER AVAILABLE AUGUST 29, 1978

RITA KINDRED, CLAIMANT
Richard Kropp, Claimant's Atty.
Own Motion Determination

Claimant, a cannery worker, suffered a compensable injury on June 15, 1970 when she slipped on a wet floor and injured her back. Diagnosis was lumbar strain superimposed on a severely degenerative disc L5-S1. Claimant's treatment was conservative. On December 16, 1970 her claim was closed by a Determination Order granting claimant 32° for 10% unscheduled disability.

Claimant appealed and a Hearing Officer on April 5, 1971 affirmed the Determination Order as did the Board; however, the circuit court granted claimant an additional 16°.

Claimant's back complaints continued. Dr. Ellison performed a discectomy and fusion on July 13, 1972. By April 11, 1973 claimant was stationary and a Second Determination Order granted claimant an additional 80°. On May 10, 1974 a stipulation granted claimant an additional 32°, giving claimant a total of 160° for 50% unscheduled disability.

Claimant first began to reveal psychiatric problems in 1972. On December 29, 1976 Dr. Parvaresh determined claimant's psychiatric problems were injury related. Claimant, thereafter, came under the care of Dr. Arnold, a psychiatrist, who hospitalized claimant on several occasions. By stipulation, claimant's claim was reopened with time loss commencing December 22, 1976. On June 20, 1978 she was found to be psychiatrically stationary but needed continued supportive treatment.

The employer requested a determination of claimant's condition and the Evaluation Division of the Workers' Compensation Department recommended that claimant be granted compensation for temporary total disability from December 22, 1976 through June 20, 1978, but no additional award of permanent partial disability.

The Board finds, based on Dr. Arnold's report of June 20, 1978 wherein he finds claimant incapable of sustaining gainful employment, that claimant is permanently and totally disabled as of the date of Dr. Arnold's report.

ORDER

Claimant is hereby granted compensation for temporary total disability from December 22, 1976 to June 20, 1978.

Claimant is to be considered to be permanently and totally disabled as of June 20, 1978.

Claimant's attorney is granted as a reasonable attorney fee for his services a sum equal to 25% of the compensation granted to claimant by this order, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-2464 AUGUST 29, 1978
WCB CASE NO. 76-956

FRANK MASON, CLAIMANT
Allen T. Murphy, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

A request for review having been duly filed with the Workers' 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 Administrative Law Judge is final by operation of law.

WCB CASE NO. 77-7505 AUGUST 29, 1978

MARY MORRIS, CLAIMANT
George Jenks, Claimant's Atty.
Bob Joseph, Defense Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order Referring for Hearing

Claimant filed a claim for an alleged industrial injury sustained on June 20, 1977 while in the employ of Portland Adventist Medical Center, whose carrier was Liberty Mutual Insurance Company. This claim was denied by the carrier on November 11, 1977 on the grounds that claimant's most recent complaints and symptomatologies represented an aggravation of a 1967 industrial injury sustained while claimant was employed by Mt. St. Joseph's Nursing Home, whose workers' compensation coverage was furnished by the State Accident Insurance Fund. Claimant requested a hearing on the propriety of this denial.

On July 31, 1978 claimant, by and through her attorney, advised the Board of the denial of the 1977 injury and requested the Board to exercise its own motion jurisdiction and set the request for own motion relief for hearing on a consolidated basis with the previous request for hearing on the denial by Liberty Mutual Insurance Company. Claimant also requested the Board to join both Liberty Mutual and the Fund as parties defendant to enable the Administrative Law Judge (ALJ) to determine whether

claimant's present condition represents an aggravation of her 1967 injury for which own motion relief should be granted or results from an injury suffered on June 20, 1977.

Upon conclusion of the hearing the ALJ shall cause a transcript of the proceedings to be prepared; a copy of such transcript together with the ALJ's recommendation on claimant's request for own motion relief relating to the 1967 industrial injury to be forwarded to the Board.

The ALJ shall also prepare his Opinion and Order on the issue of the propriety of the denial of claimant's 1977 claim by Liberty Mutual Insurance Company.

WCB CASE NO. 77-7382 AUGUST 29, 1978

NINA POWELL, CLAIMANT
Rolf Olson, Claimant's Atty.
Scott Gilman, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer originally requested Board review and then withdrew its request. Claimant requested cross-request of the Administrative Law Judge's (ALJ) order which remanded claimant's claim to the employer for acceptance of the treatment recommended by Dr. Winkler on December 8, 1977 with reopening commencing on that date. Claimant contends she is entitled to reopening earlier than December 8, 1977.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated April 4, 1978, is affirmed.

WCB CASE NO. 76-3992 AUGUST 29, 1978

PAUL RUSSELL, CLAIMANT
Gary Jones, Claimant's Atty.
Keith Skelton, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's order which affirmed the employer's denial.

The Board, after de novo review, affirms and adopts the Opinion and Order and the Order on Reconsideration of the Administrative Law Judge, copies of which are attached hereto and, by this reference, are made a part hereof.

ORDER

The order of the Administrative Law Judge dated January 20, 1978 and the Order on Reconsideration, dated February 24, 1978, are affirmed.

WCB CASE NO. 77-4555 AUGUST 29, 1978

JAMES STEARNS, CLAIMANT
M. Elliott Lynn, Claimant's Atty.
Delbert Brenneman, Defense Atty.
Request for Review by Claimant
Cross Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

Claimant seeks review of the order of the Administrative Law Judge (ALJ) which affirmed the carrier's denial of claimant's claim for aggravation of her 1973 injury but directed it to pay for the medical care, diagnostic tests and treatment furnished or ordered by Dr. Lesac and Dr. Hill (or reimburse the claimant for those sums which he had heretofor expended for such purposes) and to pay claimant's attorney an attorney fee of $500.

The employer cross requests Board review of that portion of the ALJ's order which directed it to furnish medical care and treatment pursuant to ORS 656.245.

Claimant, a 34 year old elevator mechanic, suffered a compensable injury on November 8, 1973 when he was struck in the upper back by a piece of falling metal. He was seen by Dr. Matthews on February 18, 1974 who made a diagnosis of cervical strain superimposed upon some degenerative changes. Originally, the claim was classified as a non-disabling injury; claimant missed several hours of work on the afternoon of the injury but returned to work the following day. There was no time loss of a compensable nature.

In December, 1976 claimant's symptoms returned after a coughing seizure. Claimant was examined by Dr. Lesac on March 22, 1977 who thought that claimant had a recurrence of nerve root irritation probably on the basis of a soft cervical disc. He referred claimant to Dr. Hill, a neurosurgeon, who saw claimant on

April 1, 1977. Nerve conduction studies were normal and both Dr. Lesac and Dr. Hill encouraged claimant to return to work. Dr. Hill saw claimant again on May 18, 1977 and found no evidence of localizing sign, no evidence of any serious problem; he felt that claimant should be released and encouraged to return to work. He did not think he had a cervical disc problem at that time.

On June 6, 1977 the employer wrote claimant, stating that consideration had been given to all the facts regarding his claim for aggravation of the original non-disabling injury and it was the carrier's opinion that the fact did not justify making any payment to claimant for workers' compensation benefits. Claimant requested a hearing on the denial, contending that he was in need of further medical treatment and temporary total disability payments.

The ALJ concluded that the denial by the employer and its carrier of claimant's claim for aggravation was proper but that tht employer and its carrier should pay claimant for such medical care and treatment resulting from his present symptomatology because of the causal relationship to the 1973 non-disabling industrial injury. He also granted claimant's attorney an attorney fee.

The Board, after de novo review, agrees with the ALJ that claimant has failed to prove by a preponderance of the medical evidence that his present condition, although related to his 1973 non-disabling industrial injury, now prevents claimant from returning to work, therefore, claimant is not entitled to any compensation for either temporary total disability or permanent partial disability payments pursuant to ORS 656.273. It also agrees that claimant is entitled to medical care and treatment under ORS 656.245 and the carrier's refusal to furnish it justifies awarding an attorney fee.

ORDER

The order of the ALJ, dated January 16, 1978, is affirmed.

SAIF CLAIM NO. A 915909 AUGUST 29, 1978

CHARLES A. THORN, CLAIMANT
Evohl Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Amended Own Motion Order

On August 11, 1978 the Board entered its Own Motion Order in the above entitled matter dismissing the hearing set therefor on August 9, 1978 based upon the State Accident Insurance Fund's request.

The order inadvertantly failed to grant claimant's attorney an attorney fee pursuant to OAR 436-82-150(1). In the above entitled matter claimant had been granted an award of permanent total disability in 1965. The Fund in 1978 had requested that the Board exercise its own motion jurisdiction and cancel that award; at the hearing in 1978 it withdrew this request.

The Board concludes that under these circumstances claimant's attorney is entitled to a reasonable attorney fee payable by the Fund, therefore, its Own Motion Order of August 11, 1978 should be amended by inserting after the fourth complete paragraph on page 1 of said order the following:

> "Claimant's attorney is awarded as a reasonable attorney fee for his services on behalf of the claimant, the sum of $650, payable by the State Accident Insurance Fund."

In all other respects the Own Motion Order of August 11, 1978 should be ratified and reaffirmed.

IT IS SO ORDERED.

WCB CASE NO. 78-386 AUGUST 29, 1978

WILLIAM TUDOR, CLAIMANT
Gerald Doblie, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant request review by the Board of the Administrative Law Judge's (ALJ) order which affirmed the Determination Order of January 6, 1978.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

The Board notes, however, that on page 2 of the order, the second line the word "unscheduled" should be corrected to read "scheduled".

WCB CASE NO. 77-6411 AUGUST 31, 1978

DAVID BARNETT, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant, by and through his attorney, petitioned the Board on January 27, 1978 to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his compensable industrial injury to his right leg sustained on March 11, 1954. The claim has been closed and claimant's aggravation rights have expired.

On January 4, 1977 Dr. Scheinberg examined claimant who, at that time, was complaining of pain in his right hip area. On January 25, 1977 a total hip arthroplasty was performed with a Charnley-Miller prothesis. The Fund reopened the claim and it was closed by an Own Motion Determination dated September 19, 1977 which granted claimant compensation from January 4 through February 22, 1977. This is the date of the last award or arrangement of compensation received by claimant for his 1954 injury.

On December 14, 1977 claimant, by and through his attorney, had filed a request for hearing alleging he had suffered a disabling occupational disease as a result of his employment with Tillamook County. The Fund on April 18, 1978 denied claimant's claim for occupational disease. Both parties requested that the hearing on the denial be heard in consolidation with claimant's request for own motion relief.

The Board referred claimant's request for own motion relief to set for hearing at the same time as his hearing on the denial.

The matter was set for hearing on July 13, 1978, however, prior to the hearing the parties stipulated to settle the claim for occupational disease on a disputed claim basis and dismissed their request for hearing thereon and further stipulated that the claimant's claim for own motion relief should be referred to the Board with a recommendation by the Administrative Law Judge (ALJ) that all medical and temporary total disability benefits be paid therefrom prior to further processing and closure when appropriate.

The stipulation was conditioned upon the Board's acceptance of the request for own motion relief and the payment of those medical and temporary total disablity benefits. This stipulation was approved by the ALJ on August 15, 1978 and the ALJ forwarded a copy of the approved stipulation to the Board to be construed as his recommendation that claimant's request be granted.

Claimant, initially, had requested the Board to direct the Fund to pay claimant compensation for temporary total disability at the applicable rate retroactive to the date of claimant's second surgery on November 11, 1977 and until his condition was medically stationary.

The Board accepts the affirmative recommendation of the ALJ.

ORDER

Claimant's claim for an industrial injury suffered on March 11, 1954 is hereby remanded to the Fund for acceptance and for payment of compensation, as provided by law, commencing November 11, 1977 and until the claim is again closed pursuant to the provisions of ORS 656.278.

Claimant's counsel is awarded as a reasonable attorney fee for his services in this matter, the sum equal to 25% of the compensation for temporary total disability which claimant shall receive as a result of this order, payable out of said compensation as paid, not to exceed $500, and also to a sum equal to 25% of any award which claimant may receive for permanent partial disability, also payable out of that compensation as paid; the aggregate fee shall not exceed $2,300.

WCB CASE NO. 76-1629 AUGUST 31, 1978

In the Matter of the Compensation
of the Beneficiaries of
ANTHONY BUCKINGHAM, DECEASED
David Vandenberg, Claimant's Atty.
R. Kenney Roberts, Defense Atty.
Request for Review by the Beneficiaries

Reviewed by Board Members Wilson, Moore and Phillips.

The beneficiaries of the deceased workman, hereafter referred to as claimant, request review by the Board of the Administrative Law Judge's (ALJ) order which affirmed the denial of claimant's claim.

The deceased workman was a working millwright foreman, who suffered a heart attack at work at the end of his shift on December 19, 1975; he died on March 15, 1976.

The millwright supervisor testified that at that time the workman had been working twelve straight ten hour days; his normal work shift was from 3:30 p.m. to 1:30 a.m. but during this period he had had to start work at 6:30 a.m. on Saturdays with only 3-4 hours sleep and work Sundays. The reason for the extended work week was due to the installation of new machinery

which had to be completed by the end of December in order for the employer to get a "tax break". Because of this installation the workman's crew had been put on the day shift leaving only the deceased workman and one other millwright to work the night shift.

A co-worker and millwright assistant testified that on the night of the workman's attack both performed their regular work plus the work of installing this new edger. The workman had told him that he was concerned about beating the deadline so that he would not have to work over the Christmas holidays. This witness testified that the workman was driving himself and was even missing smoking breaks.

He testified that on the night of December 19 they were pressed for time and the work the workman had been performing that evening was to lower a rollcase 12 inches and place carrier banks, weighing 70 pounds apiece, underneath the rollcase. This was heavy awkward work to do alone. The workman also had to set jacks, weighing 75-100 pounds, on top for support; this required him to carry the jacks 29 feet each way and he had been working in a 15 1/2 inch area.

This co-worker, who was the only person working with the workman that evening, testified further that the workman must have had his heart attack around 12:20a.m. He said the workman had been doing the above described work for one hour before his attack, and the lapse of time between finishing this heavy work and the attack was ten minutes at the most. The last thing this witness saw was the workman welding on the legs; they both quit work around 12:00. The final statement the workman made to this witness was that he was going to hose down the work area; this witness then left to put some things away and when he returned claimant had had the attack.

The workman had made no complaints to this witness and had looked normal; he had gone to the doctor that morning for a checkup and had indicated he had never felt better.

The sawmill superintendent testified that he witnessed the heart attack on closed circuit television. There was a log jamup and the workman arrived at the jammed machine, ducked under some construction then grabbed his head, doubled over at the waist, dropped to one knee; he ran down to the workman who by then was lying on the floor face down.

Dr. Kochevar, claimant's treating physician for 17 years, diagnosed a myocardial infarction with cardiac arrest. On July 22, 1977 Dr. Kochevar reported that the December 19, 1975 examination of the workman had revealed no chest pain and only occasional complaints of heartburn. Dr. Kochevar believed that the work activity contributed to the workman's infarction, based on the affidavits of the workman's co-workers. Not only was claimant fatigued and under stress but just before his attack he

had been using a cutting torch with fumes blowing into his face which further reduced the oxygen supply to his body. Other factors contributing were working in awkward positions, heavy lifting and long hours.

On October 25, 1976 Dr. Wysham, a cardiologist, reported there was no relationship to the workman's work and his attack; that the attack could just as easily have occurred at home.

On August 11, 1977 Dr. Kloster, also a cardiologist, reported the workman had suffered a myocardial infarction and cardiac arrest on December 19, 1975 which led to cerebral damage and ultimate death. Based upon the description of the workman's work activities just preceeding the attack, it was his opinion that the workman had been exposed to significant increased and unusual work activity preceeding his attack which was a material contributing cause.

Dr. Kloster, upon being deposed, testified that the workman was under mental stress as well as the unusual and excessive work. Heavy work causes increased pulse rate, increased blood pressure causing less oxygen. The myocardial infarction was both anterior and inferior. Dr. Kloster felt that just the possibility of the workman not getting the Christmas holidays off was a stress factor, and all the other factors combined aggravated the workman's underlying disease. Dr. Kloster felt that if it weren't for the activities the workman had performed that evening he would not have had the attack.

Dr. Wysham was deposed and testified that in his opinion the work activities had no effect on his heart attack. In his opinion the record did not indicate that the workman had been engaged in any vigorous physical activity or any physical strain at the time of the attack. The workman's 12 straight days of working did not cause unusual fatigue; if he had been under stress or fatigue then his blood pressure that morning at the doctor's office would have indicated such condition. Dr. Wysham further testified that if a large part of the workman's work was, in fact, heavy physical work and had been performed by the workman when in awkward positions and involving heavy lifting, one half hour or so prior to his attack, then he would change his opinion; however, he felt that the work activity done by the workman during the hour before the attack was not strenuous.

The ALJ found no evidence that the workman had been concerned over the deadline and he gave the greatest weight to Dr. Wysham's opinion. He concluded that claimant had failed to prove the workman had been working under stress. He further concluded that claimant did not carry the burden of proving a compensable injury and he affirmed the denial.

The majority of the Board, on de novo review, disagrees with the conclusions reached by the ALJ.

Based on the opinions and reports of Drs. Kloster and Kochevar, the Board finds that the workman's work activities and his stressful work situation did cause his attack. This is supported by the testimony of the workman's co-worker, the only witness present who could and did describe the workman's activities prior to the attack. This co-worker testified the workman's work during the hour before the attack was heavy physical work and also that only ten minutes, at the most, had elapsed from the time the workman had finished performing this heavy work and the time of his heart attack.

The majority of the Board concludes that the workman's death arose out of and in the course of his employment and the claimant's claim must be accepted as compensable and claimant be awarded all the benefits to which claimant is entitled.

ORDER

The order of the ALJ dated March 22, 1973, is reversed.

The claimant's claim for benefits under the Workers' Compensation Act is remanded to the employer and its carrier to be accepted and for the payment to claimant of all benefits to which claimant is entitled under the provisions of the Workers' Compensation Act.

Claimant's attorney is awarded as a reasonable attorney fee for his services both before the ALJ and at Board review, the sum of $1,000, payable by the employer and its carrier.

Board Chairman M. Keith Wilson respectfully dissents from the majority opinion of the Board as follows:

The order of the Administrative Law Judge, which approved the denial of compensability should be affirmed. I agree with the findings and the ultimate conclusions and would adopt the Opinion and Order as the Board's order in this case.

M. Keith Wilson, Chairman

WCB CASE NO. 77-2953 AUGUST 31, 1978

GARRISON CANDEE, CLAIMANT
R. Kenney Roberts, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On July 13, 1978 the Board, after de novo review, affirmed and adopted the Opinion and Order of the Administrative Law Judge (ALJ) which granted claimant time loss benefits from May 12, 1976 through July 15, 1976 and from September 23, 1976 through October 4, 1976 in addition to penalties and attorney fees. Claimant had contended at Board review that she was entitled to an award of permanent partial disability for her condition; the State Accident Insurance Fund had cross appealed and contended that claimant was not entitled to temporary total disability benefits from May 12, 1976 through July 15, 1976 because she was receiving full wages during that period of time.

On July 28, 1978 the Fund requested the Board to reconsider its Order on Review of July 13, 1978, still contending that claimant was not entitled to receive temporary total disability benefits during the period for which her non-complying employer had paid her certain monies and asking the Board, on reconsideration, to reverse that portion of the ALJ's order.

On August 4, 1978 the claimant, by and through her attorney, responded to the Fund's motion, stating that neither ORS 656.018(4) or 656.262(9) stand for the proposition that credit should be given to a non-complying employer situation such as existed in the above entitled matter. Claimant also asked the Board to reconsider its affirmance of that portion of the ALJ's order which ruled she was not entitled to any compensation for permanent partial disability.

Because the time for filing an appeal from the Board's Order on Review had nearly expired, the Board set aside said order on August 14, 1978 to enable it to give full consideration to both motions.

The Board, after fully considering the issue of claimant's entitlement to temporary total disability benefits from May 12, 1976 through July 15, 1976, concludes that the monies given to claimant from her employer represented a gratuity and cannot be considered as wages, as defined by the Workers' Compensation Act. During the period between May 12, 1976 and July 15, 1976 the claimant furnished no services for the employer; he merely made a voluntary payment of money to claimant to enable her to live while she was recuperating from her injuries.

Therefore, claimant is entitled to receive compensation for temporary total disability from the date of her injury May 12, 1976.

The Board concludes that the motion to reconsider made by the Fund on July 28, 1978 should be denied and the motion to reconsider claimant's entitlement to an award for permanent partial disability made by the claimant on August 4, 1978 also should be denied and that the Board's Order on Review entered on July 13, 1978 should be reinstated, reaffirmed and ratified in its entirety.

IT IS SO ORDERED.

WCB CASE NO. 77-4246 AUGUST 31, 1978

WARREN COLLINS, CLAIMANT
Thomas Huffman, Claimant's Atty.
SAIF, Legal Services, 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 Administrative Law Judge's (ALJ) order which granted claimant permanent total disability effective the date of his order (January 31, 1978).

Claimant, a plumber, experienced a gradual onset of back pain and on September 19, 1975 filed a claim and quit his employment.

On February 2, 1976 Dr. Coletti reported claimant had suffered a fall at home in June, 1975 and had had intermittant back discomfort which his job continually aggravated until September 18, 1975 when he took claimant off work. A myelogram taken on January 16, 1976 revealed a herniated disc. Dr. Coletti performed a laminectomy at L4-5 on February 24.

Dr. Robinson examined claimant at the Fund's request on August 4, 1976 and diagnosed degenerative changes with sciatica. He felt claimant's fall aggravated his underlying condition.

On March 4, 1977 Dr. Pasquesi reported claimant was stationary and he should be retrained to do work requiring no repetitive bending, stooping, twisting of the trunk, no lifting over 30 pounds and no sitting or standing for 8 hours without changing positions. He rated claimant's impairment at 20% of the whole man.

On April 6, 1977 Dr. Coletti concurred with the findings of Dr. Pasquesi; he also recommended vocational rehabilitation.

A Determination Order of June 6, 1977 granted claimant 48° for 15% unscheduled disability.

Claimant had continued complaints and on August 24, 1977 a myelogram revealed an old disease at L4-5.

On October 20, 1977 Dr. Parsons examined claimant and diagnosed recurrent lumbar disc protrusion. He felt that further exploration of L4-5 disc space was warranted, but claimant was reluctant to have further surgery. Dr. Parsons told claimant to return if his pain became more severe.

On November 2, 1977 Dr. Coletti considered claimant disabled from the standpoint of further work on the basis of his lumbosacral complaints. Claimant was medically stationary and was totally disabled from seeking gainful employment.

In April of 1977 claimant had had contact with a service coordinator and, at that time, claimant indicated he wasn't interested in any assistance as long as he was on time loss; he also said that if he were released he would seek work on his own.

The ALJ found, based on the medical evidence of record, that claimant was permanently and totally disabled. He further found that since Dr. Coletti did not specifically release claimant for work that neither claimant's refusal of help from the service coordinator nor his failure to seek employment was unreasonable.

The Board, on de novo review, finds claimant is not permanently and totally disabled. Dr. Coletti stated claimant was "disabled from further work on the basis of his lumbosacral complaints". There are no physical findings to justify claimant's complaints. Claimant has sought no employment and has refused the help of a service coordinator which makes it apparent he refuses to help himself.

The Board concludes that claimant is entitled to a greater award for his loss of wage earning capacity than that granted by the Determination Order and would award 60% unscheduled disability and would urge claimant to reconsider the services of a field service coordinator to find him suitable and gainful employment.

ORDER

The order of the ALJ, dated January 31, 1978, is modified.

Claimant is hereby granted an award for 192° for 60% unscheduled disability. This award is in lieu of the award granted by the ALJ's order which in all other respects is affirmed.

WCB CASE NO. 76-4547 AUGUST 31, 1978

ROBIN CRAWFORD, CLAIMANT
John Stewart, Claimant's Atty.
Roger Luedtke, Defense Atty.
Charles Paulson, Defense Atty.
Amended Order on Review

Reviewed by Board Members Wilson and Phillips.

On August 3, 1978 the Board entered its Order on Review in the above entitled matter. The Administrative Law Judge (ALJ) had found that claimant had suffered a compensable injury and the responsibility therefor was that of the Hervin Company and its carrier, Liberty Mutual Insurance Company and the ALJ remanded claimant's claim to that employer and its carrier and awarded claimant's attorney the sum of $750 as a reasonable attorney fee to be paid by Liberty Mutual.

On review the Board found that claimant had suffered a compensable aggravation of her 1973 injury and that the responsibility for her present condition was that of the employer, Quality Plastics, Inc., and its carrier, North Pacific Insurance Company. The Board also found that claimant was entitled to a greater award for her permanent partial disability and granted claimant's attorney a reasonable attorney fee for his services at Board review the sum equal to 25% of the increased compensation the order awarded claimant payable out of said compensation as paid. However, inadvertantly claimant's attorney was not awarded a fee payable by North Pacific Insurance Company for prevailing on the issue of compensability.

Therefore, the Order on Review entered on August 3, 1978 should be amended by inserting between the third and fourth paragraphs on page 5 of said order the following:

> "Claimant's attorney is awarded as a reasonable attorney fee for his services in obtaining the acceptance of claimant's claim for aggravation which had been denied by North Pacific Insurance Company on behalf of Quality Plastics Company, the sum of $750, payable by North Pacific Insurance Company."

In all other respects the Order on Review dated August 3, 1978 should be ratified and reaffirmed.

IT IS SO ORDERED.

WCB CASE NO. 77-4788 AUGUST 31, 1978

CAROL GREGSON, CLAIMANT
James Larson, Claimant's Atty.
SAIF, Legal Services, 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 Administrative Law Judge's (ALJ) order which granted claimant compensation for permanent total disability effective June 7, 1977.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

Claimant's attorney is hereby granted as a reasonable attorney fee for his services at Board review, the sum of $400, payable by the State Accident Insurance Fund.

WCB CASE NO. 77-6096 AUGUST 31, 1978

CARRIE JEAN HARDING, CLAIMANT
Dwayne Murray, Claimant's Atty.
SAIF, Legal Services, 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 Administrative Law Judge's (ALJ) order which approved its October 4, 1977 partial denial as of the date of his order but disapproved it as of the date of its entry and ordered the Fund to pay compensation for temporary total disability for the period claimant was off work and the cost of all medical services for this injury.

Claimant, a 49 year old custodial worker, filed a report of injury of an incident of June 2, 1977 when her exposure to fumes from broken chemical bottles caused injury to her eyes.

Claimant testified she suffered an immediate onset of swelling and watering of the eyes and after cleaning up the chemical spill she experienced nausea which kept on recurring and required medical treatment.

Claimant was examined by Dr. Kuehn who, on August 23, 1977, reported that his first examination of claimant on July 11, 1977 indicated that her eye irritation had completely resolved; however, claimant did have complaints of headache, gastrointestinal upset with vomiting and nausea. Dr. Kuehn opined these symptoms were not directly related to toxic exposure but he did feel there was significant disability and it was directly related to her work. Claimant also was now experiencing a great deal of tension which he felt was responsible for her symptoms complex.

The Fund issued a partial denial on October 4, 1977 accepting toxic conjuctivities for her eye condition but denying any other medical problems claimant was then alleging.

On October 14, 1977 Dr. Kuehn restated his position that claimant was advised not to return to work until her "significant disability" (headache, gastrointestinal upset with nausea and vomiting) had subsided.

The ALJ found that the Fund's denial when initially entered on October 4, 1977 was inappropriate and unreasonable because Dr. Kuehn's initial report unequivocally related claimant's symptom complex to her work environment, therefore, he concluded that the partial denial was improper at the date of its entry, but found, based upon the medical and lay testimony at the hearing, that Dr. Kuehn's report was based completely on an inaccurate history related to him by claimant, therefore, the partial denial was appropriate as of the date of his order. He ordered the Fund to pay to claimant compensation for temporary total disability for her two weeks off the job as recommended by Dr. Keuhn and to pay all medical bills.

The Board, on de novo review, finds that the partial denial issued by the Fund was proper from its inception. Claimant filed a claim for an eye injury and at the time of Dr. Kuehn's initial examination that problem had resolved itself. Claimant never has filed a claim for any other injury nor is there any evidence that the eye injury had any connection with or caused any other of claimant's problems which were denied by the Fund.

ORDER

The order of the ALJ, dated April 20, 1978, is reversed.

WCB CASE NO. 77-4691 AUGUST 31, 1978

ROBERT HESCH, CLAIMANT
Peter Hansen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the Administrative Law Judge's (ALJ) order which affirmed the Determination Order of May 26, 1977. Claimant contends he is entitled to compensation for temporary total disability because his rights were prejudiced by the Field Services Division, and the alternative issue, extent of disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated April 10, 1978, is affirmed.

NO NUMBER AVAILABLE AUGUST 31, 1978

GEORGE HUBER, CLAIMANT
Own Motion Order

On May 26, 1978 the Board received a request from claimant to reopen his claim filed on February 4, 1971 for an occupational disease while employed by Carmichael Oldsmobile Company, whose carrier was Safeco Insurance Company. Claimant was advised to furnish the Board medical corroboration of his contention that his present condition is the result of the 1971 injury and represents a worsening thereof.

On July 21, 1978 Dr. Lachman advised the Board that he had reexamined claimant on June 20, 1978 at which time claimant continued to show signs of chronic hand dermatitis. He stated that claimant is 62 years old and, in Dr. Lachman's opinion, his hand dermatitis is being worsened by a severe heart attack which has necessitated open heart surgery. Dr. Lachman felt that claimant, because of his age, chronic hand dermatitis and recent cardiac surgery would not be able to be employed for some time, if at all.

The Board advised the carrier of the request for own motion relief, furnished a copy of Dr. Lachman's report

and asked the carrier to advise the Board within 20 days of its position with regard to claimant's request.

On August 15, 1978 the carrier responded, stating that it did not feel that there had been a worsening of claimant's condition as a result of his industrial injury of 1971; that as Dr. Lachman indicated the change in claimant's condition was related to his recent heart attack.

The Board, after considering Dr. Lachman's report, concludes that claimant's present condition is not related to his industrial occupational disease of February 4, 1971, therefore, his request for the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim, should be denied.

IT IS SO ORDERED.

WCB CASE NO. 77-6838 AUGUST 31, 1978

ANNA JOHNSTON, CLAIMANT
Rolf Olson, Claimant's Atty.
Stanley Jones, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer requests Board review of the Administrative Law Judge's (ALJ) order which remanded claimant's claim for a low back condition to it for acceptance and payment of benefits as required by law and assessed a penalty equal to 25% of the amount of medical bills heretofor unpaid and an attorney fee to claimant's counsel of $800.

Claimant sustained a compensable muscle strain, stiff neck and spasm of the trapezius muscle on March 16, 1974 while working as a nurses aide and lifting a patient. On May 14, 1974 she was found medically stationary, but continued having complaints. A Determination Order of April 4, 1975 granted claimant time loss benefits only.

Claimant subsequently moved to Louisiana and came under the care of Dr. Landry, who, on September 30, 1977, examined claimant who had complaints of neck pain, left shoulder pain and also low back pain. The low back condition was diagnosed as due to degenerative changes. On October 24, 1977 Dr. Landry reported that the myelogram for claimant's low back condition which he had recommended was related to claimant's industrial injury of March 16, 1974.

On June 8, 1977 claimant was examined by Dr. Klump for her headaches and neck pain. He found her low back had normal range of motion; he could not explain her symptoms.

On December 2, 1977 Dr. Landry reported that claimant told him she had not been able to have the myelogram because the insurance carrier refused to pay for it.

On December 20, 1977 the Workers' Compensation Department refused to refer claimant for vocational rehabilitation because the impairments resulting from her injury were slight, if any.

The claims adjuster for the carrier testified that at the time of hearing the carrier had received some of Dr. Landry's medical bills but had paid none. No medical expenses had been paid since October, 1977. This witness testified that the intent of his letter of November 1, 1977 (which the carrier claims was not a denial but merely an advisory letter) was to deny any low back condition. He stated that the carrier intended to pay the medical bills relating to the neck and shoulder and did not deny claimant's right to submit those bills.

The ALJ found that the letter of November 1, 1977 was a de facto denial without giving claimant any notification of her rights of appeal. The ALJ found that at the time of the original injury claimant's low back problems were not sigificant but that Dr. Davis, in his report of April 1, 1974, did diagnose lumbosacral sprain; also, Dr. Lilly, on July 20, 1976, found resolved low back pain.

The ALJ concluded, based on Dr. Landry's opinion and reports that claimant's low back condition was related to her March, 1974 injury and the responsibility for treatment of such condition was that of the carrier. He directed the carrier to accept claimant's claim for her low back condition and pay her benefits therefor.

He further directed the carrier to pay claimant an additional sum equal to 25% of the amount of any unpaid medical bills, not to exceed $300. He granted claimant's attorney an attorney fee of $700 for prevailing on a defacto denial of the low back claim and an attorney fee of $100 for obtaining claimant an additional sum of compensation as a penalty.

The Board, after de novo review, finds no evidence that claimant's low back condition causally relates to her March 16, 1974 injury; however, it does find that the carrier's denial was not in compliance with the statutory requirements, therefore, it was not a denial. Claimant is entitled to receive compensation from the date of her claim for her low back injury to the date responsibility for such claim is properly accepted or denied; and to additional compensation as a penalty for that period. Claimant's attorney fee shall be paid by the carrier. This is provided for by the ruling of the Oregon Supreme Court in <u>Jones v Emanuel Hospital</u>, 280 OR 147.

ORDER

The order of the ALJ, dated February 27, 1978, is reversed.

Claimant is awarded compensation, as provided by law, from the date of the claim for a low back condition, Dr. Landry's letter of September 30, 1977 and until the claim is properly accepted or denied by the employer and its carrier.

Claimant is awarded additional compensation, as a penalty, equal to 15% of the amount due claimant for the period of time set forth above.

Claimant's attorney is awarded as a reasonable attorney fee the sum of $350, payable by the employer and its carrier.

WCB CASE NO. 75-5380 AUGUST 31, 1978

NINE POOLE, CLAIMANT
Jeanyse Snow, Claimant's Atty.
Eugene Cox, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the Administrative Law Judge's (ALJ) order which granted her an award of 64° for 20% unscheduled right shoulder disability. Claimant contends she is permanently and totally disabled.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated April 4, 1978, is affirmed.

WCB CASE NO. 78-2930 AUGUST 31, 1978

JOHN M. REED, CLAIMANT
Richard Butler, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the Order of Dismissal entered by the Administrative Law Judge (ALJ) on June 27, 1978.

The Board, after de novo review, affirms and adopts as its own, the Order of Dismissal of the ALJ dated June 27, 1978, a copy of which is attached hereto and, by this reference, made a part hereof.

WCB CASE NO. 76-4362 AUGUST 31, 1978

ALVIN RICHARDSON, CLAIMANT
Michael Shinn, Claimant's Atty.
SAIF, Legal Services, 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 Administrative Law Judge's (ALJ) order which granted claimant compensation for permanent total disability effective March 8, 1978, the date of hearing.

Claimant, a 61 year old janitor-watchman, on July 21, 1975 sustained a compensable injury when he slipped on the stairs and fell on his back. On March 4, 1976 Dr. Pasquesi diagnosed exacerbation of lumbosacral strain with some sciatic radiation. Claimant's condition was not stationary and he was treated conservatively by Dr. Gambee.

Dr. Pasquesi re-examined claimant on May 28, 1976 and, at that time, diagnosed chronic lumbosacral instability superimposed upon the back of a 62 year old man. Dr. Pasquesi found claimant medically stationary with an impairment of 13% of the whole man.

A Determination Order of August 11, 1976 granted claimant 112° for 35% unscheduled low back disability.

Claimant continued having back complaints and Dr. Gambee finally hospitalized him for traction. On November 23, 1977 Dr. Gambee indicated claimant was exhibiting muscle spasm,

decreased range of back motion and pain; since the claim closure the claimant's condition had deteriorated.

Dr. Duff, who examined claimant on January 30, 1978 said claimant was suffering from a chronic disc syndrome with mild neuropathy; he recommended a myelogram and possible surgery.

On February 15, 1978 Dr. Davis, after examining claimant, did not recommend a myelogram but felt claimant's condition could best be helped by physical therapy.

Claimant has made two attempts to return to work but could not handle it. Claimant has worked most of his life as a painter; he became a janitor and watchman in 1973. Claimant is currently retired and drawing social security benefits.

The ALJ found that the on-going physical therapy alleviates claimant's symptoms but does not improve his condition, therefore, claimant has no prospects of regaining the necessary physical ability to be gainfully employed. The ALJ found claimant to be permanently and totally disabled.

The Board, after de novo review, finds that no efforts have been made to attempt to retrain claimant. The Board does not feel that the medical evidence supports a finding of permanent total disability but it does believe that claimant could be helped if contacted by the Field Services Division of the Workers' Compensation Department and attempts made to place him in a suitable job or in a retraining program.

Based upon the medical evidence the Board concludes that claimant is entitled to an award equal to 240° for 75% of the maximum for unscheduled disability to compensate him for his loss of wage earning capacity resulting from his industrial injury.

ORDER

The order of the ALJ, dated March 29, 1978, is modified.

Claimant is granted 240° for 75% unscheduled disability. This is in lieu of the award granted by the ALJ's order which, in all other respects, is affirmed.

WCB CASE NO. 76-3868 AUGUST 31, 1978
WCB CASE NO. 76-2370

JOSEPH SHARNETSKY, CLAIMANT
Allen Owen, Claimant's Atty.
Daryll Klein, Defense Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by EBI Insurance
Cross Request for Review by SAIF

Reviewed by Board Members Moore and Phillips.

The employer, Whiteley Fixtures, through its carrier, EBI Insurance Company requests review by the Board of the Administrative Law Judge's (ALJ) order which remanded claimant's claim to it for acceptance and payment of compensation as provided by law, affirmed the Determination Order of November 5, 1976 and affirmed the denial of the State Accident Insurance Fund. The employer Stadler Sorg Fixtures, through its carrier the State Accident Insurance Fund cross appeals the order of the ALJ contending it is entitled to reimbursement for any monies expended.

The Board, on de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated January 18, 1978, is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney fee for his services at Board review, the sum of $50, payable by EBI Insurance Company.

WCB CASE NO. 74-3721 AUGUST 31, 1978

FRANK STEINBECK, CLAIMANT
Gary Susak, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requested Board review of the amended order of the Administrative Law Judge (ALJ) which found that the incidents which occurred in February, 1974 and November, 1975 were aggravations of claimant's 1968 injury and remanded the claimant's aggravation claim for the 1968 injury to the Fund for acceptance and payment

of benefits, as provided by law, directed the Fund to pay claimant compensation for temporary total disability from February 26, 1974 to June 1, 1974 together with a 50% benefit for temporary partial disability from June 1, 1974 to November 11, 1974 and awarded claimant's attorney an attorney fee payable out of the compensation granted claimant.

Claimant contends that he is entitled to penalties and to the payment of his attorney's fee by the Fund as provided in the ALJ's original Opinion and Order dated September 8, 1976.

The Board, after de novo review, affirms and adopts the Amended Opinion and Order of the ALJ, a copy of which is attached thereto and, by this reference, is made a part hereof.

The Board takes administrative notice that the amendments to ORS 656.273 made by Chapter 497 section 1, Oregon Laws 1975 were made retroactive by section 5 of that act, however, the Board agrees with the ALJ that the attorney fee must be paid out of the compensation awarded claimant.

ORDER

The order of the ALJ, dated November 4, 1976 is affirmed.

WCB CASE NO. 77-3996 AUGUST 31, 1978
WCB CASE NO. 77-3995

JOHN ZELLER, CLAIMANT
Don Wilson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Administrative Law Judge's (ALJ) order which affirmed the Determination Order of April 5, 1977 which had awarded claimant 32° for 10% unscheduled low back disability; and the ALJ awarded claimant 32° for 10% unscheduled lung disability.

Claimant, a 54 year old mechanic-welder, suffered a compensable injury on May 19, 1975 to his left hip. Diagnosis was lumbosacral and sacroiliac strain with synovitis and myositis.

Claimant in July, 1975 saw Dr. Ordonez with complaints of low back and left leg pain. On August 7, 1975 Dr. Smith performed a laminectomy and disc excision. In January, 1976 claimant returned to work but later was hospitalized for inhalation of noxious fumes.

The claim was closed by a Determination Order of April 5, 1977.

On November 1, 1977 Dr. Berg, after examining claimant, diagnosed chronic recurrent low back strain superimposed on pre-existing arthritis; chronic cardiovascular hypertensive disease, mild obesity and chronic residual lung disease. Dr. Berg found claimant stationary from an orthopedic standpoint. He rated claimant's impairment from this injury as mildly-moderate.

Claimant filed a claim for the inhalation of welding fumes on October 19, 1976. Diagnosis was pneumonitis, secondary to inhalation of toxic fumes, and coronary atherosclerosis. Claimant was released to work on October 18, 1976. This claim was closed by a Determination Order of January 5, 1977 which granted claimant time loss benefits only.

On August 9, 1977 Dr. Zbinden made a diagnosis of claimant's lung, to-wit: restrictive lung disease mild etiology suspected inhalation of toxins and chronic airways disease caused by inhalation of toxins. He found permanent disability of 20-40%.

The ALJ found the award of 10% for claimant's low back disability was adequate to compensate him for his loss of wage earning capacity; however, he found that claimant's lung impairment limited his capabilities to some extent and awarded him 32° for 10% unscheduled lung disease.

The Board, on de novo review, agrees that claimant is entitled to the 10% award for lung disability; however, the Board finds that claimant, based on the medical evidence, is entitled to an additional award of 32° for 10% unscheduled low back disability and to an award of 15° for 10% loss function of his left leg.

ORDER

The order of the ALJ, dated March 6, 1978, is modified.

Claimant is hereby granted 96° for 30% unscheduled low back and lung disability, and 15° for 10% loss of his left leg. These awards are in lieu of all previous awards granted claimant for his May 19, 1975 injury.

Claimant's attorney is granted as a reasonable attorney fee a sum equal to 25% of the increased compensation granted to claimant by the ALJ and by this order, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-2680 SEPTEMBER 7, 1978

CATHRYN ALEXANDER, CLAIMANT
Keith Tichenor, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the order of the Administrative Law Judge (ALJ) which affirmed the Determination Order of April 18, 1977.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated April 14, 1978, is affirmed.

WCB CASE NO. 77-4423 SEPTEMBER 7, 1978

FRANCIS EASTBURN, CLAIMANT
A. C. Roll, Claimant's Atty.
Douglas Kaufman, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer requests review by the Board of the order of the Administrative Law Judge (ALJ) which remanded claimant's aggravation claim to it with compensation for temporary total disability commencing March 16, 1977 until closure is authorized and assessed a penalty against it in the sum of 25% of $1,500.58 plus 25% against compensation for temporary total disability from March 16, 1977 to January 11, 1978 (the date of the order).

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated January 11, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $350, payable by the carrier.

WCB CASE NO. 77-5377 SEPTEMBER 7, 1978

LONNIE L. HENRY, CLAIMANT
John DeWenter, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

The claimant seeks review by the Board of the order of the Administrative Law Judge (ALJ) which affirmed the denial by the State Accident Insurance Fund of claimant's claim for an industrial injury but ordered the Fund to pay claimant compensation for temporary total disability from May 17, 1977 until August 18, 1977 plus additional compensation equal to 15% of the aforesaid amount as a penalty and to pay claimant's attorney $200 for unreasonable delay in the payment of compensation.

Claimant, a 28 year old millworker, has worked for the employer since 1972. He started work pulling on a greenchain, was placed on cleanup for nearly a year and then returned to the greenchain. In September, 1973 he worked as head spotter and in August, 1974 became the charger operator, a job he held until January, 1977 when he quit work because of the problems with his feet which he had had for some time.

On the various jobs claimant held while working for the employer he was on his feet almost 8 hours a day, 5 days a week.

Claimant's foot problems actually started when he took over as head spotter, however, he didn't think it was serious and he continued to work. By the first of 1975 he started developing more heat and pain in his feet which would swell and sometimes would turn purple on the top. This affected claimant's ability to lift as well as to stand. His job as head spotter required claimant to lift cords and other heavy weights from time to time. Usually the problems with his feet would commence about two hours after he started to work on his shift and continued beyond the end of his shift. Claimant took 10-15 aspirin a day in an endeavor to alleviate the swelling and pain. He finally sought medical attention. Dr. Hogan, who operated on both feet, advised claimant to quit his job because of his problems.

Claimant filed a claim on May 17, 1977 which stated that between May, 1975 and September, 1976 he had developed this foot problem due to his work. Dr. Hogan reported that it was impossible to pinpoint the etiology of claimant's symptoms, however, they were definitely aggravated by his prolonged standing. Dr. Brooke, after looking at the medical reports of Dr. Anderson and Dr. Singer, was of the opinion that claimant's complaints were not related to his work. Dr. Anderson to whom

claimant had,been referred by Dr. Hogan, said the etiology of the problem was unknown to him but he found no evidence of inflammatory arthritis. Dr. Singer felt claimant's problems was primarily that of mechanical problem; he found no gross alignment, abnormalities or metabolic abnormalities.

Claimant's primary treating physician is Dr. Hogan, although he has been seen and examined by Dr. Anderson and Dr. Singer, neither of whom would give an unequivocal opinion as to the cause of claimant's problems.

The ALJ found that this was a situation where expert medical evidence must be relied upon to determine claimant's condition and there is a difference of medical opinion in this case. Dr. Hogan believes that claimant's condition has been aggravated by the prolonged standing which has been required of him in the various jobs he has held with the employer since 1972. He also feels that claimant's condition will probably worsen if he continues to engage in employment which requires extensive standing on his feet. Dr. Brooke states the problem is not work related.

Claimant contends that the tendency to have foot problems may have pre-existed his employment, however, it has been aggravated and accelerated by his employment.

The ALJ finds that Dr. Hogan equivocates somewhat in his statements that claimant's prolonged standing has aggravated his foot condition and also is unable to determine the exact cause of claimant's foot problems. The ALJ felt that even if prolonged standing did aggravate the condition that doesn't necessarily mean that the occupation itself aggravated claimant's condition because standing is a normal function. The ALJ was not convinced from the medical evidence that any type of standing could have caused claimant to have difficulties with his feet. He found no evidence that claimant's work was the reason for his foot condition, although claimant might not be able in the future to take jobs which required him to be on his feet any great length of time.

The ALJ also found that claimant had filed his claim on May 17, 1977 and the Fund did not issue a denial until August 18, 1977 and there was no evidence that the Fund ever paid claimant any compensation for temporary total disability or did anything to process his claim until August 18, 1977. The evidence indicated that the employer had transmitted the claim to the Fund and it had to be accepted or denied within 60 days or compensation be paid within 14 days after the Fund had notice or knowledge of the claimant's claim.

The ALJ concluded that this had not been done and he directed the Fund to pay claimant compensation for temporary total disability from May 17, 1977 through August 18, 1977 plus a penalty equal to 15% of said compensation for that period

of time and to pay claimant's attorney a reasonable attorney fee.

The Board, on de novo review, finds that the medical evidence does support a finding that claimant has sustained a compensable industrial injury. Claimant acknowledges that his condition may have pre-existed his tenure with the employer, but contends that said condition was aggravated and accelerated by that employment, therefore, it is compensable. Aggravation of a pre-existing condition is compensable. Beaudry v Winchester Plywood Co., 255 Or 503.

There are conflicting medical opinions expressed in the ALJ's order; however, Dr. Brooke never examined claimant and Dr. Anderson and Dr. Singer were unable to give any definite opinion as to the cause of claimant's foot problems. Basically it boils down to an analysis of the medical opinions expressed by Dr. Brooke and by Dr. Hogan. Dr. Hogan was claimant's treating physician and he also performed the surgery, therefore, he was in a position to express an accurate medical opinion. Dr. Singer who also personally treated claimant and took a detailed history from him of his problems, however, did not choose to express an opinion.

The ALJ relied basically on Dr. Brooke's opinion that the complaints voiced by the claimant were not a product of his occupation. It is well established in this state that in cases which involve conflicting medical opinions on the issue of extent of job-related strain, the courts have given greater weight to the treating physician's opinion than to the opinions expressed by other involved doctors. In this case Dr. Hogan stated that although he could not pinpoint the etiology of claimant's symptoms, that such symptoms were definitely aggravated by claimant's prolonged standing required by his job. The ALJ apparently ignored Dr. Hogan's opinion.

The Board concludes that claimant had a pre-existing foot condition which was aggravated by his work which required him to stand on his feet for nearly 8 hours a day, 5 days a week.

The Board agrees with the ALJ's imposition of penalties and attorney fees because of the Fund's failure to pay claimant compensation for temporary total disability within 14 days after it had knowledge or notice of the claim and/or to either accept or deny said claim within 60 days after such notice or knowledge.

ORDER

The order of the ALJ, dated April 3, 1978, is modified.

Claimant's claim is remanded to the Fund for acceptance and for the payment of compensation, as provided by law, commencing on May 17, 1977 and until the claim is closed pursuant to ORS 656.268.

The balance of the ALJ's order is affirmed.

Claimant's attorney is awarded as a reasonable attorney fee for his services on the issue of compensability both before the ALJ at the hearing and at Board review the sum of $800, payable by the Fund.

WCB CASE NO. 77-1233 SEPTEMBER 7, 1978

HILLARY KELLY, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
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 affirmed the Determination Order dated October 21, 1976 whereby claimant had been awarded 64° for 20% unscheduled disability.

Claimant is a 49-year-old janitor who sustained a compensable injury on August 13, 1974 when he slipped and fell down 8 or 10 steps and injured his neck and back. The injuries were diagnosed as a back muscle sprain and conservative treatment was initially recommended. However, because of continuing complaint, a myelogram and electromyogram were performed; both were essentially negative.

Claimant continued to complain and in July 1975 he was evaluated by the physicians at the Disability Prevention Center where he engaged, in their opinion, in "gross dramatics" and many of the findings were considered invalid because of voluntary restriction of physical motion. It was felt that claimant had considerable functional overlay and gross emotional overlay with exaggeration.

The Disability Prevention Division was unsuccessful in helping claimant deal with his problems and a psychiatric evaluation in January 1976 indicated claimant had mild depression which would not preclude his returning to some types of work. A closing orthopedic examination revealed significant over-response to palpation, a rather marked inconsistency in the straight-leg raising maneuver and the conclusion was that claimant's symptomatology had not significantly changed during the preceding year.

In March 1976 claimant was evaluated by Dr. Hickman, a clinical psychologist, who felt there was organic brain damage due to trauma resulting in mild to moderate intellectual impairment; he felt claimant's psychopathology was secondary

to the industrial injury and that claimant's limitations precluded any type of retraining and, therefore, claimant was permanently and totally disabled.

The claim was closed by the Determination Order of October 21, 1976.

The Referee found that claimant had been educated through the sixth or seventh grade and that most of his work experience had been in heavy labor. Claimant testified of constant pain in his neck which would be increased by certain physical movements; that he has a throbbing pain in his low back which is constant and, at times, radiates into the left leg causing this leg to become numb and sometimes causes him to fall. He attributes all of his symptomatology to the industrial injury and states that he does very little as most activity causes increased pain.

Claimant had sustained a compensable injury to his back on August 4, 1967 and, ultimately, it was recommended that claimant have a spinal fusion, however, the surgery was never performed and in September 1969 claimant commenced working for the present employer as a janitor. He continued that employment until his industrial injury.

The 1967 claim had been closed by a Determination Order which had awarded claimant 64° for 20% unscheduled low back disability.

The Referee found that claimant's credibility was suspect, there were too many inconsistencies in his testimony. Movie film viewed by the Referee at the hearing indicated that claimant's allegations of certain physical limitations or restrictions were not completely true. The Referee stated that he did not believe claimant when he testified that pain medication did not provide him any relief and then testified that Anacin does provide relief.

About three months prior to Dr. Hickman's examination claimant had been examined by Dr. Quan, a psychiatrist, who concluded that claimant's psychopathology would not preclude his returning to work. The psychologist at DPD recorded claimant's psychopathology as secondary to his original organic injury and the Referee felt this apparently referred to the August 1967 industrial injury.

After giving consideration to all the evidence the Referee concluded that claimant's loss of wage earning capacity was not in excess of the award which he had been granted by the Determination Order of October 21, 1976.

The Board, on de novo review, finds that the medical evidence indicates that claimant's loss of wage earning capacity is in excess of 20%. The claimant's work background consists

wholly of heavy manual labor and the testimony of claimant concerning the constant pain in his neck which is increased by certain physical movements and the pain which he continues to have in his low back and left leg certainly justify the placing of limitations of movements such as lifting, bending, stooping and twisting and these limitations will preclude claimant from a rather substantial segment of the labor market which, prior to his industrial injury, was available to him.

Therefore, the Board, based upon the medical evidence, finds that claimant is entitled to an award equal to 128° for 40% unscheduled disability to adequately compensate him for the loss of wage earning capacity resulting from his August 13, 1974 injury.

The Board suggests that the Field Services Division of the Workers' Compensation Department attempt to assist claimant in obtaining a job which he can perform within his physical limitations and on a gainful and regular basis.

ORDER

The order of the Referee, dated November 18, 1977, is modified.

Claimant is granted 128° for 40% unscheduled neck and low back disability; this award is in lieu of the award made by the Determination Order of October 21, 1976 which the Referee had affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the compensation increased by this order, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 76-6891 SEPTEMBER 7, 1978
WCB CASE NO. 76-6892

THOMAS D. TVETAN, CLAIMANT
Scott Gilman, Claimant's Atty.
James Boyer, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the order of the Administrative Law Judge (ALJ) which denied claimant's request for reopening of his claim, for interim compensation, penalties, attorney fees and for psychiatric care or psychotherapy; and affirmed the Determination Orders of July 7 and July 29, 1976.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated February 22, 1978, is affirmed.

WCB CASE NO. 77-6941-E SEPTEMBER 8, 1978

GILBERT EDWARDS, CLAIMANT
Robert Martin, Claimant's Atty.
Michael Hoffman, Defense Atty.
Order of Dismissal

A request for review having been duly filed with the Workers' 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 Administrative Law Judge is final by operation of law.

WCB CASE NO. 76-5551-E SEPTEMBER 8, 1978
WCB CASE NO. 77-778

FRANK FISHER, CLAIMANT
Rolf Olson, Claimant's Atty.
Michael Hoffman, Defense Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks review by the Board of the order of the Administrative Law Judge (ALJ) which directed Fred Meyer, as a self-insured employer, hereinafter referred to as the employer, to pay claimant compensation for permanent total disability and awarded claimant's attorney a fee of $1500, payable by Fred Meyer.

The employer does not challenge the award for permanent total disability but contends that claimant suffered his compensable injury at a time when it was a contributing employer to the State Accident Insurance Fund, therefore, the Fund should be responsible for claimant's condition.

Claimant suffered a compensable injury on May 7, 1974 which was ultimately closed by a Second Determination Order on January 22, 1976 awarding claimant compensation for permanent total disability effective January 1, 1976. The employer requested a hearing on this Determination Order (WCB Case No. 76-5551-E).

Claimant filed a claim for a back injury on October 15, 1973; this claim was closed by a Determination Order dated May 7, 1976 which awarded claimant no compensation. Claimant requested a hearing on this Determination Order (WCB Case No. 77-778).

The Fund was joined as a party to these proceedings on motion made by the attorney for the employer and both requests were heard on a consolidated basis.

The employer was a contributing employer to the Fund until September 1, 1973 when it became self-insured. It alleges that claimant suffered the onset of his psychiatric disability at a time when the employer was a contributing employer.

The ALJ found that the claimant had disabling psychoneurosis materially related to his work and had finally terminated employment with the employer in May, 1974 and has not worked since.

From October, 1973 through April, 1974 claimant suffered a series of slips and falls during the course of his employment which resulted in the back injury for which he filed a claim. The ALJ found that the pain from the back injury exacerbated claimant's nervous condition and that claimant terminated his employment because of the combination of his psychoneurosis and back pain.

The ALJ found ample medical evidence to indicate that claimant is unemployable and that rehabilitation is not feasible. He concluded that claimant is permanently and totally disabled.

Claimant first worked as a meat cutter for the employer in January, 1967 and at that time he had no known significant physical or psychological disabilities. He was transferred in 1968 from Portland to the South Salem store where he managed the meat department until 1972 when he was transferred to the North Salem store. However, the second transfer was not as a manager but as a "second man". This position he held until he terminated in May, 1974.

There is no evidence that a claim has ever been filed against the Fund nor was the Fund put on notice of a possible claim although the employer was well aware of claimant's work-connected problems which commenced in 1972.

The ALJ concluded that the failure of the employer

to report these matters to the Fund indicated that the employer evidently did not consider claimant to have suffered any compensable injury in either 1972 or 1973 and that its current position is inconsistant with its conduct at that time. The ALJ found that the Fund did not have any opportunity to investigate the claim or take any measures to litigate disability; even after claimant had made a formal claim against the employer and the claim was closed in 1975 by the First Determination Order nor did the employer report the matter to the Fund after the claim was reopened.

On October 25, 1976 a Special Determination Order granted the employer 100% second injury relief on the May 7, 1974 industrial injury. The ALJ concluded, correctly, that in order to prevail in its request for second injury relief the employer had to show that it had knowledge of pre-existing permanent disability when it retained claimant in employment; that it had a statutory as well as equitable duty to notify the Fund of claimant's job related disability.

He concluded that it would be both inequitable and unconscionable, after its previous failures to disclose the facts to the Fund, to allow the employer now to say that the Fund is responsible for claimant's condition because such disability commenced at a time that the Fund was furnishing workers' compensation coverage for the employer.

The ALJ also found that claimant's permanent total disability was the result of both his back pain which had resulted from slips and falls and an exacerbation of his psychiatric condition occurring after September 1, 1973. The evidence indicates that there were specific incidents in 1974 where claimant had slipped and fallen which contributed independently to his final disability. Claimant had been able to work regularly albeit he had had problems and was required to take medication, from April, 1973 to March, 1974 and claimant testified he felt he could have continued to work except for the back problems which finally became so unbearable that claimant quit his employment in May, 1974 and at that time the employer was self-insured, and is, therefore, responsible for claimant's final disability.

The Board, on de novo review, agrees with the conclusion reached by the ALJ that the responsibility for claimant's present condition is that of the self-insured employer. However, it gives the greatest weight to the evidence which indicates that claimant was able to work up until the last incident and, under the "last injurious exposure" rule as adopted by the appellate courts of this state, the carrier on the risk at the time of the incident which is not merely a recurrence of a previous injury but materially contributes to a worker's physical or psychiatric condition is responsible.

The Board finds that claimant's problems are mostly psychological in nature, however, they have been exacerbated by the pain which results from claimant's back injury and the combination finally produced a condition which caused claimant to cease work and to prevent him from returning to work.

ORDER

The order of the ALJ, dated February 27, 1978, is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney fee for his services at Board review, the sum of $100, payable by Fred Meyer, a self-insured.

WCB CASE NO. 77-7106 SEPTEMBER 8, 1978

RICHARD HALL, CLAIMANT
Pamela Thies, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the order of the Administrative Law Judge (ALJ) which granted claimant an award of 70% unscheduled low back disability. Claimant contends he is entitled to an award for permanent total disability.

Claimant, then a 56 year old meat cutter, sustained a compensable injury on August 10, 1973 when he slipped on a floor mat, landing on his right hip. Diagnosis was acute lumbosacral strain and hip contusion.

Claimant came under the care of Dr. Cruickshank who performed a laminectomy and disc excision on October 19, 1973. Dr. Cruickshank released claimant for work on a trial basis on December 6, 1973; claimant worked a four hour shift and on February 19, 1974 was released to return to his regular occupation.

A Determination Order of July 8, 1974 granted claimant 32° for 10% unscheduled disability.

Claimant continued having problems and was referred to Dr. Mueller who requested that the claim be reopened. A myelogram was negative and on January 30, 1975 Dr. Mueller found claimant again stationary. A stipulation of April 10, 1975 granted claimant an additional 48° for a total award of 80° for 25% unscheduled disability.

On April 12, 1976 claimant's condition was worsening and again Dr. Mueller requested the claim be reopened. Claimant was referred to Dr. Hill who performed exploratory surgery on May 22, 1976.

Claimant was given conservative treatment but didn't respond and on November 7, 1976 Dr. Hill performed another laminectomy.

On January 31, 1977 Dr. Mueller, after examining claimant, felt he was stationary with 50% motion of his back in all directions. On April 19, 1977 claimant was admitted to the Pain Center.

Dr. Seres diagnosed intractable low back pain with radiation into both lower extremities. Claimant also had depression, moderate to severe, with sleep disturbance and irritability. Claimant was 60 years old, has a sixth grade education and his past working experience has been mostly meat cutting. Dr. Seres' discharge summary indicates claimant had significant disability and could not return to any heavy type occupation but he could do the most light types of work.

A Second Determination Order of November 10, 1977 granted claimant an additional 32° for a total of 112° for 35% of the maximum.

Dr. Painter, a psychologist, reported on January 17, 1978 that claimant's condition was deteriorating; that he was severely depressed at the time of this examination.

Claimant testified he presently has low back pain which radiates into his legs as far down as his ankles with tingling in both feet. Claimant has not sought any employment since he ceased his employment after the issuance of the Second Determination Order.

The ALJ found that the medical reports did not support a finding of permanent total disability. He concluded, based on claimant's age and his three surgeries and his lack of education that claimant's loss of wage earning capacity was 70%.

The Board, on de novo review, finds claimant is permanently and totally disabled. The medical evidence indicates claimant could only now perform the most light type of activities and claimant is 61 years old, has minimal education and lacks job skills. Therefore, the Board concludes he cannot be retrained for such types of employment. It should be noted the Board was furnished a report of Dr. Painter which indicates that claimant is permanently and totally disabled. However, this report was received after the final date for the filing of briefs and, therefore, was not considered by the Board.

ORDER

The order of the ALJ, dated March 21, 1978, is modified.

Claimant is hereby granted compensation for permanent total disability, effective the date of this order. This is in lieu of the award granted by the ALJ's order which is affirmed in all other respects.

Claimant's attorney is granted as a reasonable attorney fee for his services at Board review a sum equal to 25% of the increased compensation granted claimant by this order, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-5872 SEPTEMBER 8, 1978

DARYL VANCIL, CLAIMANT
Michael Strooband, Claimant's Atty.
SAIF, Legal Services, 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 order of the Administrative Law Judge (ALJ) which granted claimant an award of 112° for 35% unscheduled disability.

Claimant suffered a compensable injury on January 30, 1976 while working on the spreader in a plywood mill. This job involved considerable twisting and bending. On February 12, 1976 claimant underwent a laminectomy. Claimant returned to his spreader job in May, but the job aggravated his condition and by August he was forced to terminate due to severe back pain with radiculopathy.

Dr. Weinman, claimant's treating physician, recommended claimant be retrained. Claimant was examined at the Disability Prevention Division where Dr. Mason recommended claimant not perform excessive lifting, bending or twisting stresses. Also claimant was found to need retraining. On November 1, 1977 claimant was released for work.

Claimant completed a course in small engine repair and searched for work in the Medford area but was not successful. Claimant lives in Trail, Oregon, about 25 miles from Medford, and he doesn't want to move to a larger city. Claimant presently does light painting of wood products and earns $3.00 an hour.

Claimant is 33 years old and although he has a high school education it undoubtedly was obtained through "social promotion". He has a difficult time understanding what he reads.

The ALJ found claimant is now precluded from work he had performed all his adult life and although claimant has been retrained to do small engine repair, he lives in an area where there are few opportunities for such work. Claimant has also sought this type of employment in the Medford area but has not been successful.

The ALJ concluded claimant was entitled to 112° for 35% unscheduled disability to compensate him for his loss of wage earning capacity.

The Board, on de novo review, finds claimant's training program which he completed in small engine repair has broadened the scope of his earning capacity, therefore, claimant's award should more closely reflect his actual loss of wage earning capacity within the wide range of industrial occupations.

The Board concludes claimant is entitled to an award of 64° for 20% unscheduled disability.

ORDER

The order of the ALJ, dated January 20, 1978, is modified.

Claimant is hereby granted 64° for 20% unscheduled disability. This award is in lieu of that award granted by the ALJ's order, which, in all other respects, is affirmed.

SAIF CLAIM NO. HC 41353 SEPTEMBER 12, 1978

WALTER R. BUCKLEY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable industrial injury on September 23, 1966 while employed as a livestock inspector by the Portland Livestock Market, Inc., whose workers' compensation coverage was furnished by the State Compensation Department, the predecessor of the State Accident Insurance Fund. Claimant, who was driving a truck when it was hit by a train, suffered multiple injuries for which he was hospitalized. The claim was ultimately closed by a Determination Order dated May 24, 1973 which awarded claimant 66° for 60% loss of the left leg, 5° for 5% loss of the right foot and 38.4° for 20% unscheduled disability. Claimant's aggravation rights have expired.

On August 24, 1978 claimant called the Fund and requested that this claim be reopened because he had undergone surgery on July 20, 1978 consisting of an excision of scar and also of the left heel with mesh grafting. He requested that he be paid compensation for time loss and medical expenses, contending that the surgery was required as a result of his 1966 injury.

On August 28, 1978 the Fund referred the medical documents including the surgical report of July 20, 1978 to the Board, stating it would not oppose reopening of the claim if the Board found the medical evidence was sufficient to indicate that the surgery was caused by the 1966 injury and represented a worsening of claimant's condition since his last award and arrangement of compensation.

The Board, after studying the report from Dr. Pasquesi, the surgical report and the initial claim filed for the injury in 1966, concludes that it should exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen claimant's claim for the payment of compensation, as provided by law, commencing on the date of the surgery, July 20, 1978, and until the claim is closed pursuant to the provisions of ORS 656.278.

IT IS SO ORDERED.

SAIF CLAIM NO. A 310030 SEPTEMBER 12, 1978

OHMAN E. CHRISTOPHER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On August 7, 1952 claimant sustained a compensable injury to his left foot while employed by Jim Whitaker Logging Company. The carrier was the State Industrial Accident Commision, predecessor of the State Accident Insurance Fund. The claim was accepted and initially closed with an award of compensation equal to 50% loss of function of the left foot.

On December 31, 1977 the claimant requested the Board to reopen his claim pursuant to its own motion jurisdiction. This request was supported by medical reports from Dr. James W. Brooke who was of the opinion that claimant's present condition was related to the 1952 injury and represented a worsening of said condition.

On February 28, 1978 the Board issued its Own Motion Order remanding claimant's claim to the Fund to be accepted and for the payment of compensation commencing February 15, 1977 which was the date claimant was hospitalized for exploration

of the old area of osteomyelitis.

On August 11, 1978 the Fund submitted the file to the Evaluation Division of the Workers' Compensation Department and requested a determination. The Evaluation Division recommended to the Board that claimant be granted additional compensation only for temporary total disability from August 15, 1977 through November 11, 1977 inclusively.

The Board concurs in the recommendation.

ORDER

Claimant is awarded compensation for temporary total disability from August 15, 1977 through November 11, 1977, inclusively. This is in addition to any awards previously granted claimant for this August 17, 1952 industrial injury.

WCB CASE NO. 77-18 SEPTEMBER 12, 1978

CARLOS DUFFY, CLAIMANT
J. David Kryger, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests and the Fund cross requests review by the Board of the order of the Administrative Law Judge (ALJ) which affirmed the denial by the Fund for claimant's heart condition but awarded claimant 160° for 50% unscheduled angina disability.

Claimant contends he is entitled to an award for permanent total disability. The Fund contends the award should be reversed.

Claimant was a trust officer for the State Veteran's Department and his job was acting as a trustee and handling money for veterans who were incompetant and disabled. Claimant contends that this job was quite stressful due to his extra heavy workload and also because of the animosity between the director of the Department of Veteran's Affairs and the assistant director of claimant's division.

In September, 1975 claimant suffered chest pains and was hospitalized with a diagnosis of a possible myocardial infarction. Claimant returned to work but continued to have chest pains from time to time. On October 4, 1976 claimant suffered a severe attack of angina for which he was hospitalized. The diagnoses were acute chest pain, probably prolonged angina,

doubtful myocardial infarction, borderline diabetis, obesity, hypertension and arteriosclerotic heart disease. Claimant filed a claim and on December 22, 1976 the Fund issued a partial denial, accepting the attacks of angina but denying any responsibility for cliamant's underlying heart disease.

A Determination Order of March 2, 1977 granted claimant benefits for time loss only.

Dr. Moore, claimant's treating physician, on June 10, 1977 stated that claimant's stress at work was a contributing factor to his coronary artery disease, but on July 29, 1977 he qualified that statement by saying claimant's work stress may not be as important as other risk factors.

On August 9, 1977 Dr. Wysham, a cardiologist, who examined claimant, noted that since claimant had ceased his employment, at the advice of his physician, his chest pains were less frequent. Dr. Wysham believed that claimant's symptoms were brought on by stress at work, therefore, claimant's health would not permit him to continue his employment.

On October 6, 1977 Dr. Kloster, a cardiologist, after examining claimant, felt that claimant's work stress did not contribute to the underlying heart disease, however, the stress did bring on attacks of angina and these attacks eventually prevented claimant from doing his usual work.

Dr. Kloster, upon being deposed, testified that claimant's angina attacks caused temporary effects but caused no damage permanently to his heart. However, claimant's cessation of his employment was indicated by them. Dr. Kloster said he would recommend claimant quit work at this job because repeated angina attacks eventually lead to a myocardial infarction.

The ALJ found claimant was forced to quit his employment due to his compensable angina condition, and that his loss of wage earning capacity due to this condition would be adequately compensated for by an award equal to 50% of the maximum. He did not find that the medical evidence suggested a finding of permanent total disability.

However, the ALJ found the underlying heart disease was not compensable and he affirmed the partial denial..

The Board, after de novo review, concurs with the conclusions reached by the ALJ.

ORDER

The order of the ALJ, dated March 29, 1978, is affirmed.

SAIF CLAIM NO. AC 70675 SEPTEMBER 12, 1978

FRANK W. HICKMAN, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On April 13, 1978 claimant, by and through his attorney, petitioned the Board to exercise its own motion jurisdiction and reopen his claim for a compensable injury sustained on April 24, 1967 while he was in the employ of Mid-Willamette Lumber Corporation, whose carrier was the State Accident Insurance Fund.

The claim was closed by a Determination Order dated May 20, 1969 whereby claimant was awarded compensation equal to 15% loss of an arm by separation for unscheduled disability and 5% loss of use of the left leg. Claimant appealed from the Determination Order and a Hearing Officer's order dated August 11, 1970 increased the award to 100° for loss of an arm by separation for his unscheduled disability and to 50° loss of the use of the left leg.

On February 1, 1974 claimant filed a claim for aggravation; it was settled by a stipulation, dated September 9, 1974, which increased claimant's unscheduled disability award to 128.8° loss of an arm by separation but made no change in the award of 50° loss of the use of the left leg.

Claimant's aggravation rights now have expired and claimant alleges that he has been required to seek additional medical care and treatment and that his condition has worsened and he is unable at the present time to perform any gainful employment. He further alleges that he has not received any type of further injury or accident which has contributed to his present disability and that his present condition is directly related to the 1967 industrial injury.

In support of claimant's petition, the report of Dr. Embick, dated December 11, 1977, was submitted by claimant.

On April 18, 1978 the Board informed the Fund of claimant's request and asked it to respond thereto. On April 28, 1978 the Fund replied, stating it had reviewed claimant's application and Dr. Embick's report in support thereof; that Dr. Embick recommended no specific treatment and, therefore, the Fund found no justification for reopening the claim. However, the Fund did request that the Board delay its decision until a further medical evaluation of claimant's condition, stating that an appointment had been made for claimant to be seen by the Orthopaedic Consultants on May 16, 1978.

On August 21, 1978 the Fund was requested to advise the Board of the results of this evaluation by the Orthopaedic Consultants. On August 23, 1978 the Board and claimant's attorney each was furnished a copy of the report from the Orthopaedic Consultants. The Fund stated that report had been placed in the claim file and not called to the proper parties' attention. Based upon this report, the Fund opposed claimant's request for own motion relief.

The three physicians, after examining claimant on May 16, 1978, found claimant to be medically stationary and stated that, in their opinion, there was no significant difference between claimant's condition at the present time and his condition on September 9, 1974, the date of the last award or arrangement of compensation received by claimant for this injury. They recommended the claim should not be reopened.

The Board, after considering the reports from the Orthopaedic Consultants and Dr. Embick, conclude that there is no justification, at this time, for reopening claimant's claim and that claimant's petition should be denied.

IT IS SO ORDERED.

WCB CASE NO. 77-1292 SEPTEMBER 12, 1978

SUSAN JOHNSON, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
Order

On August 15, 1978 the Board entered its order in the above entitled matter denying claimant's request for the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and allow claimant to have a hearing on the partial denial made by the employer and its carrier on July 23, 1976 and which claimant failed to request a hearing within 60 days.

The claimant's request failed to state why claimant had not requested a hearing on the propriety of the denial within the statutory time.

On August 24, 1978 claimant's attorney requested the Board to reconsider its order, stating that the responsibility for the failure to make a timely appeal was that of claimant's previous attorney; that she had subsequently fired that attorney and sought the legal advice of her present counsel after the appeal time had run.

The failure to make a timely appeal by claimant's attorney is imputed to claimant; it cannot be considered as good

cause for claimant not to have filed her request for hearing on the denial within the 60 days required by statute.

ORDER

The motion to reconsider the Board's order of August 15, 1978 is denied.

WCB CASE NO. 77-7667 SEPTEMBER 12, 1978

LOIS LEININGER, CLAIMANT
Charles Seagraves, Claimant's Atty.
John Klor, Defense Atty.
Order of Dismissal

A request for review, having been duly filed with the Workers' 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 Administrative Law Judge is final by operation of law.

WCB CASE NO. 77-5863 SEPTEMBER 12, 1978

RAMON D. MATA, CLAIMANT
Frohnmayer & Deatherage, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order

On August 30, 1978 the Board received a request from the State Accident Insurance Fund to reconsider its Order on Review entered in the above entitled matter on August 4, 1978.

The Board, after due consideration of the facts set forth in the request, finds no justification for reconsidering its order, therefore, the request should be denied.

IT IS SO ORDERED.

WCB CASE NO. 77-7266 SEPTEMBER 12, 1978

CARL PENLAND, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

A request for review, having been duly filed with the Workers' 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 Administrative Law Judge is final by operation of law.

WCB CASE NO. 76-1723 SEPTEMBER 12, 1978
WCB CASE NO. 76-4261

RICHARD C. PICK, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Charles Paulson, Defense Atty.
Order on Remand

On December 8, 1977 an Order on Review was entered in the above entitled matter wherein the majority of the Board modified the order of the Referee, dated April 12, 1977, which had granted claimant an award for permanent total disability by reducing said award to 256° for 80% of the maximum allowed by unscheduled disability.

Claimant, by and through his attorney, petitioned the Court of Appeals for judicial review of the Board's order. On July 5, 1978 the Court of Appeals reversed the Board's order and remanded it to the Board with instructions to reinstate the order of the Referee.

The Board received the Judgment and Mandate from the Court of Appeals on September 5, 1978 and in compliance therewith does hereby set aside its Order on Review entered on December 8, 1977 and reinstates in its entirety the Opinion and Order of the Referee dated April 12, 1977.

SAIF CLAIM NO. HC 360467 SEPTEMBER 12, 1978

FRANK RAINES, CLAIMANT
Kirkpatrick & Howe, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury while employed by Small Parts Manufacturing, Inc., whose workers' compensation coverage was furnished by the State Accident Insurance Fund. The date of the injury was March 6, 1972, the claimant's claim has been closed and his aggravation rights have expired. The last award and arrangement of compensation received by claimant was on March 29, 1974 when claimant's award for his right leg was increased to 90° for 60% disability of his right leg and his previous award of 48° for 15% unscheduled disability was affirmed.

On August 14, 1978 the claimant, by and through his attorney, requested the Fund to accept claimant's claim for aggravation and pay for claimant's on-going treatment and the brace recommended by Dr. Robins. Claimant furnished supportive reports from Dr. Robins, Dr. Marble and Emanuel Hospital.

On August 28, 1978 the Fund responded, stating that claimant's aggravation rights had expired but it would be responsible for payment of necessary and related medical expenses due to the 1972 injury. The question of entitlement to additional compensation would have to be determined by the Workers' Compensation Board pursuant to its own motion jurisdiction granted by ORS 656.278. The Fund forwarded a copy of claimant's request and supporting medical reports to the Board for their consideration.

The Board, after carefully considering the reports from Dr. Robins and Dr. Marble, concludes that the claimant's present condition is due, at least to a certain extent, to his industrial injury sustained on March 6, 1972 and that it does represent a worsening since claimant's last award of compensation for that injury which was granted on March 29, 1974.

ORDER

Claimant's claim for an industrial injury suffered on March 6, 1972 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on March 8, 1978 and until closed pursuant to the provisions of ORS 656.278, less time worked.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation for temporary total disability granted by this order, payable out of said compensation as paid, not to exceed $500.

SAIF CLAIM NO. B 100466 SEPTEMBER 12, 1978

GENEVIEVE REYNOLDS, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

On May 30, 1978 an Own Motion Determination was entered in the above entitled matter which erroneously granted claimant compensation equal to 32° for 10% unscheduled psychiatric disability.

This award was based upon claimant's industrial injury sustained on December 26, 1964 at which time the maximum award for unscheduled disability was 145°. Therefore, claimant's award for 10% unscheduled psychiatric disability is equal only to 14.5° and the Board's Own Motion Determination should be amended by substituting 14.5° for 32° on the last line of the last paragraph on page 2 and also on the third line of the first paragraph under the "Order" portion of the Own Motion Determination.

In all other respects the Own Motion Determination should be ratified and reaffirmed.

IT IS SO ORDERED.

WCB CASE NO. 78-2099 SEPTEMBER 12, 1978

WALTER G. SMITH, CLAIMANT
Ringo, Walton, Eves & Gardner,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On August 10, 1978 the Board received from claimant, by and through his attorney, a request to reopen a compensable industrial accident sustained by claimant in 1962. Claimant's aggravation rights have expired. The request for own motion relief, pursuant to ORS 656.278, was supported by a medical report from Dr. McGee, dated July 18, 1978, which specifically relates claimant's present condition to his industrial injury.

On August 11, 1978 the Board informed the Fund, which had received a copy of claimant's request, to advise it of the Fund's position within 20 days.

On August 22, 1978 the Fund replied, stating it would not oppose the claimant's request for own motion relief. It

enclosed a report from the Orthopaedic Consultants, dated July 11, 1978, which indicated that a great deal of claimant's present problems are the result of progressive osteoarthritic changes which have occurred through the passage of time since the 1962 injury; however, lately, there has been particularly great apparent nerve root pressure with increasing pain. Although the preponderance of claimant's problems relates to the progression of the osteoarthritic changes, the three physicians felt that there is some relationship to his original injury which started all of his problems. They felt that the decompression type laminectomy suggested by Dr. McGee could possibly be of help to claimant, at least from a humanitarian standpoint, although it would not get him back into the labor market.

The Board, after studying the reports from Dr. McGee and the Orthopaedic Consultants and taking into consideration the lack of opposition to claimant's request for own motion relief, concludes that the claimant's request for the Board to exercise its authority, pursuant to ORS 656.278, and reopen his claim for the industrial injury identified as SAIF Claim A 922605 should be granted and the claim should be reopened on the date claimant is admitted to the hospital for the surgery recommended by Dr. McGee and for the payment of compensation, as provided by law, commencing on that date and until the claim is closed pursuant to ORS 656.278.

Claimant's attorney should also be granted a reasonable attorney's fee for his services equal to 25% of the compensation for temporary total disability granted by this order, payable out of said compensation as paid, not to exceed $500.

IT IS SO ORDERED.

CLAIM NO. C70-2564 SEPTEMBER 12, 1978

ROXANA STARKS, CLAIMANT
Own Motion Determination

Claimant suffered a compensable injury to her back on November 13, 1970. Dr. Eisendorf diagnosed a prolapsed disc at L5-S1 and treated claimant conservatively. The claim was closed by a Determination Order dated April 13, 1971 which awarded claimant compensation equal to 32° for 10% unscheduled low back disability.

In 1974 Dr. Donald T. Smith, after a myelogram, diagnosed a central disc herniation in the lower lumbar spine. There is no evidence that claimant's claim was formally reopened at that time.

On August 10, 1977 claimant saw Dr. Blosser who treated her conservatively until February 17, 1978. Claimant lost work from January 10, 1978 until she was released to return to work on February 23, 1978. Dr. Blosser recommended that she not spend extensive time lifting boxes or loading trucks.

On July 28, 1978 the employer, National Biscuit Company, advised claimant that it had written to her doctor to obtain medical information concerning her injury and had been informed that she had last seen him on February 17, 1978. The letter requested claimant to return to her doctor if she was still having difficulty because of the injury to enable him to make a current report on her condition; it further informed claimant that if it did not hear from either claimant or her doctor within 2 weeks it would assume that claimant had made a complete recovery and a final determination would be requested (WCB Bulletin #9).

Claimant did not reply, therefore, it was assumed that she has made a full recovery.

The Evaluation Division of the Workers' Compensation Department recommended to the Board that claimant be awarded additional compensation only for temporary total disability from January 10, 1978 through February 22, 1978.

The Board concurs with this recommendation.

ORDER

Claimant is awarded compensation for temporary total disability from January 10, 1978 through February 22, 1978. This award is in addition to any previous awards granted claimant for her industrial injury of November 13, 1970.

WCB CASE NO. 77-6549 SEPTEMBER 12, 1978

BARBARA TROW, CLAIMANT
Peter Hansen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the order of the Administrative Law Judge (ALJ) which directed the Fund to pay (or reimburse claimant) for all outstanding medical bills for Dr. Ferrante's services rendered after August 4, 1977, the date of claimant's first hearing, plus mileage related thereto, and to pay the bills of Drs. Grass, Kehr and the Orthopedic

and Fracture Clinic.

Claimant contends she is entitled to payment for all medical bills and to penalties and attorney fees for unreasonable resistance to the payment of such bills.

Claimant suffered a compensable injury on January 9, 1976. The claim was closed by a Determination Order on December 22, 1976 granting no award for permanent partial disability. Claimant appealed and, after a hearing on August 4, 1977, an Opinion and Order of August 30, 1977 awarded claimant 16° for 5% unscheduled disability. On appeal, the Board increased the award to 48° for 15% unscheduled disability.

Claimant commenced palliative treatment with Dr. Ferrante and incurred further expenses by seeing Dr. Grass, a psychiatrist, and several chiropractors.

Dr. Ferrante, who continued treating claimant until late 1977, testified that as of January 25, 1978 claimant was symptom free. Claimant, however, continued to see chiropractors on a regular basis.

The ALJ found that Dr. Ferrante's bills as well as those of Dr. Grass and Dr. Kehr (who was seen on an emergency basis) were not unreasonable and were therefore compensable. However, he found her frequent visits to various chiropractors presumably could continue for the rest of her life were neither reasonable nor compensable.

He further found that some of the medical bills should have been litigated at the prior hearing, therefore, could not be now litigated. The ALJ found the Fund's failure to pay these bills did not justify the assessment of penalties and attorney fees.

The Board, on de novo review, finds that under the provisions of ORS 656.245 all medical bills pertaining to claimant's compensable injury must be paid and the Fund's failure to pay them does constitute unreasonable resistance to the payment of compensation.

The Board concludes claimant is entitled to the payment of all medical expenses incurred by her which relate to her January, 1976 industrial injury and to additional compensation, as a penalty, in an amount equal to 15% of all unpaid medical bills. She is also entitled to have her attorney fees paid by the Fund.

ORDER

The order of the ALJ, dated April 7, 1978, is modified.

The Fund is hereby ordered to pay all medical expenses incurred by claimant which relate to her January 9, 1976 injury.

The Fund is hereby ordered to pay claimant a sum equal to 15% of all these medical expenses as a penalty for its unreasonable resistance to the payment of compensation.

The claimant's attorney is hereby granted as a reasonable attorney fee for his services before the ALJ and at Board review, the sum of $1,000, payable by the Fund.

WCB CASE NO. 77-4446 SEPTEMBER 13, 1978

DONALD JAMISON, CLAIMANT
Sidney Galton, Claimant's Atty.
Jerard Weigler, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson, Moore and Phillips.

The employer requests Board review of the Administrative Law Judge's (ALJ) order which granted claimant permanent total disability commencing the date of his order (December 5, 1977).

The majority of the Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated December 5, 1977, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $350, payable by the carrier.

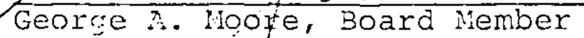
Dissent of George A. Moore, Board Member:

This reviewer respectfully dissents from the majority opinion and finds that claimant is not permanently and totally disabled. Five physicians found claimant capable of light employment with restrictions of bending and lifting. Dr. Seres at the Pain Center rated claimant's physical impairment as moderate and found that claimant is capable of performing light to moderate work. In 1977 Dr. Post felt, upon examination, that objective medical findings were rather limited. Dr. Newman, a psychiatrist, found claimant had better then average I.Q. in mechanical abilities. Claimant has a 10th grade education and is in the early 40 age group.

Claimant appears to have little motivation to be retrained nor has he looked for any employment since July, 1974.

It seems apparent since claimant is not permanently and totally disabled on the medical evidence alone, that the ALJ based his award of permanent total disability on a prima-facie showing of "odd-lot". I believe claimant fails to fall within this catagory for two reasons: (1) Claimant's impairment physically, based on the medical reports in evidence, was rated from moderate to moderate severe but all physicians found him capable of performing light work, therefore, claimant must show that he is incapable of performing light work or of being retrained. (2) Claimant has a wide range of past working experiences and above average mechanical abilities and is only 40 years old.

I conclude claimant could be and should be rehabilitated and recommend he seek referral for job placement assistance. Further, I find the award granted by the Determination Order to be inadequate and claimant is entitled to 208° for 65% unscheduled disability to adequately compensate him for his loss of wage earning capacity.



George A. Moore, Board Member

WCB CASE NO. 77-7346 SEPTEMBER 19, 1978

RAYMOND E. BOWLAND, CLAIMANT
MacDonald, Dean, McCallister & Snow, Claimant's Attys.
Charles R. Holloway III, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted him compensation equal to 128° for 40% unscheduled low back disability. Claimant contends that this award is inadequate.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, as amended by the subsequent order, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated April 6, 1978, as amended by an order of May 2, 1978, is affirmed.

WCB CASE NO. 76-120 SEPTEMBER 19, 1978

ROBERT T. BRADY, CLAIMANT
John D. Ryan, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks review by the Board of the Administrative Law Judge's (ALJ) order which approves the previous Determination Orders entered in the above entitled matter.

Two different Determination Orders granted claimant compensation for an industrial injury sustained on September 28, 1973. The first, dated October 21, 1974, awarded claimant 32° for 10% unscheduled mid-low back disability; the second, entered December 30, 1975, awarded the claimant an additional 32°. Claimant contends that he is permanently and totally disabled as a result of the September 28, 1973 injury superimposed upon previous injuries.

Claimant, at the time of the hearing, was 52 years old. He has a high school education and, after serving as a B-29 radio operator and gunner in World War II during which period of service his aircraft was shot down and he was taken prisoner, he spent one year at the University of Oregon. He was recalled to active duty for the Korean conflict and in 1952 returned to college hoping to prepare for medical or dental school. However, after a semester or two he dropped out and for an extensive period of time he operated a trucking business. Later he sold cars and operated various kinds of construction equipment. Claimant, in addition to being able to drive trucks, is able to do his own maintenance, however, he does not consider himself to be a mechanic.

Claimant apparently went to work for the defendant/employer in August 1966.

Claimant suffered several fractures of his cervical spine as well as a compression fracture of D2 in 1970; he was off work for approximately five months and was under the care of Dr. Schuler. In 1971 claimant suffered another injury while cranking the landing gear on a trailer. He was hospitalized and a myelogram was performed which was negative. For about

a year claimant was treated under the Kaiser Hospital Orthopedic Department for thoracic muscle spasms.

In December 1972 claimant underwent a partial hemilaminectomy and foraminotomy on the left. He was released for work and returned to work on January 26, 1973 and that claim was closed on July 12, 1973 with an award of 48° for 15% unscheduled low back disability.

On September 28, 1973 claimant suffered his third injury for which the two Determination Orders previously alluded to granted claimant a total of 64° for 20% unscheduled low back disability.

During January 1974 Dr. Spady reported claimant appeared to be convalescing from an injury to his thoracic and lumbar areas superimposed upon previous problems; he recommended no surgery. Claimant was referred for vocational rehabilitation in March 1974 and Dr. Spady recommended that claimant's claim be closed. However, before it was closed the Veteran's Administration Hospital in Portland, after evaluating claimant, diagnosed a depressive neurosis, functional back pain and functional headache.

Claimant has been examined by Dr. Straumfjord, a psychiatrist at the University of Oregon Medical School, by Dr. Gallo, Dr. Holm and Dr. Edwards. Additionally, he was seen by Dr. Mason at the Disability Prevention Division who felt that claimant's failure to return to work not only was psychological but was also conscious. Claimant has had some psychiatric problems in the past. Dr. Mason rated claimant's physical disability as mild to mildly moderate at the most. Thereafter, the first Determination Order was issued. Subsequently, the claimant came under the care of Dr. Chuinard who is of the opinion that claimant is now permanently and totally disabled. Dr. Chuinard opposes claimant's return to truck driving and apparently to any type of work.

The ALJ found that claimant's demeanor on the witness stand indicated that he fully concurred with Dr. Chuinard's opinion; that claimant had made no effort to find employment. Dr. Chuinard had been requested to study a report from the Orthopaedic Consultants, however, he failed to state whether he agreed or disagreed with their opinion which was that claimant was stationary and needed no further treatment; they felt claimant was able to work at a job which required little or no stress on the back and that his loss of function as a result of the injury was mildly moderate. The second Determination Order which granted an additional 32° was then entered.

The ALJ found that the preponderance of the evidence indicated that claimant has a mild to moderate back injury for which he has already been fully compensated. Claimant has a great deal of psychopathology which perhaps pre-existed for a substantial time his present industrial injury. The ALJ

found that if the present accident had exacerbated the psychopathology then claimant would be entitled to counseling but he has consciously thwarted that. The ALJ stated that claimant had a knack for manipulation generally coupled with a bright mentality and, based primarily on his observance of claimant's demeanor at the hearing, raised substantial skepticism in his mind. He affirmed the two Determination Orders.

The Board, on de novo review, finds that the medical evidence is not sufficient to support claimant's contention that he is permanently and totally disabled. Dr. Chuinard is the only doctor who feels that claimant is unable to be gainfully employed at any type of occupation. Dr. Mason feels that there is a great deal of exaggeration and evidence of heavy functional overlay. The evidence indicates that claimant's motivation might be considered suspect; however, with claimant's history of injuries sustained while working as a truck driver, the Board feels it is reasonable to assume that claimant's refusal to return to that occupation is on a psychological rather than physical basis, nevertheless, it is equally disabling insofar as limiting claimant's wage earning capacity.

The Board finds that there are many factors involved in this case which are not directly attributable to the industrial injury but after separating the non-attributable factors from the attributable factors, it arrives at the conclusion that claimant has suffered a substantial loss of his wage earning capacity. Although his physical impairment is rated as mild to mildly moderate and, at first blush, claimant would appear to be an excellent candidate for retraining because of his educational and work background, such retraining is not feasible because of claimant's psychological problems. Taking into consideration these psychological problems which are related to his industrial injuries, the Board concludes that claimant has suffered substantial loss of potential wage earning capacity.

Claimant has received a total of 64° for 20% unscheduled low back disability for his 1973 injury; the Board concludes that claimant is entitled to an additional award of compensation equal to 128° for 40% unscheduled low back disability.

ORDER

The order of the ALJ, dated January 19, 1978, is reversed.

Claimant is awarded a sum equal to 128° of a maximum of 320° for 40% unscheduled mid-low back disability. This award is in addition to any previous awards for permanent partial disability received by claimant for his industrial injury of 1973.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the compensation granted claimant by this Order on Review, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 76-5880 SEPTEMBER 19, 1978

DONALD G. BUELL, CLAIMANT
Allen G. Owen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the Fund's denial of his claim of a disabling knee condition.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated April 7, 1978, is affirmed.

WCB CASE NO. 76-2772 SEPTEMBER 19, 1978

JOE BURRIS, CLAIMANT
A. C. Roll, Claimant's Atty.
Jaqua & Wheatley Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson, Moore and Phillips.

The employer seeks Board review of the Administrative Law Judge's (ALJ) order which found claimant to be permanently and totally disabled as of the date of his order.

The majority of the Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated December 19, 1977, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $300, payable by the carrier.

Chairman M. Keith Wilson dissents as follows:

The claimant has been deemed to be permanently and totally disabled by the Administrative Law Judge and by a majority of the Board on the basis that the claimant has brought himself within the category of "odd-lot" permanent total.

I disagree. The burden of proof remains upon the claimant to establish permanent and total disability. The medical evidence falls far short of showing a disability sufficient to invoke the "odd-lot" consideration. At most, the physical disability has been evaluated by all of the doctors as being in the mild to moderate ranges.

The various doctors have suspected secondary gain motivation and deliberate choice of retirement. It is perfectly proper that any worker may exercise the option of retirement but it does not follow that employers through the Workers' Compensation system are responsible for the retirements costs.

The award of permanent total disability should be reduced to 60% unscheduled disability.

M. Keith Wilson, Chairman

WCB CASE NO. 77-5303 SEPTEMBER 19, 1978

JANICE L. CALHOUN, CLAIMANT
Thwing, Atherly & Butler,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge (ALJ) order which granted her compensation equal to 64° for 20% unscheduled back disability. The Fund contends that the ALJ's order should be reversed.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated March 6, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $250, payable by the Fund.

WCB CASE NO. 77-6007 SEPTEMBER 19, 1978

MELVIN DECKER, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the carrier's denial of his claim for aggravation.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated April 28, 1978, is affirmed.

WCB CASE NO. 78-4047 SEPTEMBER 19, 1978

PATSY L. GREINER (fka Ward), CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith, Defense Attys.
Own Motion Order Referring for Hearing

On September 1, 1978 claimant, by and through her attorney, requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and issue an order directing Industrial Indemnity Insurance Company which furnished workers' compensation coverage for Webster Orchards, claimant's employer at the time of her industrial injury sustained on September 2, 1970, to reopen her claim for said injury for further medical care and treatment. Claimant's claim had been initially closed by a

Determination Order dated November 24, 1971 and claimant's aggravation rights have expired. In support of the request for own motion relief, claimant submitted substantial medical reports.

Claimant has also filed a claim for an alleged new injury against her current employer, Albertson's Food Service, whose workers' compensation coverage is furnished by Scott Wetzel Services, Inc. This claim was denied by Scott Wetzel on on May 18, 1978 on the grounds that the incident was an aggravation of claimant's September 1970 injury. At the present time, a request for hearing is pending on the denial (WCB Case No. 78-4047).

At the present time, the Board does not have sufficient information on which to make a determination on claimant's request for own motion relief, therefore, it is referring claimant's request for such relief to its Hearings Division with instructions to set it down for hearing on a consolidated basis with the hearing on the denial presently pending in WCB Case No. 78-4047.

After the hearing, the Administrative Law Judge (ALJ) shall cause a transcript of the proceedings to be made and shall submit a copy thereof together with the ALJ's recommendation on the merits of claimant's request for own motion relief pursuant to ORS 656.278 to the Board.

The ALJ shall also enter an appealable Opinion and Order on the issue of the denial in WCB Case No. 78-4047.

SAIF CLAIM NO. DC 176864 SEPTEMBER 19, 1978

PAUL E. HOLMSTROM, CLAIMANT
Charles Paulson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

On August 11, 1978 an Own Motion Determination was entered in the above entitled matter which erroneously awarded claimant compensation for temporary total disability from November 17, 1975 through June 15, 1976; claimant is entitled to compensation for temporary total disability from November 17, 1975 through June 15, 1978, therefore, the Own Motion Determination should be amended by deleting from the second line of the first paragraph under the "Order" portion of the Own Motion Determination the year "1976" and substituting therefor the year "1978".

In all other respects the Own Motion Determination should be reaffirmed and ratified.

IT IS SO ORDERED.

CLAIM NO. 2-70-126 SEPTEMBER 19, 1978

RONALD L. HORNER, CLAIMANT
Own Motion Determination

Claimant suffered a compensable injury to his low back on October 30, 1970 when he fell over a log and a choker lying on the ground. He was found to be medically stationary by Dr. Donnelly as of November 6, 1970 and released to work on December 14, 1970. Claimant's claim was closed on July 9, 1971 with time loss benefits allowed to November 30, 1971 only.

Claimant's claim was reopened on May 23, 1973 for a myelogram and two laminectomies performed in late 1973 and early 1974. He was considered to be medically stationary by Dr. Short on January 30, 1975. The Determination Order of March 25, 1975 granted claimant time loss benefits from May 7, 1973 through February 25, 1975 and compensation equal to 40% low back disability. A Hearing Officer's Opinion and Order, dated August 29, 1975, awarded claimant an additional 20%.

Claimant was involved in a vocational rehabilitation program for about a week in November 1975.

Claimant stopped working in April 1978 and saw Dr. Adams with complaints of back and leg pain. The carrier reopened his claim on May 15, 1978. Dr. Degge, in his June 22, 1978 report, stated claimant's condition was essentially the same as it had been on the date of his previous closing examination; he suggested claim closure. Claimant returned to work on June 26, 1978.

On August 11, 1978 the carrier requested a determination of claimant's condition. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted only compensation for temporary total disability from April 27, 1978 through June 25, 1978.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from April 27, 1978 through June 25, 1978. This is in addition to any previous awards claimant has been granted for his October 30, 1970 industrial injury.

WCB CASE NO. 77-7962 SEPTEMBER 19, 1978

RUSSELL H. JACKSON, CLAIMANT
Franklin, Bennett, Ofelt & Jolles, Claimant's Attys.
Gearin, Landis, Aebi, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks review by the Board of the Administrative Law Judge's (ALJ) order which found that claimant was a California employee and his claim for an industrial injury sustained on September 26, 1976 should have been filed in the State of California; the ALJ, therefore, affirmed the employer's denial to the extent that it was based on that ground.

Claimant, a 36-year-old long haul truck driver, sometime prior to June 1976 applied for employment at the defendant/employer's Portland terminal. Claimant said that on June 17 he was notified that he had been assigned a trip as a "second driver" and the destination was Norfolk, Virginia. The trip to Norfolk was uneventful as was the return trip to the main terminal in the Los Angeles area. Claimant's log indicates that he arrived at Paramount, California on June 30, 1976 and that he was off duty from July 8 to July 13, 1976 when he left Los Angeles with his next load.

On September 23 claimant returned to Paramount after the dispatcher had left for the day and the claimant's co-driver left him at a motel. The following day claimant called in to see what he should do and was advised to return to the motel and wait for further instructions by telephone. On September 26 he was exposed to chlorine gas and other chemicals while staying at this motel. The exposure caused visual and respiratory problems. Claimant returned to Portland, Oregon on October 10 and has not worked since that date. On October 17 he filed a claim which was denied on December 19.

The ALJ found that before he could reach the issue of compensability it would be necessary to determine whether or not claimant was protected under the provisions of ORS 656.126(1) which provides that if a worker who has been employed in Oregon and is subject to the Oregon Workers' Compensation Act temporarily leaves the state incidental to that employment and receives an accidental injury arising out of and in the course of his employment he is entitled to the benefits of the Oregon Workers' Compensation Act the same as if he had been injured within this state.

Claimant contends that he was hired in Portland, Oregon and that Portland was his "home base" for the duration of his employment. Defendant contends that all of its employees

are considered as California employees regardless of where they were hired.

Defendant's safety director testified that he reviewed claimant's application when claimant first arrived in Paramount. During this conversation he notified the claimant that Paramount would be his home terminal and that he would be reimbursed for motel expenses upon presentation of receipt if he was laid over on dispatch when he was not in Paramount or in the Los Angeles area. Claimant disputes this conversation, although he states that he was told motel expenses would be reimbursed by defendant and he was not reimbursed for motel expenses incurred while he was in Los Angeles. Claimant stated that he was told in July or August that he was supposed to be a California based driver; this, in direct conflict with his earlier testimony that his "home base" was never transferred from Portland. Claimant further testified that during the three months he worked with the defendant he was in Portland for six or seven days and that he had not been paid for lay-over time in Portland although the co-driver was.

The ALJ found that although it was claimant's contention that his home terminal was Portland, he was not reimbursed for motel expenses incurred during a lay-over in Los Angeles between July 8 and July 13 albeit he may have attempted to obtain reimbursement for such expenses. The ALJ concluded that had claimant attempted to secure reimbursement that might have been the time he was notified by defendant that he was considered to be a California based driver.

The ALJ found that a long haul truck driver who seldom returns to Oregon could be considered as a worker employed with this state who temporarily leaves incidental to such employment within the meaning of ORS 656.126; it depends upon the individual facts of each case. If claimant had been injured prior to June 30, the date he first arrived in Paramount, California, it is quite probable that he would have been found to have been an Oregon driver. The defendant's manager of its Portland terminal testified that he did not have authority to hire or fire drivers and that he had notified claimant that only Los Angeles did the hiring, however, there was no evidence that the Portland terminal manager lacked such authority.

The ALJ was convinced that contrary to claimant's contention that "home base" was where his domicile was located and the "home office" was where the instructions came from and there was a difference, that this was based primarily on claimant's incorrect interpretation of the DOT definition of the term.

Based upon the evidence produced from claimant and from the defendant's safety director, the ALJ concluded that claimant was a California based driver and was also aware that he had been considered as such by the defendant/employer.

Claimant also contended he was entitled to penalties and attorney fees for unreasonable refusal to pay compensation. Claimant filed his claim on October 17 and it was not denied until December 19. ORS 656.262(4) requires that the first installment of compensation be paid no later than the 14th day after the subject employer has notice or knowledge of the claim.

The ALJ found that if claimant did not receive compensation for temporary total disability within 14 days from the filing of his claim and every 14 days thereafter he would be entitled to compensation for that period regardless of whether he prevailed on the main issue and he would also be entitled to penalties and attorney's fees. However, the record is devoid of any evidence on this issue and the ALJ concluded that claimant failed to sustain his burden of proof, therefore, no penalties or attorney's fees were granted.

The Board, on de novo review, concurs in the conclusions reached by the ALJ. Claimant had been hired on a probationary basis to make one haul from Portland to Norfolk, Virginia and then routed back to the defendant/employer's home terminal in Paramount, California to be processed for hiring. The fact that claimant's application for employment was received in Portland and certain administrative details were taken care of at that time in Portland, does not alter the fact that the ultimate decision as to whether or not claimant was to be permanently employed was deferred to the home office in California. There is a discrepancy in claimant's testimony as to whether he was informed by the defendant/employer that he was to be considered as a California based driver. On direct examination he said he was not; on cross-examination he admitted that he had been. He further admitted that he was not reimbursed for his lodging while he stayed at a motel in Paramount.

There is no evidence that claimant was ever dispatched out of the defendant's Portland terminal subsequent to his official hiring on June 30, 1976 at Paramount, California and there is no testimony in the record that claimant ever picked up or delivered a load in Oregon subsequent to his initial departure from Oregon on June 23, 1976. Claimant steadfastly maintained that his home base was determined by his domicile, i.e., where his home and family were, and not by the location of the employer's main office or the place from where he received his instructions.

The Board concludes that although claimant has the right to choose his domicile and in this case he retained his domicile in Oregon, nevertheless, he must be considered as a California based driver under the circumstances of this particular case and, therefore, he is not entitled to Oregon Workers' Compensation benefits. The ALJ correctly concluded he did not have jurisdiction to determine the compensability of the alleged injury.

ORDER

The order of the ALJ, dated May 4, 1978, is affirmed.

WCB CASE NO. 78-327 SEPTEMBER 19, 1978

JOEL JOSLIN, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks review by the Board of the Administrative Law Judge's (ALJ) order which found that the State Accident Insurance Fund had paid claimant compensation for temporary total disability beyond the date time loss was terminated by the Determination Order of June 28, 1977 and was entitled to offset this overpayment for temporary total disability against a subsequent award for permanent partial disability granted by an Opinion and Order dated November 23, 1977.

The Board, after de novo review, finds that under the circumstances of this case the Fund acted properly and it affirms and adopts as its own the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, made a part hereof.

ORDER

The order of the ALJ, dated April 13, 1978, is affirmed.

WCB CASE NO. 77-4590 SEPTEMBER 19, 1978

ERNEST MOORE, CLAIMANT
Anderson, Fulton, Lavis & Van Thiel, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the Fund's denial of his claim of a bilateral knee condition.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached

hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated January 30, 1978, is affirmed.

WCB CASE NO. 77-1035 SEPTEMBER 22, 1978

EDNA DEFENBAUGH, CLAIMANT
Bloom, Chaivoe, Ruben, et. al., Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the November 15, 1976 Determination Order whereby claimant was granted time loss benefits only.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated February 28, 1978, is affirmed.

WCB CASE NO. 77-4727 SEPTEMBER 22, 1978

VALENTINO R. DUPONT, CLAIMANT
Bodie, Minturn, VanVoorhees, Larson & Dixon, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the order of the Administrative Law Judge (ALJ) which directed the State Accident Insurance Fund to pay for Dr. Blumberg's treatment and also for claimant's transportation and subsistance in conjunction with obtaining such treatment and further directed the Fund to pay claimant an award of compensation equal to 192° for 60% unscheduled low back disability, this award to be paid in lieu of and not in addition to any previous awards received by claimant for

his January 1971 industrial injury. Claimant contends the ALJ erred in not reopening his claim for further medical care and for the payment of compensation for temporary total disability based upon a report from Dr. Henson dated February 15, 1978 or, in the alternative, contends that he is entitled to an award for permanent total disability.

Claimant is 43 years old, has eight years of formal schooling and obtained a GED while in the Navy. Later claimant took some courses in accounting at a junior college but did not complete his program. He has driven truck, done construction work and, after 1968, worked as a millwright and welder.

On January 8, 1971, while attempting to roll a log with a peavey, claimant suffered a compensable injury to his low back; his initial medical treatment was received from Dr. Chuinard who diagnosed an acute lumbosacral strain. Claimant continued to note low back symptoms and came under the care of Dr. Corrigan who treated claimant conservatively and later referred him to the Physical Rehabilitation Center. Dr. Mason found a chronic strain with no clinical evidence of a disc; he also was of the opinion that claimant had a conversion-reaction overlay.

The claimant was examined by the members of the Back Evaluation Clinic who recommended a rigid back brace be used but found no need for other orthopedic or neurological treatment. A psychological evaluation by Dr. May indicated claimant had intellectual resources of above average and possessed sufficient aptitude and ability to be retrained in several areas of employment. Claimant was recommended for vocational retraining in some field that would not place undue strain on his back and the claim was first closed on November 18, 1971 with an award of 48° for 15% unscheduled low back disability.

Claimant continued to receive medical care including pain medication. In February 1972 he reported back pain radiating into his left leg. Shortly thereafter claimant was involved in an automobile accident which caused him to sustain some facial injuries but did not seriously aggravate his back condition. The claim was reopened for further medical treatment and claimant was hospitalized for three weeks in June 1972. He was placed in traction and given novocaine injections, therapy and exercises. Although at first there was some improvement noted, later the back symptoms recurred and in December 1972 claimant underwent a two-level fusion, L4, S1. A psuedoarthrosis resulted and further fusion surgery was performed in September 1973.

Claimant continued to complain of pain in his back and in his lower right leg and further psuedoarthrosis was found

which caused additional surgery to be performed on October 18, 1974. After this surgery, the fusion appeared to be solid, although claimant did report continued low back pain and was hospitalized once again in February 1976 for removal of the rod inserted in his spine.

Claimant still complained of pain and Dr. Chuinard was concerned about claimant's intake of pain medication which he felt was excessive. He was unable to objectively understand the level of claimant's complaints of back discomfort in the light of the demonstration of the solid fusion. His recommendation that claimant be referred to the Disability Prevention Division was turned down. Later Dr. Chuinard recommended a referral to Dr. Seres' Northwest Pain Center where on June 7, 1977 it was noted that claimant's main concern was not his pain but his financial security. He was unable to visualize himself returning to work and the doctors felt it unlikely that he would return to meaningful employment. It was felt that claimant did have a residual capacity for some type of light employment, but was not motivated in that regard as he did not feel that any such work would provide him with financial security he required. The doctors at the Pain Center felt that there was too much drug dependence and suggested immediate claim closure, recommending claimant undergo no further treatment, be taken off the narcotic medication, discontinue the repeated back injections and be told that he had to deal with his problems on his own. Dr. Chuinard concurred with this assessment of claimant's condition and problems. He felt claimant did not have a level of low back pain which justified the continuation of codeine medication and he refused to continue to prescribe it.

Claimant's claim was closed again with an additional award of 32° for 10% unscheduled low back disability.

On February 15, 1978 claimant was interviewed by Dr. Henson of the Jefferson County Mental Health Division who felt claimant was in need of further medical care including psychiatric intervention in the form of anti-depressants and analgesics. He felt that therapeutic intervention for pain relief such as was provided at the Emanuel Hospital might also be helpful. He believed claimant's current emotional problems were related to his prolonged disability and not to the drug medication withdrawal. It was his opinion that claimant was not currently capable of either full time gainful employment or vocational rehabilitation.

Claimant had been referred to the Division of Vocational Rehabilitation in July 1971 while he was at the Physical Rehabilitation Center and was found to have had a vocational handicap and to be eligible for services. Originally, the vocational goal was to train claimant to be a medical laboratory technician, however, because of the car accident, he had to drop out of school, although prior to the accident he

had been making good progress. The schooling was not resumed because of claimant's subsequent medical treatment and surgeries. In August 1977 he was again referred to the Division of Vocational Rehabilitation and at this time it was hoped that claimant could be trained in business management. He was authorized to commence his retraining program in September 1977, however, he dropped out of his program in less than a month because of a fear of driving to and from Bend which was related to his prior automobile accident; also, fear of people, an uneasy feeling about his younger classmates and a lack of interest in the courses themselves. The DVR services were terminated on the basis of claimant's failure to cooperate.

Claimant has not looked for work, he has filed no job application but states he would like to return to school and learn business machine repair work. Claimant is able to speak English and Spanish and has served as an interpreter for Spanish speaking people in several court hearings.

The ALJ found that the medical evidence shows that a continuation of medical treatment for this claimant would be more harmful than helpful. Claimant has undergone treatment of one kind or another since January 1971 for his industrial injury and he has submitted to at least two unsuccessful surgeries. The 1974 surgery did result in a successful fusion and he has continued under medical care since that time. Dr. Chuinard, claimant's treating physician, has consistently been unable to find any objective proof that this continued treatment was necessary or even benefiting claimant; in fact, as a result of the treatment, claimant acquired a drug habit which most of the physicians feel has reached a dangerous stage and should be discontinued.

The ALJ further found that Dr. Henson did not review the very extensive medical records in this case; there is no showing that he was aware of the comments of Dr. Chuinard or Dr. Seres with regard to an instant discontinuation of certain treatment in this case. The ALJ concluded that the claim should not be reopened for the medical treatment suggested by Dr. Henson, agreeing with Dr. Seres that the claimant should get off the narcotic medication and further medical treatment and "deal with his problem on his own". He also found lack of motivation and compensation neurosis to be an important factor in his case.

The treatment provided claimant by Dr. Blumberg for right chest pain incurred while claimant was pulling a hose in May 1977 was found to be compensable by the ALJ because Dr. Blumberg related his treatment of claimant to the surgery of October 18, 1974; he also found that claimant's costs for transportation and subsistance required to obtain that medical treatment compensable and ordered the Fund to pay for the treatment, transportation and subsistance.

On the question of extent of permanent disability, the ALJ found claimant had previously been awarded a total of 80° for 25% of the maximum for unscheduled disability and that this did not adequately compensate claimant for his loss of wage earning capacity resulting from his industrial injury. He did not feel that claimant was permanently and totally disabled as claimant contended because claimant still has both the physical and mental abilities to regularly perform some form of gainful and suitable employment. However, there are many things that claimant was able to do prior to his injury that he now cannot do and, in spite of his lack of motivation and his failure to cooperate with the DVR, the ALJ concluded that claimant's permanent partial disability approximates an award of 192° for 60% of the maximum for his unscheduled disability.

The Board, on de novo review, agrees with the findings and conclusions reached by the ALJ; however, if the treatment recommended by Dr. Henson can be furnished to claimant under the provisions of ORS 656.245 the Board is of the opinion that such assistance should be furnished.

The Board also recommends that the Field Services Division of the Workers' Compensation Department make every possible attempt to assist claimant in either an on-the-job training program or job placement to enable claimant, if possible, to return to a larger segment of the labor market.

ORDER

The order of the ALJ, entered March 21, 1978, is affirmed.

The Board also directs the State Accident Insurance Fund to furnish to claimant any and all treatment recommended by Dr. Henson which can be provided under the provisions of ORS 656.245.

WCB CASE NO. 77-7680 SEPTEMBER 22, 1978

RICHARD FINCH, CLAIMANT
Merten & Saltveit, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the Administrative Law Judge's (ALJ) order which found that the State Accident Insurance Fund intended only to deny the reopening of claimant's claim for aggravation, not the compensability of the underlying psychological condition which claimant had and, therefore, ordered that the letter of denial, dated January 5, 1978, was

limited in scope solely to a denial of a current condition of aggravation and was now moot; the ALJ also affirmed a special Determination Order dated January 10, 1978.

Two issues were presented to the ALJ: (1) an appeal from the Fund's letter of denial, dated January 5, 1978, and (2) an appeal from the special Determination Order of January 10, 1978, actually from a Determination Order dated October 21, 1977 which awarded claimant no compensation for permanent partial disability as a result of his injury of August 23, 1974. Claimant alleges he has suffered permanent disability but stipulated that he is not asking for any current treatment and that he is now medically and vocationally stationary.

The ALJ found that the letter of denial was ambiguous based upon the second paragraph which stated that in the Fund's opinion claimant's psychological condition pre-existed his injury and was only minimally aggravated by his industrial injury; that the Fund thought that after providing claimant with two years of psycholgical counseling that it had fulfilled its responsibility, therefore, it denied claimant's claim to reopen on the basis of psycholgical aggravation. The ALJ did not know whether that should be interpreted as a denial of the overall compensability of claimant's psychological condition or only of an aggravation thereof and specifically denying responsibility for the current care and treatment recommended by Dr. Fleming.

The ALJ concluded that the Fund merely intended to deny a reopening of the claim for aggravation and because claimant is not asserting aggravation and has specifically rejected further treatment, the ALJ found the questions of timeliness, lack of notice to claimant's attorney and other such issues, together with the entire issue of aggravation became moot.

On the second issue of the adequacy of the special Determination Order, the ALJ, after listening to claimant testify concerning his constant back pain, pain in the right leg and limitations in lifting, concluded that such complaints were not substantiated by the medical reports and therefore affirmed the special Determination Order.

The Board, on de novo review, agrees with the ALJ's conclusion that it was not the intent of the Fund to deny the compensability of claimant's underlying psychological condition but only to deny reopening of claimant's claim for aggravation thereof. However, on the issue of extent of disability the Board finds that Dr. Wisdom, an orthopedic specialist, felt claimant had some permanent partial disability in his low back and was able to generally live with this within rather strict limits although he might still need some medical orthopedic management from time to time.

Claimant was examined by the physicians at the Orthopaedic Consultants who diagnosed chronic lumbar strain with

residuals and noted depressed left ankle jerk, cervical arthritis which was not industrially related and anxiety and depression, acute at times and chronic. They also found minor arthritic changes of the lumbar spine and expressed their opinion that the total loss of function with relation to the lower back alone would be described as being in the upper border of mild, which would be equal to 20%.

The Board also finds that claimant has been retrained by the Board to be a journalist, having been provided a two-year training course which resulted in an award of an associate degree to claimant. Claimant testified that it was necessary to have at least a degree in journalism in order to secure a job as a reporter, therefore, he had not been successful in seeking such employment. However, the Board feels that this retraining does reduce some of the loss of wage earning capacity which the medical evidence indicates approximates 20%.

The Board concludes that claimant would be adequately compensated for his loss of wage earning capacity resulting from his industrial injury of August 23, 1974 by an award of 32° for 10% unscheduled disability.

ORDER

The order of the ALJ, dated April 25, 1978, is modified.

Claimant is awarded 32° of a maximum of 320° for 10% unscheduled disability resulting from his industrial injury of August 23, 1974.

In all other respects the order of the ALJ is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for her services at Board review a sum equal to 25% of the compensation awarded claimant by this order, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-7114 SEPTEMBER 22, 1978

DAVID KOEHLER, CLAIMANT
John DeWenter, Claimant's Atty.
J. W. McCracken, Jr., Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

The claimant seeks review by the Board of the order of the Administrative Law Judge (ALJ) which approved the denial

dated November 9, 1977 of claimant's claim for a compensable injury.

Claimant is not certain of the exact date the injury happened but believes it was in late September, 1977. The alleged injury occurred when claimant fell while working on the glue line in a beam laminating plant. The claimant lost time from work and required medical treatment.

Claimant testified that a board 8 feet long was pushed against him causing him to trip on a protruding bolt, lose his balance and fall backwards onto a stack of beams 18 to 30 inches high. Claimant said that his lower back struck the edge of the stack. Co-workers observed the fall. One stated he thought it happened in early September and he described it as a good hard fall but didn't think any part of claimant's body had hit the edge of the beam; the other stated that it was in early September and he described the incident as claimant rolling but not jolting, with claimant's buttocks and back hitting the flat side rather than the edge of the beams.

Claimant testified he felt a pull but no pain in his lower back and he returned to work and finished the shift. At the end of the shift claimant was advised to file a claim but he did not do so because he felt he had only pulled a muscle.

Claimant continued to work and in the week following the incident he was transferred to the finishing department where he was required to bend over while running a sander; this caused a constant pull on his back. He advised his boss of the discomfort but still did not fill out a claim nor indicate when, where or how the back symptoms commenced. He continued to engage in strenuous repetitive work after the fall and, finally, on October 27, 1977 was seen by Dr. Thomas, a chiropractor, who diagnosed a severe strain to the supporting structures of the sacroiliac joint. Claimant continued to receive chiropractic treatment and on October 27, 1977 filed a claim. Claimant was not sure of the actual date and asked one of the bosses with whom he had talked on the date he had fallen if he recalled what day it was; the other man was not sure but told him not to worry about it. Claimant indicated on the Form 801 that his injury had occurred on October 5.

The boss with whom claimant talked had an office located on a 5 to 6 foot high platform which could be reached by a stairway. This boss and another witness observed claimant descending the stairway twice on October 27, 1977 placing his hands on the armrails and swinging to the floor with his feet in the air. Claimant did not appear to be in any discomfort although he had submitted a note from his doctor that day indicating that he was disabled. Claimant stated that the swinging down the stairs did not bother his back.

The ALJ found that the burden of proof was upon claimant

to prove by a preponderance of the evidence that the incident at work was a material contributing factor to his subsequent disability and his need for medical services. There was no certainty as to the date or time of the injury; the testimony of the two co-workers had placed it in early September but claimant stated it could have occurred on several different dates between August 29 and October 5. If it did actually occur in early September there was a lapse of almost two months before claimant first sought treatment from a doctor and during those two months claimant worked regularly at strenuous work. He was absent several times but the evidence indicates that the excuse claimant gave to his employer for these absences prior to seeing the doctor was that he had been sick.

The ALJ found that although claimant did promptly report the fall to one of his bosses it was not apparently a significant injury because he did not immediately file a claim nor seek medical attention but continued to do strenuous work. Claimant testified that he did complain of back disability to two bosses, however, they did not testify nor was it shown that they were unavailable. The ALJ felt that the fact that they were not called must be construed against claimant.

The employer questions whether a side injury could change location and later produce back symptoms. The ALJ felt that this possibly could occur, however, there was not expert medical proof in the record that it did occur in this particular case. Assuming that claimant did sustain a back injury, there was no expert medical proof connecting claimant's symptoms on October 27, 1977 with such an incident which had occurred one or two months earlier. Also, there were inconsistencies in the evidence regarding what happened after the fall.

The ALJ was persuaded that actually claimant had fallen on the flat surface of the beam and rolled over. He concluded that although claimant suffered a fall sometime in early September while at work, because almost two months elapsed between the date and the date he sought medical treatment and because during that period of time he worked regularly without complaint performing strenuous work the fall was not a material contributing factor to the condition for which claimant ultimately required medical services. He affirmed the denial.

The Board, on de novo review, finds that the incident was witnessed and that the evidence reveals that claimant did suffer a fall on the job. The only reason that the ALJ found the fall not to constitute a compensable injury was because, in his opinion, claimant had not sought medical treatment for almost two months after the alleged incident and he continued to perform strenuous work. This is not completely supported by the evidence in the record.

For a very short period of time claimant returned to

his work on the glue line, a relatively light job, however, a week following the incident he was transferred to the finishing department where he was engaged in very strenuous work which required constant bending over while running the sanders. This caused a pull on his back and he advised his boss of the discomfort. The fact that he did not file a claim has no bearing because the evidence indicates claimant had no idea what was causing his back symptoms at that time. Ultimately, the claimant was taken off the sanding job and put back on the glue line and his pain eased.

There is no dispute over the fact that claimant did fall while working; actual date claimant fell is not particularly material. The Board concludes that the claimant fell and as a result of that fall suffered some disability to his back, either temporary or permanent in nature, which ultimately required medical attention. In all probability, had claimant remained on the glue line the temporary disability would have resolved itself without any medical treatment, however, when he was transferred to the finishing department to do the job which placed a constant strain on his back, this exacerbated the initial injury and ultimately required medical attention.

The Board concludes that claimant did suffer a compensable injury when he fell and struck the stack of beams and that this was the onset of claimant's industrial injury, therefore, his claim should have been accepted and properly processed.

ORDER

The order of the ALJ, dated March 16, 1978, is reversed.

Claimant's claim is remanded to the employer, a self-insured, to be accepted and for the payment of compensation, as provided by law, commencing October 5, 1977 and until closed pursuant to the provisions of ORS 656.268.

Claimant's attorney is awarded as a reasonable attorney fee both before the ALJ at the hearing and at Board review, the sum of $800, payable by the employer.

WCB CASE NO. 77-328 SEPTEMBER 22, 1978

PATRICK MANDELL, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks review by the Board of the order of the Administrative Law Judge (ALJ) which affirmed the Determination Order dated September 9, 1976 awarding no compensation to claimant and the denial of claimant's aggravation claim by the Fund.

Claimant, a 44-year-old custodian, alleges that on July 1, 1976 he was cleaning a toilet with "power" cleaner and inhaled some of the fumes which caused him to cough, have difficulty breathing and resulted in a sore throat. The cleaning compound contained 76% hydrochloric acid which, when combined with water, will give off gaseous fumes.

Dr. Shultz diagnosed an allergic reaction to poison; Dr. Miller diagnosed bronchitis and he continued to treat claimant for a short period of time. No doctor found claimant to be medically stationary nor released him for regular work, nevertheless, a Determination Order dated September 9, 1976 closed claimant's claim with no award for compensation.

On September 15, 1976 claimant was hospitalized for shortness of breath and Dr. Mahoney, who is claimant's current treating physician, advised claimant's supervisor that claimant would be able to return to work on a full time basis by October 21; however, before that date, he placed the claimant on steroid medication and said he would require regular follow-up treatment for at least the next 6 to 8 months. Claimant's exposure to the fumes had resulted in significant irritation of the large and small airways of his lungs, with some reduction in his pulmonary function.

Claimant had worked half days from September 28 until October 4, 1976 when he stopped working upon the advice of Dr. Mahoney.

On October 29, 1976 claimant was exposed to smoke bombs which were placed in his home to rid the house of fleas; exposure to this chemical caused considerable tracheal bronchial irritation and again precipitated wheezing and shortness of breath. The steroids, Prednisone, had caused claimant to have a high level of glucose and triglycerides and he was hospitalized for control of diabetes aggravated by the administration of the Prednisone which Dr. Mahoney reduced from 40 mgs to 20 mgs per day. Dr. Mahoney stated claimant had noticed continued improvement.

In November Dr. Mahoney stated that claimant, on September 23, had had shortness of breath, scattered inspiratory and expiratory wheezing. His forced expiratory volume was 50% of normal. His opinion was that the reduction of claimant's pulmonary function was probably most related to the chemical solution at work. Claimant had become extremely sensitive to chemical irritants and he felt it was unlikely claimant would be able to return to any job which involved significant exposure to irritants which could cause reactive airway problems.

Claimant denied that he had ever had any exertional dyspnea or wheezing incidents prior to July 1, 1976.

The Fund, on December 19, 1976, denied claimant's aggravation claim which was based on Dr. Mahoney's October 5, 1976 report which had indicated claimant was again disabled.

Dr. Mahoney, when deposed, stated that, after examining and treating claimant, he felt the industrial injury triggered the symptoms claimant experienced.

The ALJ, after reviewing all of the evidence, found that claimant had a temporary exacerbation of an underlying problem; that once he had recovered from that problem he had no further pulmonary problems relating to the industrial injury. He concluded that the Determination Order should be affirmed and also that the denial by the Fund of claimant's claim of aggravation should be affirmed.

The Board, after de novo review, reverses the order of the ALJ. Claimant had not been found to be medically stationary by any doctor at the time his claim was closed on September 9, 1976. Dr. Mahoney definitely connected the claimant's pulmonary problems to his work and found that it was necessary to treat claimant with steroid medication, namely, Prednisone. Unfortunately, this type of treatment caused claimant to have a diabetes condition for which he had to be hospitalized.

The medical evidence supports a finding that but for the steroid treatment necessary to relieve claimant's pulmonary problems claimant would not have had diabetes, therefore, the two conditions constitute one continuous injury. The Board further finds that claimant is not medically stationary at the present time and he is entitled to receive compensation for temporary total disability from July 1, 1976, the date of his injury, and until his claim is closed pursuant to ORS 656.268. Having found that the claimant's claim remains in an open status, the question of aggravation becomes moot.

ORDER

The order of the ALJ, dated September 13, 1977, is reversed.

The Determination Order, dated September 9, 1976, is set aside and claimant's claim is remanded to the Fund for the payment of compensation as provided by law, from July 1, 1976 and until the claim is closed pursuant to provisions of ORS 656.268.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of all of the compensation, both for temporary total disability and permanent partial disability, which claimant may

receive as a result of this order, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-7054 SEPTEMBER 22, 1978

LINDA K. MISNER, CLAIMANT
Dye & Olson, Claimant's Attys.
Rankin, McMurry, Osburn, Gallagher & VavRosky, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks Board review of the order of the Administrative Law Judge (ALJ) which awarded claimant 22.5° for 15% loss of function of the right leg and 60° for 40% loss of function of the left leg; amended the Determination Order dated October 20, 1977 to read that claimant was entitled to compensation for temporary total disability inclusively from March 31, 1977 through April 12, 1977, less time worked, and temporary partial disability or temporary total disability, if the latter is in fact the case, less time worked, from April 13, 1977 through October 6, 1977; and stated that no offset of any kind could be made by the employer against the award of permanent partial disability granted to claimant.

Claimant was injured on March 15, 1977 when she bent down to plug in a cold food unit and dislocated her right knee. Approximately three or four years previously claimant had sustained an injury to her left knee while taking a physical education course in high school. Dr. Teal had performed surgery on this knee. On March 15, 1977 claimant received emergency treatment and lost no time from work until March 31. The dressings applied by Dr. Teal caused an allergy and the brace made the right knee worse. Claimant's right knee problems caused her to use her left knee and leg to a greater extent than normally and resulted in a second surgery being performed on the left knee on May 19, 1977 by Dr. Teal. The recovery was uneventful.

At first Dr. Teal reported that the left knee operation was not connected with the industrial injury to claimant's right knee and on August 2, 1977 he said claimant's right knee was medically stationary and the impairment was minimal to moderate. On October 6, 1977 Dr. Teal again examined claimant's left knee and, although he found the condition about the same, he stated that he wanted to amend his earlier opinion that claimant's left knee condition had nothing to do with the 1977 injury to the right knee. He stated that although claimant did have pre-existing problems with the left knee, because

she had to favor the right knee following the industrial injury the left knee problem became so severe that it required additional corrective surgery.

On September 6, 1977 the carrier had requested the Evaluation Division to issue a Determination Order relating only to the right knee injury, basing its request on Dr. Teal's letter of August 2, 1977. On October 20, 1977 a Determination Order awarded claimant compensation for time loss only and related the award solely to the right knee injury.

Dr. Teal rated the left knee impairment as moderate and on October 20, 1977 he reported that there was medical causation between the right knee injury of March 15, 1977 and claimant's left knee surgery and disability therefrom.

Based upon Dr. Teal's letter of October 20, 1977, Evaluation was requested to reconsider its Determination Order and evaluate both the left knee and the right knee; however, Evaluation did not have the authority to do this.

The ALJ found, based upon the loss of function, that the claimant had proven by a preponderance of the medical evidence, primarily Dr. Teal's report, that her right knee impairment represented a 15% loss of function of that leg. The ALJ found that the left knee impairment represented a 40% loss of function. He concluded that these impairments were legally and medically caused by her on-the-job injury of March 15, 1977.

The ALJ further found that the Determination Order of October 20, 1977 should be amended as set forth in the opening paragraph of this order. He found, in fact, that compensation for temporary disability had been paid through October 23, 1977 and that apparently claimant had returned to work at a different job on November 11, 1977.

The ALJ allowed no offset against permanent partial disability awards made by his order on account of any overpayments of compensation for temporary disability.

The Board, on de novo review, finds that the medical evidence does not support the awards allowed by the ALJ for claimant's scheduled disabilities. The Board concludes that claimant's loss of function of the right leg is in the mild category and that it is properly compensated for by an award for 10% loss function of the right leg. With respect to the loss of function of the left leg, the Board concludes that the claimant has 25% loss of function.

The ALJ's directive that no offset against the permanent partial disability awards may be made on account of any temporary disability overpayments is incorrect. The em-

ployer should be allowed to offset any overpayments of temporary total disability against payments of permanent partial disability awarded by the ALJ's order.

ORDER

The order of the ALJ, dated March 14, 1978, is modified.

Claimant is awarded 15° for 10% loss of function of the right leg and 37.5° for 25% loss of function of the left leg. These awards are in lieu of those granted by the ALJ.

The employer is entitled to offset against the awards made by the ALJ for permanent partial disability any overpayment of compensation which it has made for temporary disability.

In all other respects the ALJ's order is affirmed.

WCB CASE NO. 76-6523-E SEPTEMBER 22, 1978

HARLEY SHORT, CLAIMANT
David A. Vinson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Richard W. Butler, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which vacated the Board's Own Motion Order, dated October 26, 1976, which remanded claimant's claim for an industrial injury sustained on January 11, 1968 to claimant's employer and its carrier, Aetna Casualty and Surety Company, to be accepted for payment of compensation commencing March 12, 1976 and until closed pursuant to the provisions of ORS 656.278. The ALJ held that claimant had suffered a new injury on February 27, 1975 and that the responsibility therefor would be that of the carrier covering the risk at the time of that injury, namely, the State Accident Insurance Fund.

Claimant had sustained a compensable injury on January 11, 1968 when he was struck by a jitney and suffered hip and right leg injuries. At the time he was employed by Unisphere, Inc., whose carrier was Aetna. Dr. Moulter diagnosed an acute lumbosacral strain. The claim was closed by a Determination Order dated May 7, 1968 with an award equal to 10% of the maximum allowable for unscheduled disability.

In March 1969 claimant underwent back surgery and a second Determination Order of March 26, 1970 granted him ad-

ditional compensation equal to 15% of the maximum. In Oct= ober 1971 claimant's symptoms increased, to-wit: he had instability at the L4-5 interval. This was stabilized on November 12, 1971 and in October 1972 Dr. Degge reported that claimant's condition was stationary; his symptoms mild to moderate. He recommended claimant be retrained for employment which did not place heavy demands on his back. On November 7, 1972 a third Determination Order granted additional compensation equal to 10% of the maximum.

Claimant was seen by Dr. Degge on February 3, 1973 complaining of back pain radiating down the right leg and Dr. Degge recommended the claim be reopened for temporary treatment. This was done and on June 19, 1973 claimant's condition was again found to be stationary by Dr. Degge and the claim was closed on August 14, 1973 by the fourth Determination Order which awarded claimant no additional compensation for permanent partial disability. As a result of claimant's January 11, 1968 he now has received compensation equal to 35% of the maximum. The fourth Determination Order was appealed and, after a hearing, affirmed by an ALJ.

During 1973, claimant worked for a short period of time washing buses but quit because of pain in his right side and leg; he remained unemployed but did look for work.

On February 26, 1974 claimant was examined by Dr. McHolick who reported that claimant had a solid two-level fusion but he found some irritation of the right fifth lumbar nerve root with some paresthesias of his foot which have developed more recently. He thought the problem might be caused by a possible encroachment of the right fifth lumbar nerve by a facet fixing screw, a part of the March 1969 surgery.

On January 20, 1975 claimant went to work as a court security officer for the Lane County Sheriff's Office under the CETA program. This job involved escorting prisoners to court and sitting in the court room and doing other miscellaneous duties. Claimant missed no time from work although he stated that he continued to have back pain which was not severe.

On February 27, 1975 claimant slipped and fell while delivering a car to the shop. He landed on cement on his right buttocks and experienced pain down his back and right side which he described as feeling as though someone had stuck him with a needle. He saw Dr. Koch who told him to take a few days off. Claimant returned to work on March 3 but testified he seemed to get progressively worse and that sitting in the courtroom on the hard benches caused his back and leg pain to become more severe. He filed a claim which was accepted by the Fund as a non-disabling injury.

On April 16, 1975 claimant was examined at the Veteran's Administration Hospital for a Compensation Review. At that time he complained of pain in the mid-lumbar area radiating into the right buttocks, thigh, calf, foot and little toe. Dr. McVay diagnosed a post-op. spine fusion and laminectomy for degenerative disc disease with residual neuropathy; she stated she did not feel that claimant would show any improvement with regard to the neuropathy or symptoms which he presently had but that his condition was stationary.

The claimant testified that in December of 1975 the two toes on his right foot would become numb after sitting for 15 minutes and after walking. He stated that he had not had this symptom prior to the 1975 fall. He also said that after the fall he had a sharp pain which would hit his back and go out to his right side.

Claimant was seen by Dr. Fletchall in September 1975 who stated that claimant had related his difficulty to an accident on February 27, 1975. Dr. Fletchall felt the claim should be reopened and made an appointment for claimant to be examined by Dr. Robertson; he suggested claimant not work until after the examination. Claimant ceased work approximately September 3, 1975. Claimant was examined by Dr. Robertson on September 29, 1975 who diagnosed a mild radiculitis at the S-1 nerve root distribution. He stated claimant related his pain to an incident in February 1975. For reasons not pertinent to this case, Dr. Robertson discontinued treating claimant.

On November 12, 1975 Dr. Dunn, a neurologist, examined claimant and diagnosed a probable pseudoarthrosis of the L4-5 fusion and a possible S1 root compression, right. He recommended a myelogram which, when taken on December 16, 1975, was essentially normal.

On December 16, 1975 claimant was seen in consultation by Dr. Gilsdorf who reported that following claimant's second fusion claimant continued to experience intermittent low back pains with paresthesias in his right lower extremity and numbness in the right foot on prolonged sitting. He reported that claimant stated he had had no new symptoms since the February 1975 incident but that the old symptoms had increased in severity. Dr. Gilsdorf felt claimant continued to have symptoms of mechanical low back pain as well as radiculopathy which appeared to involve the S1 root on the right. This could be due either to encroachment in the canal of the bone proliferation or post-surgical, herniated disc fibrosis. Dr. Gilsdorf was of the opinion that the mechanical symptoms in all probability arose from the derangement at the upper level of the fusion mass but he was unable to absolutely rule out a pseudoarthrosis.

The Fund, on December 19, 1975, denied claimant's request to reopen his claim for the February 27, 1975 injury as a disabling injury on the basis that claimant's present condition for which he was being treated was not the result of his February 1975 injury but rather of a pre-existing condition on-going since January 1968.

On May 28, 1975 claimant participated in a physical agility test conducted by the Lane County Sheriff's Department which included pushing a vehicle, climbing an eight-foot wall, doing sit ups, running a 100-yard obstacle course and dragging a 170-pound dummy. Claimant passed the test but testified that the day after he took it he suffered with back pain.

After claimant's request to reopen had been denied he petitioned the Board to reopen his 1968 claim pursuant to ORS 656.278. This presented a question of whether or not claimant's present condition resulted from a new injury and was the responsibility of the Fund or from an aggravation of his 1968 injury and the responsibility of Aetna.

The Board referred the matter to its Hearings Division to take evidence on this issue and, after a hearing, an ALJ recommended that the Board remand claimant's claim for the January 11, 1968 injury. The ALJ at the same time issued an order upholding the Fund's denial which, upon appeal, was affirmed by the Board and is presently pending in the Oregon Court of Appeals.

After the issuance of the Board's Own Motion Order on October 26, 1976 the employer requested a hearing pursuant to ORS 656.278(3) and, after a hearing, the present ALJ issued his order with the findings and conclusions as set forth in the opening paragraph of this order.

The Board, on de novo review, has carefully reviewed the medical reports and finds that it is still in agreement with the findings and conclusions reached by the first ALJ, namely, that claimant did not sustain a new injury in February 1975 but that his present condition resulted from an aggravation of his January 11, 1968 industrial injury.

The medical reports indicate that claimant from the time of his 1968 injury continued to experience symptoms of low back pain with radiation into his lower right extremity. After the closure in 1973 but before going to work for Lane County claimant continued to experience symptoms and in 1974 was seen by Dr. McHolick who reported that claimant's symptoms involved low back pain and paresthesias of the right foot and he felt at that time that claimant's symptoms suggested encroachment of the nerve root, a diagnosis very similar to that of Dr. Gilsdorf which was made following the incident of February 1975.

Claimant had testified that he continued to experience these symptoms when he went to work for Lane County and he reported to Dr. Gilsdorf that prior to February 1975 he experienced both back pain and numbness of the right foot. The incident on February 27, 1975 resulted in claimant losing only three days of work and after he returned he continued working until September 1975. Between February and September 1975 claimant was able to successfully pass a rather strenuous agility test and apparently able to work, albeit he did work with pain.

In the present case before the Board, the ALJ concluded that responsibility could not be placed upon the employer unless there was competent evidence that a medical-causal relationship existed between the employment and the alleged disability. The possibility that there was such relationship was not enough; the medical evidence must show with reasonable certainty that they are related. He found that there was sufficient evidence to show the medical-causal relationship; however, the Board disagrees. The evidence indicates that the incident which occurred on February 27, 1975 did not contribute independently to claimant's injury but merely required continuing treatment which had commenced immediately following claimant's 1968 injury and represented a recurrence of the symptomatology resulting from that 1968 injury.

The Board concludes that the ALJ erred in vacating the Board's Own Motion Order dated October 26, 1976 and that said order should be reinstated in its entirety.

The Board finds that the present case is a perfect example of the "merry-go-round" effect produced by the provisions of ORS 656.278. After the expiration of a worker's aggravation rights the worker may apply to the Board for the exercise of its own motion jurisdiction granted by ORS 656.278 and if the worker is successful he cannot appeal even though the award may not be as generous as the worker anticipated. However, if the worker is granted some relief the employer or the Fund may request a hearing and, after this hearing, the ALJ will issue an order which may be appealed under the provisions of ORS 656.289 and 656.295.

That is exactly what happened in this case. The first ALJ found that claimant had aggravated his earlier industrial injury, the carrier liable for the risk at that time appealed and the second ALJ found that claimant had sustained a new injury in 1975. The end result of this entire matter is that claimant has had up to the present time three hearings before an ALJ and two before the Board and the matter is still not fully resolved inasmuch as the first ALJ's order sustaining the denial of the 1975 claim by the Fund is pending judicial review by the Oregon Court of Appeals.

In the Board's opinion the procedures provided by ORS 656.278 beg for prolonged and repetitive litigation which is neither in the interest of the worker, the employer or the public generally.

ORDER

The order of the ALJ, dated April 7, 1978, is reversed.

The Board's Own Motion Order, dated October 26, 1976, is reinstated in its entirety.

Claimant's attorney is awarded as a reasonable attorney's fee for prevailing at Board review a sum of $200, payable by the employer, Unisphere, Inc., and its carrier, Aetna Casualty and Surety Company.

WCB CASE NO. 76-4902 SEPTEMBER 22, 1978

CARL STARR, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order on Remand

On January 5, 1978 the Board entered its Order on Review in the above entitled matter which affirmed and adopted the Opinion and Order of the Administrative Law Judge, dated June 3, 1977, which had granted claimant 256° for 80% unscheduled permanent partial disability.

On January 27, 1978 claimant, by and through his attorney, petitioned the Oregon Court of Appeals for judicial review of the Board's order and, on September 8, 1978, the Board received from the Oregon Court of Appeals its Judgment and Mandate with instructions to enter an order in accordance with its decision and opinion granted on July 5, 1978, to-wit: that claimant is permanently and totally disabled.

The Board, in compliance with the Judgment and Mandate of the Oregon Court of Appeals, hereby finds claimant to be entitled to compensation for permanent total disability from and after the date of this order.

WCB CASE NO. 77-6373 SEPTEMBER 22, 1978

GENEVA TAYLOR, CLAIMANT
Dye & Olson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson, Moore and Phillips.

Claimant seeks review by the Board of the order of the Administrative Law Judge (ALJ) which directed the State Accident Insurance Fund to pay 10% penalties on all compensation for temporary total disability due and owing claimant from September 13, 1977 until November 22, 1977 but ruled that the Fund had properly paid claimant the compensation for temporary total disability and the penalties assessed by the order of an ALJ entered on September 13, 1977; however, he did direct the Fund to pay claimant's attorney a reasonable attorney's fee in the sum of $300 for unreasonable delay in making these payments for temporary total disability.

Claimant sustained a compensable injury on September 10, 1974 when she slipped and fell while working as a housekeeper for Sacred Heart General Hospital. The claim was first closed by a Determination Order dated July 17, 1975 whereby claimant was awarded 160° for 50% unscheduled low back disability; she was also awarded compensation for temporary total disability from September 12, 1974 through June 11, 1975. Claimant requested a hearing on the issues of extent of her permanent disability and her entitlement to time loss benefits for the worsening of her condition due to a broken foot she sustained on April 15, 1976.

After a hearing, ALJ Gayle Gemmell issued her Opinion and Order on September 13, 1977 which directed the Fund to reopen claimant's claim and to pay claimant compensation for temporary total disability from and after June 18, 1976, the date claimant entered the hospital for surgery, and until the claim was closed pursuant to ORS 656.268. This order also directed the Fund to pay the claimant additional compensation equal to 25% of all compensation due and owing to claimant from June 18, 1976 to the date of the ALJ's order (September 13, 1977).

The ALJ had held that Dr. Golden's letter of August 4, 1976 which informed the Fund of claimant's back surgery in June 1976 met the requirement for a valid aggravation claim and that inasmuch as the Fund received this report at least by October 22, 1976 and thereafter did nothing to process the claim as required by law that such conduct constituted unreasonable delay and resistance to the payment of compensation and entitled claimant to penalties and attorney fees.

The ALJ's order was affirmed by the Board on March 6, 1978.

The claimant now alleged that the Fund failed to pay her the full time loss benefits ordered by ALJ Gemmell and requested a hearing on that issue and, at the time of the hearing, raised a second issue, to-wit: the Fund's failure to make timely payment of this compensation to claimant.

The Fund, replying to claimant's contention that it did not comply with the terms of the ALJ's order of September 13, 1977, said that it had previously paid claimant compensation for permanent partial disability pursuant to the Determination Order of July 17, 1975 for a substantial portion of the period for which ALJ Gemmell had ordered the payment of temporary total disability benefits, namely, a sum equal to $5,497.01 and that it had, in effect, transferred that amount to be applied against the compensation for temporary total disability ordered by ALJ Gemmell leaving a balance of $524.19 due claimant for the period between June 18, 1976 and November 8, 1977. The Fund further offered evidence that on November 8, 1977 it issued its check in the amount of $524.19 and, therefore, claimant had been completely paid for all of the benefits, including penalties, which the previous order had directed it to pay claimant.

The present ALJ agreed that the Fund had complied with the previous order but he found that there had been a lapse of 56 days after the issuance of the ALJ's order of September 13, 1977 and the payment of the balance due claimant and this constituted unreasonable delay in the payment of compensation. He ordered the Fund to pay claimant compensation equal to 10% of all temporary total disability due and owing claimant from September 13, 1977 until November 22, 1977 and to pay claimant's attorney as a reasonable attorney's fee the sum of $300.

The Board, on de novo review, finds that the matter before it is purely legal; the facts are not in dispute. The question to be answered is whether or not a carrier may offset payments for permanent partial disability which it previously had been ordered to pay against an award of compensation for temporary total disability over the same period of time or a portion of that period of time.

The ALJ relied on the ruling in the case of Walter Reid, WCB Case No. 73-1324, to distinguish the present case from the holdings of Horn v. Timber Products, Inc., 12 Or App 365 and Wingfield v. National Biscuit Co., 8 Or App 408, stating that although Horn and Wingfield appear on the surface to establish that claimant is entitled to receive compensation for temporary total disability and permanent partial disability for the same period of time a careful analysis will reveal that the court actually did not make such a holding.

In Reid, the ALJ's opinion, which was affirmed by the Board on review, held that payment of permanent partial disability would not continue after claimant had been placed in a status of temporary total disability. The ALJ felt that this logic, i.e., that a worker is not entitled to receive compensation for permanent partial disability and temporary total disability for the same period of time, applies to past paid permanent partial disability benefits, especially where such benefits were not paid to claimant in a lump sum as was the case in Wingfield.

The majority of the Board agrees with the ALJ that when a claim is reopened for the payment of compensation for temporary total disability the claimant is not entitled to receive continuing payments for permanent partial disability which previously have been awarded by a Determination Order or any other order.

The purpose of the Workers' Compensation Act is to provide an injured worker with compensation for his industrial injury. During the period that the worker is temporarily but totally disabled obviously the worker can earn no wages; when the worker's condition becomes medically stationary if the evidence indicates that he or she cannot be completely returned to the condition he or she was in prior to the industrial injury then the worker is awarded compensation for permanent partial disability, i.e., an award to compensate for the loss of wage earning capacity suffered as a result of the industrial injury. Whether the worker is receiving temporary total disability benefits or permanent partial disability benefits the basis is still the same; he or she is being compensated for sustaining an industrial injury which may be either temporary or permanent in nature.

In this case claimant filed a claim for aggravation and for extent of disability. ALJ Gemmell found that the claim for aggravation should be accepted as of the date claimant was admitted for surgery; however, during a portion of this time claimant had been receiving payments for permanent partial disability as a result of an earlier Determination Order award. In such cases only a "paper" transaction is required. The payments for permanent partial disability are changed to reflect payments for temporary total disability; this results in no adverse affect on claimant's rights to receive compensation for an industrial injury; when claimant's condition again becomes stationary and his claim is closed claimant is entitled to receive a newly determined award for permanent partial disability.

There have been cases where, through an error or mistake on the part of the carrier, a worker has received compensation for both temporary total disability and permanent partial disability during the same period of time and the Board has consistently held that the worker is entitled to keep all

of the compensation received. However, in this case, no error or mistake was made by the carrier; the ALJ, in her order of September 13, 1977, did not provide for an offset nor did she prohibit it.

The majority of the Board concludes that under the circumstances of this case, the Fund properly applied the compensation for permanent partial disability which it had previously paid claimant pursuant to the Determination Order of July 17, 1975 against the compensation for temporary total disability ordered by ALJ Gemmell's order of September 13, 1977 and that the order of the ALJ presently before it should be affirmed in its entirety.

ORDER

The order of the ALJ, dated April 12, 1978, is affirmed.

Board Member Kenneth V. Phillips dissents as follows:

I find the instant case to be squarely within the holdings of Horn v. Timber Products, Inc., 12 OR App 365, 507 P2d 36 (1973).

Claimant was awarded $11,200 for loss of earning capacity. Loss of earning capacity under Oregon Law is not related to time loss.

Claimant was awarded by ALJ Gemmell's order time loss from June 18, 1976 until such time as the aggravation claim was closed as provided by statute.

Those are two different and distinct awards for two separate purposes.

In the absence of a specific order by the ALJ authorizing suspension of permanent partial disability payments for the period during which temporary total disability payments were ordered the carrier had no authority to unilaterally take the offset and was wrong in doing so.

I would respectfully dissent from the majority opinion and order temporary total disability payments to begin as did the order of September 13, 1977 and order payment of penalties against the entire temporary total disability payments due and owing as did the order of September 13, 1977, thus reversing the order of April 12, 1978.

Respectfully submitted,

Kenneth V. Phillips, Board Member

WCB CASE NO. 76=5286 SEPTEMBER 22, 1978

CLAIR VANDEHEY, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
Don G. Swink, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury to his right shoulder and neck on September 29, 1969 when he fell approximately four feet. After conservative treatment, his claim was closed in November 1970 with no award for permanent disability.

Beginning in March 1973 claimant was seen by numerous doctors, both for physical problems and psychological problems; the latter arising out of his physical disability. Referee Fitzgerald, on March 24, 1977, ordered claimant's claim reopened for active psychological care by Dr. Hickman.

Dr. Hickman is presently working with claimant and his vocational rehabilitation counselor with the goal of helping claimant become self-supporting in his own retail shoe business. Claimant has 10 years experience in this type of work on a part-time basis but Dr. Hickman feels that one more year of care and rehabilitation efforts is needed.

Dr. Baskin, on August 3, 1978, indicated that he found no objective physical findings of impairment.

The carrier, on August 29, 1978, requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted time loss benefits from January 4, 1977 through August 29, 1978, the date the carrier requested the claim be closed.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from January 4, 1977 through August 29, 1978, less time worked.

Claimant's attorney has already been awarded a reasonable attorney's fee by the Opinion and Order of March 24, 1977.

WCB CASE NO. 77-5039 SEPTEMBER 22, 1978

ROY WILLIAMS, CLAIMANT
Fulop & Gross, Claimant's Attys.
Breathouwer & Gilman, Defense Attys.
Request for Review by Employer
Cross-appeal by Claimant

Reviewed by Board Members Wilson and Moore.

The employer seeks Board review of the Administrative Law Judge's (ALJ) order which granted claimant compensation equal to 32° for 10% unscheduled low back disability. The employer contends that claimant has suffered no permanent disability as a result of his injury; claimant contends that the award is inadequate.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated March 29, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $200, payable by the carrier.

WCB CASE NO. 77-3213 SEPTEMBER 28, 1978

ARLIE J. BAKER, CLAIMANT
A. C. Roll, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the Fund's denial of her claim for an aggravation and dismissed her request for hearing.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated April 25, 1978, is affirmed.

WCB CASE NO. 78-780 SEPTEMBER 28, 1978

NANCY BORDEN, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted her compensation equal to 45° for 30% loss of the left leg.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated April 28, 1978, is affirmed.

WCB CASE NO. 77-7822 SEPTEMBER 28, 1978

JOHN DILWORTH, CLAIMANT
D. Richard Hammersley, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order Denying Motion

On September 5, 1978 the State Accident Insurance Fund filed a request for Board review of the Administrative Law Judge's (ALJ) order entered in the above entitled matter.

On September 8, the Fund filed a motion requesting the Board to summarily reverse the ALJ's order of August 25, 1978 in its entirety and remand the case to the Hearings Division with directions to grant to the Fund a change of ALJs before whom the Fund could present evidence in support of its position and who was not so personally prejudiced against the Fund's attorney as to prevent the giving of a hearing.

OAR 436-83-325 provides for disqualification of an ALJ by the filing of an affidavit of prejudice with the Presiding ALJ before the hearing is held. In this case the hearing has been held and a request for review of the ALJ's Opinion and Order entered as a result thereof has been filed by the Fund. Furthermore, the Board finds nothing in the affidavit in support of the Fund's motion which convinces it that it should summarily reverse the ALJ's Opinion and Order.

Therefore, the Board concludes that as soon as it receives the file in the above entitled matter the Board review should be processed in accordance with the provisions of ORS 656.295. Should the Board find that the ALJ has improperly, incompletely or otherwise insufficiently developed or heard the case it may remand it to the Hearings Division to be retried; otherwise, an Order on Review should be entered.

Furthermore, the motion of the State Accident Insurance Fund dated September 8, 1978 should be denied in its entirety.

IT IS SO ORDERED.

WCB CASE NO. 77-6942 SEPTEMBER 28, 1978

MARY L. FERGUSON (JORDAN), CLAIMANT
Evohl F. Malagon, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer seeks Board review of the Administrative Law Judge's (ALJ) order which granted claimant compensation equal to 64° for 20% unscheduled low back disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated April 26, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $250, payable by the carrier.

SAIF CLAIM NO. GD 66126 SEPTEMBER 28, 1978

BARBARA FOSS, CLAIMANT
John M. Parkhurst, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination on
Reconsideration

On July 19, 1978 the Board issued its Own Motion Determination in the above entitled matter granting claimant compensation for temporary total disability from July 1, 1976 through April 25, 1978, less time worked.

On August 13, 1978 claimant, by and through her attorney, requested the Board to reconsider this Own Motion Determination on the basis that claimant's treating physician, Dr. Cherry, did not concur with the opinion of the Orthopaedic Consultants but was of the opinion that claimant was still not medically stationary and able to return to work.

The Board now is asked to reconsider whether or not claimant's condition is presently medically stationary and, if so, the extent to which she has suffered permanent partial disability as a result of the industrial injury to her back and the psychological disability arising therefrom. It is also requested that claimant's attorney be awarded a reasonable attorney's fee.

The Board, having reconsidered all of the medical evidence in the file, concludes that there is no justification for finding that claimant's condition was not stationary on April 25, 1978, the date claimant was examined by the Orthopaedic Consultants who felt claimant had been adequately compensated for her unscheduled disability by the awards previously received which equaled 35% loss of function of an arm for such unscheduled disability.

The Board finds nothing in the record to indicate that claimant's attorney had actively and meaningfully participated in behalf of claimant's request for own motion relief prior to the time the Own Motion Determination was entered on July 19, 1978, therefore, until it is so advised by claimant's counsel that he did perform such services, the Board finds that he is not entitled to an attorney's fee.

ORDER

The motion for reconsideration of the Board's Own Motion Determination entered on July 19, 1978 in the above entitled matter is hereby denied.

WCB CASE NO. 76-5851 — SEPTEMBER 28, 1978
WCB CASE NO. 77-2452

LONNIE FRASURE, CLAIMANT
Yturri, Rose & Burnham, Claimant's Attys.
Lindsay, Nahstoll, Hart, Neil & Weigler, Defense Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Request for Review by Agripac
Cross-request by Claimant

Reviewed by Board Members Wilson and Moore.

Leatherby Insurance Company requested Board review of the Administrative Law Judge's (ALJ) order which found claimant's post-September 13, 1975 disabling low back condition was a new injury, not an aggravation of the pre-existing injury; found his claim was not barred as against its insured, Agripac, Inc., for untimely notice of claim pursuant to ORS 656.265, and awarded claimant 240° for 75% unscheduled disability.

Claimant filed a cross-request of that portion of the ALJ's order which found the employer, Permaneer Corporation, and its carrier, Chubb-Pacific Indemnity Group, also were not responsible for his claim.

There are two claims involved in this matter.

Claimant appealed the denial by Leatherby on March 28, 1977 of responsibility of claimant's post-September 13, 1975 disabling low back condition. Leatherby contends claimant had sustained an aggravation of a prior industrial injury rather than a new injury (WCB Case No. 77-2452).

Claimant also appealed the adequacy of the Determination Order dated July 8, 1976 relating to the accepted compensable injury claimant sustained to his low back and right leg on January 13, 1972 while employed by Permaneer (WCB Case No. 76-5851) which granted claimant additional compensation for temporary total disability but no award for permanent partial disability in addition to that previously granted by Determination Orders dated December 4, 1972 and June 5, 1974, to-wit: 15° for 10% loss of the right leg and 96° for 30% unscheduled low back disability.

During 1975 claimant was accepted as a vocational rehabilitation client for retraining purposes and attended school as a machinist. He completed this course on May 9, 1975 and on June 10 claimant was placed in an on-the-job training program as a machinist apprentice, working in Corvallis. His duties involved custom work, not production work. Claimant was also involved in general cleaning up

and shipping and receiving which he classified as moderate work rather than light or heavy. The evidence indicates his work performance and progress in his training program both were satisfactory. At times his back was symptomatic but he lost no time from training or work. He was terminated from his machinist job because of economic conditions.

In September 1975 claimant was employed as a laborer by Agripac, also located in Corvallis. On his first day at work on September 13, 1975 his job duties involved shoveling corn from underneath the machinery (fast repetitive work which involved lifting, bending and stooping). Claimant's back became symptomatic; he experienced severe back pain which radiated down both legs; it came on gradually without any specific traumatic event. The following work day, Monday, September 15, 1975, claimant was placed on production work sorting beets which involved prolonged standing. Claimant reported to his supervisor at Agripac that his back was hurting because of the shoveling activities and he requested lighter type work. No light work was available and claimant terminated his job before the close of the second day.

On September 15, claimant sought further medical treatment because of his chronic back condition. X-rays revealed nothing extra-ordinary and Dr. Lohr diagnosed an acute lumbar back strain with a history of post-operative laminectomy. He referred claimant to Dr. Tsai who diagnosed severe lumbar strain with bilateral L5 nerve root irritation, more marked on the right side. Conservative treatment failed to improve claimant's condition and on February 25, 1976 a second low back surgery was performed.

Chubb-Pacific reopened claimant's original claim because of his post-September 13, 1975 disabling low back condition and commenced paying time loss benefits and medical benefits. It processed the claim to closure, treating claimant's claim as a valid aggravation claim because of the medical information submitted by Drs. Lohr and Tsai after the September 13, 1975 incident. The claim for the January 13, 1972 injury was closed for a third time on July 8, 1976 with an award of compensation for temporary total disability only.

The ALJ found that claimant had not been symptom free since his industrial injury of January 13, 1972, that he had experienced chronic back pain, limitation of motion of his back and radiating pain down and throughout his right leg since that date. Claimant has experienced substantially the same symtomatologies since his work activities at Agripac after September 13, 1975 except he has an additional symptom, i.e., a radiating pain down and throughout his left leg.

The ALJ found that since the January 13, 1972 injury claimant had experienced residual physical limitations on activities which require lifting, bending, stooping and so forth. His residual physical limitations since his work activities at Agripac after September 13, 1975 were substantially similar except, according to claimant, they are now more severe.

The ALJ found that the medical evidence established that claimant's work activities at Agripac on September 13, 1975 were a material contributing factor to claimant's need for further medical treatment, including his low back surgery. Dr. Tsai stated that within all reasonable medical probability claimant would not have needed the surgery in 1976 and the preceeding medical care in 1975 had it not been for claimant's work activity on September 13, 1975 at Agripac.

Claimant did not file a claim against Agripac until February 9, 1977, however, the ALJ found that claimant's failure to file a formal claim earlier was because he was being paid workers' compensation benefits by Chubb-Pacific on the basis of an aggravation claim; also claimant did not feel that he had received a new injury at Agripac. Claimant had never been completely symptom free since his original injury and no traumatic event had occurred on that first day at Agripac; his back simply became more and more painful as he was doing his shoveling.

Although Chubb-Pacific had never formally denied claimant's aggravation claim and, in fact, had processed the claim to closure, nevertheless, it requested an order pursuant to ORS 656.307 designating a paying agent. No order was issued.

The ALJ found claimant, who was 36 years old, has a formal 10th grade education but other than his vocational training as a machinist apprentice has no other formal education or training. His work experience has been restricted to jobs which required physical or manual labor and the physical limitations placed upon claimant by his physicians indicate that in all probability he will not be able to return to that type of work. At the present time claimant is operating a gas station and motel complex in Ontario, Oregon; his duties involve relatively light work.

The ALJ found that claimant's present income was substantially less than the income he earned at his prior occupation or machinist apprentice. He found that claimant was credible and concluded that claimant's post-September 13, 1975 disabling low back condition was compensable as a new injury. The shoveling activities in which claimant engaged on that day severely increased his low back condition and Drs. Gallo, Lohr and Tsai all causally related claimant's

post-September 13, 1975 disabling back condition to these activities and concur that they were material factors to claimant's subsequent disabling low back condition which required surgery.

The ALJ concluded that the claimant's claim for a new injury was not barred by his untimely filing of his claim pursuant to ORS 656.265(1). Although the claim was not timely filed, Agripac was advised of when, where and how claimant's injury occurred. The evidence indicates that claimant advised his supervisor that his back hurt him because of the shoveling activities and that as such pain precluded continuing the job; therefore, he asked for lighter work. Not being able to obtain it, he terminated. This was sufficient to remove the bar to claimant's claim for a new injury [ORS 656.265(4)(a)].

With respect to the adequacy of the Determination Order dated July 8, 1976 the ALJ concluded although the evidence does not support a finding of permanent total disability, it does indicate that claimant has had a substantial reduction in his potential wage earning capacity. Claimant's physical condition affects his ability to perform heavy work in the general labor market which requires repetitive lifting, bending, stooping, etc. Also, claimant's ability to return to his vocational retraining occupation, i.e., as a machinist apprentice, has been substantially impaired.

The ALJ concluded, after considering claimant's physical impairment and residuals, his age, education, training and experience, that claimant was entitled to an award of compensation equal to 240° for 75% of the maximum allowable for unscheduled disability.

He also ordered Leatherby to make such necessary monetary adjustments with Chubb-Pacific to reimburse it for any compensation paid claimant, or on claimant's behalf, regarding his post-September 13, 1975 disabling low back condition, including time loss benefits, medical benefits and any awards of compensation made under the Determination Orders in WCB Case No. 76-5851 and ordered Leatherby to pay claimant's attorney a reasonable attorney's fee in the amount of $1,500.

The Board, on de novo review, agrees with the findings and conclusions of the ALJ with the exception of the award of 240°, an increase of 144° over the previous award granted claimant. The Board finds that the medical evidence does not support such an award. Claimant has lost a substantial amount of his wage earning capacity, however, he is young and even with his physical limitations there are many jobs which he can be trained to do that are within his physical capabilities.

The Board also finds that although the third Determination Order issued on July 8, 1976 refers to claimant's injury of January 13, 1972, nevertheless, based upon the findings and conclusions of the ALJ that claimant suffered a new injury on September 13, 1975, the date of the third Determination Order should be considered as the commencement of claimant's aggravation rights relating to his September 13, 1975 injury.

The Board feels that an award equal to 208°, which represents 65% of the maximum would adequately compensate claimant for his loss of wage earning capacity. The Board strongly recommends that claimant avail himself of assistance in job placement by the Field Services Division of the Workers' Compensation Department.

ORDER

The order of the ALJ, dated March 10, 1978, is modified.

The date of the third Determination Order which is July 8, 1976 shall be deemed to be the commencement date of claimant's aggravation rights insofar as they relate to his September 13, 1976 industrial injury.

Claimant is awarded 208° of a maximum of 320° for unscheduled low back disability. This is in lieu of the award granted by the ALJ in his order which in all other respects is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review $250 payable by Agripac, Inc., and its carrier, Leatherby Insurance Company.

WCB CASE NO. 77-5717 SEPTEMBER 28, 1978

SANTOS C. FUENTES, CLAIMANT
Welch, Bruun, Green & Caruso, Claimant's Attys.
Gearin, Landis & Aebi, Defense Attys.
Order of Dismissal

A request for review, having been duly filed with the Workers' 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 Administrative Law Judge is final by operation of law.

WCB CASE NO. 77-1096 SEPTEMBER 28, 1978

ETHEL V. GEE, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Cheney & Kelley, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted her an additional award of compensation equal to 64° for a total award of 192° for 60% unscheduled low back disability. Claimant contends that she is permanently and totally disabled.

The Board, after de novo review, affirms and adopts the Opinion and Orders of the ALJ, copies of which are attached hereto and, by this reference, are made a part hereof.

ORDER

The orders of the ALJ, dated March 22, 1978 and May 4, 1978, are affirmed.

CLAIM NO. B53-144364 SEPTEMBER 28, 1978

LARRY GEHRKE, CLAIMANT
Own Motion Determination

Claimant suffered an industrial injury to his low back on June 23, 1970. Initially it was processed as a "no time loss, no disability claim" and closed as such on July 7, 1970. It was later reopened and the first closure pursuant to ORS 656.268 was made by a Determination Order dated July 27, 1972. This order had been issued after claimant, in 1971, had had a lumbar laminectomy performed by Dr. Raaf at the L5-S1 level. He then returned to work and the aforesaid Determination Order granted claimant an award of compensation equal to 10% unscheduled low back disability.

Claimant continued to do well until February 1974, receiving conservative treatment. Acupuncture was tried after a laminectomy and fusion had been considered. The acupuncture resolved, to some extent, claimant's symptoms and the case was closed on July 31, 1975 with an additional award of compensation equal to 10% unscheduled low back disability.

In August 1977 claimant had a minor exacerbation

and in November of the same year he had a more severe exacerbation. Again he was given conservative treatment and acupuncture which improved his condition. Claimant again aggravated in February 1978 and Dr. Raaf performed a repeat laminectomy of L5-S1 on March 1, 1978 while Dr. Rankin fused L5-S1 surgically. The claimant made a good recovery and was felt to be essentially asymptomatic by May 1978. The x-rays showed a solid fusion and claimant was allowed to return to light work at that time.

On August 22, 1978 both Dr. Rankin and Dr. Raaf examined claimant for a closing evaluation. Claimant is a printer and apparently is doing well at his present job but he has been advised to limit his lifting to occasional maximum of 75 pounds and repetitive lifting of 25 pounds. Claimant has valid concerns regarding his ability to obtain employment in another shop.

The Evaluation Division of the Workers' Compensation Board was requested to make a determination of claimant's present condition. They recommended to the Board that claimant be given no additional award for permanent partial disability, finding that claimant's wage earning capacity had not altered since July 31, 1975, the date of the last award and arrangement of compensation received by claimant for this industrial injury. It did recommend that claimant be awarded compensation for temporary total disability from February 21, 1978 through May 15, 1978 and temporary partial disability from May 16, 1978 through August 22, 1978.

The Board finds that claimant is precluded from doing practically any type of work except light work and that his main occupation as a printer involves the need to do heavy work. Therefore, the Board concludes that claimant has suffered a greater loss of wage earning capacity than the previous awards which total 20% of the maximum allowable by statute for unscheduled disability represent.

The Board concludes that, after considering claimant's age, education and work background, he is entitled to an additional award of 15% for a total of 35% of the maximum to adequately compensate him for his loss of wage earning capacity.

ORDER

Claimant is awarded compensation for temporary total disability from February 21, 1978 through May 15, 1978 and for temporary partial disability from May 16, 1978 through August 22, 1978. Claimant is also granted an award equal to 48° for 15% unscheduled low back disability.

These awards are in addition to previous awards received by claimant for his industrial injury of June 23, 1970.

SAIF CLAIM NO. HC 259000 SEPTEMBER 28, 1978

BARBARA J. GLENN, CLAIMANT
Buss, Leichner & Barker, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant, by and through her attorney, on June 14, 1978, requested the Board to exercise its own motion authority pursuant to ORS 656.278 and provide claimant with additional compensation for temporary and permanent disability based upon the findings of Dr. Robert E. Rinehart whose medical reports were enclosed.

On June 26 the Fund was advised of the claimant's request and asked to state its position within 20 days thereafter. On the following day the Fund replied that, after reviewing claimant's file, it was felt that additional medical opinion should be obtained and arrangements were made for claimant to be examined by the Orthopaedic Consultants in Portland.

On July 20, 1978 claimant was examined by Drs. Jones, Clark and Gallow, at the Orthopaedic Consultants. It was their opinion that from an orthopedic and neurologic point of view claimant's condition is stationary and the claim should remain closed and no further definite treatment was recommended. However, the doctor strongly recommended that claimant have a psychiatric examination at this time to determine whether the marked hysterical component is related to the accident. The doctors found no evidence of progression of objectivity nor any objective findings to substantiate the subjective symptoms; nor was there any evidence of any objective neuropathy or radiculopathy.

On September 6, 1978 the Fund furnished the Board a copy of the report from the Orthopaedic Consultants and stated that it felt claimant was entitled to medical treatment pursuant to the provisions of ORS 656.245 but that there was no justification for reopening the claim.

The Board, after considering carefully the reports from Dr. Rinehart and the report from the physicians at Orthopaedic Consultants, concludes that the medical treatment recommended could be furnished claimant under the provisions of ORS 656.245; however, the Board feels that the Fund also should provide for the psychiatric examination recommended by the physicians at Orthopaedic Consultants.

Claimant's attorney should be granted as a reasonable attorney's fee a sum equal to 25% of the costs of the

medical care and treatment received by claimant pursuant to ORS 656.245, payable out of said compensation as paid, not to exceed $500.

IT IS SO ORDERED.

CLAIM NO. 145-71-041 SEPTEMBER 28, 1978

LARRY D. LEETCH, CLAIMANT
Own Motion Determination

Claimant suffered a compensable injury on February 18, 1971 when he was struck from behind by a sheet of veneer while working for Georgia-Pacific Corporation. After treatment, claimant's claim was closed on March 31, 1971 with time loss benefits only.

Dr. Parshall, on August 31, 1977, asked permission to perform surgery and the claim was reopened. Claimant underwent the recommended surgery on October 3, 1977. He recovered uneventfully and was released to regular work by Dr. Parshall on October 24, 1977. The doctor found his condition stationary on October 25, 1977.

On September 5, 1978 the carrier requested a determination of claimant's present condition. The Evaluation Division of the Workers' Compensation Department recommended that claimant just be granted temporary total disability compensation from October 3, 1977 through October 23, 1977.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from October 3, 1977 through October 23, 1977.

WCB CASE NO. 76-6184 SEPTEMBER 28, 1978

MAX LeGORE, CLAIMANT
Gooding and Susak, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the Fund's denial of his claim.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated March 1, 1978, is affirmed.

WCB CASE NO. 77-4400 SEPTEMBER 28, 1978

JOHN McINTOSH, CLAIMANT
Richard O. Nesting, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which found he was not entitled to additional temporary total disability compensation, penalties or attorney fees.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated March 31, 1978, is affirmed.

WCB CASE NO. 77-7055 SEPTEMBER 28, 1978

ALLEN J. MUSARACA, CLAIMANT
Rick W. Roll, Claimant's Atty.
Cavanaugh & Pearce, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the Fund's denial of his claim.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated April 28, 1978, is affirmed.

WCB CASE NO. 77-3292 SEPTEMBER 28, 1978

PATRICIA M. OLSON, CLAIMANT
Richardson, Murphy & Nelson, Claimant's Attys.
Rankin, McMurry, Osburn & Gallagher,
Defense Attys.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Request for Review by National Appliance

Reviewed by Board Members Wilson and Phillips.

National Appliance Company, by and through its carrier, United Pacific Reliance Insurance Company, seeks Board review of the Administrative Law Judge's (ALJ) order which remanded claimant's aggravation claim to it for acceptance and payment of compensation to which she is entitled.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof. However, in line 7, paragraph 3, page 2, "1975" should be "1974".

The Board did not consider any of the material contained in the brief of United Pacific Reliance Insurance Company which was not received by the ALJ at the hearing.

ORDER

The order of the ALJ, dated January 11, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $50, payable by National Appliance Company, by and through its carrier, United Pacific Reliance Insurance Company.

WCB CASE NO. 77-1556 SEPTEMBER 28, 1978

AUDREY E. PARKER, CLAIMANT
Ackerman & DeWenter, Claimant's Attys.
J. W. McCracken, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which found that her husband was entitled to compensation equal to 240° for 75% unscheduled low back disability as a result of his industrial injury. Claimant contends that her husband, at the time of his death from an unrelated condition, was permanently and totally disabled.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, as amended by a later order, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated January 26, 1978, as amended by a February 3, 1978 order, is affirmed.

WCB CASE NO. 77-2129 SEPTEMBER 28, 1978

THOMAS L. TAYLOR, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the March 28, 1977 Determination Order, as amended on May 10, 1977, whereby he was granted compensation equal to 20% loss of function of the right leg and 5% loss of function of the left leg. Claimant contends he is permanently and totally disabled.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated January 6, 1978, is affirmed.

WCB CASE NO. 77-390 SEPTEMBER 29, 1978

ELWOOD BARDWELL, CLAIMANT
Gildea & McGavic, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted him compensation equal to 112° for unscheduled mid and low back disability, 60° for loss of the right leg and 30° for loss of the left leg. Claimant contends that he is permanently and totally disabled.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated May 18, 1978, is affirmed.

SAIF CLAIM NO. A 779323 SEPTEMBER 29, 1978

CHARLES E. BREWSTER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury on February 5, 1960 while in the employ of Safeway Pre-Pakt Produce Department. The claim was accepted and was closed by an order of the State Industrial Accident Commission dated May 25, 1965 which granted claimant an award for permanent partial disability equivalent to 10% loss function of the right arm. Claimant's aggravation rights have expired.

On January 27, 1975 the State Accident Insurance Fund reopened claimant's claim and paid time loss from November 25, 1974 to January 21, 1975. The claim was closed, based upon Dr. Hopkins report, and claimant was granted an increase in permanent partial disability of 13% loss of function of the right arm.

On August 30, 1978 the Fund was advised by Dr. Hopkins that claimant underwent an olecranon bursectomy, right elbow at Emanuel Hospital on August 17, 1978 and would be seen for suture removal on August 31, at which time Dr. Hopkins would decide when it would be possible for claimant to return to work.

Subsequently, claimant telephoned the Fund requesting that his claim be reopened due to the surgery. The Fund forwarded to the Board all of the pertinent material from the claim file relating to the May 5, 1969 injury and all subsequent medicals. The Fund stated that it would not oppose reopening of the claim if the Board found that the medical justified such reopening.

The Board, after considering the latest medicals which clearly relate claimant's present condition to his industrial injury of 1960 and indicate that it has worsened since the last award or arrangement of compensation, concludes that claimant's claim for his February 5, 1960 industrial injury should be remanded to the State Accident Insurance Fund for acceptance and for the payment of compensation, as provided by law, commencing August 17, 1978 and until the claim is again closed pursuant to the provisions of ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 77-7071 SEPTEMBER 29, 1978
WCB CASE NO. 78-1914

FRANK W. CALLENDER, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Newhouse, Foss, Whitty & Roess, Defense Attys.
Collins, Velure & Heysell, Defense Attys.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which remanded claimant's aggravation claim to it for acceptance and payment of compensation to which he is entitled.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated May 16, 1978, is affirmed.

SAIF CLAIM NO. A 67413 SEPTEMBER 29, 1978

ARTHUR CHAFFIN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Jaqua & Wheatley, Defense Attys.
Own Motion Order

On May 23, 1977 claimant requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claims for injuries sustained in 1958 and in 1964. Medical documentation in support of the request was furnished to the Board.

On May 31, 1977 the State Accident Insurance Fund responded to claimant's request, stating there were two carriers involved in claimant's claim: (1) the State Industrial Accident Commission (predecessor to the Fund), and (2) the Georgia-Pacific Corporation. The Fund requested a hearing to resolve the responsibility for further medical care and treatment and the Board referred the matter to the Hearings Division with instructions to set for a hearing to determine the merits of claimant's request for own motion relief.

By an Own Motion Order, dated June 9, 1977, the matter was referred with instructions for the Referee, upon conclusion of the hearing, to cause a transcript of the proceedings to be made and submitted to the Board together with his recommendation.

On December 8, 1977 a hearing was held before Administrative Law Judge (ALJ) J. Wallace Fitzgerald who found that claimant had commenced working for Coos Bay Lumber Company (which subsequently became Georgia-Pacific Corporation) in 1975 and had worked continuously for it until March 1976. He found that claimant had suffered a low back injury on June 23, 1958 for which he filed a claim which was closed a month later with no award for permanent disability. The claim was later reopened in November 1958 and claimant underwent two lower back fusions, one in 1959, the other in 1960. Claimant's claim was again closed in March 1962 with a total award of compensation equal to 80% loss function of an arm for unscheduled disability.

In 1962 claimant returned to work and in January of the following year he reported an injury to his groin caused by driving his hyster into a hole. Chronic strain of the groin was diagnosed, however, the ALJ was unable to determine whether this injury was treated as a separate industrial injury.

In June 1964 claimant suffered an industrial injury to his neck while driving the hyster; he was treated by Dr. Smith whose opinion, in September 1966, was that claimant's neck disability was equivalent to 35% loss function of an arm for unscheduled disability.

In 1974 claimant again reported recurrence of neck pain headaches which Dr. Smith stated were probably due to cervical spine dysfunction. In 1975 claimant underwent a cervical myelogram and some consideration was given to surgery, however, it was not performed as the myelogram was interpreted as negative. In November 1975 claimant reported a recent back injury which occurred while he was opening a lid at work. This was diagnosed as a low back strain.

Early in 1976 claimant fell off a ladder at home and at about the same time he had increased lower back pains after stepping off a catwalk while at work.

The ALJ found that in addition to claimant's injuries involving his low back and neck he had had a large number of other serious medical problems, e.g., surgery to remove growth on his vocal cords, hernia repair, and various stomach problems. Claimant also had been hospitalized for a nervous breakdown and he had been afflicted with genital-urinary bleeding, anemia, ulcers and prostate problems.

Following the 1964 injury to his neck, claimant returned to his hyster job at Georgia-Pacific. He reported that the bouncing and rough riding involved with driving the hyster aggravated both his low back and his neck condition and he was transferred to a job operating a Raimann machine and later assigned an even lighter job,i.e, cutting strips for the machine. After this job was eventually eliminated claimant was given other tasks to do and during the last three to four years of his employment he worked in the company's glue making department. He quit on March 24, 1976. Claimant testified that he was still putting in a full time shift but would be completely exhausted at the end of the day. He further testified that his back continued to worsen up to the time he quit.

Claimant stated that since 1962 he has had some eight to ten episodes at home and at work which hurt his back and caused increased symptoms; these include the falling from the ladder and stepping off the catwalk. The fall from the ladder occurred about the time he quit his job at Georgia-Pacific.

The ALJ found that on June 8, 1977 Mr. McCallister, corporate manager, Georgia-Pacific Workers' Compensation Claims, advised the Board that at the time of claimant's 1964 injury the company was operating as a rejected employer subject to the Employer's Liability Act and was not covered by

the Workers' Compensation Law. This letter had not been received by the Board at the time it issued its Own Motion Order of June 9, 1977 which referred the matter for hearing. At the hearing the attorney for Georgia-Pacific moved that the matter be dismissed on the grounds that the Board did not have jurisdiction over Georgia-Pacific at the time of the 1964 injury. The ALJ did not feel that he had the authority to rule on the Board's jurisdiction and denied the motion; however, in his recommendation to the Board, he expressed his opinion that the Board would not have had own motion jurisdiction over Georgia-Pacific under these facts.

When the Workers' Compensation Board was created the Legislature provided that the Board would exercise own motion jurisdiction pursuant to ORS 656.278 and have all the powers, duties and functions formerly imposed upon the State Industrial Accident Commission with regard to claims. An employer who was not subject to the Act prior to 1965 would not have been subject to the powers of the State Industrial Accident Commission and claims against an employer who had rejected the Act would not have been administered by that Commission and cannot now be administered by the Board.

With regard to the claimant's claim for his cervical problem, the ALJ was unable to find sufficient evidence of a worsening of that condition attributable to the 1964 injury. In September 1966 Dr. Smith had rated claimant's neck disability as equivalent to 35% unscheduled disability and there is no real evidence that the neck condition has permanently worsened since that time. Claimant admitted that his neck condition was not the reason he retired from work and he states that although he has been seeing a chiropractor for his neck condition about five or six times a year, he has been doing this ever since 1964.

The ALJ found that there was little doubt that claimant's low back condition had worsened appreciably since he was awarded compensation equal to 80% for unscheduled disability in March 1962, however, in light of claimant's intervening accident history, he found it hard to attribute that worsening to the 1958 industrial injury to the extent that the Fund should be charged with the responsibility for the present condition.

The ALJ recommended that the Board not reopen claimant's claim for the cervical injury sustained in 1964 because it would appear that the Board had no jurisdiction against Georgia-Pacific in this matter and also there was not sufficient evidence of a compensable aggravation of that condition.

The ALJ further recommended the Board not reopen claimant's claim for a low back injury suffered in 1958 for the reason that the evidence was not sufficient to justify

a finding that the present condition of claimant's back is attributable to the industrial injury of 1958.

The Board, after reviewing the transcript and studying the ALJ's recommendations, accepts the recommendations made by the ALJ which were based upon an excellent resume of claimant's industrial and non-industrial injuries and the medical histories thereof and also his well-explained interpretation of the jurisdictional question.

ORDER

The request by the claimant on May 23, 1977 for the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claims for injuries sustained in 1958 and in 1964 is hereby denied.

WCB CASE NO. 78-365 SEPTEMBER 29, 1978

EDGAR FOSTER, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
Roger Warren, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer seeks Board review of the Administrative Law Judge's (ALJ) order which granted claimant compensation equal to 112° for 35% unscheduled permanent partial disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof. Although filing of briefs is not mandatory, the Board appreciates and finds helpful the parties' analysis and viewpoints on the relativity of the evidence to the issues and would urge the submission of briefs, particularly when there is an absence of written closing arguments.

ORDER

The order of the ALJ, dated April 12, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $50, payable by the carrier.

WCB CASE NO. 77-5261 SEPTEMBER 29, 1978

MELVIN GROTH, CLAIMANT
Alan M. Lee, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted him compensation equal to 160° for 50% unscheduled back and neck disability. Claimant contends that he is permanently and totally disabled.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated April 14, 1978, is affirmed.

WCB CASE NO. 77-5778 SEPTEMBER 29, 1978
WCB CASE NO. 77-6664

ROBERT D. HAGEN, CLAIMANT
Hoffman, Morris, Van Rysselberghe & Guistina, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith, Defense Attys.
SAIF, Legal Services, Defense Atty.
Amended Order on Review

On August 4, 1978 the Board entered its Order on Review which did not provide for an award of an attorney's fee to claimant's attorney for his services at Board review. Inasmuch as the request for review was made by the State Accident Insurance Fund and the Fund failed to prevail the claimant's attorney is entitled, pursuant to the provisions of ORS 656.382(2), to a reasonable attorney's fee payable by the Fund.

In this case, however, the main issue was which carrier was responsible for claimant's claim. No briefs were filed by any of the parties and claimant was listed only as an interested party.

On August 14, 1978 claimant's attorney submitted an affidavit stating he had spent some time reviewing the record and the transcript of proceedings and performed legal research and had prepared a brief although said brief was not filed with the

Board. The affiant requested a reasonable fee for his services at Board review.

Because of the provisions of ORS 656.382(2), the Board concludes that its Order on Review should be amended by inserting after the first paragraph in the "Order" portion of its Order on Review the following:

> "Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum of $50, payable by the State Accident Insurance Fund."

In all other respects the Order on Review entered on August 4, 1978 should be ratified and reaffirmed.

IT IS SO ORDERED.

WCB CASE NO. 77-6838 SEPTEMBER 29, 1978

ANNA JOHNSTON, CLAIMANT
Dye & Olson, Claimant's Attys.
Stanley Jones, Defense Atty.
Order of Abatement

On August 31, 1978 the Board entered its Order on Review in the above entitled matter which reversed the Opinion and Order of the Administrative Law Judge (ALJ) dated February 27, 1978 but awarded claimant compensation from the date of her claim for a low back condition, namely Dr. Landry's letter of September 30, 1977, and until the claim was properly accepted or denied by the employer, awarded claimant an additional compensation as a penalty equal to 15% of the amount due claimant for the period set forth above and granted claimant's attorney $350 as a reasonable attorney's fee.

On September 18, 1978 claimant's attorney had written a letter requesting the Board to reconsider its order, stating that the specific grounds for the request for reconsideration relate to the award of a reasonable attorney's fee and contending that the attorney's fee awarded by the Board's order should be in addition to the amount awarded originally by the ALJ. For reasons unknown, this letter was not received by the Board until September 28. On that same date a letter was received from the employer's attorney opposing claimant's request; also, a letter was received from the adjuster for the carrier stating that the carrier requested reconsideration of the Board's order insofar as it related to awarding claimant additional compensation as a penalty.

The statutory period within which to file an appeal from the Board's Order on Review will expire on September 30, therefore, the Board concludes that it would be appropriate to hold its Order on Review, dated August 31, 1978 in abeyance for such period of time as necessary to enable the Board to give proper consideration to both requests for reconsideration.

ORDER

The Order on Review entered in the above entitled matter on August 31, 1977 is hereby abated until such time as the Board can enter an order either reaffirming or amending said Order on Review.

This order shall have the effect of tolling the provision of ORS 656.295(8).

SAIF CLAIM NO. HC 89232 SEPTEMBER 29, 1978

E. TED MICHAUD, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On August 31, 1978 the Board received from claimant a request that it exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an industrial injury sustained on August 14, 1967.

Earlier, the claimant had requested the Fund to reopen his claim and the Fund responded, stating that the claim initially had been accepted for low back condition but there was no evidence in claimant's file that his neck or left arm was injured in his industrial accident. The Fund advised claimant that if he was not satisfied with its decision he could write to the Board and request own motion relief; claimant did.

The Fund furnished the Board all of the medical records and, based upon full consideration of the medical evidence, the Board concludes that there is no justification for reopening claimant's claim for his present conditions which consist of pain in his neck, left shoulder and left arm. Therefore, the Board concludes that the claimant's request for own motion relief which it received on August 31, 1978 should be denied.

IT IS SO ORDERED.

WCB CASE NO. 77=5983 SEPTEMBER 29, 1978

EVRISTE NACOSTE, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which granted claimant housekeeping services under ORS 656.245 in conformance with the recommendations of claimant's treating physician.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof. The Board does not understand the Fund's insistence that yard care should never be considered a housekeeping duty. There is no evidence in this record that claimant ever asked to be reimbursed for his yard care expenses.

ORDER

The order of the ALJ, dated March 24, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $300, payable by the Fund.

SAIF CLAIM NO. C 177316 SEPTEMBER 29, 1978
SAIF CLAIM NO. C 149013

ELBERT PIETROK, CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Order

On April 27, 1978 the Board entered its Own Motion Order in the above entitled matter which remanded claimant's claim for an industrial injury suffered on March 24, 1969 to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on February 20, 1978, the date claimant was admitted to the hospital for the surgery performed by Dr. Poulson, and until the claim was closed pursuant to ORS 656.278.

The Board has now been advised by Dr. Poulson that claimant has been unable to work since February 3, 1978, the

date a myelogram was performed. Therefore, the Own Motion Order should be amended by deleting from the fourth line of the second paragraph on page two of said order the following:

"February 20, 1978, the date claimant was admitted to the hospital for surgery performed by Dr. Poulson",

and substituting therefor,

"February 3, 1973, the date Dr. Poulson performed a myelogram".

In all other respects the Own Motion Order dated April 27, 1978 should be affirmed.

IT IS SO ORDERED.

WCB CASE NO. 77-7120 SEPTEMBER 29, 1978

EARL A. REYNOLDS, CLAIMANT
Rask & Hefferin, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the Fund's denial of his claim.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated May 17, 1978, is affirmed.

SAIF CLAIM NO. KC 223350 SEPTEMBER 29, 1978

THEODORE D. RODRIGUEZ, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury to his right knee on December 8, 1969. By a Determination Order, dated March 18, 1970, he was granted time loss benefits to December 15, 1969.

Claimant's claim was reopened for surgery by Drs. Smith and Easton in June 1970 and closed on March 2, 1971 with time loss benefits from June 18, 1970 to November 18, 1970 and 23° for partial loss of the right leg.

Claimant saw Dr. Donald Smith in August 1974 who, in July 1975, recommended further surgery. The claim was reopened on August 28, 1975, the date claimant entered the hospital and after claimant's aggravation rights had expired. Claimant was released for work by Dr. Smith on February 9, 1976 and found to be medically stationary in April 1976.

Claimant's claim was closed by an Own Motion Determination, dated June 29, 1976, which granted claimant additional time loss benefits and permanent partial disability equal to 20% loss of the right leg.

Surgery was again performed on April 4, 1978 and claimant was found to be stationary on June 27, 1978. An Own Motion Order, dated July 19, 1978, ordered the claim accepted for time loss commencing February 1, 1978 and payable until the claim was closed pursuant to ORS 656. 278.

On August 24, 1978 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted temporary total disability benefits from February 1, 1978 through June 27, 1978, less time worked, and an additional award of compensation equal to 10% loss function of the right leg.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from February 1, 1978 through June 27, 1978, less time worked, and an additional award of compensation equal to 10% of the right leg. These awards are in addition to the awards claimant has previously been granted.

WCB CASE NO. 77-5834 SEPTEMBER 29, 1978

ALOHA ROSENBERG, CLAIMANT
Richardson, Murphy & Nelson,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the Fund's denial of her claim.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated May 1, 1978, is affirmed.

WCB CASE NO. 77-4718 SEPTEMBER 29, 1978

THOMAS M. SEEFELD, CLAIMANT
Jules Drabkin, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the carrier's denial of his claim.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated April 17, 1978, is affirmed.

WCB CASE NO. 77-6924 SEPTEMBER 29, 1978

STEVE SNELL, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which remanded claimant's aggravation claim to it for acceptance and payment of compensation to which he is entitled.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated May 25, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $250, payable by the Fund.

WCB CASE NO. 77-5000 SEPTEMBER 29, 1978

ALICE SNIDER, CLAIMANT
Sid Brockley, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted her compensation equal to 48° for 15% unscheduled back disability. Claimant contends this award is inadequate.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated April 25, 1978, is affirmed.

WCB CASE NO. 77-6372 SEPTEMBER 29, 1978

RALPH C. STATHEM, CLAIMANT
Doblie, Bischoff & Murray,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which granted claimant compensation equal to 320° for 100% unscheduled permanent partial disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated January 27, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $400, payable by the Fund.

WCB CASE NO. 77-6346 SEPTEMBER 29, 1978
WCB CASE NO. 77-7990

HAROLD TIETZ, CLAIMANT
Kirkpatrick & Howe, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund seeks Board review of that portion of the Administrative Law Judge's (ALJ) order which remanded claimant's low back claim to it for acceptance and payment of compensation.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated April 20, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $400, payable by the Fund.

SAIF CLAIM NO. EC 324243 OCTOBER 6, 1978

JEANNE BEATTY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On July 5, 1978 the State Accident Insurance Fund received a request from claimant to reopen her claim; attached to the claimant's letter were several medical reports from Dr. Post.

The Fund forwarded the request and the attached medical reports to the Board, stating that if the Board found the medical evidence justified reopening claimant's claim, pursuant to the Board's own motion authority, the Fund would not oppose it.

Claimant was injured on September 2, 1971 while working at Columbia Manor Nursing Home. She filed a claim which was accepted and initially closed by a Determination Order, dated June 28, 1972; claimant's aggravation rights have expired.

According to Dr. Post's report of April 12, 1978, claimant since her original injury and the surgery which was necessitated thereby has continued to exhibit limitations of motion of extension of the left elbow and to have chronic pain without specific re-injury or aggravation. Dr. Post, in his report, stated he planned to re-explore the lateral elbow and radial-humeral joint and requested that the claim be reopened.

The Board, after reviewing the medicals attached to claimant's request, concludes that claimant's claim for the industrial injury suffered on September 2, 1971 should be reopened from the date claimant was admitted to Providence Hospital for the surgery performed by Dr. Post and Dr. Geist and should receive compensation, as provided by law, from that date and until her claim is again closed pursuant to the provisions of ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 78-103 OCTOBER 6, 1978

EARLENE HUFF, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
G. Howard Cliff, Defense Atty.
Order of Dismissal

A request for review, having been duly filed with the Workers' 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 Administrative Law Judge is final by operation of law.

WCB CASE NO. 77-1688 OCTOBER 6, 1978

VIOLA E. JOHNSON, CLAIMANT
Carney, Probst, Levak & Cornelius,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which granted claimant compensation equal to 112° for 35% unscheduled back disability. The Fund contends that this award is excessive.

Claimant, a 44-year-old dumper operator, sustained a back strain on August 7, 1976 when she was knocked off a platform, landing on the ground. She was seen by Dr. Benoit that same day.

Dr. Koch found claimant medically stationary on September 14, 1976 and released her for work. Claimant's claim was closed on October 20, 1976 with an award of compensation for temporary total disability from August 7, 1976 through September 14, 1976.

Claimant was hospitalized in December 1976; Dr. Hockey diagnosed lumbosacral strain. He felt claimant's complaints were out of proportion to any objective findings and believed that there was some functional overlay.

On February 15, 1977 the Fund issued its denial of claimant's claim for aggravation.

Dr. Lechnyr, a psychiatric social worker/psychotherapist, reported, on February 17, 1977, that claimant should be treated for organic pain; that she had no emotional overlay relating to her low back pain.

Dr. Hockey, on April 21, 1977 felt claimant's problem was muscular in nature and could find very little wrong with her. On November 14, 1977 Dr. Karasek found L5 radiculopathy on the left which he related to her industrial injury. Dr. Robertson, on December 2, 1977, stated that a myelogram performed earlier was normal but claimant would continue to have low back problems. He felt she would not be able to return to her former job at the cannery and would be limited in her activities.

The ALJ found, based upon claimant's testimony, that her back hurts and pain radiates into her arms and leg whenever she does very much work. She is unable to sit or stand for a prolonged period of time and she takes pain medication. Claimant's work experience has been in jobs that required at least a moderate amount of physical effort and she is unable to return to her former job or to any work with which she was familiar. However, she had been able to handle a tallying job at the cannery for one season (summer of 1977) and it is possible claimant could do similar work somewhere else in the future.

The ALJ noted that claimant is capable of being retrained quite successfully and, based upon her age, education, work experience, level of physical impairment and probable retrainability, concluded she had suffered a loss of wage earning capacity equal to 112° for 35%. The ALJ discounted the fact that most of claimant's work had been of a seasonal nature and determined her loss of wage earning capacity, based upon her ability to work in the broad field of general industrial occupations. Ford v. SAIF, 7 Or App 549.

The Board, after de novo review, feels that the award of the ALJ was somewhat high. Claimant is a middle-aged woman who, although precluded from her former occupations, still is able to perform a variety of jobs for which she can be suitably retrained. The medical evidence does support an award equal to 80° for 25% unscheduled disability to adequately compensate claimant for her condition.

ORDER

The order of the ALJ, dated March 30, 1978, is modified.

Claimant is hereby granted compensation equal to 80° for 25% unscheduled back disability. This award is in lieu of the award granted by the ALJ in his order, which in all other respects is affirmed.

WCB CASE NO. 77-7311 OCTOBER 6, 1978

JAMES T. JONES, JR., CLAIMANT
Gary K. Jensen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross-request by the SAIF

Reviewed by Board Members Wilson, Moore and Phillips.

Claimant seeks Board review of that portion of the order of the Administrative Law Judge (ALJ) which ordered the claim remanded to the State Accident Insurance Fund for the payment of certain monies to the court for disbursement in accordance with the court's order.

The State Accident Insurance Fund cross-requests Board review of the entire order of the ALJ.

Claimant sustained a compensable industrial injury on December 1, 1976 and as a result thereof was entitled to receive compensation for temporary total disability in the amount of $337.62 every two weeks commencing December 1, 1976 and continuing until his claim was closed pursuant to ORS 656.268.

On October 11, 1977 the Fund was served with a process issued out of the circuit court for the County of Washington, State of Oregon, in the form of an order directing "defendant's employer" to withhold each and every month from the disposable earnings due or to become due claimant 25% thereof to be applied in a manner specified in said order and further ordered that "defendant's employer" transmit the monies to the DHR-Support Unit in Salem, Oregon. On the same date the Fund commenced withholding from the temporary total disability due claimant in the amount equal to 25% thereof and which amounts to $84.40 bi-weekly. These amounts withheld, however, were not paid as the court had directed by its order but were set aside in an "escrow" account.

The Fund contends that it is not claimant's employer and that the money payable from the Fund to claimant cannot be classified as "earnings". It further contends that regardless of how the money due claimant from the Fund is classified, such money is not subject to the process of the circuit court and its order is void by reason of ORS 656.234 which provides that compensation and the right to receive it are exempt from seizure on execution, attachment or garnishment or by the process of any court.

The claimant contends that the withholding of 25% of the compensation due him from the Fund is contrary to the provisions of ORS 656.234; that the court order served upon the

Fund has no validity as it was directed to the "defendant's employer" and neither the definition of employer [ORS 656.005(16)] nor the test for determining an employer as defined in Oremus v. The Oregonian Publishing Co., 11 Or App 444, fit the Fund.

Claimant also attempts to distinguish the instant case from the court's ruling in Calvin v. Calvin, 6 Or App 572, where claimant's permanent partial disability award was garnished, stating that in his case the compensation was for temporary total disability.

The matter was submitted on the record and no testimony was taken.

The ALJ found the court order was valid although it was directed to "defendant's employer" because the Fund is authorized to insure a contributing employer against liability which such employer may have on account of an industrial injury.

The ALJ further found that although earnings and wages might not always be synonomous, in the present case the Fund did not contend that the "term" used was confusing and misleading and did not offer it as excuse for non-compliance with a court order.

The contention that the ALJ should not follow the ruling in Calvin (supra.) in the present case because in Calvin the award was for permanent partial disability and here it was for temporary total disability was not persuasive. Compensation is compensation whether it be for permanent partial disability or for temporary total disability. In Calvin it was argued that the award was not subject to garnishment because of the provisions of ORS 656.234 and the court held that when that section was read along with the preamble to the workers' compensation law (ORS 656.004) it did not make payment exclusive to the workman. The ALJ also made additional distinctions between the instant case and Calvin, however, such distinctions merely support the ALJ's initial conclusions.

On the question of penalties and attorney's fees the Fund contends that its conduct in making itself a stakeholder in the face of legislative doubt as to its responsibility as to when the money should be paid was not so unreasonable as to justify the assessment of penalties and an award of attorney's fees. In support of its contention the Fund cites Norgard v. Rawlinson's New System Laundry, 30 Or App 399, in which the issue was whether or not an insurer acted unreasonably under ORS 656.268(8) by refusing to pay compensation consisting of medical expenses pending review. The refusal was based on the Board's interpretation of ORS 656.005(9) and ORS 656.313(1) that medical expenses were not compensation and the court held that the insurer's reliance on the Board's decision was not unreasonable as long as the insurer had a legitimate doubt from

a legal standpoint of its liability. In the instant case, however, the ALJ seemed to feel that the Fund's actions had been unreasonable because it did not rely on any appellate authority as was the case in Norgard. Therefore, he awarded attorney's fees and assessed penalties.

The ALJ concluded, based upon Calvin, that the monies in issue here should be paid as directed by the court.

The Board, on de novo review, agrees with the ALJ's conclusion that the Fund should comply with the order of the circuit court which directed "defendant's employer" to withhold from the compensation due claimant for temporary total disability an amount equal to 25% of said amount and pay such amounts as directed by the court.

The Board believes that this matter should have been handled exclusively in the circuit court, however, because the withholding of compensation due claimant raises a question concerning a claim, claimant did have the right, pursuant to ORS 656.283(1), to request a hearing on the propriety of such withholding. Claimant chose to use this approach.

The Board finds that the Fund was faced with a dilemma because of the provisions of ORS 656.262 and 656.313 which would appear to be in direct conflict with the court order directing the Fund, as the insurer for the employer, to withhold a certain amount of compensation due from it to claimant. If it failed to comply with the court's order it faced possible contempt; if it complied with the order it would violate certain provisions of the Workers' Compensation Act. Therefore, the Board concludes that the Fund should not have been assessed penalties and directed to pay a fee to claimant's attorney under the provisions of ORS 656.262(8) and 656.382. The actions of the Fund were certainly not unreasonable; no matter what action it took it would be a violation of either an order or a statute.

ORDER

The order of the ALJ, dated April 24, 1978, is amended.

Those portions of the order directing the Fund to pay claimant compensation equal to 10% for temporary total disability compensation withheld from him from October 11, 1977 to the date of the ALJ's order and further directing it to pay claimant's attorney the sum of $500 as a reasonable attorney's fee shall be deleted from the ALJ's order which in all other respects is affirmed.

SAIF CLAIM NO. A 689013 OCTOBER 6, 1978

ALVIE E. LEACH, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order Referring for Hearing

On June 27, 1978 claimant requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim No A 689013. Claimant was unable to furnish the Board the date of the industrial injury but he did attach to his request medical reports from Dr. Cronk which indicated that claimant's need for a laminectomy performed on January 19, 1978 was related to an earlier industrial injury.

The Board advised the State Accident Insurance Fund of the request for own motion relief and enclosed the reports from Dr. Cronk. On August 1, 1978 the Fund replied, stating that the claim records for claimant's industrial injury had been destroyed and it was, at the present time, investigating the matter in an attempt to rebuild the file and determine the Fund's responsibility, if any.

On September 14, 1977 the Fund informed the Board that it was providing the Board with copies of all of the medical information it had been able to locate regarding claimant's claim No. A 689013. Many of the records have been destroyed and some of the doctors involved are now deceased, including the original treating doctor. The Fund stated, after reviewing the medical information it had, especially Dr. Tsai's report of January 9, 1969, that it appeared claimant's injury was to the thoracic spine and not the low back. Additionally, Dr. Tsai's history describes a low back injury to claimant while lifting a car battery three or four years prior to 1969. Based on this information, the Fund contended that it had no responsibility for claimant's low back condition and that the claim should not be reopened.

The Board, after reviewing the medical information furnished to it by the Fund, concludes that there is no way of determining, based on such documentation, how the industrial injury occurred or what part of the body was injured. It is the Board's opinion that perhaps such information can be obtained if this matter is heard by an ALJ. Therefore, this matter is referred to its Hearings Division to be set for a hearing to receive evidence of the parties concerned and, hopefully, reconstruct the events surrounding the original injury and all subsequent incidents which may have occurred since the initial injury which might have an affect upon claimant's present condition.

Upon conclusion of the hearing, the ALJ shall cause a

transcript of the proceeding to be prepared and shall submit to the Board a copy thereof together with the ALJ's recommendation on the merits of claimant's request for own motion relief.

WCB CASE NO. 77-6556 OCTOBER 6, 1978

CORAL MONROE, CLAIMANT
Allen, Stortz, Barlow, Fox & Susee,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the order of the Administrative Law Judge (ALJ) which affirmed the Determination Order dated August 25, 1976 awarding claimant compensation for temporary total disability only.

Claimant went to work for the employer on June 6, 1972; her job consisted of cutting turkey tails which moved by on a conveyor belt at a level slightly above claimant's head. On August 15, 1972 claimant slipped on a piece of turkey which was lying on the floor and fell. Claimant continued to work until October 5, 1972.

On January 31, 1973 claimant sought medical care for the first time; she was examined by Dr. Warner, a chiropractic physician, who diagnosed subluxations of the thoracic and lower cervical spine with secondary functional disturbances. From that time forward claimant went through the process of many diagnoses, evaluations, and surgical procedures.

The first medical doctor who treated claimant was Dr. Spady who felt that claimant had had a neck problem after her injury but he questioned the relationship between the injury as she described it and her subsequent neck trouble inasmuch as there had been a six-month interval between the industrial injury and the first treatment by Dr. Warner. On March 12, 1974 Dr. Buza, after examining claimant on consultation to Dr. Spady, found musculo-ligamentous strain, cervical area. He recommended hospitalization for traction, massage and so forth. On March 27 a myelogram of the lumbar and dorsal spine was normal.

On April 4, 1974 Dr. Buza and Dr. Spady performed an anterior cervical fusion after finding claimant had a marked narrowing of the disc space between C5 and C6 with large spur formation.

On October 10, 1974 Dr. Spady found claimant to be medically stationary; she still had considerable complaints regarding both the low back and the cervical areas but he knew of no particular treatment that would be effective in relieving claimant's symptoms. He recommended claim closure. However, the claim was not closed apparently because claimant's treating doctor decided not to release her to work.

On March 14, 1975 Dr. Chester, who had been treating claimant since November 1974, agreed with Dr. Buza that the diagnosis was that of chronic lumbosacral strain with a probable degenerative intervertebral disc disease. He felt there was no need for further specific medical treatment and that the claim could be closed. His report indicated that he was under the impression that Dr. Buza was claimant's primary treating physician. Dr. Buza, on April 6, 1975, had recommended that claimant get another opinion from the University of Oregon Medical School; her examinations had been normal except for the cervical muscle spasm, but because of claimant's continuing complaints he had made such recommendation.

Claimant continued to be treated by Dr. Buza who, on February 24, 1976, stated he felt claimant's condition was stable.

On March 15, 1976 Dr. Reilly examined claimant and found no neurological deficits. Dr. Anderson x-rayed the cervical spine and reported a solid fusion of C5-6 with degenerative joint disease at the facet joints of C1-2, C3-4, and C4-5.

Claimant returned to the care of Dr. Warner on April 30, 1976; she was still complaining of arm pains and Dr. Warner suggested 12 chiropractic treatments. Soon thereafter claimant was examined again by Dr. Spady who deferred to Dr. Buza on the decision of whether claimant's claim should be closed.

Dr. Spady found claimant to be nervous, she possessed a normal gait and there was an absence of muscle wasting or motor weakness although there were limitations in motion. He found no justification for such limitations. He did find pronounced convertible ligament tenderness present at the L5-S1 level but none in the cervical spine region.

On July 12, 1976 Dr. Buza again examined claimant and said there was no reason why she could not return to work; he had nothing further to suggest in the way of treatment and care and observed that claimant had a significant component of subjective pain which was not supported by the objective evidence resulting from his examination of claimant.

The employer requested that the claim be closed and on August 4, 1976 the Determination Order from which claimant appealed was issued.

A Notice of Non-Referral for Vocational Assistance was issued on October 19, 1976 by the Disability Prevention Division. It was based upon the medical records indicating the industrial injury resulted in no permanent disability and from an orthopedic standpoint it was medically possible for claimant to return to her regular work or work of a similar type. Furthermore, claimant had been released to return to her regular job and therefore, no vocational handicap appeared to exist. Sponsorship of any type of training program at that time was refused.

Claimant was next examined by Dr. Parvaresh, a psychiatrist, on October 21, 1976, who stated that claimant displayed signs and symptoms of anxiety neurosis, chronic but gradual exacerbation of the pre-existing tension. He felt the anxiety tension was of life-long duration and most likely would continue to persist, however, the exacerbation was within reasonable medical probability due to her industrial accident and a long-term convalescent period. He stated that there were no orthopedic restrictions on her activity and, therefore, claimant would be able to engage in gainful employment for which she has the skill and training. From the psychiatric standpoint, Dr. Parvaresh did not believe claimant's psychiatric impairment was of such a degree that it would preclude her from seeking and maintaining employment. He suggested that this, however, could be best answered by the evaluation rehabilitation counselor who has already evaluated claimant and knew the job availability, record of prior injury and current back problems.

On November 9, 1976, the Disability Prevention Division reviewed her file and made an official referral of claimant to the Vocational Rehabilitation Division; claimant was put on vocational assistance. The rehabilitation counselor found claimant had a significant vocational handicap on December 3, 1976 and she was certified for vocational rehabilitation service. A job retraining plan was developed. Shortly thereafter, claimant was examined by Dr. Poulson who stated that claimant had limitations of motion of the cervical spine but they were not severe. He expressed his opinion that claimant had a full-blown chronic pain syndrome with all of the mental aberrations that go with it. He felt the best thing for claimant was for her to be sent to the Pain Clinic; he found so much psychological overlay present that he did not feel any other type of treatment would be helpful.

Dr. Seres advised Dr. Poulson on February 15, 1977 that claimant would not derive any benefit by admission to the Pain Center program on any basis. He found only a slight possibility of claimant's lowering her disability role or pain behavior. He felt that claimant's disability level should be determined at "mild to moderate". He recommended her claim be closed. However, he did note that claimant had chronic mechanical low back pain and cervical pain.

Dr. Yospe also examined claimant and agreed essentially with the findings made by Dr. Parvaresh.

Dr. Poulson stated that although claimant had full range of motion of her spine it was still possible for her to have pain in that range of motion as she claimed; however, there was no way to measure such pain. He felt that claimant had a large functional component overlaying her symptoms and that although claimant considered herself to be permanently and totally disabled, it was his opinion that she was probably capable of working.

The ALJ found that there was a serious credibility issue in the case. He felt that claimant's testimony might well appear to be a gross exaggeration when compared to much of the medical testimony. He found that some of the doctors felt she had pain but even those doctors felt that she had converted or magnified that pain far beyond the existence of objective physical findings.

The ALJ found that there was also a question of how much weight be given to which particular medical opinions inasmuch as there were obvious conflicts in said medical opinions both physiological and psychiatric.

The ALJ found that the objective findings of the medical doctors did not support the subjective complaints of claimant. He did find that claimant had had surgery but that the only thing that tied the need of the operations to the original industrial injury was the history given by claimant.

The ALJ was of the impression that claimant was able to work if she desired to do so and furthermore that none of her present problems were in any way connected with the alleged industrial injury of August 1972. He believed that claimant was desperately trying to use pain which was in no way caused by the alleged injury of August 1972 in order to secure financial support.

The ALJ found that the medical doctors were solely dependent upon claimant's truthfulness in relating the history of both the fall and the symptoms she claimed to have in asserting their opinions on medical causation and disability. Although it was true that claimant had operations and treatment, that did not prove any connection between said operations and treatment and the fall. He concluded that claimant had failed to prove any permanent disability relating to the claimed injury by a preponderance of the evidence. He stated, "Maybe claimant had a fall or accident that injured her. But I find it did not happen, as set forth in the Form 801, on the premises of the employer in August 1972". For that reason he affirmed the Determination Order.

The Board, on de novo review, finds that the sole issue before the ALJ was extent of claimant's permanent disability; the compensability of claimant's claim was never at issue. The claim had been accepted, time loss benefits had been paid and the claim was closed. Claimant was not satisfied with the award granted by the Determination Order and, therefore, under the provisions of ORS 656.283, requested a hearing.

The Board finds that, based upon the substantial medical evidence in the record, claimant had sustained as a result of her fall on August 15, 1972 some permanent disability. Dr. Poulson stated that claimant, in his opinion, could return to work, but he also stated that there would be some residual disability as a result of claimant's industrial injury. Dr. Buza, Dr. Spady and Dr. Poulson, all said that claimant could return to work, however, that does not equate to saying that claimant has suffered no permanent partial disability.

There is no evidence in the record that the surgery performed by Dr. Buza, with the assistance of Dr. Spady, on April 4, 1974 was necessitated by anything other than the industrial injury. Dr. Spady did doubt the etiologic relationship between the injury and claimant's subsequent trouble and treatment because of the six-months interval but he refused to respond to this question catagorically.

The ALJ in his opinion deals with factors which properly should be considered in a case which involves compensability of a claim but that question was not before him; the only thing the ALJ had to determine was how much, if any, wage earning capacity has claimant lost as a result of the industrial injury sustained on August 15, 1972.

Granted that the medical reports are somewhat in conflict and based to a large extent on the history related to the doctors by claimant which was not at all times reliable, the Board concludes that the preponderance of the medical evidence justifies a finding that claimant has sustained some permanent physical impairment. This impairment when considered with other factors, e.g., claimant is 52 years old, has a ninth grade education, has no clerical experience or skills but has always engaged in manual labor, and apparently has only a fair prognosis for retraining, persuades the Board that the claimant has lost some of her wage earning capacity as a result of her industrial injury. The Board concludes that to adequately compensate claimant for such loss she should be granted an award equal to 20% of the maximum allowable by statute for unscheduled disability.

ORDER

The order of the ALJ, dated May 16, 1978, is reversed.

Claimant is hereby awarded compensation equal to 64° for 20% unscheduled disability.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the compensation awarded claimant by this order, payable out of said compensation as paid, not to exceed $2,300.

CLAIM NO. B 8186 OCTOBER 6, 1978

JACK N. ROBINSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury on July 31, 1963 when a pickup being backed up caught his left thigh between the tailgate and a piece of machinery. After conservative care the claim was closed on January 17, 1964 with an award for time loss benefits only.

The claim was reopened at Dr. McHolick's request and claimant was granted compensation equal to 10% of the leg on September 23, 1964.

On April 26, 1977 claimant requested that the Board exercise its own motion jurisdiction and reopen his claim. Dr. Brooke informed the Board, on June 4, 1977, that claimant's problems were probably the result of his 1963 injury. Dr. Phifer saw claimant on August 18, 1977 and found degenerative arthritis of the left knee; he recommended an arthrogram and possibly an arthroscopy. The Fund, on December 19, 1977, advised the Board that it would be responsible for providing claimant with additional medical treatment for his knee.

Dr. Brooke performed a left anterior medial meniscectomy on January 24, 1978 and claimant returned to work on June 1, 1973; he has worked steadily since that date with no time loss.

On August 23, 1978 the Fund requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted compensation for time loss from January 23, 1978 through May 31, 1978, less time worked, and compensation equal to 10% loss of the left leg.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted temporary total disability benefits from January 23, 1978 through May 31, 1978, less time worked, and compensation equal to 10% loss of the left leg. These awards are in addition to any previous awards claimant has received for his July 31, 1963 industrial injury.

WCB CASE NO. 77-7271 — OCTOBER 6, 1978

JAMES R. SCOTT, CLAIMANT
Welch, Bruun, Green & Caruso, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson, Moore and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the carrier's denial of his claim for aggravation.

The majority of the Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof. The Board finds no evidence in the record to indicate whether the 1970 or the 1974 injury is responsible for claimant's present condition.

ORDER

The order of the ALJ, dated May 11, 1978, is affirmed.

Board Member George A. Moore respectfully dissents as follows:

The claimant's last award or arrangement of compensation was February 21, 1976. Dr. Anderson's closing report of January 6, 1975 found no muscle spasm nor tenderness but back flexion was limited to 50% due to pain. Dr. Anderson released claimant to his regular occupation as a millwright.

The aggravation claim is based on the medical reports of Drs. Anderson, Tilden and Thomas. Dr. Anderson's report of September 19, 1977 indicated claimant still had 50% loss of range of motion due to pain, but also with tenderness and straight leg raising was done to 70° with tightness. Dr. Anderson felt claimant could not return to his millwright job. However, he felt, clinically, there were no changes upon examination from the

previous examination in 1974. I find this report ambiguous.

After claim closure in 1975, claimant returned to his millwright job and continued to work. In September 1977 Dr. Anderson found he could no longer return to such work; therefore, claimant's condition has worsened as he is now precluded from his regular occupation. This is supported by the reports of Drs. Tilden and Thomas and by claimant's testimony.

I conclude claimant has proven a worsened condition related to his original industrial injury which now precludes his returning to his regular occupation and his claim for aggravation should be remanded to the State Accident Insurance Fund for acceptance.

WCB CASE NO. 74-3721 OCTOBER 6, 1978

FRANK A. STEINBECK, CLAIMANT
Gary Susak, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order Denying Request for Reconsideration

On August 31, 1978 the Board entered its Order on Review in the above entitled matter which affirmed and adopted as its own the Administrative Law Judge's Amended Opinion and Order, dated November 4, 1976.

On September 8, 1978 claimant, by and through his counsel, requested the Board to reconsider this order, specifically requesting that it rule on the ALJ's failure to assess penalties and award an attorney's fee based upon the administrative notice taken by the Board in its order that the amendments to ORS 656.273 made by Chapter 497, Section 1, Oregon Laws 1975, were made retroactive by Section 5 of that Act.

On September 25, 1978 the Fund responded in opposition to claimant's request for reconsideration, stating that although the intent of the 1975 Legislature was that the amendments to ORS 656.273 should be applied retroactively and one amendment was that a physician's report indicating a need for further medical services was a claim for aggravation, in this case at the time (May 27, 1974) Dr. Vanderbilt advised the Fund that claimant needed further medical services, his report was not legally recognizable as a valid claim for aggravation.

It is the position of the claimant that the Fund should be subjected to penalties and attorney's fees pursuant to ORS 656.262 because of its "unreasonable" delay in denying the claim for aggravation. It is the position of the Fund that

the test for determining "unreasonableness" is the actions of the carrier at the time in question and not by application of hindsight and a newly enacted statute, which, initially, was surrounded by some confusion as to how it should be applied.

The Board, after giving consideration to the petition for reconsideration and the Fund's response thereto, concludes that the Fund's actions could not be considered to constitute unreasonable delay. At the time the Fund received Dr. Vanderbilt's report in May 1974, it was not a legally recognized claim for aggravation and the Fund had no duty to issue a formal denial. Subsequently, a claim for aggravation was made by claimant's attorney on September 9, 1975 which was denied by the Fund on October 7, 1975.

The Board concludes that the Fund's conduct was not so "unreasonable" under the circumstances and law then existing as to justify the assessment of a penalty and the award of attorney's fees. Therefore, the claimant's request that the Board reconsider its Order on Review, dated August 31, 1978, should be denied.

IT IS SO ORDERED.

WCB CASE NO. 77-1753 OCTOBER 6, 1978

CURT WILLIAMS, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

The claimant seeks review by the Board of the Administrative Law Judge's (ALJ) order which upheld the denial by the State Accident Insurance Fund of claimant's claim for a heart attack on October 6, 1976.

Claimant, who had worked for the employer for six years as a damage appraiser, was admitted to the coronary care unit of Emanuel Hospital where he remained for one-and-a-half weeks. The final diagnosis was coronary heart disease with acute partial thickness myocardial infarction and chronic prostatitis.

On the day of the incident nothing eventful happened until claimant stopped at Wakehouse Motors to appraise a damaged Dodge Dart. This car was jammed up against a wall and because it had damage on the right front side it was necessary for claimant

to push the car away from the wall. He did so, took pictures and then pushed it back. At that time he felt no pain but as he was leaving Wakehouse Motors he felt a little "tingle". Claimant's next stop was Rosemare Auto Body in Vancouver. Apparently, claimant's own car had some front end damage and on the way as the car was rounding a curve the steering wheel started to vibrate badly and caused claimant's arms to hurt as he held the wheel. When claimant lowered his arms they felt better, he relaxed and the pain went away. Claimant was at Rosemare for about 25 minutes and did an estimate on a big Chrysler. He had no lunch and his next stop was at Lynn Kirby Ford where he was to check out a "total loss". This car, which claimant described as a piece of junk, had front end damage and claimant testified that he had considerable difficulty in opening the hood which was badly jammed. He finally pulled the hood up and at that time, according to claimant, he felt "like something stuck on my chest and my arms felt like they were coming off".

Dr. Hattenhauer, a cardiologist, after reviewing the hospital records, expressed his opinion that claimant's "heart burn" which occurred sometime prior to the heart attack was, in fact, angina pectoris which claimant did not recognize. He did not feel either the effort put forth by claimant in holding his wheel which was vibrating as he drove to Vancouver or the lifting of the hood of the car at Lynn Kirby Ford was a material cause of claimant's partial thickness myocardial infarction. He stated that the heart muscle was not receiving enough blood or oxygen through the narrow coronary arteries but this was a condition which took years to develop. He felt the main factors which led to the myocardial infarction were claimant's long history of smoking and his rather high serum cholesterol.

Dr. Wysham, also a cardiologist, testified that if claimant encountered a great amount of difficulty and had to pull or push hard for at least one minute in unlatching the hood of the automobile at Lynn Kirby Ford, it was his opinion that this would cause an abrupt strain on the heart. If the work effort was this strenuous, it was medically probable that the effort precipitated the heart strain which probably precipitated the myocardial infarction. Dr. Wysham stated that the EKG's probably did not reflect a myocardial infarction, however, the three enzyme studies did show an elevation which, although slight, were significant. He concluded claimant had had a small myocardial infarction.

The ALJ found evidence indicating that when claimant was walking home two days prior to his admission to the hospital he developed a mild aching in his chest which radiated to both arms, more prominently into the left; it lasted three to four minutes. Claimant had no more chest pain until early in the morning of the hospital admission when he was

driving his car to and from Vancouver. Claimant described the pain as a dull pressure type aching in the middle of the chest which caused him to perspire lightly and had spread into both arms. It lasted for over a half an hour and then stopped.

The ALJ found that claimant also had complained of dull aching chest pain around noon on October 6 as he was driving to see his doctor for a re-check of his prostate problem. Claimant had told the investigator for the Fund that when he went to Vancouver to appraise the damaged vehicle he developed for the first time aching and numbness in both arms while driving; he also told him that when he was raising the hood on the vehicle at Lynn Kirby Ford he felt like someone had stepped on his chest and squeezed the blood out of his arms. As he drove to his urologist's office he started to sweat and became weak.

The ALJ said he was unable to reconcile all of the versions of what had occurred prior to the heart attack. He found the claimant appeared to be a hard working person and very knowledgeable in his business but the fact that he gave so many versions of what happened failed to produce a reasonable conviction that the facts were actually as they were ultimately given to Dr. Wysham and upon which Dr. Wysham based his opinion. He concluded that claimant had not met his burden of proving that he had suffered a compensable injury on October 6, 1976. He affirmed the denial of said claim.

The Board, on de novo review, finds no great conflict in the stories which claimant related to different parties. The chronology of events which occurred on October 6, 1976 as told by claimant to the investigator for the Fund is essentially the same as that reported by claimant at the hearing with the exception that he did not tell the investigator about his visit to Wakehouse Motors. At the hearing claimant testified that he did not tell the investigator about this trip because he did not think about it.

The Board finds that the evidence indicates that claimant expended a great deal of effort in raising the hood on the badly damaged car he was evaluating at Lynn Kirby Ford. Claimant testified at the hearing that it had required "large effort" on his part to lift the hood. It was Dr. Wysham's opinion that if claimant, in fact, was exerting a great deal of effort either pulling or pushing hard and did this for a minute or two it was probable that he raised his blood pressure to a marked degree in the course of so doing. It is well known that isometric exercise does, in fact, cause an abrupt rise in blood pressure.

Dr. Wysham said that assuming claimant already had pre-

existing coronary artery disease then such type of effort would likely cause an acute strain on his heart and would make the blood supply inadequate for the demands of his heart at that particular time and might well precipitate a myocardial infarction. Summing it up, he said, assuming the facts all to be true, it was his opinion that it was a medical probability that claimant's effort aggravation or precipitated his cardiac condition and thereby precipitated a myocardial infarction.

Dr. Wysham went further and stated that the symptoms claimant experienced following the hood lifting incident were more diagnostic of a myocardial infarction than his prior symptoms; they were more severe, were associated with other symptoms such as sweating and weakness and persisted even after his exertion ended. He stated that the lifting incident would not have to be inordinately severe to precipitate an infarction in an unstable situation. He felt claimant's condition at that time was indeed unstable based upon a report by Dr. Moore which indicated that claimant had discomfort in his chest two days prior to October 6 while he was walking home.

The Board concludes that the medical evidence preponderates in favor of a finding that claimant suffered a compensable injury as a result of the lifting of the hood incident at Lynn Kirby Ford on October 6, 1976 and that this was within the scope and course of his employment, therefore, the claim should have been accepted.

ORDER

The order of the ALJ, dated March 31, 1978, is reversed.

Claimant's claim for an industrial injury sustained on October 6, 1976 is hereby remanded to the State Accident Insurance Fund for acceptance and for the payment of compensation, as provided by law, commencing on October 6, 1976 and until claimant's claim is closed pursuant to the provisions of ORS 656.268.

Claimant's attorneys are awarded as a reasonable attorneys' fee for their services both before the ALJ at the hearing and at Board review a sum of $1,000, payable by the State Accident Insurance Fund.

WCB CASE NO. 77-2872 OCTOBER 6, 1978

RONALD E. YORK, CLAIMANT
Nikolaus Albrecht, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Atty.
Roger Warren, Defense Atty.
Request for Review by Claimant
Cross-appealed by Aetna

Reviewed by Board Members Wilson, Moore and Phillips.

The claimant seeks Board review of the Administrative Law Judge's (ALJ) order which remanded his claim for aggravation to Aetna Casualty and Surety Company for acceptance and payment of benefits as provided by law, directed Aetna to reimburse Employers Insurance of Wausau for all sums heretofor paid to claimant, and to pay claimant's attorney $500 as a reasonable attorney's fee.

Claimant contends he should have been awarded penalties for unreasonable delay in payment of temporary total disability benefits and should have been awarded temporary total disability benefits beginning April 6, 1977, less time worked. The carrier, Aetna, cross-requests Board review, stating the issue to be determined on review is which carrier is responsible for claimant's condition.

Claimant suffered a compensable injury to his neck on March 14, 1972 while in the employ of Tektronix, Inc., whose carrier was Aetna. The claim was closed by a Determination Order, dated June 6, 1973, which granted claimant 16° for 5% unscheduled neck disability. At the time of the 1972 injury claimant was employed as a utility man and had been involved in a motor vehicle accident in the course of his employment.

In November 1976 claimant was transferred to spot welding and began to develop increased symptoms. On April 6, 1977 Dr. Fagan was consulted by claimant who was complaining of neck pain; he prescribed conservative treatment. The ALJ assumed that claimant contended Dr. Fagan's letter constituted a claim of aggravation because when he requested a hearing on May 3, 1977 he attached a copy of Dr. Fagan's report thereto.

The ALJ found no evidence that Dr. Fagan's report was sent to Aetna nor to Employers Insurance of Wausau which was furnishing the employer workers' compensation coverage in 1977.

The ALJ found that the evidence so overwhelmingly supported a finding of aggravation of the 1972 injury that it would be futile to discuss the evidence, therefore, no discussion on the merits of claimant's claim for aggravation was contained in the ALJ's order.

The ALJ did find that on May 25, 1977 Wausau paid temporary total disability benefits for the period from March 15 to May 9, 1977, less time worked, and the check therefor apparently was sent to Tektronix who then forwarded it to claimant. The ALJ was unable to learn the reason for Wausau's failure to forward the check directly to claimant; the Workers' Compensation Board has expressly prohibited the procedure utilized by Wausau. The ALJ found that claimant returned to work on July 11, 1977 and on September 23, Wausau filed a Form 802 indicating that the compensation for temporary total disability had been paid to claimant through July 8, 1977. Claimant had lost a day and a half from work on March 15 and 16, 1977 and on May 6, 1977 Dr. Fagan had authorized time loss to be continued until claimant returned to work on July 11, 1977. The ALJ found that inasmuch as July 9 and 10 were not work days that claimant had been paid all the compensation due him.

The ALJ found nothing in the record to indicate whether compensation for the period between May 5 and July 8 was paid but, although claimant contended he was entitled to penalties for unreasonable delay in the payment of compensation, he concluded there was a failure on the part of claimant to present evidence as to the dates compensation was paid, therefore, he did not award penalties but only a reasonable attorney's fee to claimant's attorney.

The majority of the Board, on de novo review, agrees with the conclusion reached by the ALJ but does not find the evidence supporting claimant's claim for aggravation so overwhelmingly convincing that a discussion on the merits of the claim would not be of assistance to those who choose to read this order.

The question before the ALJ was whether or not claimant's present condition was the result of an aggravation of his 1972 injury or of a new injury. It is true that Oregon has adopted the "Massachusetts-Michigan" rule for cases involving successive injuries and successive insurance carriers. Smith v. Ed's Pancake House, 27 Or App 361. Basically, that law states that if the second incident contributed independently to the injury, the second insurer is solely liable, even if the injury would have been much less severe in the absence of the prior condition, and even if the prior injury contributed to the major part of the final condition. The majority of the Board does not find that the "Massachusetts-Michigan" rule is applicable in this case; there is no medical evidence to indicate that there was any specific incident subsequent to March 14, 1972 which contributed independently to claimant's condition. To the contrary, the medical evidence indicates that the initial diagnosis was strain of cervical spine (and loss of tooth) and after the claimant filed his claim on May 16, 1977 for "recurrent neck pain" the medicals indicated that claimant's primary complaints still were of pain and discomfort in the posterior cervical region radiating

to both shoulders. The x-rays of the cervical spine taken in 1972 as well as the x-rays taken in December 1977 reveal a narrow disc space at the C5-6 level with evidence of very mild degenerative changes.

The majority of the Board concludes that claimant's transfer to the job of spot welding in 1976 did not even slightly contribute to the causation of claimant's present disabling condition; the claimant's condition in 1977 is merely a recurrence of the symptoms resulting from his 1972 injury. Claimant had had several intervening recurrences between 1972 and 1977. Therefore, the claim for aggravation is valid and the carrier on the risk at the time of the 1972 injury is responsible for claimant's present condition.

ORDER

The order of the ALJ, dated April 6, 1978, is affirmed.

Board Member George A. Moore respectfully dissents as follows:

In November 1976 claimant's job was changed from that of a weld technician, a relatively light job, to that of spot welder which required reaching activities and much vibration.

On April 12, 1977 Dr. Fagan indicated that claimant's new job had worsened his condition from the increased lifting and bending and a job change was recommended.

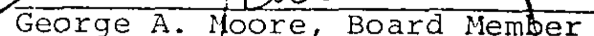
I find claimant's symptoms were much more severe in 1977 from the repeated trauma of his job, than they were in 1972. After the 1972 injury claimant saw no physician for his problems from March of 1973 until April 1977 and he continued working.

This case falls under the "Massachusetts-Michigan" rule as the repeated trauma in 1976-1977 contributed more than slightly to his disabling condition.

Further, I find that claimant had new symptoms after the 1977 incident that were not present after the 1972 injury, i.e., pain and numbness in his arms, hands and shoulders.

Claimant's testimony was that after the 1977 incident his neck pain was two to three times worse than in 1972.

I conclude that claimant's work in 1976 and 1977 of repeated trauma was much more strenuous work and caused a new injury; I would remand the claim to Employers Insurance of Wausau for acceptance as a new injury.



George A. Moore, Board Member

WCB CASE NO. 77-5878 OCTOBER 6, 1978

VERNON ZACHARY, CLAIMANT
James H. Nelson, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Order of Dismissal

A request for review, having been duly filed with the Workers' 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 Administrative Law Judge is final by operation of law.

WCB CASE NO. 77-328 OCTOBER 9, 1978

PATRICK MANDELL, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order of Abatement

On September 22, 1978, the Board issued its order in the above entitled matter. On September 29, 1978, the Board received a motion from the State Accident Insurance Fund to reconsider this order.

The Board concludes that a brief from both SAIF and the claimant should be presented before it can properly reconsider its order.

Because the time for appealing from the Board's order is near expiration, the Board concludes that its Order on Review entered in the above entitled matter should be abated until such time as the Board, after studying the briefs of each party and reviewing the record, can make a decision on SAIF's motion. Pending that decision the provisions of ORS 656.295(8) should be tolled.

IT IS SO ORDERED.

SAIF CLAIM NO. A 356244 OCTOBER 11, 1978

MARVIN A. BISCHOFF, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

In 1953 claimant suffered a compensable injury to his right eye. His claim was accepted and claimant received medical care from Dr. Goldman, an ophthalmologist in Portland. On August 5, 1953 claimant's claim was closed. His aggravation rights have expired.

On September 12, 1977, the State Accident Insurance Fund received a letter from Dr. Neal which stated that claimant had been seen by him over the past seven years and was last seen on August 15, 1977 for a routine eye examination. Dr. Neal stated, after the examination and because of claimant's concern over the secondary exotropia of the right eye resulting from his old industrial injury, that he would recommend that the exodeviation be surgically corrected. Dr. Neal requested that the claimant's claim be reopened and claimant be provided the opportunity for possible restoration of normal visual acuity by means of excision of the secondary cataract and fitting of a contact lens.

On September 27, 1978 the Fund forwarded Dr. Neal's letter and copies of pertinent documents from the Fund's claim file to the Board, stating that if the Board found the evidence justified granting claimant's request for own motion relief pursuant to ORS 656.278 which Dr. Neal's letter was interpreted to be, it would not oppose reopening of the claim.

The Board concludes that the reports furnished it by the Fund do justify reopening claimant's claim designated as No. A 356244 relating to a 1953 injury and for the payment to claimant of compensation, as provided by law, from the date the recommended surgical procedure is performed and until the claim is closed pursuant to the provisions of ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 76-5851 OCTOBER 11, 1978
WCB CASE NO. 77-2452

LONNIE FRASURE, CLAIMANT
Yturri, Rose & Burnham, Claimant's Attys.
Lindsay, Nahstoll, Hart, Neil & Weigler,
Defense Attys.
Souther, Spaulding, Kinsey, Williamson &
Schwabe, Defense Attys.
Amended Order on Review

On September 23, 1978 the Board issued its Order on Review in the above entitled matter. The order contains an error in the fourth line of the next to the last paragraph on page 5 thereof, to-wit: "September 13, 1976 industrial injury". It should read "September 13, 1975 industrial injury".

SAIF CLAIM NO. B 86026 OCTOBER 11, 1978

CHARLES L. HOOVER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On July 12, 1978 claimant petitioned the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for an injury suffered on August 20, 1964. Claimant's aggravation rights have expired. In support of his request, claimant enclosed surgical and medical reports from Emanuel Hospital of a recent date and the closing order dated July 7, 1965 issued by the State Industrial Accident Commission (predecessor to the State Accident Insurance Fund).

On July 28, 1978 the Fund was furnished copies of claimant's petition and the medical attachments and requested to advise the Board of its position within 20 days.

On August 8, 1978 the Fund indicated that claimant's claim had been closed since July 7, 1965 and it had received no correspondence concerning it until the Board's letter. The Fund asked for additional time to obtain more recent data.

On September 27, 1978 the Fund advised the Board that it had up-to-date information which indicated that claimant's present cervical spine condition was the result of an off-the-job injury in April 1978. It opposed reopening claimant's claim.

The Board, after thorough consideration of the medical reports submitted both by claimant and the Fund, concludes

that claimant had failed to establish that his present condition is related to the 1964 injury. Claimant's petition for own motion relief should be denied.

IT IS SO ORDERED.

WCB CASE NO. 77-2528 OCTOBER 11, 1978

JUNE MARIE LEVY, CLAIMANT
Kennedy, Bowles & Towsley,
Claimant's Attys.
Cheney & Kelley, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks Board review of that portion of the Administrative Law Judge's (ALJ) order which remanded claimant's back claim to it for acceptance and payment of compensation.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated April 17, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $250, payable by the carrier.

WCB CASE NO. 77-4120 OCTOBER 11, 1978

MARVA D. McKINNEY (KAREEM), CLAIMANT
Charles Paulson, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Attys.
Order of Dismissal

On June 16, 1978 an order of an Administrative Law Judge (ALJ) was entered in the above entitled matter which granted claimant an award of 80° for 25% unscheduled low back disability. On June 6, 1978 the Board acknowledged receipt of a request for review of said order by the claimant and on July 21, 1978 it acknowledged receipt of a cross-request for review by the employer.

On October 5, 1978, after the Board had received claimant's brief, it was advised that claimant had been readmitted to the hospital and the employer had reopened her claim and resumed payment of compensation for temporary total disability. Inasmuch as the claim is now in an open status and will have to be closed by another Determination Order, the present issues presented to the Board on the request and cross-request for review of the order of the ALJ have become moot.

THEREFORE, the claimant's request for Board review and the employer's cross-request for Board review of the order of the ALJ entered on June 16, 1978 are hereby dismissed.

WCB CASE NO. 77-7902 OCTOBER 11, 1978

GAIL SANDS, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of that portion of the Administrative Law Judge's (ALJ) order which failed to find that the actions of the Field Services Division violated the rules of said division.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated April 24, 1978, is affirmed.

WCB CASE NO. 77-4597 OCTOBER 11, 1978

DOUGLAS SCHELIN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the carrier's denial of his claim.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated May 22, 1978, is affirmed.

WCB CASE NO. 78-3173 OCTOBER 11, 1978

BLANTON SIMMONS, CLAIMANT
Glen McClendon, Claimant's Atty.
R. Kenney Roberts, Defense Atty.
Stipulated Settlement

It is hereby stipulated by and between Blanton Simmons through his attorney, Glen McClendon and G. D. Searle-Will Ross, through their insurers, CNA, through R. Kenney Roberts of their attorneys that Claimant compensably injured his back in an on-the-job automobile accident on May 5, 1977. Subsequently, Claimant claimed aggravation of his condition. It is the position of the insurance carrier that Claimant's injury resulting from the automobile accident is completely resolved and his present condition is a result of a separate and intervening and superseding incident resulting from a basketball game and is totally unrelated to the industrial accident. The aggravation claim was denied. A hearing was held and the Administrative Law Judge held the claim compensable. The insurance carrier appealed this case. It is the insurance carrier's contention that the Administrative Law Judge failed to consider evidence which directly impeached Claimant's testimony regarding the issue of intervening accident. Further, it contends that there is additional evidence showing a new injury. There being a bona fide dispute and the parties wishing to resolve this matter on a disputed claim basis;

It is hereby stipulated and agreed that this matter be compromised subject to the approval of the Workers' Compensation Board by CNA Insurance Company paying and Claimant accepting the sum of $12,000 in full payment of a disputed claim agreement. This is in addition to amounts previously ordered paid which have been paid in full. Claimant's aggravation claim shall remain in a denied status and he shall take no further workers' compensation benefits on account of this claimed aggravation. Any present or future medical treatment to his back will be considered the result of alleged intervening and superseding activity and injury. The insurance carrier and employer will no longer be responsible for present or any future medical care or treatment of Claimant's back nor shall they be responsible for present of future temporary total disability, or permanent disability.

It is further agreed that if for any reason Claimant shall become entitled to benefits in the future, under his claim, any money paid pursuant to this Stipulation shall be offset against these future benefits.

It is further agreed that Claimant's Attorney, Glen McClendon, shall receive an attorney's fee of $375, payable out of this settlement and not in addition to it.

WCB CASE NO. 77-7063 OCTOBER 11, 1978
WCB CASE NO. 77-7064

MILTON STIANSON, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Order of Dismissal

A request for review, having been duly filed with the Workers' 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 Administrative Law Judge is final by operation of law.

WCB CASE NO. 77-7715 OCTOBER 12, 1978

JOHN RUSSELL, CLAIMANT
Dye & Olson, Claimant's Attys.
Bruce Bottini, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer seeks review by the Board of the order of the Administrative Law Judge (ALJ) which awarded claimant 128° for 40% unscheduled disability.

The issues before the ALJ were whether claimant's claim had been prematurely closed on December 7, 1977 because claimant was vocationally handicapped and the extent of claimant's unscheduled permanent partial disability.

Claimant was a 32-year-old welder who suffered a compensable injury to his low back on December 27, 1976 while assisting a co-worker to lift a flat bar. The diagnosis of his injury was an acute low back strain superimposed upon a pre-existing spondylolysis condition.

Claimant received conservative treatment and after a recovery period which included vocational rehabilitation consideration for evaluation, planning and development, his claim was closed on December 7, 1977 with a Determination Order which granted claimant compensation only for time loss from December 28, 1976 to November 17, 1977.

Claimant testified that he experiences chronic back pain radiating down both legs which is increased by activities. He also stated that he has some limitation of motion of his back and he is unable to lift, drive for prolonged periods of time and prolonged sitting, standing, bending, stooping or ascending and descending stairs seem to exacerbate his back condition. The medical evidence indicates that claimant does have limitations on certain activities which require lifting, bending or stooping and in all probability claimant is excluded from such employment in the general industrial labor market which requires these activities.

Claimant is a graduate of high school and has the equivalent of two years of college in general course work with primary emphasis on art classes. He has two years of experience as a welder for the employer; his primary employment has been jobs consisting of physical or manual labor such as steel fabrication, carpentry work, cement and masonry work and also roofing.

On August 15, 1977 claimant had been referred to an authorized program of vocational rehabilitation; however, no program was ever developed between claimant and his counselor and on November 17, 1977 claimant was terminated from the program because of failure to progress in a timely and satisfactory manner. The records indicate that claimant was very difficult in making his choice of programs and also failed to cooperate with his vocational rehabilitation counselor, although claimant testifies to the contrary.

On February 1, 1978 the termination decision was reconsidered at the request of claimant and apparently was upheld because claimant was not considered to have a vocational handicap. The Field Services Division of the Workers' Compensation Department felt claimant's permanent disability, if any, did not preclude his return to regular employment and because of his education, training and experience, he had sufficient skills and ability to allow him to return to regular employment. Claimant was offered employment re-entry assistance to be provided by a private organization, however, as of the date of the ALJ's order claimant had not availed himself of such services. During December 1977 claimant received unemployment compensation benefits and he testified that he had looked for work without success. Claimant feels he could return to light type work.

The ALJ found that the claim had not been prematurely closed. Only the Field Services Division has the authority to determine the eligibility of a worker for referral to an authorized program of vocational rehabilitation. A worker is entitled to administrative review of the decision of the Disability Prevention Division under the provisions of OAR 436-61-060, however, in this case, the ALJ was unable to say that the decision made regarding termination, later upheld on reconsideration, was made upon unlawful procedure, was arbitrary, capricious or characterized by abuse of discretion or unauthorized exercise of discretion. He also found there was sufficient documentation to sustain a finding that claimant did not have a vocational handicap which would entitle him to be placed in vocational rehabilitation program.

The ALJ found that claimant was entitled to an award of compensation for his loss of wage earning capacity which included claimant's ability to obtain and hold gainful and suitable employment in the general industrial labor market. Based upon the record, the ALJ found it more probable than not that claimant's physical condition affected his ability to perform "heavy work" and to perform any work in the general labor market which required heavy lifting, bending, stooping, and so forth. The ALJ concluded, as a practical matter, claimant was precluded at least to a substantial degree from returning to his former occupation because of

the duties involved therein. Taking into consideration claimant's physical impairment, age, education, training and work background, the ALJ concluded that claimant was entitled to an award of compensation equal to 40% of the maximum allowable by statute for unscheduled permanent partial disability.

The Board, on de novo review, is of the opinion that the medical evidence does not support a finding that claimant's physical disability is as substantial as indicated in the order of the ALJ. Unless claimant tries to do substantially heavy work he is not troubled with his back pain according to Dr. Spady's report of February 21, 1978. Furthermore, claimant has done a variety of types of work, some of which did not require such strenuous activity as was required by his job with the employer. Claimant has a high school education plus two years of college and he appears to have no trouble adapting to new types of employment.

The Board feels that he probably is aggravating his condition by his work on the farm (which was not mentioned in the order of the ALJ). Claimant seems to be motivated only insofar as he is allowed to do what he wants to do. He has not been cooperative with any of the efforts made to rehabilitate him or to place him in a job which is within his physical and mental capabilities.

The Board concludes that claimant would be adequately compensated for the loss of wage earning capacity resulting from his industrial injury of December 27, 1976 by an award of compensation equal to 80° which is 25% of the maximum.

ORDER

The order of the ALJ, dated May 2, 1978, is modified.

Claimant is awarded 80° of a maximum of 320° for 25% unscheduled back disability. This is is lieu of the award made by the order of the ALJ which in all other respects is affirmed.

SAIF CLAIM NO. AC 100414 OCTOBER 13, 1978

LAURA A. BAZZY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury on October 16, 1967 when she slipped and fell injuring her back and legs. Claimant received treatment from Dr. McKillop for over a year before he recommended claim closure, noting that she would be somewhat restricted in her low back movements. The claim was

closed by a Determination Order dated February 19, 1969 which granted claimant compensation equal to 48° for 15% unscheduled disability in addition to time loss benefits.

The claim was reopened on April 15, 1971 at the request of Dr. Spady. A myelogram was performed on July 1, 1971 and claimant was released for work on August 3, 1971 with some functional impairment.

The claim was again closed on August 18, 1971 with additional time loss benefits only.

Based on a report by Dr. Spady the claim was reopened on October 16, 1974 with time loss commencing August 17, 1974. Claimant received only symptomatic treatment from Dr. Spady and returned to work on October 2, 1974.

Claimant filed a claim for a new back injury resulting from an incident at work on April 16, 1975. She was granted 32° for 10% unscheduled back disability for this injury.

On September 8, 1978 the State Accident Insurance Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted additional time loss compensation from August 17, 1974 through October 1, 1974 only, less time worked.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from August 17, 1974 through October 1, 1974, less time worked.

WCB CASE NO. 78-365 OCTOBER 13, 1978

EDGAR FOSTER, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Roger Warren, Defense Atty.
Order of Abatement

On September 29, 1978 the Board entered its Order on Review in the above entitled matter affirming and adopting the Opinion and Order of the Administrative Law Judge, a copy of which was attached to and made a part of the Board's order.

Under date of September 28, 1978 the attorney for the

appellant advised the Board by telephone that he had just discovered he had not filed his brief and he asked for an extension of time within which to do so. He stated that he had contacted the attorney for the claimant and he had no objections to the request for an extension. This was confirmed by a letter of the same date; however, the matter had already been reviewed and, in fact, the Order on Review was issued the following day.

On October 3, 1978 the Board received from the attorney for the appellant a brief and on October 9, 1978 it received a letter from him requesting the Board to set aside its Order on Review dated September 29, 1978 and to give consideration to his brief and to allow claimant's attorney the opportunity to file an answering brief.

The Board, after due consideration, concludes that because of the assistance it sometimes receives from briefs filed by the parties and because the request for an extension of time was made orally prior to the entry of the order and acquiesced in by the opposing attorney, the brief submitted by the attorney for the appellant on October 3, 1978, a copy of which was mailed to the attorney for the claimant, should be given full consideration, provided that the attorney for the claimant be given 10 days from the date of this order within which to respond. The Board's order is hereby abated.

IT IS SO ORDERED.

WCB CASE NO. 76-2678 OCTOBER 13, 1978
WCB CASE NO. 76-2679

MICHAEL GILROY, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Order on Remand

On August 23, 1977 the Board entered its Order on Review in the above entitled matter which affirmed the denial of the Fund of claimant's claim for aggravation and remanded claimant's claim for a new injury of April 21, 1976 to Employee Benefits Insurance; granted claimant's attorney an attorney's fee of $300 for his services before the Referee and $300 for his services in connection with Board review, both payable by EBI.

The employer, by and through its carrier, EBI, appealed and claimant cross-appealed. In his cross-appeal, the claimant contended that he was entitled to an award of a penalty and

attorney's fee from EBI because of its failure to pay him compensation or deny his claim within 14 days of the employer's receipt of notice of the claimant's injury.

The Oregon Court of Appeals in its opinion issued August 1, 1978 ruled that EBI had notice of claimant's claim of a new injury on May 25, 1976 but did not deny it until June 14, 1976, nor make any payment of compensation for time loss until July 6, 1976, over 25 days after it was due, constituted unreasonable delay which made it liable for an award of a penalty and attorney's fees pursuant to ORS 656.262(8). Payment of compensation should have commenced on the date of claimant's injury, April 21, 1976, rather than from the date that such injury was reported to claimant's employer, May 25, 1976, and continued until June 14, 1976, the date EBI denied claimant's claim for a new injury.

The Court of Appeals, after considering the circumstances of the case, ruled that an assessment of a penalty equal to 10% of the compensation for time loss due claimant for the period from April 21, 1976 to June 14, 1976 would be adequate.

The Board, in its Order on Review, dated August 23, 1977, had affirmed the attorney's fee granted to claimant's attorney for his services before the Referee, payable by EBI and had granted claimant an additional attorney's fee for his services in connection with Board review which was payable by EBI.

On September 27, 1978 the Board received the Judgment and Mandate of the Oregon Court of Appeals and in compliance therewith hereby amends its Order on Review dated August 23, 1977 by inserting between the third and fourth paragraph in the "Order" portion thereof the following:

> "Claimant is awarded additional compensation in an amount equal to 10% of the compensation for temporary total disability due claimant from April 21, 1976, the date of his injury to June 14, 1976, the date of EBI's denial, in the nature of a penalty for EBI's unreasonable delay in the payment of compensation to claimant."

WCB CASE NO. 77-7569 OCTOBER 13, 1978

JOSEPH L. LANDRY, CLAIMANT
Charles Paulson, Claimant's Atty.
Tooze, Kerr, Peterson, Marshall
& Shenker, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the November 18, 1977 Determination Order whereby he received compensation for time loss only.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof. An error on page 1, paragraph 2, line 2 should be corrected. "November 18, 1978" should be changed to read "November 18, 1977".

ORDER

The order of the ALJ, dated May 2, 1978, is affirmed.

WCB CASE NO. 77-4966 OCTOBER 13, 1978

DANIEL M. MACK, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Cheney & Kelley, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the July 28, 1977 Determination Order whereby claimant was awarded 16° for 5% unscheduled head and neck disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated June 23, 1978, is affirmed.

WCB CASE NO. 77-1186 OCTOBER 13, 1978

EDWARD MAZE, CLAIMANT
Dye & Olson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted him compensation equal to 80° for 25% unscheduled back disability. Claimant contends this award is inadequate.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated February 3, 1978, is affirmed.

WCB CASE NO. 77-6615 OCTOBER 13, 1978

JOHN J. SLATSKY, CLAIMANT
E. B. Sahlstrom, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order on Motion to Dismiss

On August 24, 1978 the Administrative Law Judge entered his order affirming the May 16, 1977 Determination Order.

On September 25, 1978, according to the United States Postal Service postmark on the envelope addressed to the Workers' Compensation Board, claimant requested review of the ALJ's order.

The 30th day after the date of the issuance of the ALJ's order was September 23, 1978, which was a Saturday; therefore, the request mailed on the following Monday, September 25, was timely and the Fund's motion to dismiss said request should be denied.

IT IS SO ORDERED.

WCB CASE NO. 77-7153 OCTOBER 13, 1978

ANTHONY J. YAZZOLINO, CLAIMANT
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted him compensation for 35% unscheduled low back disability and time loss benefits for his period of hospitalization in August 1977.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated April 10, 1978, is affirmed.

WCB CASE NO. 77-5590 OCTOBER 16, 1978

VIRGIL ABREGO, CLAIMANT
Dye & Olson, Claimant's Attys.
Gearin, Landis & Aebi, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks review by the Board of the order of the Administrative Law Judge (ALJ) which granted claimant 192° for 60% unscheduled back disability. Claimant contends he is permanently and totally disabled.

Claimant suffered a compensable injury on June 7, 1974 to his low back while sorting and lifting boxes. He was seen by Dr. Stanford three days later. On November 17, 1974 claimant was referred to Dr. Buza who thought claimant might have a protruded disc, L5-S1 right and suggested that a myelogram be performed. The myelogram was done on November 21 and claimant was admitted to the hospital on November 24 for back surgery.

On November 21, 1975 Dr. Buza advised the employer's carrier that claimant possibly could pick cherries off a conveyor belt if he were able to rotate sitting and standing during the job. He indicated that claimant's disability was approximately 25%.

The employer, on January 27, 1976, asked Dr. Buza to advise them if claimant's condition was stationary and the amount of impairment he felt claimant had. Dr. Buza replied on May 25 that claimant's condition was stationary and that the present treatment he was receiving was purely palliative; however, on August 25 Dr. Buza indicated that claimant could not sit or stand for prolonged periods of time and that bending, lifting or twisting and also walking exacerbated claimant's back discomfort. It was his opinion that at that point in time that claimant was probably unable to engage in any type of gainful employment.

On January 6, 1977 claimant was examined by the physicians at the Orthopaedic Consultants who indicated claimant's condition was stable and the claim should be closed. They further stated that claimant would have to seek another type of occupation because his former work for the employer involved lifting and was heavy type work which claimant was incapable of performing. Job placement was recommended.

On August 31, 1977 a Determination Order awarded claimant 112° for 35% unscheduled low back disability.

After the hearing before the ALJ a report from Dr. Buza, dated December 7, 1977, was admitted. This report stated Dr. Buza's opinion that when he had last examined claimant on May 25, 1977 claimant was stable but was still having severe pain in the low back and left hip. It was his opinion, based upon claimant's complaints, that claimant would not be able to return to work, that his condition was chronic and would remain unchanged in the future.

Some film was admitted at the hearing with which the ALJ was not overly impressed. This film showed claimant doing certain activities which, in the opinion of the ALJ, was not persuasive that claimant was able to do any heavy physical work on a sustained basis.

Claimant was born and educated in Mexico. He has a third grade education and his work background has been solely in heavy manual labor. Claimant testified to the satisfaction of the ALJ that he had to kneel to pick up an object, that he had to hold on to something to enable himself to rise from a squatting position and he was unable to even lift a small sack of sugar from the trunk of his car. The film did indicate that claimant could bend at the waist, but it was impossible to determine how long he could maintain this position.

Claimant's testimony was found to be somewhat less than credible and the ALJ took that into consideration in giving weight to the contention that claimant would have difficulty returning to work based on his physical limitations. He also found that claimant had done very little to seek work or engage

actively in vocational rehabilitation. The employer had offered claimant extremely light work but claimant had failed to return and attempt to do this type of work. However, even though the ALJ questioned claimant's credibility, he was unable to disregard the comments made by Dr. Buza which were based upon objective findings as well as subjective complaints.

The ALJ, after taking into consideration the opinions expressed by Dr. Buza, claimant's age, his limited background and his limited work experience, also his inability to read or write in the English language, found that his wage earning capacity has been substantially diminished by his industrial injury. Although Dr. Stiper, a vocational specialist, had testified that there was no work to which claimant could return, this opinion was based to a certain extent on the subjective complaints made by claimant and the ALJ viewed it with caution.

The ALJ found the medical testimony was very favorable to claimant's claim but because of the questionable credibility of claimant's testimony he concluded that claimant had failed to meet his burden of proving that he was permanently and totally disabled. However, claimant had not been adequately compensated for his loss of wage earning capacity by the award of 112°, therefore, he increased that award to 192° which represents 60% of the maximum allowable by statute for unscheduled disability.

The Board, on de novo review, agrees with the findings and conclusions of the ALJ. The physicians at Orthopaedic Consultants after examining claimant found that his total loss of function of his back was mildly moderate and stated that he should obtain some other form of work, but they did not state that he was incapable of performing any occupation. Dr. Buza, in his December 1977 report, stated he did not believe that claimant could return to work, but this was based upon claimant's complaints and past history. The objective medical evidence simply does not substantiate an award for permanent total disability.

Furthermore, claimant offers no explanation for his refusal to accept the extremely light work offered to him by his employer or his lack of effort to seek any type of employment. The services of vocational rehabilitation were offered to claimant, however, claimant rejected such assistance and his rehabilitation counselor closed his claim because he was not actively pursuing a rehabilitation program.

The Board concludes that the award granted claimant by the order of the ALJ is sufficient to compensate claimant for his loss of wage earning capacity resulting from his industrial injury of June 7, 1974.

ORDER

The order of the ALJ, dated April 3, 1978, is affirmed.

WCB CASE NO. 77-7433 OCTOBER 16, 1978

LAWRENCE CLINANSMITH, CLAIMANT
VanNatta & Peterson, Claimant's Attys.
Roger Warren, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted him compensation equal to 64° for 20% unscheduled low back disability and 6.75° for 5% loss of the right foot. Claimant contends that this award is inadequate.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated May 12, 1978, is affirmed.

WCB CASE NO. 77-7823 OCTOBER 16, 1978

JERRY EDWARDS, CLAIMANT
Franklin, Bennett, Ofelt & Jolles,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which approved the Fund's denial of his aggravation claim for his November 6, 1972 injury.

Claimant, a 47-year-old tree planter, sustained an injury to his left knee on October 19, 1972 when he twisted it while planting trees. Dr. Graham diagnosed a suspected torn medial cartilage. After an exploratory arthrotomy of the left knee revealed defects, Dr. Graham performed a medial

meniscectomy of the left knee with patellar shaving on December 27, 1972. Claimant continued to have knee pain and swelling; Dr. Graham diagnosed a chondromalacia patella which was severe, with pain and disability in the left knee. Consequently, he performed a total patellectomy of the left knee on May 1, 1973.

Dr. Graham found claimant to be medically stationary on December 5, 1973. He noted claimant had stiffness after prolonged sitting, momentary buckling episodes and trouble walking on inclines. He felt claimant could not go back to construction work. He found claimant had full range of motion in his knee.

A Determination Order dated January 15, 1974 awarded claimant compensation equal to 45° for 30% loss of the left leg.

Dr. Graham requested claimant's claim be reopened for further evaluation and possible subsequent surgery on September 13, 1974 because claimant was continuing to have signifiant disabling difficulty with his knee. An arthrogram did not reveal any significant abnormalities. At this time claimant began to use a knee brace on Dr. Graham's advice.

Dr. Graham reported in May 1975 claimant was complaining that his knee pain was aggravated by any substantial activity, e.g., prolonged standing, going up and down stairs, pushing or pulling with the knee. The knee continued to be unstable. Dr. Graham felt claimant was restricted from jobs requiring climbing ladders, stairs, inclines; also, prolonged standing, walking or pushing and pulling of heavy equipment.

A second Determination Order dated July 2, 1975 awarded compensation for temporary total disability only.

Dr. Graham indicated in August 1976 that it would be reasonable to do an arthrodesis (fusion) of the left knee to gain pain relief. After the Orthopaedic Consultants concurred with this treatment, Dr. Graham performed the surgery on September 21, 1976. He indicated claimant would not be able to return to his former employment.

A third Determination Order dated April 7, 1977 awarded claimant additional compensation equal to 60° for 40% loss of the left leg.

Claimant desired to become a travel agent with his wife and work in Alaska, which they did. On June 1, 1977 in Fairbanks, Alaska, claimant was walking through an unpaved parking lot which still had some wet spots after a recent rain. His left foot slipped on a wet spot and then suddenly stopped when it reached a dry spot. Claimant stated the bone snapped. Dr.

Kelley diagnosed a supracondylar fracture, two inches proximal to the previously arthrodesed left knee. Dr. Kelley felt the fracture would not have happened had claimant's knee not been fused.

The Fund denied claimant's aggravation claim on October 27, 1977 after claimant had informed them of his injury in August 1977.

The ALJ, after reviewing all of the evidence, concluded that the claimant had failed to establish either medical or legal causation and affirmed the Fund's denial.

The Board, after de novo review, concludes that claimant has not met his burden of proving that he has sustained an aggravation of his initial condition; therefore, the Board affirms the ALJ's order.

ORDER

The ALJ's order, dated April 7, 1978, is affirmed.

WCB CASE NO. 78-13 OCTOBER 16, 1978

CLETIS FREEMAN, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted him compensation equal to 208° for 65% unscheduled low back disability. Claimant contends that he is permanently and totally disabled.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated May 26, 1978, is affirmed.

WCB CASE NO. 77-4186 OCTOBER 16, 1978

JAMES F. HOARD, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund requests review by the Board of the order of the Administrative Law Judge (ALJ) which set aside its denial dated May 11, 1977, directed the Fund to accept claimant's claim for the payment of compensation, as provided by law, until the claim was closed pursuant to ORS 656.268 and further directed the Fund to pay claimant's counsel an attorney's fee in an amount to be fixed following submission by said counsel of an affidavit in support of an appropriate fee.

The question before the ALJ was compensability of claimant's claim. On March 29, 1977 claimant, who at that time was a 41-year-old truck driver, filled out a Form 801 report of injury which stated that he suffered headaches and lightheadedness first noted about February 18 and which he attributed to the repetitive movements of his truck.

On May 11, 1977 the Fund denied the claim, stating that claimant's headaches were not caused by his employment as a truck driver.

Claimant's family physician, Dr. Conklin, referred claimant to Dr. Throop, a neurologist, Dr. Throop discounted the earlier diagnosis of tension headaches because of the unilaterality and unusual focal right ear symptoms. He did note some aspects of an atypical occipital neuralgia. He suggested x-rays of the skull and cervical spine, however, he came up with no specific diagnosis.

In May 1977 Dr. Conklin reported that a skull series and electroencephalogram were unremarkable. He stated that claimant was subsequently believed to be rather depressed and anxious and much of his symptoms were related to his truck driving and appeared to be a condition that might be described as a "fear of driving". Claimant was then referred to Dr. Kuttner, a psychiatrist, for further evaluation and therapy.

On May 18, 1977 Dr. Kuttner reported that claimant was definitely depressed, suffered much anxiety and had what could best be described as a psychophysiological reaction of the neuromuscular system. His opinion was that these anxiety symptoms were related to a combination of the physical and emotional

stresses related to claimant's profession as well as to problems he has had related to his recent separation from his wife. He thought claimant's claim should be accepted by the Fund and as rapidly as possible to insure claimant's return either to truck driving or to other work; delay could well lead to development of chronic disability.

The Fund referred claimant to Dr. Maltby, a psychiatrist, who diagnosed a conversion reaction. It was his opinion that claimant's conversion neurosis (compensation) stemmed from his marital problems and was not materially related to his employment. Dr. Maltby's report was submitted to Dr. Kuttner for review who commented that he considered Dr. Maltby's report to be a fairly accurate picture of claimant although he did not entirely agree with the conclusions. It was his impression that claimant's current inability to work was quite likely in part related to his marital problems but he still felt that both the emotional and physical stresses of driving truck had contributed particularly in the light of his specific symptoms.

The ALJ found that claimant had been married three times. At the present time he was having marital difficulties with his third wife and they were separated. The evidence indicates that claimant is a diligent effective worker but has had a long history of acute financial difficulties with continuing indebtedness and constant demands by his creditors, including garnishment of wages.

The ALJ found that the emotional trauma resulting from claimant's separation from his second wife had substantially dissipated at the time of his physical symptoms in February 1977. He found that claimant apparently was the type of individual who throughout his entire adult life had moved quite readily from one marital or extra-marital arrangement to another without any great transitory emotional distress on the break-up. After claimant's separation from his third wife, he lived with a young lady who testified that claimant had a very bad emotional response to his third wife leaving him and moving in with another man prior to the beginning of her relationship with claimant. But although claimant was depressed he had no complaints of headaches, back pain, ear pain, dizziness or fear of driving. She further testified that they took a trip to California which included 20 hours of uninterrupted driving; this was in January 1977 while claimant was recuperating from a hernia operation and he was in good health and good spirits. It was her testimony that only after claimant returned from a couple of weeks work in eastern Oregon transporting loads of plywood over a rather difficult and exhausting road that he first reported the headaches and pain around his ears.

The ALJ found that the record as a whole gave substantial support to Dr. Kuttner's opinion as to the relationship between claimant's work and the diagnosed conversion hysteria

with attendant physical symptomatology. He concluded that a material causative relationship had been established and he therefore remanded the claim to the Fund for acceptance and payment of compensation.

The Board, after de novo review, finds that the medical opinions expressed by Dr. Maltby are more persuasive than those of Dr. Kuttner's.Furthermore, claimant has had too many off-the-job problems which resulted in claimant's disinclination to look for employment.

The Board, based upon the evidence in the record, concludes that claimant has, through his own voluntary actions wholely unrelated to his work activity, placed himself in his present condition and the responsibility for such condition is not that of the State Accident Insurance Fund whose denial of claimant's claim must be approved.

ORDER

The order of the ALJ, dated March 29, 1978, is reversed.

The denial of claimant's claim made by the State Accident Insurance Fund on May 11, 1977 is approved.

WCB CASE NO. 77-5657 OCTOBER 16, 1978

GEORGE HOCH, CLAIMANT
Lachman & Henninger, Claimant's Attys.
Eugene Buckle, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the November 21, 1977 Determination Order whereby he was granted compensation equal to 64° for 20% unscheduled low back disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated April 21, 1978, is affirmed.

WCB CASE NO. 77-6470 OCTOBER 16, 1978

MATTHEW NIBLACK, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Attys.
Newhouse, Foss, Whitty & Roess,
Defense Attys.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which remanded to it claimant's claim for an occupational disease for acceptance and payment of benefits.

Claimant, a 27-year-old employee of the State Employment Division, alleges he developed pains in both legs resulting from prolonged standing at his work. Claimant had worked for the State for 2 years. His first job with the Employment Division was that of a claims taker which he stated required him to stand five out of the eight hours he worked.

In June 1976 claimant was transferred to an interviewer position. There was very little standing required and his legs didn't bother him.

In June 1977 he was transferred back to his first job and his legs again began to bother him. Claimant, on August 25, 1977, filed his claim which the Fund denied on October 10, 1977.

Dr. Smith reported on August 11, 1977 that claimant gave him a history of developing pain in his legs with numbness from the hips down while running cross-country in 1966. He told Dr. Smith that upon graduation from high school he had joined the Navy and the prolonged marching and standing involved in basic training bothered his legs; that he also tried to run in track events but his legs again bothered him; and that he has a 30% disability from the Veteran's Administration. Dr. Smith examined claimant's lower extremities from the knees down and found claimant had mild tenderness and discomfort in his lower extremities. X-rays were normal. Dr. Smith diagnosed pain in both lower extremities of undetermined etiology.

Dr. Massey, who had been treating claimant since July 19, 1977, diagnosed a probable chronic anterior compartment syndrome.

Claimant also had worked as a security guard in college and the prolonged standing caused his legs to hurt.

Claimant has missed no time from work, except for doctor appointments.

The ALJ found claimant was suffering from an occupational disease and remanded the claim to the Fund.

The Board, after de novo review, finds no evidence that claimant's condition was materially and permanently worsened by his work. Claimant's condition may have, from time to time, become symptomatic at work, but a showing that employment produces symptoms of a disease of unknown or undetermined etiology is not sufficient. Weller v. Union Carbide Corporation, 35 Or App 355. The denial was proper.

ORDER

The ALJ's order, dated May 3, 1977, is reversed.

The State Accident Insurance Fund's denial is approved.

SAIF CLAIM NO. A 737168 OCTOBER 16, 1978

JOHN T. RAWLS, CLAIMANT
C. H. Seagraves, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

On May 3, 1978 the Board issued its Own Motion Determination in the above entitled matter which granted claimant compensation for 100% loss by separation of the right leg and compensation for 75% loss of an arm for unscheduled disability. The order stated that said awards were in lieu of the former award claimant had received for permanent total disability.

On October 10, 1978 claimant, by and through his attorney, requested the Board to reconsider this order, stating that the words "in lieu of" were misleading and that the State Accident Insurance Fund had taken the position that inasmuch as it already had paid to the claimant based upon his earlier award for permanent total disability an amount which was in excess of that to which he was entitled by the awards granted by the Board's order of May 3, 1978 it had the right to offset this amount and, therefore, it had fully paid claimant.

The Board often uses the words "in lieu of" when it, after a de novo review, modifies an award made by an Administrative Law Judge and the usage of such words in that situation is quite proper; however, the Own Motion Determination in the above case was issued based upon a re-evaluation of claimant's condition. The only reasonable interpretation which can be given to

the Board's actions in granting awards for disability less than permanent total disability is that claimant was permanently and totally disabled from the date of his 1959 injury and was entitled to receive compensation for such disability until May 3, 1978, when the Board, based on new medical evidence, found that he had less than permanent and total disability. Claimant's present disability, as recited in the Board's order entitled him to receive compensation for that disability from the date of the order forward.

Therefore, the Board concludes that the Own Motion Determination entered in the above entitled matter on May 3, 1978 should be amended by deleting therefrom the first paragraph on page two and substituting therefor the following:

> "Claimant is, as of the date of this order, not permanently and totally disabled; however, he is entitled to compensation for 100% loss by separation of the right leg and compensation for 75% loss of an arm for unscheduled disability, said compensation to be paid claimant commencing on May 3, 1978".

The Own Motion Determination, entered May 3, 1978, should be affirmed in all other respects except that the claimant shall have 30 days from the date of this order to request a hearing.

IT IS SO ORDERED.

WCB CASE NO. 77-1560 OCTOBER 16, 1978

FRANCES SCHLACK, CLAIMANT
Ronald E. Hergert, Claimant's Atty.
Charles Paulson, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the carrier's denial of her claim for an alleged injury of July 3, 1975.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated May 5, 1978, is affirmed.

WCB CASE NO. 77-1023 OCTOBER 16, 1978

HELEN M. SMITH, CLAIMANT
Yturri, Rose & Burnham, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which found claimant did not timely appeal the Determination Order or timely exercise her aggravation rights.

Claimant contends her claim was never closed or, if it was closed, she was not adequately appraised of the closure. She also contends that if the claim was closed payments should be continued to be made to her under ORS 656.245.

Claimant suffered back and leg injuries in an automobile accident on December 7, 1965. She lost no time from work and was found to have no permanent impairment. An order entered on March 10, 1966 by the Workmen's Compensation Department allowed claimant's claim for all required and authorized medical services due to her injury and closed the claim. This order set forth claimant's appeal rights allowing her to appeal either to the Department or the court or to request a hearing before the Workmen's Compensation Board.

The Department, on July 28, 1966, denied a claim for medical services from the Orthopedic and Fracture Clinic since the claim had been closed. After several letters and medical verifications that claimant's treatment for her present condition was directly related to her December 7, 1965 injury the bill was approved on July 15, 1966.

Dr. Baranco continued to treat claimant on a monthly basis. Claimant slowly improved. On May 11, 1967 he reported claimant was being treated for chronic cervical and thoracic myofibrositis and radiculitis. He treated her with a dorsal lumbar brace, cervical traction and medication. Claimant had continued to work during this time period. In October 1967, Dr. Baranco again reported the same complaints claimant had had in January 1966, the date of his first contact with claimant.

Claimant requested the Board to reopen her claim on January 30, 1976 pursuant to ORS 656.278.

Dr. Baranco indicated on March 23, 1976 he had seen claimant intermittently for residual discomfort in the lower cervical and mid-thoracic area. In October 1976, he reported claimant stated that long periods of sitting or standing

would aggravate her condition. He felt a myelogram was indicated.

The State Accident Insurance Fund, on December 20, 1976, denied any responsibility for claimant's current low back condition involving pain in the hip and leg for which the myelogram had been recommended. The denial was based on the fact that the original injury involved the upper back and neck and was not related to her current low back problem. Claimant requested a hearing.

At the hearing, the Fund moved for dismissal on the grounds that the request was not timely. Claimant contended her claim had never been closed. She testified that she continued to receive medical care and treatment, some of which she paid for and some of which the Fund paid for.

The ALJ found that claimant had not timely appealed the order of March 10, 1966 or timely exercised her aggravation rights and granted the motion to dismiss.

The Board, after de novo review, concurs with the ALJ that claimant failed to timely request a hearing or exercise her aggravation rights. However, claimant is entitled to have all of her medical bills which relate to her 1968 injuries (the upper and mid back) paid by the Fund pursuant to the provisions of ORS 656.245.

The Board finds that the failure of the Fund to pay such bills justifies the assessment of a penalty equal to 25% of such unpaid medical bills.

ORDER

The ALJ's order, dated April 28, 1978, is modified.

The State Accident Insurance Fund is ordered to pay all claimant's medical bills relating to the 1965 mid and upper back injury, which it has not paid.

Claimant is hereby granted compensation equal to 25% of said unpaid medical bills as and for a penalty.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $350, payable by the Fund.

The order of the ALJ, in all other respects, is affirmed.

WCB CASE NO. 76-2810 OCTOBER 16, 1978

BOB TOWE, CLAIMANT
Douglas A. Shepard, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order on Remand

On December 20, 1977 the Board issued its Order on Review in the above entitled matter reversing the order of the Referee dated May 27, 1977 which had upheld the claimant's claim for a myocardial infarction suffered on or about October 28, 1975. In its order, the Board found that the angina attacks suffered by claimant were a direct result of his work activities and caused claimant to seek medical attention and lose time from work acting upon his doctor's advice, therefore, the claimant was entitled to compensation for this time loss. The Board ordered the State Accident Insurance Fund to pay claimant time loss benefits from October 11, 1975 to November 13, 1975.

The claimant appealed the Board's order and the Court of Appeals, in an opinion and order entered June 27, 1978, ruled that because claimant had been awarded time loss benefits he must be considered to have partially prevailed on a rejected claim and, as the respondent, be entitled to an attorney's fee.

The Board, in compliance with the judgment and mandate of the Court of Appeals issued September 22, 1978 hereby amends its Order on Review entered in the above entitled matter on December 27, 1977 by adding the following paragraph to page three of said Order on Review:

> "Claimant's attorney is awarded as a reasonable attorney's fee for his services both before the Referee at the hearing and at Board review, a sum of $500, payable by the State Accident Insurance Fund.

WCB CASE NO. 77-3017 OCTOBER 16, 1978

SHELLEY J. WHEELER, CLAIMANT
Carlotta H. Sorensen, Claimant's Atty.
Gorham & Sarriugarte, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Request for Review by Claimant.

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the denial by Employee Benefits Insurance Company.

Claimant, 23 years old, alleges she sustained an injury to her back on February 16, 1976 while pulling on the dry chain. Claimant last worked on February 8, 1977. Her claim indicates she called in sick on the 14th and then told the employer on the 16th that she would not be able to work because she had hurt her back at home while lifting heavy boxes when moving.

Dr. Hoda began treating claimant. A review of the x-rays of February 22, 1977 showed a compression fracture of the superior anterior aspect of the body of L3. Later x-rays showed no further compression. His diagnosis was a healing fracture body of L3.

The claim was denied on April 28, 1977.

Claimant was hospitalized on March 3, 1977 with recurring back pain, right and left and radiculopathy within the right posterior leg. She was re-admitted to the hospital in May and again in October 1977. Dr. Casey diagnosed lumbar myofascitis, secondary to an old compression fracture of L3. In October 1977, claimant was still complaining of low back pain, however, there was no radiculopathy.

On March 17, 1976, Dr. Edelman did a fetogram which revealed claimant was pregnant and had been for 36 weeks. She had a child in March 1976.

Claimant testified she worked on February 11, 1977 and then moved her household residence on the 12th and 13th, a weekend. She did not work the 14th, but claims she did work the 15th and 16th. The employer's records reflected claimant did not work after the 8th of February.

Claimant also testified she had had some back problems after a car wreck in 1971 or 1972 which resolved without residuals and her only other problem was during her pregnancy. Dr. Kenyon's office records reflected claimant had back pain before, during and after her pregnancy. His first record of back pain is in January 1975. In August 1976 he noted claimant had back pain which related to an auto accident and he felt was a lumbar sprain. Dr. Kenyon's x-rays revealed an old, well healed fracture of L3, the same area she now contends is causing her problems.

The ALJ, after reviewing all of the evidence, felt that claimant had not met her burden of proof. He noted it was questionable whether claimant worked on the day she alleged she suffered the injury; also, there was her denial of any in-

jury made to her employer. Dr. Hoda stated that in the absence of any other history of injury to claimant's back he felt the injury she received at work was responsible for the fracture of L3 but there was evidence of prior back pain according to Dr. Kenyon. Also, claimant's condition of pregnancy must be considered.

The ALJ felt, after analyzing all of the evidence, without using speculation and conjecture he could not find claimant had suffered a compensable injury. He, therefore, affirmed the denial.

The Board, after de novo review, concurs with the ALJ's finding. There are too many inconsistencies in the evidence to find that claimant suffered a compensable injury on or about February 16, 1977. The medical evidence indicates claimant had an on-going back problem in the same area she contends she injured on the 16th.

ORDER

The ALJ's order, dated May 4, 1978, is affirmed.

WCB CASE NO. 77-5885 OCTOBER 19, 1978

HOWARD W. ALLEN, CLAIMANT
Lively & Wiswall, Claimant's Attys.
Lindsay, Nahstoll, Hart, Neil & Weigler, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which denied his claim for additional compensation for temporary total disability and penalties and attorney fees.

Claimant contends he is entitled to compensation for temporary total disability from April 30, 1977 until his claim is closed plus penalties and attorney fees because of the employer's failure to properly and timely process his claim and pay temporary total disability without a medical report stating that claimant's condition was medically stationary.

Claimant, then a 62-year-old dry chain operator, sustained a back injury on July 31, 1976 while pulling veneer. Dr. Bryson, a chiropractic physician, diagnosed sprain of the lumbar spine with right sacroiliac subluxation. Claimant was treated with adjustments and physiotherapy.

Claimant lost no time from work and was found to be medically stationary by Dr. Bryson on August 23, 1976 with no permanent impairment.

Dr. Larson, an orthopedic surgeon, examined claimant on April 13, 1977. Claimant had been having intermittent discomfort in his back since he first injured it in 1967. Claimant felt he progressively was having more difficulty keeping up with his work. His complaints were of low back pain with radiation to the right leg and pain by coughing and sneezing. Dr. Larson diagnosed a chronic back problem with some evidence of irregularity of the facets of the lower back region. Dr. Larson felt claimant should lessen the stress he put on his back.

On April 15, 1977 claimant returned to Dr. Larson with Social Security forms to be filled out for disability benefits. Claimant had been placed on a grading job on two occasions and felt it aggravated his back. He returned to his patcher job on March 26 but his back continued to bother him.

Claimant worked continuously after his July 1976 injury until he quit work on April 15, 1977.

Claimant retired on May 1, 1977; he had been paid compensation for temporary total disability from April 16, 1977 through April 30, 1977.

On August 15, 1977 the employer requested a determination. On November 22, 1977 a representative of the Evaluation Division asked for a current examination by Dr. Larson, asking him to describe any residuals due to claimant's injury. The employer again requested a determination on December 1, 1977. None was made.

Claimant, since his retirement, has reported to the unemployment office for unemployment compensation, but was considered not able to work and has not sought other work.

The ALJ found that the employer had no obligation, based upon the medical evidence, to pay additional compensation for temporary total disability. Penalties and attorney fees were not applicable as the employer had made two attempts to have the claim closed.

The Board, after de novo review, affirms the ALJ's order. There is no evidence in the record which supports claimant's claim for additional compensation for temporary total disability. The employer should not be penalized for "failure to timely process" claimant's claim; the evidence indicates that twice the employer requested claim closure.

ORDER

The ALJ's order, dated May 19, 1978, is affirmed.

WCB CASE NO. 77-5007 OCTOBER 19, 1978

JAMES R. ATCHLEY, CLAIMANT
Jerry E. Gastineau, Claimant's Atty.
Collins, Velure & Heysell, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Order of Dismissal

A request for review, having been duly filed with the Workers' 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 Administrative Law Judge is final by operation of law.

WCB CASE NO. 77-7690 OCTOBER 19, 1978

PAUL BLOOM, CLAIMANT
Merten & Saltveit, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which found that claimant was both medically and vocationally stationary; that his injury was non-disabling; that claimant was not entitled to any award for permanent partial disability or any penalties and attorney's fees. Claimant contends his injury should have been classified as disabling and remanded to the Fund.

Claimant, then a 38-year-old program manager, sustained a compensable injury to his low back on December 30, 1976. After lifting several light boxes, he lifted a heavy one and injured his back. Claimant never lost any time from work because of this injury.

Claimant had planned a New Year's Eve party for 45 people and did not cancel it.

On January 3, 1977 claimant saw Dr. Motz who diagnosed an acute exacerbation of a chronic sacroiliac strain.

Claimant stated he had injured his low back in October 1976 in another lifting incident, but did not file a claim nor

lose any time from work. Claimant also injured his leg in July 1977, but has no residuals from it and suffered no time loss.

Claimant indicated he has a high pain tolerance and is a very hard worker. In January 1977 claimant was asked to re= sign, but refused to do so until July 1977.

Two people who had worked for claimant testified that they had observed claimant at work in pain and bent over.

Claimant's injury was classified as non-disabling by the Fund and claimant was so notified by a letter dated March 24, 1977.

Claimant did not work after his leaving his job. He took some vacation time and planned to write a book.

In late December 1977 claimant was unable to get out of bed because of back pain. He was seen by Dr. Sirounian who diagnosed chronic lumbosacral strain with no indications of a herniated nucleus pulposus. He treated claimant with pain medication and continued conservative therapy. In January 1978 Dr. Sirounian felt claimant should exercise and continue taking medication.

Claimant had been searching for a job in the fall of 1977; he was offered two jobs, but he turned them both down. He was drawing unemployment compensation and indicated he was willing and physically able to work.

Dr. Motz indicated she felt claimant should be referred to the Callahan Center for evaluation and rehabilitation.

On March 1, 1978 Dr. Sirounian authorized time loss from December 28, 1977 to February 24, 1978.

The ALJ found that this was an accepted claim, there= fore, penalties and attorney's fees were not appropriate. He found no evidence that the time loss authorized by Dr. Sir= ounian was related to his industrial injury.

The ALJ concluded claimant was both medically and vo= cationally stationary and had not suffered a disabling injury.

The Board, after de novo review, concurs with the ALJ's findings. There is no evidence that claimant is not medically and vocationally stationary or needs additional medical treat= ment. Likewise, there is no evidence indicating claimant has lost any time from work because of the December 30, 1976 injury, therefore, he is not entitled to any time loss benefits; the injury was correctly classified as non-disabling.

This claim, which was filed for claimant by the em= ployer, is an accepted claim; penalties and attorney's fees are not applicable.

ORDER

The ALJ's order, dated March 29, 1978, is affirmed.

WCB CASE NO. 77-7461 OCTOBER 19, 1978

HOMER CRAFT, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the Determination Order, dated November 21, 1977, awarding claimant 64° for 20% unscheduled disability for his back injury. Claimant contends he is entitled to a greater award.

Claimant, then a 19-year-old planer off-bearer, sus= tained an injury to his back on April 14, 1975 when he slipped and fell. This injury was diagnosed as a traumatic aggravation of a congenital anomaly of the fifth vertebra. After a period of conservative treatment, claimant underwent a fusion of L5 to the sacrum on October 2, 1975. A myelogram had revealed spondylolysis L5 but no evidence of disc herniation or other significant abnormality of the lumbar canal.

Dr. Carter, in July 1975, felt claimant needed vocational rehabiliation. He placed the following limitations on claimant; no heavy lifting or excessive bending and stooping activities.

In May 1976 Dr. Carter indicated claimant was fully am- bulatory, but still needed to use a lumbosacral corset for symptomatic relief. He felt claimant could return to light work, but would never be able to return to heavy work requiring extensive bending or stooping or any type of heavy lifting of materials greater than 20 pounds.

Claimant is now 22 years old and has a 7th grade educa- tion. Under the Vocational Rehabilitation Division's sponsor= ship claimant began a GED program, but didn't successfully com= plete it. He also began an on-the-job training program as a building construction estimator, but did not complete the pro= gram although he did acquire some skills in this area.

Claimant's prior work experience consists of construction work, mill work, and carpet laying.

In August 1977, claimant began his own construction business building pole buildings. Claimant mainly does the selling, building estimation and sets up the materials and work schedules. He drives 1000-1200 miles per month. Claimant occasionally does assist his 2-3 employees in performing light work but he avoids any heavy lifting.

A Determination Order, dated November 21, 1977, awarded claimant compensation for temporary total disability and compensation equal to 64° for 20% unscheduled disability resulting from his low back injury.

The ALJ found claimant was not entitled to any increased award of compensation.

The Board, upon de novo review, finds that the claimant has been adequately compensated. Claimant has undergone a fusion and is limited from that segment of the labor market which requires any heavy lifting, repetitive or excessive bending or stooping activities, however, claimant has the necessary skills to do other types of work which are within his physical and mental capabilities. The Board concludes claimant's loss of wage earning capacity is no greater than 20%.

ORDER

The ALJ's order, dated May 22, 1978, is affirmed.

WCB CASE NO. 77-592 OCTOBER 19, 1978

REINO JARVI, CLAIMANT
Edward N. Fadeley, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which remanded claimant's claim to it for acceptance and payment of compensation to which he is entitled.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated May 31, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $300, payable by the Fund.

WCB CASE NO. 77-3518 OCTOBER 19, 1978

ODICE OSBORNE, CLAIMANT
Harold Adams, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which granted claimant an award of compensation equal to 112° for 35% unscheduled disability for his back injury. The Fund contends this award is excessive.

Claimant, when a 30-year-old mill worker, suffered a compensable low back injury on August 13, 1974 when he fell while trying to dislodge a piece of wood from a belt. Claimant received chiropractic treatment from Dr. Schmidt and made slow progress.

Claimant was referred to Dr. Burr in May 1975. Dr. Burr was given a history of back injury in 1960 suffered while handling heavy lines working on tugboats. Claimant told him that he had back pain with heavy labor, which radiated down the legs but without any numbness. Claimant had tried lighter work in 1972 but for financial, as well as other, reasons he returned to logging in 1973. Dr. Burr diagnosed degenerative disc disease, mild L5-S1 and chronic low back disability.

In October 1975, Dr. Schmidt found claimant to be medically stationary. He felt claimant would need continuing therapy, as well as a very intense program of exercise and home care.

In December 1975 claimant was examined by the Orthopaedic Consultants. They reported that claimant had tried to work in May 1975 as a chaser, but had lasted only one day, after which he was laid up for several days. It was noted claimant's weight had been reduced from 289 pounds to 234 pounds. Claimant's complaints were of pain in the lower back without pain, numbness, or tingling in his legs. Their diagnosis was chronic lumbosacral strain, with acute episodes, by history, suggesting

some instability at the lumbosacral level of his spine and obesity. It was their opinion claimant was medically stationary and they suggested claimant avoid heavy manual labor and not return to his previous job. The loss of function due to this injury was in the upper border of minimal.

Claimant was enrolled in a vocational rehabilitation program and obtained a GED. He was then enrolled in a two-year office manager program. However, claimant withdrew in early 1977 because of back pain and a declining interest in the program.

In March 1977, claimant went to work as a yarder operator. He occasionally helped other workers with heavy lifting although this was contrary to his employer's orders. After such activity, he experienced flare-ups of back pain and lost time from work.

Claimant was referred to the Disability Prevention Division in December 1977. Dr. Halferty's diagnosis was chronic recurrent lumbar strain (degenerative intervertebral disc disease) and moderate obesity. Dr. Loeb felt claimant was a poor candidate for long term rehabilitation. Claimant was able to stand on his feet to do sanding and planing without difficulty for 1-1/2 hours and he lifted 53 pounds without stress. Dr. Halferty felt claimant should be restricted to light to medium work, with the maximum of 50 pounds lifting and repetitive lifting of not over 25 pounds.

A Determination Order, dated June 8, 1977, awarded claimant compensation equal to 16° for 5% unscheduled disability resulting from his low back injury.

Vocational Rehabilitation suggested claimant be trained to work in electronics or as a machinist, but claimant rejected these ideas. Claimant felt he was able to make good money working in the woods and was not interested in a job which did not pay as well as the logging jobs.

Claimant testified he feels he is able to do about 50% of what he could do before his injury. He feels that the techniques he learned at the Disability Prevention Division have reduced the incidence of back exacerbation when he works.

Claimant last worked as a truck driver for approximately three weeks. He and a co-driver hauled lime. They drove approximately 10-11 hours a day, sharing the driving equally. Claimant indicated he experienced a little "nagging" problem in his back.

The majority of claimant's work experience has been heavy manual labor. The consensus of the medical and vocational specialist is that claimant should not return to this type of work.

The ALJ found claimant had suffered a loss of wage earning capacity much greater than 5% and increased the award to 112° for a 35% unscheduled low back disability.

The Board, after de novo review, finds that claimant has undergone no surgery; he has not indicated a desire to engage in any form of employment other than heavy manual labor types of employment, even though this is contrary to the recommendations of his doctors.

The Board, based on cases with the same type of work restrictions placed on the worker and similar factual matters, concludes that claimant's loss of wage earning capacity would be adequately compensated for by an award of compensation equal to 80° for 25% unscheduled disability for his low back injury.

ORDER

The ALJ's order, dated April 26, 1978, is modified.

Claimant is hereby awarded compensation equal to 80° for 25% unscheduled low back disability. This is in lieu of the award made by the ALJ's order which in all other respects is affirmed.

SAIF CLAIM NO. EC 352941 OCTOBER 19, 1978

PHYLLIS C. RICKS (ROBINSON), CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On February 11, 1972 claimant suffered a compensable injury to her left thumb. The claim was accepted and closed by a Determination Order dated December 29, 1972 whereby claimant was awarded 5% loss equal to 2.4°. At the time of her injury claimant was working for Communications Workers of America, Local 9201.

In May 1978 claimant's thumb began to ache and she was unable to bend it without the first joint popping out of the socket. On July 26 she was examined by Dr. Nathan who had treated her for the 1972 injury. Claimant stated that Dr. Nathan advised her that she should reopen her claim as the loss of the use of her thumb was directly related to the 1972 industrial injury and that surgery would be necessary.

On July 26, 1978 the claimant wrote to the Fund and requested that it reopen the claim. On August 14, 1978 Dr. Nathan advised the Fund that, after examining claimant, although he was not able to state specifically that there was

a direct relationship between the "triggering" of her left thumb and her industrial injury of 1972 it appeared reasonable to consider that there was such a relationship. He said that claimant would be re-examined by him on September 13 and he requested permission to proceed with the surgical release of the triggering in her left thumb.

On October 6, 1978 the Fund forwarded all the above correspondence to the Board and stated that it would have no objections to the Board reopening claimant's claim pursuant to the Board's own motion jurisdiction granted by ORS 656.278 if the Board found that the medical evidence justified such reopening.

The Board has reviewed the medical records provided it, including the operative report of September 21, 1978 which indicated that Dr. Nathan performed a median nerve block, left wrist, to release claimant's left trigger thumb, and concludes that claimant's request for own motion relief should be granted and that her claim for the February 11, 1972 industrial injury should be remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, commencing on July 26, 1978, the date claimant was first examined by Dr. Nathan, and until claimant's claim is again closed pursuant to the provisions of ORS 656.278, less any time worked.

IT IS SO ORDERED.

WCB CASE NO. 78-579 OCTOBER 19, 1978

GLEN R. SCHAFFER, CLAIMANT
Walter B. Hogan, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order on Motion to Dismiss

On August 25, 1978 the Administrative Law Judge entered his order remanding claimant's claim to it for acceptance and payment of compensation to which he is entitled.

On September 25, 1978, according to the date stamped on the request (the request was hand-carried to the Workers' Compensation Board's office on that date), the Fund requested review of the ALJ's order.

The 30th day after the date of the issuance of the ALJ's order was September 24, 1978, which was a Sunday, therefore, the request received on the following Monday, September 25, was timely and the claimant's motion to dismiss said request should be denied.

IT IS SO ORDERED.

SAIF CLAIM NO. C 347173 OCTOBER 19, 1978

BEN E. SELL, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On January 11, 1972 claimant suffered a compensable injury to his right knee while employed by the Oregon State Highway Department. The claim was accepted and closed by a Determination Order dated February 18, 1972 which awarded claimant compensation only for temporary total disability. Claimant's aggravation rights have expired.

Claimant contacted the State Accident Insurance Fund, requesting that his claim be reopened. The Fund furnished the Board with all of the medical information which accompanied claimant's request and stated that it would not oppose claimant's request that his claim be reopened if the Board found that the medical evidence justified such reopening.

A right knee arthrogram done by Dr. Purnell on March 22, 1978 at the request of Dr. Bassinger indicated questionable loose body in the knee and degeneration of the medial cartilage. Claimant was referred to Dr. K. Clair Anderson who first saw claimant on April 11, 1978. At that time claimant was complaining of knee pain and gave a long history of pain in both knees over the past five years. Dr. Anderson's impression, after examination, was internal derangement of the right knee superimposed on osteoarthritis and claimant was admitted to the hospital on April 25, 1978 for an arthrotomy with medial meniscectomy.

Dr. Anderson, in a letter dated September 27, 1978, stated that the injury claimant had sustained in 1972 could conceivably have torn the meniscus which allowed the progressive symptoms which claimant had experienced over the past five years and given no other history of injury it was his feeling that claimant's present problem was related to the 1972 accident.

The Board, having reviewed the medical records which include Dr. Anderson's letter and chart reports as well as the operative reports and the report of Dr. VanOlst who examined claimant on February 7, 1972 for evaluation of his right knee injury, concludes that there is justification for granting claimant's request to reopen his 1972 claim pursuant to the provisions of ORS 656.278.

ORDER

Claimant's claim for an industrial injury sustained on January 11, 1972 is remanded to the State Accident Insurance Fund for acceptance and for the payment of compensation, as

provided by law, commencing on March 22, 1978, the date the first right knee arthrogram was performed by Dr. Purnell, and until the claim is closed pursuant to the provisions of ORS 656.278, less time worked.

WCB CASE NO. 77-5162 OCTOBER 19, 1978

BENJAMIN L. SMITH, CLAIMANT
Benton Flaxel, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund seeks Board review of the order of the Administrative Law Judge (ALJ) which granted claimant 52.5° for 35% loss of the left leg and 244° for 75% unscheduled neck, shoulder, left hip disability but approved the Fund's partial denial of July 26, 1977.

Claimant suffered a compensable injury on August 24, 1974 when his left leg was caught in the steering wheel as he was thrown through the front windshield of his milk truck. Claimant's injuries were diagnosed as a fracture of the left tibia, disarrangement of the left knee, hemarthrosis, and multiple severe contusions and abrasions. Claimant was seen first by Dr. Brazer, then by Dr. Boots and finally by Dr. Smith. The latter's chart notes indicated claimant's recovery was slow. Based on an examination of claimant on February 21, 1975 he found substantial sprain of the cervical spine with persistent difficulties. This made it impossible for claimant to drive and he was also unable to carry on the insurance business that he had been attempting to operate.

On August 26, 1974 claimant had been examined by Dr. Mason at the Disability Prevention Center who recommended further treatment for claimant's cervical spine status in the nature of muscle relaxant medication and cervical traction.

After claimant was discharged from the Disability Prevention Center on September 12, 1975 he returned home and continued to be treated by both Dr. Smith and Dr. Boots.

On November 26, 1975, while claimant was in a supermarket his knee and hip gave out from under him and he fell landing on his tailbone and injuring his sacrum and lower back. Dr. Boots said claimant's condition had been medically stationary until this non-industrial injury occurred, however, after the accident claimant's symptomatology varied with exacerbations and remissions. Dr. Boots was of the opinion that

the accident-in-the-supermarket activated the pre-existing industrial injury. In a later report, Dr. Boots states that claimant told him that the incident of November 26 was a new injury and that the Fund was not liable for it. Dr. Boots felt that there was no question but that claimant's previously existing injuries were definitely aggravated and that his sacroiliac injury was a new injury.

Claimant was examined by the Orthopaedic Consultants who reported on April 7, 1977 that claimant had a chronic cervical sprain, by history, with minimal objective findings; lateral tibial condylar fracture, left, by history, with minimal objective findings presently, but with possible torn meniscus of the left knee; residuals of contusion and sprain to the left hip; and an apparent severe anxiety tension state. From an orthopedic and neurologic point of view they felt claimant's condition was stationary, however, claimant was in need of a psychiatric evaluation which should be done before claim closure. It was recommended that claimant not return to the same occupation but they felt he could return to other types of work with limited walking, standing and sitting after his anxiety tension problem had been eliminated. The loss of function in the neck was in the lower level of mild, loss of function in the left knee, left hip and left foot was mild, and both were work related; the loss of function in the lower back was not related to the injury.

Dr. Wahl, a clinical psychologist, who examined claimant on June 2, 1977, referred to an injury of August 24, 1974 and to a re-aggravation injury in January 1975 (probably meant November 26, 1975) and rated the degree of interference from functional disturbance as mild; he diagnosed a depressive neurosis caused by concern over claimant's loss of health and, based upon the findings contained in Dr. Perkins' psychological testing of claimant on September 4, 1975, Dr. Wahl felt claimant's condition had become considerably worse in the last year and a half to two years. He concluded that claimant had shown little or no pathology before the accident, referring apparently to the non-industrial fall in November 1975. He felt that this fall produced extreme pre-occupation by claimant with his health and also extreme depression and feelings of physical helplessness.

Later, Dr. Wahl, upon being deposed, indicated that he felt claimant had handled any physical or psychological stress adequately following the industrial injury of August 24 and that most of the psychopathology developed as a result of the later non-industrial injury.

With regard to attempts at vocational rehabilitation, the ALJ found that claimant's counselor was of the opinion that the functional limitations, e.g., no prolonged standing, sitting, no weight bearing on the left leg, and no prolonged operation

of motor vehicles, precluded claimant from returning to his previous occupations or from doing any other physical activities which might aggravate his disability. Several attempts were made to contact the claimant after he had taken the real estate examination on February 9, 1976 to determine his plans; all were unsuccessful. The evidence indicates that he did not take any examination after February 1976. The Vocational Rehabilitation Division was notified on April 28, 1977 that the Workers' Compensation Board had terminated claimant's vocational program on October 22, 1976 because he was still unable to actively participate in his vocational program.

The ALJ found that claimant had completed the fifth grade and had received his GED prior to entering the real estate school. The psychological testings reveal that claimant was bright, alert and intellectually competent to do many types of non-manual work, however, most of his work experience has been manual labor.

Claimant testifies the pain in the back of his head and cervical spine area radiates into the shoulder and arms; he contends that the shoulder limitations on movement prevent him from driving a vehicle and that any kind of jarring causes his upper body to hurt. He also stated he had jabbing pains and spasm in his left hip area. If he walks or exercises, his left foot goes to sleep and he is unable to squat or kneel nor can he do any prolonged sitting.

The ALJ found that claimant had proven that he had sustained injuries to his left knee, his left hip and had suffered a neck strain and associated pains in the shoulder and has residuals of contusion and strain to the left hip. He found that the lower back problem was not work related nor was there any evidence of any right leg disability or right arm disability relating to the industrial injury.

The ALJ concluded, based upon Dr. Bert's opinion and the reports from the Orthopaedic Consultants, that claimant had suffered 35% loss function of his left leg and that, based upon claimant's age, educational and work limitations, qualifications and experiences, lack of suitability for retraining and inability to return to any manual labor, claimant had suffered substantial loss of wage earning capacity.

Claimant's claim had been originally closed by a Determination Order dated December 6, 1977 whereby claimant had received 15° for 10% loss function of the left leg and 144° for 45% unscheduled disability. The ALJ increased these awards to 52.5° for 35% loss function of the left leg and to 240° for 75% unscheduled neck, shoulder, left hip disability. He affirmed the denial made by the Fund on July 26, 1977 of any responsibility for lower back (claimant, at the hearing, stated that he no longer made any claim relating to these problems, therefore,

they were not at issue at the time of the hearing).

The Board, on de novo review, finds that the medical evidence does not support the awards granted claimant by the ALJ either for his scheduled injuries or for his unscheduled disability. The ALJ correctly concluded that claimant was not permanently and totally disabled. Although claimant had been involved in a very severe accident, he felt that claimant was probably exaggerating his pain to some extent. The ALJ did not attempt to relate claimant's present complaints to his pre-November 26, 1975 condition. Dr. Mason, on August 26, 1975, found no visible deformity in the left knee, no palpable synovial thickening and no fusion evident. There was equal ranges of motion in both knees. Dr. Mason found some tenderness over the top of the left foot but no deformity and he stated the arch supports appeared to be an adequate fit, right and left. When claimant was discharged from the Disability Prevention Center, Dr. Mason's report, dated September 12, 1975, stated claimant was making various exaggerating complaints about problems with his foot and claiming that the truck had rolled over his foot and crushed it. However, he did not indicate any disability in the left foot in his discharge summary. After the intervening non-industrial accident of November 26, 1975 claimant had a complete new set of complaints as indicated in Dr. Boots' report of March 27, 1976.

The Board finds that claimant's credibility is somewhat suspect, based upon a comparison of Dr. Boots' original history of the incident of November 26, 1975 and the history given by claimant to the Orthopaedic Consultants concerning that same incident. In the latter history, he completely forgot to tell the physicians at the Orthopaedic Consultants that the subsequent intervening accident aggravated everything that had been wrong with him prior thereto and also caused some new injuries. Apparently, the physicians at the Orthopaedic Consultants did not review Dr. Boots' report but relied primarily on the history given to them by claimant. However, even without the accurate history, they evaluated the disability in the left knee, hip, and foot as mild and related it primarily to the later injury.

Dr. Boots in his report of February 3, 1976 stated that claimant's condition was considered medically stable until November 26, 1975 when claimant slipped in a supermarket and that since that time his symptomatology had varied with exacerbations and remissions.

The Board concludes that the intervening non-industrial accident of November 26, 1974 has materially aggravated claimant's conditions which resulted from his original industrial injury but apparently the ALJ did not segregate the various disabilities from the actual causes in arriving at his decision to increase the awards for both scheduled and non-scheduled disabilities.

The Fund contends that claimant had been adequately compensated by the awards granted by the Determination Order, however, the Board finds the medical evidence does justify a slight increase, although substantially less than the increases granted by the ALJ. The Board concludes that to adequately compensate claimant for his loss function of the left leg, he should be entitled to 37.5° for 25% of the maximum and 176° for 55% of the maximum allowable for unscheduled disability. The decrease in the latter award is based on evidence which indicates claimant's lack of cooperation with the Vocational Rehabilitation Division and the reports from Drs. Perkins and Wahl, both clinical psychologists, which state that claimant is bright and has the intellect to enable him to do, or be trained to do, many types of non-manual jobs. The fact that claimant's work experience has been mostly manual labor does not preclude the possibility of training claimant to do light type work.

ORDER

The order of the ALJ, dated June 19, 1978, is modified.

Claimant is awarded compensation equal to 22.5° for 15% loss of his left leg and compensation equal to 32° for 10% unscheduled disability in the neck, shoulder, and left hip area. These awards are in addition to and not in lieu of the awards previously made by the Determination Order dated December 6, 1977.

The ALJ's order, in all other respects, is affirmed.

SAIF CLAIM NO. RC 353644 OCTOBER 19, 1978

DOROTHY SZABO, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury to her low back on February 15, 1972. Her claim was accepted and closed by a Determination Order entered July 29, 1972 and claimant's aggravation rights have now expired.

On September 8, 1978 claimant, by and through her attorney, requested the Board to exercise its own motion pursuant to ORS 656.278 and reopen her claim. The request stated that claimant had been hospitalized on April 9, 1978 for recurrent low back pain. A myelogram indicated marked defects at L4-5, L5-S1 and possibly L3-4. A decompressive hemilaminectomy was

performed on April 20, 1978. The Board was furnished a complete claim file by the State Accident Insurance Fund which stated that it would not oppose reopening the claim if the Board found the medical evidence justified it. The date of the last award or arrangement of compensation was a stipulated order approved on November 5, 1976.

The Board, after carefully considering the medical evidence furnished to it, concludes that claimant's claim should be opened as of the date she was hospitalized, April 9, 1978, and paid compensation, as provided by law, from that date and until her claim is closed pursuant to the provisions of ORS 656.278.

Claimant's attorney should be granted as a reasonable attorney's fee for his services a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $500.

IT IS SO ORDERED.

WCB CASE NO. 78-684 OCTOBER 19, 1978

CHESTER TEAL, CLAIMANT
Ringo, Walton, Eves & Gardner,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which awarded claimant compensation equal to 64° for 20% unscheduled disability as a result of a hernia suffered on February 18, 1977. Claimant contends he is entitled to a greater award.

Claimant, then a 62-year-old heavy equipment operator, suffered a hernia on February 18, 1977 when he slipped while carrying a grader blade; this was his fourth hernia. Dr. Gilbert, who had been treating claimant since 1970 when he had his first umbilical herniorrhaphy, reported in May 1977 claimant had had two more herniae which had been repaired unsuccessfully. He said that claimant had to lose weight prior to repairing this last hernia.

On May 23, 1977 Dr. Gilbert performed a ventral herniorrhaphy. During this operation, a mesh was placed overlying the wound to provide adequate support for the repaired ventral hernia.

Claimant was released from Dr. Gilbert's care in August 1977. He advised claimant not to work where either periodic or persistent heavy lifting or straining were required. Claimant's current job required this and Dr. Gilbert felt claimant needed a lighter job and should discuss this with his employer. He should be considered permanently disabled insofar as heavy physical labor or lifting are concerned.

A Determination Order, dated January 16, 1978, awarded claimant compensation only for temporary total disability from May 23, 1977 through August 16, 1977.

On February 27, 1978 Dr. Gilbert stated that he had discussed his recommendations with claimant at great length. He reported claimant had worked all of his life as a grader operator and was not trained for any other type of work. He felt there was no work available in a supervisory position or which did not involve lifting. It was his opinion that if claimant returned to a job requiring heavy lifting he had a 30-50% chance of having a recurrence of his hernia. It was noted that claimant was a very large man and had a very large abdomen, which in itself produces quite a strain on the abdominal wall herniae. Dr. Gilbert has never advised claimant not to work.

Claimant testified he had no trouble returning to work after his three previous herniae. He has a high school education and has worked for this employer for 31 years doing road work. Prior to this claimant worked in logging. Claimant felt the heaviest part of his job consisted of changing grader blades once or twice a week. He has to carry them to the grader and replace them. Additionally, he helps road repair crews and lifts buckets of tar, a task which in the past had caused two of the herniae.

Claimant complained of pain where the mesh was placed. He stated he could not sit or stand for prolonged periods, sleep through the night, and must shift positions. He lies down three or four times during the day. The pain in his side caused him to give up hunting and fishing. Claimant retired because he could not find lighter work with his employer.

Dr. Gilbert felt claimant should not have pain severe enough to prevent him from working. He thought that claimant was employable and could return to his job as a grader operator if necessary, but it would not be in his best interest to do so.

The ALJ found that claimant was entitled to an award based on his loss of wage earning capacity equal to 20%.

The Board, after de novo review, concurs with the ALJ's conclusion. Claimant is barred from any employment requiring heavy lifting or straining. Dr. Gilbert finds that claimant

is capable of doing some type of work and claimant indicates he would be able to work if he could find a lighter form of employment.

The Board finds that claimant has a permanent disability which has caused him to sustain some loss of wage earning capacity but that an award of 20% adequately compensates claimant for his loss.

ORDER

The ALJ's order, dated May 4, 1978, is affirmed.

SAIF CLAIM NO. GA 710939 OCTOBER 19, 1978

MELVIN L. VEELLE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On January 13, 1959 claimant suffered a compensable injury to his left leg and ankle while working for Sanders and Veelle Logging Company. Claimant was off work approximately two years and when he returned to the logging industry he had residual of persistent stiffness in the left ankle. Although the medical records of the original claim are incomplete the State Accident Insurance Fund stated that claimant had been originally granted an award equal to 15% left foot.

Claimant was treated by Dr. Hardiman for post-traumatic osteoarthritis involving the ankle in 1976 and again for tendinitis and probable ganglion cyst in 1977. On January 10, 1978 claimant was examined by Dr. Hardiman complaining of a painful hypertrophic bone spur on the talus which had been present for some time and was painful and had interfered with claimant's ability to work as a logger. Claimant was admitted to the hospital and the spur was surgically removed by Dr. Hardiman in April 1978.

The claimant requested that his claim be reopened pursuant to the Board's own motion jurisdiction and the Fund, after being notified of claimant's request, responded, stating they had no objections to reopening the claim. The Board entered its Own Motion Order, dated May 3, 1978, which remanded claimant's claim for his January 13, 1959 injury to the Fund for acceptance and payment of compensation, as provided by law, commencing April 3, 1978, the date the claimant entered the hospital for the surgery proposed by Dr. Hardiman.

On September 6, 1978 the final examination of claimant indicated he was still having some symptoms consisting primar-

ily of discomfort on the medial side of his left ankle and some numbness in the left heel. The residual loss of range of motion was the same as when the claim had been previously closed. The Evaluating Committee recommended to the Board that claimant be awarded compensation for temporary total disability from April 3, 1978 to May 2, 1978, inclusively, but given no award of compensation for permanent partial disability in addition to that previously awarded.

The Board concurs in the recommendation.

ORDER

Claimant is awarded compensation for temporary total disability from April 3, 1978 to May 2, 1978, inclusively. This award is in addition to previous awards which claimant has received for his industrial injury sustained on January 13, 1959.

WCB CASE NO. 77-6326 OCTOBER 19, 1978

BETTY J. YOUNGBLOOD, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
William H. Replogle, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the employer's denial of her claim.

Claimant, a 24-year-old coin collector for the phone company, alleges she sustained a low back injury on June 20, 1977, a Monday, while lifting a coin box. She worked the rest of the week. She stated she had called her supervisor and told him of this incident on Wednesday, however the supervisor denies this. A co-worker, who was unavailable at the time of the hearing, also was advised by claimant of her injury, according to claimant.

Claimant called her supervisor on Monday, June 27, 1977, and told him she wouldn't be at work because her back hurt. She told him she did not know how she had injured her back. On the same day she went to the emergency room at Emanuel Hospital; she also went to the emergency room a week later.

Mr. Fisher, claimant's regular supervisor, returned from vacation on July 5, 1977 and inquired into the cause for claimant missing work. He made notes of the hospital instruction for claimant which indicated claimant was to rest in bed with pil-

lows propped under her knees, use a heating pad, etc., and see Dr. Surbaugh on July 5. Claimant told him she didn't know how she hurt her back. He noted claimant appeared to be in quite a bit of pain and unable to walk properly.

Mr. Fisher continued to visit claimant and obtain a form of weekly report of disability from her. After he had knowledge that claimant had filed a Workers' Compensation claim on July 25, 1977 he again visited claimant, who told him she had thought about her problem and realized she had injured her back on June 20, 1977. At first she thought she had pulled a muscle, however, the next day the hip hurt and she found it was uncomfortable to walk or to sit.

Dr. Surbaugh, on July 14, 1977, indicated claimant's injury was work related. His diagnosis was "right HNP level indeterminant suspect L4-5".

On September 9, 1977 the carrier denied the claim.

On October 10, 1977 Dr. Surbaugh indicated claimant had a spontaneous onset of pain in the left flank in late June 1977. The pain shifted to the right and radiated into her leg. Walking, sitting, coughing or sneezing aggravated her pain. He diagnosed a herniated L4-5 disc on the right and recommended restricted activity and bed rest. He felt claimant could return to light, sedentary employment.

In February 1978 Dr. Surbaugh thought that claimant's work was extremely likely to have been the material cause of her herniated disc. He indicated there was nothing else in the history to suggest that anything else caused the problem.

In his deposition, Dr. Surbaugh stated that claimant's job involved twisting, bending and that claimant's herniated disc develops primarily from a twisting and bending type of injury. He felt, taking into consideration claimant's work, the spontaneous onset of pain, the pain in the left flank progressing to the right flank and through the thigh and calf and the x-rays, that in all medical probability claimant's condition was causally related to her work.

Claimant had moved her household on June 30, 1977.

The ALJ found that there were too many inconsistencies and discrepancies in the record; that the most he could find was that claimant could have injured her back on the job as alleged but she failed to prove that she did. Therefore, he affirmed the employer's denial and assessed no penalties or awarded any attorney's fee.

The Board, after de novo reivew, finds that the claimant's testimony and the medical evidence are consistent with the accident as described by the claimant. No evidence con-

tradicts claimant's explanation of how, where and when she was injured and what followed afterwards. Dr. Surbaugh, in his deposition, clearly and unequivocally stated that in all medical probability claimant's condition (herniated disc) was causally related to her work. He further noted that the progression of claimant's pain symptoms were consistent with her injury. There was no medical evidence to refute Dr. Surbaugh's opinions.

The Board finds claimant did sustain a compensable injury to her low back on June 20, 1977; however, the carrier did compensate claimant for her time loss, therefore, no penalties should be imposed or an attorney's fee awarded.

ORDER

The ALJ's order, dated April 21, 1977, is reversed.

Claimant's claim is remanded to Pacific Northwest Bell, a self-insured, for acceptance and for payment of benefits, as provided by law, from June 20, 1977 and until it is closed pursuant to ORS 656.268.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services both at the hearing and at Board review in the amount of $1,000, payable by Pacific Northwest Bell.

WCB CASE NO. 77-78
WCB CASE NO. 77-4857
WCB CASE NO. 77-6402

OCTOBER 19, 1978

PETER ZAKLAN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Jones, Lang, Klein, Wolf & Smith, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed Bowen Roofing Company's denial of his claim for aggravation and affirmed the Fund's denials of his claim for new injuries allegedly suffered on September 22, 1976 and May 18, 1977.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated March 16, 1978, is affirmed.

WCB CASE NO. 76-5844 OCTOBER 24, 1978
WCB CASE NO. 76-5845

MILDRED BRIGGS, CLAIMANT
Flaxel, Todd & Nylander,
Claimant's Attys.
Collins, Velure & Heysell,
Defense Attys.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer seeks Board review of the Administrative Law Judge's (ALJ) order which remanded claimant's aggravation claim to it for acceptance and payment of compensation to which she is entitled.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated April 12, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $300, payable by the carrier.

WCB CASE NO. 77-7036 OCTOBER 24, 1978

DANIEL L. COTTON, CLAIMANT
Rick W. Roll, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the carrier's denial of his claim for a low back injury suffered on August 3, 1977.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated May 12, 1978, is affirmed.

WCB CASE NO. 77-449 OCTOBER 24, 1978

EDDY FARLEY, CLAIMANT
Lively & Wiswall, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which granted claimant compensation equal to 45° for 30% loss of the right leg. The Fund contends this award is excessive.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated June 22, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $250, payable by the Fund.

WCB CASE NO. 78-1119 OCTOBER 24, 1978

RANDY JONES, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which awarded claimant 64° for 20% permanent partial disability. The Fund contends this award is excessive.

Claimant, a 20-year-old gluer, alleged he sustained a back injury resulting from his work from May through August 1976. At an earlier hearing, ALJ Daughtry had found that claimant's longstanding underlying Grade I spondylolithesis of L5 on S1, a congenital defect, was made symptomatic by his work activity and was compensable.

Dr. McHolick reported on September 17, 1976, that claimant complained of pain across the low back out into the hip area. He observed claimant moving about freely; he found no lumbar spasm, no back muscle spasm and obtained negative results

from the neurological examination, straight leg and other manipulative tests. Dr. McHolick diagnosed bilateral pars interarticularis defect with a Grade 1 spondylolisthesis. He was surprised that claimant had been hired at the mill because of his back condition; possibly no routine pre-employment x-rays had been taken by the employer. He felt claimant would continue to have problems with his back, but wouldn't require surgery. He said that claimant was not a candidate for heavy work and he would not under any circumstances give claimant a full release for heavy work at the mill.

Dr. Glaede indicated claimant had had his back pain for five months and that it was gradually becoming worse. Drs. Glaede and McHolick concur that claimant is capable of light work. Dr. Glaede felt claimant's back condition was not a work induced injury.

On January 25, 1977 Dr. McHolick released claimant for full duty except for work involving heavy repetitive lifting. Based on claimant's size, back musculature and body build, he felt repetitive lifting of 50 pounds would be considered heavy lifting. Claimant had full back motion, no tenderness or spasm, negative straight leg test and a normal neurological examination.

Dr. McHolick indicated in September 1977 that he could not determine if claimant would have minimal physical impairment. He saw no need for further treatment.

A Determination Order, dated February 7, 1978, awarded claimant compensation only for temporary total disability from August 31, 1976 through January 6, 1978.

Claimant has an 11th grade education and was referred to vocational rehabilitation. Claimant completed a short term welding course on January 6, 1978 but has been unable to obtain employment.

Claimant testified he has constant pain in the low back; that he must limit his walking; that he has pain which radiates down the left leg; that prolonged sitting increases his pain and he felt he could not lift over 30 pounds.

The ALJ found that claimant had worked for four years without any problem with his pre-existing condition. After considering the limits of claimant's vocational training, he found claimant had suffered a loss of wage earning capacity equal to 64° for 20% unscheduled disability for his back injury.

The Board, after de novo review, finds that claimant has a congenital condition which is aggravated by heavy manual work. He had this condition before he was employed in the mill with this employer and continues to have it. However, there

is no evidence that claimant's work for this employer increased his condition in a permanent manner. Dr. McHolick was unable to determine if claimant had suffered any minimal permanent physical impairment.

In the case of Weller v. Union Carbide Corporation, 35 Or App 355, in dealing with a compensability issue, the Court of Appeals stated:

> "To have a compensable occupational disease, claimant must establish that his work . . . originally caused or materially and permanently worsened his spine condition. It is not sufficient merely to establish that claimant's work . . . required him to make certain motions which caused his underlying condition to be symptomatic, i.e., caused pain."

In our case, claimant's claim was found to be compensable and the sole issue before the Board is the extent of disability. Using the rationale of the Weller case (supra), claimant has not proven any more than a temporary exacerbation of his back which disabled him. Claimant does not have any permanent impairment arising out of or in the course of his employment. Claimant is now stationary and his back has not changed; he still has the congenital abnormality, Grade I spondylolithesis. There is no medical evidence to support any award for a permanent partial disability award.

This is an unscheduled disability case and the sole test to be applied is the loss of claimant's wage earning capacity. The Board finds that claimant has not sustained any loss of wage earning capacity. Dr. McHolick said that claimant's size, back musculature, body build, eliminated him from doing any repetitive lifting of 50 pounds or more. Claimant had these limitations before his injury and still has them. The Board finds the injury or occupational disease which claimant alleges he has sustained has had no effect on claimant's wage earning capacity and the Determination Order of February 7, 1978 was proper.

ORDER

The ALJ's order, dated April 25, 1978, is reversed.

The Determination Order, dated February 7, 1978, is reinstated.

WCB CASE NO. 76-5797 OCTOBER 24, 1978

WILLIAM J. TAYLOR, CLAIMANT
Gordon H. Price, Claimant's Atty.
Lindsay, Nahstoll, Hart, Neil &
Weigler, Defense Atty.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

A request for review, having been duly filed with the Workers' 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 Administrative Law Judge is final by operation of law.

WCB CASE NO. 77-5113 OCTOBER 24, 1978

JAMES THORP, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of that portion of the Administrative Law Judge's order which remanded claimant's claim for a psoriatic arthritis condition to the Fund for acceptance and payment of compensation to which he is entitled.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated February 27, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $50, payable by the Fund.

WCB CASE NO. 78-543 — OCTOBER 24, 1978
WCB CASE NO. 77-5571

PAUL WALLACE, CLAIMANT
Merten & Saltveit, Claimant's Attys.
G. Howard Clifff, Defense Atty.
Rankin, McMurry, Osburn, Gallagher
& VavRosky, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the denials issued by Underwriters Adjusting Company and Industrial Indemnity Company and found he was not entitled to a Board-sponsored program of vocational rehabilitation.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated April 28, 1978, is affirmed.

WCB CASE NO. 78-1670 — OCTOBER 27, 1978

DAISY BUCK, CLAIMANT
Franklin, Bennett, Ofelt & Jolles,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order Dismissing Motion

On September 15, 1978 the Board received a request from the claimant, by and through her attorney, for a Board review of the order of the Administrative Law Judge (ALJ) entered in the above entitled matter on September 1, 1978.

On October 6, 1978 the Board received from the State Accident Insurance Fund a motion to dismiss the claimant's request for Board review on the grounds and for the reason that the said request did not have any certificate of service attached thereto and on the additional grounds that the request for review was filed untimely.

ORS 656.289(3) provides that the order of an ALJ is final unless within 30 days after the date on which a copy of the order is mailed to the parties, one of the parties requests a review by the Board under ORS 656.295. ORS 656.295(2) provides that the request for review shall be mailed to the Board and copies of

the request shall be mailed to all parties of the proceeding before the Referee (ALJ).

The Board received claimant's request for Board review on September 15, 1978 which was within the 30 days after the date of the ALJ's order. Furthermore, there is no provision contained in the Workers' Compensation Act to the effect that a request for review must have attached thereto a certificate of service.

The Board concludes that the Fund's motion to dismiss claimant's request for Board review in the above entitled matter should be denied.

IT IS SO ORDERED.

WCB CASE NO. 77-1934 OCTOBER 27, 1978
WCB CASE NO. 77-4501

FADDIE JAMES CREAR, CLAIMANT
McMenamin, Joseph, Herrell & Paulson,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Cheney & Kelley, Defense Attys.
Request for Review by the SAIF
Cross-appeal by Claimant

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund seeks Board review of the order of the ALJ which approved the denial of claimant's claim by Industrial Indemnity but directed it to pay claimant 16° for 5% unscheduled low back disability on the 1974 claim. The order disapproved the denial of claimant's claim by the Fund and ordered the Fund to accept it and pay compensation to claimant until closure pursuant to ORS 656.268. The ALJ also ordered the Fund to pay claimant, as a penalty, an additional amount equal to 10% of the compensation due claimant from the date of his injury until May 23, 1977 plus any amounts due claimant under the order of December 28, 1977 designating the Fund as the paying agent and to pay claimant's attorney a sum of $800.

The claimant filed a cross-request for Board review, contending that he is entitled to a greater degree of permanent partial disability than that awarded by the ALJ.

Claimant is a 63-year-old furniture cleaner who has worked for this employer since 1973. On September 25, 1974 he suffered a compensable injury to his back while lifting a chair. He was first treated by Dr. Gambee and returned to his regular work except for a short period in June 1975. Claimant

missed no time from work because of his back pain and his claim was closed by a Determination Order dated June 6, 1976 which granted claimant compensation for temporary total disability only.

On or about December 22, 1976 claimant, who had been doing considerable bending and stooping while cleaning furniture for the employer due to the pre-Christmas rush, had a recurrence of his back problem. At the time claimant had been injured in 1974 the employer was insured by Industrial Indemnity, however, on January 1, 1976 the employer's workers' compensation coverage was furnished by the Fund.

Dr. Gambee advised Industrial Indemnity that claimant had returned for treatment on January 13, 1977 and had been admitted to the hospital. On March 17 Industrial Indemnity denied claimant's request to reopen on the grounds that claimant had sustained a new injury in December 1976.

On April 26 claimant's attorney notified the employer that claimant would file a claim against the Fund; this claim was denied by the Fund on June 29, 1977 on the grounds that claimant's current problem was a natural aggravation of his 1974 injury.

On December 28, 1977 an order was issued by the Workers' Compensation Department pursuant to the provisions of ORS 656.307, designating the Fund as the paying agent pending a determination of the responsibility for claimant's condition.

At the hearing claimant contended that he was entitled to an award for permanent partial disability as a result of his 1974 injury and a determination of whether he had sustained a new injury on December 22, 1976 or aggravated his 1974 injury. He also contended that he was entitled to penalties and attorney fees on the wrongful denial by both carriers and for delay in making said denials. Claimant did not receive compensation within 14 days nor has he received any payments under the .307 order. On this latter matter, claimant asked for additional penalties and attorney fees.

The medical evidence indicated claimant had a degenerative spine disease associated with sciatica and involved the L4-5 left, however, he was not considered a good candidate for surgery.

The ALJ found that claimant was able to return to work immediately after his accident and worked until June 6, 1975, a period of almost nine months. Dr. Gambee, claimant's treating physician, believed claimant would have a definite permanent residual. At the time of his injury claimant was 60 years old, he has a high school education and a basic work background in furniture cleaning.

The ALJ concluded, considering claimant's age, education, experience, training and impairment prior to the second injury, that claimant did sustain a mild loss of earning capacity and he granted claimant an award of 16° for 5% unscheduled disability.

On the issue of whether the incident of December 22, 1976 represented a new injury or an aggravation of the 1974 injury, the ALJ found a causal relationship did exist between the disability evidenced by claimant's entering the hospital on January 19, 1977 and his increased work activities prior to Christmas, 1976. Claimant admitted that he had been feeling pretty good prior to December 22, 1976 but after the increased work due to the pre-Christmas rush he developed a great deal of pain and numbness which radiated into his left leg. Although Dr. Gambee, in his report of July 27, 1977, suggested claimant had sustained an "aggravation" of his 1974 injury, the ALJ found there was no way of determining whether he used the word "aggravation" as a term of art relating to the workers' compensation law.

The ALJ found that claimant had worked at his regular job until December 1976 and although he had had some discomfort at work after his first injury it had not been sufficient to force him to seek additional medical attention for at least a year. When claimant was last seen by Dr. Gambee in December his back condition was improving. Dr. Gambee said he would not see claimant again unless he had more trouble.

The ALJ concluded that this was an indication that claimant's degenerative back condition had been stable for at least a year and that the work at the employer's in December 1976 did contribute, even though slightly, to his overall major condition, therefore, the carrier on the risk at the time of the December 1976 incident, Industrial Indemnity, was responsible for claimant's current condition which must be considered as a new injury.

The ALJ found that claimant had not received compensation from either carrier even though he was off work from January 19 through February 25, 1977. The ALJ further found that Industrial Indemnity denied claimant's claim on March 17, 1977 but because there was no indication in the file of the date Industrial Indemnity first learned of the claim for aggravation, the ALJ found that Industrial Indemnity was not liable to pay claimant compensation for temporary total disability from the date of claimant's accident to the date of the denial.

Claimant's employer had notice of the claim for a new injury on April 26 and the Fund should have paid compensation no later than 14 days thereafter and the compensation should have commenced as of the date of the injury and continued until the date of the denial. Claimant, on March 23, 1977, had sustained a heart attack while at work and the Fund had paid

claimant compensation for temporary total disability arising out of this condition until its denial of the claim therefor on November 7, 1977. The ALJ concluded that the Fund was liable for the payment of compensation to claimant for temporary total disability from the date of his injury until March 23, 1977, less time worked, because its failure to pay this compensation constituted unreasonable conduct.

The Fund did not make any payments of any benefits due claimant in accordance with the .307 order issued on December 28, 1977. The ALJ found that this constituted unreasonable resistance and subjected the Fund to penalties and attorney fees. The ALJ then issued the directive recited in the opening portion of this order.

The Board, on de novo review, finds that the incident of December 22, 1976 cannot be considered to be a new industrial injury. Dr. Gambee, on July 27, 1977, stated that claimant has had essentially one disease process which dates from his industrial accident of September 1974, that he has had intermittent exacerbations and remissions of that process. In his opinion the etiologic mechanism of claimant's problems is the industrial accident of 1974 and claimant has had an aggravation in 1976.

The Board concludes that the claimant's increased work activities just prior to Christmas 1976 was an aggravation of his 1974 injury. Any significant increase in activities such as bending and stooping necessitated by cleaning furniture for the employer could have caused claimant's prior back problems to flare up.

The Board concludes that Industrial Indemnity, the carrier on the risk at the time of the 1974 injury, is responsible for claimant's present conditions and must pay claimant compensation, as provided by law, from the date of his injury to the date of this order. Inasmuch as the Fund did not comply with the .307 order it is not entitled to any reimbursement from Industrial Indemnity. However, the Fund's refusal to comply with the .307 order constitutes unreasonable resistance to the payment of compensation, therefore, it must be assessed a penalty and pay claimant's attorney a reasonable attorney's fee for such unreasonable refusal.

The Board finds, based upon the medical evidence, that claimant's condition is again medically stationary but that the award made by the ALJ of 16° for 5% unscheduled disability is not adequate to compensate claimant for the loss of wage earning capacity resulting from the aggravation of his 1974 claim. The Board increases the award to 48° which is equal to 15% of the maximum allowable by law for unscheduled disability.

ORDER

The order of the ALJ, dated February 22, 1978, is reversed.

The denial of claimant's claim for a new injury made by the Fund on June 29, 1977 is approved.

The claimant's claim for aggravation is referred to the employer and its carrier, Industrial Indemnity, for the payment of compensation, as provided by law, commencing on December 22, 1976, the date claimant aggravated his 1974 injury, and until the date of this order which closes claimant's claim with an award of 48° for 15% unscheduled low back disability.

The State Accident Insurance Fund shall pay claimant compensation equal to 25% of the compensation due claimant from December 28, 1977, the date the order was issued pursuant to ORS 656.307 designating it as the paying agent, and until the date of this order.

Claimant's attorney shall be awarded as a reasonable attorney's fee the sum of $800, payable by the State Accident Insurance Fund for its refusal to pay compensation as directed pursuant to the order issued under the provisions of ORS 656.307.

Claimant's attorney is entitled to a reasonable attorney's fee for his services at Board review in an amount equal to 25% of the increased compensation granted claimant by the order, payable out of such increase as paid, not to exceed $2,300.

WCB CASE NO. 77-6592 OCTOBER 27, 1978

VICKIE FRANKLIN, CLAIMANT
Feitelson & Terry, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which granted claimant an award of compensation equal to 80° for 25% unscheduled disability for her neck injury.

Claimant, a 24-year-old cannery worker, injured her shoulder-neck on October 7, 1976 when she slipped on a metal stairway and grabbed the stair railing to keep from falling. Dr. Colgan, a chiropractic physician, diagnosed an acute traumatic 2nd and 6th cervical and 6th thoracic muscle strain with secondary functional disturbances. Claimant complained

of right shoulder and neck pain, numbness, insomnia and arm numbness.

Dr. Colgan reported claimant was medically stationary on March 23, 1977 with some residuals.

Claimant has continued to experience pain and has continued to be treated by Dr. Colgan.

Dr. Mayhall examined claimant and reviewed her x-rays. He found no fracture or dislocation of the cervical spine. Claimant reported that she was having difficulty sleeping at night and doing her housework. An EMG study was normal and Dr. Mayhall reported on May 28, 1977 that claimant was probably medically stationary; it appeared to him that claimant probably had a strain of the muscle around the shoulder girdle which was responsive to the therapy claimant was receiving from Dr. Colgan. Claimant might need additional treatments in the future to relieve pain. Dr. Mayhall felt claimant could do some light work which would not involve heavy lifting.

Dr. Colgan reported claimant was medically stationary as of June 14, 1977.

Dr. Colgan reported in July 1977 that claimant should do only light work and will need periodic adjustments for some time.

Her claim was closed by a Determination Order, dated September 23, 1977, which awarded claimant compensation equal to 16° for 5% unscheduled disability to her neck injury.

At the hearing claimant stated that her neck and shoulder pains have continued and she is unable to sleep for more than 2-3 hours at a time and awakes at night in pain. She is unable to lie on her right shoulder. Claimant also has given up her outside activities, her gardening and most of her housework.

Claimant has a 10th grade education. Her work experience, which indicates she has worked intermittently, is limited to cannery work, housecleaning and care of patients in a nursing home. She has not made any significant effort to obtain employment since her injury.

Claimant's husband, sister and a friend all corroborated claimant's testimony.

The ALJ concluded, based on claimant's age, education and work experience and her limitations, that she was entitled to a larger award of compensation and he increased the award to 80° for 25% unscheduled disability for her neck injury. He also found claimant was not entitled to any more medical care and treatment under ORS 656.245 than that which the Fund was

presently providing.

The Board, after de novo review, finds the claimant has not lost 25% of her wage earning capacity, based upon the medical evidence. It concludes that an award of compensation equal to 48° for 15% unscheduled neck disability is adequate to compensate claimant. The Board agrees that claimant is entitled to receive the additional care and treatment under ORS 656.245 which she requested.

ORDER

The ALJ's order, dated March 3, 1978, is modified.

Claimant is hereby awarded compensation equal to 48° for 15% unscheduled neck disability. This is in lieu of any prior awards.

Further, claimant is entitled to additional medical care and treatment under ORS 656.245.

The remainder of the ALJ's order is affirmed in all respects.

WCB CASE NO. 77-7181 OCTOBER 27, 1978

SAMUEL WETZEL, CLAIMANT
Dye & Olson, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Request for Review by Claimant
Cross-appealed by Employer

Reviewed by Board Members Moore and Phillips.

The claimant seeks Board review of the order of the Administrative Law Judge (ALJ) which granted him an additional 112° for 35% unscheduled low back disability; this additional award gave claimant a total of 240° for 75% unscheduled low back disability. Claimant contends that he is permanently and totally disabled.

The employer cross-requests Board review, contending that the award granted by the ALJ was excessive.

Claimant, a 46-year-old truck driver, suffered a compensable injury to his back on April 23, 1973. He was first seen by Dr. Johnson who diagnosed a lumbosacral strain; later he was treated with chiropractic manipulations by Drs. Moore and Fagan and released to work with limitations on lifting on July 2, 1973. Claimant returned to work and his claim was closed by a Determination Order dated October 26, 1973 which granted claimant com-

pensation only for temporary total disability.

Claimant continued to work until March 1974 when he saw Dr. Moore again for chiropractic manipulation. Dr. Spady, who examined claimant on July 15, 1974, found a lumbar spine sprain still significantly symptomatic. On November 7, 1974 Dr. Fax re-examined claimant and found that he was still unable to do any heavy lifting or constant stooping; both of these activities were involved in his job. Claimant was fitted with a back brace to replace the corset which he had originally been fitted for.

Claimant was referred by Dr. Fax to the Disability Prevention Division for rehabilitation. Claimant's knowledge of mechanical matters was above the average and he had good dexterity operating large tools; the prognosis for restoration and rehabilitation was good. Claimant had a good work record for many years as a truck mechanic, however, claimant did not feel that he could physically do this type of work. He considered other alternatives such as instructing in the automotive field. The evaluation of his disability was in the minimal to mild range loss of back due to the injury. A change to a job without heavy manual labor was advised.

On April 8, 1975 a second Determination Order awarded claimant 32° for 10% unscheduled low back disability. Claimant appealed and the ALJ, after a hearing, increased the award to 112° for 35% unscheduled low back disability.

Claimant still was unable to find work and was seen regularly by Dr. Fax. Claimant had good and bad days from a physical standpoint; an examination in February 1976 revealed that claimant's back was giving him considerable more pain down into his legs. Claimant was hospitalized for traction in April 1976 and apparently improved and was ambulatory at the time of his discharge, having no leg or back pain. Dr. Fax ordered a pelvic traction apparatus for claimant to use at home. In May 1976 Dr. Fax examined claimant and found him to be stationary with additional problems, to-wit: inability to ride in a car or sit as well as he had been able to prior to the last flare-up. Other than this Dr. Fax found claimant essentially the same and the Determination Order dated June 30, 1976 awarded claimant an additional 5%.

The Orthopaedic Consultants found claimant's condition was not stationary and recommended further examination, including a myelogram.

After a psychological examination in August 1976 it was found that claimant had good aptitudes in the mechanical and scientific areas but his emotional problem had significantly deteriorated since the last examination. Such problems were considered to be work related because claimant strongly desired to return to work and was distressed by the fact that from a physical standpoint he could not, nor had he been trained for

appropriate light type work.

The claimant has lived on a small farm since 1962 and had a small dairy herd. He operated his dairy with the help of his son and daughter who lived at home. Claimant has an eighth grade education and has received his GED equivalency. Prior to entering the military service he had worked on a farm and during seven years in the Air Force he did automotive and heavy equipment repair. Since his discharge from the armed services he has worked steadily as a journeyman mechanic doing heavy equipment repair. He has not been able to return to work since 1973 although he has made attempts to do so. Claimant has had no surgery and takes no medication.

The ALJ found that claimant had a severe physical impairment, that he had already been granted awards totalling 40% for unscheduled low back disability and Dr. Fax, in his report of November 1974, found claimant to be moderately disabled and precluded from doing any work involving bending, stooping or heavy lifting. Later, in December 1976, he found claimant's disability to be moderately severe with the same limitations.

The ALJ found that claimant's injury was substantially physically disabling and would likely reduce the claimant's earning capacity but because claimant had the mental ability which would qualify him for many types of employment not requiring heavy physical labor his injury probably would not reduce his earning capacity as greatly as it would that of a person so limited in education and mental capacity to preclude the worker from even doing light type work.

The ALJ, after citing several cases which involved similar questions relative to the determination of a worker's loss of earning capacity, concluded that claimant has many personal resources together with valuable experience in the mechanical field and he appears to be highly motivated to return to work. Furthermore, the medical evidence indicates that he is capable of performing light work. He further concluded that it is entirely possible that claimant, by limiting his work habits to isolated communities where there are few availabilities for such types of employment, is not acting in his best interest. Taking all of this into consideration, the ALJ increased claimant's previous award which totalled 40% to 75%.

The Board, after de novo review, finds that the award granted by the ALJ to be somewhat high. As indicated in the ALJ's order claimant, according to the medical evidence, is physically able to do light mechanical work; no doctor has told claimant he could not return to work. Claimant takes no medication although he does wear a back brace and does his exercises as prescribed by the doctor.

Claimant was not satisified with the award granted him by the Determination Order dated April 8, 1975 and requested a

hearing. After this hearing, the ALJ increased claimant's disability to 112° for 35% of the maximum allowable by law for unscheduled disability. The evidence indicates that there is not too much difference between claimant's condition at that time and his condition at the time of the hearing before the ALJ. Claimant has not worked since 1974, however, he does own approximately 90 acres of farm land and he has 25 milking cows and a total of 65 young head of stock.

Claimant has never had any form of surgery to his back; the evidence indicates that claimant has a chronic lumbosacral strain. His condition seems to change from time to time; at times he feels very good and at other times he experiences severe pain.

The Board finds, based upon the medical records, that claimant has suffered some diminution of his wage earning capacity as a result of his industrial injury; however, the medical evidence certainly does not support a finding that claimant is permanently and totally disabled, or that he is entitled to an award equal to 75%.

The Board concludes that claimant would be adequately compensated for his loss of wage earning capcaity by an award of 192° which would equal 60% of the maximum allowable by law.

The Board also strongly recommends that claimant seek to obtain job placement through the assistance provided by the Field Services Division of the Workers' Compensation Department.

ORDER

The order of the ALJ, dated May 26, 1978, is modified.

Claimant is awarded 192° out of a maximum of 320° for 60% unscheduled low back disability. This award is in lieu of the award granted by the ALJ whose order in all other respects is affirmed.

WCB CASE NO. 78-1546 OCTOBER 27, 1978

JERRY H. WHITE, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

A request for review, having been duly filed with the Workers' 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 Administrative Law Judge is final by operation of law.

WCB CASE NO. 77-6561 OCTOBER 30, 1978

LOUIE ATTERBURY, CLAIMANT
Rader & Rader, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which granted claimant compensation equal to 240° for 75% unscheduled permanent partial disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated June 2, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $50, payable by the Fund.

WCB CASE NO. 77-1634 OCTOBER 30, 1978

In the Matter of the Compensation of
CARL D. BERG, CLAIMANT
And the Complying Status of
MAYFIELD ENTERPRISES, INC., EMPLOYER
Allen G. Owen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which found claimant was not a subject employee at the time of his injury and affirmed the denial issued by the Fund.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated April 27, 1978, is affirmed.

SAIF CLAIM NO. GB 91918 OCTOBER 30, 1978

ANTHONY J. BRUGATO, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered multiple injuries in a motor vehicle accident on November 1, 1964; the injury was considered as a compensable industrial injury and required subsequent surgeries and lengthy convalescence. The claim was initially closed on October 28, 1968 by a Determination Order and claimant's aggravation rights have expired.

Subsequent to the initial closure, litigation resulted in increased awards and on August 30, 1976 the Board issued an Own Motion Determination which awarded claimant compensation for permanent total disability.

The Fund requested a hearing pursuant to the provisions of ORS 656.278(3) and a Referee issued an Opinion and Order, dated April 28, 1977 and amended on May 4 and May 31, 1977, which reduced the award of compensation to 90% of the maximum for unscheduled disability, 70% loss of the right leg and affirmed a prior order of November 15, 1971 which had granted claimant compensation equal to 95% loss of the left leg. The Opinion and Order was affirmed by the Board Order on Review dated October 26, 1977.

On August 15, 1978 the Board issued an Own Motion Order reopening claimant's claim, commencing payments for compensation, as provided by law, on June 19, 1978, the date claimant was hospitalized for excision of a huge right inguinal lipoma. Claimant returned to work on June 24, 1978 and on September 27, 1978 Dr. Uhle found claimant's condition was medically stationary. He indicated no additional permanent partial disability would accrue from the surgery.

A request for claim closure was made and an Evaluation Committee of the Workers' Compensation Department recommended to the Board that the claim be closed with an additional award for temporary total disability from June 19, 1978 through September 27, 1978, less time worked but did not recommend any additional award for permanent partial disability in excess of the award claimant has previously received.

The Board concurs in this recommendation.

ORDER

Claimant is awarded compensation for temporary total disability from June 19, 1978 through September 27, 1978, less time worked. Claimant is entitled to no additional compensation for permanent partial disability in excess of that which has previously been granted to him for his industrial injury of November 1, 1964.

Claimant's attorney has previously been awarded a reasonable attorney's fee by the Own Motion Order of August 15, 1978.

WCB CASE NO. 78-819 OCTOBER 30, 1978

In the Matter of the Compensation of
THOMAS COLLINS, CLAIMANT
And the Complying Status of
Horace W. and Jean A. Anderson,
dba NATIONAL SHEETROCK & SUPPLY CO., EMPLOYER
James D. Vick, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the order of the Administrative Law Judge (ALJ) which found that claimant was not a subject employee and that Horace W. (Andy) and Jean A. Anderson, dba National Sheetrock & Supply Co., hereinafter referred to as Anderson, were not non-complying employers from October 6 through October 21, 1977. He vacated the Proposed and Final Order #4353-A, dated January 10, 1978.

Anderson is a partnership operating a dry wall business and deals primarily with general contractors. Anderson performs no labor but bids on jobs, obtains the contracts and supervises the work. Anderson primarily uses nailers, scrapers and sprayers and tells them how much they will be paid on the job; each trade has its own pay scales and the pay is generally by the square foot. The workers may refuse to take the job if the pay offered is not satisfactory.

Anderson had prepared a form entitled "Independent Contractors Agreement". Claimant, who had been out of work for almost a year, sought a job with Anderson. Claimant was a nailer and, normally, the nailers furnished their own tools, however, in this instance, because of claimant's financial plight, Anderson allowed him to purchase tools "on account"

from Anderson. Claimant had completed two houses for Anderson before he was presented the agreement which he signed. Claimant had received five checks from Anderson when, on October 27, 1977, he filed a report of an injury to his back and shoulder sustained while lifting sheetrock on October 20, 1977.

On January 10, 1978 a Proposed Order was issued by the Compliance Division of the Workers' Compensation Department which found Anderson to be a non-complying employer from October 6, 1977 through October 21, 1977. It was stipulated by the parties that claimant had sustained an injury on October 20, 1977; the sole question to be determined was whether or not, at that time, claimant was an employee of Anderson or an independent contractor.

The ALJ found that the job of a nailer was a skilled job and that although nailers are a regular part of Anderson's dry wall work, as far as the individual workman is concerned the work is not continuous and the pay is determined by each job. He further found that nailers often worked on several jobs at the same time and their rate of pay was generally determined by square footage and is fairly standard except where there are special building situations. A nailer could accept or reject a job and normally he provided his own tools and each job was generally handled on an individual basis.

In this case the job was handled by Anderson on a contract basis from the building contractors and each job was accepted within the framework of his contract with the builder. The nailers were aware of the building codes and how to apply the dry wall and needed no instructions except for special building situations. The practice was to hire by the job rather than by the hour and the workers could work at their own pace and choose their own hours of work.

The ALJ found that in this case there was no close cooperation required between claimant's job as a nailer and the other workmen working on the job. Claimant was not hired on a continuing basis and the corresponding degree of risk to him did not depend upon Anderson's activities. Claimant was hired for a specific job and paid for each job. These conditions, in the opinion of the ALJ, made the ruling of the Oregon Supreme Court in Woody v. Waibel, 276 Or 189 (1976), not applicable.

The Board, on de novo review, finds that Anderson uses two of its workers to nail sheetrock to the studs in a house and these nailers are paid per lineal foot at a price set by Anderson. The taping and spraying involved is done by other workers. A nailer requires no special training, only experience. The evidence indicates that some of Anderson's workers had worked for other dry wallers in the past and, while working for others, were considered employees and covered by their employer's insurance. These workers, including the claimant,

did not have their own insurance and could not afford it. Anderson directed the manner in which the work was to be performed and was the person to whom problems were presented when encountered. He personally controlled the worker's performance which had to be satisfactory to him and he had the power to fire any of the workers. Anderson was legally responsible to the house builder for the dry wall jobs which his nailers, scrapers and sprayers completed and if one of the crew made a mistake it would be the responsibility of Anderson to repair it.

The wall board nailers worked in pairs and Anderson's approval had to be obtained before a new partner was interviewed by Anderson and it was only with his permission that he would be allowed on the job site. The workers were told by Anderson to which houses they should go and they had no choice of accepting or rejecting the job unless they wished to look elsewhere for employment.

Traditionally, the "control" test is the primary method of determining whether a worker is an employee or an independent contractor. Bowser v. SIAC, 182 Or 42. However, the most recent ruling by the Oregon courts appears to indicate that in order to settle a controversy of employer-employee versus independent contractor status, not only must the control test by considered but also Larson's "Relative Nature of the Work" test must be considered. Woody v. Waibel, supra.

The Board finds that the evidence is abundant that Anderson exercised the requisite degree of control over claimant to bring him within the Act. In a general capacity Anderson watched over the quality of the work done by his workers because he, not his workers, was legally responsible to the builder for the houses that were completed. If the nailers and the other workers had been truly independent they would have been responsible for any defects in workmanship. Questions about a job were directed to Anderson who normally appeared at the houses once or twice each day. Anderson directed the manner in which the work was to be done and told the workers which walls were to be hung with sheetrock and where to rap. He also had control over the nailers to the extent that if one wished to take on a new partner, he could not do so without the permission of Anderson. This all indicates a close employer-employee relationship.

Just before the claimant was injured Anderson ran out of houses to dry wall and had a small job of light patchwork to do. Claimant needed work and was given the patchwork job on an hourly basis, stating he would give him $60. Claimant agreed and on October 21, 1977 picked up his check for that amount. When a worker receives wages based on the time employed rather than the amount of work accomplished, it is strong evidence that he is an employee. Bowser v. SIAC, supra.

An additional factor to consider in determining the right to control is the unrestricted right of the employer to terminate the particular service whenever he chooses regardless of the final results of the work. In this case, Anderson, according to the testimony of some of his other workers, did have the right to fire them. He could tell his workers which jobs to do and if they preferred not to do it they were unemployed as far as he was concerned.

The "Relative Nature of the Work" test which was considered by the court in Woody v. Waibel, supra, states that any worker whose services form a regular and continuing cost of the product and whose method of operation is not such an independent business that it forms within itself a separate route through which his own costs of industrial accident can be channeled is within the presumptive area of intended protection. 1A Larson's Workmen's Compensation Law, Section 43. 51.

In this case, Anderson operated a dry wall business which constantly required a nailer's service to put the wall boards in place; such services constituted an integral part of the dry wall business and would form a regular and continuing part of the cost of the product. The nailers' work is an essential part of Anderson's business which would fail without it. Anderson's supervision over each job, his handling of problems which arose as a result of the jobs and his close supervision of the quality certainly indicate the necessity for close cooperation between Anderson and claimant and the other workers.

In Woody v. Waibel, the court considered the degree of risk to the claimant, which depended, in that case, on his employer's output. In this case, there was a similar degree of risk for the claimant because if Anderson found no suitable jobs claimant would lose work.

Larson's "Relative Nature of the Work" test requires that the workers' calling be such an independent business that it forms in itself a separate channel to shoulder the responsibility of industrial accidents to justify a finding that said worker would be an independent contractor not an employee. In this case, the Board finds that claimant's occupation is not a skilled, separate calling or enterprise. By no stretch of the imagination could the occupation of wall board nailer be considered an independent business which forms a separate channel to assume the responsibility of industrial accidents.

The Board does not give any weight to the form identified as "Independent Contractors Agreement"; an employee cannot be transferred into an independent contractor by making use of an aggreement. ORS 656.236.

The Board concludes that an employer-employee relationship existed between claimant and Anderson and that Anderson was a non-complying employer and claimant a subject worker at the time he suffered his injury on October 20, 1977. Therefore, the Proposed and Final Order #4353-A, dated January 10, 1978, should be reinstated.

ORDER

The order of the ALJ, dated May 3, 1978, is reversed.

The Proposed and Final Order #4353-A dated January 10, 1978 is hereby approved and made final by this order.

The claim is remanded to the State Accident Insurance Fund for the payment of compensation, as provided by law, commencing October 20, 1977 and until the claim is closed pursuant to ORS 656.268. The Fund shall be reimbursed from the Administrative Fund of the Workers' Compensation Department, on a periodic basis, for all its costs incurred related to claimant's claim and the Workers' Compensation Department shall be entitled to recover such costs from the employer.

Claimant's attorney is awarded as a reasonable attorney's fee for his services both before the ALJ at hearing and at Board review, the sum of $1,000, payable by the State Accident Insurance Fund which shall be reimbursed from the Administrative Fund of the Workers' Compensation Department and recovered by the Department from the non-complying employer, pursuant to ORS 656.054.

WCB CASE NO. 77-119 OCTOBER 30, 1978

ELDON DAVIS, CLAIMANT
Pippin & Bocci, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Gearin, Landis & Aebi, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which dismissed his claim on the basis of the statute of limitations.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated March 30, 1978, is affirmed.

WCB CASE NO. 77-6693 OCTOBER 30, 1978

WEERT FRERICHS, CLAIMANT
Mark Bliven, Claimant's Atty.
Emmons, Kyle, Kropp & Kryger, Defense Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson, Moore and Phillips.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which directed it to pay claimant the appropriate compensation for temporary total disability from July 20, 1977 to December 6, 1977 based upon the wage rate claimant was receiving on May 16, 1975 rather than the assumed wage rate in effect on June 15, 1977.

Claimant suffered a compensable injury, i.e., a left inguinal hernia, on May 16, 1975. The hernia was first repaired by Dr. Craske on May 28, 1975; later it recurred and was again repaired by Dr. Craske on December 9, 1975.

Claimant was found to be eligible for vocational rehabilitation and was enrolled in a prosthetic-orthotic technician program commencing June 15, 1976. Pursuant to ORS 655.605 and .615 the Vocational Rehabilitation Division had placed claimant's name on the list of enrollees furnished to the Fund, therefore, claimant was covered by it through the VRD program. Claim- developed arthritis in both hands, especially in the thumbs, in mid-1977 which was brought on by his work in the training program. He filed a claim on August 4, 1977 for a June 15, 1977 injury.

On October 24, 1977 a Determination Order closed claimant's claim for the May 16, 1975 industrial injury. This order recited that claimant was entitled to "compensation for temporary total disability inclusively from May 27, 1975 thru August 13, 1975 and further from December 8, 1975 thru February 6, 1976. Worker was found to be medically stationary February 6, 1976. Temporary total disability from April 9, 1976 thru July 20, 1977, less amounts paid subject to OAR 436-61-D52(2). . . ."

In June 1977 claimant had surgery on both thumbs and he became medically stationary on November 11, 1977.

On December 8, 1977 claimant was advised by the Field Services Division of the Workers' Compensation Department that

the temporary total disability rate for the injury of May 16, 1975 was greater than the rate for the June 15, 1977 injury. It was stipulated by the parties that claimant was on the "list" covered by ORS 655.605 - .615 at the time of his injury in 1977, that he was in the course and scope of the program at that time and was doing work required of a full time paid employee.

The basic question before the ALJ was whether claimant was entitled to be paid compensation for temporary total disability during the period he was in the training program at the rate based upon his wages at the time of his May 1975 injury or at a rate established under the provisions of ORS 655.605 - .615.

The ALJ, citing the ruling of the Court of Appeals in Wood v. State Accident Insurance Fund, 30 Or App 1103, wherein some of the facts were identical to those in the present situation and others were not, states that the case before him could go either way with persuasive arguments on both sides but concluded, based essentially on the whole rationale of Wood, which includes the statement that the provisions of the Workers' Compensation Act should be "liberally construed in favor of the injured worker", that the rate of temporary total disability for the period from July 20, 1977 to December 6, 1977 should have been based upon claimant's earnings at the time he was injured in 1975 and charged to the original employer.

The majority of the Board, on de novo review, finds that the reason the worker in the Wood case was not paid compensation pursuant to ORS 655.615 was because he was not a trainee as defined by 655.605 nor was he performing the duties of a full time paid employee at the time of his injury. In the case before the Board the parties had stipulated that claimant was doing the same type of work that a full time paid employee of the Orthopedic Company would have performed and under the rationale of the Wood case and the unambiguous wording of ORS 655.615, the 1977 injury should have been chargeable to the Vocational Rehabilitation Division which pays premiums for such eventualities as this.

It is true that the Workers' Compensation Act is to be "liberally construed" in favor of the injured worker, however, the law must be uniformly applied and applied in a manner intended by the Legislature. In the absence of any showing by the claimant of Legislative intent contrary to the clear wording of ORS 655.615 and taking into consideration the fact that at the time of the June 15, 1977 accident claimant was a "trainee" as defined by ORS 655.605 - .615, the majority of the Board concludes that claimant's claim for the surgery to his thumbs (bilateral tenosynovitis) should be paid from the Workers' Compensation coverage provided by the Vocational Rehabilitation Division pursuant to ORS 655.605 - .615 and at an assumed wage rate fixed by the State Accident Insurance Fund pursuant to ORS 655.615(3).

ORDER

The order of the ALJ, dated March 17, 1978, and reissued on May 4, 1978, is reversed.

Claimant's claim for a compensable industrial injury suffered on June 15, 1977 while in a training program sponsored by the Vocational Rehabilitation Division is hereby remanded to the State Accident Insurance Fund for acceptance and payment of compensation for temporary total disability, pursuant to the provisions of ORS 655.605 through 655.615, from July 20, 1977, the date compensation for temporary total disability was terminated by the Determination Order dated October 24, 1977, and until December 6, 1977, the date claimant received his first check for temporary total disability.

Board Member Kenneth V. Phillips dissents as follows:

The ALJ was correct in his opinion that the circumstances in this case are analogous to a workman being injured during the course of medical treatment for a compensable injury. A second injury resulting from treatment or any other phase of recovery toward employability should be and is intended to be treated as the consequence of the first injury. Lost time rates were established to provide the injured worker compensation which would permit him to maintain a standard of living close to that he provided himself while able to work and the opinion of the majority of the Board permits an entirely unrelated incident to destroy that result.

I would affirm the Opinion and Order of the ALJ.

Kenneth V. Phillips, Board Member

WCB CASE NO. 77-4833 OCTOBER 30, 1978

WILSON C. GREENWADE, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
Collins, Velure & Heysell, Defense Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant requests review by the Board of the order of the Administrative Law Judge (ALJ) which denied claimant's re-

quest for him to set aside a disputed claim settlement entered into between claimant and his attorney and the State Accident Insurance Fund and which had been approved by a Referee on January 6, 1976.

Claimant had filed a claim for an injury on January 20, 1975, alleging that he felt dizziness and weakness while employed by the employer and suffered a stroke before leaving his place of employment. On August 13, 1975 the Fund denied claimant's claim on the basis that he had sustained a cerebral vascular stroke and this condition was not aggravated by or related to his own job activity.

Claimant requested a hearing on the denial but prior to the hearing the matter was settled by a bona fide dispute stipulation whereby the Fund paid claimant and his attorney a sum of $2,000. This stipulation provided that the parties agreed that all issues which were or could have been raised in claimant's request for hearing, dated August 25, 1975, were resolved and the payment of the agreed sum by the Fund did not constitute expressed or implied acceptance or responsibility for claimant's claim for treatment, time loss, permanent disability or any other expense resulting from claimant's accident on June 20, 1975 and that the Fund's denial should remain in full force and affect forever.

Claimant now contends that the stipulation should be set aside because many of the medical expenses amounting to several thousand dollars were not covered by the stipulation; also, his mental faculties at the time he entered into the stipulation were not such as to enable him to make a proper judgment with regard to said stipulation.

The ALJ found that after the Fund's denial of claimant's claim he sought legal advice from a Medford attorney who, after discussing the matter with claimant and with claimant's treating doctor, concluded that it would be very doubtful that the claim would be held compensable if it went to a hearing. The attorney then contacted the claimant's wife and stated that because of his feelings concerning this case he felt that an offer of $2,000 on a disputed claim basis would be the best award claimant could expect at that time and should be accepted. Claimant's wife took the disputed claim settlement home and explained to her husband what the lawyer had told her. Claimant then signed it.

Dr. Melson, claimant's treating physician, testified that he would not say at the time claimant signed the disputed claim settlement, which was after claimant had suffered the stroke, that claimant was incompetent. However, he did feel that claimant had impaired reasoning ability. He was not only suffering from chronic depression but was also suffering from organic damage to the brain.

The ALJ concluded that although claimant might not have been able to exercise good judgment at the time he signed the disputed claim settlement, he did have a competent attorney and the evidence indicated that claimant's attorney, at the time he entered into the disputed claim settlement, felt that it was a good settlement insofar as claimant was concerned.

The fact that subsequently claimant's condition became substantially worse is not the fault of claimant's attorney or of the Fund. There is no evidence in the record to indicate that claimant was at any time misled as to his rights under the disputed claim settlement or that he was not fully advised of such consequences.

The Board, on de novo review, agrees with the findings and conclusions of the ALJ.

ORDER

The order of the ALJ, dated January 26, 1978, is affirmed.

WCB CASE NO. 76-4433 OCTOBER 30, 1978

JOSEPH HANSFORD, CLAIMANT
Day, Prohaska & Case, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted him compensation equal to 16° for 5% unscheduled left shoulder and psychological disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated May 4, 1978, is affirmed.

WCB CASE NO. 76-5093 OCTOBER 30, 1978

WALTER R. HAYES, CLAIMANT
Jaqua & Wheatley, Claimant's Attys.
SAIF, Legal Services, Defense Attys.
Order on Remand from Circuit Court

On July 19, 1977 the Board entered its Order on Review in the above entitled matter which affirmed the order of the Referee, dated January 13, 1977, whereby the Referee found claimant to be permanently and totally disabled.

On August 4, 1977 the State Accident Insurance Fund appealed the Board's Order on Review to the Circuit Court for the State of Oregon for Douglas County and on September 11, 1978, after the court had reviewed the record, including briefs previously submitted and being fully advised in the premises, ordered the case be remanded to the Board for further medical evidence on the matter of recondition and physical rehabilitation.

The Board, in accordance with the Order of Remand from the circuit court, hereby remands the above entitled matter to its Hearings Division to set for a hearing before Administrative Law Judge John F. Baker with specific instructions to take further medical evidence on the matter of recondition and physical rehabilitation of the claimant.

IT IS SO ORDERED.

WCB CASE NO. 77-3682 OCTOBER 30, 1978

DOROTHY HOLIFIELD, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted her compensation equal to "196 degrees" [sic] (a figure which should be corrected to read "192 degrees") for unscheduled low back disability. Claimant contends that she is permanently and totally disabled.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated April 28, 1978, is affirmed.

WCB CASE NO. 77-1727 OCTOBER 30, 1978

WILLIAM E. HOLMES, CLAIMANT
Brink, Moore, Brink & Peterson,
Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Attys.
Request for Review by Claimant
Cross-appealed by Argonaut

Reviewed by Board Members Wilson and Moore.

Both claimant and the employer/carrier seek Board review of the Administrative Law Judge's (ALJ) order which awarded him 15° for 10% loss of his left leg, approved the portion of the denial by Argonaut Insurance Company of claimant's low back condition but reversed the portion which denied his request for medical care and treatment for his left leg condition and awarded claimant's attorney an attorney's fee. Claimant contends the low back condition is compensable.

Claimant, a 30-year-old laborer in a lumber mill, sustained a compensable injury to his left leg on July 6, 1972 when it was pinned between a forklift and a tram cart. Dr. Bauer diagnosed a muscle contusion and released claimant who returned to regular work on July 26, 1972. Dr. Bauer found claimant was medically stationary as of August 15, 1972; he felt claimant had not suffered any permanent impairment.

A Determination Order, dated October 9, 1972, closed the claim with an award for temporary total disability only.

On January 5, 1973 Dr. Nash examined claimant, who was complaining of an "ache of the whole left leg" when he resumed an upright position after squatting or semi-kneeling; that the condition seemed to be worsening and at times was associated with a "low back ache". Dr. Nash reviewed x-rays of left hip and femur dated July 6, 1972 and found them normal. No indication of a need for further neurological treatment or investigation were found. Dr. Nash believed claimant would lose no additional time from work.

On September 13, 1975 Dr. Nash again examined claimant for complaints of left leg pain, tingling and low back pain. These pains had developed insiduously but most marked over the last nine months and claimant felt they were related to his July 1972 injury. Dr. Nash requested additional studies.

On February 28, 1976 Dr. Nash reported claimant had been improving until February 27, 1976 when he fell at work, striking the left gluteal and lower back regions. Dr. Nash was unable to determine whether or not claimant was medically stationary or if he would suffer a permanent disability. He did feel there was not any reason for claimant to stop working if he received adequate medical treatment.

In September 1976 Dr. Nash indicated claimant still complained of low back and left leg pain which was "much less severe". Claimant continued to work and Dr. Nash felt claimant had received maximum benefit from the medical treatment.

Claimant continued to experience low back pain with left sciatic radiation of pain. Dr. Nash continued to conservatively treat claimant.

Dr. Bauer indicated in June 1977 that claimant had never mentioned a back problem, related or unrelated, to his injury.

Dr. Nash indicated in February 1976 he suspected a herniated disc, but claimant improved and no further testing has been done.

In an interview in April 1977 claimant denied having any back trouble except for three days about 15 years ago. Claimant testified that after his fall in February 1976 he instantly felt pain in his back and left leg. He also complained of headaches since this incident and stated he was "slower" than before it happened.

On February 28, 1977 the carrier denied all further responsibility, stating the February 1976 incident was a new injury.

The ALJ found that Dr. Nash's opinion that claimant's back condition was related to his July 1972 injury was not based on all the facts, therefore, he concluded that the denial of responsibility for the back condition was proper. Also, the medical evidence did not support a finding that the July 6, 1972 accident either caused or aggravated claimant's low back symptoms.

The ALJ found that there was no doubt that claimant continued to have symptoms from time to time as a result of his compensable leg injury sustained on July 6, 1972. Although his aggravation rights have expired, they had not done so at the time claimant requested further benefits; such request tolls the statutory five-year period. The ALJ found claimant's leg condition was stationary and that he had the authority to rate the "dry" aggravation claim. He also reversed that portion of the carrier's denial, which he stated was too broad, relating to further benefits for her leg condition.

The ALJ rated claimant's scheduled disability, based on the fact claimant now works slower, is unable to climb ladders, and cannot paint or do remodeling work, at 10% loss of the leg.

The Board, after de novo review, concurs with the ALJ's finding that claimant's low back condition was not the responsibility of the carrier. Claimant has failed to prove by a preponderance of the evidence that his low back condition was either caused or aggravated by the July 6, 1972 industrial injury. Dr. Nash's deposition indicates he had no history of a twisting injury and no history of prior back and leg symptoms since July 1972 which he considered to be important. There is no indication of a twisting injury. Claimant did not experience back symptoms until sometime after the July 1972 incident and had a history of some back trouble prior to it. Dr. Nash did not have an opinion as to the cause of claimant's present backache.

The Board finds that portion of the carrier's denial relating to his left leg condition was improper; however, there is no evidence which supports an award for claimant's scheduled disability. There is no evidence which indicates that claimant has suffered any loss of function of his left leg resulting from his industrial injury of July 1972 but claimant is entitled to medical care and treatment for his left leg under the provisions of ORS 656.245, therefore, because the denial was so broad as to deprive claimant of this treatment, the Board considers claimant's attorney to have partially prevailed in overturning that portion and to be entitled to an attorney's fee pursuant to ORS 656.386(1).

ORDER

The ALJ's order, dated April 6, 1978, is modified.

The denial by the carrier on February 28, 1977 only as it relates to claimant's low back symptoms is approved but claimant shall be furnished the necessary medical care and treatment for his left leg pursuant to ORS 656.245. The ALJ's award for the left leg is reversed.

Claimant's attorney is granted as a reasonable attorney's fee for partially prevailing on a denied claim to the extent that the carrier's refusal to provide medical care and treatment under ORS 656.245 was improper shall be paid the sum of $150 payable by the employer/carrier.

WCB CASE NO. 78-670 OCTOBER 30, 1978

JOHNNY R. JONES, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order approving the Determination Order, dated July 28, 1977, which awarded claimant compensation equal to 16° for 5% unscheduled diability resulting from his skin condition. Claimant contends his unscheduled disability is greater.

Claimant, a 41-year-old cement laborer, alleges he developed dermatitis on or about May 8, 1975. Dr. Lachman diagnosed allergic contact dermatitis probably due to concrete. Initially, the Fund denied his claim on the basis it did not provide workers' compensation coverage for the employer but in a stipulated order dated January 12, 1976 it accepted the claim.

On December 18, 1975 Dr. Lachman indicated that in May 1975 claimant had shown severe eczematous dermatitis of the hands, arms, legs with secondary pyoderma. His diagnosis was chronic allergic contact dermatitis of the hands with extensive eczematization due to cement "poisoning", probably potassium dichromate. He believed that claimant should not work in cement in any capacity but should be re-employed in some other occupation. Claimant's condition improved with medication.

In March 1976 Dr. Lachman found claimant was free of dermatitis except for mild scaling of the hands and arms. He found no evidence of a disabling injury or physical limitations from previous attacks of cement contact dermatitis.

On April 6, 1976 claimant was referred for vocational rehabilitation to be trained as a sous chef. However, claimant developed problems with his school attendance and his program was continued on a conditional basis. In May 1977 claimant stopped attending school and his vocational program was terminated on June 10, 1977.

On July 28, 1977 the Determination Order was entered.

Dr. Lachman stated in August 1977 that claimant's irritant-contact dermatitis of his hands was well controlled. Claimant had only occasional itching and peeling of his hands, which was eliminated by use of a topical cortisone cream. Dr. Lachman found no signs of residual damage other than mild erythema and hyper and hypo-pigmentation of the hands, arms, face and neck.

In September 1977 claimant was re-referred to vocational rehabilitation for training in the area of food service. Claimant again had attendance problems and this program was terminated on December 19, 1977.

Claimant testified he left the vocational program because he knew as much about cooking as the program could teach him.

A second Determination Order, dated January 20, 1978, awarded claimant additional compensation for temporary total disability.

Claimant has a 10th grade education. His work experience consists of concrete work and cooking. Claimant has been employed since April 1978 assembling trusses.

The ALJ found that awards made by the two Determination Orders were adequate to compensate claimant for his loss of wage earning capacity.

The Fund contends claimant's disability is scheduled and loss of wage earning capacity cannot be considered. Also, that claimant's condition represents merely a temporary exacerbation of a pre-existing condition. The ALJ found the preponderance of the medical evidence reveals that claimant's symptoms keep showing up in other parts of his body and must be considered as systemic in nature, not solely related to claimant's hands.

The Board, after de novo review, concurs with the ALJ's conclusion. The Board finds claimant's lack of cooperation in the vocational rehabilitation training program has precluded any possible reduction of his disability. Injured workers have an obligation to attempt to reduce their disability. ORS 656.325(4).

The Board concludes that claimant's failure to participate in and/or complete the vocational rehabilitation programs offered to him justifies a finding that most of claimant's loss of wage earning capacity is of his own choosing.

ORDER

The ALJ's order, dated May 25, 1978, is affirmed.

WCB CASE NO. 77-2963 OCTOBER 30, 1978

PAUL MANEY, CLAIMANT
Franklin, Bennett, Ofelt & Jolles,
Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Request for Review by Claimant
Cross-appeal by Employer

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted claimant an award of compensation equal to 15° for 10% loss of his left leg and terminated claimant's temporary total disability on November 5, 1976. Claimant contends the award for scheduled disability is not adequate and the November 5, 1976 termination date is incorrect.

The employer/insurer cross-appeals, contending the claimant has no permanent partial disability.

Claimant, a 19-year-old security officer, sustained a compensable injury to his left knee on July 26, 1976 when he slipped coming down a ladder, catching his leg and hanging upside down. On August 16, 1976 claimant's knee locked. Dr. Rankin diagnosed a ruptured cartilage. On August 18, 1976 claimant was operated on for "removal of detached osteochondritis dissecans fragment from left knee joint".

A Determination Order, dated March 30, 1977, awarded claimant compensation for temporary total disability from August 17, 1976 through December 14, 1976.

Claimant was terminated by his employer and began working for the Port of Portland on November 5, 1976. The ALJ found that claimant was actually physically available for work as of November 5, 1976, although claimant testified he didn't actually start work until November 24, that it was only on a part-time basis to learn more about his job and was without pay.

Claimant is currently a full time college student.

Claimant stated he does not take any medication for pain relief. His knee begins to be painful with any prolonged running, dancing, biking and with any heavy lifting use of his knee. He estimates it takes one-half hour after he ceases his activity for the pain to dissipate. Claimant can fully extend and flex his knee.

The ALJ found claimant had minimal residuals and awarded claimant compensation equal to 15° for 10% scheduled disability for loss of the left leg.

The ALJ concluded that the employer was entitled to a credit for the over-payment of temporary total disability against claimant's award of permanent partial disability.

The Board, after de novo review, concurs with the ALJ's order. Claimant has minimal loss of use or function of his left leg. He was physically capable of returning to work, as indicated by his employment application and his testimony, therefore, his compensation for temporary total disability should have terminated as of November 5, 1976.

ORDER

The ALJ's order, dated February 17, 1978, is affirmed.

SAIF CLAIM NO. C110322 OCTOBER 30, 1978

JOHN MORLAND, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Attys.
Own Motion Determination

Claimant suffered a compensable injury on January 2, 1968. The claim was accepted and Dr. Oren Richards, in his closing report, dated February 28, 1969, found that the cervical injury and subarachnoid hemorrhage had completely resolved with no residuals. The claim was closed by a Determination Order, dated March 21, 1969, which granted claimant compensation only for temporary total disability.

On April 5, 1977 claimant suffered a recurrence of a subarachnoid hemorrhage at the site of an original aneurysm relating to the January 1968 industrial injury. A left frontal craniotomy was performed with excision of adhesions and clotting and clipping of the aneurysm itself. On July 1, 1977 claimant requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim.

On July 19, 1977 the Board issued its Own Motion Order which remanded the claim to the Fund for acceptance and payment of compensation commencing on April 5, 1977 and until the claim was closed pursuant to the provisions of ORS 656.278.

Dr. Richards' report of June 13, 1978 stated that claimant, who is now 55, has suffered permanent brain damage which precludes him from any reasonable possibility of returning to employment. He stated the injury was obviously severe and that claimant was most fortunate to have made as much of a recovery as he has made.

Dr. Hill, in reports dated June 15 and September 8, 1978, described neurological deficits involving judgment, memory and decision making ability and he agreed with Dr. Richards that claimant would not be able to be gainfully employed in the future.

The majority of the Evaluating Committee concluded that the Board by its Own Motion Order, dated July 19, 1977, had established the causal relationship between the April 5, 1977 incident and the 1968 industrial injury, therefore, the majority of the Evaluating Committee, recommended that claimant be awarded compensation for permanent total disability. This, despite the fact that claimant had retired voluntarily and was at the present time collecting retirement funds from several sources and had done so prior to the recurrence of his problem.

The Board concurs with the recommendation of the majority of the Evaluating Committee. The fact that claimant has retired voluntarily and is collecting retirement funds and has done so prior to the April 5, 1977 occurrence cannot be considered in making an evaluation of claimant's disability in light of the medical evidence which definitely relates the April 5, 1977 incident to the January 2, 1968 industrial injury and adequately supports a finding that claimant's present condition is worse than it was at the time he last received an award or arrangement of compensation for the 1968 injury.

ORDER

Claimant shall be considered to be permanently and totally disabled as of the date of this order.

Claimant's counsel is awarded as a reasonable attorney's fee for his services a sum equal to 25% of the compensation for permanent total disability awarded claimant by this order, to be paid such compensation as paid to a maximum of $2,300.

WCB CASE NO. 77-2833 — OCTOBER 30, 1978

CARL OAKES, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests a Board review of the order of the Administrative Law Judge (ALJ) which granted claimant an award of 256° which is 80% of the maximum allowable

for unscheduled disability. Claimant had previously been awarded a total of 160° for 50% unscheduled disability, 15° for 10% loss function of the right leg and 20.25° for 15% loss function of the left foot. The Fund contends that the increase of 96° granted claimant by the ALJ was not justified.

Claimant suffered a compensable injury to his low back and right leg on September 10, 1971 while moving furniture. The injury was diagnosed as a degenerative L5-S1 disc and a somewhat degenerated L4-L5 disc, right. Claimant's right leg condition was diagnosed as a lacerated lateral meniscus and chondromalacia of the patella. Claimant had a lumbar laminectomy on January 26, 1972 and on August 15, 1972 had an arthrotomy and lateral meniscectomy on his right leg.

The claim was first closed by a Determination Order dated February 1, 1973 whereby claimant was awarded 48° for 15% unscheduled disability and 15° for 10% loss function of the right leg. A stipulation was approved on November 9, 1973 whereby claimant's award for unscheduled disability was increased to 128° for 40% of the maximum allowable by statute. On August 24, 1976, after a hearing, an ALJ directed claimant's claim for aggravation be reopened. Claimant's back condition included left hip and left leg involvement and his condition was diagnosed as a herniated disc L4-5, left, and L5-S1, left. Claimant underwent surgery on September 24, 1975 and again on June 24, 1976. The claim was finally closed by a Determination Order entered on April 7, 1977 which granted claimant an award of 20.25° for 15% loss function of the left foot and an an additional 32° for 10% unscheduled low back disability.

The ALJ found that in 1972 Dr. Serbu had rated claimant's physical impairment as "moderate" and on January 11, 1973 Dr. Phifer felt claimant would have some residual symptoms as a result of his leg surgery. He rated claimant's right leg impairment at 10% loss of function and stated that claimant's condition would prevent him from working on jobs requiring extensive walking or walking on rough terrain.

In the fall of 1975 Dr. Lilly, after examining claimant, stated he would have some permanent partial disability as a result of his back condition and should never, in the future, do heavy work involving his back. On February 14, 1977 Dr. Lilly stated claimant's condition could be considered stationary and the claim closed; that claimant still complained of pain in the left buttock and in the sciatic distribution down on the back of the left leg but the pain was not extremely severe and was better than it had been prior to the June 1976 surgery.

The ALJ found claimant, who is now 63 years of age, has a formal eighth grade education and considers himself as a "jack of all trades". His work background is extensive but relates primarily to heavy work or manual labor. Claimant

testified that he could not walk, sit or stand for prolonged periods, he could not walk on rough or uneven ground nor could he do bending, stooping and climbing activities. Claimant is able to exercise, drive an automobile with an automatic shift and he is able to shop at grocery stores periodically and to work in his yard. Claimant can also change a tire, hunts and he can help with minor building maintenance work. Claimant testifies that such activities, however, increase his symptomatology.

Since the injury, claimant has worked for wages only as a watchman for the fair board, a job which lasted only five days. Claimant has owned and operated a cabin rental complex in Lakeview since 1972 and, assuming full rental capacity, the potential gross monthly income is $855 and a net income of approximately $400.

The ALJ found claimant had made very little effort to seek employment since his injury.

The ALJ concluded that claimant was not permanently and totally disabled; the medical evidence indicates that claimant's physical impairment is not so severe as to warrant an award of permanent total disability under the Oregon law. Furthermore, the ALJ found claimant's motivation to return to the labor market was questionable and that claimant is now self employed and operates a cabin rental complex which has the possibility, depending upon general economic factors not within claimant's control, to provide claimant with the net income on a regular basis. However, claimant's physical condition and resulting residuals do affect his ability to perform heavy work and manual labor and, therefore, preclude him from returning to most types of employment in which he was engaged prior to his industrial injury.

The ALJ, after considering the claimant's physical impairment and the residuals thereof, his age, education, training and experience, concluded that claimant was entitled to an increase of 96° which would give claimant a total award of 256° which is equal to 80% of the maximum allowable for unscheduled disability. The ALJ concluded that claimant had been adequately compensated as of the date of the hearing for any of his scheduled disabilities.

The Board, after de novo review, finds no medical justification for the increase of 30% granted by the ALJ for claimant's unscheduled disability. The medical evidence does support the awards for both of the scheduled injuries.

The date of the last award and arrangement of compensation was the Determination Order dated April 7, 1977 and as a result of that order claimant received 160° which represented 50% of the maximum for unscheduled disability. The claim had been closed by the stipulation approved on November 9, 1973 and approximately two years later claimant aggravated. After a

hearing the claim was remanded to the Fund on August 24, 1976; when claimant's condition again became stationary the claim was closed based upon a report from Dr. Lilly, dated February 14, 1977, which stated that at that time claimant had full range of motion of the lower back with no tenderness. Claimant had a minor amount of residual low back pain and some sciatic-type pain on the left. Dr. Lilly stated claimant was not able to do heavy work but that he could do light work and that he could continue to manage his apartments as he had done in the past.

The Board concludes that claimant had been adequately compensated for his loss of wage earning capacity by the prior awards for his unscheduled disability which total 160° or 50% of the maximum allowable for unscheduled disability.

ORDER

The order of the ALJ, dated March 29, 1978, as amended by his order dated April 10, 1978, is reversed.

The Determination Order, dated April 7, 1977, is reinstated in its entirety.

WCB CASE NO. 77-6430 OCTOBER 30, 1978
WCB CASE NO. 77-472

THOMAS S. REYNOLDS, CLAIMANT
Brand, Lee, Ferris & Embick, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Jones, Lang, Klein, Wolf & Smith, Defense Attys.
Douglas Minson, Defense Atty.
Request for Review by Argonaut

Reviewed by Board Members Wilson and Phillips.

Argonaut Insurance Company seeks Board review of the Administrative Law Judge's (ALJ) order which remanded claimant's claim to it for acceptance and payment of compensation to which he is entitled. Argonaut was also directed to reimburse Safeco Insurance Company for all monies it expended as a result of the ALJ's July 6, 1977 order. Penalties and attorney fees were also assessed against Argonaut.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof. The Board finds that there was no reason for this matter to be referred to the Compliance Division of the Workers' Compensation Department for further investigation.

ORDER

The order of the ALJ, dated April 19, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for her services in connection with this Board review in the amount of $50, payable by Argonaut Insurance Company.

WCB CASE NO. 77-4772 OCTOBER 30, 1978

GEORGE RILEY, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Keith D. Skelton, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer seeks Board review of the Administrative Law Judge's (ALJ) order which assessed a penalty and an attorney's fee against it for unreasonable refusal to pay compensation.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated April 26, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $50, payable by the carrier.

WCB CASE NO. 78-382 OCTOBER 30, 1978

MARY R. RUIZ, CLAIMANT
Huffman & Zenger, Claimant's Attys.
SAIF, Legal Services, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted her additional temporary total disability compensation from August 24, 1977 to October 24, 1977. Claimant contends she is entitled to further time loss benefits in addition to compensation for permanent partial disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated June 16, 1978, is affirmed.

SAIF CLAIM NO. RC 228129 OCTOBER 30, 1978

AVIS R. RUSZKOWSKI, CLAIMANT
Collins, Velure & Heysell, Claimant's Attys.
SAIF, Legal Services, Defense Attys.
Own Motion Determination

Claimant suffered a compensable injury on January 23, 1970. After a series of reopenings and closures, claimant's claim was reopened by a Board's Own Motion Order on February 28, 1978 for surgery recommended by Dr. Dunn.

Dr. Dunn's closing report, dated September 7, 1978, indicates that claimant continues to suffer pain in the right leg and back with some relief from the use of a transcutaneous nerve stimulator; she continues to use medication.

On September 18, 1978 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department finds claimant to be severely disabled but concludes that she has been adequately compensated by earlier awards for her condition. It recommends that claimant be granted temporary total disability benefits from December 8, 1977, the date of the surgery, through September 7, 1978.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability compensation from December 8, 1977 through September 7, 1978, less time worked.

Claimant's attorney has previously been awarded a reasonable attorney's fee by the Own Motion Order of February 28, 1978.

SAIF CLAIM NO. AC 386 OCTOBER 30, 1978

RALPH E. SCHWAB, CLAIMANT
F. P. Stager, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On January 11, 1978 the Board issued its Own Motion Order which remanded claimant's claim for a right knee injury suffered on January 10, 1966 to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on March 22, 1976 and until closed pursuant to the provisions of ORS 656.278, less time worked, and also awarded claimant's attorney as a reasonable attorney's fee a sum equal to 25% of the compensation which claimant may receive as a result of this order payable out of said compensation as paid, not to exceed $2,000.

The basis for the reopening by the Own Motion Order was consideration of surgery for correction of claimant's right knee condition; however, this surgery has not been done and the physicians involved are no longer advising surgery. The evidence indicates claimant is able to walk approximately 12 blocks, his knee moves to an arc of motion of 115° and, apparently, he is getting along adequately.

Claimant has some medial instability and he has received by an order dated February 26, 1975 an award equal to 45% of the right leg for such disability.

On September 12, 1978 the employer requested claim closure and the Evaluation Division of the Workers' Compensation Department recommended that claimant be granted no additional award either for temporary total disability or permanent partial disability.

The Board concurs with this recommendation.

ORDER

Claimant's claim for a compensable injury issued on January 10, 1966 is hereby closed with no further award for disability.

WCB CASE NO. 77=1163 OCTOBER 30, 1978

DOROTHY TIPTON, CLAIMANT
Holmes & James, Claimant's Attys.
SAIF, Legal Services, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted her an award of compensation equal to 208° for 65% unscheduled disability for her low back injury. Claimant contends this award is inadequate.

The Board would affirm and adopt the factual findings as set forth in the ALJ's Opinion and Order, dated February 23, 1978, a copy of which is attached hereto and, by this reference, made a part of this order. However, the Board finds, based upon the medical evidence, that claimant is entitled to a larger award of compensation for her low back injury. Claimant is unable to perform any of her former forms of employment; she is only capable of light employment.

The Board, based on a comparison of the facts in this case with similar cases, concludes claimant is entitled to an award of compensation equal to 256° for 80% of the maximum for unscheduled disability.

ORDER

The ALJ's order, dated February 23, 1978, is modified.

Claimant is granted an award of compensation equal to 256° for 80% unscheduled disability for her back injury. This is in lieu of the award made by the order of the ALJ which is affirmed in all other respects.

Claimant's attorney is granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-7857 OCTOBER 30, 1978

OLETA UNDERWOOD, CLAIMANT
Dye & Olson, Claimant's Attys.
SAIF, Legal Services, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted her compensation equal to 32° for 10% unscheduled neck and shoulder disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated June 26, 1978, is affirmed.

WCB CASE NO. 78-351 OCTOBER 30, 1978

KEITH WARD, CLAIMANT
John D. Ryan, Claimant's Atty.
SAIF, Legal Services, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted claimant an award of compensation equal to 13.5° for 10% loss of his right foot. Claimant contends he is entitled to an award of compensation for a back injury and to a greater award for his right foot injury.

Claimant, a 41-year-old truck driver, on March 23, 1976, while helping a customer, fell from a two-foot ladder injuring his right ankle and hitting his back on five-gallon paint cans. The hospital emergency room diagnosis was right ankle sprain. The claimant came under the care of Dr. Baldwin, who diagnosed a causalgia type pain and Sudeck's atrophy. He treated claimant with five sympathetic blocks.

In August 1976 Dr. Baldwin indicated claimant was improving, but it would take several more months for a complete recovery.

Claimant was referred to the Disability Prevention Center in November 1976 and discharged from there in January 1977.

Dr. Mason indicated claimant had mild physical disability to his right ankle. He felt claimant was capable of light to moderately heavy work, but should avoid excessive walking or climbing at this time. Claimant was expected to make a complete recovery. No job change was recommended.

The consensus opinion was that claimant did not have a vocational handicap as he possessed marketable skills and was able to return to one of his previous occupations. Claimant indicated he could drive a truck, do carpentry work and even do auto mechanics. He had owned and operated his own photography business for five years. However, claimant was referred to the Vocational Rehabilitation Division for job search skill training.

In February 1977 claimant enrolled in a bookkeeping training program, which he completed.

Dr. Baldwin indicated in late February 1977 that claimant continued to have ankle pain on prolonged standing and walking on concrete. The ankle swelled toward the end of the day, but resolved by morning. Claimant still was not medically stationary. Dr. Baldwin opined claimant would have some permanent disability in his ankle.

The Orthopaedic Consultants also examined claimant. They noted claimant walked with a limp and, in addition to the complaints he made to Dr. Baldwin, complained that he developed cramps in his foot and an increased feeling of coldness in his right foot. They found claimant was not medically stationary and suggested gait training and cord stretching at the Rehabilitation Institute of Oregon. Dr. Baldwin concurred.

Claimant began this program but it was discontinued after he missed seven sessions.

Dr. Baldwin, on September 14, 1977, reported he found the same situation as before, to-wit: no objective level of significant disability and no reason to continue disability payments.

A Determination Order dated January 5, 1978 awarded claimant compensation for temporary total disability from March 23, 1976 through December 1, 1977.

Claimant began work on January 16, 1978 as a maintenance clerk. He performs various tasks requiring him to do a great deal of walking on a carpeted concrete floor. He stated his ankle pain was to the point that he hardly could stand at the end of the day. He uses a whirlpool, aspirin, pain medication and an elastic stocking to help reduce the pain and swelling. Claimant said the ankle pain radiates up his leg into the calf and thigh every day, and he walks with a limp when in pain.

Claimant also indicated he has a back problem. He had hurt his back in 1961 but felt he had fully recovered. He says

if he sits too long or bends over at work he has trouble straightening and has back pain.

The ALJ found that claimant was not entitled to any award of compensation for his back claim based on the lack of medical evidence relating his back symptoms to his injury; however, the ALJ, after considering claimant's age, education, training and work experience, found that claimant was entitled to an award of compensation for 13.5° for 10% scheduled disability for his ankle injury.

The Board, after de novo review, concurs with the ALJ's findings and conclusions but notes that this is a scheduled injury. The test to be applied is loss of function. Dr. Baldwin found that claimant would have permanent impairment in the form of arthro-fibrosis and chronic pain with standing and walking.

The Board concludes that claimant has lost some function of his right foot and is entitled to the award of compensation the ALJ gave him for such loss.

ORDER

The ALJ's order, dated May 16, 1977, is affirmed.

WCB CASE NO. 78-784 OCTOBER 31, 1978

JOHN A. AVDEEF, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Cheney & Kelley, Defense Attys.
Request for Review by Employer
Cross-appeal by Claimant

Reviewed by Board Members Moore and Phillips.

The employer seeks Board review of the Administrative Law Judge's (ALJ) order which granted claimant compensation equal to 128° for 40% unscheduled permanent partial disability and failed to find that he had been wrongfully denied special maintenance in order that he could continue his program of vocational rehabilitation. The employer contends the disability award is excessive.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated April 28, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $50, payable by the carrier.

WCB CASE NO. 77-5956 OCTOBER 31, 1978

DENNIS S. BOOKSHNIS, CLAIMANT
Welch, Bruun, Green & Caruso,
Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks review by the Board of the order of the Administrative Law Judge (ALJ) which affirmed the Determination Order of September 16, 1977. Claimant contends he is permanently and totally disabled.

Claimant is a deaf mute employed as a warehouseman who on January 22, 1977 felt back pain while lifting boxes; it commenced again while claimant was steam cleaning trucks.

Dr. Gill diagnosed low back strain with a possible herniated disc and hospitalized claimant for two weeks for conservative care.

On April 21, 1977 Dr. Goodwin diagnosed pre-existing degenerative changes of the thoracic and lumbar spine with spurring of considerable degree, and lumbar strain. He felt treatment should be vigorous with encouragement for claimant to return to light work because the doctor felt the longer claimant was unemployed the harder it would be to get him back to work.

On June 3, 1977 Dr. Struckman, who examined claimant, felt claimant had a low pain threshhold and the arthritis in a man of claimant's age indicated a rather advanced degenerative change and his symptoms would be progressive. Dr. Struckman believed that claimant's condition was medically stationary and his disability rated as mild to moderate. He recommended that claimant be retrained for work not requiring heavy lifting, repetitive bending or prolonged sitting although he felt such restrictions were severe because claimant was a deaf mute. Claimant could never return to his regular occupation.

On July 15, 1977 claimant declined the services of the Vocational Rehabilitation Division.

On September 16, 1977 a Determination Order granted claimant 48° for 15% unscheduled low back disability.

On March 30, 1978 Mr. Hovey, a rehabilitation counselor, opined claimant was unfeasible for any vocational rehabilitation services. On April 6, 1978 Dr. Jastak, after examining claimant, was of the opinion that due to claimant's deaf-mute condition, education, motivation and his past work experiences, claimant was not retrainable.

Claimant went to oral school for 10 years and to deaf school 4 years. His past work experiences have been driving oil trucks, working in a bag factory and working at Tektronix.

Claimant testified, through his daughter, that his present problems are pain in the left leg, hip, neck, back and headaches.

Films were shown at the hearing which rebutted some of the testimony of claimant as to his limitations and also the testimony of his daughter.

The ALJ found claimant had been adequately compensated by the award granted by the Determination Order and he affirmed that award.

The Board, on de novo review, finds that the award of the Determination Order is inadequate to properly compensate claimant for his loss of wage earning capacity. Claimant is now precluded from all heavy manual labor which was the only work claimant has ever done.

The Board believes an award of 96° for 30% unscheduled low back disability would more fairly compensate claimant and it would further urge the Field Services Division of the Workers' Compensation Department to find an on-the-job training position for claimant because claimant's pre-existing conditions are handicapping his prospects of employment in the labor market.

ORDER

The order of the ALJ, dated June 6, 1978, is hereby modified.

Claimant is hereby granted an award of 96° for 30% unscheduled low back disability. This award is in lieu of the award made by the Determination Order dated September 16, 1977 which was affirmed by the ALJ.

Claimant's attorney is granted as a reasonable attorney's fee, a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-7390 OCTOBER 31, 1978

RICHARD VAUGHN, CLAIMANT
Burton J. Fallgren, Claimant's Atty.
Cheney & Kelley, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the denial of his claim. Claimant contends that on September 13, 1977 he suffered either an aggravation of his May 9, 1977 injury or a new industrial injury.

Claimant, a 55-year-old meat worker, on May 9, 1977, fell and wrenched his back, left arm, left shoulder and neck. He returned to work in June. On October 13, 1977 he began having pain in the shoulder, neck and upper back because the work load had increased. The following day at work, the pain in his shoulder and neck became progressively worse and moved to his chest. The next day he was hospitalized and missed two weeks of work. He again returned to work but left on November 13, 1977 because of pain in the arm, shoulder and neck.

Dr. Strong, on October 15, 1977, diagnosed a probable gastric distention, mimicking cardiac pain.

On October 18, 1977 Dr. Strong felt there was no relationship between his illness and his employment. He did not consider this industrially related.

Dr. Fisher, on October 21, 1977, ruled cut cardiac ischemic disease, but scheduled a stress test.

Claimant's claim for an apparent heart attack was denied on October 24, 1977 by the employer/carrier.

On October 28, 1977 Dr. Strong reported the stress test revealed no evidence of cardiac disease or upper gastrointestinal disease. He felt claimant's problem was probably a chest wall problem related to his work.

Dr. Fisher, on November 9, 1977, diagnosed a chest wall syndrome which he believed arose out of claimant's employment because claimant had been in a crouched position

for an extended period of time.

Dr. Harrison, claimant's treating physician for his May 1977 injury, reported on November 30, 1977 he felt claimant's problems were the sequelae of his May injury.

On December 15, 1977 Dr. Miller indicated claimant's symptoms were compatible with a mild, chronic, trapezius strain or possibly cervical radiculopathy. He felt claimant's experience in October was part of his recurring symptoms related to his cervical radiculopathy.

Drs. Harrison, Strong and Fisher all believed claimant's condition and the resulting hospitalization in October 1977 were not associated with his May 1977 injury.

The ALJ found that the greater weight of the medical evidence did not support either an aggravation claim or a new injury on September 14, 1977. No specific diagnosis was sufficient to establish that claimant had suffered a new injury.

The Board, after de novo review, concurs with the ALJ. Dr. Harrison, claimant's treating physician for his May 1977 injury, clearly states claimant's condition on September 14, 1977 was not related to the May 1977 injury, thus there has been no aggravation of that injury. The new injury claim also must fail based on the lack of medical evidence. Dr. Strong did not consider it to be industrially related; he later concluded claimant's problem was probably related to the chest wall and related to claimant's work. No specific diagnosis has been made. No medical causation has been shown, only conclusions of such causation.

The Board finds claimant failed to prove he sustained a new injury on October 14, 1977.

ORDER

The ALJ's order, dated May 4, 1978, is affirmed.

TABLE OF CASES

SUBJECT INDEX

Volume 25

ADVANCE PAYMENT

Hearing dismissed: R. Blair ---------------------------------- 226

AGGRAVATION

Affirmed over SAIF appeal: J. Silsby --------------------- 89
Defective denial very expensive: A. Johnston ------------- 306
Denial affirmed: S. Allison ------------------------------ 226
Denied on back claim: J. Castle -------------------------- 14
Denied on 1970 compression fracture: C. Hart ------------- 284
Denied shoulder claim: D. Holland ------------------------ 212
Double payments disapproved: G. Taylor ------------------- 374
Heart claim secondary to knee surgery over dissent:
W. Miller -- 57
Late claim: H. Smith ------------------------------------- 459
Mandate entered: M. Gilroy ------------------------------- 443
New injury OR: both denials affirmed: D. Henry ----------- 78
New injury OR: first employer liable where no new trauma:
R. Crawford -- 132
New injury OR: penalties denied: R. Hagen ---------------- 154
New injury OR: reversed by board in five pages: F. Grear 491
Penalties allowed: F. Eastburn --------------------------- 314
Relitigation not favored: B. Rattay ---------------------- 104
Reopening stops partial disability payments: G. Taylor --- 374
Reversed in four pages: E. Douglas ----------------------- 110
Settled for $12,000: B. Simmons -------------------------- 437
Settlement barred later own motion claim: F. Wilhelm ----- 44
Tree planter denied knee claim: J. Edwards --------------- 450

AOE/COE

Ability to work vigorously prior to injury evidence of no
bad disc: F. Draper -------------------------------------- 278
Acupuncture treatment: R. Mata --------------------------- 166
Allowance affirmed: J. Johnston -------------------------- 24
Allowance reversed: J. Hoard ----------------------------- 453
Allowed in three pages: O. Robertson --------------------- 269
Aneurysm not compensable: W. McCall ---------------------- 168
Back claim allowed on reversal: B. Lee ------------------- 217
Back claim allowed on reversal: D. Koehler --------------- 360
Back denial affirmed where prior problems: C. Boyeas ----- 93
Cardiac pain: R. Vaughn ---------------------------------- 534
Coin collector hurt back lifting coins---allowed on
reversal: B. Youngblood ---------------------------------- 482
Denial affirmed: A. Amon --------------------------------- 12

Denial affirmed where inconsistencies: S. Wheeler -------- 461
Denial on neck claim affirmed: R. Autry ------------------ 131
Denied on reversal: T. Robinson -------------------------- 62
Denied back claim where no claim for several months:
V. Pomeroy -- 219
Diabetes aggravated: P. Mandell -------------------------- 363
"Drop attack" claim denied in four pages: R. Seymour ------ 173
Employees helping another contractor across street not on
job: J. Bean -- 143
"Going and coming rule" - jumped over employer's back
fence: G. Lane -- 24
Heart - no; angina - yes: C. Duffy ----------------------- 329
Heart attack allowed over dissent: A. Buckingham --------- 295
Heart claim allowed on reversal: C. Williams ------------- 425
Heart claim and phlebitis reversed over dissent:
L. Herndon -- 17
Independent contractor OR: sheetrock nailer is employee:
T. Collins -- 503
Knee claim reversed in three pages: M. Kitzman ----------- 115
Knee denial reversed in four pages: D. Houdashelt -------- 157
Last injurious exposure: F. Fisher ----------------------- 321
Last injurious exposure rule: R. DeVault ----------------- 241
Medicals allowed: W. Holmes ------------------------------ 514
Moving expenses payable: R. Stritt ----------------------- 127
Multiple carriers: aggravation over dissent: R. York ---- 429
New injury OR: no new trauma---first employer liable:
R. Crawford --- 132
Occupational disease denied: F. Mullenberg --------------- 170
Oregon truck driver works for California company:
R. Jackson -- 350
Partial denial upheld on reversal: C. Harding ------------ 303
Pneumonia claim allowed: J. Barker ----------------------- 142
Prior condition make worse: L. Henry --------------------- 315
Psychological problems not related: M. Salinas ----------- 31
Psychological problems paid: D. Stewart ------------------ 273
Reopened to treat pre-existing psychiatric problem:
J. Russell -- 85
Teacher with four back claims: J. Jaeger ----------------- 160
Two claims woven together: L. Frasure -------------------- 383
Vague partial denial: W. Fox ----------------------------- 73

MEDICAL SERVICES

Acupuncture: R. Mata ------------------------------------- 166
Diagnostic services: J. Stearns -------------------------- 291
Examination to rule out cancer payable: E. McCullough ---- 245
Housekeeper allowed as medical services: E. Nacoste ------ 404
Moving expenses for medical problem: R. Stritt ----------- 127
Penalty on $6,843 medical bill: R. McNutt ---------------- 121

MEMORANDUM OPINION

Affirmed: C. Alexander ----------------------------------- 314

Affirmed: F. Ayers -- 240
Affirmed: A. Baker -- 379
Affirmed: L. Barker -- 47
Affirmed: F. Callender -- 396
Affirmed: G. Candee -- 14
Affirmed: M. Crouch -- 48
Affirmed: E. Davis -- 507
Affirmed: E. Defenbaugh -- 354
Affirmed: J. Hansford -- 512
Affirmed: R. Hesch -- 305
Affirmed: R. Jarvi -- 468
Affirmed: J. Joslin -- 353
Affirmed: R. Martell -- 245
Affirmed: J. McIntosh -- 392
Affirmed: R. McIntosh -- 268
Affirmed: M. O'Neill -- 60
Affirmed: N. Powell -- 290
Affirmed: J. Reed -- 309
Affirmed: M. Ruiz -- 525
Affirmed: P. Russell -- 290
Affirmed: G. Sands -- 436
Affirmed: J. Sharnetsky -- 311
Affirmed: L. Sink -- 271
Affirmed: T. Tvetan -- 320
Affirmed: G. Wehinger -- 256
Affirmed: T. Zink -- 46
Affirmed 40%: J. Avdeef -- 531
Affirmed 10% neck: R. Barton -- 202
Affirmed 30% leg: N. Borden -- 380
Affirmed 40% back: R. Bowland -- 341
Affirmed 20% back: J. Calhoun -- 346
Affirmed 50% leg: M. Candella -- 258
Affirmed 20% back: L. Clinansmith -- 450
Affirmed 50% leg: K. Emmert -- 206
Affirmed 20% leg: S. Evans -- 35
Affirmed 30% leg: E. Farley -- 486
Affirmed 20% back: M. Ferguson -- 381
Affirmed 35% back: E. Foster -- 400
Affirmed 60% back: E. Gee -- 388
Affirmed 15% arm: E. Gora -- 36
Affirmed 50% back: M. Groth -- 401
Affirmed 15% each hand: G. Hagler -- 100
Affirmed 5% shoulder: C. Hankins -- 139
Affirmed 20% back: I. Heath -- 52
Affirmed 20% back: H. Hohlfeld -- 37
Affirmed 60% back: D. Holifield -- 513
Affirmed 10% back: S. Lambert -- 227
Affirmed 5% neck: D. Mack -- 445
Affirmed 25% back: E. Maze -- 446
Affirmed 75% back: T. Pattee -- 268
Affirmed 20% back: N. Poole -- 308
Affirmed 15%: W. Saunders -- 126
Affirmed 15% back: A. Snider -- 408

Affirmed 100% back: R. Stathem -------------------------- 409
Affirmed 10% back: O. Underwood -------------------------- 529
Affirmed 25%: L. Wahner -------------------------- 255
Affirmed 10% back: R. Williams -------------------------- 379
Affirmed 35%: A. Yazzolino -------------------------- 447
Affirmed 7.8° finger and thumb: J. Loe -------------------------- 139
Affirmed aggravation claim: W. Garoutte -------------------------- 244
Affirmed allowance: J. Levy -------------------------- 435
Affirmed allowance: V. Smets -------------------------- 272
Affirmed allowance of aggravation: M. Briggs -------------------------- 485
Affirmed allowance of aggravation claim: R. Gibb --------- 51
Affirmed allowance of claim: B. Nicholson -------------------------- 235
Affirmed allowance of claim: C. Peoples -------------------------- 235
Affirmed back claim: K. Bosell -------------------------- 34
Affirmed back and leg awards: E. Bardwell -------------------------- 395
Affirmed back at 75%: A. Parker -------------------------- 394
Affirmed denial: C. Berg -------------------------- 501
Affirmed denial: D. Cotton -------------------------- 485
Affirmed denial: D. Cozad -------------------------- 34
Affirmed denial: E. Moon -------------------------- 101
Affirmed denial of occupational disease: G. Wehinger ----- 141
Affirmed denial of permanent total disability: R. Rosse -- 53
Affirmed dermatitis denial: B. Piercey -------------------------- 140
Affirmed extra time-loss: C. Tackett -------------------------- 140
Affirmed knee denial: E. Moore -------------------------- 353
Affirmed leg award at 20% and 5%: T. Taylor -------------------------- 394
Affirmed no time loss: R. Deroos -------------------------- 3
Affirmed penalties: G. Riley -------------------------- 525
Affirmed permanent total disability: C. Gregson ----------- 303
Affirmed total disability: E. Alsman -------------------------- 141
Aggravation allowed: P. Olson -------------------------- 393
Aggravation allowed: S. Snell -------------------------- 408
Aggravation denied: O. Johnston -------------------------- 264
Aggravation denied: P. Zaklan -------------------------- 484
Allowance affirmed: K. Kalweit -------------------------- 264
Allowance affirmed on neck claim: K. Brandon -------------------------- 150
Allowance of arthritis claim affirmed: J. Thorp ----------- 489
Back: 75% affirmed: L. Atterbury -------------------------- 501
Back: 20% affirmed: G. Hoch -------------------------- 455
Claim allowed: H. Tietz -------------------------- 409
Denial affirmed: F. Green -------------------------- 284
Denial affirmed: S. Hutcheson -------------------------- 287
Denial affirmed: A. Kelley -------------------------- 216
Denail affirmed: T. Lowe -------------------------- 265
Denial affirmed: A. Musaraca -------------------------- 392
Denial affirmed: E. Reynolds -------------------------- 405
Denial affirmed: A. Rosenberg -------------------------- 407
Denial affirmed: D. Schelin -------------------------- 437
Denial affirmed: F. Schlack -------------------------- 458
Denial affirmed: T. Seefeld -------------------------- 407
Denial of pain clinic affirmed: E. Cox -------------------------- 131
Denied aggravation: M. Decker -------------------------- 347
Denied aggravation: G. Hill -------------------------- 37

Denied aggravation: D. Thompson -------------------------- 223
Denied aggravation: J. Scott ------------------------------ 423
Denied knee claim: D. Buell ------------------------------- 345
Denied occupational disease: F. Falla --------------------- 243
Dismissed: B. Smith --------------------------------------- 54
Foot award affirmed: K. Dvorak ---------------------------- 280
Mandate spread: W. Hayes ---------------------------------- 513
No partial disability: K. Ingwerson ----------------------- 6
No permanent total disability: H. Roe --------------------- 236
No rehabilitation: L. Saunders ---------------------------- 236
No vocational rehabilitation: P. Wallace ------------------ 490
Order corrected: L. Frasure ------------------------------- 434
Reconsideration denied: R. Mata --------------------------- 333
Revision: J. Landry --------------------------------------- 445
Sixty-five percent affirmed: C. Freeman ------------------- 452

NOTICE OF INJURY

Late hernia claim: T. Papen ------------------------------- 171

OCCUPATIONAL DISEASE

Back claim for spondylolithesis: R. Jones ----------------- 486
Late claim basis for denial: W. Hardage ------------------- 209
Remanded to join SAIF as party: F. Livingston ------------- 229
Sore legs from standing around: M. Niblack ---------------- 456

OWN MOTION JURISDICTION

Denial affirmed: M. LeGore -------------------------------- 391
Denied: J. Hutchinson ------------------------------------- 38
Denied: E. Michaud -- 403
Denied aggravation claim bars own motion later: F. Wilhelm 44
Denied on 1969 back claim: A. LeClaire -------------------- 227
Denied on 1967 claim: F. Hickman -------------------------- 331
Denied on 1964 claim: C. Hoover --------------------------- 434
Denied on 1971 claim: G. Huber ---------------------------- 305
Denied on 1971 claim: W. Husk ----------------------------- 262
Denied where request end run on partial denial: S. Johnson 216
Determination: F. Essy ------------------------------------ 1
Determination: C. Vandehey -------------------------------- 378
Determination amended: P. Holmstrom ----------------------- 348
Determination amended: G. Reynolds ------------------------ 336
Determination amended on permanent total disability case:
J. Rawls -- 457
Determination on 1964 auto accident: A. Brugato ----------- 502
Determination on 1966 ankle claim: D. Blue ---------------- 2
Determination on 1967 arm claim: L. Barker ---------------- 181
Determination on 1964 back claim: B. Foss ----------------- 55
Determination on 1968 back claim: D. Fulton --------------- 35
Determination on 1970 back claim: L. Gehrke --------------- 388
Determination on 1969 back claim: P. Holmstrom ------------ 185
Determination on 1970 back claim: R. Horner --------------- 349

Determination on 1970 back claim: A. Kephart ------------- 6
Determination on 1971 back claim: R. Mata ---------------- 165
Determination on 1972 back claim: H. Peabody ------------- 41
Determination on 1970 back claim: R. Starks --------------- 337
Determination on 1968 broken ankle: L. Chase ------------- 204
Determination on 1967 claim: L. Bazzy -------------------- 441
Determination on 1971 claim: L. Leetch ------------------- 391
Determination on 1965 claim: W. McFarland ---------------- 201
Determination on 1969 claim: J. Morland ------------------ 520
Determination on 1970 claim: A. Ruszkowski --------------- 526
Determination on 1966 claim: R. Schwab ------------------- 527
Determination on 1971 claim: T. Toureen ------------------ 65
Determination on 1969 claim: J. Wood --------------------- 224
Determination on 1967 elbow claim: C. Wyant -------------- 108
Determination on 1952 foot claim: O. Christopher --------- 328
Determination on 1966 foot claim: J. Mizar --------------- 187
Determination on 1959 foot claim: M. Veelle -------------- 481
Determination on 1971 gunshot wound: D. Clough ----------- 205
Determination on 1970 head claim: D. Armstrong ----------- 66
Determination on 1971 head and neck claim: D. Fry -------- 207
Determination on hemorrhoid claim increased to total
disability: J. Young ---------------------------------- 194
Determination on 1969 knee claim: R. Inman --------------- 81
Determination on 1971 knee claim: K. Morgan -------------- 40
Determination on 1968 knee claim: F. Reid ---------------- 60
Determination on 1969 knee claim: T. Rodriguez ----------- 405
Determination on 1970 knee claim: J. Standard ------------ 9
Determination on 1937 knee claim: N. Zeller -------------- 196
Determination on leg claim: F. Reid ---------------------- 179
Determination on 1964 leg claim: J. Robinson ------------- 422
Determination on 1964 logging accident: R. Bernard ------- 92
Determination on 1971 toe claim: W. Gatens --------------- 114
Determination of total disability: R. Kindred ------------ 288
Determination rescinded: K. Morgan ----------------------- 188
Dr. Rinehart treatment: B. Glenn ------------------------- 390
Heart claim death remanded for hearing: F. Johlke -------- 164
Increased to total disability on 1956 claim: J. Slonecker 250
Leg injury of 1954: D. Barnett --------------------------- 294
Knee claim reopened: B. Sell ----------------------------- 473
Merry-go-round criticized: H. Short ---------------------- 368
Order revised: E. Pietrok -------------------------------- 404
Order revised and fee allowed: G. Thorn ------------------ 292
Permanent total disability canceled after ten years where
back to work: D. Wright -------------------------------- 238
Reconsideration denied: B. Foss -------------------------- 382
Reconsideration of total disability abandoned: C. Thorn -- 191
Referred for hearing: E. Hazlett ------------------------- 211
Referred for hearing: P. Greiner ------------------------- 347
Referred for hearing: W. Krueger ------------------------- 39
Referred for hearing: A. Leach --------------------------- 416
Referred for hearing: M. Luttrell ------------------------ 230
Referred for hearing: M. Morris -------------------------- 289

Referred for hearing: D. Rowden ---------- 190
Referred for hearing: J. Witt ---------- 177
Rejecting employer under old Employer's Liability Act not subject to further liability: A. Chaffin ---------- 397
Reopened 1966 back case: R. Hansen ---------- 5
Reopened 1969 back claim: J. Croy ---------- 183
Reopened 1956 back claim: D. Davis ---------- 94
Reopened 1967 back claim: J. Huston ---------- 186
Reopened 1968 back claim: D. Lisonbee ---------- 9
Reopened 1967 back claim: J. Pinkard ---------- 84
Reopened 1962 back claim: W. Smith ---------- 336
Reopened 1973 back claim: R. Webster ---------- 11
Reopened 1971 claim: J. Beatty ---------- 410
Reopened 1960 claim: C. Brewster ---------- 395
Reopened 1970 claim: D. Heck ---------- 184
Reopened 1968 claim: K. Lawson ---------- 8
Reopened 1944 claim: L. Radford ---------- 43
Reopened 1969 claim: T. Rodriguez ---------- 64
Reopened 1972 claim: D. Szabo ---------- 478
Reopened 1966 claim for foot surgery: W. Buckley ---------- 327
Reopened 1969 claim for tail area surgery: T. Harper ---------- 77
Reopened 1964 claim where multiple old injuries: A. Burgato 202
Reopened 1953 eye claim: M. Bischoff ---------- 433
Reopened finger claim: N. Cole ---------- 182
Reopened 1972 leg claim: F. Raines ---------- 335
Reopened where original file lost: S. Hutcheson ---------- 263
Settled for $10,000: W. Sorenson ---------- 252
Settlement of $27,500 set aside: W. Whitt ---------- 192
Thumb claim from 1972: P. Ricks ---------- 471

PENALTIES AND FEES

Affirmed: T. Reynolds ---------- 524
Affirmed: F. Steinbeck ---------- 311
Allowed over chiropractor's bills: B. Trow ---------- 338
Allowed over refusal to pay medical: H. Smith ---------- 459
Delayed denial: L. Fleming ---------- 48
Delayed processing: L. Henry ---------- 315
Fee allowed on reconsideration: F. Hagen ---------- 401
Fee by fund: C. Thorn ---------- 292
Fee of $1,000 allocated between different attorneys: D. Simpson ---------- 53
Fee of $1,000 reduced: P. Ferris ---------- 281
Fee reduced to $500 from $1,000: J. Silsby ---------- 89
Penalty allowed: J. Cozart ---------- 199
Penalty and fee for delayed denial even where denial upheld: C. Baker ---------- 67
Penalty of 10% allowed: R. Broderick ---------- 70
Penalty of 10% for late acceptance: R. DeVault ---------- 241
Request for closure protects against claim for failure to process: H. Allen ---------- 463
Settled: L. Fleming ---------- 259
Withholding check after garnishment: J. Jones ---------- 413

PERMANENT PARTIAL DISABILITY

(1) Arm and Shoulder
(2) Back
(3) Foot
(4) Leg
(5) Neck and Head
(6) Unclassified

(1) ARM AND SHOULDER

Arm: 90% for sprain: J. Albert ---------- 128
Arm and shoulder: 25% on multiple claims: D. Stewart ----- 273

(2) BACK

Back: 60% affirmed where want total: V. Abrego ---------- 447
Back: 20% affirmed where must avoid heavy lifting:
H. Craft ---------- 467
Back: 60% affirmed in five pages: V. Dupont ---------- 354
Back: 20% affirmed: L. Hanson ---------- 17
Back: 85% affirmed: C. Harris ---------- 156
Back: 80% affirmed: R. Rimer ---------- 30
Back: 35% affirmed: J. Williams ---------- 276
Back: 25% for chronic sprain: B. McWilliams ---------- 248
Back: none on reduction: R. Jones ---------- 486
Back: 20% on five-page increase from nothing: C. Monroe -- 417
Back: 30% on increase for truck driver who can't drive:
C. Bilow ---------- 148
Back: 30% on increase where claim total disability:
D. Bookshnis ---------- 532
Back: 60% on increase for mild to moderate disability:
R. Brady ---------- 342
Back: 10% on increase: R. Finch ---------- 358
Back: 70% on increase: W. Mandley ---------- 28
Back: 40% on increase where walk with cane: D. McIver ---- 118
Back: 30% on increase: M. Ober ---------- 101
Back: 10% on increase: M. Overstreet ---------- 124
Back: 80% on increase: D. Tipton ---------- 528
Back: 75% on large increase for inability to work:
R. Dowell ---------- 136
Back: 20% on reduction: R. Burkhart ---------- 256
Back: 60% on reduction from total: W. Collins ---------- 300
Back: 35% on reduction in four pages: E. Douglas ---------- 110
Back: 35% on reduction for mild disability: P. Ferris ---- 281
Back: 65% on reduction: L. Frasure ---------- 383
Back: 40% on reduction for mildly moderate disability:
M. Goins ---------- 150
Back: 25% on reduction where retrainable: V. Johnson ----- 411
Back: 25% on reduction: R. Martin ---------- 231
Back: 60% on reduction for moderate disability: C. Oakes = 521
Back: 25% on reduction from 35%: O. Osborne ---------- 469

Back: 75% on reduction: A. Richardson ------------------- 309
Back: 10% on reduction from 30%: C. Ross ---------------- 221
Back: 25% on reduction from 40%: J. Russell ------------- 439
Back: 20% on reduction: D. Vancil ----------------------- 326
Back: 60% on reduction where no surgery: S. Wetzel ------- 497
Back: 10% on reduction in three-page opinion: G. Winslow - 105
Back: 70% on settlement: D. Davidson -------------------- 109
Back: 10% where use transcutaneous stimulator: M. Mack --- 82
Back and leg: 55% and 25% after reduction: B. Smith ------ 474

(3) FOOT

Foot: 10% for pain: K. Ward ----------------------------- 529

(4) LEG

Leg: 60% affirmed: L. Tipton ---------------------------- 33
Leg: 25% and 10% on reduction: L. Misner ---------------- 366
Leg: 15% for knee: W. Galloway -------------------------- 98
Leg: 10% for sore knee: P. Maney ------------------------ 519
Leg: 10% where can play college basketball: D. Hartshorne 260

(5) NECK AND HEAD

Neck: 15% on reduction: V. Franklin --------------------- 495

(6) UNCLASSIFIED

Angina: 50% affirmed: C. Duffy -------------------------- 329
Brain damage: 20% after contusion: R. Finley ------------ 96
Brain damage: 40% on increase: H. Kelly ----------------- 318
Dermatitis: 40% on increase: R. McNutt ------------------ 121
Hemorrhoids: 35% on increase: R. Howard ----------------- 213
Hernia: 20% affirmed: C. Teal --------------------------- 479
Lung: 10% for welder: J. Zeller ------------------------- 312
Multiple injuries of forearms, legs, and body: H. Beaupre - 144
Skin: 5% where refuse rehabilitation: J. Jones ---------- 517

PROCEDURE

Abatement pending reconsideration: A. Johnston ---------- 402
Abatement to permit late filing of brief: E. Foster ------ 442
Attorney malpractice not good cause: S. Johnson --------- 332
Bitter criticism of merry-go-round procedure: H. Short ---- 368
Delayed denial excused where pay time-loss: O. Robertson -- 269
Disqualification of judge after hearing is tardy: J. Dil
J. Dilworth --- 380
Dissent on double payment issue: G. Taylor -------------- 374
Garnishment of benefits: J. Jones ----------------------- 413
Late briefs not considered: W. Townsend ----------------- 54
Mandate spread: R. Pick --------------------------------- 334
Mandate spread: B. Towe --------------------------------- 461

Mistaken overpayment not recoverable: G. Taylor ----------- 374
Motion for additional medical denied: E. Gerber ----------- 56
Non-disabling injury claim: P. Bloom --------------------- 465
Offset allowed: C. Owen ---------------------------------- 52
Order abated: L. Fleming --------------------------------- 225
Order corrected: D. Graves ------------------------------- 209
Order corrected: R. McNutt ------------------------------- 248
Order corrected: W. Tudor -------------------------------- 293
Order on review set aside pending reconsideration:
G. Candee -- 197
Order revised: R. Crawford ------------------------------- 302
Reconsideration denied: D. Simpson ----------------------- 91
Reconsideration denied: F. Steinbeck --------------------- 424
Remand after court of appeals: M. Leedy ------------------ 180
Remand denied: P. Ferris --------------------------------- 4
Remand denied: C. Penland -------------------------------- 189
Remanded: R. Bigsby -------------------------------------- 2
Remanded to receive medical reports: G. Grannell ---------- 208
Reopening makes appeal moot: M. McKinney ----------------- 435
Settlement upheld: W. Greenwade -------------------------- 510
Tolled order: P. Mandell --------------------------------- 432

REQUEST FOR HEARING

Good cause shown on late request: B. Vinson -------------- 254

REQUEST FOR REVIEW

Certificate of service not required: D. Buck ------------- 490
Dismissed as late filed: P. Zehner ----------------------- 240
Dismissed for want of an issue: E. Chloupek -------------- 241
Request was timely: G. Schaffer -------------------------- 472
Timely: J. Slatsky --------------------------------------- 446
Withdrawn: J. Atchley ------------------------------------ 465
Withdrawn: S. Antalo ------------------------------------- 47
Withdrawn: G. Edwards ------------------------------------ 321
Withdrawn: S. Fuentes ------------------------------------ 387
Withdrawn: E. Huff --------------------------------------- 411
Withdrawn: K. Larsen ------------------------------------- 217
Withdrawn: L. Leininger ---------------------------------- 333
Withdrawn: F. Mason -------------------------------------- 289
Withdrawn: C. Penland ------------------------------------ 334
Withdrawn: E. Russell ------------------------------------ 172
Withdrawn: B. Schivers ----------------------------------- 172
Withdrawn: R. Seaton ------------------------------------- 126
Withdrawn: M. Stianson ----------------------------------- 438
Withdrawn: W. Taylor ------------------------------------- 489
Withdrawn: F. Vasbinder ---------------------------------- 192
Withdrawn: J. White -------------------------------------- 500
Withdrawn: J. Wohlmacher --------------------------------- 224
Withdrawn: V. Zachary ------------------------------------ 432

TEMPORARY TOTAL DISABILITY

Calculation of time-loss reversed over dissent: W. Frerichs 508
Continues forever unless proper denial: A. Johnston -------- 306
Interim compensation runs from date of claim to date of denial: C. Williams -------------------------------- 46
Medically stationary date debated: L. Holden -------------- 286
Pain center referral requires reopening: D. Lisonbee ------ 9
Payment cancels partial disability award: G. Taylor ------- 374
Reconsideration denied: G. Candee ------------------------- 299
Reopened for psychiatric care: J. Russell ----------------- 85

TOTAL DISABILITY

Affirmed: L. Adams -- 12
Affirmed: D. Gregory -------------------------------------- 16
Affirmed: W. Huiras --------------------------------------- 23
Affirmed: M. Turner --------------------------------------- 276
Affirmed over dissent: D. Jamison ------------------------- 340
Affirmed over dissent: D. Stacey -------------------------- 176
Affirmed over dissent for mild to moderate: J. Burris ----- 345
Allowed on increase: R. Hall ------------------------------ 324
Allowed on increase for multiple problems: D. Howell ------ 21
Date of award revised: E. Creason ------------------------- 277
Mandate entered: C. Starr --------------------------------- 373
Psychiatric problems plus back: F. Fisher ----------------- 321
Reversed: A. Richardson ----------------------------------- 309
Reversed and reduced: W. Collins -------------------------- 300
Reversed and reduced to 70% where mildly-moderate problems: W. Mahaffey --- 265
Reversed for illiterate fish picker with wrist sprain: J. Albert --- 128

VOCATIONAL REHABILITATION

Denial affirmed: M. Goins --------------------------------- 150
Retraining denied: D. Stahl ------------------------------- 237

ALPHABETICAL INDEX

VOLUME 25

NAME	WCB CASE NUMBER	PAGE
Abrego, Virgil	77-5590	447
Adams, Lenora R.	77-4779	12
Albert, Joseph	77-473	128
Alexander, Cathryn	77-2680	314
Allen, Howard W.	77-5885	463
Allison, Stephen D.	77-4951	226
Alsman, Eugene M.	77-3973	141
Amon, Alta M.	77-268	12
Anderson, Horace W.	78-819	503
Antalo, Sergio	77-3466	47
Armstrong, Darrlyn I.	SAIF Claim No. SC 267826	66
Atchley, James R.	77-5007	465
Atterbury, Louie	77-6561	501
Autry, Rick	77-4924	131
Avdeef, John A.	78-784	531
Ayers, Fred M.	77-1951	240
Baker, Arlie J.	77-3213	379
Baker, Charles F.	77-6192	67
Bardwell, Elwood	77-390	395
Barker, John T.	77-358	142
Barker, Larry	76-6091	47
Barker, Larry D.	Claim No. B 104C314863	181
Barnett, David	77-6411	294
Barton, Richard C.	77-5457	202
Bazzy, Laura A.	SAIF Claim No. AC 100414	441
Bean, John	77-4079	143
Beatty, Jeanne	SAIF Claim No. EC 324243	410
Beaupre, Herschel	76-2970	144
Berg, Carl D.	77-1634	501
Bernard, Ronald	SAIF Claim No. DB 98943	92
Bigsby, Robert	77-3976	2
Bilow, Charles	77-4468	148
Bischoff, Marvin A.	SAIF Claim No. A 356244	433
Blair, Roy E.	77-4561	226
Bloom, Paul	77-7690	465
Blue, Donald	SAIF Claim No. KC 42782	3
Bookshnis, Dennis S.	77-5956	532
Borden, Nancy	78-780	380
Bosell, Kenneth J.	77-3840	34
Boyeas, Clarence F.	77-3632	93
Bowland, Raymond E.	77-7346	341
Brady, Robert T.	76-120	342

Name	WCB Case Number	Page
Brandon, Kenneth	77-2683	150
Brewster, Charles E.	SAIF Claim No. A 779323	395
Briggs, Mildred	76-5844 and 76-5845	485
Broderick, Robert	77-5491	70
Brugato, Anthony J.	SAIF Claim No. FB 91918	202
Brugato, Anthony J.	SAIF Claim No. GB 91918	502
Buck, Daisy	78-1670	490
Buckingham, Anthony	76-1629	295
Buckley, Walter R.	SAIF Claim No. HC 41353	327
Buell, Donald G.	76-5880	345
Burkhart, Robert W.	77-5172	256
Burris, Joe	76-2772	345
Calhoun, Janice L.	77-5303	346
Callender, Frank W.	77-7071 and 78-1914	396
Candee, Garrison	77-2953	14
Candee, Garrison	77-2953	197
Candee, Garrison	77-2953	299
Candella, Maria	77-2875	258
Castle, Jessie	77-5404	14
Chaffin, Arthur	SAIF Claim No. A 67413	397
Chase, Leonard J.	SAIF Claim No. DC 11033	204
Chloupek, Emil	77-3178	241
Christopher, Ohman E.	SAIF Claim No. A 310030	328
Clinansmith, Lawrence	77-7433	450
Clough, Dale F.	SAIF Claim No. RC 340816	205
Cole, Norma	SAIF Claim No. RC 157974	182
Collins, Thomas	78-819	503
Collins, Warren	77-4246	300
Cotton, Daniel L.	77-7036	485
Cox, Eileen Bennight	77-5810	131
Cozad, Dorothy	77-5650	34
Cozart, James	77-1197	199
Craft, Homer	77-7461	467
Crawford, Robin	76-4547	132
Crawford, Robin	76-4547	302
Crear, Faddie James	77-4501 and 77-1934	491
Creason, Edwin	77-4141	277
Crouch, Michael J.	77-4514	48
Croy, John D.	SAIF Claim No. KB 149515	183
Davidson, Darwin L.	77-6743	109
Davis, Dorothy J.	SAIF Claim No. A 535871	94
Davis, Eldon	77-119	507
Decker, Melvin	77-6007	347
Defenbaugh, Edna	77-1035	354
DeRoos, Robert	77-4746	3
DeVault, Roy	77-3951	241

Name	WCB Case Number	Page
Dilworth, John	77-7822	380
Douglas, Edith	77-5074	110
Dowell, Richard	77-3224	136
Draper, Frank A.	77-3952	278
Duffy Carlos	77-18	329
Dupont, Valentino R.	77-4727	354
Dvorak, Kenneth L.	77-5715	280
Eastburn, Francis	77-4423	314
Edwards, Gilbert	77-6941-E	321
Edwards, Jerry	77-7823	450
Emmert, Katherine J.	77-4517	206
Essy, Frank M.	SAIF Claim No. DC 336719	1
Evans, Sandra	77-4729	35
Falla, Melvin	77-4982	243
Farley, Eddy	77-449	486
Ferguson, Mary L. (Jordon)	77-6942	381
Ferris, Philip	76-5233	4
Ferris, Phillip	76-5233 and 77-1907	281
Finch, Richard	77-7680	358
Finley, Robert	77-2029	96
Fisher, Frank	76-5551-E and 77-778	321
Fleming, Leo C.	77-5173	48
Fleming, Leo C.	77-5173	225
Fleming, Leo C.	77-5173	259
Foss, Barbara	SAIF Claim No. GB 66126	55
Foss, Barbara	SAIF Claim No. GD 66126	382
Foster, Edgar	78-365	400
Foster, Edgar	78-365	442
Fox, Wayne O.	77-6076	73
Franklin, Vickie	77-6592	495
Frasure, Lonnie	76-5851 and 77-2452	383
Frasure, Lonnie	76-5851 and 77-2452	434
Freeman, Cletis	78-13	452
Frerichs, Weert	77-6693	508
Fry, Donald L.	23-71-135	207
Fuentes, Santos C.	77-5717	387
Fulton, Darrell D.	Claim No. C604/8759 HOD	35
Galloway, William	77-3124	98
Garoutte, Waymon	77-1676-B	244
Gatens, William L.	SAIF Claim No. ZC 323179	114
Gee, Ethel V.	77-1096	388
Gehrke, Larry	Claim No. B53-144364	388
Gerber, Earl O.	76-5090	56
Gibb, Raymond	77-2982 and 77-2983	51
Gilroy, Michael	76-2678 and 76-2679	443
Glenn, Barbara J.	SAIF Claim No. HC 259000	390
Goins, Mickie M.	77-1521	150

Name	WCB Case Number	Page
Gora, Eugene C.	77-875	36
Grannell, Gayelord	77-2256	208
Graves, Dianne	77-4394	209
Green, Farry Alyce	76-3882	284
Greenwade, Wilson C.	77-4833	510
Gregory, Dale	77-1452	16
Gregson, Carol	77-4788	303
Greiner, Patsy L. (fka Ward)	78-4047	347
Groth, Melvin	77-5261	401
Hagen, Robert D.	77-5788 and 77-6664	154
Hagen, Robert D.	77-4778 and 77-6664	401
Hagler, Gordon	77-4147	100
Hall, Richard	77-7106	324
Hankins, Catherine	76-4760	139
Hansford, Joseph	76-4433	512
Hansen, Richard A.	SAIF Claim No. HB 133167	5
Hanson, Lowell A.	76-6012	17
Hardage, William	75-4910	209
Harding, Carrie Jean	77-6096	303
Harper, Terry L.	Claim No. SS 543-68-2250	77
Harris, Clarence	77-324	156
Hart, Claude	77-2733	284
Hartshorne, David	77-4876	260
Hayes, Walter R.	76-5093	513
Hazlett, Earl Stanley	Claim No. CA 628-7097-199-11-M	211
Heath, Irwin	77-6867	52
Heck, Donald C.	SAIF Claim No. EC 280757	184
Henry, Dennis C.	76-5192, 77-2293 and 77-3575	78
Henry, Lonnie L.	77-5377	315
Herndon, Lester R.	77-5656	17
Hesch, Robert	77-4691	305
Hickman, Frank W.	SAIF Claim No. AC 70675	331
Hill, Gary G.	76-5945	37
Hoard, James F.	77-4186	453
Hoch, George	77-5657	455
Hohlfeld, Harold	77-3347	37
Holden, Lyle	77-6204	286
Holifield, Dorothy	77-3682	513
Holland, Dan	76-4854	212
Holmes, William E.	77-1727	514
Holmstrom, Paul E.	SAIF Claim No. DC 176864	185
Holmstrom, Paul E.	SAIF Claim No. DC 176864	348
Hoover, Charles L.	SAIF Claim No. B86026	434
Horner, Ronald L.	Claim No. 2-70-126	349
Houdashelt, Dorothy	76-4106	157
Howard, Robert	77-7110	213
Howell, Dale	76-460	21

Name	WCB Case Number	Page
Huber, George	No Number	305
Huff, Earlene	78-103	411
Huiras, Wayne D.	77-3642	23
Husk, Winfred E.	Claim No. 05X-014736	262
Huston, Joseph	SAIF Claim No. C 89861	186
Hutcheson, Steven E.	SAIF Claim No. YB 127220	263
Hutcheson, Steven E.	77-1675	287
Hutchinson, James W.	SAIF Claim No. FC 80795	38
Ingwerson, Katherine	77-1801	6
Inman, Robert L.	Claim No. 280-013-9362	81
Jackson, Russell H.	77-7926	350
Jaeger, Jacque C.	77-2217, 77-2218, 76-6130 and 76-6915	160
Jamison, Donald	77-4446	340
Jarvi, Reino	77-592	468
Johlke, Floyd	70-2687	164
Johnson, Susan	77-1292	216
Johnson, Susan	77-1292	332
Johnson, Viola E.	77-1688	411
Johnston, Anna	77-6838	306
Johnston, Anna	77-6838	402
Johnston, John H.	77-5347-B	24
Johnston, Opal M.	77-4624	264
Jones, James T., Jr.	77-7311	413
Jones, Johnny R.	78-670	517
Jones, Randy	78-1119	486
Jordan, Mary L. Ferguson	77-6942	381
Joslin, Joel	78-327	353
Kalweit, Kent	77-727	264
Kareem, Marva D. McKinney	77-4120	435
Kelley, Alex D.	77-5827	216
Kelly, Hillary	77-1233	318
Kephart, Archie I.	Claim No. 425	6
Kindred, Rita	No Number	288
Kitzman, Mary D.	77-4090	115
Koehler, David	77-7114	360
Krueger, W. George	SAIF Claim No. FC 183362	39
Lambert, Sharon	77-6031	227
Landry, Joseph L.	77-7569	445
Lane, Carroll, Jr.	77-1184	24
Larsen, Kenneth	77-6713	217
Lawson, Kenneth S.	SAIF Claim No. DC 140764	8
Leach, Alvie E.	SAIF Claim No. A 689013	416
LeClaire, Arthur	Claim No. 133-CB-2148600	227
Lee, Betty Lou	77-6727	217
Leedy, Melvin	76-4682	180

Name	WCB Case Number	Page
Leetch, Larry D.	Claim No. 145-71-041	391
LeGore, Max	76-6184	391
Leininger, Lois	77-7667	333
Levy, June Marie	77-2528	435
Lisonbee, Dwayne	SAIF Claim No. AC 162632	9
Livingston, Francis R.	76-6334	229
Loe, John	77-6362	139
Lowe, Terry G.	77-5815	265
Luttrell, Melvin D.	78-672 and 78-673	230
Mack, Daniel M.	77-4966	445
Mack, Marvin C.	76-3382	82
Mahaffey, William L.	77-2847	265
Mandell, Patrick	77-328	363
Mandell, Patrick	77-328	432
Mandley, William H.	77-2614	28
Maney, Paul	77-2963	519
Martell, Raymond	77-5498	245
Martin, Roma	76-3005	231
Mason, Frank	77-2464 and 76-956	289
Mata, Ramon D.	SAIF Claim No. PC 296570	165
Mata, Ramon D.	77-5864	166
Mata, Ramon D.	77-5863	333
Mayfield Enterprises, Inc.	77-1634	501
Maze, Edward	77-1186	446
McCall, William S.	76-3217	168
McCullough, Eva M.	77-6840	245
McFarland, Weldon F.	SAIF Claim No. DB 155225	201
McIntosh, John	77-4400	392
McIntosh, Richard	77-6464	268
McIver, Dorothy	77-4991	118
McKinney, Marva D.	77-4120	435
McNutt, Ronald D.	76-7189	121
McNutt, Ronald D.	76-7189	248
McWilliams, Bertha	77-1807	248
Michaud, E. Ted	SAIF Claim No. HC 89232	403
Miller, Wayne D.	76-6336	57
Misner, Linda K.	77-7054	366
Mizar, John D.	SAIF Claim No. GA 872730	187
Monroe, Coral	77-6556	417
Moon, Evelyn C.	77-1103	101
Moore, Ernest	77-4590	353
Morgan, Karen Sue	Claim No. B830C378942	40
Morgan, Karen Sue	Claim No. B830C378942	188
Morland, John	SAIF Claim No. C 110322	520
Morris, Mary	77-7505	289
Mullenberg, Frank	75-2908	170
Musaraca, Allen J.	77-7055	392

Name	WCB Case Number	Page
Nacoste, Evriste	77-5983	404
National Sheetrock & Supply	78-819	503
Niblack, Matthew	77-6470	456
Nicholson, Bill D.	77-5730	235
Oakes, Carl	77-2833	521
Ober, Mary	76-6194	101
Olson, Patricia M.	77-3292	393
O'Neill, Michael S.	77-7846	60
Osborne, Odice	77-3518	469
Overstreet, Mary H.	76-4805	124
Owen, Clair	77-6494	52
Papen, Tamara Joan	77-7084	171
Parker, Audrey E.	77-1556	394
Pattee, Thorval W.	76-5120	268
Peabody, Horace E.	Claim No. 941C235604	41
Penland, Carl	77-7266	189
Penland, Carl	77-7266	334
Peoples, Clara	77-5868	235
Pick, Richard C.	76-1723 and 76-4261	334
Piercey, Becky	77-4490	140
Pietrox, Elbert	SAIF Claim No. C177316 and C149013	404
Pinkard, James B.	Claim No. B104C322036	84
Pomeroy, Victor	77-1009	219
Poole, Nina	75-5380	308
Powell, Nina	77-7382	290
Radford, Loren W.	SAIF Claim No. F 894065 and FC 133449	43
Raines, Frank	SAIF Claim No. HC 360467	335
Rattay, Bringfried	75-4945 and 76-6087	104
Rawls, John T.	SAIF Claim No. A 737168	457
Reed, John M.	78-2930	309
Reid, Frank H.	SAIF Claim No. C 171222	60
Reid, Frank	SAIF Claim No. C 171222	179
Reynolds, Earl A.	77-7120	405
Reynolds, Genevieve	SAIF Claim No. B 100466	336
Reynolds, Thomas S.	77-6430 and 77-472	524
Richardson, Alvin	76-4362	309
Ricks, Phyllis C.	SAIF Claim No. EC 352941	471
Riley, George	77-4772	525
Rimer, Robert	77-4823	30
Robertson, Onis R.	77-5480	269
Robinson, Jack N.	Claim No. B8186	422
Robinson, Phyllis C. Ricks	SAIF Claim No. EC 352941	471
Robinson, Theola	77-2230	62

Name	WCB Case Number	Page
Rodriguez, Theodore D.	SAIF Claim No. KC 223350	64
Rodriguez, Theodore D.	SAIF Claim No. KC 223350	405
Roe, Herman	77-5374	236
Rosenberg, Aloha	77-5834	407
Ross, Gail	77-4035	221
Rossi, Augustine J.	77-498	53
Rowden, Donald B.	78-3042	190
Ruiz, Mary R.	78-382	525
Russell, Ethelyn	78-1009	172
Russell, Jerry	77-1815	85
Russell, John	77-7715	439
Russell, Paul	76-3992	290
Ruszkowski, Avis R.	SAIF Claim No. RC 228129	526
Salinas, Maria	77-737	31
Sands, Gail	77-7902	436
Saunders, Lester E.	77-6597	236
Saunders, William	77-5639	126
Schaffer, Glen R.	78-579	472
Schelin, Douglas	77-4597	437
Schivers, Bobby	78-2098	172
Schlack, Frances	77-1560	458
Schwab, Ralph E.	SAIF Claim No. AC 386	527
Scott, James R.	77-7271	423
Seaton, Robert M.	77-7544	126
Seefeld, Thomas M.	77-4718	407
Sell, Ben E.	SAIF Claim No. C 347173	473
Seymour, Richard B.	77-6343	173
Sharnestsky, Joseph	76-3868 and 76-2370	311
Short, Harley	76-6523-E	368
Silsby, James	77-5353	89
Simmons, Blanton	78-3173	437
Simpson, Donald E.	76-6812	53
Simpson, Donald E.	76-6812	91
Sink, Lucy	77-6085	271
Slatsky, John J.	77-6615	446
Slonecker, John W.	SAIF Claim No. YA 750071	250
Smets, Virginia	76-6987	272
Smith, Benjamin L.	77-5162	474
Smith, Billy H.	77-2191	54
Smith, Helen M.	77-1023	459
Smith, Walter G.	78-2099	336
Snell, Steve	77-6924	408
Snider, Alice	77-5000	408
Sorenson, Walter P.	72-225	252
Stacey, Doyle D.	77-2944	176
Stahl, Daniel C.	77-5032	237
Standard, James M.	Claim No. I-010730	9

Name	WCB Case Number	Page
Starks, Roxana	Claim No. C70-2564	337
Starr, Carl	76-4902	373
Stathem, Ralph C.	77-6372	409
Stearns, James	77-4555	291
Steinbeck, Frank	74-3721	311
Steinbeck, Frank	74-3721	424
Stewart, David D.	77-3200 and 77-3201	273
Stianson, Milton	77-7063 and 77-7064	438
Stritt, Richard	77-3622	127
Szabo, Dorothy	SAIF Claim No. RC 353644	478
Tackett, Charles C.	77-2376	140
Taylor, Geneva	77-6373	374
Taylor, Thomas L.	77-2129	394
Taylor, William J.	76-5797	489
Teal, Chester	78-684	479
Thompson, Darrell C.	77-5037	223
Thorn, Charles A.	SAIF Claim No. A 915909	191
Thorn, Charles A.	SAIF Claim No. A 915909	292
Thorp, James	77-5113	489
Tietz, Harold	77-6346 and 77-7990	409
Tipton, Dorothy	77-1163	528
Tipton, Lester A.	77-5209	33
Toureen, Terry L.	SAIF Claim No. NC 332608	65
Towe, Bob	76-2810	461
Townsend, William	77-5702	54
Trow, Barbara	77-6549	338
Tudor, William	78-386	293
Turner, Maybell	77-6822	276
Tvetan, Thomas D.	76-6891 and 76-6892	320
Underwood, Oleta	77-7857	529
Vancil, Daryl	77-5872	326
Vandehey, Clair	76-5286	378
Vasbinder, Francis	76-7070	192
Vaughn, Richard	77-7390	534
Veelle, Melvin L.	SAIF Claim No. GA 710939	481
Vinson, Bertha	77-6178	254
Wahner, Lynn M.	77-4653	255
Wallace, Paul	78-543 and 77-5571	490
Ward, Keith	78-351	529
Webster, Ruby	SAIF Claim No. BC 419847	11
Wehinger, Gladys J.	77-1724	141
Wehinger, Gladys J.	77-1724	256
Wetzel, Samuel	77-7181	497
Wheeler, Shelley J.	77-3017	461
White, Jerry H.	78-1546	500

Name	WCB Case Number	Page
Whitt, William	74-1910 and 77-7974-E	192
Wilhelm, Floyd	71-725 and 74-1008	44
Williams, Cecil L.	77-386	46
Williams, Curt	77-1753	425
Williams, Jerry F.	77-5210	276
Williams, Roy	77-5039	379
Winslow, Gary	77-7305	105
Witt, Judy	INA Claim No. 941-C242447	177
Wohlmacher, James	76-5345	224
Wood, John D.	SAIF Claim No. KC 186886	224
Wright, Dean T.	SAIF Claim No. HC 158298	238
Wyant, Clyde C.	SAIF Claim No. GODC 1075	108
Yazzolino, Anthony J.	77-7153	447
York, Ronald E.	77-2872	429
Young, John G.	SAIF Claim No. SC 267781	194
Youngblood, Betty J.	77-6326	482
Zachary, Vernon	77-5878	432
Zaklan, Peter	77-78, 77-4857 and 77-6402	484
Zehner, Paul	77-2340	240
Zeller, John	77-3996 and 77-3995	312
Zeller, Nelson J.	SAIF Claim No. 585427	196
Zink, Thomas P.	77-5290	46

ORS CITATIONS

Volume 25

ORS 656.004 -------------------- 413
ORS 656.005 (9) -------------------- 413
ORS 656.005 (16) -------------------- 413
ORS 656.018 (4) -------------------- 197
ORS 656.018 (4) -------------------- 299
ORS 656.126 (1) -------------------- 350
ORS 656.234 -------------------- 413
ORS 656.236 -------------------- 192
ORS 656.236 -------------------- 503
ORS 656.245 -------------------- 60
ORS 656.245 -------------------- 127
ORS 656.245 -------------------- 275
ORS 656.245 -------------------- 291
ORS 656.245 -------------------- 338
ORS 656.245 -------------------- 354
ORS 656.245 -------------------- 390
ORS 656.245 -------------------- 404
ORS 656.245 -------------------- 459
ORS 656.245 -------------------- 516
ORS 656.262 -------------------- 424
ORS 656.262 (4) -------------------- 350
ORS 656.262 (8) -------------------- 48
ORS 656.262 (9) -------------------- 197
ORS 656.262 (9) -------------------- 299
ORS 656.265 -------------------- 383
ORS 656.265 (1) -------------------- 383
ORS 656.265 (4) -------------------- 171
ORS 656.265 (4) (a) -------------------- 383
ORS 656.273 -------------------- 311
ORS 656.273 -------------------- 424
ORS 656.273 (1) -------------------- 110
ORS 656.273 (6) -------------------- 89
ORS 656.289 (3) -------------------- 240
ORS 656.289 (3) -------------------- 490
ORS 656.295 -------------------- 381
ORS 656.295 (5) -------------------- 229
ORS 656.295 (8) -------------------- 104
ORS 656.295 (8) -------------------- 225
ORS 656.295 (8) -------------------- 402
ORS 656.295 (8) -------------------- 432
ORS 656.307 -------------------- 383
ORS 656.313 (1) -------------------- 413
ORS 656.325 (4) -------------------- 517
ORS 656.382 (2) -------------------- 401
ORS 656.386 (1) -------------------- 514
ORS 656.605 -------------------- 508
ORS 656.615 -------------------- 508